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RESPONSE TO *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE*

Fred Wertheimer *

Alexandra T.V. Edsall **

I. INTRODUCTION

Our response to Ackerman and Ayres's important new book¹ includes three parts. First, we argue that, in their critique of the "old paradigm," Ackerman and Ayres misstate the vitality of the traditional approach.² Indeed, we find that they incorporate more of that model than they suggest—including public financing,³ a ban on soft money,⁴ a prohibition of corporate and union campaign contributions and expenditures,⁵ and reform of the Federal Election Commission ("FEC")⁶—confirming that many of its elements are indispensable to any program that seeks to limit the influence of money over government decisions.

Second, we review that aspect of their proposal that departs sharply from the traditional approach: the secret donation booth.⁷ Here, instead of disclosing the identities of campaign donors, the goal is to keep them secret—from the recipients as well as the public—in order to withhold the information that enables politi-

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1. BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002).

2. *See infra* Part II.

3. *See* ACKERMAN & AYRES, *supra* note 1, at 210–12 (Citizen Sovereignty Act § 16).

4. *See id.* at 203–05 (Citizen Sovereignty Act § 10).

5. *Id.* at 204 (Citizen Sovereignty Act § 10(h)).

6. *Id.* at 194–97 (Citizen Sovereignty Act § 6).

7. *See infra* Part III.

cians to favor their donors.⁸ In the discussion below, we review this proposal, expressing our concern that efforts to prevent politicians from identifying their donors would fail, resulting in the worst-case scenario in which politicians and donors have close relations built on known large contributions, but the public is kept unaware.

Third, we close with a discussion of the recently enacted Bipartisan Campaign Reform Act ("BCRA").⁹ In the course of their critique, Ackerman and Ayres contrast their proposal to what they characterize as "the alternative—the effort by Senators McCain and Feingold to breathe new life into the old paradigm."¹⁰ Since publication of Ackerman and Ayres's book, that effort has resulted in the successful passage of the BCRA. Of course, the "alternative" to Ackerman and Ayres's proposal is not the BCRA, but the BCRA accompanied by other key elements of the traditional reform program, including public financing and reform of the FEC. So compared, the traditional approach offers a compelling response to the need to "insulat[e] . . . democratic politics from the rule of big money."¹¹ That said, the BCRA taken alone is crucial, both to the traditional approach *and* to Ackerman and Ayres's program. The BCRA responds to evasive maneuvers that have enabled the political parties and large donors to channel money into the campaign finance system outside the regulatory framework. Unless these maneuvers are prohibited, they will allow a bypass of *any* system that seeks to control the source or amount of money spent on federal elections, including Ackerman and Ayres's own. Given the necessity of the BCRA's measures to any program of campaign finance reform and the current constitutional challenge to the new law,¹² we discuss the operation and constitutionality of its principal elements in some detail.¹³

8. See ACKERMAN & AYRES, *supra* note 1, at 25.

9. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (to be codified in scattered sections of 2 U.S.C.) [hereinafter BCRA]; see also *infra* Part IV.

10. ACKERMAN & AYRES, *supra* note 1, at 53.

11. *Id.* at 13.

12. A constitutional challenge to the BCRA is now under review in the U.S. District Court for the District of Columbia. See *McConnell v. FEC*, No. 02-0582 (D.D.C. filed Mar. 27, 2002).

13. See *infra* Part IV.

II. THE “OLD PARADIGM”

Ackerman and Ayres endorse a central goal of campaign finance reform: to prevent politicians from being beholden—and potentially answerable—to large donors and special interests.¹⁴ As they reason, the legitimacy of our democracy depends on our representatives not paying special heed to major donors.¹⁵ Ackerman and Ayres correctly note that the traditional approach to campaign finance reform includes three principal elements to address this goal: limits on the source and amount of campaign contributions, disclosure of campaign contributions and expenditures, and public financing of candidates.¹⁶ Taken together, these measures offer a compelling response to the need to prevent money from swaying officeholders. Limits prevent officeholders from becoming or appearing obligated to major donors. Disclosure helps enable enforcement of these limits by enhancing scrutiny of politician-donor relations. Public financing reduces incentives to pursue private money and dependence on that money.

Ackerman and Ayres err in suggesting that the failings of the campaign finance system, which are many, signal inherent flaws in this approach.¹⁷ To the contrary, these failings reflect under-enforcement by the regulators and partial adoption by Congress—problems that would undermine Ackerman and Ayres’s proposal as well. From early on, campaign finance reform has been hampered by the FEC’s notoriously weak enforcement.¹⁸ In the most prominent of its failings, as detailed below, the FEC has allowed the political parties to raise and spend unlimited amounts of unregulated soft money, which has enabled widespread circumvention of the contribution limits and the presidential public financing system.¹⁹ Congress, too, has hindered campaign finance reform, adopting only limited measures and rarely taking action to stop evasion.

With effective enforcement and wholesale enactment, the traditional approach would significantly cabin the influence of large

14. See ACKERMAN & AYRES, *supra* note 1, at 13.

15. See *id.*

16. See *id.* at 3–4.

17. See *id.* at 3.

18. See *infra* Part II.D.

19. See *infra* Part IV.A.

donors, restoring integrity to our democratic system. As we detail below, Ackerman and Ayres's charges against the traditional approach are misplaced.

A. *Limits*

Ackerman and Ayres's rejection of limits is more qualified than they suggest. While the authors discard the current limits on individual contributions, they retain another type of limit, also crucial to the traditional approach. Since 1907, Congress has banned the use of corporate treasury funds for contributions to federal candidates and their parties,²⁰ and since the 1940s, Congress has prohibited the use of union dues in connection with federal elections.²¹ As the Supreme Court of the United States has explained, the restriction on corporate campaign contributions and spending counters "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."²² Ackerman and Ayres follow the traditional approach in prohibiting corporate and union donations.²³ In addition, Ackerman and Ayres preserve the current cap of \$5,000 on individual contributions to political action committees ("PACs"); and, while they raise them substantially, they preserve caps on individual contributions to candidates and parties.²⁴ Moreover, Ackerman and Ayres authorize candidates to raise money outside of their secret donation booth during the exploratory phase of their campaigns, but impose additional limits for this phase.²⁵

20. Federal Corrupt Practices (Tillman) Act, ch. 420, 34 Stat. 864 (1907).

21. Labor Management Relations (Taft-Hartley) Act, ch. 120, sec. 304, § 313, 61 Stat. 136, 159 (1947); see also *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209 (1982); *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 415-16 (1972) (noting that Congress barred labor unions from making campaign expenditures in order to "eliminate the effect of aggregated wealth on federal elections"); *United States v. United Auto. Workers and Cong. of Indus. Org. (UAW-CIO)*, 352 U.S. 567, 578-79 (1957) (detailing congressional intent behind the proscription on electoral activity funded from the "huge war chests being maintained by labor unions") (quoting *To Regulate Labor Organizations: Hearings on H.R. 804 and H.R. 1483 Before a Subcomm. of the House Comm. on Labor*, 78th Cong. 2 (1943) (statement of Rep. G.W. Landis)).

22. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990).

23. ACKERMAN & AYRES, *supra* note 1, at 204-05 (Citizen Sovereignty Act § 10(h)).

24. *Id.* at 204 (Citizen Sovereignty Act § 10(e)-(f)).

25. *Id.* at 206-07 (Citizen Sovereignty Act § 12)).

Ackerman and Ayres substantially raise the basic limits on individual contributions to candidates and parties.²⁶ In doing so, they argue that limits have led to a “dismal cycle” in which limits are continuously overcome by loopholes.²⁷ Ackerman and Ayres argue that

until we change the incentives of big donors and ambitious politicians, we will not get the heart of the problem, . . .

. . . [Measures to close loopholes] will generate pathologies of [their] own. Politicians and donors will be increasingly obliged to master a complex rulebook, and their knowledge of the rules will be tested under very difficult conditions. . . .

The predictable—if unintended—result, is the criminalization of politics.²⁸

We take these charges in turn.

In characterizing campaign finance reform as a “dismal cycle,” Ackerman and Ayres repeat a common charge against campaign finance reform. According to this criticism, reform is futile, because money, like water, “will always find its own level.”²⁹ While echoing the charge, Ackerman and Ayres correctly note that it is “exaggerated.”³⁰ Indeed, contrary to the image presented by the critics of a perpetual and futile race to plug loopholes, the recently enacted BCRA represents the first time in more than two decades that Congress has plugged loopholes in campaign finance laws. Unlike tax laws or accounting standards, which are routinely revised to take account of evasion, Congress has generally met loopholes in campaign finance laws with inaction or even tacit satisfaction. The FEC, moreover, has regularly opened, rather than closed, loopholes.

Ultimately, effective enforcement is the answer to charges of futility, and it is equally critical to Ackerman and Ayres’s proposal. As they acknowledge of their own proposal, without overhaul of the FEC, “we will be writing yet another chapter in the sorry history of reform.”³¹

26. *Id.* at 116.

27. *Id.* at 8.

28. *Id.* at 46.

29. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999).

30. ACKERMAN & AYRES, *supra* note 1, at 8.

31. *Id.* at 128.

Ackerman and Ayres further challenge contribution limits on the ground that they foster a “proliferating net of legalisms” that enmesh ordinary citizens in “a host of complex and obscure rules threatening severe punishments.”³² By contrast, their proposal includes a “basic rule, easily understood by everybody: Never give or accept gifts that haven’t passed through the secret donation booth.”³³ True, they have extensive “regulations of last resort,”³⁴ but these “concern a few big givers” who “can readily afford hiring lawyers and accountants to keep clear of the stratospheric limits imposed on their activities.”³⁵

This charge that the current system is more complex and difficult to enforce than Ackerman and Ayres’s proposal is puzzling. Each model includes a primary rule likely to affect ordinary citizens: current law places a limit of \$2,000 on individual contributions to candidates,³⁶ and Ackerman and Ayres’s model channels all contributions through the secret donation booth.³⁷ Beyond these basic rules, *both* systems include a number of rules designed to govern the behavior of sophisticated political players. These rules, among others, regulate corporate and union giving, ensure that neither the political parties nor interest groups raise money outside the system to use on behalf of candidates, and regulate PACs.³⁸ On these dimensions, Ackerman and Ayres’s “regulations of last resort” are at least equal in complexity to the traditional approach.³⁹

Moreover, Ackerman and Ayres’s approach includes a number of rules more likely to ensnare ordinary citizens than current law. For instance, to prevent bundling of donations by PACs—the practice in which PACs collect and channel multiple donations from individuals in order to concentrate their influence— “[d]onors can’t give their checks to anybody for inspection or collection, but must go to the post office themselves.”⁴⁰ In addition,

32. *Id.* at 52.

33. *Id.*

34. *Id.* at 184.

35. *Id.* at 52.

36. BCRA, Pub. L. No. 107-155, sec. 307(a), 116 Stat. 81, 102 (2002) (to be codified at 2 U.S.C. § 441a(a)(1)).

37. ACKERMAN & AYRES, *supra* note 1, at 199 (Citizen Sovereignty Act § 8(a)).

38. *See id.* at 184–85.

39. *See id.*; *see also id.* at 111–27.

40. *Id.* at 97.

Ackerman and Ayres give vouchers worth fifty dollars to all registered voters who request them and require voters to donate these vouchers in the secret donation booth, away from public scrutiny.⁴¹ Ackerman and Ayres consider it unlikely that politicians would engage in the “complex and risky enterprise” of buying vouchers on the black market.⁴² We, however, are less confident. As the recent scandal involving false signatures on D.C. Mayor Anthony Williams’s nomination papers suggests,⁴³ at the very least, some campaign workers could be expected to violate the law in pursuit of vouchers. Such actions could involve significant numbers of citizen voucher-holders in illegal transactions.

Ultimately, any campaign finance system that regulates the source of campaign money will necessarily have some complexity. Under the current system, as history shows, it is not well-meaning innocents who typically risk running afoul of these provisions, but strategically aggressive players.⁴⁴

In their criticism of contribution limits, Ackerman and Ayres also assert that limits do not “change the incentives of big donors and ambitious politicians,” while their proposal does.⁴⁵ We will argue below that their proposal may not change the incentives that have fueled close relations between politicians and big donors.⁴⁶ Moreover, when assessing incentives, the appropriate comparison is not between Ackerman and Ayres’s proposal and contribution limits, but between their proposal and alternative proposals taken as a whole. Traditional reform proposals include comprehensive public financing of candidates. With public funding at the level Ackerman and Ayres provide—approximately \$3 billion per year⁴⁷—these traditional proposals would certainly alter politicians’ incentives to pursue private money.

41. *See id.* at 67.

42. *Id.* at 68.

43. Christine B. Whelan, *Letters, Not Levers, Sway Washington Race: Denied a Spot on Election Ballot, D.C. Mayoral Incumbent Goes from Shoo-In to Write-In*, WALL ST. J., Aug. 20, 2002, at A4.

44. *See, e.g.*, PROJECT FEC, NO BARK, NO BITE, NO POINT: THE CASE FOR CLOSING THE FEDERAL ELECTION COMMISSION AND ESTABLISHING A NEW SYSTEM FOR ENFORCING THE NATION’S CAMPAIGN FINANCE LAWS 87–91 (2002) [hereinafter NO BARK, NO BITE] (recounting the use of soft money in the 1996 presidential race under high-level direction, FEC staff recommendation to take action, and FEC refusal to do so), available at <http://www.reforminstitute.org/cgi-data/article/files/30.shtml>.

45. *See* ACKERMAN & AYRES, *supra* note 1, at 46.

46. *See infra* Part III.

47. ACKERMAN & AYRES, *supra* note 1, at 91.

B. *Public Financing*

Another principal element of traditional campaign finance reform proposals is public financing.⁴⁸ Here, there is significant common ground between Ackerman and Ayres's proposal and what they call the "old paradigm."⁴⁹ Both proposals recognize that public financing is essential to curtail the influence of special-interest money and to promote competition by making resources available to challengers.⁵⁰ They differ, however, in the mechanism to distribute public funds. Most public financing models, including the current system for funding presidential elections, use matching and/or block grants to distribute funds.⁵¹ Ackerman and Ayres instead distribute public financing through vouchers available to all registered voters.⁵² As they argue, this method "democratiz[es] . . . campaign finance" by "invit[ing] millions to take a small but active role throughout the election campaign."⁵³

That said, the traditional approach offers many of the benefits that Ackerman and Ayres claim as exclusive to their model. In urging that their model offers a sharp contrast to traditional public funding models, Ackerman and Ayres assert three principal differences.⁵⁴ First, while traditional models are "centralized" and "alienate citizens from funding decisions," their model lets citizens direct the flow of funding.⁵⁵ Second, while traditional models favor incumbents by setting a high threshold that bars challeng-

48. RICHARD BRIFFAULT, *THE ASS'N OF THE BAR OF THE CITY OF N.Y., DOLLARS AND DEMOCRACY: A BLUEPRINT FOR CAMPAIGN FINANCE REFORM 99* (2000).

49. ACKERMAN & AYRES, *supra* note 1, at 3.

50. *See id.* at 19; BRIFFAULT, *supra* note 48, at 7–8, 100, 102–03, 105; Richard Briffault, *Point/Counterpoint: Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 568–72 (1999); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 45–47 (1996); Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1192–93 (1994); Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1149–54 (1994).

51. *See* BRIFFAULT, *supra* note 48, at 107–08; Hasen, *supra* note 50, at 27–30 (Richard Hasen, however, joins Ackerman and Ayres in advancing a voucher-based program); Raskin & Bonifaz, *supra* note 50, at 1192; Wertheimer & Manes, *supra* note 50, at 1150.

52. ACKERMAN & AYRES, *supra* note 1, at 14, 142 (identifying the vouchers as Patriot dollars).

53. *Id.* at 15.

54. *Id.* at 9.

55. *Id.* at 3, 156 (describing how citizens will direct the flow of campaign money).

ers from receiving funds, their model does not.⁵⁶ Third, while traditional models entrench existing parties, their model leaves all parties equally free to make their case for funding to the electorate.⁵⁷ These contrasts mischaracterize the traditional model.

Ackerman and Ayres's first criticism is that traditional public funding models "hand[] a pot of money to bureaucrats, who are supposed to dole it out by referring to criteria established by a statute."⁵⁸ Contrary to this charge of bureaucratic control, alternative public financing models distribute much or all of their funding through matching grants, which let citizens direct the flow of funding.⁵⁹ The current system for presidential public funding, for instance, provides all public primary funding through matching grants—matching the first \$250 of any contribution to a qualifying candidate⁶⁰—and other proposals from the "traditional" camp likewise provide for all funding through matching grants.⁶¹

It is true that the current presidential system provides funding for the general election through block grants.⁶² At this stage, the major party candidates (those whose parties received at least 25% of the vote in the previous presidential election) each receive an equal block grant meant to cover the full costs of the general campaign.⁶³ A minor party candidate (whose party received between 5 and 25% of the vote in the previous presidential election) receives a block grant that is a fraction of the major party grant, based on the ratio of the minor party candidate's votes in the previous election to the average number of votes for candidates of the major parties.⁶⁴

Giving block, rather than matching, grants to fund the general election certainly reduces citizen control over the flow of money. But here, two of Ackerman and Ayres's goals collide. As they recognize, incumbents have a natural fundraising advantage.⁶⁵ This advantage arises in part from an incumbent's ability to favor or

56. *Id.* at 3, 18–19.

57. *Id.* at 3, 20.

58. *Id.* at 19.

59. See sources cited *supra* note 50 and accompanying text.

60. See 26 U.S.C. § 9033(b)(3)–(4) (2000).

61. See, e.g., BRIFFAULT, *supra* note 48, at 29.

62. See 26 U.S.C. §§ 9001–9013 (2000).

63. *Id.* §§ 9002(6), 9004(a)(1).

64. *Id.* §§ 9002(7), 9004(a)(2).

65. ACKERMAN & AYRES, *supra* note 1, at 19, 156–58.

disfavor donors—which Ackerman and Ayres believe they will eliminate through the secret donation booth.⁶⁶ Even assuming this is so, incumbents will retain a fundraising advantage on the basis of their name recognition, regular contacts with and services for their constituents, and great potential for being re-elected.⁶⁷ The presidential block grant neutralizes this advantage by giving the incumbent and challenger equal amounts of money and limiting their spending to these funds.⁶⁸ Indeed, the system has been credited with “offset[ing] the built-in edge of incumbents in the general election.”⁶⁹ For example, challengers won in three of the five publicly funded presidential elections in which an incumbent ran.⁷⁰

Ackerman and Ayres further charge that traditional public funding programs favor incumbents by imposing high thresholds for eligibility.⁷¹ To the contrary, the presidential funding model not only aids challengers by equalizing resources during the general election,⁷² but it also makes it possible for many non-incumbents to mount campaigns during the primary.⁷³ Indeed, the current system solves the threshold problem at the primary election stage with relative ease and in accordance with democratic principles.⁷⁴ In order to receive matching grants, a candidate must raise at least \$5,000 in each of at least twenty states in increments no greater than \$250.⁷⁵ This system has resulted in a wide field of primary competitors with public financing, and there is no evidence that any significant candidate has been shut out by this threshold.⁷⁶ Presidential funding has contributed substantially to many non-incumbent candidates, including Bill Clinton and Pat Buchanan in 1992, Jesse Jackson in 1984 and 1988, George H.W. Bush in 1980, and Jimmy Carter in 1976.⁷⁷ In 2000,

66. *Id.* at 158.

67. *Id.* at 38.

68. See 26 U.S.C. § 9004(a)(1) (providing that “[t]he eligible candidates of each major party in a presidential election shall be entitled to equal payments”).

69. BRIFFAULT, *supra* note 48, at 103.

70. *Id.*

71. ACKERMAN & AYRES, *supra* note 1, at 19.

72. See 26 U.S.C. § 9004(a)(1) (providing that major party candidates will receive “equal payments”).

73. BRIFFAULT, *supra* note 48, at 103.

74. See *id.*

75. 26 U.S.C. § 9033(b)(3)–(4) (2000).

76. BRIFFAULT, *supra* note 48, at 103.

77. *Id.* (citing ANTHONY CORRADO, PAYING FOR PRESIDENTS: PUBLIC FINANCING IN

nine candidates were eligible for public funding, including Democratic candidates Al Gore and Bill Bradley, and Republican candidates Pat Buchanan, Alan Keyes, Lyndon LaRouche, Gary Bauer, Dan Quayle, John McCain, and Elizabeth Dole.⁷⁸

Finally, Ackerman and Ayres express concern that traditional funding programs entrench the major parties.⁷⁹ The current presidential funding system, however, appropriately funds third parties in proportion to their electoral strength.⁸⁰ As noted above, primary candidates can receive funding without regard to party.⁸¹ For the general elections, major party candidates receive larger grants than third party candidates,⁸² but third parties are given money in accordance with their past electoral strength.⁸³ It is worth considering revisions to the system that would take into account *current* strength, rather than relying exclusively on past performance, in awarding funds to third party candidates.⁸⁴ Overall, however, the present system is reasonably neutral as to third parties.

True, the campaign finance system does not promote third parties, but, as Ackerman and Ayres appear to agree, that is not its role.⁸⁵ As they write, “[e]ven far-reaching changes in campaign finance will not repeal the basic electoral logic that generates two major parties.”⁸⁶ The U.S. electoral system, for reasons unrelated to campaign finance, strongly favors two parties.⁸⁷ As “Duverger’s Law” explains, the U.S. electoral system of choosing representatives by majority rule on a single ballot predictably results in a

NATIONAL ELECTIONS 43–44 (1993)).

78. Press Release, FEC, Buchanan, Gore, Keyes and LaRouche Declared Eligible for Primary Matching Funds in 2000 Race (Sept. 30 1999), at <http://www.fec.gov/press/elig999.htm>.

79. ACKERMAN & AYRES, *supra* note 1, at 3.

80. 26 U.S.C. § 9004(a)(2)(A) (2000).

81. *See id.* § 9004(a)(1).

82. *See id.*

83. *Id.* § 9004(a)(2)(A).

84. *See* ACKERMAN & AYRES, *supra* note 1, at 20 (noting that reliance on *past* electoral performance can cause problems when third parties lose momentum, as was the case with the Reform Party during the 2000 election, which was entitled to funding because of Ross Perot’s success in the previous presidential election).

85. *See id.* at 22.

86. *Id.*

87. MAURICE DUVERGER, PARTY POLITICS AND PRESSURE GROUPS: A COMPARATIVE INTRODUCTION 27 (David Wagoner trans., Thomas Y. Crowell Co. 1972) (1968).

two-party system.⁸⁸ Unlike proportional representation, a party that wins only a minority of votes in an election gains no representatives.⁸⁹ Unlike a run-off system, a minority party cannot compete on the first ballot secure in the knowledge that if its constituency splinters on that ballot, it can withdraw, or form a coalition, on the second ballot.⁹⁰ As a result, voters will be reluctant to “waste” their votes on minority parties, and minority parties—or their constituents—will tend to merge with a majority party.⁹¹

While Ackerman and Ayres’s criticisms are misplaced, the current presidential funding system does need reform and, ultimately, expansion to cover congressional races. The presidential public financing system worked well in the first three elections held under the system.⁹² In 1985, the bipartisan Commission on National Elections reviewed the system and concluded, “[p]ublic financing of presidential elections has clearly proved its worth in opening up the process, reducing undue influence of individuals and groups, and virtually ending corruption in presidential election financing.”⁹³ Beginning with the 1988 presidential race, however, soft money fundamentally undermined the system’s effectiveness and credibility.⁹⁴ The soft money ban in the BCRA addresses this central problem.⁹⁵ Nevertheless, other major reforms are needed to maintain the future viability of the presidential system.

A recent reform proposal developed by Democracy 21 and Common Cause would provide for substantially more public funding, increased overall spending limits, and changes in the timing of distributions in response to the accelerated primary schedule.⁹⁶ The reform proposal would also emphasize the need for publicly

88. *Id.* at 27–28.

89. *Id.* at 28.

90. *Id.* at 28–29.

91. *Id.* at 29.

92. See BRIFFAULT, *supra* note 48, at 99–101 (describing the success of the public financing system).

93. COMM’N ON NAT’L ELECTIONS, ELECTING THE PRESIDENT: A PROGRAM FOR REFORM 37 (Robert E. Hunter ed., 1986).

94. BRIFFAULT, *supra* note 48, at 46.

95. See BCRA, Pub. L. No. 107-155, sec. 101(a), 116 Stat. 81, 82 (2002) (to be codified at 2 U.S.C. § 441i(a)).

96. COMMON CAUSE & DEMOCRACY 21, FIXING THE PRESIDENTIAL PUBLIC FINANCING SYSTEM 1, 3 (2003).

funded candidates to compete with privately funded candidates.⁹⁷ In particular, this proposal would increase the current 1:1 match on the first \$250 of a private contribution during the primary phase to a 3:1 or 4:1 match on the first \$500, cap individual contributions to participating candidates at \$500, and increase funding to finance the program.⁹⁸ It would also call for substantial increase in the primary and general election overall spending limits and repeal of the state-by-state spending limits in the primary.⁹⁹ To take account of the increasingly front-loaded primary schedule, the proposal would distribute primary funding earlier.¹⁰⁰ In addition, it would raise the limits for party spending on behalf of presidential candidates.¹⁰¹

C. Disclosure

Current campaign finance law requires candidates, PACs, political parties, and independent spenders to disclose campaign contributions and expenditures.¹⁰² Disclosure requirements, the Supreme Court has recognized, “aid the voters in evaluating those who seek federal office, . . . [D]isclosure requirements [also] deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.”¹⁰³ They also “are an essential means of gathering the data necessary to detect violations of the contribution limitations.”¹⁰⁴

Ackerman and Ayres advocate the replacement of disclosure with mandatory anonymity, under which neither the public nor the politicians who receive donations would know their source.¹⁰⁵ In advancing their proposal, Ackerman and Ayres criticize the traditional focus on disclosure.¹⁰⁶ “[L]ow voter motivation,” they explain, “makes a full-information remedy a profoundly problem-

97. *Id.* at 5.

98. *Id.* at 2.

99. *Id.* at 2–3.

100. *Id.* at 3–4.

101. *Id.* at 4.

102. See 2 U.S.C. §§ 431–442 (2000).

103. *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976).

104. *Id.* at 68.

105. ACKERMAN & AYRES, *supra* note 1, at 27–28.

106. *Id.* at 27.

atic aspect of the old reform paradigm. . . . [I]f most voters pay scant attention to politics, they won't take the time to go through the lengthy lists of donors published in the name of 'full information.'¹⁰⁷ They further reason that disclosure is inadequate because it amounts at best to "quasi-full information[]"¹⁰⁸

Ackerman and Ayres make an effective case about the *limits of disclosure*, persuasively rebutting those who advocate disclosure only as the appropriate regime for campaign finance.¹⁰⁹ Ackerman and Ayres, however, have not made the case for *elimination* of disclosure. While disclosure does not prevent a politician from favoring major donors, it constrains such action. Further, disclosure draws public attention to some of the most serious problems in campaign finance.¹¹⁰ Public disclosure, for instance, played a key role in countering soft money.¹¹¹ Until 1991, the FEC did not require the political parties to disclose soft money spending.¹¹² That year, in response to legal action brought by Common Cause, the FEC adopted disclosure rules.¹¹³ The resulting information helped fuel the ultimately successful legislative effort to eliminate soft money.¹¹⁴

Ultimately, Ackerman and Ayres's argument for eliminating disclosure turns on their argument that they can prevent the recipient politicians, as well as the public, from knowing the identity of their donors.¹¹⁵ As we discuss below, we seriously doubt the feasibility of this approach.¹¹⁶

107. *Id.*

108. *Id.* at 94 (noting that traditional disclosure "doesn't require publication of . . . what the politician and the donor say to one another in the profess of giving and getting.").

109. *Id.* at 27; see, e.g., Issacharoff & Karlan, *supra* note 29, at 1736-37; Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 326-27 (1998).

110. See BRIFFAULT, *supra* note 48, at 46 (exploring the use of soft money); Expert Report of Thomas E. Mann at 11-26, *McConnell v. FEC*, No. 02-0582 (D.D.C. filed Mar. 27, 2002) (recounting use of soft money), available at <http://www.camlc.org/vocacy-court2-31.html>.

111. *Id.*

112. *Id.*; Expert Report of Mann at 14, *McConnell*, No. 02-0582.

113. *Id.*; see also 11 C.F.R. § 106.5(g)(3) (2002).

114. See *infra* text accompanying notes 176-83.

115. ACKERMAN & AYRES, *supra* note 1, at 94.

116. See *infra* Part III.

D. *FEC Reform*

In addition to the three elements outlined above, reform of the FEC is central to the traditional reform program, as it is to Ackerman and Ayres's proposal.¹¹⁷ As the authors rightly emphasize, "[t]he current Federal Election Commission is an icon of ineffectiveness," and "it is essential to design adequate institutions" to oversee campaign finance reform.¹¹⁸ A bipartisan task force convened in 2001 by Democracy 21 has also concluded that "[n]o law will be effective if the agency responsible for its enforcement interprets the law contrary to its basic purposes and intent, administratively creates gaping loopholes in the law, and tolerates widespread evasion of the law."¹¹⁹

There are three principal flaws in the current FEC, which both Ackerman and Ayres and traditional reformers target. First, in many respects, Congress designed the FEC, its own watchdog, to frustrate effective enforcement.¹²⁰ Unlike most agencies, which are either headed by a single administrator or have an odd number of commissioners, the FEC has six members and requires a majority to take action.¹²¹ By statute, no more than three of the commissioners can be members of the same political party.¹²² In practice, it has been composed of three Democrats and three Republicans.¹²³ This structure, Ackerman and Ayres note, "virtually guarantee[s] administrative failure on a broad front."¹²⁴ Congress further imposed awkward and time-consuming enforcement procedures on the agency, designed, as reported in the *Congressional Quarterly*, "to protect incumbents and challengers from overly aggressive investigators."¹²⁵ Under these procedures, the FEC lacks power in all significant cases to impose sanctions, but in-

117. ACKERMAN & AYRES, *supra* note 1, at 10.

118. *Id.*

119. NO BARK, NO BITE, NO POINT, *supra* note 44, at 33. Fred Wertheimer initiated and served on this task force. *Id.* at 4.

120. See BRIFFAULT, *supra* note 48, at 150.

121. 2 U.S.C. § 437c(a)(1), (c) (2000); see also BRIFFAULT, *supra* note 48, at 150 ("[O]nly the FEC and the International Trade Commission consist of an even number of commissioners—and the ITC is empowered to act on the affirmative vote of three out of six commissioners, whereas four votes are required for FEC action.").

122. 2 U.S.C. § 437c(a)(1).

123. See BRIFFAULT, *supra* note 48, at 150.

124. ACKERMAN & AYRES, *supra* note 1, at 131.

125. Jackie Koszczuk, *Money Woes Leave FEC Watchdog with More Bark than Bite*, 56 CONG. Q. 469, 470 (1998).

stead must enter into a voluntary agreement with the party under review or seek redress in court.¹²⁶ Before it enters court, moreover, it must conduct a multi-staged investigation and review process, requiring the concurrence of four commissioners at three separate stages.¹²⁷

Second, “[t]he FEC is a classic example of a ‘captured’ agency—one that has become attuned to serving the interests of the community it is supposed to be regulating.”¹²⁸ When Congress first established the FEC, it authorized the leaders of Congress to appoint four of its six commissioners.¹²⁹ The Supreme Court in *Buckley v. Valeo*¹³⁰ struck down this arrangement as a violation of the President’s appointment power,¹³¹ and Congress subsequently amended the statute to provide for presidential appointment.¹³² In practice, however, the White House has continued to look to Congressional leaders to identify nominees for the Commission.¹³³ The resulting commissioners typically have close ties and allegiance to incumbent officeholders and the political parties.¹³⁴ As a consequence, Ackerman and Ayres note, “[a]ny proposal that damages the interests of leading politicians of either party will be greeted skeptically, and embraced only if it promises to do more damage to the rival party—in which case it is likely to be vetoed by the other three-member bloc.”¹³⁵

Third, Congress has “chronically under-funded” the FEC.¹³⁶ As Ackerman and Ayres observe, “Congress has often used its fiscal powers as a club to batter agencies into line when they offend powerful interests.”¹³⁷ This is the case with the FEC. In the words of former Representative Tony Coehlo, “there’s basically been an

126. See 2 U.S.C. § 437g(a)(4)(A)(i) (2000); see also NO BARK, NO BITE, *supra* note 44, at 52.

127. See 2 U.S.C. § 437g(a)(2), (a)(4)(A)(i), (5)(C), (6)(A); see also NO BARK, NO BITE, *supra* note 44, at 51.

128. NO BARK, NO BITE, NO POINT, *supra* note 44, at 15.

129. *Id.*

130. 424 U.S. 1 (1976).

131. *Id.* at 143.

132. See 2 U.S.C. § 437c(a)(1) (2000); see also NO BARK, NO BITE, *supra* note 44, at 15.

133. See, e.g., Koszczuk, *supra* note 125, at 469 (“an informal understanding gives Congress control over who is nominated.”).

134. See NO BARK, NO BITE, NO POINT, *supra* note 44, at 61.

135. ACKERMAN & AYRES, *supra* note 1, at 130–31.

136. NO BARK, NO BITE, NO POINT, *supra* note 44, at 20.

137. ACKERMAN & AYRES, *supra* note 1, at 134.

attempt on the part of people to try to make the FEC noneffective by withholding money. And they succeeded to a great extent.”¹³⁸ In November 2001, for instance, 54 out of the 174 cases on the Commission’s docket were unassigned for lack of staff.¹³⁹ According to a PricewaterhouseCoopers audit, “[w]ith its current level of resources and escalating workloads, the FEC accomplishes its disclosure responsibilities, but struggles to meet its compliance mission.”¹⁴⁰

In response to the FEC’s widely acknowledged failings, Ackerman and Ayres propose its replacement by a five-member commission selected exclusively from retired federal judges.¹⁴¹ These judges, the authors reason, are uniquely suited to serve as impartial “watchdogs.”¹⁴² They will “no longer lust after high political office,” but will “seek to ensure that their names receive honorable mention in the annals of the republic.”¹⁴³ This “appeal to fame” will promote independence, for judges

are aware of our great constitutional legacy, and *are* alive to the honor that goes with making a genuine contribution to its sustenance. They have also been socialized into the cast of mind necessary for the successful operation of the FEC—cultivating habits of impartiality in the name of the rule of law.¹⁴⁴

To further insulate the judges from political pressure, Ackerman and Ayres propose their appointment to staggered, nonrenewable ten-year terms.¹⁴⁵

Ackerman and Ayres also address the budgetary and enforcement problems of the current FEC. Their proposed commission

138. Joshua Shenk, *Designed for Impotence*, U.S. NEWS & WORLD REP., Jan. 20, 1997, at 30, 32.

139. Federal Election Commission, Statement of Reasons of Commissioner Scott E. Thomas, (Nov. 9, 2001) (Pre MUR 395), available at <http://fecweb1.fec.gov/members/thomas/thomasstatement39.html>.

140. PRICEWATERHOUSECOOPERS LLP, TECHNOLOGY AND PERFORMANCE AUDIT AND MANAGEMENT REVIEW OF THE FEDERAL ELECTION COMMISSION ES-3 (1999).

141. ACKERMAN & AYRES, *supra* note 1, at 129.

142. *Id.*

143. *Id.*

144. *Id.* Because of these expected advantages of having retired federal judges serve as commissioners, the authors conclude that constraining the President to appoint only retired federal judges falls within Congress’s authority to “prescrib[e] . . . reasonable and relevant qualifications and rules of eligibility of appointees.” *Myers v. United States*, 272 U.S. 52, 129 (1926).

145. ACKERMAN & AYRES, *supra* note 1, at 130.

includes an independent enforcement division, headed by the agency's general counsel and separate from the commission's operating divisions.¹⁴⁶ The Commission would be funded, like Social Security, with an enduring appropriations statute rather than through the annual appropriations process.¹⁴⁷ While Congress would remain free to alter the appropriations formula, any changes would "come not during a midnight session on an omnibus appropriations measure but after a high-visibility debate—with a majority taking full responsibility for their votes before their constituents."¹⁴⁸

Traditional reformers have similarly proposed creation of a new FEC that is more powerful and insulated from Congressional interference. Under a proposal issued in 2002 by the Democracy 21 bipartisan task force noted above, the FEC would be replaced by a new independent agency headed by a single administrator, a model successfully used in other countries.¹⁴⁹ The new agency's enforcement powers would include the authority to impose penalties directly on violators through adjudication before administrative law judges subject to judicial review.¹⁵⁰ The administrator would serve a ten-year, nonrenewable term and be appointed by the President subject to Senate confirmation, typically giving both parties a role in the selection process.¹⁵¹ By concentrating responsibility in a single administrator, this proposal would attract public attention to the selection and performance of the new leader, increasing the accountability of the agency and of the appointment process.¹⁵² The agency would be funded on a multi-year basis, and Congress would receive nonpartisan recommendations from the General Accounting Office as to the appropriate funding level.¹⁵³ While the two proposals differ in their particulars, they reflect common and important objectives.

146. *Id.* at 132–33.

147. *Id.* at 135.

148. *Id.* at 136.

149. NO BARK, NO BITE, NO POINT, *supra* note 44, at 34.

150. *Id.* at 34.

151. *Id.* at 37–38.

152. *Id.* at 35–36.

153. *Id.* at 43.

III. THE ACKERMAN AND AYRES PROPOSAL: THE SECRET DONATION BOOTH

Ackerman and Ayres depart significantly from the traditional approach in replacing disclosure with mandatory anonymity through the secret donation booth.¹⁵⁴ Under their proposal, all donations to candidates, political parties, PACs, and groups engaging in express advocacy would be given through the secret donation booth—a blind trust that would keep donors' identity secret from the recipients as well as the public.¹⁵⁵ Individuals could contribute much greater sums to candidates than currently authorized, including up to \$100,000 to presidential candidates.¹⁵⁶ While contributors could publicize *alleged* donations to specific candidates, they could not, according to Ackerman and Ayres, prove that they had made these donations.¹⁵⁷ The authors analogize their regime to the secret ballot.¹⁵⁸ The secret ballot, they reason, enabled voters to falsely profess support for a politician, “mak[ing] it more difficult for candidates to *buy* votes.”¹⁵⁹ The secret donation booth, they argue, would similarly allow individuals to falsely assert that they donated money, “mak[ing] it harder for candidates to *sell* access or influence.”¹⁶⁰

Ackerman and Ayres include numerous measures to preserve the secrecy of their donation booth. To prevent donors from proving contributions with a cancelled check, for instance, the authors give all donors the right to obtain a refund of a contribution within five days of making it.¹⁶¹ Donors who received refunds would have the same cancelled checks as true donors, rendering a cancelled check inconclusive as to whether a donation had been made.¹⁶² The result of these measures, suggest Ackerman and Ayres, is that anyone could assert that he or she had made a large donation, but no one could prove it.¹⁶³ In this world of “cheap talk,” Ackerman and Ayres argue, politicians would be

154. ACKERMAN & AYRES, *supra* note 1, at 6.

155. *Id.*

156. *Id.* at 117.

157. *Id.* at 6.

158. *See id.*

159. *Id.*

160. *Id.*

161. *Id.* at 101.

162. *Id.*

163. *Id.* at 104.

unable to identify their true donors, and thus unable to favor them.¹⁶⁴

While elegant in design, we seriously question the ability of this model to work in practice.

Buying votes in an election involves a very different calculus from selling access to politicians, making analogies between the two of limited use. Vote-buying, by its nature, requires a politician to verify large numbers of votes, each one of which is insignificant on its own. Access-selling, by contrast, involves a far smaller network of individuals and can succeed with only a few verified transactions.

Within this network, many politicians have close relations with their major donors and supporters. Based on their past contribution history, professional ties, or common agendas, politicians would in many cases reasonably believe these donors' assertions that they had made contributions. These major donors, meanwhile, would have little interest in misleading politicians and would not consider it worthwhile to undertake the risk or psychic cost of lying, in part because the amount of the contribution is in any event often relatively small compared to the potential benefits. As Alan G. Hassenfeld, Chairman of the Board and CEO of Hasbro, has testified in the litigation regarding the constitutionality of the BCRA:

Many in the corporate world view large soft money donations as a cost of doing business, and frankly, a good investment relative to the potential economic benefit to their business. . . . I remain convinced that in some of the more publicized cases, federal officeholders actually appear to have sold themselves and the party cheaply. They could have gotten even more money, because of the potential importance of their decisions to the affected businesses.¹⁶⁵

164. *Id.* at 6.

165. Declaration of Alan G. Hassenfeld ¶ 16, *McConnell*, No. 02-0582, available at <http://www.camlc.org/advocacy-court2-31.html>. MIT professors Stephen Ansolabehere, John M. de Figueiredo, and James M. Snyder Jr. argue that the low ratio between the overall amount of political contributions and the economic stakes of government decision-making suggests that contributions are given not to gain influence, but for the satisfaction of participation in its own right. See Ansolabehere et al., *Why Is There So Little Money in U.S. Politics?* 17 *J. ECON. PERSP.* 105 (2003).

That the political contribution market has not reached its full potential size, however, is in no way inconsistent with the conclusion that many donors, particularly the largest, give contributions in order to gain influence. Indeed, Ansolabehere, de Figueiredo, and Snyder

Major donors would gain further credibility regarding their asserted contributions because Ackerman and Ayres require ultimate disclosure of contributions.¹⁶⁶ To insure against misdirection of funds, Ackerman and Ayres provide for delayed disclosure of contributions, with the FEC publishing contributions ten years after each election.¹⁶⁷ Just as the federal judges that Ackerman and Ayres target for their commission “will have their eyes on the history books,”¹⁶⁸ many large donors, including business leaders, will have, and will reasonably be presumed to have, concerns about their reputations. Certain exposure of any lies about contributions even in ten years, would make it far less appealing for these donors to lie about contributions, and it would lend weight to their assertions that they had made a contribution.

We also question the efficacy of the many controls Ackerman and Ayres would impose to keep their blind trust blind.¹⁶⁹ Campaign finance players have aggressively skirted the current system, and Ackerman and Ayres’s approach would certainly foster similar efforts. Even with strict controls, for instance, government leaks are difficult to contain, and some information could come from the FEC officials and staff with access to the database. In another route of circumvention, donors could provide assurance to politicians by having their accountants certify contributions. And, while Ackerman and Ayres have designed complex mechanisms for disbursements from the blind trust to prevent noticeable jumps in a candidate’s receipts that could be tied to a particular donor,¹⁷⁰ it may well underestimate the ingenuity of the major campaign finance players to believe that they will be

acknowledge that “a subset of donors—mainly corporate and industry PACs—behave as if they expected favors in return” and that “[t]hese contributors may in fact receive a reasonable rate of return—say 20 percent . . .” *Id.* at 126. As lobbyist Robert Rozen testified in the litigation regarding the BCRA, “[w]hile some soft money is given for ideological purposes, companies and trade associations working on public policy for the most part give to pursue their economic interests.” Declaration of Robert Rozen ¶ 10, *McConnell*, No. 02-0582, available at <http://www.camlc.org/advocacy-court2-31.html>. A survey of 300 business executives at major U.S. corporations conducted for the Committee on Economic Development similarly reported that 75% of these executives said that “political donations give them an advantage in shaping legislation,” and 78% “called the system ‘an arms race for cash that continues to get more and more out of control.’” Declaration of Charles E.M. Kolb ¶ 9, *McConnell*, No. 02-0582, available at <http://www.camlc.org/advocacy-court2-31.html>.

166. ACKERMAN & AYRES, *supra* note 1, at 99.

167. *Id.*

168. *Id.* at 131.

169. *See id.* at 99–100.

170. *Id.* at 104–07.

unable to defeat these mechanisms. Unlike vote buying schemes, which generally require a large number of improper transactions to affect the outcome, even a small number of contributors breaking through Ackerman and Ayres's controls could significantly undermine the system.

Ackerman and Ayres's proposal to keep secret the financial backers of *independent* campaign spending faces additional obstacles. Here, as with contributions to candidates, Ackerman and Ayres propose to channel contributions to organizations to fund express advocacy through a blind trust.¹⁷¹ Even assuming these groups could not prove the identity of *specific* individual donors, they could persuasively signal their *general* source of funding. Tort lawyers, for instance, could fund their own express advocacy organization. Even without establishing their contributors, they could prove to candidates that tort lawyers as a group had financed a powerful campaign in aid of, or in opposition to, a particular candidate. Such campaigns would enable tort lawyers, and similar groups, to gain influence over candidates, notwithstanding the secret donation booth.

The public, as well as politicians, could identify the backers of such independent campaigns. With respect to individual donations, however, politicians would be unlikely to publicize any information they learned about their donors. If politicians knew the identity of particular major donors, but the public did not, politicians could readily favor those donors without political consequences. No public information would lead the media or the electorate to scrutinize these governmental actions.

The absence of public disclosure would also undermine enforcement of many aspects of Ackerman and Ayres's proposal, including the elements of current campaign finance law that they retain. With the blind trust, the public would have no way of monitoring compliance with these aspects—including Ackerman and Ayres's ban on union, corporate, and non-citizen contributions;¹⁷² their overall contribution limits;¹⁷³ and their rules restricting PAC contributions of private money to candidates.¹⁷⁴ Enforcement of these rules would have to be trusted entirely to the FEC, outside the check of public scrutiny—a disturbing prospect.

171. *See id.* at 125–26.

172. *Id.* at 205–05 (Citizen Sovereignty Act § 10(h)).

173. *Id.* at 203–04 (Citizen Sovereignty Act § 10(c)–(e)).

174. *Id.* at 203 (Citizen Sovereignty Act § 10(b)).

Ackerman and Ayres are correct that the current system of campaign finance regulation has serious problems. These problems, however, are not due to inherent problems with the traditional approach, taken as a whole. Instead, they result from the FEC's chronic underenforcement and Congress's reluctance to establish a strong and effective system. The 2002 passage of the BCRA represents an important step to counter these trends. We discuss it below.

IV. BIPARTISAN CAMPAIGN REFORM ACT

BCRA responds to the emergence of a "shadow" campaign finance system, in which large individual contributors, corporations, and unions have directed massive funds to federal elections outside the federal campaign finance laws by donating soft money to the parties and sponsoring unregulated "issue ads" designed to influence elections. This shadow system bypassed the current system of campaign finance control, as it would bypass Ackerman and Ayres's regime. Because the BCRA's reforms are needed to make *any* system of campaign finance function effectively, we discuss their constitutionality in some detail.¹⁷⁵

A. *Soft Money: The Parties*

A central part of the new law is the soft money ban.¹⁷⁶ Soft money is money the parties have raised and spent outside the restrictions of federal campaign finance law.¹⁷⁷ The parties have raised soft money on the theory that they use it to influence state—rather than federal—elections. It is widely acknowledged, however, that the parties have used it to target federal elections.

175. The authors are on the legal team representing the congressional sponsors of the BCRA as defendant-intervenors in the litigation currently reviewing the constitutionality of the new legislation. *See* *McConnell v. FEC*, No. 02-0582 (D.D.C. filed Mar. 27, 2002). This discussion draws on the defendant-intervenors' and the government's briefs in the case and on the extensive evidence presented in the case.

176. *See* BCRA, Pub. L. No. 107-155, sec. 101(a), 116 Stat. 81, 82 (2002) (to be codified at 2 U.S.C. § 441i(a)).

177. *See* ACKERMAN & AYRES, *supra* note 1, at 45 ("Existing law bans big contributions to candidates but permits big gifts to political parties. So big givers take advantage of this loophole to channel vast sums to the parties, which can legally spend the money for a host of activities that benefit their favored candidates."); Expert Report of Mann at 11-26, *McConnell*, No. 02-0582.

Any campaign finance system that regulates the source or amount of money that can be used for federal campaigns must grapple with the soft money problem and the role of political parties in elections. It must, in other words, ensure that money forbidden to be used in federal elections is not channeled through the political parties to benefit federal candidates. The BCRA does so by banning soft money, and Ackerman and Ayres “endorse [this] effort to sweep soft-money contributions to political parties into the regulatory framework.”¹⁷⁸ Their model statute similarly “treats all political parties as their candidates’ alter egos, and requires all their campaign expenditures to come through the secret donation booth.”¹⁷⁹

Ackerman and Ayres vouch for the constitutionality of the soft money ban.¹⁸⁰ We agree.

The soft money ban is justified on two separate bases identified by the Supreme Court as appropriate grounds to restrict contributions.¹⁸¹ First, it prevents circumvention of the rules—already upheld—that restrict contributions to candidates and to political parties for the purposes of influencing federal elections.¹⁸² Second, it prevents corruption and the appearance of corruption.¹⁸³ We discuss each basis in turn.

1. Preventing Circumvention

Since *Buckley*, the Court has repeatedly upheld contribution limits designed to prevent evasion of the limits on contributions to candidates.¹⁸⁴ The soft money ban does precisely that.

178. *Id.* at 54.

179. *Id.* at 124.

180. *See id.* at 54, 125.

181. *See* *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 441, 456 (2001).

182. *Id.* at 456.

183. *Id.* at 441.

184. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court upheld the \$25,000 annual aggregate limit on individual contributions in the Federal Election Campaign Act (“FECA”) because it prevented evasion of the FECA’s basic \$1,000 contribution limit. *Id.* at 38; *see also Colorado Republican Fed. Campaign Comm.*, 533 U.S. at 456 (“circumvention is a valid theory of corruption”); *California Med. Ass’n. v. FEC*, 453 U.S. 182, 198 (1981) (upholding the \$5,000 limit on contributions to multicandidate political committees because contribution limits upheld in *Buckley* otherwise “could be easily evaded”).

Soft money is money raised by the parties outside the federal restrictions; it includes individual donations that exceed the contribution limits as well as direct contributions from corporations and unions.¹⁸⁵ The theory of soft money, and the basis on which the FEC authorized it in rulings issued in 1978 and 1979, is that it relates to nonfederal elections.¹⁸⁶ Ostensibly, the parties use it for the nonfederal “portion” of activities, such as get-out-the-vote (“GOTV”) efforts, that affect both federal and nonfederal elections. Contrary to this theory, however, the parties have targeted soft money at the presidential and key congressional races, using it to finance advertising about named federal candidates, GOTV efforts, and other activities in states facing competitive federal elections.¹⁸⁷ Indeed, even the academic expert retained by the plaintiffs *challenging* the BCRA agreed that the “[n]ational parties allocate soft money to state organizations primarily with the intent to help federal candidates in close races,” and that the parties “exploit federal campaign finance laws by using soft money for candidate support even though federal laws require them to use it for generic party building.”¹⁸⁸

The state parties have played a key role in this circumvention by spending soft money transferred from the national parties. “The national parties exerted firm control over the ways in which soft money was spent,” and “[t]he primary goal” of this spending “was to support the election of federal, not nonfederal, candidates.”¹⁸⁹ In the 2000 election cycle, for instance, the national parties transferred more than \$240 million in soft money to state and local parties, principally for the purpose of influencing federal elections through “issue ads,” GOTV, and similar activities.¹⁹⁰

The soft money ban in the BCRA responds to this large-scale circumvention with three elements. First, it requires the national parties to raise and spend only hard money.¹⁹¹ Second, because of

185. See BRIFFAULT, *supra* note 48, at 124, 126.

186. See *id.* at 127.

187. See *id.*

188. Ray La Raja, *American Political Parties in the Era of Soft Money 74–75* (2001) (unpublished Ph.D. dissertation, University of California, Berkeley) (attached to La Raja Cross Exam. Tr. at Ex. 3, *McConnell*, No. 02-0582).

189. Expert Report of Mann at 16, *McConnell*, No. 02-0582.

190. FEC, *National Party Transfers to States*, at <http://www.fec.gov/press/051501partyfund/tables/nat2state.html> (last visited Mar. 20, 2003).

191. See BCRA, Pub. L. No. 107-155, sec. 101(a), 116 Stat. 81, 82 (2002) (to be codified at 2 U.S.C. § 441i(a)).

the extensive role state parties played in directing soft money to federal races, it requires the state parties to spend only hard money, or a specified mixture of hard money and limited soft money, on "federal election activit[ies]."¹⁹² Third, it prohibits federal candidates and officeholders, as well as national party officials, from raising soft money.¹⁹³ Congress enacted these measures to prevent the parties from raising money to influence federal elections outside the federal campaign finance system, and these anticircumvention measures should be upheld accordingly.

2. Preventing Corruption and the Appearance of Corruption

The Supreme Court of the United States has long upheld contribution restrictions, such as the soft money ban, on the grounds that they prevent corruption and the appearance of corruption.¹⁹⁴ Under *Buckley* and subsequent cases, Congress may enact contribution limits not simply to counter acts of bribery and quid pro quo corruption, but also to prevent less "blatant and specific attempts of those with money to influence governmental action,"¹⁹⁵ including the risk that large contributions will exert an "undue influence on an officeholder's judgment, [or] the appearance of such influence."¹⁹⁶

192. *Id.* sec. 101(a), 116 Stat. at 82. The statute defines "federal election activit[ies]" as: (1) voter registration activity during the 120 days immediately before a regularly scheduled federal election; (2) voter identification, GOTV, and generic campaign activity conducted in connection with an election in which a candidate for federal office is on the ballot; (3) public communications that promote, support, attack, or oppose a clearly identified candidate for federal office; and (4) the services of state party employees who spend more than 25 percent of their time on activities in connection with a federal election. *Id.* § 101(b), 116 Stat. at 85–86.

Under the Levin Amendment, named for its sponsor, state parties may use soft money to pay for an allocated part of the expense of "[f]ederal election activity," so long as the activity does not refer to a clearly identified candidate for federal office, the funds are not used for certain broadcast communications, and the funds are raised directly by the state or local party in increments of \$10,000 or less—these funds are known as "Levin funds." *Id.* § 101(a), 116 Stat. at 83.

193. *See id.* § 101(a), 116 Stat. at 84.

194. *See* *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001); *Buckley v. Valeo*, 424 U.S. 1, 28 (1976).

195. *Buckley*, 424 U.S. at 28.

196. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. at 441; *see also* *Nixon v. Shrink Missouri Gov't Political Action Comm.*, 528 U.S. 377, 390 (2000) ("Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the

The Court in *Buckley* reasoned that “the reality or appearance of corruption” is “*inherent* in a system permitting unlimited financial contributions.”¹⁹⁷ The soft money experience confirms that conclusion. While some have argued that party fundraising does not create the same risk of corruption as direct candidate fundraising, the evidence belies this claim, and the Supreme Court has upheld limits on contributions to parties.¹⁹⁸ Indeed, “[m]uch of the soft money raised for political parties is raised by elected officials—sitting members of the Senate and the House of Representatives.”¹⁹⁹ Federal officeholders head and constitute the members of four of the six national party committees—the House and Senate campaign committees.²⁰⁰ The sitting President typically exercises substantial control over the fifth—the Republican or Democratic National Committee.²⁰¹ As a result, “[p]arty committees do not so much dilute and ‘cleanse’ private interest money as centralize it and focus it on the President and the congressional leadership.”²⁰²

When party officials, rather than federal candidates and officeholders, raise the funds, the “party’s involvement does not sterilize the system.”²⁰³ As the Supreme Court has recognized, parties “act as agents for spending on behalf of those who seek to produce obligated officeholders.”²⁰⁴ Therefore, “substantial donations turn the parties into matchmakers whose special [interest] meetings and receptions give the donors the chance to get their points across to the candidates,”²⁰⁵ and donors “can use parties as conduits for contributions meant to place candidates under obligation.”²⁰⁶ Evidence obtained in the BCRA litigation bolsters these conclusions. A fundraising letter from former Republican Chair-

tune could jeopardize the willingness of voters to take part in democratic governance.”).

197. *Buckley*, 424 U.S. at 28 (emphasis added).

198. *See id.* at 38 (upholding the overall yearly limit of \$25,000 on contributions by an individual, recognizing that this limit will preclude “huge contributions to [a] candidate’s political party”).

199. Declaration of Senator Rudman ¶ 6, *McConnell*, No. 02-0582, available at <http://www.camlc.org/advocacy-court2-31.html>.

200. *See id.*

201. *See* Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 651 (2000).

202. *Id.*

203. Declaration of Senator Rudman ¶ 12, *McConnell*, No. 02-0582.

204. *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 452 (2001).

205. *Id.* at 461.

206. *Id.* at 452.

man Jim Nicholson to the chief executive of Bristol-Myers Squibb, for example, advised, “[w]e must keep the lines of communication open if we want to continue passing legislation that will benefit your industry.”²⁰⁷ A “call sheet” written to prepare former Democratic Chairman Don Fowler to make a fundraising call to a Senior Texaco official directed Fowler to request a \$35,000 donation while noting presidential support of the “Oil Industry” on pending legislation: “The President helped out the Oil Industry by supporting them on drilling issues in the Gulf of Mexico. The bill passed the House on Tuesday.”²⁰⁸

Additional evidence gathered in the BCRA litigation shows soft money fundraising results not only in the appearance, but also the actuality, of undue influence. As former Senator Warren Rudman testified, “[l]arge soft money contributions in fact distort the legislative process.”²⁰⁹ In the words of former Senator and Republican Whip Alan Simpson, “[d]onations from the tobacco industry to Republicans scuttled tobacco legislation, just as contributions from the trial lawyers to Democrats stopped tort reform.”²¹⁰ Former Senator Paul Simon described an incident when Federal Express, which had reportedly contributed close to \$1 million in soft money to the political parties, sought an amendment to certain legislation during the 1995–1996 Session.²¹¹ When Senator Simon opposed the amendment in the Democratic Caucus, one of his senior colleagues responded that “we’ve got to pay attention to who is buttering our bread.”²¹²

Soft money also fosters the widespread appearance of corruption, itself sufficient to justify the ban. As the Court has explained, Congress has authority to restrict contributions to prevent even the *appearance* of corruption, lest “confidence in the system of representative Government . . . be eroded to a disas-

207. Letter from Jim Nicholson, RNC Chairman, to Charles Heimbold, Chairman Bristol-Myers (Apr. 9, 1999), available at <http://www.camlc.org/advocacy-court2-47.html>.

208. DNC Finance Call Sheet for Jim Broninger, Texaco, Nov. 10, 1995, available at <http://www.camlc.org/advocacy-court2-47.html>.

209. Declaration of Senator Rudman ¶ 9, *McConnell*, No. 02-0582, available at <http://www.camlc.org/advocacy-court2-31.html>.

210. Declaration of Alan K. Simpson ¶ 10, *McConnell*, No. 02-0582, available at <http://www.camlc.org/advocacy-court2-31.html>.

211. Declaration of Paul Simon ¶ 13, *McConnell*, No. 02-0582, available at <http://www.camlc.org/advocacy-court2-31.html>.

212. *Id.* ¶ 14; see also *FEC v. Colorado Fed. Campaign Comm.*, 533 U.S. 431, 451 n.12 (2001).

trous extent.”²¹³ A poll conducted by a bipartisan team of leading pollsters and presented to the court reviewing the BCRA reported: “[t]he American public believes [that] [t]he views of large contributors to parties improperly influence policy and are given undue weight in determining policy outcomes.”²¹⁴ Among other conclusions, the poll found that that seventy-one percent of Americans believe that “members of Congress sometimes decide how to vote . . . based on what big contributors to their political party want, even if it is not what most people in their district want, or even if it’s not what they think is best for the country.”²¹⁵

B. *Electioneering by Interest Groups, Corporations, and Unions*

The second area of shadow campaign finance involves campaign spending by interest groups, corporations, and unions. Campaign finance law has long included this activity within its regulatory framework. Largely since 1996, however, these groups have evaded this framework by running “sham” issue ads that escape regulation and by coordinating their ostensibly independent spending with candidates.²¹⁶ As with soft money, these maneuvers allowed these groups to operate outside the campaign finance laws.²¹⁷ Importantly, these tactics would allow identical evasion of Ackerman and Ayres’s system, making an effective response as critical to their system as to the traditional framework.

Indeed, Ackerman and Ayres recognize this need, tracking the traditional approach in important respects. Current law prohibits corporations and unions from spending their general treasury funds on campaign activities, requiring them to use only money in PACs financed by their individual constituents.²¹⁸ Ackerman and Ayres adopt this restriction.²¹⁹ Current law included inde-

213. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (quoting *United States Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 565 (1973)).

214. MARK MELLMAN & RICHARD WIRTHLIN, RESEARCH FINDINGS OF A TELEPHONE STUDY AMONG 1300 ADULT AMERICANS 5 (Sept. 23, 2002), available at <http://www.camlc.org/advocacy-court2-31.html>.

215. *Id.* at 7.

216. See *infra* text accompanying notes 240–47; see also, e.g., Thomas E. Mann & Norman J. Ornstein, *Not a Danger to Free Speech*, WASH. POST, July 14, 1998, at A15.

217. See *id.*

218. 11 C.F.R. §§ 114.1(a)(2)(iii), 114.2(b) (2002).

219. ACKERMAN & AYRES, *supra* note 1, at 204–05 (Citizen Sovereignty Act § 10(h)).

pendent campaign spending by individuals and groups other than corporations and unions within the regulatory framework, requiring disclosure of this spending.²²⁰ Ackerman and Ayres also incorporate campaign spending in their regime requiring it to be funded through the secret donation booth.²²¹ Finally, current law treats interest group spending that is *coordinated* with a candidate like a direct contribution to that candidate,²²² and the FEC, pursuant to BCRA, has issued new regulations to enforce this provision.²²³ Ackerman and Ayres similarly emphasize the need “to create an effective barrier against coordination with the candidate,” recognizing that “[i]f candidates can create organizations that masquerade as independents but function as integral parts of their campaign, they will no longer encourage givers to use the blind trust.”²²⁴

Ackerman and Ayres reject, however, another key measure of the BCRA that responds to shadow activity by corporations, unions, and interest groups.²²⁵ This measure responds to the rise of sham issue ads since 1996.²²⁶ These sham issue ads exploited the rule adopted in *Buckley*, discussed in detail below, that treats an ad by spenders other than candidates and political committees, including political parties, as a campaign ad only if it uses words of “express advocacy.”²²⁷ The BCRA displaces this express advocacy test for the periods close to an election, redefining the types of advertisements that are treated as campaign advertisements during these periods.²²⁸ Under the new standard, an ad is a campaign ad if it clearly identifies a federal candidate within thirty days of a primary or sixty days of a general election and is targeted to the candidate’s constituency.²²⁹

220. 11 C.F.R. §§ 109.1(b)(1), 109.2(a) (2002).

221. See ACKERMAN & AYRES, *supra* note 1, at 199 (Citizen Sovereignty Act § 8(a)).

222. BCRA, Pub. L. No. 107-155, sec. 202, 116 Stat. 81, 90–91 (2002) (to be codified at 2 U.S.C. § 441a(a)(7)).

223. *Id.* sec. 214(c), 116 Stat. at 95; Coordinated and Independent Expenditures, 68 Fed. Reg. 421 (Jan. 3, 2003). Congressional sponsors of the BCRA have challenged these regulations under the Administrative Procedure Act on the ground that they fail to implement the legislation properly. *Shays v. FEC*, No. 02-1984 (D.D.C. filed Oct. 8, 2002).

224. ACKERMAN & AYRES, *supra* note 1, at 123.

225. *Id.* at 54; see also BCRA sec. 201(a), 116 Stat. at 88–90.

226. *Buckley v. Valeo*, 424 U.S. 1, 44 (1976).

227. See *infra* text accompanying notes 236–47.

228. BCRA sec. 201, 116 Stat. at 89.

229. *Id.*

Ackerman and Ayres argue that this redefinition of campaign ads “restrains free speech.”²³⁰ We disagree. The BCRA does not ban any form of speech. It simply applies the funding and disclosure rules that have long governed campaign ads to a redefined set of campaign ads, carefully delineated by Congress to take account of recent campaign advertising practices and targeted at ads aimed at influencing elections.

The funding restrictions associated with classification as a campaign ad are longstanding. These rules prohibit corporations and unions from financing campaign ads with treasury funds, while leaving them free to use their PACs—which are voluntarily funded by their individual constituents—to finance these ads.²³¹ The rules place no restriction on other groups or individuals, but simply require them to disclose their spending and the source of these funds.²³² The Court has upheld these disclosure rules and restrictions on corporate spending.²³³ As the Court explained in *Austin v. Michigan State Chamber of Commerce*,²³⁴ the restriction on corporate spending prevents distortion of the “political marketplace” by countering “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”²³⁵

230. ACKERMAN & AYRES, *supra* note 1, at 54.

231. 11 C.F.R. §§ 114.1(a)(2)(iii), 114.2(b) (2002).

232. *Id.* §§ 109.1(b)(1), 109.2(a).

233. The Court upheld the disclosure requirements in *Buckley*, reasoning that they “increase[] the fund of information concerning those who support the candidates” and “further[] First Amendment values by opening the basic process of our federal election system to public view.” 424 U.S. 1, 81–82 (1976).

234. 494 U.S. 652 (1990).

235. *Id.* at 659–60. The Court has not expressly addressed the analogous restriction on union spending, but has given no reason to believe that it would treat that restriction differently from the corporate restriction.

Opponents have argued that the BCRA’s restrictions on corporate spending burden “citizens groups.” See, e.g., 144 CONG. REC. H5456 (daily ed. July 14, 1998) (statement of Rep. Chenoweth). The Supreme Court, however, has already addressed the permissibility of imposing the corporate restrictions on nonprofit corporations, and its decision applies under the BCRA as under previous law. In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), in particular, the Supreme Court ruled that nonprofit corporations that are formed to promote political ideas and do not accept corporate or union money must be excepted from the rule requiring corporations to make campaign expenditures through PACs. *Id.* at 263–64. This exception continues to apply to the BCRA’s new definition of campaign ads. See 11 C.F.R. § 114.10(d)(1). Accordingly, under the BCRA, nonprofit advocacy groups that do not accept corporate or union money can spend unlimited funds on the newly defined campaign ads—they simply have to disclose the spending. See *id.* §

Before the BCRA, the line between campaign ads, which may be regulated, and issue ads, which may not, was that drawn by the Supreme Court in *Buckley*.²³⁶ When the Court decided *Buckley*, Congress had enacted a statute that drew an impermissibly vague line between campaign and issue ads.²³⁷ Rather than invalidating the statute, the Court drew a line of its own—ruling that ads by independent spenders would be treated as campaign ads if they “expressly advocated” the election or defeat of a candidate.²³⁸ In the well-known “magic words” footnote, the Court explained that this definition would cover communications “containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ [and] ‘reject.’”²³⁹ In adopting this test, the Court in *Buckley* never said the express advocacy line was the only constitutionally permissible line; it simply adopted this line to preserve a statute that had failed to offer sufficient precision.

The express advocacy line worked reasonably well for two decades, because most corporations, unions, and other organizations complied with the intent of this test.²⁴⁰ Starting with the 1996 election, however, these groups have exploited the express advocacy test by broadcasting ads that did not use the “magic words” but were plainly designed and perceived to support or oppose a candidate.²⁴¹ A typical ad opposing Arkansas Senate candidate Winston Bryant, for instance, closed: “Winston Bryant: government waste, political junkets, soft on crime. Call Winston Bryant and tell him to give the money back.”²⁴²

Using negative issue ads, the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”) in 1996

114.10(e)(2). Nonprofit corporations that *do* accept corporate or union money, of course, are appropriately subject to the restrictions to prevent them from serving as conduits for prohibited corporate and union giving. *See id.* § 114.10(c)(2).

236. *See* 424 U.S. at 44.

237. The statute sought to regulate expenditures “relative to a clearly identified candidate” and to require disclosure of spending “for the purpose of . . . influencing” an election. *Id.* at 39, 77.

238. *Id.* at 44, 80.

239. *Id.* at 44 n.52

240. Expert Report of Jonathan S. Krasno & Frank J. Sorauf, Evaluating the Bipartisan Campaign Reform Act (BCRA) at 50, *McConnell*, No. 02-0582, available at <http://www.camlc.org/advocacy-court2-31.html>.

241. *See* Mann & Ornstein, *supra* note 216, at A15.

242. 144 CONG. REC. H5456 (daily ed. July 14, 1998) (statement of Rep. Meehan).

launched a campaign against selected Republican incumbents in the House.²⁴³ Corporate interests soon responded with an ad campaign run by a group calling itself “The Coalition: Americans Working for Real Change”—whose founders included the U.S. Chamber of Commerce and the National Association of Manufacturers.²⁴⁴ Both groups spent millions of dollars on advertisements targeting key Congressional races.²⁴⁵ The “express advocacy” test was no hindrance to these campaigns.²⁴⁶ As the AFL-CIO’s political director acknowledged, “[i]f somebody handed me a magic wand and said there is no election law, I would do exactly what I am doing now.”²⁴⁷

In response to these developments, Congress adopted the new line defining campaign ads in the BCRA.²⁴⁸ Congress’s new test provides clear guidance and it is well aimed at ads with an electioneering purpose.²⁴⁹ Indeed, contrary to opponents’ charges that the law is overbroad, comprehensive studies of interest-group advertising provide strong evidence that the BCRA’s definition targets and covers ads that are aimed at influencing elections.²⁵⁰ These studies found that interest group advertisements mentioning candidates are heavily concentrated in the weeks leading up to the election, signifying that the interest group choice to mention a candidate is tied to a goal to influence the election.²⁵¹ For example, Citizens for Better Medicare, a group funded by the pharmaceutical industry, ran more than 23,000 ads during the first nine months of 2000 without mentioning a candidate.²⁵² In the two months preceding the election, it ran more than 10,000

243. Frank Swoboda, *AFL-CIO to Target 75 House Districts*, WASH. POST, Jan. 25, 1996, at A16.

244. Diana Kunde, *Reorganized Labor: New AFL-CIO Leaders Try To Give Ailing Movement a Lift*, DALLAS MORNING NEWS, Sept. 1, 1996, at 1J.

245. Phillip Dine, *Labor, Business Groups Battle, Try To Advance Their Agenda*, ST. LOUIS POST-DISPATCH, Nov. 6, 1996, at 20A.

246. See Adam Clymer, *System Governing Election Spending Found in Shambles*, N.Y. TIMES, June 16, 1996, at A1.

247. *Id.* (quoting Steven Rosenthal).

248. See BCRA, Pub. L. No. 107-155, sec. 201(a), 116 Stat. 81, 89 (2002) (to be codified at 2 U.S.C. § 434(f)(3)).

249. See *id.*

250. Expert Report of Krasno & Sorauf at 60–61, *McConnell* (No. 02-0582).

251. *Id.* at 57. In 2000, 78–85% of interest group ads referring to candidates ran in the 60 days before the election. Expert Report of Kenneth M. Goldstein at 17–18, *McConnell*, No. 02-0582, available at <http://www.camlc.org/advocacy-court2-31.html>.

252. Expert Report of Goldstein at app. tbl. 17A, *McConnell*, No. 02-0582.

ads mentioning candidates.²⁵³ The studies also found that interest group ads mentioning candidates are concentrated in the states and congressional districts with competitive elections, further signaling an electioneering purpose.²⁵⁴

In addition to this objective evidence, studies asking viewers to determine whether the purpose of an ad is “to provide information about or urge action on a bill or issue” or “to generate support or opposition for a particular candidate” found that, of all airings of interest-group ads during 2000 that were perceived as genuine issue ads, only 3.1% would have been covered by the BCRA.²⁵⁵ Similarly, in 1998, only 6.1% of genuine issue ads would have been covered by the BCRA.²⁵⁶

As this evidence shows, the BCRA’s new definition carefully targets campaign ads. The *Buckley* definition, by contrast, fails to capture most ads aimed at elections.²⁵⁷ Indeed, candidates generally avoid express advocacy words in their own ads.²⁵⁸ As a veteran media consultant testified in the BCRA litigation: “In the modern world of 30 second political advertisements, it is rarely advisable to use such clumsy words as ‘vote for’ or ‘vote against.’ . . . All advertising professionals understand that the most effective advertising leads the viewer to his or her own conclusion without forcing it down their throat.”²⁵⁹ Drawing on this insight, unions, corporations, and interest groups have shown that it is painless to craft advertisements that skirt the express advocacy standard while furthering their electioneering purposes. Without a redefinition of campaign ads, *any* restriction on campaign advertising by independent spenders—including Ackerman and Ayres’s rule requiring it to be funded through the secret donation booth—will be substantially irrelevant.

The Court, therefore, should uphold this new definition in light of: (1) the manifest failure of the express advocacy test; (2) the

253. *Id.*

254. *Id.* at 20. In the last sixty days before the 2000 election, for instance, 85–90% of interest group ads referring to candidates for the House or the Senate aired in competitive districts or states. *Id.* at 20–24.

255. *Id.* at 24–25, 27.

256. Expert Report of Krasno & Sorauf at 60 & app. C, *McConnell*, No. 02-0582.

257. Expert Report of Goldstein at 16, *McConnell*, No. 02-0582.

258. *See id.* (11.4% of candidate ads in 2000 used express advocacy).

259. Declaration of Douglas L. Bailey ¶ 3, *McConnell*, No. 02-0582, available at <http://www.camlc.org/advocacy-court2-31.html>.

evidence suggesting that Congress's new definition of campaign advertising for ads running close to an election is appropriately targeted at ads with an electioneering purpose; and (3) the reasonably modest restrictions that classification as a campaign advertisement now entails.

V. CONCLUSION

Ackerman and Ayres offer an important perspective on campaign finance reform, and pinpoint many of the current system's failings. They wrongly argue, however, that these failings are inherent in the traditional model of campaign finance reform. To the contrary, weak enforcement and a reluctant Congress are the forces that undermine the current system, and they would equally imperil Ackerman and Ayres's proposal. The BCRA includes key strengthening measures. Reform of the FEC and of the presidential funding system, and, ultimately, expansion of the public funding system to all federal races, will help restore the integrity of our democracy.
