Campaign Finance Reform in the 105th Congress: The Failure to Address Self-Financed Candidates

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CAMPAIGN FINANCE REFORM IN THE 105TH CONGRESS: THE FAILURE TO ADDRESS SELF-FINANCED CANDIDATES

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I. INTRODUCTION

At the outset of the 105th Congress, Senators John McCain (R-AZ), Russ Feingold (D-WI), and Fred Thompson (R-TN) introduced Senate Bill 25, the Bipartisan Campaign Finance Reform Act of 1997. The impetus for campaign finance reform came from the 1996 fundraising scandals, which revealed blatant campaign finance violations, including fundraising calls from the White House by the Vice President, White House coffees, foreign efforts to influence the United States Elections, and abuse of “soft money.” The 1996 campaign scandals are considered to be the most serious campaign finance controversy since Watergate. However, despite revelations of the scandals, the Bipartisan

1. S. 25, 105th Cong. (1997); see also United States Senate, McCain, Feingold, Thompson Introduce Bipartisan Campaign Reform Act of 1997 (Jan. 21, 1997) (press release on file with the Hofstra Law Review) (Introducing the Bipartisan Campaign Reform Act of 1997). In this Note, Bipartisan Campaign Finance Reform Act, McCain-Feingold Bill, Senate Bill 25, and S. 25 will be used interchangeably to discuss the same piece of legislation.

2. History suggests that the best chance for serious campaign finance reform occurs when a new Congress faces a major financial controversy or scandal that has occurred in the previous election. See Anthony Corrado, Money and Politics: A History of Federal Campaign Finance Reform, in CAMPAIGN FINANCE REFORM: A SOURCEBOOK 25, 35 (Anthony Corrado et al. eds., 1997) (writing that the 1996 elections demonstrated that the current campaign finance system is broken and needs fixing).

3. See Senate Comm. on Government Affairs, Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns 4459, 4499 (1998). Blatant abuses and violations of the Federal Election Campaign Act (“FECA”) were committed by the Clinton-Gore ‘96 Re-election Campaign Committee, the Democratic National Committee, and various non-profit organizations. See generally id. The responsibility of the Senate Committee, however, was to investigate and report its findings of illegal and improper activities that arose during the 1996 federal elections and recommend possible reforms. See id. The Committee holds no legislative authority. See id. “Now is the time to apply the knowledge gained from this experience to effective legislation, or the American public must be prepared to endure more blatant campaign finance law manipulation and corruption.” Id. at 4499.

4. See id. at 42 (finding that Vice-President Gore made approximately 45 telephone solicitations from his White House Office, raising as much as $800,000 for the Democratic National Committee).

5. See id. at 41 (detailing the hosting of 103 fundraising events in the White House for small groups of large donors).

6. See id. at 46 (revealing that the Democratic National Committee’s pursuit of contributions from wealthy and well-connected foreign nationals provided these foreign nationals with almost unlimited access to the President and other important United States policymakers).

7. See id. at 4465 (explaining how the Clinton-Gore ‘96 campaign illegally used approximately $44 million in national committee soft money); see also Rebecca Carr, Thompson Widens Scope as Investigation Begins, 55 Cong. Q. 273, 273-74 (1997) (explaining how the Senate Governmental Affairs Committee’s investigation focused on the misuse of “soft money”). For a definition of soft money, see infra note 16 and accompanying text.

Self-Financed Candidates

Campaign Finance Reform Act never passed in the 105th Congress. A Republican led filibuster forced both sides to stop debating the bill in the Senate on February 26, 1998. Even though the House passed a companion bill in early August 1998, the Senate again proved unable to break the filibuster and vote on the campaign finance reform bill.

The Senate was correct in not reaching a straight up and down vote on the McCain-Feingold Bill. The Republicans, in opposition to the McCain-Feingold Bill, filibustered primarily because they deemed the bill to be an unconstitutional infringement on political speech, and because it failed to address compulsory union dues. This Note, however, offers a different rationale for opposing the McCain-Feingold Bill. The McCain-Feingold Bill failed to adequately confront one of the most serious problems that exists in federal elections today—the proliferation of the wealthy self-financed candidate who can spend as much of his own money in an attempt to win federal office. Under the current sys-
tern, a candidate who lacks millions of dollars in personal wealth is left to raise inordinate amounts of money, or is unable to run at all because he cannot afford start up costs. The McCain-Feingold Bill, however, included added regulations, such as banning soft money and redefining issue advocacy, which would have only enhanced the self-financed candidate’s advantage.

Part II of this Note focuses on the failure of the McCain-Feingold Bill during the 105th Congress. Detailing the legislative history of the bill, the analysis shows how party politics forced the co-sponsors to take out the controversial “Spending Limits and Benefits” section of the original bill. This section would have implemented an aggressive voluntary spending limit system, including free and reduced broadcast time and reduced postage rates. This Note asserts that partisan politics eventually caused the bill’s demise. Part III discusses Buckley v. Valeo and the unfair advantage that the decision has afforded self-financed public officials, or by winning major public office for themselves); JAMIN B. RASKIN & JOHN BONIFAZ, THE WEALTH PRIMARY: CAMPAIGN FUNDRAISING AND THE CONSTITUTION 11-14 (1994) (discussing the proliferation of the millionaire candidate who can buy his way into public office).

15. See CONGRESSIONAL QUARTERLY, CONGRESSIONAL CAMPAIGN FINANCES: HISTORY, FACTS, AND CONTROVERSY 14-15 (Mary W. Cohn ed., 1992) (suggesting that a candidate needs at least $25,000 of personal money to make a run as an open-seat or challenger in a House race, and even more for a Senate campaign).

16. See infra Part II; see also S. 25, 105th Cong. §§ 210-13 (1997); S. 25, 105th Cong. §§ 101-02 (1997) (as amended); CENTER FOR RESPONSIVE POLITICS, supra note 14, at 14 (defining “soft money” as political money raised by national and state parties that is not regulated by federal campaign law because the money is given for party building purposes, such as bumper stickers and get out the vote drives; however, this money is often used to benefit specific federal candidates). In 1992, the two major parties raised approximately $83 million in soft money, and that figure increased to $262.1 million in the 1996 elections. See Anthony Corrado, Party Soft Money, in CAMPAIGN FINANCE REFORM: A SOURCEBOOK 165, 167, 175 (Anthony Corrado et al. eds., 1997). On the other hand, “hard money” refers to campaign contributions that are federally regulated. See CENTER FOR RESPONSIVE POLITICS, supra note 14, at 8.

17. See S. 25, 105th Cong. §§ 404-06 (1997); S. 25, 105th Cong. §§ 201-05 (1997) (as amended); infra Part II.

[Issue advocacy is] a constitutionally-protected form of free speech to which contribution limits do not apply, involving the use of political advertisements and other mass communications that promote a position regarding a political issue . . . . Groups and individuals who pay for such communications have sometimes been charged with “express advocacy”—that is, with advocacy that benefits particular candidates, a practice which is regulated by federal and state election law. CENTER FOR RESPONSIVE POLITICS, supra note 14, at 10.


19. 424 U.S. 1 (1976) (per curiam). The Buckley Court invalidated sections 608(a), (c), and (e) of FECA which placed limits on the amount of money an individual is able to spend on his own campaign, the overall amount a candidate could spend on a campaign, and the amount of expenditures for express advocacy made independent of the candidate and his campaign, respectively. See id.
SELF-FINANCED CANDIDATES

20. The United States Supreme Court upheld the contribution limits of the FECA Amendments of 1974, but struck down expenditure limitations. See Buckley, 424 U.S. at 58. Thus, with the contribution ceilings intact from the FECA Amendments of 1974, which forced a candidate to raise money in small increments, and with the Court striking down expenditure limitations, Buckley gave wealthy candidates an advantage. See NEUBORNE, supra note 8, at 12; RASKIN & BONIFAZ, supra note 14, at xii; Jamin Raskin & John Bonifaz, Equal Protection and the Wealth Primary, 11 YALE L. & POL'y REV. 273, 328-29 (1993). The FECA amendments of 1974 were the most comprehensive campaign finance legislation ever implemented, and while the law is an amendment to the original FECA of 1971, the Act left little of the 1971 laws intact. See Corrado, supra note 2, at 32.

21. The Buckley Court ruled that congressional efforts to regulate campaign spending must advance a compelling governmental interest. See Buckley, 424 U.S. at 16. The Court held that the government has a compelling interest in avoiding actual (or the appearance of) corruption, and the Court was concerned with the buying of legislative votes with campaign contributions. See id. at 26. Thus, the Court found that "the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed." Id. at 53. But, the majority rejected the compelling government interest in equalizing opportunities between the rich and poor. See id. at 48-49. Therefore, under Buckley, the only way to equalize the playing field is to subsidize those with less money, since limitations on how much one can spend are unconstitutional. See NEUBORNE, supra note 8, at 9.

22. Two preeminent scholars in the field of political science, Frank Sorauf and Herbert Alexander, have evaluated whether a self-financed candidate can actually buy political office. See infra notes 186-95 and accompanying text. Sorauf contends that wealthy candidates have the ability to buy elections in certain situations. See infra notes 186-91 and accompanying text. Alexander believes that Buckley gives self-financed candidates a clear advantage. See infra notes 192-95 and accompanying text.


25. See infra notes 202-05 and accompanying text.
Senate in 1984), this section sheds light on why campaign finance reform must confront the issue of personal wealth advantage. The difference in resources between self-financed candidates and their opponents makes it next to impossible for candidates without vast resources to win congressional elections.

Part V discusses the three major areas of the McCain-Feingold Bill: spending limits, soft money, and issue advocacy. Part V analyzes the effect each section has on the self-financed candidate problem. This Note argues that if legislation, such as the McCain-Feingold Bill, is enacted, and soft money and issue advocacy are regulated, while no voluntary spending limits are implemented, self-financed candidates will gain further advantage because a premium will be placed on personal money. Moreover, the fact that soft money and issue advocacy faced similar constitutional and political roadblocks as spending limits suggests that spending limits should not have been stripped from the original bill.

Part VI discusses reforms that would effectively reduce the advantage of self-financed candidates and yet work within the framework of the Buckley decision. The original version of the McCain-Feingold Bill featured voluntary spending caps and benefits for complying candidates and took serious steps towards reducing the advantage of self-financed candidates. This Note, however, calls for voluntary total public financing of elections that would completely offset the advantage of the wealthy candidate. Specifically, a minimum floor of funds would be created for eligible candidates who choose to comply with the voluntary

26. See infra notes 206-13 and accompanying text.
27. See RASKIN & BONIFAZ, supra note 14, at xiii (suggesting that the candidate who spends the most amount of money will almost always win the primary and usually go on to win the general election); see also CONGRESSIONAL QUARTERLY, supra note 15, at 14-15 (discussing the use of a candidate's own money in election campaigns). Self-financed candidates generally loan money to their campaigns with the intention that once they are elected, they can easily raise enough money to repay themselves. See Center for Responsive Politics, Tracking the Cash: Candidate Fundraising in the 98 Elections (visited June 23, 1998) <http://www.crp.org/pubs/tracking/track.htm>.

In the context of discussion of self-financed candidates in this Note, direct contributions and candidate loans make up the amount a self-financing candidate spends on his campaign.

28. Political parties favor self-financed candidates because this frees up funds for the parties to support party candidates in other elections. See Center for Responsive Politics, supra note 27. Moreover, it is hard for the parties to convince candidates without money to run for office. See infra notes 196-97 and accompanying text.

29. See Bradley A. Smith, Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform, 105 YALE L.J. 1049, 1081-82 (1996) (theorizing that campaign finance reform which does not confront Buckley only increases the wealthy candidate's advantage).
30. See infra Part VI.A (discussing why Buckley will likely not be overruled).
spending limits. Furthermore, if a candidate chose not to comply with the relevant spending cap, the opposing candidate would receive matching expenditures for the amount the non-complying candidate spends over the expenditure limitation.

II. THE LEGISLATIVE HISTORY OF THE MCCAIN-FEINGOLD BILL

A. The Original Version

The first version of Senate Bill 25, the Bipartisan Campaign Reform Act was introduced on January 21, 1997. In a press conference to introduce the bill, co-sponsor Senator Feingold remarked:

"For years, campaign finance reform has stalled because of the inability of the two parties to join together and craft a reform proposal that is fair to both sides. We believe we have bridged those differences and produced a bill that calls for mutual disarmament and will lead to fair and competitive elections . . . ."

Bill co-sponsor Senator McCain paralleled Senator Feingold's sentiments, stating that "[b]y passing a [bipartisan] bill that limits the effect of money in politics and levels the playing field between the challenger and incumbent, we can change the face of politics today."

The eighty-seven page bipartisan legislation was divided into five

31. See S. 25, 105th Cong. (1997). The original sponsors of Senate Bill 25 were Senators Feingold, Thompson, and McCain. Senator Feingold is the Democrat Junior Senator from Wisconsin, McCain is the Republican Senior Senator from Arizona, and Thompson is the Senior Republican Senator from Tennessee and Chairman of the Senate Governmental Affairs Special Investigations Committee. See id.

32. United States Senate, supra note 1. President Clinton pledged support for the McCain-Feingold Bill. See Carr, supra note 7, at 274. On January 23, he gathered Senators McCain and Feingold, as well as Representatives Shays and Meehan (who introduced H.R. 493, the House equivalent of the McCain-Feingold Bill) in the Cabinet Room, and he told them that "he was behind them" and that he would personally wage a campaign to pass the law as a priority in his second term." See id. H.R. 493 eventually turned into H.R. 2183, which passed in the House on August 6, 1998. See supra note 10 and accompanying text; infra note 99 and accompanying text.

33. United States Senate, supra note 1; see also 143 CONG REc. S9999 (daily ed. Sept. 26, 1997) (statement of Sen. McCain). Senator McCain stated:

[This] debate . . . will determine whether or not we will take an action that most Americans are convinced we are utterly incapable of doing—reforming the way we are elected to office. Most Americans believe that Members of Congress have no greater priority than our own reelection. . . . Most Americans believe we will let this Nation pay any price, bear any burden to ensure the success of our personal ambitions—no matter how dear the cost might be to the national interest. . . . [N]ow is the moment when we can begin to persuade the people that they are wrong.

Id.
sections: Senate Election Spending Limits and Benefits, Reduction of Special Interest Influence, Enforcement, Miscellaneous, and Constitutionality. Under section I, candidates who voluntarily agree to limit their overall spending,\(^3\) to spend less than $250,000 of their own personal money,\(^3\) and to raise at least sixty percent of their campaign funds from individuals in their home states,\(^5\) would be eligible for limited free television time,\(^3\) additional discounted television time,\(^3\) and a discount on postal rates for campaign mailings.\(^3\) Moreover, if a candidate agreed to limit his spending, and was faced with an opponent who will not adhere to the spending limits of $250,000, the complying candidate's individual contribution limits would be raised from $1000 to $2000.\(^4\)

Section II of the Bipartisan Campaign Reform Act focused on reducing special interest influence. First, the bill tightened restrictions on Political Action Committee's ("PACs") contributions to candidates.\(^4\) In addition, this proposal also banned soft money so that national political parties would no longer be able to solicit and receive these contributions, which are unlimited and unregulated by federal law.\(^4\)

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34. See S. 25, 105th Cong. § 503 (1997). This section provided qualifications for a candidate to be eligible for expenditure limitations. See id. In the primary, a Senate candidate's spending could not exceed the lesser amount of 67 percent of the general election expenditure limitation or $2.75 million. See id. § 503(b)(1)-(2). In the general election, the limit could not exceed the lesser of $5.5 million or the greater of $950,000 or $400,000 plus 30 cents multiplied by the voting age population not in excess of 4 million, and 25 cents multiplied by the voting age population in excess of 4 million. See id. § 503(d)(1).

35. See id. § 503(a)(1) (1997) (stating that the aggregate amount of expenditures that may be made during an election cycle by an eligible Senate candidate may not exceed 10 percent of the general election expenditure limitation or $250,000).

36. See id. § 502(e)(1)(A).

37. See id. § 102(1)(c). Each Senate candidate who qualified for the general election ballot would be eligible to receive 30 minutes of free broadcast time from stations within his time. See id.

38. See id. § 103(1)(a). The reduced broadcast rate should not exceed 50 percent of the lowest charge of the relevant station. See id.

39. See id. § 104.

40. See id. § 105.

41. See id. § 201.

42. See id. § 211(a) ("A national committee of a political party... shall not solicit or receive any contributions, donations, or transfers of funds, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act."). The FECA Amendments of 1979 created the soft money loophole. See Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1981) (codified in scattered sections at 2 U.S.C. §§ 431-55 (1994)). By allowing parties to spend money on candidates under the auspices of party-building activities, a loophole developed that allowed parties to receive donations from corporations and labor unions as "party building" activities. See generally Corrado, supra note 16, at 167-77. "[I]n 1979 Congress authorized a circumscribed realm of unlimited party expenditures." Id. at 171. In 1978, the FEC helped to open the soft money loophole "by allowing corporations, labor unions, and wealthy individuals to contribute funds directly to a political party free from the usual restric-
Furthermore, Senate Bill 25 provided those candidates who complied with expenditure limitations and were eligible for benefits with an increase in the amount of expenditures when their non-complying opponent receives more than $10,000 in total independent expenditures. Thus, when an independent expenditure totaling in the aggregate of $10,000 had been made in the same election in support of an opposing candidate, or against the eligible candidate, the FEC was required to provide the eligible Senate candidate notice within two business days that their candidacy was allowed an increase in the applicable expenditure limit equal to the amount by which the independent expenditure exceeded $10,000.

Section III, Enforcement, allowed for random audits and investigations of contributions received by an eligible Senate candidate to ensure voluntary compliance with the Act, increased reporting requirements, instituted more severe penalties for knowing and willful violations, and prohibited contributions of individuals not qualified to vote. In the Miscellaneous section, the bill called for increased disclosure and accountability for those who engage in political advertising, distinguished between independent and coordinated expenditures, defined express advocacy, and banned incumbent use of "franked" mass mailings. Finally, the bill included a severability clause and a review of constitutional issues.
Regardless of the great public outcry for campaign finance reform, politics has and will continue to play a significant role in campaign finance reform. Since the passage of the Federal Election Campaign Act ("FECA") Amendments of 1974, no significant campaign finance reform has received congressional approval. Moreover, campaign finance support generally follows party lines, with Democrats supporting reform and Republicans opposing any type of reform. Senate Minority Leader Tom Daschle (D-ND) remarked in floor debate: "For the last 21 years, since [Buckley], Democrats have tried to overcome obstacles put in place by that ruling. We have tried to find ways to
address the complexities, the problems, the shortcomings of that decision. Senator McConnell, an ardent foe of any campaign finance legislation, commented after a bipartisan campaign finance bill was successfully filibustered in the Senate of the 103d Congress: "My party did the slaying then."

The original McCain-Feingold legislation was supported by all forty-five Democrats in the Senate, but by only three of fifty-five Republicans. Facing heavy skepticism from the Republican majority, Senator McCain introduced a modified version of the Bipartisan Campaign Finance Reform Act on September 29, 1997. In introducing his revised bill, Senator McCain stated: "I hope that all of my colleagues who raised such concerns will take a new and openminded look at this bill. Gone are spending limits. Gone is free broadcast time. Gone are reduced rate TV time and postal subsidies." Senator McCain, however, made it clear that two fundamental principles are non-negotiable: seek-

61. See PAUL DICKSON & PAUL CLANCY, THE CONGRESS DICTIONARY: THE WAYS AND MEANINGS OF CAPITOL HILL 118-20 (1993) (defining "filibuster" as a tactic employing a long speech or constant talking to delay or stop action on a bill).
63. See Keller, supra note 12, at A-36.
64. Senators McCain and Feingold recognized that the original Senate Bill 25 had no chance of getting a straight up and down vote, since only three Republicans supported the bill. See Monica Borkowski, Summing Up the Year in Congress, N.Y. TIMES, Nov. 14, 1997, at A31.
65. See S. 25, 105th Cong. (1997) (as amended). At the outset of the second session of the 105th Congress, Senator Fritz Hollings (D-SC) offered a joint resolution calling for a constitutional amendment that would provide Congress with the ability to impose mandatory spending limits on campaign spending. See S.J. Res. 18, 105th Cong. (1997). By a vote of 38-61 on March 18, 1997, the bill was defeated. See 143 CONG. REC. S2397 (daily ed. Mar. 18, 1997). Senator Feingold was strongly against the amendment saying that the Members of Congress had three choices. See 143 CONG. REC. S2240 (daily ed. Mar. 13, 1997).
66. First, they can vote for constitutional amendments and partisan reform proposals that basically have predetermined fates of never becoming law. . . . Second, they can stand with the junior Senator from Kentucky [Mitch McConnell] and others who stood here on the Senate floor last June and told us all was well with our campaign finance system and we should all be thrilled that so much money was pouring into the campaign coffers of candidates and parties. . . . A third option, Mr. President, Senators can join with the Senator from Arizona and myself and others who have tried to approach this problem from a bipartisan perspective and have tried to craft a reform proposal that is fair to all. Id. (statement of Sen. Feingold).
66. 143 CONG. REC. S10,003 (daily ed. Sept. 26, 1997) (statement of Sen. McCain). Senator McCain reached an agreement with Majority Leader Lott (R-MS), whereby a modified version of Senate Bill 25 would be allowed to be introduced, but Lott would then be able to offer an amendment, namely the Paycheck Protection Act. See 143 CONG REC. S10,176-77 (daily ed. Sept. 29, 1997).
ing a level playing field between challengers and incumbents and lessening the influence of money in elections.67

The amended Senate Bill 25 removed the controversial parts from the original bill. First, section I of the original bill, entitled “Senate Election Spending Limits and Benefits”68 was wiped out and replaced with a small section near the end of the bill entitled “Personal Wealth Option.”69 Specifically, the section barred the political parties from making coordinated expenditures70 on behalf of Senate candidates who agreed to limit their personal spending to $50,000 per election.71 Thus, under the modified bill, candidates who did not comply with the spending limits would no longer be entitled to coordinated expenditures from their parties. Nevertheless, free and reduced broadcast time and postal subsidies were eliminated from the new McCain-Feingold package.72 Notably, the amended bill also eliminated the controversial section tightening restrictions on PACs.73

The modified Senate Bill 25 concentrated on banning soft money,74 placing this ban in Section I of the revised campaign finance reform


70. See CENTER FOR RESPONSIVE POLITICS, supra note 14, at 5 (“Coordinated Expenditure—In federal elections, money spent by political parties on behalf of their presidential and congressional candidates in the general election. Such expenditures are limited by law, and are not direct payments to candidates but payments by the parties to cover candidates’ campaign costs.”).

71. See S. 25, 105th Cong. § 401(b)(1) (1997) (as amended). Current law permits the national committee of a political party to spend a limited amount of money in coordination with a Senate campaign, the amount based on the voting population of the state. See 2 U.S.C. § 441a(d) (1994); United States Senate, McCain, Feingold Introduce Modifications to Campaign Finance Reform Bill (Sept. 29, 1997) (press release on file with the Hofstra Law Review) [hereinafter Modifications].

72. See supra notes 34-38 and accompanying text (discussing the original Senate Bill 25). The co-sponsors planned to offer an amendment that would have provided Senate candidates with a 50 percent discount on television costs provided that they agreed to raise 60 percent of their campaign funds from their home states, accepted no more than 25 percent of their funds in Political Action Committee (“PAC”) contributions, and limited spending to $50,000. See supra notes 34-38 and accompanying text. Even in the amendment, however, free television time and postal subsidies would not have been included. See Modifications, supra note 71, at 2-3. However, Senator Lott never allowed modifications to be offered. See infra note 86 and accompanying text.

73. See S. 25, 105th Cong. § 201 (1997). The co-sponsors also planned to offer an amendment that would have tightened restrictions on PACs, by providing benefits for those candidates who agreed to accept no more than 25 percent of their campaign funds in aggregate PAC contributions. See Modifications, supra note 71, at 3.

74. See 143 Cong. Rec. S10,001 (daily ed. Sept. 26, 1997) (statement of Sen. McCain) (“[T]he soft money ban would serve two purposes. First, it would reduce the amount of money in campaigns. Second, it would cause candidates to spend more time campaigning for small dollar donations from people back home.”).
The bill required all contributions to national parties to be subjected to "hard money" restrictions. To compensate for lost soft money, a doubling of the limit that an individual could give to a state party, in hard money, was raised from $5000 to $10,000, and the aggregate contribution was raised from $25,000 to $30,000.

Section II of the amended McCain-Feingold Bill redefined "issue advocacy." Modifying the current definition of "express advocacy" to provide a clear distinction between communications used to advocate candidates and communication used to advocate issues, the bill defined express advocacy as any broadcast television or radio communication that mentioned the name of a federal candidate within sixty days of an election.

Section III, Disclosure, made no significant changes from the first reform package. Section IV, however, contained a key addition to the bill, a codification of the Supreme Court’s 1988 decision in Communications Workers of America v. Beck. Beck held that non-union employees in a closed shop union workplace who are required to contribute funds to the union can request that this money not be used for political purposes. The revised bill codified Beck, allowing non-union members to have their agency fees reduced by an amount equal to the portion of fees used for political purposes, so long as a member files a timely objection.

76. "Hard money" is defined as those contributions that are spent to affect the outcome of a federal election and which are subject to the federal election campaign laws. See CENTER FOR RESPONSIVE POLITICS, supra note 14, at 8.
78. See id. § 102(b) (increasing the amount of aggregate contributions was also new to the revised Senate Bill 25).
79. See id. §§ 201-05; see also supra notes 17, 42 and accompanying text (detailing issue advocacy).
80. See id. § 201. Under section 201, groups or parties would be allowed to run ads supporting issues, but if a group or party wants to run an issue ad within 60 days of an election, they cannot mention the candidate’s name. See id. If ads do mention a candidate’s name, the expenditure is subject to federal election contribution laws. See 143 CONG. REC. S10,004 (daily ed. Sept. 26, 1997) (statement of Sen. Feingold) ("[This section] does not do, as the majority leader has suggested, ban billboards[,] . . . touch voter guides[,] . . . [and it doesn’t ban one single television or radio ad, ever.").
81. See S. 25, 105th Cong. §§ 301-08 (1997) (as amended) (mandating greater disclosure and enforcement of donors); S. 25, 105th Cong. §§ 301-08 (1997); supra notes 46-49 and accompanying text.
82. 487 U.S. 735 (1988).
83. See id. at 762-63.
After significant floor debate in the fall of 1997, a Republican led filibuster blocked a straight up and down vote on the modified Senate Bill 25.\(^85\) Moreover, Senator Lott (R-MS) proposed an amendment focusing on compulsory labor union dues that he knew would be opposed by most Democrats.\(^86\) Senator Lott also used his power as Majority Leader to prevent any attempts to amend his amendment to Senate Bill 25.\(^87\) Thus, by a fifty-three to forty-seven vote,\(^88\) the Democrats in the Senate could not pass a "cloture" vote\(^89\) to end the filibuster that was blocking action on Senate Bill 25.\(^90\) The Republicans, by a fifty-two to forty-eight vote, fell eight votes shy of getting a straight up and down vote on Lott’s amendment.\(^91\) Threatened with Democrats delaying tactics on other legislation,\(^92\) however, Senator Lott agreed to call up the campaign finance bill before March 1998. Moreover, Lott agreed to allow the Senate to vote on a motion to table Senate Bill 25.\(^93\)

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85. See Office of Senator Russ Feingold, Feingold: Campaign Finance Reform Still Kicking (Oct. 23, 1997) (press release on file with the Hofstra Law Review) (explaining how Senator Lott employed a rarely used parliamentary tactic that prevented any Senator from offering modifications or changes to the bill).

86. The Lott Amendment to Senate Bill 25, the Paycheck Protection Act, would have amended section 501 of the revised Senate Bill 25, calling for members and non-members of unions to consent to having their labor dues used for political purposes. See S. 25, 105th Cong. § 501 (1997) (proposed amendment), reprinted in 143 CONG. REC. S10,176-77 (daily ed. Sept. 29, 1997). But see 143 CONG. REC. S10,115 (daily ed. Sept. 29, 1997) (statement of Sen. McCain) ("I must oppose the amendment before the Senate. I do so not because I disagree with its intent. In fact, I strongly support what it seeks to do. But, as with all difficult choices, a decision must be made. In this case, I must decide that passage of overall campaign finance reform must be the Senate’s first goal."). Supporters of the Paycheck Protection Act had a contrary view. See id. (statement of Sen. Warner (D-VA)) ("This is a ‘freedom’ pill for the ability of the American worker to begin to think and exercise his or her own judgment. I commend those who support this measure.").


88. The original vote was 53-47, but Minority Leader Senator Daschle forced more votes, and Senator Hutchinson, who had originally supported the move to allow a vote, changed his stance in two subsequent cloture votes, thus ending in a 52-48 vote. See id.

89. See DICKSON & CLANCY, supra note 61, at 58-59 (defining “cloture” as the “[p]rocess by which debate can be limited in the Senate without unanimous consent” which is invoked by a three-fifths roll call vote of all Senators present and voting).


91. See Doherty, supra note 87, at 2449.

92. See Carroll J. Doherty, Fight Over Overhaul Measure Spills Over to Other Bills, 55 CONG. Q. 2582, 2582 (1997) (discussing how Minority Leader Senator Daschle had led a Democratic filibuster of a massive six year transportation bill and threatened other bills).

93. See Borkowski, supra note 64, at A31; see also Office of Senator Russ Feingold, Feingold: Campaign Finance Reform Still Kicking (Oct. 23, 1997) (press release on file with the Hofstra Law Review) ("Feingold applauded the vote today in the U.S. Senate affirming that a majority of Senators are unwilling to adjourn the Senate for the year or proceed with new business without adequate consideration of campaign finance reform legislation.").
Under this unanimous consent agreement, Majority Leader Lott would introduce a campaign finance bill of his own, and Senator McCain would then be recognized to offer an amendment to Lott's underlying bill. That amendment would be the revised Senate Bill 25 that was debated in the fall session. On February 24, 1998, the Senate voted fifty-one to forty-eight against tabling the bill, but the sponsors acknowledged that they would not be able to muster the sixty votes necessary to shut off debate and end the Republican led filibuster. Therefore, on February 26, 1998, campaign finance in the Senate seemed to be a dead issue for the 105th Congress.

Nevertheless, on August 6, 1998, the House passed an equivalent bill to the revised Senate Bill 25, H.R. 2183, which would effectively

94. See supra note 86 and accompanying text; see also S. 1663, 105th Cong. (1997) (Paycheck Protection Act); 144 CONG. REC. S869 (daily ed. Feb. 24, 1998) (introducing the Paycheck Protection Act); 143 CONG. REC. S10,379 (daily ed. Oct. 6, 1997) (statement of Sen. Feingold) (“[W]e are talking about something [the Paycheck Protection Act] that is, in fact, an attempt to destroy this McCain-Feingold campaign finance reform bill . . .”).

95. Throughout the Fall and early Winter campaign finance debate, Senator Snowe (R-ME) suggested trying to reach a middle ground bill that would have addressed both the compulsory union dues issue as well as soft money and issue ads. See 143 CONG. REC. S10,724 (daily ed. Oct. 9, 1997) (statement of Sen. Snowe) (“. . . regret that the Senate has missed an opportunity today to coalesce around a middle ground that would allow campaign finance reform to advance.”). In the Winter session, Senator Snowe introduced Senate Bill 1647, the Snowe-Jeffords Amendment, which modified issue ads and the union dues issue, trying to gain Grand Old Party (“GOP”) support. See id. (Introducing Amendment 1647). But, on a procedural vote to table, or kill, the modified measure, all 48 Republican opponents voted to kill the Snowe-Jeffords Amendment. See Carroll J. Doherty, Senators' Votes Seem Set in Stone, 56 CONG. Q. 467,467 (1998).

96. See 144 CONG. REC. S867 (daily ed. Feb. 24, 1998) (statement of Sen. Daschle) (“This will be clearly an up-or-down vote on the McCain-Feingold bill, through a tabling motion, that we have sought now for some time. . . . A vote against McCain-Feingold is a vote, in my view, to end reform, at least for this Congress, once again.”). The reason the vote was 51-48, and not 52-48, was because Senator Harkin (D-IA), a McCain-Feingold supporter, missed the vote. See Doherty, supra note 95, at 467.

97. See 144 CONG. REC. S1045 (daily ed. Feb. 26, 1998) (citing the failed cloture vote on Senate Bill 1663, the proposed Paycheck Protection Act, a bill to protect individuals from having their money involuntarily collected and used for politics by a corporation or a labor organization and ending debate on Senate Bill 25). Sponsors acknowledged even before the debate that they would not be able to get the 60 votes necessary to end the Republican filibuster. See Doherty, supra note 95, at 467.

98. See 144 CONG. REC. S1046 (daily ed. Feb. 26, 1998) (statement of Sen. Glenn (D-OH)) (“Although we had a majority of the U.S. Senate, the majority did not prevail because of the cloture that we would have been required to get to break a filibuster.”). President of Common Cause, Ann McBride, whose group supported the McCain-Feingold Bill, responded to the end of campaign finance in the 105th Congress: “A minority of Senators today turned their backs on the American people and used an obstructionist filibuster to thwart the will of the majority of Senators who stand ready to pass campaign finance reform.” Ann McBride, Statement of Common Cause President Ann McBride on Senate Filibuster of Campaign Finance Reform (visited Mar. 5, 1998) <http://www.commoncause.org/publications/022698.htm>.
ban soft money and curb issue advertisements. After the House’s approval of H.R. 2183, Senator Lott brought the revised Senate Bill 25 back to the Senate and allowed Senators McCain and Feingold to attach Senate Bill 25 as an amendment to Senate Bill 2237, a Senate Interior Appropriations Bill. On September 10, 1998, the Senate voted fifty-two to forty-eight against cutting off debate on Senate Bill 2237, eight votes short of initiating cloture and breaking the filibuster. Soon afterward, Senator McCain withdrew his amendment, and the Senate’s consideration of campaign finance reform terminated for the 105th Congress.

III. THE CREATION OF THE MILLIONAIRE LOOPHOLE

A. Federal Election Campaign Act

In 1971, reacting to the rising costs of federal campaigns, Congress passed FECA. One of the reasons for implementing the 1971 legislation was that campaign costs skyrocketed from $155 million in 1956 to $300 million in 1968. This increase was largely due to the rise of the

99. See H.R. 2183, 105th Cong. (1998). The legislative history of House Bill 2183 parallels that of Senate Bill 25. House Bill 493 was introduced as a companion bill to Senate Bill 25 and included voluntary spending limits, reduced postage rates, and broadcast time. See Telephone Interview with Alison Rak, Legislative Director, Office of Representative Christopher Shays (Oct. 19, 1998) (on file with the Hofstra Law Review). After the revised Senate Bill 25 failed in the Senate in November and February, Representatives Shays (R-CT) and Meehan (D-MA) introduced House Bill 3256 (amended H.R. 493) on March 19, 1998. See id. Under the rules introduced by the Republican leadership, House Bill 2183 was introduced first, and then all other competing campaign finance bills were introduced and were technically considered amendments to House Bill 2183. See id. Thus, 11 amendments faced a roll call vote, and the revised Shays-Meehan Bill was the only proposal that commanded a majority. See id.; see also Alison Mitchell, Debate on Campaign Finance Begins, N.Y. TIMES, May 23, 1998, at A11. When the Shays-Meehan Bill passed in an official vote, the text of House Bill 2183 was struck and inserted with the text of House Bill 3256 (the amended Shays-Meehan Bill). See Jeffrey L. Katz & Carroll J. Doherty, Campaign Finance Gets Day in the Sun, But Senate’s Shadow is Looming, 1998 CQ WEEKLY 2173, 2173-74; Interview with Alison Rak, supra; supra note 10 and accompanying text.

100. See Charles Pope, McCain-Feingold Bill on Campaign Financing Proves Dead on Revival, 1998 CQ WEEKLY 2402, 2402.

101. See supra note 11 and accompanying text.

102. See supra note 11 and accompanying text; see also 144 CONG. REC. S10,182-83 (daily ed. Sept. 10, 1998) (statement of Sen. McCain) (“Tomorrow’s newspapers will probably not highlight the fact that we failed again on campaign finance reform... So I hope we can move forward. I will never give up on this fight as long as I am a Member of this body... Mr. President, I withdraw my amendment.”).

Self-financed candidates.

Becoming effective in 1972, FECA repealed the Federal Corrupt Practices Act, placed contribution limits on the amount a political candidate running for federal office could give to his campaign, put ceilings on the amount a campaign could spend on media, and created stricter disclosure and enforcement procedures. However, FECA had major deficiencies; there were no real contribution limitations on wealthy individuals and special interest groups, as the expenditure limitations only applied to broadcast media, and the disclosure and enforcement procedures were unclear, since there was no entity that could act upon the data.

Nonetheless, FECA was never tested in a federal election because of the Watergate scandal, which led to the passage of the 1974 FECA Amendments in the second session of the 93d Congress. The amendments implemented contribution ceilings, expenditure limitations, and established a statutory scheme for public financing of presidential campaigns. The new amendments adopted section 608(a) of the 1971

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106. See Pub. L. No. 92-225, 86 Stat. 9 (1972) (formerly 18 U.S.C. § 608(a)(1), repealed in 1976) (placing a ceiling on contributions by any candidate or his immediate family to his own candidacy at $50,000 for a presidential or vice-presidential campaign, $35,000 for a Senate campaign, and $25,000 for a House campaign).

107. See 2 U.S.C. § 104 (1994) (limiting the total amount that could be spent on media to 10 cents per eligible voter or $50,000, whichever amount is greater).


110. Investigations into the Nixon campaign showed a reliance on large contributions, illegal corporate contributions, and undisclosed slush funds. See Corrado, supra note 2, at 32. Moreover, allegations that contributors bought quid pro quo favors such as ambassadorships, gained special legislative favors, and enjoyed privileges, led to this thorough 1974 reform. See id.


112. See 2 U.S.C. § 441a (1994) (formerly 18 U.S.C. § 608 (b) (repealed 1976)) (placing limits on the amount that an individual or committee could give to a candidate—the most relevant being that an individual could give $1000 in support of a federal candidate, and placing a $5000 limit on donations by PACs).

113. See 26 U.S.C. §§ 9001-42 (1994) (formerly 18 U.S.C. §§ 403-08) (creating an optional program of public financing for presidential general elections and a voluntary system of matching funding for presidential primary campaigns); J. Skelly Wright, Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?, 82 Colum. L. Rev. 609, 611 n.11 (1982) (noting that in 1974, the Senate passed a bill providing for the public financing of congres-
FECA, but also enacted total spending limits. The limited Senate candidate expenditures to $100,000 and $150,000 in Senate primaries and general elections respectively, and $70,000 in both House primaries and general elections. In 1974, Congress also erected spending limits on contributions by PACs and party committees, as well as creating an administrative agency, the FEC, to oversee the gathering and publicizing of reports and enforcement of campaign finance legislation.

Frank Sorauf writes in *Money in American Elections* that the fear of a wealthy candidate drawing on his own resources “was a major motivation in Congress behind the FECA limitations on a candidate’s use of his or her own resources.” Further, the House Committee Report on the FECA Amendments of 1974 declared: “Under the present law the impression persists that a candidate can buy an election by simply spending large sums in a campaign.” Before the passage of the FECA Amendments of 1974, a wealthy candidate’s money could be offset by an opponent receiving large donations from wealthy supporters or PACs. However, under the FECA Amendments of 1974, a system was created which provided for contribution and expenditure limitations, subsequently removing the impact of both the wealthy donor and the wealthy candidate.

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116. See SORAUF, supra note 104, at 8-9. The final FECA amendments did not contain the Senate-passed provision for partial public financing of congressional campaigns. In conference, Democrats in the Senate dropped the fight for public financing in return for higher spending limits for congressional elections and a stronger independent election commission to enforce the law. See CONGRESSIONAL QUARTERLY, supra note 15, at 44.
117. SORAUF, supra note 24.
118. Id. at 67.
119. Wright, supra note 113, at 610 n.5 (citing H.R. REP. No. 1239, at 3 (1974)).
120. See NEUBORNE, supra note 8, at 12.
SELF-FINANCED CANDIDATES

B. Buckley v. Valeo

On January 2, 1975, in response to the FECA Amendments of 1974, a group of political conservatives, civil libertarians, members of minor political parties, and liberal reformers challenged the constitutionality of the amendments. The United States Court of Appeals for the District of Columbia upheld all of the law’s major provisions, but the Supreme Court granted certiorari on appeal. On January 30, 1976, in a 294 page opinion, the Court, in Buckley v. Valeo, issued a decision which completely governs campaign finance jurisprudence today.

In its decision, the Supreme Court upheld the amount of money that could be contributed to a campaign but struck down the amount of money that can be spent by a candidate. Specifically, the Court upheld section 608(b), which set limits on how much individuals and PACs could contribute to a candidate, but invalidated sections 608(a), (c) and (e)(1). The invalidated sections placed caps on the amount an individual could contribute to his own campaigns, on the total amount an individual could contribute, and on the amount an individual could give on behalf of a candidate.

The Court held that these sections violated the First Amendment.

122. Plaintiffs included Senator James Buckley (Cons. R-NY), Eugene McCarthy, the Socialist Labor and Socialist Workers Parties, the American Conservative Union, and the American Civil Liberties Union. See Neuborne, supra note 8, at 4. The plaintiffs argued that contribution and expenditure limitations hindered the freedom of contributors and candidates to express themselves in federal politics, and thus it is more difficult for challengers to defeat incumbents. See id.

123. Buckley v. Valeo, 519 F.2d 817, 897-98 (D.C. Cir. 1975).

124. The opinion is divided into a 143 page per curiam opinion for the Court, statutory appendices and footnotes and 59 pages of separate opinions by five justices that dissent and concur on specific issues. See Neuborne, supra note 8, at 6. The Court labored under severe time constraints from Congress who wanted a decision before the 1976 elections. See id. Thus, factual hearings were not heard by both sides and the Court was forced to rule on all of FECA in a short time. See id.


126. See 2 U.S.C. § 441a(a)(1)(A) (1994) (“No person shall make contributions . . . to any candidate . . . with respect to any election for Federal office which, in the aggregate, exceed $1,000.”); Buckley, 424 U.S. at 23.


131. See Buckley, 424 U.S. at 58-59.
The Court also equated campaign spending money with speech\(^\text{132}\) and:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.\(^\text{133}\)

Constitutional scholar Burt Neuborne suggests that the *Buckley* Court was wrong when it "drew the general abstract principle that the first dollar of spending is the same as the thirty-millionth. At some point, money stops being speech, and it becomes an oppressive force, reinforcing disproportionate power."\(^\text{134}\)

In the process of upholding this "money equals speech" proposition, the Court rejected the government's contention that FECA was not regulating speech, but rather it was regulating the conduct leading up to the speech; this analysis was accepted by the Supreme Court eight years prior in *United States v. O'Brien*.\(^\text{135}\) The *Buckley* Court, however, asserted that the expenditure of money does not introduce a non-speech element or reduce the strict scrutiny required by the First Amendment.\(^\text{136}\)

The Court required a compelling governmental interest for Congress to uphold FECA.\(^\text{137}\) The government promulgated two compelling interests: avoiding the reality or appearance of corruption, and fostering


\(^\text{133}\) *Buckley*, 424 U.S. at 19 (footnote omitted). "Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.* n.18.

\(^\text{134}\) *Democracy vs. Free Speech?*, PROGRESSIVE, Jan. 1997, at 8, 8 (quoting Burt Neuborne); see also 143 CONG. REC. S2251 (daily ed. Mar. 13, 1997) (statement of Sen. Reed (D-RI), quoting Ronald Dworkin, New York University School of Law professor) ("'The Buckley decision was a mistake, unsupported by precedent and contrary to the best understanding of prior first amendment jurisprudence. It misunderstood not only what free speech really is, but what it really means for free people to govern themselves.'").

\(^\text{135}\) 391 U.S. 367, 382 (1968) (stating that a defendant can be prosecuted for burning his draft card because there is a sufficiently important governmental interest in regulating the non-speech element of the conduct; such regulation is unrelated to the suppression of free expression, and there is only an incidental restriction on the First Amendment, which is no greater than necessary to further that interest); see also *Buckley*, 424 U.S. at 16-17 (citing *O'Brien*). The Court did not find *O'Brien* to be persuasive. See *Buckley*, 424 U.S. at 16.

\(^\text{136}\) See *Buckley*, 424 U.S. at 16-17.

\(^\text{137}\) See *id.* at 10. To sustain rules that censor political speech, the *Buckley* Court required a showing of a compelling governmental interest. See NEUBORNE, *supra* note 8, at 5.
equal political participation. The Court rejected the government's argument that a compelling governmental interest in fostering equal political participation existed, but accepted the danger of corruption interest. According to the Court, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." Hence, the Court rejected the equal participation principle in favor of First Amendment freedoms. With respect to section 608(a), the Court held that equalizing the financial resources of candidates is not a basis to maintain this section because the candidate "may nonetheless outspend his rival as a result of more successful fundraising efforts."

Thus, the Court stated that the primary governmental interest served by the Act was to avoid the appearance of or reality of corruption of the political process. From the 1972 election, the Court reasoned "that large contributions are given to secure a political quid pro quo from current and potential office holders," and that "[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." The Court reasoned that no matter how much a candidate spends out of his pocket, no risk for quid pro quo corruption exists. The Court found that "the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts..."
the coercive pressures and attendant risks of abuse."\(^{145}\)

The Buckley Court drew a crucial distinction between contributions and expenditures.\(^{149}\) According to the Court, the difference between the two is that "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitation on financial contributions."\(^{150}\) The rationale is that with expenditures, the candidate is doing the actual speaking, but with contributions, there is only a political association.\(^{151}\) Moreover, in upholding contribution limits, the Court found that it would limit the appearance or reality of corruption.\(^{152}\) However, in a separate opinion, Justice Burger disagreed with the Court's analysis: "By limiting campaign contributions, the Act restricts the amount of money that will be spent on political activity—and does so directly."\(^{153}\)

Furthermore, in a separate opinion, Justice White called for the upholding of all of FECA.\(^{154}\) Justice White reasoned that Congress had the right to determine whether personal wealth ought to play a less important role in a campaign, and that FECA's limitations did not rise to the level of speech protected by the First Amendment.\(^{155}\) He stated: "It is critical to obviate or dispel the impression that federal elections are purely and simply a function of money . . . ."\(^{156}\) Thus, White believed "[t]he ceiling on candidate expenditures represents the considered judgment of Congress that elections are to be decided among candidates none of whom has overpowering advantage by reason of a huge campaign war chest."\(^{157}\) With respect to section 608(a), Justice White reasoned that upholding this section "tends to equalize access to the political arena, encouraging the less wealthy, unable to bankroll their own campaigns, to run for political office."\(^{158}\)

Similar to Justice White, Justice Marshall found that equal access to the political arena and restored confidence in the electoral process

\(^{148}\) Id.
\(^{149}\) See id. at 58-59.
\(^{150}\) Id. at 23.
\(^{151}\) See Neuborne, supra note 132, at 22.
\(^{152}\) See Buckley, 424 U.S. at 26.
\(^{153}\) Id. at 241-42 (Burger, C.J., concurring and dissenting).
\(^{154}\) See id. at 263-65 (White, J., concurring and dissenting). Justice White was the only justice with political experience, having run John F. Kennedy's 1960 presidential campaign for the mountain states. See SORAF, supra note 24, at 237-38.
\(^{155}\) See Buckley, 424 U.S. at 263-64 (White, J., concurring and dissenting).
\(^{156}\) Id. at 265.
\(^{157}\) Id.
\(^{158}\) Id. at 266.
were goals of FECA.\textsuperscript{159} Justice Marshall believed that section 608(a) should be upheld because "the wealthy candidate's immediate access to a substantial personal fortune may give him an initial advantage that his less wealthy opponent can never overcome."\textsuperscript{160} Moreover, understanding the limitations of section 608(b) and that a candidate would have to raise contributions from individuals in $1000 increments, Marshall recognized that the wealthy self-financed candidate would have an unfair advantage.\textsuperscript{161}

Thus, \textit{Buckley} is the great stumbling block to creating effective limits on campaign expenditures. Importantly, however, the \textit{Buckley} Court did declare: "Congress ... may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding."\textsuperscript{162} The Court used this rationale when upholding the sections of FECA providing for the public financing of presidential elections.\textsuperscript{163} In floor debate supporting the voluntary spending limits of the original Senate Bill 25, Senator Dodd remarked:

\begin{quote}
One of the McCain-Feingold's great advantages is that it is written with the Supreme Court's \textit{Buckley} versus \textit{Valeo} decision, in mind. Trying to avoid the assertions that have been made by many, and I believe with good reason, they are concerned whether or not this bill would actually pass constitutional muster.\textsuperscript{164}
\end{quote}

\textsuperscript{159} See id. at 286-90 (Marshall, J., concurring and dissenting).
\textsuperscript{160} Id. at 288. "In the Nation's seven largest States in 1970, 11 of the 15 major senatorial candidates were millionaires. The four who were not millionaires lost their bid for election." Id. at 288 n.1 (quoting 117 \textit{CONG. REc.} H42,065 (1971) (remarks of Rep. Macdonald (D-MA))).
\textsuperscript{161} See id. at 288.
\textsuperscript{162} \textit{Buckley}, 424 U.S. at 57 n.65.
\textsuperscript{164} [T]he critics argue that virtually any inducement offered to a candidate to persuade her to limit campaign spending is unconstitutional as a form of indirect 'coercion.' But the \textit{Buckley} Court clearly distinguished between inducements designed to elicit a voluntary decision to limit spending and coercive mandates that impose involuntary spending ceilings. If giving a Presidential candidate a $60 million subsidy is a constitutional inducement, surely providing free television time and reduced postal rates falls into the same category of acceptable inducement."


144 143 \textit{CONG. REc.} S2312 (daily ed. Mar. 14, 1997) (statement of Sen. Dodd (D-CT)).
IV. POST-BUCKLEY: CAN A SELF-FINANCED CANDIDATE BUY AN ELECTION?

A. Self-Financed Data

By upholding contribution limits and invalidating expenditure limits, the Buckley Court created a system that placed a greater premium on the wealthy candidate than before FECA was passed, a system where a candidate must raise money in small increments set by federal law, but is allowed to spend as much personal money as he wishes. However, before this Note can scrutinize the failure of the final version of McCain-Feingold Bill to include spending limits or propose reforms that will actually combat the millionaire loophole, this Note must fully evaluate whether the Buckley decision allows a wealthy candidate to buy political office.

In 1992, an average winning campaign for a seat in the House of Representatives cost $543,000, and a winning campaign for the Senate cost on average $3.9 million. Moreover, the data from 1992 reveals an eighty-nine percent victory rate in the House and an eighty-six percent victory rate in the Senate for candidates who outspent their opponents.

In The Wealth Primary, Jamin Raskin and John Bonifaz suggest that candidates running for United States Congress compete in a wealth primary where the candidate who collects the most amount of money almost always wins the party's nomination and usually goes on to win the general election if he is able to outspend his opponent. The authors split the wealth primary into four classes: incumbents, millionaire challengers, campaigners, and the non-affluent. While Raskin and Bonifaz suggest that the incumbent is well situated to win the wealth primary, the authors believe that the millionaire challenger, the candidate who is willing and able to spend whatever money is needed to win an election,

165. See Buckley, 424 U.S. at 288 (Marshall, J., concurring and dissenting). Self-financed candidates often loan their campaign money and then get paid back through contributions once they are elected. See RASKIN & BONIFAZ, supra note 14, at xiii. Before FECA, a wealthy candidate's influence could be offset by large donations. See NEUBORNE, supra note 8, at 12.
166. See RASKIN & BONIFAZ, supra note 14, at 3.
167. See id. at 7.
168. See id. at xii.
169. See id.
170. Raskin and Bonifaz point to the large network of wealthy contributors and lobbyists, plus the massive set of public subsidies, like free postage and a paid staff, as key factors facilitating the incumbent advantage in the wealth primary. See id.
has become very successful and adept at winning in the primary and in the general election.\textsuperscript{171}

The amount of personal expenditures spent by House and Senate candidates reached a high of $122.6 million in the 1993-1994 election cycle.\textsuperscript{172} According to the FEC, contributions and loans from the candidate\textsuperscript{173} doubled between the 1991-1992 and the 1989-1990 election cycle, and increased another thirty-seven percent in the 1993-1994 election cycle.\textsuperscript{174} However, a study by the Center for the Responsive Politics found that of the 149 candidates that ran for seats in the House and Senate in 1995-1996 and who spent more than $100,000 of their own money, only nineteen won.\textsuperscript{175} In 1993-1994, two-thirds of Senate candidates who spent over $100,000 of their own money lost at the polls.\textsuperscript{176} In 1991-1992, eight of eleven Senate candidates who spent over $100,000 in personal spending lost.\textsuperscript{177} And, in 1989-1990, all nine candidates who spent $100,000 or more of their own money lost at the polls.\textsuperscript{178}

Yet despite many self-financed candidates losing at the polls, some are clearly winning.\textsuperscript{179} In the process, the number of millionaires in Congress has continued to rise; in 1992, seventy-one of 435 Representatives (sixteen percent) and twenty-six of 100 Senators were millionaires (twenty-six percent), and in 1994, the level rose to seventeen percent and twenty-eight percent, respectively.\textsuperscript{180} Similarly, research has revealed that wealthy candidates gain an advantage by being able to afford expensive, professional consultants who can help them plan their strategy.\textsuperscript{181} Further, the races that attract self-financed candidates are

\textsuperscript{171} See \textit{id}.
\textsuperscript{173} See \textit{supra} note 27 (explaining the common funding scenario for self-financed candidates).
\textsuperscript{174} See \textit{1994 Fundraising}, \textit{supra} note 23, at 2.
\textsuperscript{180} See Craig Winneker, \textit{The Roll Call Fifty}, \textit{ROLL CALL}, Jan. 24, 1994, at 1, 17.
\textsuperscript{181} See \textit{CONGRESSIONAL QUARTERLY}, \textit{supra} note 15, at 15.
those for an open-seat, because these candidates can begin a campaign with a huge television blitz.\textsuperscript{182} In 1992, of the ninety-one open seats for the House, the candidate who spent the most money won in seventy-one of those races.\textsuperscript{183} But in the general election, the advantage of personal wealth lessens because issues become more important, and voters are able to draw clear distinctions.\textsuperscript{184}

Two experts on campaign finance, Frank Sorauf and Herbert Alexander, have extensively evaluated the likelihood of success of self-financed candidates.\textsuperscript{185} Sorauf contends that the candidate who spends millions of dollars on media campaigns for name and face recognition, inevitably hinders his opponent’s chances of winning the election.\textsuperscript{186} To the contrary, Sorauf also suggests that the failure of a candidate to raise money is often a reflection of potential contributors’ assessments of the self-financed candidate’s prospects for election, and that the self-financed candidate does not have a broad range of support.\textsuperscript{187} Moreover, Sorauf suggests that incumbents are clearly able to cope with self-financed candidates.\textsuperscript{188} He contends that the self-financed candidate, spending his own money, is one way to make elections more competitive.\textsuperscript{189} Furthermore, the myth of the incumbent millionaire spending his own money to remain office is not true, for incumbents rarely dip into their funds, and in fact, they raise money like any other congressional candidate.\textsuperscript{190}

Alexander’s evaluation finds that while self-financed candidates often lose, this type of candidate has clear advantage.\textsuperscript{191} Alexander

\begin{enumerate}
\item \textsuperscript{182} See id.; see also RASKIN \& BONIFAZ, supra note 14, at xlii (saying that self-financed candidates “make it clear that they will spend whatever needs to be spent to deter, discourage, or overwhelm the opposition and thereby secure a majority of votes”).
\item \textsuperscript{183} See RASKIN \& BONIFAZ, supra note 14, at 8.
\item \textsuperscript{184} See CONGRESSIONAL QUARTERLY, supra note 15, at 15.
\item \textsuperscript{185} See generally ALEXANDER, supra note 24; SORAUF, supra note 24.
\item \textsuperscript{186} See SORAUF, supra note 24, at 68; see also CONGRESSIONAL QUARTERLY, supra note 15, at 15 (stating that one clear advantage for the wealthy candidate is the ability to afford expensive political consultants who can plan a self-financed candidate’s campaign strategy).
\item \textsuperscript{187} See SORAUF, supra note 24, at 68.
\item \textsuperscript{188} In 1984, $13.8 of the $34 million spent in self-financed money was spent by candidates who never even reached the general election. See id. at 66.
\item \textsuperscript{189} See id. Yet, self-financed candidates do not need to show constituent support, and some find this problematic. See 143 CONG. REC. S10,728-29 (daily ed. Oct. 9, 1997) (statement of Sen. Moseley-Braun) (“Allowing these self-financing candidates to avoid having to show a broad range of support is, I believe truly undemocratic. In fact, I believe that every candidate should be able to demonstrate that they have the support of a broad range of individuals and organizations, that their candidacy has, in fact, come about as a true desire of the ‘people.’”).
\item \textsuperscript{190} See SORAUF, supra note 24, at 69.
\item \textsuperscript{191} See ALEXANDER, supra note 24, at 27-28.
\end{enumerate}
points to name recognition as the major advantage of the rich candidate, where his candidacy makes news as does any information on the family's personal fortune. Moreover, Alexander believes that Americans admire a candidate who tries to buy an election. He reasons that self-contributing by a candidate may not be so bad, since the money that self-financed candidates spend is not tainted or encumbered by any special interests or wealthy contributors.

Political parties have had difficulty finding qualified candidates who lack personal money to run for Congress simply because the cost of running is too steep. Senator Daschle remarked:

I wish I could give you some indication of how difficult it is to tell a candidate, 'I want you to run. I want you to seek one of the highest offices in the land. But to do that, you're going to have to somehow raise $4.5 million between now and next November. . . . I don't know how you'll raise the money. But never mind, you can do it.'

Moreover, the political parties favor self-financed candidates because the party can dedicate their time and money to other campaigns. The party does not have to worry about the wealthy candidate raising sufficient money to adequately compete, and the candidate is not beholden to wealthy contributors.

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192. See id. at 28.
193. See id. Alexander points to American voters' infatuation with names like Roosevelt, Taft, Kennedy, and Rockefeller. See id.; see also MARTIN SCHRAM, SPEAKING FREELY 130 (1995) ("All the arguments that [Buckley] will produce a gilded Congress of rich people doesn't affect people very much. They sort of like it when [Ross] Perot says, 'I'm buying the election for you.'") (quoting Rep. Foley (D-WA)).
194. See Buckley v. Valeo, 424 U.S. 1, 264 (1976) (White, J., concurring and dissenting) (providing a rationale similar to Herbert Alexander's); ALEXANDER, supra note 24, at 23.
195. See Richard L. Berke, Run for Congress? Parties Find Rising Stars Are Just Saying No, N.Y. Times, Mar. 15, 1998, at Al (stating that many qualified candidates are not running for Congress because the money chase is too burdensome); see also 143 CONG. REC. S9998 (daily ed. Sept. 26, 1997) (statement of Sen. Daschle (D-SD)) ("[T]he system is broken. That experience is repeated over and over and over again. How many more times will we have to tell someone who may consider running for the U.S. Senate, 'You can't afford it. This is now a club for millionaires.'").
197. See note 28 and accompanying text.
198. See Berke, supra note 196, at A1; see also RASKIN & BONIFAZ, supra note 14, at 14 ("Millionaires in Congress often argue that we are better off having them as representatives because they will not be beholden to big-money special interests for campaign cash.").
B. Case Studies: Huffington and Rockefeller

A brief case study of Michael Huffington’s unsuccessful bid for Senator in 1994 displays that the candidate who spends the most amount of personal resources will not always win in a general election.\footnote{199} Adhering to Raskin and Bonifaz’s wealth primary theory,\footnote{200} Huffington outspent his opponent in the primary with his own money and won the Republican party nomination.\footnote{201} Huffington spent $20 million of his own money in television advertisements to garner name recognition, convey his message, and convince California voters that he was a quality candidate.\footnote{202} Even though Huffington was a challenger to a popular, entrenched incumbent, Senator Diane Feinstein (D-CA), he only lost by about 100,000 votes.\footnote{203} Intervening factors, such as Feinstein’s record in Congress, the fact that she was one of Washington’s top fund-raisers who spent $20 million of her own in the race and “Nannygate,”\footnote{204} allowed Feinstein to prevail. Nevertheless, without his vast personal re-

\footnote{199} See infra notes 202-05 and accompanying text.  
\footnote{200} See infra notes 202-05 and accompanying text.  
\footnote{201} Michael Huffington is the son of Houston oilman Roy Huffington, long time Republican contributor, who was appointed by George Bush to be ambassador to Austria in 1988. See Sidney Blumenthal, The Candidate, NEW YORKER, Oct. 10, 1994, at 54, 58. Huffington worked in the family business for many years before deciding to run for Congress in 1992. See MICHAEL BARONE & GRANT UJIFUSA, ALMANAC OF AMERICAN POLITICS 1994, at 141 (1995). Huffington was elected to the House of Representatives for the 22nd District of California in 1994, with no political experience. See supra note 201. He spent about five million dollars of his own money to garner this House seat, the most money ever spent in a Congressional election. See Dan Balz, High Rolling In California: Anti-Government Challenger Pours Millions Into Senate Race, WASH. POST, Oct. 6, 1994, at A1.  
\footnote{202} In January of 1994, Huffington had a six percent favorable rating and four percent negative rating and was thus unknown by 90 percent of the electorate. See Stuart Rothenberg, California Brawl: What We Learned From a Mega-Race, ROLL CALL, Nov. 17, 1994, at 18, 18. With millions of dollars worth of broadcast ads spent by July, polls showed that the majority of residents in California had an opinion of Huffington. See id. Moreover, Huffington’s ads destroyed much of Feinstein’s popularity. See id. By portraying incumbent Senator Diane Feinstein as a tax and spend liberal and a career politician, Huffington was able to help lower Feinstein’s favorability rating. See Balz, supra note 201, at A1. The amount of money Huffington paid for media advertisements helped him compete and stay in the race against Feinstein. See Rothenberg, supra. Feinstein had been seen by many as an effective and terrific Senator. J. Bennet Johnston (D-LA) had this to say about Feinstein: “It is the most remarkable one-woman—or man, one Senator—show I’ve seen in my years in the Senate.” R.W. Apple, Jr., Struggle for the Senate: In California, a Daily Quest for Cash, N.Y. TIMES, Oct. 20, 1994, at A1.  
\footnote{203} If not for “Nannygate,” a scandal that occurred close to the general election, many GOP insiders believe Huffington would have beaten Feinstein. See Rothenberg, supra note 202, at 18 (discussing Nannygate, which refers to Huffington’s alleged hiring of illegal aliens). Cable News Network’s Chief Political Analyst Bill Schneider suggests that “without Nannygate, Diane Feinstein would not have won.” Interview with Bill Schneider, Chief Political Analyst, Cable News Network, in Washington, D.C. (Nov. 28, 1994).  
\footnote{204} See supra note 201-03 and accompanying text.
sources, Huffington would not likely have either won the party's nomination, or come so close to victory in the general election.

In contrast, John (Jay) Rockefeller IV won the 1984 open-seat Senate race in West Virginia by spending about $12 million of his own money. Rockefeller was worth a reported $200 million when he ran for Senator. Rockefeller outspent his opponent by approximately a twelve to one margin, spending money on media ads that highlighted his accomplishments in office, his commitment to the state of West Virginia, his prestige in Washington, and his recent transformation into a more down-to-earth politician.

Prior to Rockefeller's campaign, voters indicated that they would not vote for him because many believed he only had a superficial concern for the needs of his adopted state of West Virginia. Nevertheless, Rockefeller emerged victorious because of name recognition, experience, media ads which successfully made the people of West Virginia believe in his candidacy, and his opponent's lack of experience.

In sum, since incumbents are usually winners, it is clear that self-financed candidates are losers more than they are winners. Nevertheless, self-financed candidates do frequently win. The loophole created by Buckley is unfair to the less wealthy candidate, who is left with the choice of either raising money in small increments, or being unable to run at all because he cannot afford the start up costs. Self-financed candidates are able to drown out their less affluent opponents simply by

205. Rockefeller, an Exeter and Harvard graduate, is the great-grandson of the oil billionaire who was America's richest man. See BARONE, supra note 201, at 1364.


207. See BARONE, supra note 201, at 1368.

208. After losing his first stint for governor of West Virginia in 1972, Rockefeller was elected governor in 1976 and served eight years before deciding to run for the Senate in 1984. See BARONE, supra note 202, at 1364.

209. See John B. Judis, Rocky Road: Why Money Can't Buy Jay Rockefeller Love, NEW REPUBLIC, Nov. 12, 1984, at 27, 31. Rockefeller was able to use the ads to make his money and clout appear as a positive, showing that he was not trying to buy anyone's vote. See id.

210. See id. at 30 (revealing a poll in 1992 concluding that 62 percent of West Virginians believed Rockefeller had done either a fair or poor job as governor).

211. See id. at 31.

212. Rockefeller won by only 40,000 votes, which suggests that without his money, he would not likely have won. See id.

213. See SORAUF, supra note 24, at 66 (explaining that incumbents do not have to dip into their family treasury and that their own funds account for none of their receipts).

214. See supra note 180 and accompanying text.

215. See CONGRESSIONAL QUARTERLY, supra note 15, at 14 (stating that a candidate needs at least $25,000 in personal money to make a run as an open-seat or challenger candidate in a House race and even more for a Senate campaign).
being rich, and in many cases, this money leads the self-financed candidates to victory.

V. SENATE BILL 25 AND SELF-FINANCED CANDIDATES

Implementing the spending limits and benefits section of the original Senate Bill 25 would have reduced the amount of money in elections, as well as leveled the playing field between incumbents and challengers. The section did not force candidates to comply, and yet provided real benefits, such as free and reduced broadcast time and postal subsidies, that would have likely provided sufficient incentive for a wealthy candidate to adhere to the spending caps. With *Buckley v. Valeo* governing campaign finance jurisprudence, this section was a very realistic measure that would have worked within the framework of the decision.

216. See 143 CONG. REC. S10,145 (daily ed. Sept. 29, 1997) (statement of Sen. Cleland (D-GA)) (discussing a study by the group Public Citizen, which estimates that if the expenditure limit contained in the original version of the McCain-Feingold Bill were implemented, there would be a spending reduction of $259 million).

217. See supra note 67 and accompanying text (describing the goals of Senate Bill 25). Moreover, while the McCain-Feingold Bill focused on incumbents and challengers, it is clear that the drafters of the legislation, by creating voluntary expenditures limitations, were trying to stop the proliferation of self-financed candidacies and the unfair advantage that these candidates enjoy. See 143 CONG. REC. S10,001 (daily ed. Sept. 26, 1997) (statement of Sen. McCain) ("As a general rule, the candidate with the most money wins."). In a heated debate about Senate Bill 25, Senators Feingold and McConnell argued the merits of money in elections and self-financed candidacies. See 143 CONG. REC. S10,118 (daily ed. Sept. 29, 1997) (statement of Sen. McConnell) ("Senator [Feingold] has often said he thinks there is too much money in politics and we should be able to entice [candidates] into limiting their spending. So I would just like to ask the Senator how much is too much?"). In response to Senator McConnell’s question, Senator Feingold said:

I don’t have any theoretical limit that I believe in. If Michael Huffington wants to spend $30 million in California, that’s his right, but it is my belief that we ought to provide some kind of incentive to those who would voluntarily limit their spending so they could have a fair chance to get their message out. . . . What I want is some kind of fairness in the system, some kind of leveling the playing field so not just multimillionaires would get to participate.

*Id.* at S10,119.

218. See Letter from Ronald Dworkin, Professor of Law, New York University School of Law, and Burt Neuborne, Professor of Law and Legal Director, Brennan Center For Justice, New York University School of Law, to Senators John McCain and Russell Feingold, United States Senate 4 (Sept. 22, 1997) (on file with the *Hofstra Law Review*) (hereinafter Dworkin & Neuborne).

219. See supra Part III.B (discussing the holding in *Buckley*).

220. See infra Part VLB (calling for a public financing scheme with voluntary expenditure limits and matching expenditures for the opposition of non-complying candidates). The President vetoed the last public financing bill that was introduced in Congress, and Congress has not seriously considered a bill including public funding since then. See S. 3, 102d Cong. (1992); see also

http://scholarlycommons.law.hofstra.edu/hlr/vol27/iss1/8
The modified Senate Bill 25 removed all serious spending limit provisions and did not concretely attempt to limit the ability of the wealthy to buy political office.\(^{221}\) Furthermore, the voluntary personal wealth limit would not have persuaded self-financed candidates because there was no incentive to comply.\(^{222}\) Losing state party coordinated expenditures would not have deterred a self-financed candidate from spending his personal resources.\(^{223}\)

### A. Soft Money

Banning soft money\(^{224}\) has the appearance of reducing the influence of private wealth and corruption,\(^{225}\) but in actuality, a ban on soft money would only alter the flow of money.\(^{226}\) In actuality, the millions of dollars given to the political parties in soft money will not subside but rather lobbyists, corporations, and labor unions will simply bypass the parties and conduct their own campaign blitzes.\(^{227}\) Taking the 1992 election cycle as an example, the two political parties raised approximately $83 million, which was subsequently spent on candidates for whom the money was essentially intended.\(^{228}\) In 1996, the Republican party collected $141.2 million, while the Democrats raised $122 million.\(^{229}\) Regulating soft money will benefit self-financed candidates because the less wealthy candidate, who has relied on the benefits of soft money donations in the past, no longer will have that option. Less wealthy candi-

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143 CONG. REC. S10,106 (daily ed. Sept. 29, 1997) (statement of Sen. McCain) ("If we are going to pass a meaningful bipartisan campaign finance bill, we must drop the roadblocks to reform: taxpayers financing and spending limits.").

221. See supra notes 68-71 and accompanying text; see also supra Part II.B (discussing how, in an attempt to win support for their bill, the sponsors removed controversial spending limits).

222. The revised version of Senate Bill 25 limited personal spending to $50,000 per election, whereas the original bill held the personal wealth limit at $250,000. See S. 25, 105th Cong. § 101 (1997); S. 25, 105th Cong. § 401 (1997) (as amended).

223. See 143 CONG. REC. S10,728 (daily ed. Oct. 9, 1997) (statement of Sen. Moseley-Braun) ("S. 25 does little to stop or control these upward spiraling costs, and that is disappointing, because self-financing candidates continue to be a rapidly growing phenomenon in our current political system.").

224. See supra notes 42, 74-78 and accompanying text.

225. In Buckley, the Court held that the government has a compelling interest in avoiding the appearance or reality of corruption. See Buckley v. Valeo, 424 U.S. 1, 26 (1976) (per curiam).


227. See Jonathan Rauch, Vote Against McCain. Wait, Can I Say That?, WALL ST. J., Oct. 1, 1997, at A22 ("Private money—a lot of it—is a fact of life in politics, and if you push it out of one part of the system it tends to re-enter somewhere else, usually deeper in shadow.").

228. See supra note 13 and accompanying text.

229. See Carr, supra note 7, at 274.
dates will be left to find other avenues of large donor support, or be forced to allow lobbyist groups to control their elections by running issue ad campaigns.\textsuperscript{230} The wealthy candidate, however, will be able to spend as much of his own money as he wishes, continuing to take full advantage of the millionaire loophole. Senator John Ashcroft (R-MO) discussing the millionaire loophole, remarked:

\textquote{[A]ll we do when we limit everyone else is to say we want the wealthy to have more and more advantage as they singularly and uniquely can approach the podium and be heard in a society which ought to hear the voice of every man and every woman based on merit rather than based on their own personal wealth.\textsuperscript{231}}

Moreover, soft money presents a constitutional roadblock.\textsuperscript{232} While constitutional scholars, such as Burt Neuborne, argue that soft money "involves no constitutional issues and can be closed tomorrow,"\textsuperscript{233} others, such as Bradley A. Smith, suggest that political parties have the same rights as other groups in the political arena. Smith, in prepared testimony before the House Judiciary Subcommittee on the Constitution, testified: "As \textit{Colorado Republican Federal Campaign Committee}\textsuperscript{234} makes clear, political parties have the same rights in the political

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\item \textsuperscript{230} See infra Part VI.C (discussing issue advocacy).
\item Though campaign finance restrictions aim to reduce the role of money in politics, they have helped to renew the phenomenon of the 'millionaire candidate' .... The ability to spend unlimited amounts, coupled with restrictions on raising outside money, favors those candidates who can contribute large sums to their own campaigns from personal assets.
\item Smith, supra note 29, at 1081.
\item \textsuperscript{231} 143 CONG. REC. S10,019 (daily ed. Sept. 26, 1997) (statement of Sen. Ashcroft).
\item \textsuperscript{232} See id. at S10,344 (daily ed. Oct. 6, 1997) (statement of Senator McConnell) (introducing some highlights of the American Civil Liberty Union's most recent statements about the McCain-Feingold Bill) ("Accordingly, we submit that McCain-Feingold's sweeping controls on the amount and source of soft money contributions to political parties and disclosure of soft money disbursements by other organizations continue to raise severe constitutional problems.").
\item \textsuperscript{233} Neuborne, supra note 8, at 18; Dworkin & Neuborne, supra note 218, at 4; United States Senate, \textit{McCain and Feingold Release Letter Affirming the Constitutionality of Key Elements of the McCain-Feingold Bill} (Sept. 22, 1997) (press release on file with the Hofstra Law Review) (revealing that 126 legal scholars, including Burt Neuborne and Ronald Dworkin of New York University School of Law, found that there are no constitutional problems with the soft money ban included in Senate Bill 25).
\item \textsuperscript{234} Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604, 608 (1996) (holding that political parties may engage in independent expenditures); see also 143 CONG. REC. S10,517 (daily ed. Oct. 8, 1997) (letter by Joel M. Gora, Professor of Law, Brooklyn Law School, to Senator McConnell) ("[Colorado] squarely rejected the sweeping claims that soft money spent by political parties was 'corrupting' the system and had to be stopped ...."). But see 143 CONG. REC. S10,105 (daily ed. Sept. 29, 1997) (letter from Ronald Dworkin and Burt Neuborne to Senators McCain and Feingold) ("Colorado Republican did not address the

http://scholarlycommons.law.hofstra.edu/hlr/vol27/iss1/8
arena as other groups. Thus, like other groups, they have the right to raise unrestricted funds for the purposes of airing issue ads.\textsuperscript{235}

Thus, a First Amendment issue exists with soft money, and on whichever side of the fence one stands, this creates problems for the passage of even a stripped down version of the McCain-Feingold legislation.\textsuperscript{236} A frustrated Senator McCain remarked in floor debate: "[T]he current debate on the merits of campaign finance reform is being sidetracked by the argument that the Constitution stands in the way of a ban on unlimited contributions to political parties."\textsuperscript{237}

\textbf{B. Issue Advocacy}

Similar to the soft money ban, the section of the revised Senate Bill 25 clarifying the definitions of independent expenditures and closing the issue advocacy loophole\textsuperscript{238} confronted serious First Amendment opposition.\textsuperscript{239}\textit{Buckley} held that "[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views."\textsuperscript{240} Under current law, citizens groups, such as the Sierra Club, Americans for Tax Reform, and the AFL-CIO, can spend as much money as they want in issue advertisements, even last minute barrage attacks, so long as they do not urge the election or defeat of a candidate.\textsuperscript{241} In 1996, a significant amount of the soft money raised by the political parties was used to fund issue ad

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\item constitutionality of banning soft money contributions, but rather the expenditures by political parties of hard money, that is, money raised in accordance with FECA's limits.
\item Prepared Testimony of Bradley A. Smith Before the House Judiciary Subcommittee on the Constitution, Federal News Service, Sept. 18, 1997. Smith also contends that activities that are less speech related, such as voter registration and slate cards, would have been restricted unfairly if soft money were banned. See id. Smith says that in the 1976 elections, when the 1974 FECA Amendments banned soft money, and a cash shortage existed for state and local parties, there was a decline in rallies, bumper stickers, and get out the vote drives. See id.
\item See supra Part II.B. Spending limits were removed from the original version for among other reasons, the First Amendment, and soft money faced similar constitutional criticism from Republicans. See supra Part V.
\item 143 CONG. REC. S10,104 (daily ed. Sept. 29, 1997) (letter by Ronald Dworkin and Burt Neuborne to Senator McCain and Feingold)
\item See S. 25, 105th Cong. §§ 201-05 (1997).
\item See 143 CONG. REC. S10,344 (daily ed. Oct. 6, 1997) (statement of Senator McConnell) (introducing a letter by the American Civil Liberties Union) ("The unprecedented restrictions on issue advocacy contained in the McCain-Feingold bill are flatly unconstitutional under settled First Amendment doctrine.").
\item Buckley v. Valeo, 424 U.S. 1, 45 (1976) (per curiam).
\item See generally Corrado, supra note 16, at 227-42.
\end{itemize}
campaigns. According to Senator McConnell: "[T]here may be some things that are in a gray area in this debate, but issue advocacy is not. The court has been very, very clear, since Buckley, that it is impermissible for the Congress to shut these people up when they seek to criticize us." Further, the money spent on issue ads is in the form of independent expenditures, which are not subject to federal election law.

As with the ban on soft money, the issue advocacy package included in both versions of Senate Bill 25 does not level the playing field or reduce the amount of money in an election, unless spending limits are included in the legislation. A candidate without significant personal funds relies on advertisements from issue advocacy groups, whereas a wealthy candidate might not need the support because he is able to launch his own ads without the support of these groups.

VI. PROPOSED REFORMS

The type of federal campaign finance reform that Congress must adopt is one where there is a level playing field between each candidate. Since the Buckley Court invalidated sections 608(a) and (c), a loophole ridden system has allowed candidates to be exempt from expenditure limitations but not from contribution limits; subsequently, the non-wealthy candidate does not have an equal opportunity in the political arena. As Part III of this Note detailed, while it is not fair to say that a rich candidate can buy an election, the rich candidate has a clear advantage.

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242. See id. at 175.
243. 143 CONG. REC. S10,117 (daily ed. Sept. 29, 1997) (statement of Sen. McConnell); see also Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604, 608 (1996) (holding that political parties have a right to run issue ads); Federal Election Comm'n v. Christian Action Network, Inc., 110 F.3d 1049, 1062-64 (4th Cir. 1997) (holding that spending on television commercials does not violate federal election laws); Federal Election Comm'n v. GOPAC, Inc., 871 F. Supp. 1466, 1471 (D.D.C. 1994) (finding that an organization is allowed to spend corporate funds to advocate issues and criticize political opponents without being considered a political committee, so long as the organization's major purpose is not the nomination or election of identified candidates).
245. For the purposes of this Note, the Beck codification provision was important because Republicans used the issue in an attempt to divide Democrats and halt the chances of Senate Bill 25 from passing. See supra Part II.B.
246. See supra note 67 and accompanying text (explaining that leveling the playing field was a primary goal of Senate Bill 25).
248. See supra Part III.B.
249. The case study of Michael Huffington explains that each self-financed candidacy needs to be analyzed individually. Too many factors exist to say that a self-financed candidate can sim-
The only direct way to solve the campaign finance loopholes created by *Buckley* is for the Supreme Court to reconsider the decision. But, even Burt Neuborne, who has vociferously condemned the *Buckley* decision, and who has predicted the overturning of *Buckley*, says: "The Court may rally to the banner of *stare decisis* and refuse to overturn a precedent." The fact is, the Court has not reconsidered *Buckley* in the last twenty-five years, so it is not likely it will overrule the decision in the near future. Thus, this Note calls for reform initiatives that reduce the millionaire advantage while working within the framework of *Buckley*.

**A. Public Financing**

Without reversing *Buckley* and implementing mandatory spending caps, providing a congressional candidate with public resources is the most logical way to offset a self-financed candidate’s monetary advantage buy an election. Nevertheless, Raskin and Bonifaz have shown that a candidate who wins the wealth primary will almost always win the party’s nomination and usually goes on to win in the general election. See RASKIN & BONIFAZ, supra note 14, at xii.

250. See supra Part IV.

251. See Neuborne, supra note 132, at 24; see also SCHRAM, supra note 194, at 129-30 (quoting numerous members of Congress who are calling for the reconsideration of *Buckley*). But see Mitch McConnell, *Campaign Finance Reform: A Senator’s Perspective*, 8 J.L. & Pol. 333, 333-34 (1992) (arguing that *Buckley* is good law and must be followed).

252. See Neuborne, supra note 132, at 24. Neuborne’s optimism comes from the Supreme Court’s recent decision in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 608 (1996), holding that spending by a political party in support of its own candidates is protected by the First Amendment. Neuborne points to the dissent of Justices Ginsburg and Stevens in *Colorado*, who held that contribution and expenditures can be limited. See Neuborne, supra note 132, at 22. Justice Thomas also found no viable distinction between expenditures and contributions. See *Colorado Republican Fed. Campaign Comm.*, 518 U.S. at 636 (Thomas, J., concurring in the judgment and dissenting in part). Moreover, Neuborne believes that Justices Breyer, Souter, and O’Connor are on the verge of deriding the distinction between contributions and expenditures. See Neuborne, supra note 132, at 22. Hence, Neuborne thinks a majority of the Court may join Justices Ginsburg and Stevens in finding that contributions and expenditures should be limited. See id.

253. Neuborne, supra note 132, at 22.

254. In 1997, the Supreme Court denied hearing any campaign finance cases. Freshman Senator Reed (D-RI) introduced a bill in the 105th Congress that would have forced the Supreme Court to reconsider its 1976 *Buckley* decision. This legislation would have established mandatory spending limits in future U.S. Senate elections. See S. 1057, 105th Cong. (1997). Senate Bill 1057, however, never made it to floor debate.

255. The original McCain-Feingold Bill would have reduced the millionaire advantage, but certainly would not have eliminated it. See infra Part VLA & VLB (showing various public financing systems that would eliminate the millionaire advantage).

256. See *Buckley* v. Valeo, 424 U.S. 1, 57 n.65 (1976) (per curiam) (stating that Congress could engage in public financing of elections and may condition acceptance of public funds on a candidate agreeing to adhere to specific voluntary expenditure limitations).
Under this type of system, all citizens would have a legitimate opportunity to be elected to public office. Public financing involves the giving of economic support to federal candidacies through a government subsidy, either in the form of direct cash grants, matching grants that supplement private contributions, or free communication vouchers.

The following three models of public finance are a good framework to understand the available types of public funding reforms. In the presidential primary system, qualified presidential candidates who agree to limit their spending are eligible to receive dollar for dollar matching grants for the first $250 of each private contribution. The criticisms of this approach are that it features only partial, and not full, public financing, and the candidate who has the most amount of money usually wins. In the presidential general election, major party presidential candidates are given direct cash grants at the beginning of the general campaign. However, the strings attached to accepting the di-

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257. See Neuborne, supra note 132, at 24 (“Once we admit that running a democracy is very costly, and that the high price of campaigns cannot be deflected to the rich without turning over political control to them as well, public funding of elections becomes the obvious alternative.”).


The purposes of [public funding is] to make it possible for all citizens to run for public office if they so desire; to guarantee that all social groups are represented in the ranks and agendas of political candidates and public officials . . . and to preserve public officials’ time for public work, and candidates’ time for political discussion, by reducing the amount of time used for raising money.

Id.


261. Both House Bill 3 and Senate Bill 3 included communication vouchers, and both passed in the House and Senate in the 103d Congress, but failed to make it out of conference. See Burke, supra note 109, at 390. House Bill 3 provided for voter communication vouchers on a matching basis, while Senate Bill 3 provided communication discounts for postage and broadcast costs. See id.

262. See BURT NEUBORNE, A SURVEY OF EXISTING EFFORTS TO REFORM THE CAMPAIGN FINANCE SYSTEM 12 (1997). To be eligible, a candidate must raise at least $5000 in contributions in 20 different states of not more than $250 per contribution. See id. Moreover, the subsidy is lost if the candidate does not receive 10 percent of the vote in two consecutive state primary elections. See id.

263. See 26 U.S.C. § 9037 (1994). The funding for this program comes from a voluntary tax check off box on federal tax forms that are deposited in the Presidential Election Campaign Fund. See Corrado, supra note 2, at 33.

264. In the past four presidential elections, the candidate with the most money raised as of January 1 of the election year went on to win the primary. See NEUBORNE, supra 262, at 13.

265. In 1996, the direct grant for the presidential general election was $62 million. See id. at
rect grant is that the candidate cannot raise any money from private contributions.\footnote{266}{See 26 U.S.C. § 9004(a)(1) (1994). Minor parties that polled between five percent and 25 percent in the previous election receive a direct grant in proportion to their previous election showing. See Neuborne, supra 263, at 12. Parties that polled less than five percent in the previous election do not receive any money until after the election is over. See id.} Publicly funded communication vouchers would provide candidates with free broadcast time, print advertising, or mailings.\footnote{267}{Included in section I of the first version of the McCain-Feingold Bill were free and discounted broadcast time for candidates who accepted voluntary spending limits, as well as postal subsidies. See S. 25, 105th Cong. §§ 102-04 (1997).}

Moreover, both the campaign finance bill (which was passed in the 102d Congress and vetoed by President Bush) and the campaign finance bills passed separately by the House and Senate in the 103d Congress (which did not make it out of conference) included public financing sections.\footnote{268}{See supra note 58 and accompanying text.} Senate Bill 3 would have provided candidates in the House and Senate who adhered to voluntary spending limits with public funds to match spending above the limit by a non-complying opponent.\footnote{269}{See Donovan, supra note 58, at 1652.} Once a non-complying candidate's opponent exceeded the voluntary spending limit, the complying candidate would get a federal subsidy of one-third of the general election limit.\footnote{270}{See id. In the Senate, the voluntary spending limit would have ranged from $635,000 to $8.9 million, depending on the size of the state. See id. Regardless, one-third of the total expenditure cap would have been given in matching funds for eligible candidates. See id. Senate Bill 3 would have provided House candidates who agreed to spending limits and successfully raised money through private donations of $60,000 in payments of $250 or less with $200,000 of the $600,000 spending limit. See id. Nevertheless, Republicans filibustered the move to take the bill to conference. See Clymer, supra note 58, at 6.} Similar to Senate Bill 3, House Bill 3, the House's campaign finance package in the 103d Congress, would have provided partial public funding in matching funds.\footnote{271}{Specifically, complying House candidates would be provided with public funding up to one-third of the spending limit. See Campaign Finance Bills Compared, 52 Cong. Q. 262, 263 (1994). To be eligible for the public funding, the candidate would be required to raise 10 percent of the spending limit in contributions of $200 or less from individuals. See id. at 262. The House voluntary spending limit of $600,000 per campaign is not applicable if the candidate spends in excess of 25 percent of the limit. See Burke, supra note 109, at 389.} Senate Bill 3 in the 103d Congress was not a direct public financing bill, as it only provided candidates who agreed to abide by spending limits with substantial television discounts.\footnote{272}{See Fred Wertheimer & Susan Weiss Manes, Campaign Finance Reform: A Key to Restoring the Health of Our Democracy, 94 Colum. L. Rev. 1126, 1132 (1994).} The bill did provide back-up public

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\footnote{266}{See 26 U.S.C. § 9004(a)(1) (1994). Minor parties that polled between five percent and 25 percent in the previous election receive a direct grant in proportion to their previous election showing. See Neuborne, supra 263, at 12. Parties that polled less than five percent in the previous election do not receive any money until after the election is over. See id.}

\footnote{267}{Included in section I of the first version of the McCain-Feingold Bill were free and discounted broadcast time for candidates who accepted voluntary spending limits, as well as postal subsidies. See S. 25, 105th Cong. §§ 102-04 (1997).}

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\footnote{272}{See Fred Wertheimer & Susan Weiss Manes, Campaign Finance Reform: A Key to Restoring the Health of Our Democracy, 94 Colum. L. Rev. 1126, 1132 (1994).}
financing for a candidate whose opponents exceeded the voluntary spending cap.\textsuperscript{233}

Both the public finance bills of the 102d and 103d Congresses would have addressed the unfair advantage created by \textit{Buckley}. They attempted to rescue the federal campaign finance from many of its most pressing shortcomings, namely allowing challengers to run competitive races and reducing the scramble for private funds.\textsuperscript{234} The major problem with these bills was that the matching subsidies totaled only a third of the total expenditure limit. Thus, a non-wealthy candidate would nevertheless be disadvantaged in a campaign against a self-financed candidate who chose to disregard the voluntary limits. Moreover, wealthy candidates would not be likely to accept public funding if they could only receive partial public funding.

It remains imperative for Congress to enact a public finance system that will insure that if a candidate chooses to disregard the voluntary limits,\textsuperscript{275} sufficient incentives would be available so that the abiding candidate can compete to a similar level of effectiveness as the non-complying candidate. Therefore, total public financing is the only solution. Congress must create a total public financing system\textsuperscript{276} where the qualified\textsuperscript{277} candidate would be able to receive a full subsidy before both the primary and the general elections. The amount and form of the subsidy, as well as the expenditure limitation, should be decided by Congress,\textsuperscript{278} as it was in the 102d and 103d Congresses.\textsuperscript{279} Moreover, partici-

\textsuperscript{273} See id.
\textsuperscript{274} See SORAUF, \textit{supra} note 24, at 371 (finding that spending limits with public funding will end fund-raising pressures and prevent the influence of the wealthy individual who can spend campaign dollar after campaign dollar).

\textsuperscript{275} The best reform would be an overruling of \textit{Buckley} allowing for expenditure limitations and then adopting total public financing. This would insure that candidates could spend a certain total sum, whether from private or public money, and any candidate could have access to money. But considering that \textit{Buckley} is not likely to be overruled, this is not very realistic.

\textsuperscript{276} Jamin Raskin's and John Bonifaz's proposal entitled "Democratically Financed Elections" has been put forward by the Working Group on Electoral Democracy. See Raskin & Bonifaz, \textit{supra} note 258, at 1189 n.12. Raskin and Bonifaz presented this proposal as part of their article for the 1994 Symposium on Campaign Finance Reform at Columbia University. See id. The proposal calls for total public financing with voluntary limits. See \textit{generally id.} at 1189-1203.

\textsuperscript{277} The qualifications would be similar to the presidential primary system, namely that it would be necessary to show a broad base of support by raising a certain amount of money in small donations. See id. at 1188 (theorizing that a congressional candidate would need to raise a large number of contributions in five dollar donations).

\textsuperscript{278} Campaign finance scholars believe that the \textit{Buckley} Court may have struck down expenditure limitations because the limits were unreasonably low. See NEUBORNE, \textit{supra} note 8, at 18-19. Thus, the spending caps for any public financing scheme needs to flexible, fair, and indexed annually to account for inflation. See id.

\textsuperscript{279} See \textit{supra} notes 58, 270-71 and accompanying text.
String: SELF-FINANCED CANDIDATES

P...ating candidates should be able to receive heavy discounts on television time, print advertisements, and mailings. If, however, a candidate decides to opt out of the public financing plan, which is allowed under *Buckley*, the advantage will be countered. The participating candidates would receive matching additional funds equal to the excess of the non-complying candidate’s private expenditures. If a challenger is facing a self-financed candidate, it is important to insure that the opposing candidate will receive these matching additional funds in a timely fashion, so that the millionaire candidate will no longer be able to outdistance the opposition. For example, Michael Huffington likely would never have won the Republican nomination if he did not have a clear advantage in the “wealth primary,” and Jay Rockefeller would likely never have been able to convince the voters of his message if he did not outspend his opponent by a twelve to one margin. The goal of this type of total public financing model is for the wealthy candidate to realize that there is no advantage in spending private money. If this were to occur, a system would be created where money is not the decisive factor in who gets elected.

**B. Senate Bill 1191**

Senator Arlen Specter (R-PA) proposed a solution to combat the candidate who disregards voluntary spending caps. On September 18, 1997, Senator Specter introduced Senate Bill 1191, a bill intended to reform the financing of elections. While including a similar package to the McCain-Feingold Bill with respect to soft money and issue advocacy, this bill would have provided public money equal to the amount in excess for candidates whose opponents do not abide by the voluntary spending caps. Senate Bill 1191’s public financing provision is mod...
eled on the 1996 Maine Clean Election Act, the nation’s first public funding bill for state elections, which included a standby public financing provision. Thus, under Specter’s bill, if candidate A spends $10 million of his money, there would be public financing for candidate B up to the amount by which such expenditure exceeds the spending cap. According to Senator Specter, “this standby provision . . . would act principally to deter somebody from spending $10 million of their own money. . . . It would stop people from buying seats in the U.S. Congress.”

A combination of this “standby” public funding provision and voluntary full public financing would level the playing field and insure that a wealthy candidate would have no advantage at any time during the election process. Start up costs would be available through public financing, and a standby provision would insure that a self-financing candidate did have not have an advantage if he did not adhere to the relevant spending cap. At the very least, Congress should implement a voluntary spending limit with subsidies for complying candidates, and a standby provision that would provide a complying candidate with matching expenditures for the amount that the non-complying candidate spent over the limit.

The biggest problem in implementing public finance reform of any kind, nonetheless total public financing, is the burden on government financial resources. In fact, amidst a recession, Congress passed the partial public financing bill in 1992, but George Bush vetoed the bill in

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288.  See Maine Clean Election Act, Me. Rev. Stat. Ann. tit. 21-A, §§ 1121-28 (West Supp. 1997). The Maine Clean Election Act provides public funding for qualified candidates who raise a specified number of five dollar contributions, who agree not to accept money from special interest groups, and who abide by the relevant spending caps. See Corrado & Ortiz, supra note 227, at 369. Once candidates receive public money, they cannot raise, nor spend, private money. This system is applicable to primaries and general elections. See id. If, however, a candidate goes over the specified spending cap, the opponent will receive an expenditure that matches the amount by which the candidate exceeded the spending cap. See id.; Steve Campbell, Maine’s Campaign Finance Law Becoming National Model, Portland Press Herald, Sept. 18, 1997, at 8A. This Maine law, which goes into effect in 2000, is considered to be the most sweeping campaign finance proposal to ever become law. See Carroll J. Doherty, Overhaul Gridlock on the Hill Contrasts with Action in States, 56 Cong. Q. 465 (1998).


290.  Id. (statement of Sen. Specter). Senator Specter’s bill was not debated in the 105th Congress.
large part because Congress could not explain how it planned to pay for the reform. This Note, however, has shown the importance of total public financing, in providing all aspiring candidates an equal opportunity to run for political office. For that equal opportunity, Congress could raise the dollar check off on federal income tax a few dollars.

Furthermore, a study done in 1993 by The Wall Street Journal and NBC found that by a fifty-three percent to thirty-nine percent margin, American voters favor public funding of congressional campaigns through a repeal of business tax deductions for lobbying expenses. If cost is the only issue, Congress can surely find a way to finance the future of America’s democracy.

VII. CONCLUSION

Congress must get serious about reform and institute a system of public financing that features a standby provision for candidates who do not comply with spending caps. If this type of reform is implemented, then legislation, such as the McCain-Feingold Bill, that proposes a ban on soft money and issue advocacy will overhaul the campaign finance reform system. Eliminating soft money and redefining issue advocacy confronted the illegalities and corruptive influence from the 1996 election, but simultaneously, would have made it more difficult for the less affluent candidate to compete in the political process.

Considering the vetoed partial funding bill in the 102d Congress, the defeat of a similar bill in the 103d Congress, and the failure of new provisions to be introduced, partial public funding bills featuring partial public funding or spending caps will likely incur substantial roadblocks in the future. Moreover, the revised McCain-Feingold legislation, a bipartisan bill that removed the controversial voluntary spending limit and benefits section from the original proposal, could not even reach a straight up and down vote in the 105th Congress. Therefore, only when the public outcry outweighs legislator exploitation of campaign

291. See S. 3, 102d Cong. (1992); H.R. 3, 102d Cong. (1992); see also Sorauf, supra note 142, at 1362-63 (pointing out that the problems of paying for partial public funding made it difficult to implement reform in the 102d and 103d Congresses).

292. The dollar check off program finances the presidential system. See 26 U.S.C. § 6096(a) (1994). Currently, 17.7 percent of Americans check off the box.

293. See Wertheimer & Manes, supra note 272, at 1151.

294. See supra Part V.I.A-B.

295. See supra Part V. Senate Bill 3, the partial public financing bill that never made it out of committee, included a provision that would have eliminated soft money. See S. 3, 103d Cong. § 312(c) (1993).

296. See Part II.B.
finance spending will a drastic overhaul of the system be implemented. Congress must not skirt the issue of self-financed candidates by hiding behind the First Amendment, something the revised McCain-Feingold Bill clearly did.

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