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THE NEW YORK CITY CAMPAIGN FINANCE SYSTEM: A MODEL SYSTEM THAT VIOLATES STATE AND FEDERAL LAW

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I. INTRODUCTION

This comment is about the legal validity of the New York City campaign finance system. The 2004 and 2007 amendments to the New York City law impacted both candidates and contributors, and brought the City into conflict with state and federal law. Candidates are impacted by contribution limits that were once voluntary, but are now mandatory for all candidates. People who wish to make contributions to political campaigns are now divided into two groups, people who do business with the city and people who do not, with people doing business with the city facing severe restrictions on their ability to contribute. The amendments to the New York City campaign finance law extended the campaign finance system to all candidates for city office to the maximum allowable extent, thus creating a mandatory regulatory scheme in conflict with the provisions of state election law. The differing rules applicable to self-financed candidates and candidates not using personal wealth to fund their campaign are in conflict with the First Amendment. Due to conflict with state and federal law New York City must amend its campaign finance law.

This comment will begin by outlining the decisions that have shaped the campaign finance world. These decisions are not explicitly part of the debate leading up to the 2007 amendments to the New York City campaign finance system, but they are so fundamental to campaign finance law that they exert a great influence on all campaign finance regulations. The discussion includes the law surrounding contributions, expenditures, self-financed candidates, and will outline the laws surrounding restrictions on lobbyists in other jurisdictions, as well as theoretical challenges to the current campaign finance system. After this material, the comment will examine the New York City campaign finance system.

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Because the evolution of the New York City campaign finance system has occurred over two decades, the comment will discuss the chronology and development of the New York City Campaign finance system as well as the current law. Because the City is a municipality and functions under state law, the comment will next discuss relevant state law, and the limitations that state law places on the ability of municipalities to enact their own legislation. Finally, the comment will discuss the impact of the recent amendments to the New York City campaign finance system, the challenges that the amendments pose to the system’s validity, and recommendations for improvement.

II. CAMPAIGN FINANCE LAW GENERALLY

There are two major ways of organizing a campaign finance system. The first type of system, which is by far the most prevalent, is the private campaign finance system. A private campaign finance system is a system of private financing of elections in which, “a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign.” Private campaign finance systems vary widely in their levels of regulation and the amounts that can be contributed to a candidate, but all derive their money from private sources. As with all private decisions, contributors who make a donation have some private interest. Campaign finance regulations have been justified as an attempt to combat the notion that donations motivated by private interest lead to corruption and a pay-to-play culture. Supporters of the private campaign finance

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3 Democracy Matters, The Promise of Clean Elections (stating “In a "Clean Elections" system, candidates who voluntarily agree not to seek private contributions can qualify for public funding by collecting a set number of small donations.) available at http://www.democracymatters.org/article.php?cat=MOMM&select=321.


5 New York City’s campaign finance board is not only tasked with tracking campaign activity in City elections, but is mandated, under New York City Charter § 1052 (a) (12), to consider rules regulating campaign contributions from those “doing business” with the City. Doing business with the city is means to have or seek a government contract,
system emphasize that a system that relies entirely on private donations accurately reflects the public’s interest in the candidate, and imposes no costs on taxpayers for private speech.  

The second type of a campaign finance system is a public finance system, sometimes referred to as “clean elections.”7 Public financing systems rely predominantly on public money in order to finance campaigns. Candidates must usually raise a set amount of money from a minimum number of private contributors in order to qualify for public funding, at which point the campaign receives public funding. 8 Public funding may take the form of either direct grants or matching funds tied to private contributions. 9 Public financing systems often limit the amount of money that a candidate may accept or spend in exchange for the receipt of public funds. 10 Public campaign systems do not rely on money from private parties, and so supporters of the system claim that candidates are less beholden to large contributors. 11 Public financing systems often employ matching funds that match a small dollar amount of every donation, shifting the emphasis of fundraising from the amount of each donation to the number of donations. Because there is less of a need for private money, supporters claim that groups that have not traditionally real estate, or working to influence the operation of government. Interim Report Of The New York City Campaign Finance Board On “Doing Business” Contributions, June 19, 2006, available at http://www.nyccfb.info/PDF/publications/doing_business_white_paper.pdf.

8 New York City requires that candidates for mayor raise a minimum of $250,000 from 1,000 people and that candidates for city council raise a minimum of $5,000 from 75 people. New York City Campaign Finance Board, Frequently Asked Questions, What is the threshold requirement for candidates to receive public matching funds?, http://www.nyccfb.info/press_room/faq.htm#11, (last visited February 16, 2008).
9 New York City provides matching funds that are tied to the size of individual contributions, which means that candidates that amass a greater number of matchable contributions will receive more matching funds. Arizona requires candidates to accept a threshold number of $5 dollar contributions, at which point the candidates receive the money necessary to run the campaign from the government.
10 In both the 2009 Primary and General Elections to be held in New York City, candidates that wish to participate in the campaign finance program must limit their spending to $5,728,000 for the office of Mayor, $3,581,000, for Public Advocate and Comptroller, $1,289,000 for Borough President, and $150,000 for City Council.
had access to large sums of money will be able to enter the political process in greater numbers.\textsuperscript{12}

Campaign finance laws have been enacted in every state.\textsuperscript{13} While there are differences between the campaign regulatory laws enacted at the federal, state, and local level regarding contribution limits, specific disclosure requirements, and permissible contributors, the basic Constitutional protections afforded to freedom of speech and freedom of association, and the government interests that justify laws that affect these rights are the same.\textsuperscript{14} The Supreme Court has ruled on the validity of both state and federal campaign finance statutes.\textsuperscript{15} Although the federal government regulates federal elections, and the states are responsible for regulation of state and local elections, all levels of government share the same reasons, justifications, and limitations for regulating campaign finance.\textsuperscript{16} Within the broad framework outlined by the courts, elections are regulated by executive agencies such as the Federal Elections Commission at the federal level and agencies with similar functions but various names at the state and local level.

The courts distinguish between “contribution limits” and “expenditure limits” in determining the impact of a regulation on speech.\textsuperscript{17} The courts also distinguish between “express advocacy” and “issue advocacy” to determine when speech is subject to campaign finance regulation.\textsuperscript{18} Campaign finance regulations and the effect on free speech have been justified as a

\textsuperscript{12} The New York City Board of Elections claims that “contribution and expenditure limits encourage community participation, while public funds provide many candidates with limited access to financial resources with the means to run for office.” New York City Campaign Finance Board, Public Dollars for the Public Good: A Report on the 2005 Elections, available at \url{http://www.nyccfb.info/PDF/per/2005_PER/2005_Post_Election_Report.pdf}.
\textsuperscript{13} See National Conference of State Legislatures, Contribution Limits, \url{http://www.ncsl.org/programs/legismgt/about/ContribLimits.htm} (providing charts on the different types of contribution limits in each state) (last visited February 16, 2008).
\textsuperscript{14} Although Buckley dealt with a federal campaign finance system, the courts have referred to Buckley when analyzing all other attempts to regulate campaigns.
\textsuperscript{17} Buckley, 424 US at 55.
\textsuperscript{18} \textit{Id.} at 43-44.
way to prevent corruption or the appearance of corruption.\textsuperscript{19} With this framework in place, the courts have been refining the point at which issue advocacy becomes express advocacy, the point at which contribution limits are outweighed by the burden on speech, and the point at which regulations overburden associational rights.

\textbf{III. Buckley: The Foundation of Modern Campaign Finance Law}

The starting point for any discussion of the law surrounding campaign finance reform must be \textit{Buckley v. Valeo}.\textsuperscript{20} In \textit{Buckley}, the United States Supreme Court decided a challenge to the Federal Election Campaign Act as amended in 1974 (FECA)\textsuperscript{21}, which established a comprehensive system of federal campaign finance regulation.\textsuperscript{22} FECA sought to regulate the amount of money that could be contributed to a campaign, limit the expenditures that could be made by a campaign, mandate disclosure of contributors, limit expenditures that could be made by independent groups, and limit the amount of personal funds that a candidate could spend on his or her own campaign.\textsuperscript{23}

There are a limited number of ways to address the problems that are inherent in any system of private campaign finance, so many of the measures that were advanced in FECA have been incorporated into other campaign finance systems.\textsuperscript{24} Many of the solutions proposed in FECA, including contribution limits, independent expenditure limits, disclosure provisions, and expenditure limits have been used in other the campaign finance systems, so many of the rules set out by the court in \textit{Buckley} remain relevant in evaluating proposals for campaign finance.

\textsuperscript{19} Id. at 58.
\textsuperscript{20} Id. at 1.
\textsuperscript{22} Buckley v. Valeo, 424 US 1, 7.
\textsuperscript{23} 88 Stat. 1263.
\textsuperscript{24} All state campaign finance systems regulate contributions to candidates in some manner, and programs such as the one established in New York City also incorporate voluntary expenditure limits.
regulation. While the holdings of *Buckley* have been elaborated on by subsequent cases, almost all cases concerning the validity of a proposed campaign finance system still refer to *Buckley* as the touchstone case²⁵ because as *Buckley* states,

contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order ‘to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people’.²⁶

The five major campaign finance restrictions at issue in *Buckley* are contribution limits, expenditure limits, independent expenditure limits, contributions of a candidate to his or her own campaign, and disclosure requirements.²⁷ Contribution limits restrict the amount of money that may be given to a candidate. Expenditure limits restrict what a candidate may spend on his or her own campaign. Independent expenditure limits restrict what a person not associated with or directed by a campaign may spend to support or further the candidacy. A contribution by a candidate to his or her own campaign is money that a candidate contributes to the campaign from his or her own private resources. Disclosure requirements define the form and substance of reporting which must include the source and amount of all contributions, and the recipient of and purpose for all campaign expenditures.

Before its discussion of the impact of each of the limits, the Court first had to address the issue of whether regulations that regulate money were a regulation of speech that was subject to

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²⁵ Most recently, in WRTL, the Roberts court overruled McConnell in part by touching on the protections of Buckley. FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2652.


First Amendment protection. The Court rejected the argument that regulation concerning the accrual and use campaign funds was a regulation of conduct and not speech. It found that contribution and expenditure limitations in FECA regulated speech and not simply conduct, and impinged on protected speech and associational freedoms. The Court stated that the “right of association is a ‘basic constitutional freedom,’" … [and] [i]n view of the fundamental nature of the right to associate, governmental ‘action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny’." Although limitations that impinge on associational freedoms are subject to the closest scrutiny, neither “the right to associate nor the right to participate in political activities is absolute … [and] [e]ven a significant interference with protected rights of political association "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." Buckley established that “limiting the actuality and appearance of corruption” is a compelling governmental interest “sufficient to justify the limited effect upon First Amendment freedoms caused by [a] contribution ceiling.”

In analyzing the restriction on expenditures, the Supreme Court first had to determine if the statute was unconstitutionally vague. FECA limited "any expenditure… relative to a clearly identified candidate,” but did not define the phrase “relative to.” This vagueness about whether a person is subject to FECA might chill speech that would be perceived as advocating for a candidate, but which was really advocacy about an issue. The District of Columbia Court of

28 The government claimed that the restrictions at issue did not implicate 1st amendment rights because the restrictions only concerned money and not speech. The court recognized that there is a lot that goes into speech besides speaking.
29 Id. at 15.
30 Id. at 22.
31 Id. at 25.
32 Id.
34 Id. at 40.
Appeals limited the phrase “relative to” to mean advocating the election or defeat of a
candidate, but this meaning was still vague because any advocacy on an issue will also
constitute some form of advocacy relative to candidates linked to the issue. In order to save the
expenditure ban from being struck down on vagueness grounds, the Court established the
distinction between “express advocacy” and “issue advocacy,” and limited the ban on
expenditures to express advocacy.

*Buckley* held that only ads that contained express words of advocacy of election or defeat,
such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote
against," "defeat," "reject," were considered express advocacy. Advocacy that did not expressly
advocate the election or defeat of a candidate, but instead focused on an issue and a candidate’s
stand on the issue, even if the ad mentioned a candidate was not express advocacy. The United
State Supreme Court ruled that imposing an expenditure limit on a campaign was too restrictive
of first amendment freedoms and would be better served by applying the contribution limit to the
campaign. In this way, ads that are coordinated with a campaign are considered contributions
and ads that are not are independent expenditures.

An independent expenditure is money spent to advocate the election or defeat of a

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36 Buckley v. Valeo, 424 U.S at 44. The distinction between express and issue advocacy and the point at which issue
advocacy becomes express advocacy was the subject of the Bipartisan Campaign Reform Act which was the subject
2652, 2652 (2007).
37 Id. at 44 n. 52
38 Id. at 44
39 Buckley v. Valeo, 424 U.S. 1, 47.
40 Id. at 46. If a campaign asks someone to pay for a print ad, the money paid to the newspaper is really a
contribution to the campaign because the campaign has in effect simply removed themselves as the middle man
between the contributor and the newspaper, but the campaign still controlled the use of the money and simply didn’t
receive it. In contrast, if a citizen decided that they supported a candidate and wished to express their personal views
by buying a newspaper ad with no direction from the candidate’s campaign, that is an independent expenditure that
goes to the core of political discourse and freedom of speech, and would not properly be called a contribution since
the campaign never exercised the type of control that receiving a donation would entail.
candidate that is not coordinated with the candidate or the candidate’s campaign.\textsuperscript{41} The independent expenditure limit was struck down because if an expenditure is independent, there can be no coordination with a campaign, and if there is no coordination with a campaign, restrictions on the independent expenditure do not prevent corruption or the appearance of corruption, and therefore “while the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression.”\textsuperscript{42}

The Supreme Court also ruled that limits on the amount of money that a candidate may spend on his or her own behalf are unconstitutional. The Court stated that “the candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates.”\textsuperscript{43} Because a candidate is giving the money to themselves, and a person cannot corrupt themselves by donating to their own campaign, the restriction does not prevent corruption or the appearance of corruption, which is the only compelling reason for such a restriction.

The Supreme Court rejected the expenditure limits contained in FECA for several reasons. In analyzing the restriction on campaign expenditures, the court observed that a “restriction on the amount of money a person or group can spend on political communication

\textsuperscript{41} Currently, “there are two major types of groups that make independent expenditures, so called 527 and 501(c)(3) committees, both named in reference to the tax provision that govern them. Currently, neither 527 committees nor 501(c)(3) committees are regulated by the Federal Election Commission. The first is a kind of issue advocacy committee that can raise money in large chunks, usually from committed high-net-worth individuals, to advocate for an issue in a TV commercial. Typically, the ad will say something like this: “Congressman Smarmet hates clean air. If you LIKE clean air, then call Congressman Smarmet at the number on your screen and tell him he’s wrong!” The 501(c)(3) has a slightly different dialect, but it has the same high-net-worth supporters, so the commercial might go something like this: “Clean air is good, especially for kids and doggies like yours who enjoy breathing it. But some people, like Congressman Smarmet, think clean air can be bad and dangerous because kids and doggies sometimes breathe too much and choke. We hope this information is useful as you think about the importance of clean air.” Melissa Lafsky, \textit{How to Rig an Election? Ask the Author, Interview with Allen Raymond}, NY Times, Freakonomics Blog, January 15, 2008, \url{http://freakonomics.blogs.nytimes.com/2008/01/15/how-to-rig-an-election-ask-the-author/?scp=1-b&sq=campaign+finance+freakonomics&st=nyt}.

\textsuperscript{42} \textit{Buckley v. Valeo}, 424 US 1, 47-8.

\textsuperscript{43} \textit{Id.} at 52.
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.”

The court concluded that the First Amendment required the invalidation of the Act's independent expenditure ceiling, § 608 (e)(1), its limitation on a candidate's expenditures from his or her own personal funds, § 608 (a), and its ceilings on overall campaign expenditures, because “these provisions place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.”

The court did allow for a voluntary limit on expenditures when it stated that “Congress may engage in public financing of election campaigns and 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 forego private fundraising and accept public funding.”

On the other hand, the court upheld the limits on contributions, stating that in contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate.”

44 Id. at 19.
45 Id. at 59.
46 Id. at 57.
47 Buckley v. Valeo, 424 US 1, 20-21. Many critics of Buckley would contend that there is a lot more to a contribution than an undifferentiated show of support, and that the size of the donation is itself political speech.
The court reinforced the idea that combating corruption is the justification for restrictions that burden political speech and that a contribution limit combats corruption by limiting “large campaign contributions -- the narrow aspect of political association where the actuality and potential for corruption have been identified -- while leaving persons free to engage in independent political expression, to associate actively through volunteering his or her services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.” 48 This is significant because the court recognizes that limiting the size of a contribution necessarily limits the assistance that the contribution provides to a campaign, but the Court nevertheless holds that such a limitation does not significantly limit the contributor’s ability to participate in the political process.

The court did not establish any bright line amount past which contributions could not be restricted, but instead indicated that the outer limits of contribution regulation could be determined by asking whether there was any showing that the limits were “so low as to impede the ability of candidates to ‘amass the resources necessary for effective advocacy’. . . [and] whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless.” 49 This manner of defining the limits of contribution limits by reference to amounts that prevent the candidate from running an effective campaign, and not by any reference to the contributor, as well as the Court’s statement that a contribution is simply an undifferentiated showing of support indicates that the Court does not feel that contribution limits are overly burdensome on contributor’s first amendment rights.

The impact of the Court’s reasoning about contribution limits on political speech cannot

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48 Id. at 21.
be overstated. According to the Court, a contribution is not simply conduct that does not implicate the 1st amendment, but at the same time, a contribution to a candidate is not speech that deserves the same protection to which an expenditure by the candidate is entitled. The right to contribute is protected by the First Amendment because of its associational value and not its speech value. People who wish to contribute must be allowed to do so not because their contribution is speech, but because they are signaling their support of a particular candidate with whom they wish to be associated. While the contributions that may be made by each contributor are limited in dollar amount, the contributor’s associational rights are not impacted because they are still able to show support. The speech of contributors is not affected because they are free to make independent expenditures, volunteer, and speak favorably about a candidate. As long as contributors are allowed to make some form of contribution to show their support, the only limit of how low contribution limits may be set is that the limits cannot be so low as to prevent candidates from being able to run an effective campaign. In a later decision, the Court reinforced that contribution limits are intended to fight corruption and held that contribution limits are unconstitutional in ballot initiative campaigns, where an issue and not a candidate is being voted on, because the danger of corruption cannot justify the limits in that instance, although disclosure may still be required.

Buckley also examined the disclosure requirements for campaign contributors and found

50 Buckley, 424 U.S. at 21.
51 See Citizens against Rent Control v. City of Berkley, 454 US 290 (1981) (discussing an ordinance that barred contributions of over $250 dollars to committees trying to oppose or support a ballot proposal. The court held that that “The restraint imposed by the ordinance on the right of association and in turn on individual and collective rights of expression plainly contravenes both the right of association and the speech guarantees of the First Amendment.” While Buckley, held that “contributions to candidates or their committees could be restricted in order to prevent corruption or its appearance, … there is no risk of corruption [here] because this case relates to contributions to committees favoring or opposing ballot measures. Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate's committees there is no significant state or public interest in curtailing debate and discussion of a ballot measure. Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression.” Id.
them to be constitutional. The court determined that there must be a "relevant correlation" or "substantial relation" between the governmental interest and the information required to be disclosed. The court identified three interests related to the disclosure of contributors. First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

In later decisions, the Court has elaborated on the breadth of acceptable disclosure requirements. Disclosure requirements have been upheld based on informational and anti-fraud interests. The Supreme Court invalidated disclosure requirements for the authors of anonymous leaflets in ballot initiatives. The court found that the interest in providing voters with additional information does not justify the disclosure and the chilling effect that it may have on speech when the author is a private citizen and disclosure of the name adds little, if anything, to the ability to evaluate a document’s message and that the anti-fraud interest was served by other election laws. Because disclosure is subject to exacting scrutiny, the court has left the door

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52 Buckley v. Valeo, 424 U.S. 1, 64 (1976).
53 Id. at 66-7.
54 Id. at 67.
55 Id. at 67-8.
57 Id. at 348-49.
58 “Significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since NAACP v. Alabama we have required that the subordinating interests of the State must survive exacting scrutiny. We also have insisted that there be a "relevant correlation" or "substantial relation" between the governmental interest and the information required to be disclosed.” Buckley v. Valeo, 424 U.S. 1, 64 (1976).
open to the invalidation of disclosure requirements in some additional circumstances. The court thus attempted to balance the need for disclosure in a system of contribution and expenditure limitations against the chilling effect that disclosure requirements can have on political speech in other contexts.

A. BUCKLEY’S APPLICATION TO THE STATES

The Court’s decision in Buckley has been extended to campaign finance systems in the States. In Nixon v. Shrink, a challenge was brought against Missouri’s campaign contribution limits.\(^{59}\) The Supreme Court stated that “[t]he principal issues in this case are whether Buckley, is authority for state limits on contributions to state political candidates and whether the federal limits approved in Buckley, with or without adjustment for inflation, define the scope of permissible state limitations today. We hold Buckley to be authority for comparable state regulation, which need not be pegged to Buckley's dollars.”\(^{60}\) The United State Supreme Court also stated that “restrictions on contributions require less compelling justification than restrictions on independent spending. . . [t]hus, under Buckley's standard of scrutiny, a contribution limit involving "significant interference" with associational rights . . . could survive if the Government demonstrated that contribution regulation was "closely drawn" to match a "sufficiently important interest," though the dollar amount of the limit need not be "fine tuned.”\(^{61}\)

Nixon is also significant because it allowed states to claim a motive of preventing corruption without presenting any evidence of the corruption that it was seeking to prevent.\(^{62}\) After Nixon, campaign finance regulations could be enacted without any legislative findings of

\(^{60}\) Id. at 381-382.
\(^{61}\) Id. at 387-88.
\(^{62}\) Id. at 390.
corruption, the threat of corruption, or the failure of bribery laws. It became accepted that large
donations, however that was defined, were corrupting or gave an appearance of corruption that
could be restricted.

IV. ISSUE ADVOCACY

Congress passed the Bipartisan Campaign Reform Act of 2002 (BCRA)\(^6^3\) to limit the
influence of so called “soft money” and “issue advocacy”.\(^6^4\) Soft money is money that is not
given to a candidate or regulated by the federal election laws.\(^6^5\) Soft money included money
donated to political parties for so called “party building” activities which included administrative
expenses and voter registration drives, but also for issue advocacy designed to “educate” voters.
Because soft money contributions given to parties were not regulated by election law, soft
money could be given in unlimited amounts by groups such as unions and corporations that
would otherwise face severe restrictions. Soft money had the effect of making the campaign
finance laws much less effective because as soon as a contributor made the maximum allowable
donation to a candidate, the contributor could continue to contribute in any amount to the
political parties who would then run issue ads for the benefit of the candidate. Additionally,
political parties were able to use soft money to pay for candidate’s administrative expenses,
which freed up resources that the candidate would have spent on staff and administration for the
candidate to spend on campaigning.

Title I of BCRA “is Congress’ effort to plug the soft-money loophole. The cornerstone of
Title I is new FECA § 323(a), which prohibits national party committees and their agents from

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soliciting, receiving, directing, or spending any soft money. (citation omitted) In short, § 323(a)
takes national parties out of the soft-money business.” 66 Title I regulates the use of soft money
by political parties, officeholders, and candidates. Title II primarily prohibits corporations and
labor unions from using general treasury funds for communications that are intended to, or have
the effect of, influencing the outcome of federal elections.” 67 The suit was initiated by Senator
Mitch McConnell (R-KY) to challenge what he saw as the unconstitutional provisions of the
legislation. The Court upholds the limits in BCRA, stating that “[l]ike the contribution limits we
upheld in Buckley, § 323’s restrictions have only a marginal impact on the ability of contributors,
candidates, officeholders, and parties to engage in effective political speech. (citation omitted)
Complex as its provisions may be, § 323, in the main, does little more than regulate the ability of
wealthy individuals, corporations, and unions to contribute large sums of money to influence
federal elections, federal candidates, and federal officeholders.” 68

The United State Supreme Court held that “a contribution limit involving even
'significant interference' with associational rights is nevertheless valid if it satisfies the ‘lesser
demand’ of being 'closely drawn' to match a 'sufficiently important interest’.” 69 In addition to
holding that “the prevention of corruption or its appearance constitutes a sufficiently important
interest to justify political contribution limits,” 70 the court held that acts other than quid pro quo
arrangements could constitute corruption which justifies upholding the soft money rules against
facial challenge. The Court expanded the definition of corruption from “simple cash-for-votes
corruption to curbing "undue influence on an officeholder's judgment, and the appearance of

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66 McConnell, 540 U.S. at 133.
67 Id. at 132.
68 Id. at 138.
69 Id. at 136.
70 McConnell v. FEC, 540 U.S. 93, 143 (U.S. 2003).
such influence.”\textsuperscript{71} The court states that the parties’ practice of selling “access to federal candidates and officeholders . . . has given rise to the appearance of undue influence.”\textsuperscript{72} Finally, the Court approves the prohibition on the use of state parties as a conduit of soft money by stating that having “been taught the hard lesson of circumvention by the entire history of campaign finance regulation, Congress knew that soft-money donors would react to § 323(a) by scrambling to find another way to purchase influence.”\textsuperscript{73} Because the state level parties are associated with the national parties, without this type of prohibition the state parties would have received the contributions and paid for the “party building” activities from which the national parties were being prohibited.

Although \textit{McConnell} upheld BCRA against a facial challenge in 2002, a successful “as applied” challenge was brought in \textit{Wisconsin Right to Life} (WRTL II) under the newly configured Roberts Court.\textsuperscript{74} WRTL II challenged the provisions prohibiting corporate spending on issue advocacy ads which also mentioned a candidate by name in describing the candidate’s stand on an issue. The Court ruled that the First Amendment required that it err on the side of protecting political speech rather than suppressing it and that the speech at issue was not the "functional equivalent" of express campaign speech.\textsuperscript{75} Because the speech was not campaign speech, the Court held that “the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy, and accordingly we hold that BCRA § 203 is unconstitutional as applied to the advertisements at issue in these cases.”\textsuperscript{76} The court held that “[b]ecause BCRA § 203 burdens political speech, it is subject to strict

\textsuperscript{71} \textit{Id.} at 150.
\textsuperscript{72} \textit{Id.} at 153-4.
\textsuperscript{73} \textit{Id.} at 165.
\textsuperscript{74} \textit{FEC v. Wis. Right to Life, Inc.}, 127 S. Ct. 2652, 2652 (2007).
\textsuperscript{75} \textit{Id.} at 2659.
\textsuperscript{76} \textit{Id.}
scrutiny. Under the strict scrutiny standard, the Government must prove that applying BCRA to WRTL’s ads furthers a compelling interest and is narrowly tailored to achieve that interest,” which the Court ruled the government did not do.77

In defining the proper standard for an as applied challenge, the court states that “[t]he freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.” To safeguard this liberty, the proper standard for an as-applied challenge to BCRA § 203 must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect. . . In light of these considerations, a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”78

By establishing that for issue advocacy to be prohibited, it must be capable of no other meaning than as an express appeal to vote for a particular individual, and by establishing that strict scrutiny applies to limits on corporate political speech, the court cleared up questions that have been unclear since Buckley.79 The Supreme Court made it clear that regulations that depend on the listener’s perception of speech to establish meaning, have the effect of chilling speech that is capable of being be perceived in a variety of ways. The prevention of this chilling effect on speech is best dealt with by protecting all speech that can be understood as issue advocacy.

Although McConnell upheld the application of BCRA to independent expenditures that are the 

77 Id. at 2664.
78 Id. at 2666-2667.
79 In Buckley, the Court laid out its general principles relating to campaign finance reform. It required that the subordinating interests of the State must survive exacting scrutiny, but in the next sentence seemed to confuse the standard by insisting that there be a “relevant correlation” or “substantial relation” between the governmental interest and the information required to be disclosed. Buckley v. Valeo, 424 U.S. 1, 64 (1976).
functional equivalent of express advocacy, WRTL seems to do everything but overrule

*McConnell* because it is unlikely that any ads will be found to have no reasonable interpretation other than as an appeal to vote for a specific candidate. 80

V. THE LIMITS OF CONTRIBUTION LIMITS

The recent United States Supreme Court decision in a Vermont case called *Randall v. Sorrell* has clarified how low contribution limits may be set before running afoul of the First Amendment. Vermont attempted to limit both contributions and expenditures in statewide political races. In discussing the expenditure limits, the court stated that “[w]ell-established precedent makes clear that the expenditure limits violate the First Amendment.” 81 While the court was asked by Vermont to overrule *Buckley’s* decision regarding the prevention of corruption and its appearance through expenditure limits, Vermont also asked the court to reconsider the impact that expenditure limits would have on decreasing the time that must be spent on fundraising. 82 The court declined to overrule *Buckley*, stating that the “Court was aware of the connection between expenditure limits and a reduction in fundraising time.” 83

The contribution limits at issue in *Randall* were more problematic than those at issue in *Buckley*. Although contribution limits had been upheld in the past, the limits at issue in *Randall* were lower than the limits in any other campaign finance statute in the country. The contribution limits at issue stated that “any single individual can contribute to the campaign of a candidate for state office during a "two-year general election cycle" is limited as follows: governor, lieutenant

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80 As one major-party political consultant testified, “it is rarely advisable to use such clumsy words as "vote for" or "vote against... .[a]ll advertising professionals understand that the most effective advertising leads the viewer to his or her own conclusion without forcing it down their throat. Other political professionals and academics confirm that the use of magic words has become an anachronism.” *McConnell v. FEC*, 540 U.S. 93, 194 n.77 (2003).
83 *Id.*
governor, and other statewide offices, $400; state senator, $300; and state representative, $200. Unlike its expenditure limits, Act 64's contribution limits are not indexed for inflation.**84**

In analyzing the contribution limits, the Supreme Court said that it “must determine whether Act 64’s contribution limits prevent candidates from “amassing the resources necessary for effective [campaign] advocacy, whether they magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage; in a word, whether they are too low and too strict to survive First Amendment scrutiny.”**85** The Court stated that contribution limitations are permissible as long as the Government demonstrates that the limits are “closely drawn” to match a “sufficiently important interest.”**86** Because the contribution limits in Vermont were so low, the Supreme Court ruled that law placed “substantial restrictions on the ability of candidates to raise the funds necessary to run a competitive election, on the ability of political parties to help their candidates get elected, and on the ability of individual citizens to volunteer their time to campaigns show[ing] that the Act is not closely drawn to meet its objectives,”**87** and so the provisions were held to be unconstitutional.

The Court reiterated that if limits are too low, it can be as harmful as when the limits are too high, and that legislators must not set contribution limits so low as to “inhibit effective advocacy by those who seek election, particularly challengers.”**88** The danger with too low of a limit is that such a limit will “magnify the “reputation-related or media-related advantages of incumbency and thereby insulat[e] legislators from effective electoral challenge.”**89** Although the requirement that contribution limits not be set so low as to prevent a candidate from amassing

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**84 Id.** at 2486.
**85 Id.** at 2492 *quoting* Buckley, 424 U.S. at 21.
**86 Randall,** 126 S. Ct. at 2491.
**87 Id.** at 2495.
**88 Id.** at 2499.
**89 Id.** at 2492 (quoting Shrink, supra, at 403-404, 120 S.Ct. 897).
the resources necessary for a campaign was stated in Buckley, it was never clear what such an amount would be. Nixon further complicated this issue by stating that limits need not be indexed for inflation, which could result in a diminishment of the ability to effectively campaign over time. Randall clarified this issue, and while not stating specific amounts, made reference to the cost of media and other campaign activities that constitute an effective campaign.\textsuperscript{90}

\textbf{VI. LEVELING THE PLAYING FIELD IS NOT A PERMISSIBLE GOAL}

The recent United States Supreme Court decision in \textit{Davis v. Federal Election Commission} made clear that campaign finance laws that create an asymmetrical campaign contribution scheme applicable to candidates based on how much of their personal wealth is used to finance their candidacy infringe on a self-financed candidate’s First Amendment rights. Campaign finance law usually applies uniformly to all candidates for office, but Section 319(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA),\textsuperscript{91} the so-called "Millionaire's Amendment," states that “[w]hen a candidate's expenditure of personal funds causes the ["opposition personal funds amount" (OPFA)] to pass the $ 350,000 mark (for convenience, such candidates will be referred to as "self-financing"), a new, asymmetrical regulatory scheme comes into play. The self-financing candidate remains subject to the limitations [of the normal system], but the candidate's opponent (the "non-self-financing" candidate) may receive individual contributions at treble the normal limit (\textit{e.g.}, $ 6,900 rather than the current $ 2,300), even from individuals who have reached the normal aggregate contributions cap, and may accept coordinated party expenditures without limit.”\textsuperscript{92}

\textsuperscript{90} \textit{Id.} at 2495.
\textsuperscript{91} 116 Stat. 109, 2 U.S.C. § 441a-1(a)
\textsuperscript{92} \textit{Davis v. Federal Election Commission, 128 S. Ct. 2759,2766 (2008).}
The Court quoted Buckley’s discussion of an expenditure cap for self financed candidates, noting that a "candidate . . . has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election" and that a cap on personal expenditures imposes "a substantial," "clea[r]" and "direc[t]" restraint on that right. We found that the cap at issue was not justified by "[t]he primary governmental interest" proffered in its defense, i.e., "the prevention of actual and apparent corruption of the political process." 93 The court also reaffirmed its rejection of the “argument that the expenditure cap could be justified on the ground that it served "[t]he ancillary interest in equalizing the relative financial resources of candidates competing for elective office." This putative interest, we noted, was "clearly not sufficient to justify the . . . infringement of fundamental First Amendment rights." 94

The Court clarified that in Buckley, they “held that Congress "may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations" even though [the court] found an independent limit on overall campaign expenditures to be unconstitutional . . . [but in that case] a candidate, by forgoing public financing, could retain the unfettered right to make unlimited personal expenditures, [while] § 319(a) does not provide any way in which a candidate can exercise that right without abridgment." 95

The government attempted to use an element of the equal protection argument, discussed infra, arguing that the asymmetrical limits are justified because they "level electoral opportunities [**753] for [***31] candidates of different personal wealth . . . [and] Congress enacted Section 319 . . . to reduce the natural advantage that wealthy individuals possess in

93 Id. at 2771. quoting Buckley 424 U.S., at 52-53.
95 Id. at 2772.
campaigns for federal office." The court rejects this argument, stating that there is "no support for the proposition that this is a legitimate government objective. . . . [and] "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."97

The government argues that contribution limits "make it harder for candidates who are not wealthy to raise funds and therefore provide a substantial advantage for wealthy candidates. Accordingly, § 319(a) can be seen, not as a legislative effort to interfere with the natural operation of the electoral process, but as a legislative effort to mitigate the untoward consequences of Congress' own handiwork and restore "the normal relationship between a candidate's financial resources and the level of popular support for his candidacy."98 The Court notes that such any advantage that wealthy people enjoy is a result of the disparate treatment of contributions and expenditures adopted in Buckley, and "[i]f the normally applicable limits on individual contributions and coordinated party contributions are seriously distorting the electoral process, if they are feeding a "public perception that wealthy people can buy seats in Congress," and if those limits are not needed in order to combat corruption, then the obvious remedy is to raise or eliminate those limits. But the unprecedented step of imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat is antithetical to the First Amendment."99

The Court next considered § 319(b)'s disclosure requirements and found them to be unconstitutional. The court held that "there must be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed," and the

96 Id. At 2773.
97 Id.
98 Id. At 2774.
99 Id.
governmental interest "must survive exacting scrutiny." Because “the § 319(b) disclosure requirements were designed to implement the asymmetrical contribution limits provided for in § 319(a), and . . . § 319(a) violates the First Amendment. . . . it follows that [the disclosure requirements] too are unconstitutional.”

VII. RESTRICTIONS ON PEOPLE DOING BUSINESS WITH THE GOVERNMENT

Within the General framework of campaign finance outlined above, there have been many decisions outlining the extent to which campaign finance regulation may burden the speech of people doing business with the government. People doing business with the government pose a special danger of corruption because while the general public is motivated to give out of ideological agreement, people doing business with the government might be motivated to contribute as a quid pro quo to receive a favorable government decision. People doing business with the government include people seeking government contracts, people seeking agency decisions, and lobbyists trying to influence legislative outcomes. While the class of people who do business with the government is larger than the class of people who are lobbyists, the reasoning for placing special restrictions on the two classes is similar.

The Supreme Court recognized over fifty years ago that lobbyists can be subject to special regulations because of their influence on the legislative process. Because the Supreme Court has recognized the special danger that contributions from those doing business with the government pose, and because preventing corruption and the appearance of corruption is the

100 Id. at 2775.
101 Id.
102 Testimony of Ciara Torres-Spelliscy On Campaign Finance Reform, Democracy Program Brennan Center for Justice at NYU School of Law, Presented to the Governmental Operations Committee of the New York City Council June 12, 2007 quoting U.S. v. Harriss, 347 U.S. 612 (1954), http://brennan.3cdn.net/dda6ad974c8e0fb1e3_98m6bxq3c.pdf (last visited March 30, 2008).
stated justification for campaign finance restrictions, one of the most significant questions in campaign finance is the extent to which restrictions may be placed on the ability of lobbyists and those that do business with the government to participate in the political process.

The 4th Circuit ruled that a ban on lobbyist donations for a short duration was permissible.103 In *North Carolina Right to Life v. Bartlett*, North Carolina prohibited the contribution or solicitation of campaign donations from lobbyists while the legislature was in session. The Court upheld the ban, stating that the restrictions “survive strict scrutiny because they advance a compelling state interest. Prohibiting lobbyist contributions and solicitations while the General Assembly is in session serves to prevent corruption and the appearance of corruption.”104 With respect to actual corruption, the Court held that “lobbyists are paid to effectuate particular political outcomes. The pressure on them to perform mounts as legislation winds its way through the system. If lobbyists are free to contribute to legislators while pet projects sit before them, the temptation to exchange "dollars for political favors" can be powerful.”105 North Carolina’s restrictions are narrowly tailored because “the restrictions . . . are limited to lobbyists and the political committees that employ them -- the two most ubiquitous and powerful players in the political arena, [and] [s]econd, the restrictions are temporally limited: they last only during the legislative session, which typically, though not invariably, has covered just a few months in an election year.106

In another decision concerning people who do business with the government, the Alaska Supreme Court upheld a restriction on registered lobbyists making donations outside of their

103 [North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705, 705 (4th Cir. 1999)].
104 *Id.* at 715.
105 *Id.* at 715-6.
106 *Id.* at 716.
election district.\textsuperscript{107} In \textit{State v. Alaska Civil Liberties Union}, a ban on out-of-district contributions by lobbyists was challenged, but the court found that “the out-of-district ban draws a logical compromise between lobbyists' private rights and their professional obligations. While lobbyists are prevented from contributing to most candidates, “the restraint does not foreclose lobbyists from engaging in political speech. . . ”[they] may also participate in and contribute to 'groups' -- including political parties -- which may contribute to any legislative candidate." And they may make independent expenditures for any legislative candidate.”\textsuperscript{108}

Although lobbyists’ contributions may be channeled both temporally and geographically, at least one court has ruled that they may not be prohibited outright.\textsuperscript{109} In 1979, California prohibited lobbyists from making political contributions. In striking the law down, the California Supreme Court stated that “the prohibition against lobbyist contributions . . . is a substantial limitation on associational freedoms guaranteed by the First Amendment, and is invalid.”\textsuperscript{110} The court found that “[w]hile either apparent or actual political corruption might warrant some restriction of lobbyist associational freedom, it does not warrant total prohibition of all contributions by all lobbyists to all candidates.”\textsuperscript{111} The court went on to differentiate lobbyists from government employees by stating that “[t]he governmental interests held to warrant substantial restrictions on political rights in \textit{CSC v. Letter Carriers} have no greater application to lobbyists than to other private campaign contributors,” but the court did not reach the issue of equal protection of the rights of lobbyists because the restrictions were held not to be narrowly tailored.\textsuperscript{112} In \textit{Letter Carriers}, The Hatch Act, which prohibits federal employees from taking an

\textsuperscript{108} Id. at 619.
\textsuperscript{109} Fair Political Practices Com v. Superior Court, 25 Cal. 3d 33, 33 (Cal. 1979).
\textsuperscript{110} Id. at 49.
\textsuperscript{111} Id. at 45.
\textsuperscript{112} Id.
active part in political campaigns, was upheld because of the compelling interests of having federal employees not appear to be partisan. By saying that *Letter Carriers* applies to lobbyists only as much as it applies to ordinary citizens, the California Court rejected the argument that lobbyists are more similar to government employees than ordinary citizens and so may be regulated like government employees instead of private citizens.\(^{113}\)

The Court of Appeals for the District of Columbia Circuit has upheld a Securities and Exchange Commission rule that prohibited people who do business with the government from soliciting campaign donations from other people on behalf of candidates and from making political contributions to offices with which they did business.\(^{114}\) The rule was challenged by the Chairman of the Alabama Republican party, a securities dealer. The court stated that “solicitation of campaign funds . . . is close to the core of protected speech, as it is "characteristically intertwined" with both information and advocacy and essential to the continued flow of both."\(^{115}\) Even though associating with others to solicit campaign funds is part of core political speech, the court upheld the ban, stating that the rule furthers a compelling interest and is narrowly tailored.”\(^{116}\) Although Blount was not a government employee, and no corruption was alleged, the Court of Appeals was willing to uphold a total prohibition on contributions that had the appearance of corruption.

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\(^{113}\) This decision has been overturned in California and lobbyists are completely barred from contributing to state candidates. California Fair Political Practices Commission, Lobbying Disclosure Information Manual, http://www.fppc.ca.gov (last visited March 30, 2008).

\(^{114}\) *Id.* at 939.

\(^{115}\) *Id.* at 942.

\(^{116}\) *Id.* at 944.
VIII. CHALLENGES TO BUCKLEY

A. EQUAL PROTECTION CLAIMS: CAMPAIGN FINANCE LAWS FAVOR INCUMBENTS

An argument that was made in *Buckley* and has been advanced in several subsequent cases is that contribution limits favor incumbents and hurt challengers and give rise to an equal protection claim. When candidates are subject to contribution limits, war chests are amassed based on the number of contributors and not the size of the contribution, which favors well known and well connected incumbents who are likely to know more people and receive more contributions. Another result of contribution limits is that it moves more political speech from the candidate controlled campaigns to political parties and political action committees, which then make independent expenditures that are more likely to benefit incumbents than challengers. The result is that challengers, who are likely to have a smaller campaign fund than the incumbent, are put at a further disadvantage by the impact of independent groups. Because contribution limits restrict the amount that a person can give, challengers cannot attempt to make up for the smaller number of contributions that they receive with larger contributions. Because fewer people contribute to the campaign of a challenger than to the campaign of a well connected opponent, and because challengers are unable to make up for having fewer contributors with larger contributions, challengers are almost assured of having less campaign money than an incumbent.

The Supreme Court rejected the argument that contribution limits favor incumbents over challengers in *Buckley*, and again in *Nixon* where it stated that “this is essentially an equal protection claim, which *Buckley* squarely faced. We found no support for the proposition that an incumbent's advantages were leveraged into something significantly more powerful by
contribution limitations applicable to all candidates, whether veterans or upstarts.” 117 The dissent in Nixon gives voice to the equal protection concerns, stating

[Appellant] Zev David Fredman asks us to evaluate his speech claim in the context of a system which favors candidates and officeholders whose campaigns are supported by soft money, usually funneled through political parties. The Court pays him no heed. The plain fact is that the compromise the Court invented in Buckley set the stage for a new kind of speech to enter the political system. It is covert speech.118 The Court has forced a substantial amount of political speech underground, as contributors and candidates devise ever more elaborate methods of avoiding contribution limits, limits which take no account of rising campaign costs. The preferred method has been to conceal the real purpose of the speech.119

Justice Kennedy goes on to describe the difficulties of running for office under a campaign finance system, stating that, Mr. Fredman is bound “to the outdated limit of $1,075 per contribution in a system where parties can raise soft money without limitation and a powerful press faces no restrictions on use of its own resources to back its preferred candidates, the Court tells Mr. Fredman he cannot challenge the status quo unless he first gives into it.”120 Justice Kennedy’s dissent criticizes Buckley, stating that “to defend its extension of Buckley to present times, the Court, of course, recites the dangers of corruption, or the appearance of corruption, when an interested person contributes money to a candidate [but] [w]hat the Court does not do is examine and defend the substitute it has encouraged, covert speech funded by unlimited soft money. In my view that system creates dangers greater than the one it has replaced.”121

Expenditure limits can also magnify the advantages of an incumbent. Campaign funds are not raised as an end unto themselves. Campaign funds are raised in order to spend money to further a campaign. A campaign is furthered by money in two primary ways: the money either

118 Thankfully the Court is not introducing another term into the campaign finance debate. The reference to “covert speech” here is to money spent on issue advocacy or given as soft money, money that is used to create speech but that is not subject to any sort of disclosure and is therefore “covert.”
120 Id. at 407 (Kennedy dissenting).
121 Id. at 408 (Kennedy dissenting). This is the closest that the Court comes to recognizing that a campaign finance system that has contribution limits and no public financing component will favor incumbents in most instances.
goes to pay for increasing the candidate’s name recognition or the money goes to increase recognition of a candidate’s stand on the issues. While money is of course spent on administrative expenses and other forms of overhead, these costs can be seen as furthering the candidate’s name or issue recognition. Because an incumbent already holds office and has all of the advantages that accompany holding office, such as media attention, the use of legislative resources such as mail and newsletters, and the ability to help and interact with the public, a challenger starts most elections at a disadvantage because the incumbent is likely to have greater name recognition than a challenger. Because a challenger and an incumbent have differing levels of recognition, each spends his or her campaign money differently. A challenger must spend a large portion of his or her money introducing themselves to their district and trying to build name recognition. An incumbent can spend a much smaller percentage of his or her campaign funds than a challenger on building name recognition and a greater percentage discussing issues or attacking his or her opponent. Consequently, if a challenger and an incumbent were to raise the same amount of money, the incumbent has an advantage because of the incumbent’s ability to dedicate more of his or her money to spreading his or her message compared with a challenger. This situation is made worse where there are spending limits because at the point where a challenger starts to become competitive, campaign spending limits choke off political competition. This is because a challenger must usually spend a greater percentage of his money simply building name recognition, and when there are spending limits, there may not be enough money available to spend to discuss issues before the expenditure limit applies. The New York State Commission on Government Integrity recognized the danger of expenditure limits in the early New York City campaign finance system which were set “too low to allow

meaningful competition . . . [because] such a low limit favors incumbents and will almost certainly have the effect of discouraging City Council challenges.”

Additionally, in evaluating a challenge to an incumbent, “the key spending variable is not incumbent spending, or the ratio of incumbent to challenger spending, but the absolute level of challenger spending.” Establishing a campaign finance system is a balancing act that must balance the need for restrictions which are low enough to combat the appearance of corruption against the need to establish contribution limits high enough to allow for campaigns to receive adequate funding. One of the dangers of campaign finance reform is that spending limits will be set at a point so low that they actually hurt the ability of a challenger to mount a successful challenge. When Congress debated spending caps in 1997, the bills establishing those caps set the spending limit at a level at which challengers could not be competitive.

Every challenger who spent less than the Senate campaign limit proposed in 1997, had lost in each of the 1994 and 1996 elections, whereas every incumbent spending less than the limit had won. Similarly, only three percent of challengers spending less than the House campaign limit proposed in 1997 had won in 1996, whereas 40% of challengers spending more than the limit had won. While expenditure limits may help to combat corruption, the “perception by an elected official that he or she is effectively immune from challenge by an insurgent (from his or her own or from another party) may do far more to foster the potential for corruption and disregard of the public interest than even large, but publicly disclosed, contributions could ever do.”

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124 Id.
126 Id.
B. UNREGULATED INDEPENDENT SPEECH

Although the Court still seems reluctant to address the issue, the implications of the ruling handed down in *Buckley* have had a major effect on the way in which campaigns are conducted and financed. The unintended results of the Court’s ruling in *Buckley* and subsequent cases, as expressed by Kennedy in his dissent in *Nixon*, call for the Court to address the consequences of the system that it helped to create.

Combating corruption by limiting campaign contributions made sense when campaigns were run by the candidate through his or her campaign committee, but *Buckley* has resulted in a movement away from candidate controlled speech to more independent speech that cannot be regulated. Rules that only attempt to limit contributions to a candidate are then unable to fully account for the types of forces and influences that are present in modern politics. Recognizing that independent expenditures can have as much of an influence as direct contributions, Congress, in an effort to combat corruption, attempted to limit so called “soft money” through the enactment of BCRA. While BCRA was upheld against facial challenge, it was later held to be unconstitutional as applied to any ad capable of having a meaning other than one of express advocacy.¹²⁸ The result of the ruling prohibiting regulation of issue advocacy is that *Buckley* is no longer able to combat corruption or the appearance of corruption as effectively as it did thirty years ago because it applies to much less political speech. Because there are so many ways to inject money into politics that are capable of being regulated, it is unclear if contribution limits combat corruption or its appearance other than by preventing candidates from being overly dependent on a single big donor. One must ignore political reality to say that direct contributions give rise to an appearance of corruption, while ads that may cost millions of dollars have no

appearance of corruption if not made in consultation with a campaign. While courts will not
strike down a law for not combating every possible evil, a law that is able to combat only the
most overt acts does not seem to be narrowly tailored to further a compelling interest.

Because campaign finance laws burden First Amendment freedoms, they have
traditionally been justified as preventing corruption or the appearance of corruption. Would be
contributors with great means have the resources to create independent speech, so their speech is
not impacted by contribution limits to the same extent that the speech of would be contributors
without great means would be impacted. Contributors with great means can still make a
contribution that shows their “undifferentiated support,” and then use their additional resources
to produce independent speech. Because would be contributors with very little wealth do not
have a great deal of money to donate, their speech is not impacted greatly by contribution limits
because they were unlikely to give significant amounts regardless of contribution limits. It is
only the speech of those would be contributors in the middle, those with enough resources to
make significant contributions but without sufficient resources to finance independent speech,
which is greatly impacted by contribution limits. If contributors with great means are able to
continue to inject whatever amounts of money they wish into politics, and the people without
great means are the ones silenced, the system does not work to combat the appearance of
corruption.

C. FAILURE TO IMPROVE CIVIL ENGAGEMENT

Advocates for campaign finance reform often assert that campaign finance reform will
“improve the openness, honesty, and accountability of government.”

129 Brennan Center for Justice, et al., Breaking Free with Fair Elections: A New Declaration of Independence for
Supreme Court, in the 2002 *McConnell* decision, referred to the “eroding of public confidence in the electoral process through the appearance of corruption” as a justification for contribution limits to political parties.\(^{130}\) Unfortunately, “the purported link between campaign finance law and perceptions of government has never been established systematically. In fact, there is good reason to doubt the existence of such a link, as [researchers have shown] that there is little or no relationship between total campaign spending in federal elections and average trust in government at the national level”.\(^{131}\) Research has shown that there is little or no relationship between total campaign spending in federal elections and average trust in government at the national level and that campaign advertising (and, therefore, campaign spending) increases interest levels, knowledge, and turnout, suggesting that spending may in fact be a net positive for democracy.\(^{132}\)

Not all reform is created equal in improving people’s perceptions of the political process. Studies using National Election Studies data, a poll on people’s perceptions of government that has been done every two years since 1948 with few exceptions, show that each element of campaign finance has differing effects on people’s perceptions of government.\(^{133}\) One study divided the goals of campaign finance laws into 5 categories, 1) Public disclosure of campaign contributions, 2) Limits on contributions by organizations, 3) Limits on contributions by individuals, 4) public subsidies to candidates that abide by expenditure limits, and 5) expenditure limits in place before the *Buckley* decision. Researchers found that while some of the reforms improved public perception of the government, some actually made that perception worse.\(^{134}\)

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\(^{130}\) *McConnell* v. FEC, 540 U.S. 93, 95, 136 (U.S. 2003).


\(^{132}\) *Id.*

\(^{133}\) *Id.* at 26.

\(^{134}\) *Id.* at 33.
When analyzing the question of “Do people have a say?”, public disclosure increases the likelihood of a positive response, as does the presence of organizational but not individual contribution limits. Adding individual contribution limits in a state decreases the belief that individuals can make a difference, though this result is not statistically significant.\textsuperscript{135} The same is true for mandatory expenditure limits. Public funding, however, has a statistically significant negative effect on people’s belief that they can influence the government.\textsuperscript{136} This means that while “there may be some modest improvement in efficacy from disclosure laws, and perhaps even limits on contributions from organizations . . . the evidence showing a negative effect of public financing is at least as strong. . . [and] there is no evidence that either mandatory expenditure limits or limits on individual contributions have any appreciable impact on efficacy.\textsuperscript{137}

Campaign finance laws limiting contributions can also have the effect of further decreasing the ability of the average citizen to get involved and make a difference. The laws work in favor of groups that have established infrastructures to raise donations from large groups, such as corporations and unions, and against groups that would organize around a policy interest.\textsuperscript{138} The laws also favor groups that have access to large donors, such as political parties, and shift power to groups that are less constrained in their fundraising abilities and better able to gather the large initial fundraising and organizing costs.\textsuperscript{139}

Campaign finance is supposed to increase trust in government by making the system more accessible for people without resources. Despite the rhetoric about making the system more

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{135}] Id.
\item[\textsuperscript{136}] Id. at 34.
\item[\textsuperscript{138}] Thomas Gais, \textit{Campaign Contribution Limits: Cure or Curse?}, Rockefeller Institute, 4, available at \url{http://www.rockinst.org/assets/C7359E95-80BF-4139-9E12-7009372BF44F.pdf}.
\item[\textsuperscript{139}] Id.
\end{enumerate}
\end{footnotesize}
accessible to challengers, the reelection rates for incumbents have increased over the past 30 years.\textsuperscript{140} As discussed earlier, one of the reasons that incumbency rates are up is that campaign finance systems benefit incumbents because money is provided based on the number of contributions. In the 2005 New York City Council race, “incumbents made up 30 percent of participants but 56 percent of contributions. And while the average incumbent raised $161,000, the average challenger raised only $31,000. Candidates for open seats raised an average of $61,000.”\textsuperscript{141} The result of a system of matching funds is that incumbents have their already considerable financial advantages magnified.

If the limits on the contributions of individuals result not in an increase but a decrease in the level of trust in government,\textsuperscript{142} and an increase in the ability of incumbents to be reelected, it is hard to see how this reform results in an increase in political participation and electoral competition that would justify the current system. Limits on what an individual may contribute may need re-examination when those limits are not able to adequately serve the end of combating corruption or the appearance of corruption, do not increase political participation or electoral competitiveness, and place a heavy burden on speech.

\textbf{IX. A MODEL SYSTEM IN NEW YORK CITY}

\textsuperscript{140} Re-election rates are obviously susceptible to many forces and cannot be explained by looking at campaign finance alone. Gerrymandering is a force that cannot be underestimated in modern politics. In the US House re-election rates were 88% in 1974, the year that FECA was passed, to 98% in 2004. Re-election rates went from 85% in 1974 to 96% in 2004 in the US Senate. Open Secrets, \textit{Reelection rates over the years}, http://www.opensecrets.org/bigpicture/reelect.asp?Cycle=2004 (last visited March 30, 2008); In the 2005 race for New York City Council, every City Council incumbent, except embattled Council Member Allan Jennings, was easily re-elected and seven incumbents did not face an opponent in either the primary or the general election. Jennings was the only incumbent to lose in the entire city. New York City Campaign Finance Board, \textit{A REPORT ON THE 2005 ELECTIONS, PUBLIC DOLLARS FOR THE PUBLIC GOOD}, \textit{supra} note 11, at 20.

\textsuperscript{141} New York City Campaign Finance Board, \textit{A REPORT ON THE 2005 ELECTIONS, PUBLIC DOLLARS FOR THE PUBLIC GOOD}, \textit{supra} note 11, at 37

The New York City campaign finance system was created in 1988 amid widespread scandal in New York City. That same year, the New York State Commission on Government Integrity issued a report outlining reforms that would improve the integrity of the New York City system. The report called for many changes, such as banning corporate contributions, treating loans as contributions, and enacting special rules for those doing business with the city, that have since been incorporated into the New York City campaign finance system. Because the New York City campaign finance system has been the subject of numerous reports, debates, and hearings over the 20 years that it has been in existence, it is viewed by many as a model for campaign finance reform.

The New York City campaign finance system contains provisions that would be unconstitutional if mandatory, but which are acceptable because the candidates volunteer to participate, thereby in essence subjecting themselves to the limits. New York City’s campaign finance system, which was created in 1988 and amended numerous times, has been widely praised and is considered a model for reform. In the declaration of legislative intent and findings, the City Council stated that the goals and purposes of the Act are “to improve popular understanding of local issues, to increase participation in local elections by voters and candidates, to reduce improper influence on local officers by large campaign contributors and to

144 Id. at 9, 14, 26
enhance public confidence local government.”

Prior to the 2007 amendments, the City’s public campaign financing system was an entirely voluntary system. In order to be eligible for public matching funds, candidates voluntarily accepted expenditure limits, contribution limits lower than state limits, more extensive disclosure requirements than state requirements, as well as a ban on corporate contributions, which are allowed under state law.

In 1998, the New York City Council passed Local Law 48 increasing the matching rate of public campaign funding was increased to 4 to 1 for the first $250 contributed by private contributors, and bonus matching rates were provided for program participants who face high spending non-participants. A bonus is triggered when a non-participating candidate spends more than 50 percent of the expenditure limit. The participating candidate then receives a $5-to-$1 match and higher spending limits. Due to a charter amendment passed in a referendum in 1998, there was some confusion about the continuing validity of the matching rate, and so the City Council enacted Local Law 21 in 2001 to clarify the validity of the matching rate.

In reaction to Michael Bloomberg’s expenditure of $73 million of his personal funds in his successful bid for the mayor in 2001, the City Council voted in 2004 to not only lift the spending limit for a participating candidate facing a self-funded opponent, but also to provide the participating candidate with a six-to-one public funds match for qualifying private contributions starting with the 2005 election.

148 Local Law of the City of New York No. 8 § 1 (1988).
152 See New York City Council Local Law 58, §6, (2004) (amending Section 3-706(3) of the Administrative Code of the City of New York), available at http://www.nyccouncil.info. The six-to-one match is capped at $1500 in public funds per contributor, and the total public funds payment capped at 125% of the expenditure limit for the office the
Prior to the 2005 election, candidates wishing to run for office in New York City had to choose whether or not to participate in the New York City campaign finance system. Those candidates who wished to participate were eligible to receive public matching funds of 4 to 1 on the first $250 of a contribution, but in exchange they could not accept corporate money, had to agree to low contribution limits, had to agree to limit their overall campaign expenditures, and had to make frequent campaign finance disclosures. Candidates who did not wish to participate were not given public money to help finance their campaign, but were subject only to state law, which has much higher contribution limits, no expenditure limits, and less stringent disclosure requirements.

The 2004 amendments also created a new class of participant and further incentives for participation. The new class of participant is the “limited participant.” By becoming a limited participant instead of a non-participant, the candidate agrees not to accept outside donations, and to finance his or her campaign with his or her own money. In exchange for foregoing any outside funding, the bonus provisions that provided a higher matching rate and expenditure limits to candidates facing non-participating candidates, would not apply.

While state law makes it in some ways easier to raise money than City law, because of the state’s higher contribution limits and different rules about who may contribute, most candidates still participated in the City system because any gain was not offset by the loss of public matching funds and the possibility of bad publicity. The lure of public funding proved to be an almost irresistible incentive to participate and resulted in a 90% participation rate.

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153 New York CITY, N.Y., ADMINISTRATIVE CODE § 3-702(13).
154 NYC CFB, supra note 108, at 8.
Although the voluntary system in New York City had a very high participation rate and was widely praised as a model for reform, the New York City Council enacted further reforms. While few candidates were inclined to run for office in New York City without participating in the campaign finance system after the enactment of increased matching rates, there was one type of candidate that was much better off running for office outside of the New York City system: the self-funded candidate.

A candidate that chose to fund his or her own campaign but wished to participate in some way in the New York City campaign finance system would be limited in the manner in which they could raise money for their campaign. If the candidate were a participant, he or she would be limited in what they could contribute, would have to raise money from other contributors within the rules of the city system, and would be required to make extensive disclosure, which would limit the benefit of being able to self-fund a campaign.\(^{156}\) If the candidate were a limited participant, then he or she could only use their own money for the campaign and could not raise money from others.\(^{157}\) In contrast, a candidate that was a non-participant could spend an unlimited amount of his or her money on his or her own campaign, could raise money from a wider variety of sources, and until the 2004 amendments would not have to make as frequent or detailed of disclosures.\(^{158}\)

**X. Applying the New York City Campaign Finance System to Non-Participating Candidates**

Until 2004, participation in the New York City campaign finance system was entirely voluntary, and non-participating candidates were bound only by state law. Candidates could

\(^{156}\) New York City, N.Y., Administrative Code § 3-703(h).

\(^{157}\) New York City, N.Y., Administrative Code § 3-718.

\(^{158}\) New York City, N.Y., Administrative Code § 3-719.
agree to the more stringent requirements of the New York City campaign finance system regulations, but the program was an incentive which did not contradict state law. If a candidate was a participant in the system, then he or she had volunteered to limit the size of the contributions that their campaign would accept to amounts that were less than what state law allows. If a candidate was not a participant, then only state law applied, and there was no conflict. Because the city system was a voluntary funding system that candidates could choose whether or not to participate in, the candidates and not the City imposed the contribution and expenditure limits. As a result the City was not impacting speech in a way that either contradicted state law or would subject it to the type of scrutiny that courts have imposed on mandatory campaign finance systems that present an unavoidable burden on candidates’ First Amendment rights.

In 2004, in an effort to rein in what was perceived by some as an advantage, the New York City Council amended the law that applied to non-participating candidates to require participation.\(^{159}\) Beginning in the 2005 election, the New York City campaign finance system was expanded to require that all candidates, including non-participating candidates, make disclosure under the more stringent New York City system.\(^{160}\) The 2007 amendments require that both limited and non-participating candidates shall comply with the same requirements as a participating candidate regarding donations from people doing business with the city, exclude donations from those people doing business with the city, including lobbyists and government contractors, from being matchable donations, and limit the amount that people doing business with the city may contribute to less than 10% of what may be contributed by a member of the

\(^{159}\) New York City, N.Y., Administrative Code § 3-703(6).
\(^{160}\) Id. at 2.
general public.\textsuperscript{161}

Most significantly, the 2007 reforms also require that “a non-participating candidate, and the authorized committees of such a non-participating candidate, shall only accept contributions as limited by the provisions of paragraphs (f) and (l) of subdivision one of section 3-703, [and] subdivision 1-a of section 3-703.”\textsuperscript{162} Paragraph (f) prohibits a candidate from accepting amounts that “in the aggregate: (i) for the office of mayor, public advocate or comptroller shall exceed four thousand nine hundred and fifty dollars, or (ii) for borough president, shall exceed three thousand eight hundred and fifty dollars, or (iii) for member of the city council, shall exceed two thousand seven hundred and fifty dollars.”\textsuperscript{163} Paragraph (l) prohibits a candidate from accepting corporate donations.\textsuperscript{164} Subdivision 1-a of section 3-703 limits what a candidate can accept from a person who has business dealings with the city to an amount that “does not exceed: (i) for the office of mayor, public advocate or comptroller four hundred dollars; (ii) for borough president three hundred twenty dollars; (iii) for member of the city council two hundred fifty dollars.”\textsuperscript{165}

The result of this is that a non-participating candidate is bound not to accept more than a participating candidate from any source other than the candidate’s own funds.\textsuperscript{166}

So as not to strip the non-participating candidate distinction of all meaning, the statute goes on to state that “notwithstanding any contribution limitations . . . , a non-participating candidate may contribute to his or her own nomination for election or election with his or her personal funds or property, in-kind contributions made by the candidate to his or her authorized

\textsuperscript{161} New York City, N.Y., Local Laws No. 34, at 7 (2007), \textit{available at} \url{http://www.nyccouncil.info/pdf_files/bills/law07034.pdf}.
\textsuperscript{162} \textit{Id.} at 14.
\textsuperscript{163} New York City, N.Y., Administrative Code § 3-703(1)(f) (2007).
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} New York City, N.Y., Local Laws No. 34, at 7 (2007), \textit{available at} \url{http://www.nyccouncil.info/pdf_files/bills/law07034.pdf}.
\textsuperscript{166} A participating candidate may only accept money from a PAC that has been registered with the CFB, while a non-participating candidate may accept money from an unregistered PAC, but both may not accept any corporate money. See \url{http://www.nyccfb.info/press_room/faq.htm#7}. 

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committees with the candidate's personal funds or property, and advances or loans made by the
non-participating candidate with the candidate's personal funds or property. A candidate's
personal funds or property shall include his or her funds or property jointly held with his or her
spouse, domestic partner, or unemancipated children."167 This functionally reduces non-
participating candidates from any person who does not wish to participate in the city campaign
finance system, to only those people who are using their own resources to finance a campaign.

While the City chose to codify the exception to its campaign finance system for non-
participants who are self-funding their campaigns, the proposition that no law can limit the
ability of a person to spend his or her own money on his or her own behalf was firmly
established in Buckley and did not depend on the City carving out a statutory exception.168 Non-
participants are also not subject to the expenditure limitations of the New York City campaign
finance system, but this distinction from participating candidates is similarly not dependent on
the City’s generosity because Buckley provides that expenditures may only be limited as part of a
voluntary program.169

The application of New York City’s campaign finance system to non-participants results
in a system in which all candidates for office in New York City are subject to the requirements of
City law to the maximum extent permissible under the federal Constitution. Buckley established
that contribution limits, and disclosure requirements may be required of all candidates without
impinging on the First Amendment, but that limitations on expenditures and contributions to a
candidate’s own campaign may only be limited as part of a voluntary system. If non-
participating candidates are not voluntarily agreeing to participate in the New York City
campaign finance program, then the City’s grace is not required to excuse non-participants from

167 Id. at 14-15.
169 Id. at 57.
the expenditure and self-financing restrictions. The City may require all candidates to make disclosure according to City guidelines and prohibit all candidates from accepting certain contributions (subject to state law as discussed infra), but candidates must volunteer to limit their contributions to their own campaign and their campaign’s overall expenditures because the government cannot impose such limitations. Because the disclosure and contribution limits apply to all candidates and cannot be avoided, the law is a mandatory law.

**XI. NEW YORK CITY VIOLATES NEW YORK STATE LAW**

Municipalities have a great deal of power under the Home Rule provision in Article IX of the New York State Constitution. Under Article IX, “local governments . . . are authorized to adopt local laws relating to their property, affairs and government, and relating to other listed subjects such as the transaction of business, and the health, safety and well-being of persons or property in the local government.” While municipalities are able to legislate on a wide variety of subjects, home rule powers have clear limitations, and “a municipality may not adopt local laws which are inconsistent with the Constitution or general State laws.” In a 1995 opinion, the Attorney General made it clear what inconsistent local laws are and how comprehensive the state Election Law is, stating

A local law is judged to be inconsistent with a general law when it prohibits what a general law permits or permits what a general law forbids. Second, a municipality may not adopt local laws where the Legislature has expressed an intent to preempt local legislation with respect to a given subject. . . . A desire to preempt may be deduced either from (1) a declaration of State policy by the Legislature; or (2) the fact that a comprehensive and detailed regulatory scheme in a particular area has been enacted by the Legislature. It is evident from the comprehensive nature of the Election Law that the State intended to occupy fully the area of campaign contribution limits, leaving no room for additional local regulation. Article 14 provides for detailed reporting and disclosure of campaign receipts and expenditures and establishes individual contribution limits. These limits are designed to apply to elections for party positions and to elections for and

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170 Id. at 1 (quoting NY Const Art IX § 2(c)(ii)(10)).

nominations for all public offices, including those at the local level.”

This clear and unequivocal statement by the Attorney General’s office on the inability of localities to enact campaign finance laws that conflict with state law suggests that the mandatory application of local law to those who do not volunteer to participate in the local system is vulnerable to challenge. The 1995 Attorney General’s opinion recognized that New York City had caps that differed from state law at the time of the opinion, but discussed the caps only as part of a voluntary system in place at the time that did not conflict with state law.

In an earlier opinion, the New York State Board of Elections found that a local legislative body is preempted from enacting a local law relating to the regulation of campaign financing and practices. In finding that state law preempted such a local law, the Board stated that “the transcripts of the legislative debates on the bill enacting Article 16-A, the article's statement of legislative intent, and the differentiation of the article's provisions between those relating to candidates for state offices and those relating to candidates for local offices all lead to the conclusion that the Legislature intended Article 16-A to preempt the entire subject matter area of campaign financing and practices.” Because the Board of Elections and the Attorney General have both stated that a locality may not create campaign financing system that contradicts state law, New York City is on weak legal ground.

The Association of the Bar of the City of New York Special Committee on Election Law recognized the questionable legal basis for enacting a mandatory local campaign finance law

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172 Id. at 2.
173 Id. at 3.
174 Id.
when it asked whether “a successful challenge against local mandatory requirements could conceivably undermine the longstanding voluntary reform.” 177 The committee questioned if “[g]iven that non-participants have been a relatively small portion of City candidates, and an even smaller proportion of competitive candidates, is it worth taking the risk of potentially exposing the successful voluntary program to a likely aggressive challenge to the City’s authority to extend the local law to non participants?” 178 With the Attorney General, State Board of Elections, and the Association of the Bar of the City of New York Special Committee on Election Law all pointing out reasons that the campaign finance system should not be extended to non-participants, it begs the question of whether these amendments were meant as substantive reforms or political moves aimed at a millionaire mayor who refused to be bound by the City campaign finance system.

While some may argue that the New York State campaign finance laws are too far from comprehensive to result in field preemption, these critics conflate the desire for additional campaign finance reforms with campaign finance laws themselves. 179 The state has enacted laws concerning the regulation of campaigns, an idea that is distinct from advancing a reform agenda. The state law involves the two major campaign finance initiatives that were approved in Buckley, disclosure and contribution limits, and does not include initiatives that were ruled unconstitutional, such as expenditure and self-financing limits. Even though the state has not

178 Id.
179 Paul S. Ryan, A Statute of Liberty: How New York City's Campaign Finance Law is Changing the Face of Local Elections, 40, (2003) available at http://www.cgs.org/publications/docs/nycreport.pdf (claiming that the state system is not comprehensive because the state does not provide public financing to candidates, the state’s campaign finance disclosure laws fail to bring independent campaign expenditures that support or oppose specific candidates into full public view, labor unions and other organizations spend tremendous sums to influence New York State and local elections without having to fully disclose such expenditures, and state disclosure laws do not require campaign contributors to disclose the identity of their employer.).

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created a public financing system, attempted to regulate issue advocacy (following *McConnell* and *WRTL II* it is unclear how far regulation of issue ads may constitutionally go), or further increased disclosure requirements, the state has passed contribution and disclosure laws that aim to regulate elections at every level of government in the state.

Until 2004, New York City’s actions were within New York State statutory and constitutional authority. After the 2004 amendments were enacted, some argued that there was a conflict between City and State disclosure requirements because the State had already mandated the type of disclosure that was required in local elections and the City enacted different requirements. Others argued that the City requirements supplemented and did not contradict the State requirements because non-participating candidates simply submitted reports required by state law to the state and submitted different reports required by city law to the City.

After the 2007 amendments were enacted, there was a clear conflict between city and state law. The extension of the program from candidates that are voluntary participants to those candidates who do not wish to participate exceeds the authority of the City of New York. Groups including the New York City Bar Association, academics, the New York State Attorney General, and the New York State Board of Elections have questioned whether a municipality has the power to enact mandatory campaign finance laws in the presence of comprehensive state regulation in the field.

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180 As recently as 2005, the Campaign Finance Board itself took this position in describing the need for the category of limited participants when it stated, “Without the legal authority to compel a self-funded candidate to curb his or her spending, the City Council created a candidate category called “limited participant” for the 2005 election.” New York City Campaign Finance Board, *THE IMPACT OF HIGH-SPENDING NON-PARTICIPANTS ON THE CAMPAIGN FINANCE PROGRAM*, supra note 129, 8.


The expansion of the New York City campaign finance system to regulate both disclosure and contributions for both participating and non-participating candidates makes the system a mandatory regulatory scheme because no candidate can avoid its requirements. Because the city campaign finance system is now a mandatory regulatory scheme, the system can no longer be described as merely providing incentives to candidates to encourage desired behavior. Instead, it is a system that conflicts with a comprehensive state regulatory scheme, exceeds local authority, and is not currently authorized under state law.

XII. NEW YORK CITY IS VIOLATING THE FIRST AMENDMENT

The recent Supreme Court decision in *Davis*, held that the asymmetrical contribution limits provided to non-self financed candidates facing self financed opponents and self-financed candidates under FECA violate the First Amendment. The Court emphasized,

The fundamental nature of the right to spend personal funds for campaign speech [and] while BCRA does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises that *First Amendment* right. *Section 319(a)* requires a candidate to choose between the *First Amendment* right to engage in unfettered political speech and subjection to discriminatory fundraising limitations. Many candidates who can afford to make large personal expenditures to support their campaigns may choose to do so despite *§ 319(a)*, but they must shoulder a special and potentially significant burden if they make that choice.

New York City forces self financed candidates to make an almost identical choice to the choice that FECA required. Candidates are similarly required to either participate in the campaign finance system with all of its attendant contribution and expenditure limits, or to remain a “non-participating candidate” where the candidate must still abide by contribution limits applicable to participating candidates, but if the non-participating candidate spends too much money from his personal funds, the participating candidate may accept much larger
contributions. New York City allows for the additional category of “limited participant,” where a self financed candidate wouldn’t trigger higher contribution limits for his opponent, but at a cost of not accepting any contributions from outside sources at all.

The Supreme Court has only approved of a campaign finance system in which “a candidate, by forgoing public financing, could retain the unfettered right to make unlimited personal expenditures.” As in the statute in question in Davis, the New York City system “does not provide any way in which a candidate can exercise that right without abridgment. Instead, a candidate who wishes to exercise that right has two choices: abide by a limit on personal expenditures or endure the burden that is placed on that right by the activation of a scheme of discriminatory contribution limits.” Because the New York City system provides asymmetrical contribution limits to candidates facing self financed candidates similar to those held to be unconstitutional in Davis, the New York City system is likely to be unconstitutional.

XIII. The Impact on Contributors to Candidates for Office in New York City

In addition to describing the contributions that a campaign may accept, the New York City campaign finance system also provides rules that apply only to those people doing business with the city. The law states that “if a contributor has business dealings with the City as defined in the campaign finance act, such contributor may contribute only up to two hundred fifty dollars for city council, three hundred twenty dollars for borough president and four hundred dollars for mayor, comptroller or public advocate.” Any contribution made by a person with business

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185 Davis v. Federal Election Commission, 128 S. Ct. 2759, 2772.
186 Id.
deals with the city is not a matchable contribution.\footnote{Id. at 7.} The 2007 changes to the campaign finance law increase the matching funds that are available to a candidate by providing that “if the threshold for eligibility is met, the participating candidate’s principal committee shall receive payment for qualified campaign expenditures of six dollars for each one dollar of matchable contributions, up to one thousand fifty dollars in public funds per contributor.”\footnote{Id. at 21.} The net result of this increase in available matching funds and denial of matching funds to those doing business with the city, is to reduce the ability of those doing business with the city to make a contribution to just over 7% of those in the general population.\footnote{Id. at 13.} The differential between the amounts that may be contributed by those doing business with the city and those who are not doing business with the city is exacerbated by the elimination of the non-participating candidate distinction. While contributions from lobbyists were previously not eligible for matching funds,\footnote{New York CITY, N.Y., ADMINISTRATIVE CODE § 3-702(3)(g) (2006)} it was the candidate’s decision whether to participate in the matching system, and the result was that the candidate and not the government limited the amount of the donation. Now that all candidates are bound by the contribution limits and source restrictions, the government and not the candidates are limiting the contributions made by those doing business with the City.

Another significant aspect of the campaign finance reform is the attempt to regulate the “bundling” of donations. Bundling occurs when a person collects contributions for a candidate from other parties that are within the legal limit, and then presents them to the candidate in a
“bundle” so as to present the candidate with a large sum of money all at once. The New York City law prohibited an intermediary from delivering any contribution from another person to a candidate. The new law expands this definition of an intermediary to include anyone who “solicits contributions to a candidate or other authorized committee where such solicitation is known to such candidate or his or her authorized committee . . . [but] shall not include spouses, domestic partners, parents, children or siblings of the person making such contribution, or any fundraising agent.” The law also excludes the “hosts of a campaign sponsored fundraising event paid for in whole or in part by the campaign,” and provides that where there are multiple individual hosts for a non-campaign sponsored event, the hosts shall designate one such host as the intermediary. This is a significant expansion of the bundling restriction and required disclosure because it prevents a person bundling contributions from avoiding the law by not physically bundling the contributions. Previously, a person bundling contributions could take every step but taking physical possession of the contributions, and if they did not physically deliver the contributions, no bundling had occurred. Disclosure requirements have been upheld in many instances to avoid the appearance of corruption that may be associated with a large contribution, and the extension of the disclosure requirement to people known by the campaign to be soliciting contributions, is likely to be upheld against First Amendment challenge because the prohibition against the bundling of a large number of contributions that is known to the campaign prevents the appearance of corruption.

The expansion of the prohibition on bundling to include not only the delivery but the solicitation of campaign donations when the campaign is aware of the activity is also likely to be upheld. If the prohibition prevented a person from speaking to friends and family about making a

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193 Id.
donation in all circumstances, the ban would pose serious questions regarding associational freedom. Because the prohibition applies only to those activities of which the campaign is aware, the associational rights of those people who are soliciting the donations are not impaired any more than is necessary to combat the appearance of corruption.

XIV. NEW YORK CITY’S RESTRICTIONS ON CONTRIBUTIONS BY PEOPLE DOING BUSINESS WITH THE CITY WILL BE UPHELD

Restrictions on contributions must be narrowly tailored to serve a compelling government interest. The only compelling government interest that has been recognized is combating corruption or the appearance of corruption. New York City has also claimed that its program aims to increase voter turnout and minority participation in the electoral process.\textsuperscript{194}

New York City has placed special restrictions on people with “business dealings with the city.” “Business dealings with the city” is defined in the campaign finance system as those people contained in a database of people doing business with the city.\textsuperscript{195} The people in the database are people that are vendors, hold city contracts, are seeking some government action from the city, or are lobbyists.\textsuperscript{196} The group of people included in the class of those with “business dealings with the city” includes everyone who would have a motivation to seek favorable treatment by making campaign contributions, and is not simply a euphemism for lobbyist, which is defined elsewhere in the law.\textsuperscript{197}

Contribution restrictions for lobbyists have been approved when they are limited either

\begin{footnotesize}
\textsuperscript{195} New York CITY, N.Y., \textsc{Administrative Code} § 3-702(18) (2007)
\textsuperscript{196} \textit{Id}.
\textsuperscript{197} New York CITY, N.Y., \textsc{Administrative Code} § 3-211 (2007)
\end{footnotesize}
temporally, prohibiting any contribution by a lobbyist for a short period, or limited
geographically, prohibiting any contribution by a lobbyist to any legislator that is not that
person’s representative, and they have even been approved when lobbyists are completely
prohibited from contributing. Because the Court has said that a contribution is not speech itself
but an expression of support, any contribution limit that does not prohibit a candidate from
amassing the resources necessary to further the candidate’s speech will be upheld.

Under New York City’s restrictions, the limits on campaign contributions by those doing
business with the city are not so restrictive as to be a complete prohibition. While severely
limiting the amount that may be contributed, the limits do not prevent contributions entirely,
allowing a showing of “symbolic support.”198 While the limits allow for a symbolic donation, the
limit is quite severe, limiting the effect of contributions by those doing business with the city to
less than 7% of the effect of contributions by the general population, and effectively bans those
doing business with the city from meaningful participation. While the ability to meaningfully
participate is not a constitutional standard, increasing the contribution limit applicable to those
doing business with the City to a limit greater than the current limit, but still well below the limit
for the general public, would allow for more meaningful participation, while still preventing
corruption by limiting the amount of money that those doing business with the city could
contribute to a contribution limit that is less than the contribution limit for the general
population.

A different kind of challenge to the restrictions on a lobbyist’s right to contribute is
currently being litigated, which may be more successful. Because labor unions are not included
as having business dealings with the city, the regulations have been criticized as favoring
candidates who draw support from organized labor at the expense of candidates who get strong

The plaintiffs argue that the law, which makes lobbyist contributions ineligible for matching funds and forbids LLC, LLP and partnership contributions, diminishes the voting strength of Hispanics because it will "significantly reduce, if not totally eliminate, the pool of Hispanic-American preferred candidates," and therefore the plaintiffs want the law declared a violation of the Voting Rights Act.

The attorney bringing the action, James Bopp, Jr., is the attorney who litigated *Randall v. Sorrell*, which held that campaign finance laws may not limit the ability of candidates to raise the money necessary for a campaign. The suit takes a similar position to *Randall* on the New York City law, claiming that the law prevents candidates from amassing sufficient resources. The plaintiffs include minorities and minor party candidates that do not have the access to resources available to some other candidates. The plaintiffs include people who want to run for office that have done so before and can testify that “it was very hard under the old law to raise enough money to challenge incumbents and the union-favored candidates . . . [and] now, it will be impossible for many of them to do so.” The law has an especially large impact on minority candidates, who often live in economically-challenged neighborhoods and whose “natural constituents do not have access to the wealth necessary to be able to support their chosen candidates.”

Although some of these candidates may receive the backing of organized labor, they will be disproportionately impacted because they are unable to draw significant financial support from their constituents.

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XV. RECOMMENDATIONS

Although New York City may have innovative ideas, it is still constrained by state and federal law in its attempt to combat corruption through campaign finance restrictions. Because New York City is a municipality located within New York State, it is subordinate to the state in its actions. The expansion of the New York City campaign finance program to non-participants mandates an action from all people running for office in New York City that is in conflict with state law. The asymmetrical contribution limits provided to self-financed and non self-financed candidates are in conflict with the First Amendment. In order to save the system from invalidation, some action must be taken.

The simplest action that could be taken to protect the New York City campaign finance system from conflict with state law is for New York State to pass a law exempting New York City from the state’s local campaign finance requirements, and authorizing the City to enact a comprehensive campaign finance system. New York State would not be creating a regulatory vacuum by exempting New York City from its local campaign finance law, because New York City is the largest city in the state, allowing legislation to easily be targeted to include no other localities that have not already enacted a local campaign finance system. Although this action would prevent conflict with state law, it would not affect the Voter Rights challenge currently being litigated.

New York City could also amend its campaign finance law to once again make it a voluntary system. Reverting to a voluntary system would save the law from conflict with state law, and because there are very few non-participants, the practical effect of such a change would be negligible.\textsuperscript{202} Because the system would no longer be legally mandatory, the state limits

\textsuperscript{202} In the 2005 City elections, only three City council primary races and the general election for mayor involved high spending non-participants that triggered the bonus provisions.
would apply to non-participants. While these limits are markedly higher, the limits would generally be applicable to participants who were the primary source of funds for their campaign, limiting the effect of such application. Reverting to a voluntary system would address the Voting Rights claim, while still serving the City’s stated goals.

New York City could also amend its campaign finance law to remove the asymmetrical contribution limits that apply to self-financed and non self-financed candidates. The City is free to increase contribution limits to a level that it think appropriate to run a campaign while still combating corruption or the appearance of corruption, but it cannot provide different limits for different candidates as a consequence of one candidate’s expenditure of personal funds. If a candidate’s acceptance of a larger campaign contribution when he or she is facing a candidate who can rely on his or her own wealth and the contribution is most needed does not implicate the threat of corruption, it is hard to see why larger contribution limits at all other times would not similarly not lead to corruption.

While the restrictions on people doing business with the city are likely to survive First Amendment challenge, New York City should consider amending its law to increase the allowable contributions for those doing business with the city. Increasing the allowable contribution from those doing business with the city to $1,000 in the mayoral race would limit the contributions of people doing business with the city to just over 20% of the general public’s contribution limit. This difference would combat corruption and increase the relative value of contributions from the general public, but would not place such a heavy burden on the speech rights of those people doing business with the city and would not be so low as to prevent a candidate from mounting a successful campaign.

While the New York City campaign finance system is facing a Voting Rights
no candidate has successfully brought a challenge to the application of the system’s requirements to non-participants. Hopefully, New York City will amend its laws to prevent conflict and possible invalidation.

XVI. CONCLUSION

The New York City Campaign finance system is a well-intentioned attempt to limit the influence of money and combat corruption or its appearance. *Buckley* is still the touchstone for the federal laws that dictate many of the rules surrounding contribution limits, expenditure limits, and disclosure requirements. Later cases established that restrictions that may be placed on lobbyists and those people doing business with the government. The limit of all campaign finance restrictions is that no restriction may prevent a candidate from running an effective campaign.

New York City’s campaign finance system violates both state and federal law. It is well established that municipalities are subordinate to the law of the states in which they are located, in addition to being subordinate to federal law. New York City’s extension of its campaign finance system to those candidates that do not wish to participate creates a mandatory regulatory system at odds with state law. The asymmetrical contribution limits violate the First Amendment rights of self-financed candidates. In order to preserve its system, and not let perfect be the enemy of good, New York City must take steps to preserve its system.

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