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Voodoo Economics: A Look Abroad for a Supply-Side Solution to America's Campaign-Finance Riddle

ABSTRACT

The title of this Note—"voodoo economics"—is, at its core, an analogy: U.S. campaign-finance regulation operates like a price ceiling in the political money marketplace. Political campaigns are financed through money-for-access transactions and campaign-finance regulation caps the level of exchange. Like any other price ceiling, regulation is both effective and flawed. It suppresses the "price" of political money but inherently falls victim to some market players' avoidance activities. This price-ceiling analogy, among other things, makes apparent that many proposals forwarded by pro-regulation and deregulation advocates cannot solve the United States' century-old campaign-finance riddle. Instead, attention should turn to shaping market forces through expanding the political money supply. Political donation incentive programs in Germany and Canada provide attractive supply-side models for reform in the United States.

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I. INTRODUCTION

Few Americans give money to candidates, parties, and political action committees (PACs).[1] Many worry that this small class of campaign contributors distorts public policy by exercising undue influence over government officials' actions.[2] Surging campaign costs

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1. Only 0.35% of the voting-age public in the United States gave a "reportable" contribution to a federal candidate, party, or political action committee during the 2006 election cycle. Ctr. for Responsive Politics, The Big Picture: Donor Demographics (2006 Cycle), http://www.opensecrets.org/bigpicture/donordemographics.asp?cycle=2006 (last visited Mar. 21, 2008). Only 0.5% gave a "reportable" contribution in the 2004 election cycle. Ctr. for Responsive Politics, The Big Picture: Donor Demographics (2004 Cycle), http://www.opensecrets.org/bigpicture/donordemographics.asp?cycle=2004 (last visited Mar. 21, 2008). The Federal Election Commission only records the name of contributors who give $200 or more.

2. *See, e.g.*, MARK MELLMAN & RICHARD WIRTHLIN, RESEARCH FINDINGS OF A TELEPHONE STUDY AMONG 1300 ADULT AMERICANS, at 29 (2002), *available at*

guarantee that their influence will only increase.[3] Regulation and deregulation advocates pitch their respective approaches as the solution to this perceived campaign-finance problem.[4]

One thing upon which advocates and opponents of campaign-finance regulation can agree is that political campaign contributors have found creative ways to resist efforts at reform.[5] The battle to regulate political contributions in the United States that began with the 1907 Tillman Act still rages today.[6] Over the last century, Congress has repeatedly enacted limits, prohibitions, and public disclosure requirements to stem the flow of money and access between federal candidates and powerful interests such as corporations,[7] labor unions,[8] and wealthy individuals.[9] The U.S.

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http://www.campaignlegalcenter.org/attachments/84.pdf (showing that 71% of survey respondents believe members of Congress favor large-dollar contributors over constituents). *See also* Michael Bailey, *The Two Sides of Money in Politics: A Synthesis and Framework*, 3 ELECTION L.J. 653, 653 (2004) (remarking that "[m]oney can distort policy."); Bob Herbert, Op-Ed., *The Donor Class*, N.Y. TIMES, July 19, 1998, at 4.15 ("I doubt that many people are aware of just how elite and homogenous the donor class [to political campaigns] is. It's a tiny group—just one-quarter of 1% of the population—and it is not representative of the rest of the nation.").

3. *See also* Press Release, Fed. Election Comm'n, 2008 Congressional Candidates Raise $239 Million in First Half of 2007 (Aug. 22, 2007), *available at* http://www.fec.gov/press/press2007/20070814candidate/20070822can.shtml.

> Fundraising totals for the 59 individual Senate campaigns in 2007 are similar to the same period in 2005, when receipts totaled $84.8 million. In 2001, when this same group of 33 Senate seats was last up for election, 56 candidates raised $43 million during the first six months of that year. . . . Campaign finance reports filed by House candidates for the period January 1 through June 30, 2007, show 427 House incumbents reporting receipts of $135.5 million, a $22.3 million (or 16.3%) increase from the same period in 2005. Individuals contributed $65.1 million to House incumbents, while PAC contributions totaled $65.6 million, in the first half of 2007.

4. *Compare* Trevor Potter, *McCain-Feingold: A Good Start*, WASH. POST, June 23, 2006, at A25 (advocating regulation), *with* Bradley A. Smith, *A Moderate, Modern Campaign Finance Reform Agenda*, 12 NEXUS 3 (2007) (supporting deregulation).

5. *See* Daniel R. Ortiz, *Water, Water Everywhere*, 77 TEX. L. REV. 1739, 1742–43 (1999) (discussing circumvention of contribution limits); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1400–07 (1994) (acknowledging that limiting individual contributions shifts resources to PACs and limiting hard money encourages a shift to soft money). *See generally* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1707 (1999) ("[P]olitical money—that is, the money that individuals and groups wish to spend on persuading voters, candidates, or public officials to support their interests—is a moving target.").

6. Tillman Act, Pub. L. No. 59-36, 34 Stat. 864 (1907). The Tillman Act was the first legislation that took aim at contributions to candidates. Other campaign finance legislation, the 1868 Naval Appropriations Act and the Pendleton Civil Service Act of 1883, pre-date the Tillman Act but were largely aimed at banning candidates from soliciting contributions from classes of federal employees.

7. 2 U.S.C. § 441b(a) (2000).

8. *Id.* § 441b(a).

9. *Id.* § 441a(a)(1)–(3).

Supreme Court upheld Congress's latest such attempt, the Bipartisan Campaign Reform Act,[10] but ominously predicted that "[m]oney, like water, will always find an outlet."[11] The Supreme Court summarized a major argument against campaign-finance regulation that brings into question the rationale behind past and future reform. If money is "hydraulic"[12] in the sense that regulation merely causes it to seep into unregulated areas further from the public's reach, then campaign-finance laws may harm more than help the quest for greater democratization of the U.S. political process.[13]

This Note examines political money's hydraulic qualities and evaluates campaign-finance regulation's utility—rather than its constitutionality—in light of those hydraulic qualities. Part II of this Note explores political money's hydraulic traits and reviews the history of American campaign-finance regulation through the lens of economics. Part III describes theoretical approaches to improving American campaign-finance regulation's efficacy. Part IV looks at German and Canadian political donation incentive programs as attractive real-world models for reform in the United States. Finally, Part V distills features from German and Canadian donation-incentive programs that can help the United States expand the political donor base and dilute the current contributing class's influence.

II. CAMPAIGN FINANCE THROUGH AN ECONOMIC LENS

This Part explains how basic economic principles apply to financial support for federal candidates' political efforts. Specifically, it describes campaign finance as a market transaction, contrasts this Note's "market" view of campaign-finance regulation with past theories, and justifies this Note's perspective. It also reviews the modern history of campaign-finance legislation from this Note's economic standpoint.

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10. Bipartisan Campaign Reform Act of 2002 (BCRA) (McCain-Feingold Campaign Finance Reform Act), Pub. L. No. 107-155, 116 Stat. 81 (2002).

11. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 224 (2003).

12. Hydraulic is used throughout this Note to refer to money as it "relat[es] to water or other liquid in motion" rather than money being "operated, moved, or effected by means of water." MERRIAM-WEBSTER ONLINE DICTIONARY (2007), http://www.merriam-webster.com/dictionary/hydraulic (last visited Mar. 8, 2008).

13. Issacharoff & Karlan, *supra* note 5, at 1707 (arguing that campaign-finance regulation, "[f]ar from making politics more accountable to democratic control . . . may make it less so").

A. *Economic Theory and Financial Support for Campaigns*

1. Supply, Demand, and Market Equilibrium in Campaign-Finance Markets

Campaigns are financed through market transactions.[14] The currency traded is access. Access is the opportunity to influence a decision-maker, or prospective decision-maker—a federal candidate.[15] Real life accounts suggest that individuals and entities contribute to gain access to federal candidates.[16] Access appears to motivate those who contribute to unopposed candidates,[17] to opposing candidates,[18] or to election winners with campaign debt because other donative interests are greatly diminished in these contexts.[19] It is also true

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14. Justin A. Nelson, *The Supply and Demand of Campaign Finance Reform*, 100 COLUM. L. REV. 524, 527 (2000).

15. *See* Kenneth C. Smurzynski, Note, *Modeling Campaign Contributions: The Market for Access and Its Implications for Regulation*, 80 GEO. L.J. 1891, 1897 (1992) (defining "access" as "the opportunity to present information to [a] decision-maker"); *see also* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 51 (Harvard Univ. Press 1971) (describing the potential of "selective incentives" to motivate participation).

16. *See, e.g.*, Andy Lenderman, *Wilson, Madrid Go Live*, NEW MEXICAN (Santa Fe), Oct. 25, 2006, at A1 (stating that Congresswoman Heather Wilson gives contributors "access to let [her] know about what their concerns are"); Edward Walsh, *Tamraz Defends Political Donations: Access to Top Officials Was "Only Reason," Pipeline Promoter Testifies*, WASH. POST, Sept. 19, 1997, at A.01 (quoting financier Roger Tamraz as saying that access to White House officials was the "only reason" he contributed $300,000 and "next time I'll give $600,000"); Juliet Eilperin, *Democrats Court Business Owners: Party Seeks Increase in Contributions*, WASH. POST, June 15, 2003, at A.04 (quoting a business leader's description of her dealings with a Democratic member of Congress: "You can go to [him] with a problem, a request, asking with a hand out, and [he] will be more than willing to help you.").

17. *See* KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 231–33 (1986) (showing that unopposed candidates received an average of $49,100 from PACs, while candidates generally averaged $44,200 in 1980 House elections).

18. In *McConnell*, the Court said that, before the Bipartisan Campaign Reform Act, "the largest corporate donors often made substantial contributions to both parties. Such practices corroborate evidence indicating that many corporate contributions were motivated by a desire for access to candidates and a fear of being placed at a disadvantage in the legislative process relative to other contributors, rather than by ideological support for the candidates and parties." McConnell v. Fed. Election Comm'n, 540 U.S. 93, 124–25 (2003). *See, e.g.*, Alex Knott & Agustín Armendariz, *Millionaires Raising Millions: Bush and Kerry Have New Major Donors in Common*, Sept. 7, 2004, http://portland.indymedia.org/en/2004/09/298259.shtml (last visited Mar. 8, 2008) (reporting that during the 2004 presidential election, donors to Bush and Kerry "look[ed] more similar than ever" and that the campaigns shared four of their ten largest donors); LARRY J. SABATO, PAC POWER: INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES 88–90 (1984) (stating that PACs contributing to opposing parties in a single election is a regular practice); *Politicians for Rent*, ECONOMIST, Feb. 8, 1997, at 23 (remarking that Phillip Morris "makes large contributions to both Republicans and Democrats").

19. Smurzynski, *supra* note 15, at 1895.

that individuals and entities financially support candidates for reasons other than obtaining access, including ideological preference, prestige, and personal relationship.[20] But this Note assumes no other motives than access for analysis purposes because such motives are irrelevant to evaluating and improving the campaign-finance regime. In other words, this Note takes up Oliver Wendell Holmes's suggestion to look at the law only from the perspective of a "bad man."[21] Access-seekers are Holmes's "bad men" not because they are "bad," but because their contributions are more likely to pervert governmental decision-making than those given purely to support broad ideals or show friendship.[22] A campaign-finance regulation scheme should focus on access seekers and deter negative effects caused by their contributions.[23] To effectively evaluate and design an effective regulatory scheme, it is necessary to assume that campaign-finance market participants use *only* access as currency.

Political money—money used for election-related purposes—is the commodity traded for access.[24] (The political money markets' orientation is thus opposite from most markets—political money is the commodity and price is calculated in terms of access, not currency units.) It may be a "gift, subscription, loan . . . , advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."[25] For this Note's purposes, political money is either a "donation" or an "outlay." It is a donation if a federal candidate exercises meaningful control over its use. Donations include, among other things, value transfers that are "contributions"[26] or "coordinated party expenditures"[27] under federal law. Political money is an outlay if a federal candidate does not

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20. *Id.* at 1893; PETER L. FRANCIA ET AL., THE FINANCIERS OF CONGRESSIONAL ELECTIONS 49 (Columbia Univ., 2003)

21. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

22. *See, e.g.*, Bailey, *supra* note 2, at 654 (explaining how contributions affect policy-making).

23. *See* Ethiopis Tafara, Dir., Office of Int'l Affairs, U.S. Sec. & Exch. Comm'n, The Benefits of an Enforcement Division, Address at the 30th Anniversary International Seminar of the Comissão de Valores Mobiliários (Brazilian Sec. Comm'n) (Sept. 5, 2006), *available at* http://www.sec.gov/news/speech/2006/spch090506et.htm (endorsing the view that regulations, in the securities context, should focus on "deter[ring] would-be wrongdoers"); Holmes, *supra* note 21, at 459 (proposing that law is best understood from the perspective of the "bad man" seeking to avoid punishment).

24. *See* Ortiz, *supra* note 5, at 1744–45 (explaining the differences between personal funds and campaign funds). The Federal Election Campaign Act of 1979 and 1989 Ethics Reform Act prohibit candidates and officeholders from using political contributions for personal use. Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, *in* THE NEW CAMPAIGN FINANCE SOURCEBOOK 7, 30 (Anthony Corrado et al. eds., 2005) (discussing the Acts' consequences for personal use of political contributions).

25. 11 C.F.R. § 100.52(a) (2008).

26. *Id.* § 100.52.

27. *Id.* §§ 109.20, 109.30–.34.

exercise meaningful control over its use. Outlays include, among other things, value transfers that are uncoordinated "expenditures,"[28] "independent expenditures,"[29] or "electioneering communications"[30] under federal law.

Donations and outlays are traded in separate markets. Like all markets, the donation and outlay markets are subject to the economic laws of supply and demand.[31] The markets' supply curves represent the quantity of donations or outlays that PACs, businesses, labor unions, individuals, governments,[32] and other entities are willing to supply at a given price in terms of access.[33] The markets' demand curves represent the quantity of donations or outlays that a federal candidate[34] will demand at a given price in terms of access.[35]

A supply-side participant in the donation and outlay markets will try to command a price for its political money that will maximize the access it receives.[36] Conversely, a candidate will endeavor to receive the greatest amount of donations or outlays for each unit of access traded to a political-money supplier.[37] The size of a candidate's access cache is determined by, among other things, the extent of the candidate's decision-making power.[38] The more power a candidate holds, the more access units she can trade in the market. As in other markets, supply and demand compel prices to reach equilibrium—a point that maximizes access for suppliers at a level that candidates are willing to grant.[39] Equilibrium, or market price,

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28. 2 U.S.C. § 431(9)(A) (2000).

29. 11 C.F.R. § 100.16.

30. *Id.* § 100.29.

31. *See* ROBIN PAUL MALLOY, LAW IN A MARKET CONTEXT 153 (2004) (applying concepts of supply and demand to understanding law in the market context).

32. Public money may be a part of these campaign-finance markets. A government is assumed to give political money in return for access granted to the general public.

33. *See* MALLOY, *supra* note 31, at 154 (explaining the supply curve).

34. It is acknowledged that PACs and parties will also at times "demand" political money. For simplicity sake and because corruption concerns are arguably greatest with political contributions to candidates, this Note only considers federal candidates as "demand-side" participants in the campaign finance market.

35. *See* MALLOY, *supra* note 31, at 155 (explaining the demand curve).

36. *See* ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 29 (3d ed. 2000) (discussing the goals and behavior of suppliers in a generic market context).

37. *Id.*

38. Stephen Ansolabehere & James M. Snyder, Jr., *Money and Institutional Power*, 77 TEX. L. REV. 1673, 1673 (1999).

39. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 151 (2003) (describing "menus of opportunities for access to would-be soft-money donors, with increased prices reflecting an increased level of access" before the Bipartisan Campaign Reform Act); *see also* COOTER & ULEN, *supra* note 36, at 29 (discussing market equilibrium in a generic market context); JAMES L. REGENS & RONALD KEITH GADDIE, THE ECONOMIC REALITIES OF POLITICAL REFORM 7 (1995) (describing the exchange of "differential rents" between politicians and various groups by stating that various groups will

is the most efficient level of exchange because quantity supplied equals quantity demanded and suppliers' and candidates' choices are consistent.[40] A shift in the donation or outlay markets' supply or demand curves generates a new market price.[41]

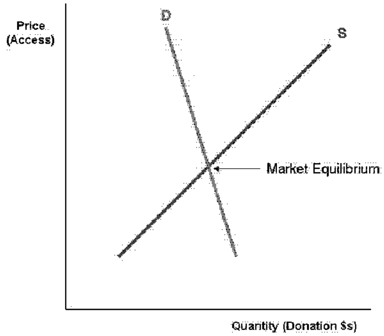

Figure 1: Donation Market

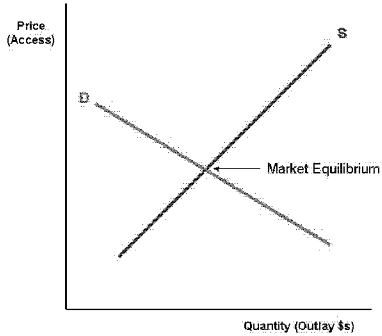

Figure 2: Outlay Market

Outlays are less useful than donations to a candidate because the candidate does not direct outlays to her preferred use.[42] Outlays may damage a candidate's electoral prospects if their use clashes with campaign strategy.[43] Candidates' demand for donations is inelastic (depicted as a steeply sloped curve in Figure 1) because outlays and

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provide differential rents "only to the point that the net advantage obtained through a favorable outcome is not dissipated").

40. COOTER & ULEN, *supra* note 36, at 29.

41. A market's supply and demand curves may shift for a variety of reasons, including the price of other goods, the price of inputs, technological advances, and changes in preferences. MALLOY, *supra* note 31, at 154–55; *see* COOTER & ULEN, *supra* note 36, at 29–30.

42. If a federal candidate were to direct independent expenditure funds to her preferred use, the funds would cease to be "independent" and become in-kind contributions. 11 C.F.R. § 109.20 (2007). *See also* Issacharoff & Karlan, *supra* note 5, at 1720 ("[A]ll spending that is not simple bribery . . . becomes valuable only when it can be "exchanged" for a different form of currency—votes."); Ortiz, *supra* note 5, at 1745 (stating that "[i]ndependent expenditures . . . and issue advocacy are less efficient" at securing access to and influence with political actors than contributions or bribery).

43. Buckley v. Valeo, 424 U.S. 1, 47 (1975). *See, e.g.*, Beth Rucker, *Is "Call Me" Ad by Republicans Racist?: They're Accused of Stirring Up Black-White Fears*, CHI. SUN-TIMES, Oct. 26, 2006, at 32 (describing an allegedly racist ad targeted at Tennessee U.S. Senate candidate Harold Ford, Jr. and efforts by Ford's opponent, Bob Corker, to remove the independent ad from the air); Issacharoff & Karlan, *supra* note 5, at 1714 ("Independent expenditures risk alienating both the supported candidate whose campaign control was compromised and the unsupported candidate, who was visibly not supported."); Lou Cannon, *Single-Issue Ads Driving California Race; House Hopefuls Vie to Be Heard Above Big-Money Media Onslaughts*, WASH. POST, Feb. 21, 1998, at A.04 ("[T]he candidates' home-town messages have been overshadowed by campaigns waged by national single-issue groups.").

other potential substitutes are not suitable.[44] Candidates' demand for outlays, on the other hand, is elastic (depicted as a gently sloped curve in Figure 2) because donations are a fitting substitute.[45] A supply curve's inward shift and resulting price increase should therefore have little effect on the quantity demanded in the donation market, but great effect on the quantity demanded in the outlay market.[46]

2. Is Campaign-Finance Regulation a Restriction on Supply or a Price Ceiling?

This Note is not the first to suggest that campaigns are financed through markets. Numerous newspaper editorials and scholarly articles have employed market terminology to describe campaign finance without delving into an economic analysis.[47] Others use economic theory primarily to assess political phenomena that are unrelated to campaign finance.[48] Still other scholars cite economic theory to evaluate campaign-finance regulation's efficacy.[49] Unlike

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44. *See* COOTER & ULEN, *supra* note 36, at 25 (describing inelasticity of demand in a generic market context); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 688 (1997) (stating simply that "the demand for political money is peculiarly inelastic."); Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1703 (1999) (conducting limited economic analysis on the assumption that demand for political money is inelastic).

45. COOTER & ULEN, *supra* note 36, at 25–26 (describing price elasticity of demand in a generic market context);

46. *Id.* at 25.

47. *See, e.g.*, Victoria S. Shabo, Comment, *"Money, Like Water . . .": Revisiting Equality in Campaign Finance Regulation After the 2004 "Summer of 527s,"* 84 N.C. L. REV. 221, 275 (2005) (describing political discourse as a "marketplace"); Jonathan Cohn, *Taking Offense*, NEW REPUBLIC, Nov. 29, 1999, at 13, 14 (discussing the need to reduce demand for campaign money); Max Frankel, *It's The Demand, Stupid*, N.Y. TIMES MAG., Feb. 2, 1997, at 24, 24 (cautioning against "trying to dry up the supply of political money instead of the demand for it"); Laura Mansnerus, *Who Are the Lawyers Packing All the Clout?*, N.Y. TIMES, Dec. 11, 2005, at 14NJ.1 (describing political contributions from law firms to candidates in terms of "supply and demand"); Norman Ornstein, *Bad Contribution*, NEW REPUBLIC, June 10, 1996, at 14, 16 (expressing the need for government to "make use of rather than contradict market forces" in implementing campaign-finance regulation).

48. *See generally* Thomas Stratmann, *The Market for Congressional Votes: Is Timing of Contributions Everything?*, 41 J.L. & ECON. 85 (1998) (discussing the market relationship between political contributions and congressional votes); Ansolabehere & Snyder, *supra* note 38 (using market models to evaluate contributions received by candidates as a measure of their political power); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 695–99 (1998) (proposing a market-based analysis of state regulation of democratic politics).

49. REGENS & GADDIE, *supra* note 39, at 1–7; Issacharoff & Karlan, *supra* note 5, at 1711; Nelson, *supra* note 14, at 527–32; Smurzynski, *supra* note 15, at 1905; Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 311–12 (1998); Sullivan, *supra* note 44, at 686.

these scholarly articles, this Note views campaign-finance regulation as a price ceiling bolstered by limits, including both caps and outright prohibitions, and disclosure requirements, rather than a supply-side market restriction.

a. Past View: Campaign-Finance Regulation as a Supply-Side Restriction

Articles by Kathleen Sullivan, Samuel Issacharoff, Pamela Karlan, and Justin Nelson assert that limits and similar types of government regulation only "restrict the supply of political money flowing to a candidate."[50] Limits restrict both the "overall amount of money in the system . . . [and] the amount any one person may place into the system."[51] Under this view, limits are supply-side restrictions that cause a market's supply curve to shift inward and price to rise. Because "one form of money is made more 'costly' [due to regulation], . . . candidates [will] look for cheaper sources of funds."[52] In other words, candidates will seek outlays because of the inflated price of donations.[53]

These articles also only tangentially address disclosure requirements' role in the campaign-finance markets. Sullivan, Issacharoff, and Karlan recognize disclosure requirements as market regulation, but fail to place it in the market context.[54] Nelson claims disclosure requirements are "true demand-side" regulations that affect only the demand for political money because "politicians have the most to fear from disclosure."[55] Nelson also argues that disclosure requirements are markedly different from limits in purpose and effect.[56]

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50. Sullivan, *supra* note 49, at 311; *accord* Sullivan, *supra* note 44, at 666 ("The split regime of *Buckley* thus authorizes government to limit the *supply* of political money, but forbids it to limit *demand*."); *see also* Issacharoff & Karlan, *supra* note 5, at 1711 (noting an "unlimited demand for campaign funds . . . but a constricted supply"); Nelson, *supra* note 14, at 527–32 (discussing the limited effectiveness of supply-side regulations and instead calling for demand-side reforms).

51. Nelson, *supra* note 14, at 533.

52. Karlan, *supra* note 44, at 1703.

53. Sullivan, *supra* note 49, at 312; Sullivan, *supra* note 44, at 668.

54. Sullivan, *supra* note 44, at 690 (explaining that "compelled disclosure avoids a regime of absolute laissez-faire."); *see also* Issacharoff & Karlan, *supra* note 5, at 1736 (proposing various measures to enhance the regulatory affect of disclosure requirements).

55. Nelson, *supra* note 14, at 550.

56. *See id.* at 551 (remarking that "disclosure does not possess the loopholes associated with" limits).

b. Proposed View: Campaign-Finance Regulation as a Price Ceiling

This Note proposes the view that campaign-finance regulation places a ceiling on political money's price rather than a restriction on political money's supply.[57] Price ceilings are a common form of market regulation.[58] Rent-control regulations illustrate price ceiling characteristics and provide a useful analogy for price ceilings in the campaign-finance context.

i. Rent-Control Price Ceiling

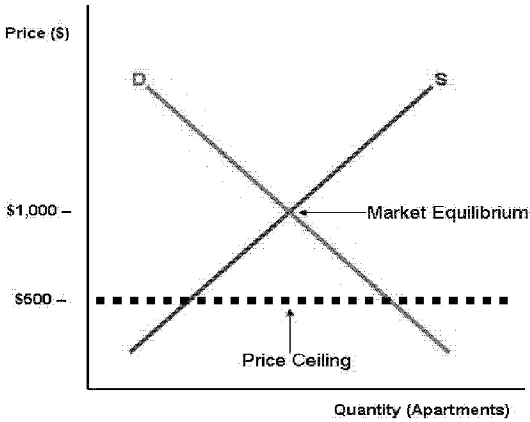

Figure 3: Rent Control Price Ceiling

Rent control is a government-declared maximum on the monthly amount paid for apartment rental.[59] For example, suppose that the government caps the monthly rental price at $500. Suppose again that the monthly rental price for apartments in a regulation-free market would be $1,000. (See Figure 3.) Because the $500 maximum is below the $1,000 free-market equilibrium, a shortage will occur because demand for an apartment at $500 exceeds supply.[60]

57. *See* R. MURRAY HAVENS, JOHN S. HENDERSON & DALE L. CRAMER, ECONOMICS: PRINCIPLES OF INCOME, PRICES, AND GROWTH 365 (1966) (discussing government price controls generally).

58. JOHN BUTTERWORTH, THE THEORY OF PRICE CONTROL AND BLACK MARKETS 1 (1994).

59. *See* BLACK'S LAW DICTIONARY 1324 (8th ed. 1999) (defining "rent control" as "[a] restriction imposed, usu. by municipal legislation, on the maximum rent that a landlord may charge for rental property").

60. BUTTERWORTH, *supra* note 58, at 63.

Shortage induces "circumvention."[61] Suppressing one market's price may also cause "substitution" to another.[62]

(1) Circumvention

Circumvention refers to market participants' efforts to exchange goods and currency at a price that exceeds the government-declared ceiling. In the rent-control context, profit-seeking landlords have obvious incentive to command a price higher than $500. Tenants who value an apartment at an amount over $500 are also motivated to pay more than the price ceiling allows. These supply-side and demand-side market participants will seek an effectively higher rent amount by, for example, agreeing to unnecessary tie-in sales or inflated security and amenity fees.[63] Absent the threat of penalty, landlords and tenants will engage in these circumventive transactions and the "black market" level[64] of exchange will approach the free-market equilibrium despite the price ceiling.[65]

Circumvention's debilitating effect on a rent-control price ceiling may be countered through formal and informal penalties.[66] Formal penalties prevent circumvention through threat of legal sanction, such as civil fines or criminal punishment.[67] Informal penalties deter potential circumventers through threat of social sanction, such as negative publicity or social stigma.[68] A rent-control price ceiling's

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61. *See* HAVENS ET AL., *supra* note 57, at 367 (describing the requirement of government enforcement of its price controls and the tendency of black markets to push prices above controlled levels); BUTTERWORTH, *supra* note 58, at 63 ("If price controls are effective in holding official prices significantly below the equilibrium level there is bound to be excess demand . . . [and] an informal system [of rationing] will develop."). Shortage may also induce non-market solutions like "queueing" on the part of demand-side participants. W. David Montgomery, Robert A. Baron, & Mary K. Weisskopf, *Potential Effects of Proposed Price Gouging Legislation on the Cost and Severity of Gasoline Supply Interruptions*, 3 J. COMPETITION L. & ECON. 357, 392–94 (2007).

62. ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 41 (1st ed. 1988) (stating that when a price ceiling lowers the rental market price below the condominium market price "suppliers prefer to switch their units to condominiums, which they sell, not rent, to occupants.")

63. An example of a "tie-in" sale in this context would be if the landlord required new tenants to also rent extra storage space along with an apartment.

64. For purposes of this Note, the "black market" equilibrium is the sum of the prevailing prices in the legal and "black" markets.

65. COOTER & ULEN, *supra* note 62, at 42 (stating that if "the rate ceiling is not strictly enforced, then consumers and suppliers will find a way to erase the shortage.").

66. *Id.* at 41 ("If the regulation of maximum rental rates is very strict, then this shortage will simply persist until something causes either the demand curve to shift inward or the supply curve to shift outward."); *see also* BUTTERWORTH, *supra* note 58, at 132 ("The use of penalties against a competitive industry obviously reduces supply, and neither the *ex ante* nor the *ex post* efficient points are achievable.").

67. Todd Lochner & Bruce E. Cain, *The Enforcement Blues: Formal and Informal Sanctions for Campaign Finance Violations*, 52 ADMIN. L. REV. 629, 630 (2000).

68. *Id.*

capacity to lower a market's price increases with the severity of its penalties.[69] This is not to say that a penalty-bolstered price ceiling will be free from circumvention. So long as landlords and tenants have sufficient market incentive, some will invent methods to continually evade new government regulations and enforcement methods.[70] This is an inherent flaw in all regulation that aims to restrict and prohibit.[71] Money, like water, will flow around the rent-control price ceiling, and government regulation will be less effective, but not totally ineffective, due to tenants' and landlords' circumventive activities.[72]

Government regulation may further reduce circumvention by supplementing a penalty-backed price ceiling with efforts to reduce demand or expand supply.[73] These efforts affect market participants' incentives. If apartment demand declines, the market equilibrium will shift closer to the $500 price ceiling and reduce circumvention. The government may lessen demand by raising wealthy tenants' taxes so as to leave them with less money for black-market fees or building transit infrastructure that makes suburban housing more attractive than urban rent-controlled apartments.[74] If apartment supply is expanded, the market equilibrium will also shift closer to the $500 price ceiling and reduce circumvention. The government may expand apartment supply by constructing public housing or subsidizing private real estate developers.[75] By imposing a penalty-backed price ceiling and reducing demand and/or expanding supply,

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69. *See* BUTTERWORTH, *supra* note 58, at 6, 48, 187 (discussing historical examples of effective price controls); *cf. id.* at 132 ("The use of penalties against a competitive industry obviously reduces supply, and neither the *ex ante* nor the *ex post* efficient points are achievable.").

70. *See* HAVENS ET AL., *supra* note 57, at 367 (describing private evasion of government-imposed price controls).

71. Doreen McBarnet, *Law, Policy, and Legal Avoidance: Can Law Effectively Implement Egalitarian Policies?*, 15 J.L. & SOC'Y 113, 118 (1988) ("Legal avoidance techniques are routine and permeate the range of law."); *see also* Herbert E. Alexander, *Money and Politics: Rethinking a Conceptual Framework*, *in* COMPARATIVE POLITICAL FINANCE IN THE 1980S, at 9, 13–14 (Herbert E. Alexander ed., 1989) (describing a shift from negative to positive laws governing U.S. campaign finance in the 1970s).

72. *See generally* Issacharoff & Karlan, *supra* note 5, at 1705 (describing the difficulty of governmental regulation of campaign finance because of people's tendency to react against such regulation).

73. *See* BUTTERWORTH, *supra* note 58, at 188 (citing examples of governments manipulating consumption to suppress black markets).

74. The tax would affect the purchasing power of the potential tenants, and the transportation infrastructure is essentially a subsidy that lowers the effective cost of suburban housing. Both actions would result in an inward shift of the demand curve for urban housing. *See* MALLOY, *supra* note 31, at 155 (listing factors that affect demand).

75. Tax subsidies lower the costs of factors of producing housing units, thereby causing an outward shift in the supply curve for urban apartments. *See id.* at 154 (listing factors that affect supply).

the government can slow the flow of circumventive exchange from a surge to a trickle.

(2) Substitution

Market participants may withdraw some funds from a particular market and redeploy them in a different one because of more favorable exchange conditions in the process known as "substitution."[76] Profit-seeking landlords predictably stream their assets toward the highest-priced marketplaces. If the apartment-rental market price drops below the closely related condominium-sale market price, for example, some landlords will rent fewer apartments and ramp-up condominium sales.[77] But if the apartment price does not fall under the condominium price, landlords will not exit the apartment-rental market. A rent-control price ceiling encourages substitution only if it artificially reduces the apartment-rental market price below that of the condominium-sale market.[78] Landlord assets are thus hydraulic because they can move beyond the reach of a rent-control price ceiling by displacing into a different market.

ii. Campaign-Finance Price Ceiling

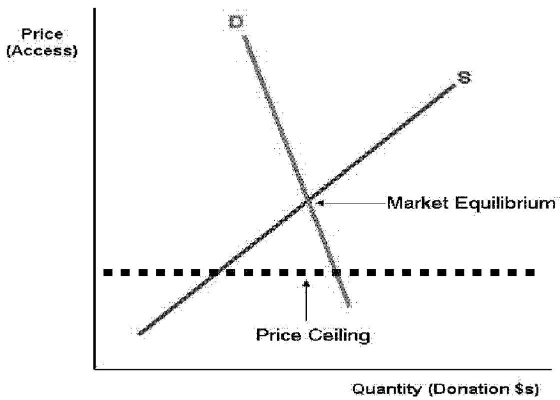

Figure 4: Donation Price Ceiling

Campaign-finance regulation is similar to rent control. A government-declared cap sets the maximum level at which political money and access may be legally exchanged. If this ceiling fixes a price below the free-market equilibrium in the donation market, for example, demand for donations will exceed supply. (See Figure 4.)

76. COOTER & ULEN, *supra* note 36, at 25.
77. COOTER & ULEN, *supra* note 62, at 41.
78. COOTER & ULEN, *supra* note 36, at 27.

This shortage induces circumvention.[79] Suppressing the donation market's price may also cause substitution to the outlay market.

(1) Circumvention in the Political Context

Circumvention refers to suppliers' and candidates' efforts to exchange donations and access at a price that exceeds the government-declared ceiling. Access-seeking donors have an obvious incentive to extract more access than the price ceiling allows.[80] Many candidates are also willing to give a higher amount of access to meet their inelastic demand for donations. Donors and candidates will thus seek to negotiate an effectively higher level of exchange through many methods. A corporation, for example, may evade the price ceiling by hosting a politician's political supporters at an expensive bash after a presidential nominating convention in return for access, such as a few moments of the politician's time.[81] Similarly, an individual might circumvent the ceiling by "bundling"[82] together others' candidate-contribution checks in exchange for a seat at an energy-policy meeting.[83] Absent the threat of penalty, donors and candidates will engage in these circumventive transactions and the black-market level of exchange, despite the declared price ceiling, will loom near the free-market equilibrium.[84]

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79. In addition to circumvention, the campaign-finance price ceilings may cause "queuing" by candidates, meaning that they spend increased time fundraising. *See generally* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1310 (1994) (noting that campaign-finance reforms are often counteracted by "the ingenuity devoted to adaptation and evasion").

80. *See* STACY B. GORDON, CAMPAIGN CONTRIBUTIONS AND LEGISLATIVE VOTING 127 (2005) (concluding that "contributions have an independent influence on votes, if those votes determine the outcome of legislation.").

81. *See, e.g.*, Sam Roberts et al., *Money and Power Cross Paths, and a Good Time Is Had by All*, N.Y. TIMES, Aug. 31, 2004, at A.1 (describing peripheral parties hosted by corporations at the 2004 Republican National Convention). A member of Congress is now generally prohibited by congressional ethics rules from attending these events if they are held in the Member's honor. Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, §§ 305, 542, 121 Stat. 735, 753–54, 767.

82. It is debatable whether "bundling" is "circumvention" given its quasi-sanctioned place in FEC regulations. *See* 11 C.F.R. § 110.6 (2007) (permitting contributions "through an intermediary or conduit"). Even if "bundling" is circumvention, it may be that this is an activity preferable over a large donation from a single contributor because it is based more on "people power" than the single large-dollar donation.

83. *See, e.g.*, Don Van Natta, Jr. & Neela Banerjee, *Top G.O.P Donors in Energy Industry Met Cheney Panel*, N.Y. TIMES, Mar. 1, 2002, at A.1 (reporting that several high-level Republican donors were invited to the White House to help formulate policy involving their industry).

84. COOTER & ULEN, *supra* note 62, at 42 (stating that if "the rate ceiling is not strictly enforced, then consumers and suppliers will find a way to erase the shortage.").

A donation price ceiling more effectively counters circumvention if backed by formal penalties, informal penalties, or both.[85] Formal penalties discourage circumvention by threatening legal sanction, such as civil fines or criminal punishment.[86] Informal penalties dissuade would-be circumventers through threat of social sanction, such as negative publicity or social stigma.[87] A donation price ceiling's ability to depress a market's price increases with the strength of its penalties.[88] But a penalty-backed donation price ceiling will not be circumvention-free. Those undeterred by penalties will invent new circumvention methods faster than the government can counter with reformed rules and enforcement methods.[89] This is an inherent flaw in all rules that restrict and prohibit.[90] Money, like water, will flow around the donation price ceiling, and government regulation of the market will be less effective (but not ineffective) due to donors' and candidates' circumventive activities.[91]

(2) Substitution in the Political Context

Substitution refers to donors and candidates departing the donation market and entering a different market because of more favorable exchange conditions.[92] Access-seeking donors, unsurprisingly, stream their assets toward the highest-priced marketplace. If the donation market price falls below the closely related outlay market price, for example, some donors will give fewer donations and will increase their outlays. But if the donation price does not drop under the outlay price, donors will not withdraw funds from the donation market. A donation ceiling encourages substitution only if it holds the donation market price artificially lower than that of the outlay price. Political money is therefore hydraulic because it can travel beyond the donation price ceiling's influence by moving to the outlay market.

c. Viewing Campaign-Finance Regulation as a Price Ceiling Rather than a Supply-Side Restriction

Campaign-finance regulation should be viewed as a price ceiling rather than a supply-side restriction because this perspective most

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85. *See supra* note 66 and accompanying text.

86. *See supra* note 67 and accompanying text.

87. *See supra* note 68 and accompanying text. This Note uses the term "informal penalty" differently than Lochner and Cain. They mean to cover only publication of campaign finance violations. This Note uses "informal penalty" to cover negative publicity and social stigma that might arise from even legal activities.

88. *See supra* note 69 and accompanying text.

89. *See supra* note 70 and accompanying text.

90. *See supra* note 71 and accompanying text.

91. *See supra* note 72 and accompanying text.

92. COOTER & ULEN, *supra* note 36, at 26–28.

accurately describes the roles of limits and disclosure requirements in the market, reflects the regulatory scheme's purpose, and captures regulation's market effects.

i. Describing Limits' and Disclosure Requirements' Market Roles

The "price-ceiling view" of regulation accurately describes the market roles of limits and disclosure requirements by placing disclosure requirements in a market context and allowing for limits' and disclosure requirements' dual-sided form.

(1) Placing Disclosure Requirements in the Market

Sullivan, Issachroff, and Karlan acknowledge that disclosure is tied to regulation but fail to place it in their market models.[93] Nelson thinks disclosure is different from limits in purpose and effect.[94] A price-ceiling view of regulation properly equates disclosure requirements with limits. Both are regulatory tools aimed at protecting the integrity of the donation and outlay price ceilings.[95] Limits allow public officials to impose formal penalties on money-for-access exchanges above a fixed, pre-determined level.[96] Disclosure, on the other hand, brings informal penalties to bear on price-ceiling circumventers[97] by "plac[ing] the question of undue influence or

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93. *See supra* note 54 and accompanying text.

94. *See supra* note 56 and accompanying text.

95. How can limits and disclosure requirements that reference dollar amounts give effect to a ceiling on price in terms of access? In a perfect world, limits' and disclosure requirements' price metric would be access units. But given the real-world difficulties of measuring access, regulators must use dollars as a rough proxy for access units. While no law prohibits candidates from giving away their entire access cache for minimal amounts of money, their money-maximizing market incentives impose a rational level of exchange and a loose correlation between dollar units and access units emerges. Dollar amounts written in regulations can thus stand-in for access amounts. The fact that the dollar is the explicit price metric should not take away from limits' and disclosure requirements' functional purpose: to protect a ceiling on the price of political money.

96. *See* Lochner & Cain, *supra* note 67, at 630 (discussing formal and informal sanctions for violators of campaign finance laws); *see, e.g.*, Martin Tolchin, *10 Pay Fines for Excessive Campaign Donations*, N.Y. TIMES, Mar. 18, 1993, at A.17 (describing penalties imposed on excessive donors).

97. *See* Stephen Ansolabehere, *The Scope of Corruption: Lessons from Comparative Campaign Finance Disclosure*, 6 ELECTION L.J. 163, 165 (2007) ("[D]isclosure is part of the regulatory system that governs the supply and demand for campaign funds by shaping the incentives facing politicians and donors, thus influencing the total cost of corruption at the macro level."); Sullivan, *supra* note 44, at 688 ("Will political money proliferate indefinitely, along with its accompanying harms? Not necessarily, provided that the identity of contributors is required to be vigorously and frequently disclosed."). Disclosure has other purposes, of course. *See also* Ansolabehere, *supra*, at 181 ("Legislatures and courts use the basic facts about campaign finance in determining the appropriate regulations to impose on the political system. Administrative agencies and courts use detailed accounts to police the political system and punish illegal activities, with the ultimate goal of ferreting out or preventing bribery and other corrupt practices."); Robert F. Bauer, *Not Just a Private*

preferential access in the hands of voters, who, aided by the institutional press, can follow the money and hold representatives accou[n]table for any trails they don't like."[98] Unlike securities-market disclosure, campaign-finance disclosure is not simply a descriptive exercise to inform the public of political money's current price.[99] It allows citizens to levy directly informal penalties against those who trade money and access above a floating threshold that is determined by public opinion on an ad hoc basis.[100] A price-ceiling view appropriately associates disclosure with limits as a price-control method that gives the donation and outlay price ceilings "bite."

(2) Allowing for Limits' and Disclosure Requirements' Dual-Sided Form

The price-ceiling view of campaign-finance regulation, unlike other perspectives, allows for the fact that limits and disclosure requirements apply to both supply-side and demand-side participants in the campaign-finance markets.

Sullivan, Issachroff, Karlan, and Nelson see limits only as "restrict[ions on] the *supply* of political money flowing to a candidate."[101] But Federal Election Commission (FEC) limits apply to both supply and demand in their respective campaign-finance markets.[102] FEC regulations cap donations to candidates from corporations,[103] labor unions,[104] foreign nationals,[105] federal

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Matter: The Purposes of Disclosure in an Expanded Regulatory System, 6 ELECTION L.J. 38, 39 (2007) (stating that disclosure "prepares the ground for further regulation").

98. Sullivan, *supra* note 49, at 326. *See* Issacharoff & Karlan, *supra* note 5, at 1737 (arguing that disclosure regulates campaign contributions "through the normal workings of the political process by competing candidate or parties and by the press").

99. *See* William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U. L. REV. 335, 358 (2000) (asserting that in election law "[t]here is no regime of laissez-faire. It may be that deregulation is good policy, but it cannot be defended as holding the high ground of non-regulatory neutrality.").

100. Sullivan, *supra* note 44, at 689.

> With contributions fully disclosed and their effects on political outcomes subject to monitoring by the free press, voters would be empowered to penalize candidates whose responsiveness to large contributors they deemed excessive. Voters could do retail what campaign finance reform seeks to do wholesale: encourage diversification in the sources of campaign funding.

101. Sullivan, *supra* note 49, at 311 (emphasis added). *See also* Issacharoff & Karlan, *supra* note 5, at 1711 (describing the effect of contribution limits as a "constricted supply"); Nelson, *supra* note 14, at 527–32 (describing the limits of supply-side regulations based on contribution limits and proposing instead demand-side reforms).

102. Ansolabehere, *supra* note 97, at 163 ("Limits on contributions and expenditures aim to restrict both the supply and demand for political donations . . . .").

103. Any corporation "is prohibited from making a contribution . . . in connection with any Federal election." 11 C.F.R. § 114.2(b)(1) (2008).

104. *Id.*

contractors,[106] PACs,[107] political parties,[108] and individuals.[109] Congruently, a federal candidate may not accept a donation that violates applicable limits.[110] Similar ceilings apply to certain outlays made by corporations, labor unions, foreign nationals, and federal contractors.[111] Suppliers and candidates alike face formal penalties—fines negotiated[112] or sought[113] by the FEC—if they make or accept[114] unlawful contributions or independent expenditures.[115] Limits restrict suppliers' dispersal and candidates' demand of political

105. "A foreign national shall not, directly or indirectly, make a contribution or a donation of money or other thing of value, or expressly or impliedly promise to make a contribution or a donation, in connection with any Federal, State, or local election." *Id.* § 110.20(b).

106. It is unlawful "for a Federal contractor . . . to make, either directly or indirectly, any contribution . . . to any political party, committee, or candidate for Federal office or to any person for any political purpose or use." *Id.* § 115.2(a).

107. Multicandidate political action committees may contribute up to $5,000 per election to a particular federal candidate. *Id.* § 110.2(b)(1). Non-Multicandidate political action committees may only contribute up to $2,300 per election to a particular federal candidate. *Id.*

108. A national political party committee may contribute up to $5,000 per election to a particular House or presidential candidate and up to $37,300 per election to a particular Senate candidate. *Id.* §§ 110.2(e), 110.3(b)(1)(i). A state political party committee may contribute up to $5,000 per election to a particular federal candidate. *Id.* § 110.3(b)(1)(ii).

109. An individual may only contribute up to $2,300 per election to a particular federal candidate. *Id.* § 110.1(b)(1). An individual must also abide by a biennial aggregate limit on the total amount of his contributions to all federal candidates and non-candidate entities. *Id.* § 110.5(b).

110. *Id.* § 110.9.

111. Corporations and labor unions are prohibited from making "independent expenditures." *Id.* § 114.2(b)(2). Corporate and union treasury funds are now prohibited from financing "electioneering communications" only to the extent that they are the "functional equivalent of express advocacy"—a standard that is satisfied only if an "ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." Fed. Election Com'n v. Wis. Right to Life, Inc., 127 S.Ct. 2652, 2667 (2007). A foreign national may not "directly or indirectly, make any independent expenditure, or disbursement in connection with any Federal, State, or local election." 11 C.F.R. § 110.20(f). It is unlawful "for a Federal contractor . . . to make, either directly or indirectly, any . . . independent expenditure of money or other thing of value . . . to any person for any political purpose or use." *Id.* § 115.2(a). A candidate is prohibited from "accepting" any of these independent expenditures because if she were to coordinate or exercise control over the disbursement of the independent expenditures, she would receive a prohibited contribution. *Id.* §§ 109.20, 110.21.

112. The Federal Election Commission may, upon "finding . . . probable cause to believe" that a violation of federal campaign regulations occurred, "attempt to reach a tentative conciliation agreement with the [supposed violator]." *Id.* § 111.18(a).

113. Unless negotiated, the Federal Election Commission must seek civil penalties in a federal district court. *Id.* § 111.24 (2007).

114. A candidate may not "accept" an independent expenditure made by a corporation, labor union, federal contractor, or foreign national without accepting a prohibited contribution. *See id.* §§ 109.20, 109.21.

115. Lochner & Cain, *supra* note 67, at 630; *see, e.g.*, Martin Tolchin, *10 Pay Fines for Excessive Contributions*, N.Y. TIMES, Mar. 18, 1993, at A17.

money originating from certain sources or exceeding specified amounts.[116] Limits also implicitly regulate candidates' choices regarding amounts and recipients of access that they dispense in the political money markets.[117] FEC limits therefore control the circumstances under which both suppliers and candidates exchange political money and access. A price ceiling model, which says limits are a price-control tool that applies to suppliers and candidates, reflects limits' dual-sided form better than a supply-side restriction.

Nelson claims that FEC disclosure is a "true demand-side" requirement.[118] But FEC disclosure requirements are not one-sided. Candidates must submit a total of contributions received and an itemized listing of all contributors who gave over $200.[119] Certain suppliers must also reveal their provision of political money to candidates.[120] Suppliers and candidates are subject to the informal sanction of negative publicity that may arise from FEC disclosure.[121] Candidates fear a loss of electoral support that may ultimately result from negative publicity.[122] Suppliers may similarly suffer severe consequences from negative publicity in the form of damaged community reputations and diminished prospects for achieving future political objectives.[123] FEC disclosure requirements are therefore not one-sided as Nelson claims, but affect both candidates and suppliers. A price ceiling view, unlike Nelson's perspective, accounts for disclosure requirements' dual-sided form by placing them in a price-control role that affects candidates and suppliers.

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116. *See, e.g.*, Tolchin, *supra* note 115.

117. *See supra* text accompanying note 95.

118. Nelson, *supra* note 14, at 533.

119. 11 C.F.R. §§ 104.3(a)(4), 100.12 (2008).

120. Political action committees and political parties must report to the FEC their contributions to candidates. *Id.* § 104.3(b)(1)(v) (2007). Individuals, political action committees, and political parties must report independent expenditures and electioneering communications under certain circumstances. *Id.* §§ 104.4, 109.10. Lobbyists must also now disclose the political contributions that they make. Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 203, 121 Stat. 735, 742–44.

121. Lochner & Cain, *supra* note 67, at 630; *see also* Issachroff and Karlan, *supra* note 5, at 1737 (remarking that in a disclosure-only regime, "regulation is accomplished through the normal workings of the political process by competing candidates or parties and by the press").

122. Lochner & Cain, *supra* note 67, at 630.

123. Negative publicity can be damaging. One could imagine that even if Jack Abramoff or Norman Hsu (principal actors in separate widely publicized fundraising scandals of recent memory) were cleared of all legal wrongdoing, it would be difficult to continue their work as lobbyists and fundraisers after their reputations were tarnished.

ii. Reflecting the Regulatory Scheme's Purpose

Many question regulation's value in the campaign-finance markets.[124] After all, political money may serve laudable aims like informing the public of candidate policy positions or increasing voter turnout.[125] Similarly, citizens, even powerful and wealthy ones, must access public officials to ensure that a representative democracy is functioning properly.[126] So why does the federal government regulate the campaign-finance markets? What is worrisome about money and access? As Professor Daniel Ortiz argues, the fear is that, if "left to themselves, various political actors will transform economic power into political power and thereby violate the democratic norm of equal political empowerment."[127] It is not the money or the access themselves, but the *exchange* of economic power and political power in the campaign-finance markets that is potentially problematic.[128] Candidates have a finite amount of access. Even if political-money suppliers only receive a "respectful hearing" instead of a "guaranteed result" from candidates,[129] a candidate who engages in a series of money-access exchanges will distribute her access "disproportionately to those [who give] money."[130] And as the price of political money

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124. *See generally*, BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM (2001).

125. Michael Bailey, *supra* note 2, at 655–56.

> Campaign money is vital to information transmission because voters are unlikely to gather information on their own. . . . Hence, when campaigns gather, package, and disseminate information, the costs of information are being borne by those with the strongest incentives to do so. The more resources they have to do this, the more information voters will get.

ALEXANDER HEARD, THE COSTS OF DEMOCRACY 9 (1960) ("Money at work in politics is not, per se, deplorable. It may simply reflect a citizen's political goals and his preferences among candidates, which are, after all, legitimate end products of a democratically organized politics and society.")

126. Smurzynski, *supra* note 15 at 1899-1903 (discussing the advantages of special interests' access-seeking behavior to the legislative process).

127. Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 895 (1998). It is important to note that "political empowerment" is not the power to influence voters, but rather, the power to influence elected decision-makers.

128. *See* Bailey, *supra* note 2, at 656 ("[E]ven though reformers are right to be concerned that money may skew policy, they also need to recognize that money plays a key role in democratic decision-making because it enables candidates to inform and mobilize voters.").

129. *Excerpts from the First News Conference of Clinton's Second Term*, N.Y. TIMES, Jan. 29, 1997, at B6.

130. Smurzynski, *supra* note 15, at 1905. *See also* Bailey, *supra* note 2, at 653 ("[I]t is possible . . . for contributions to undermine responsiveness even when there is no possibility of quid pro quo arrangements."); Justin M. Sadowsky, *The Transparency Myth: A Conceptual Approach to Corruption and the Impact of Mandatory Disclosure Laws*, 4 CONN. PUB. INT. L.J. 308, 320 (2005) (arguing that even in the absence of "tangible, corruptible benefits," exchanges that "change[ ] the natural distribution of

rises, the distribution of access becomes more lopsided. Since not all people with issue-related interest or expertise supply political money or possess the financial means to do so,[131] money-for-access trades predictably skew governmental decisions in favor of the political-money-supplying minority.[132] This is a poor result in a representative democracy.[133] Campaign-finance regulation's central purpose is therefore to ameliorate these negative market consequences by minimizing the effect of "arrangements where actors with economic power . . . seek to leverage that power into an unfair advantage in . . . the political process."[134]

Sullivan suggests that regulation is aimed at the "harms of political money."[135] But a price ceiling recognizes both the value of political money and the harms that potentially result from *exchanging* money and access. Rather than limiting political money itself, a price ceiling allows some exchange of money and access but prohibits the level of such an exchange above a certain congressionally approved threshold. A price ceiling thus seeks only to minimize the effect of "arrangements where actors with economic power . . . seek to leverage that power into an unfair advantage in . . . the political process" through capping the price of political money.[136] This price-ceiling view most accurately reflects campaign-finance regulation's central purpose.

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access" are problematic). This is not to say that political contributions are not used to influence votes or other official actions by decision-makers. Ansolabehere, *supra* note 97, at 165 ("If a politician is dependent on a small number of very large donations, then he or she might feel beholden to that small number of contributors, even without an explicit *quid pro quo*."); Stratmann, *supra* note 48, at 110 (finding that PACs use campaign contributions "to influence . . . legislative events.").

131. *See* Javier Díaz-Giménez, *Dimensions of Inequality: Facts on the U.S. Distributions of Earnings, Income, and Wealth*, FED. RES. BANK MINNEAPOLIS Q. REV., Spring 1997, at 3, 13 tbl.6 (showing that the wealthiest fifth of American households control more than 79% of the nation's wealth, whereas the bottom two-fifths controls just over 1%).

132. *See* Smurzynski, *supra* note 15, at 1905.

133. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 151 (2003) (showing concern for democracy over the role of money in acquiring "access" even absent evidence that buys results). *See* Ortiz, *supra* note 5, at 1745 n.39 (stating that democracy improves "in direct relation to the amount of influence-trading lost through regulation" regardless of "one's conception of politics. To a civic republican, private interest influence directly undercuts pursuit of the public good. To a pluralist, on the other hand, influence-trading through spending distorts the private interest equilibrium the vote itself achieves.").

134. Karlan, *supra* note 44, at 1702. *See also* FEC v. Massachusetts Citizens for Life, Inc. (MCFL), 479 U.S. 238, 257 (1986); *accord* F.E.C.v.Beaumont, 539 U.S.146, 154 (2003) (stating that special advantages of corporations, like the ability to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace, support the restriction of corporate treasury funds).

135. Sullivan, *supra* note 44, at 690.

136. Karlan, *supra* note 44, at 1703.

iii. Capturing the Effects of Regulation on the Campaign-Finance Markets

The price-ceiling view of regulation correctly captures regulation's effects on the campaign-finance markets because it fairly depicts campaign-finance regulation's prospects for success and properly explains suppliers' and candidates' avoidance of regulation.

(1) Depicting Campaign-Finance Regulation's Prospects for Success

Sullivan, Issachroff, and Karlan assert that regulation imposes "restrict[ions] [on] the supply of political money." [137] A biased image of regulation emerges under this perspective. As government curbs certain donations or outlays, it correspondingly reduces the supply of political money and raises the amount of access required to obtain it.[138] Regulation is thus counterproductive. Stronger regulation aimed at limiting political money from certain sources in the campaign-finance markets only increases the amount of access that the remaining suppliers receive. The Sullivan-Issachroff-Karlan view accounts only for campaign-finance regulation's failures but not for regulation's successes that are seen by its many proponents.

A price-ceiling view of campaign-finance regulation paints a more balanced picture. Unlike a strictly supply-side restriction, a price ceiling may successfully reduce the price of political money. This does not mean that a price ceiling will always be totally efficacious. Indeed, circumvention is inherent when there is a disparity between the ceiling price and the free-market equilibrium.[139] A price ceiling will, however, deter some potential circumventers and lower the market's prevailing price if backed by formal penalties, informal penalties, or both.[140] Regulation is not necessarily a self-defeating action if it operates as a price ceiling. The price-ceiling view of campaign-finance regulation offers a balanced perspective because it accounts for regulation's successes seen by proponents and allows for regulation's failures seen by critics. This suggests that the price-ceiling view is more accurate than other

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137. Sullivan, *supra* note 44, at 311 (emphasis added). *See also* Issachroff & Karlan, *supra* note 5, at 1711.

138. *See id.* (describing the campaign finance market by saying that "As in all markets in which demand runs high but supply is limited, the value of the good rises.").

139. Hugh Rockoff, *Price Controls*, *in* THE CONCISE ENCYCLOPEDIA OF ECONOMICS, http://www.econlib.org/LIBRARY/Enc/PriceControls.html (remarking that "the incentives to evade [price] controls are ever present, and the forms that evasion can take are limitless.")

140. *See* BUTTERWORTH, *supra* note 58, at 48, 187 (discussing historical examples of effective price controls); *id.* at132 ("The use of penalties against a competitive industry obviously reduces supply, and neither the *ex ante* nor the *ex post* efficient points are achievable.").

theories in capturing regulation's influence on the campaign-finance markets.

(2) Explaining Avoidance Activities

Karlan and Sullivan each propose that regulation avoidance by campaign-finance market participants takes the exclusive form of a "substitution effect."[141] They argue: "If one form of money is made more 'costly' . . . then we can expect candidates to look for cheaper sources of funds. We can also expect other political actors who seek to influence political outcomes to change how they spend their money."[142] To describe their argument in this Note's vocabulary, candidates reduce their "peculiarly inelastic demand" for donations and increase demand for other types of money that are "cheaper" at the time, such as outlays.[143] Suppliers follow by exiting the donation market in favor of the lower-priced outlay market.[144] Outlays will thus "rise in direct response to the constriction of" donations[145] as money "seeks the path of least resistance."[146]

This perspective is inconsistent with economic principles and observed avoidance activities by market participants. Political money does not always simply "seek[] the path of least resistance."[147] Candidates will, of course, seek cheaper sources of funds. But if donation demand is "peculiarly inelastic" as Karlan and Sullivan separately assert, only a dramatic increase in the donation price would cause candidates to demand fewer donations in favor of outlays, a less valuable commodity qualitatively.[148] If such a dramatic price increase occurred, suppliers would be reluctant to exit

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141. Karlan, *supra* note 44, at 1703; Sullivan, *supra* note 49, at 312.

142. Karlan, *supra* note 44, at 1703.

143. Sullivan, *supra* note 44, at 688. Though the full quote states that "the demand for *political money* is peculiarly inelastic," Professor Sullivan uses "political money" as a synonym for "contributions," a type of donation for purposes of this Note. *See, e.g.*, *id.* (The split regime of Buckley thus authorizes government to limit the supply of political money but forbids it to limit demand. . . . Contributions, the Court said, implicate lesser speech interests; they merely facilitate or associate the contributor with speech."). *See also* Karlan, *supra* note 44, at 1703 ("If one form of money is made more 'costly' . . . then we can expect candidates to look for cheaper sources of funds. We can also expect other political actors who seek to influence political outcome to change how they spend their money.").

144. Issachroff and Karlan, *supra* note 5, at 1714 (stating that "the reluctance to move to independent expenditures is truly only reluctance. There is ample evidence from states that have significantly restricted contributions that, at the very least financially powerful actors believe that they have no choice but to channel their political contributions through independent expenditures.").

145. *Id.*

146. *Id.* at 1716–17 (quoting WISCONSIN BLUE-RIBBON COMMISSION ON STATE-LOCAL PARTNERSHIPS FOR THE 21ST CENTURY (2001), *available at* http://www.lafollette.wisc.edu/reform/report011001.pdf).

147. *Id.*

148. *See* HAVENS ET AL., *supra* note 57, at 367.

the donation market and enter the outlay market, only to receive comparably lower access returns for the political money that they supply.[149] In other words, it is not apparent that a supplier would enter a new market to acquire less of a qualitatively identical return. Outlays therefore do not necessarily "rise in direct response to the constriction of" donations.[150] Political money follows the incentives of market participants.

Karlan and Sullivan also suggest that regulation avoidance is primarily driven by bargain-seeking candidates.[151] However, considerable anecdotal evidence suggests that regulation avoidance often results from suppliers' efforts[152] or cooperation between suppliers and candidates.[153]

The price-ceiling view offers a more accurate perspective. In a market with a ceiling, suppliers and candidates who believe that the benefits of trading outweigh potential penalties collaborate to exchange political money and access at a higher price than the ceiling allows. Such circumventive collaboration is consistent with suppliers' access-seeking and candidates' money-seeking motives that underlie the campaign-finance markets. Supplier substitution from the donation market to the outlay market is also more plausible under a price ceiling. If the donation price ceiling holds the market price artificially lower than that of the outlay market, access-seeking donors have incentive to leave for the higher-priced market. The price-ceiling view of regulation therefore most correctly describes the avoidance activities of participants in the campaign-finance markets.

B. *Historical Examples of Price Ceilings in Campaign-Finance Regulation*

This Subpart uses the price-ceiling view of campaign-finance regulation to analyze the effects of the Federal Election Campaign

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149. *Id.*

150. Issachroff and Karlan, *supra* note 5, at 1714.

151. Sullivan, *supra* note 44, at 687–88 (arguing that the reason campaign-finance regulation so often produces unintended consequences "is not just that the demand for political money is peculiarly inelastic and thus, like the demand for other addictive substances, likely to create black markets in the shadow of regulation."); Karlan, *supra* note 44, at 1703 ("If one form of money is made more 'costly' . . . then we can expect candidates to look for cheaper sources of funds.").

152. *See, e.g.*, Candice Nelson, *Loose Cannons: Independent Expenditures*, in MONEY, ELECTIONS AND DEMOCRACY—REFORMING CONGRESSIONAL CAMPAIGN FINANCE 57 (Margaret Latus Nugent & John R. Johannes eds., 1990) (describing the efforts of the National Conservative Political Action Committee in defeating five incumbent Democratic U.S. Senators in the 1978 and 1980 elections).

153. *See, e.g.*, Adam Clymer, *The Packwood Case: The Report*, N.Y. TIMES, Sept. 8, 1995, at A1 (reporting that Senator Bob Packwood's diaries showed that he talked to groups like the National Rifle Association about "independent expenditures" they were about to make on his behalf.)

Act (FECA) and the Bipartisan Campaign Reform Act (BCRA) on individuals who supply political money. Other political-money suppliers are not considered. Individuals are "the most important source of funds for federal campaigns" and are central to understanding the evolution of federal campaign-finance regulation.[154] Please note that the incomplete historical discussion below focuses only on events and activities that relate to FECA and BCRA, the two most-recently enacted federal campaign-finance laws.

1. The Federal Election Campaign Act

a. Pre-FECA Regulation and Circumvention

i. The Pre-FECA Regulatory Regime

Campaign-finance regulation had a long history even before FECA's passage in the 1970s. Congressional efforts to regulate the campaign-finance markets began with the 1907 Tillman Act[155] and continued with the 1910 Publicity Act,[156] the 1911 Publicity Act,[157] the 1925 Federal Corrupt Practices Act,[158] the 1939 Hatch Act,[159] the 1940 Hatch Act,[160] the War Labor Disputes Act of 1943,[161] and the Taft-Hartley Act of 1946.[162] These legislative measures built the pre-FECA campaign-finance regulatory regime. As applied to individuals who supplied political money, this regime limited "contributions"[163] to candidates,[164] and required public disclosure of contributions received

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154. *See generally* Clyde Wilcox et. al., *With Limits Raised, Who Will Give More? The Impact of BCRA on Individual Donors, in* LIFE AFTER REFORM 61 (Michael J. Malbin ed., 2003).

155. Tillman Act, Pub. L. No. 59-36, 34 Stat. 864 (1907); *see* Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871, 871 (2004).

156. Publicity Act of 1910, ch. 392, 36 Stat. 822 (1910).

157. Publicity Act of 1911, ch. 33, 37 Stat. 25 (1911).

158. 1925 Federal Corrupt Practices Act, ch. 368, 43 Stat. 1070 (1925) (placed as Title III within an act adjusting the salaries of employees of the Postal Service).

159. Hatch Act of 1939, ch. 410, 53 Stat. 1147 (1939).

160. Hatch Act of 1940, ch. 640, 54 Stat. 767 (1940).

161. War Labor Disputes Act, ch. 144, 57 Stat. 163 (1943).

162. Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947).

163. 2 U.S.C. § 431(8)(A) (2008) (a "contribution" is "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.")

164. Hatch Act of 1940, ch. 640, 54 Stat. 767 (1940) (imposing an annual limit of $5,000 each on individual contributions to federal candidates and to national party committees and of $3 million per calendar year on the total amount that could be received or spent by a party committee operating in two or more states).

by candidates and multi-state political committees.[165] The pre-FECA regulatory regime established a ceiling on the price of donations supplied by individuals and used contribution limits and disclosure requirements to levy penalties against ceiling circumventers.

ii. Circumvention

Most circumvention during this period aimed to evade the donation-market price ceiling. The ceiling fixed an exchange level below the free-market equilibrium. This caused a donation shortage, inducing individual-donors and candidates to engage in circumventive activities. Donors and candidates exceeded the price ceiling by circumventing or ignoring existing regulation.

Individual-donors and candidates circumvented regulation by giving and receiving donations through surrogates. Candidates created and controlled multiple campaign committees that could each receive the maximum legal amount.[166] Wealthy donors funneled money to candidates through family members.[167] Donors also gave unlimited sums to unregulated state parties, local parties, and independent political organizations that forwarded the unrestricted cash to candidates.[168] Donors and candidates "could then technically comply" with existing rules, while the level of money and access exchanged "greatly exceeded [that] intended by the law."[169]

Even if donors and candidates chose not to circumvent regulation, they could largely ignore it because the pre-FECA price ceiling was not backed by formal or informal penalties.[170] Formal penalties were "on the books" for limit violations but were seldom, if ever, imposed.[171] Disclosure was also required, but candidates and committees were not punished for failing to file reports.[172] Similarly, the threat of informal penalty did not reinforce the price ceiling

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165. 1925 Federal Corrupt Practices Act, ch. 368, 43 Stat. 1070 (1925) (requiring all multistate political committees and federal congressional candidates to file quarterly reports that included all contributions of $100 or more).

166. Corrado, *supra* note 24, at 15.

167. *Id.*; *see also* ROBERT E. MUTCH, CAMPAIGNS, COURTS AND CONGRESS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 27-28 (1988); LOUISE OVERACKER, MONEY IN ELECTIONS 249–71 (MacMillan 1932).

168. MUTCH, *supra* note 167, at 37.

169. Corrado, *supra* note 24, at 15.

170. *See id.* (remarking that "an effective regulatory regime was never established" under the pre-FECA regime).

171. *See* Bauer, *supra* note 97, at 40 (stating that the Federal Corrupt Practices Act "was widely disregarded in virtually all of its particulars. Substantive contribution limits were ignored; and so, too, were the legal requirements for timely and accurate reporting.").

172. *See* Ansolabehere, *supra* note 97, at 168 ("By the 1950s, prohibitions in the Corrupt Practices Act against corporate contributions had been extended to labor unions and other organizations. However, there was growing evidence that the legislative reporting system was inadequate. Only about half of all House members filed a report with the clerk.").

because of the disclosure program's structure. Public access to and publication of disclosure reports was not required.[173] Accessing disclosure reports "through the clerk of the House or secretary of the Senate was difficult, and reports were usually maintained for only two years and then destroyed."[174] These conditions made negative publicity and other informal penalties unlikely to result from federal disclosure.

Due to the lack of formal and informal penalties for violators, many parts of the pre-FECA regime were almost universally disregarded and the black-market level of exchange approached the free-market equilibrium in spite of the price ceiling on donations supplied by individuals.[175] This, coupled with increased demand due to skyrocketing campaign costs, meant that the price of donations rose significantly.[176] Political money proved hydraulic in the pre-FECA era, simply surging past the modest regulatory obstacles that obstructed its path.

b. Reinvigorating and Creating Price Ceilings with FECA

Congress responded to the pre-FECA regulatory regime's shortcomings in the donation and outlay markets by passing the Federal Election Campaign Act of 1971.[177] Following amendments in 1974,[178] 1976,[179] and 1980,[180] and the U.S. Supreme Court case *Buckley v. Valeo*, FECA included reformed limits, disclosure requirements, and enforcement mechanisms.[181] FECA also created a new public funding system for presidential candidates.

FECA addressed the surrogate-donation problem by imposing more rigorous limits on donations to a broader range of political actors.[182] It lowered or added limits on donations from individuals to

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173. Corrado, *supra* note 24, at 15.

174. *Id.*

175. *Id.*

176. *See, e.g.*, HERBERT E. ALEXANDER, FINANCING THE 1972 ELECTION 78, 80 (1976) (estimating that total campaign spending rose from $300 million in 1968 to $425 million in 1972, with a significant increase in presidential general election spending from $44.2 million in 1968 to almost $104 million in 1972).

177. Federal Election Campaign Act of 1971, Pub. L. 92-225, 86 Stat. 3 (1972).

178. Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 88 Stat. 1263 (1974)

179. Federal Elections Campaign Act Amendments of 1976, Pub. L. 94-283, 90 Stat. 475 (1976).

180. Federal Election Campaign Act Amendments of 1979, Pub. L. 96-187, 93 Stat. 1339 (1980).

181. Buckley v. Valeo, 424 U.S. 1 (1986).

182. *See* Debra Burke, *Twenty Years After the Federal Election Campaign Act Amendment of 1974: Look Who's Running Now*, 99 DICK. L. REV. 357, 363–64 (1995) (describing the provisions of the 1974 FECA); Corrado, *supra* note 24, at 28 (remarking that the law "folded party contributions into the scheme of contribution limits so that

candidates,[183] PACs,[184] and national party committees[185] and on donations from PACs to candidates.[186] It also stipulated that all committees created by a particular candidate would be treated as a single committee for limit purposes.[187] These measures limited individual-donors' and candidates' ability to circumvent regulation.

Disclosure requirements were strengthened by FECA. Political committees, including candidate committees, were required to file quarterly, pre-election, and post-election reports.[188] Individuals who financed communications that "expressly advocate[d] the election or defeat of a clearly identified candidate" were also required to disclose their outlays.[189]

FECA more effectively harnessed limits and disclosure requirements to penalize circumventers of the donation price ceiling. It created the FEC and "empowered [it] to receive all campaign reports, promulgate rules and regulations, . . . conduct audits and investigations, subpoena witnesses and information, and seek civil injunctions to ensure compliance with the law."[190] Also significant, FECA required public access to and prompt publication of all reports.[191] Suppliers and candidates could no longer ignore campaign-finance regulation without risk of formal and informal penalties.

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individuals could not circumvent the [limits on contributions to candidates] by giving money to the parties")

183. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (The FECA of 1974 added restrictions on other sources of funding. An individual was allowed to contribute no more than $1,000 per candidate in any primary, run-off, or general election. An individual also was barred from giving more than $25,000 in annual aggregate contributions to all federal candidates or political committees).

184. Ceilings were placed on the amount that an individual could give to a PAC at up to $5,000 per year.

185. Federal Election Campaign Act Amendments of 1976, Pub L. 94-283 (1976) (setting the national party committee limit at $20,000 per year).

186. Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263 (Donations by political committees—in particular the political action committees that the law sanctioned for use by labor unions and other groups—were limited to $5,000 per election for each candidate, with no aggregate limit on a PAC's total contributions to all candidates).

187. 2 U.S.C. § 441a(a)(7) (2008).

188. Federal Election Campaign Act Amendments of 1976 § 104(a).

189. *Id.* § 104(c).

190. Corrado, *supra* note 24, at 32.

191. Federal Election Campaign Act Amendments of 1976 § 209(a)(1); *see* MICHAEL J. MALBIN & THOMAS L. GAIS, THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES 36 (Rockefeller Institute 1998) (stating that disclosure requirements are effective if "[m]ost candidates and political organizations report what they do accurately," "reports in fact comprise most of the activities and relationships of importance to voters," "reports are available in a useful format, and at an accessible location," "people read and interpret . . . reports and then make useful information available in a timely way to voters," and "[v]oters are able and willing to use the information as a basis for making an election decision.").

FECA's public-funding system for presidential candidates is also notable. The system, which still exists today, gives public dollars to presidential hopefuls in the form of optional matching subsidies for the primary election campaign and full financing for the general election campaign.[192] The funding system expanded donation supply, albeit modestly, using public money.

FECA's reforms decreased the market prices of donations and outlays supplied by individuals. FECA's presidential public funding system modestly expanded donation supply. The donation price ceiling was reinvigorated because of limits, disclosure requirements, and enforcement mechanisms that deterred many circumventive transactions prevalent before FECA. An outlay price ceiling was established with new disclosure requirements to protect its integrity. FECA thus lowered the level at which individuals and candidates exchanged political money and access in the campaign-finance markets.

c. Post-FECA Circumvention and Substitution

Despite its successes, FECA's regulatory dam did not hold forever. The increasing costs of modern campaigning caused donation and outlay demand to rise. Growing disparity between the donation and outlay markets' ceiling prices and free-market equilibriums induced individual-suppliers and candidates to engage in circumvention. In addition, price suppression caused substitution.

i. Circumvention

After FECA, individual-suppliers and candidates continued to circumvent the donation and outlay price ceilings. Suppliers had incentives to extract more access than the price ceiling allowed. Many candidates were also willing to pay a higher amount of access to receive political money. Suppliers and candidates circumvented price ceilings during the late 1980s and 1990s largely through "soft money" and "issue advertisement" transactions.

These circumventive transactions' first step was a supplier marshaling unregulated political money—also known as soft money. Often, federal candidates requested the transfer of soft money from suppliers to political party committees.[193] Following FECA, a combination of FEC advisory opinions[194] and FEC acquiescence led to the "aggressive exploitation" of fundraising exemptions, like the "exemption for party-related grassroots and party-building

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192. *See generally* 11 C.F.R. §§ 9001.1–9039.3 (2008).

193. Anthony Corrado, *Party Soft Money*, *in* CAMPAIGN FINANCE REFORM: A SOURCEBOOK 167 (Anthony Corrado et al. eds., 1997).

194. *See, e.g.*, Fed. Election Comm'n Advisory Opinions 1978-10, 1978-50, 1979-17, 1982-5, *available at* http://saos.nictusa.com/saos/searchao.

activities."[195] These exemptions allowed individuals to give and political parties to accept unlimited amounts of political money.[196] They were used with increasing frequency to raise ever-larger amounts of political money.[197]

The second step in these circumventive transactions was using soft money to support federal candidates' campaigns. Soft money mostly bought candidate-specific advertisements.[198] Federal campaign-finance regulation at the time only applied to communications 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,' and 'reject.'"[199] Individual-suppliers and candidates therefore devised communications "that skirted the restriction on express advocacy of election or defeat but nevertheless benefited [a] candidate's campaign."[200] These communications were called "candidate-specific issue advocacy advertisements."[201] They targeted federal candidates and ran shortly before elections, but were not regulated because they did not contain so-called "magic words" of express advocacy, like "elect," "support," "defeat," and "reject."[202]

Individual-suppliers and candidates used soft money, issue advertisement transactions to exchange political money and access at a higher level than was allowed by both campaign-finance markets' price ceilings. Suppliers provided both donations and outlays.[203] Because some suppliers and candidates had sufficient market incentive, they invented a new method to circumvent the price ceilings. Government regulations and enforcement did not counter

195. Corrado, *supra* note 24, at 32.

196. *Id.*

197. Press Release, Fed. Election Comm'n, Party Committees Raise Over $1 Billion in 2001–2002 (Mar. 20, 2003), *available at* http://www.fec.gov/press/press2003/20030320party/20030103party.html. (showing that the national party committees received just over $86 million of this so-called "soft money" in 1992, compared with $496 million during the 2002 election cycle. Not all of this "soft money" was raised from individual-suppliers.)

198. *See generally* Ray La Raja & Elizabeth Jarvis-Shean, *Assessing the Impact of a Ban on Soft Money: Party Soft Money Spending in the 2000 Elections* (Institute of Governmental Studies and Citizens' Research Foundation, Policy Brief, July 6, 2001).

199. Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976).

200. *Id.* at 45.

201. Corrado, *supra* note 154, at 28.

202. *See* CAMPAIGN LEGAL CENTER, CAMPAIGN FINANCE GUIDE 46 (2004), *available at* http://www.campaignfinanceguide.org/guide-46.html.

203. Suppliers and candidates took advantage of weak supplier-candidate coordination rules at the time to allow candidates to exercise meaningful, but not total control over the use of "soft money." *See, e.g.*, David E. Rosenbaum, *White House Guests Differ over Solicitation of Money*, N.Y. TIMES, Sept. 17, 1997, at A26 (describing President Clinton's efforts at soliciting large "soft money" donations to the Democratic Party through White House coffee meetings); Tom Squitieri, *Campaign Fund-Raising Probe Turns Focus on Gore*, USA TODAY, Aug. 28, 1997, at 7A (discussing Vice President Gore's solicitation of "soft money" contributions to the Democratic Party).

this circumvention.[204] Once again, money flowed around FECA's bolstered campaign-finance price ceilings, and market regulation was less effective due to suppliers' and candidates' circumventive activities.[205]

ii. Substitution

Before the soft-money issue-advertisement circumventive transaction gained prominence, market participants reacted to FECA's then strong donation price ceiling by leaving the market. Access-seeking donors predictably streamed their assets toward the highest priced marketplace. FECA's low donation price ceiling encouraged substitution because it artificially depressed the donation market price below that of the outlay market. So some individual-suppliers withdrew some funds from the donation market and redeployed them in the outlay market. An individual named Michael Goland, for example, spent $1.1 million on advertising that expressly advocated the defeat of incumbent Republican Senator Charles Percy during the 1984 election.[206] Political money behaved hydraulically by moving beyond FECA's donation price ceiling and displacing to the then higher priced outlay market.

2. The Bipartisan Campaign Reform Act

a. Reinforcing the Donation and Outlay Price Ceilings with BCRA

For over two decades following the passage of FECA, Congress only tinkered with the campaign-finance regulatory regime. The significant legal changes during this time promoted access to reports over the internet[207] and required most committees organized under section 527 of the Internal Revenue Code to report political activities to the Internal Revenue Service (IRS) that were not otherwise disclosed to the FEC.[208] Both reforms strengthened the price ceilings'

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204. *See* DEMOCRACY 21, NO BARK, NO BITE, NO POINT: THE CASE FOR CLOSING THE FEDERAL ELECTION COMMISSION AND ESTABLISHING A NEW SYSTEM FOR ENFORCING THE NATION'S CAMPAIGN FINANCE LAWS 81–95 (2002), *available at* http://www.democracy21.org/index.asp?Type=B_BASIC&SEC=%7B6F8DBD39-D5E0-4B19-AE2D-84D01754509C%7D.

205. *See generally* Issachroff & Karlan, *supra* note 5, at 1738.

206. Nelson, *supra* note 152, at 47, 50; LISA ROSENBERG, CTR. FOR RESPONSIVE POL., A BAG OF TRICKS: LOOPHOLES IN THE CAMPAIGN FINANCE SYSTEM § 3 (1996), *available at* http://www.opensecrets.org/pubs/law_bagtricks/contents.asp.

207. *See* Treasury and General Government Appropriations Act of 2000, Pub. L. No. 106-58, sec. 639(a), § 304(a), 113 Stat. 430, 476 (amending Federal Election Campaign Act of 1971, 2 U.S.C. § 434(a)) (mandating that the Federal Election Commission "make a designation, statement, report or notification that is filed electronically with the Commission accessible to the public on the Internet").

208. *See* Act of July 1, 2000, Pub. L. No. 106-230, 114 Stat. 477 (amending I.R.C. § 527 (2000)). For an informative discussion of the origins and particulars of the § 527

influence on donations and outlays supplied by individuals, but significant legislation did not arrive until the still-effective BCRA was enacted in 2002.[209]

BCRA addressed post-FECA-era circumventive transactions by banning certain types of soft money and broadening the standard for regulable communications.[210] The soft-money ban generally prohibits national party committees[211] and federal candidates[212] from soliciting, receiving, spending, transferring, or directing any funds that are not subject to federal regulation. After BCRA, more types of communication are regulable. In addition to ads that use "express advocacy" language, regulable communications include "electioneering communications"—"any broadcast, cable, or satellite communication" made 30 days before a primary election or 60 days before a general election that "refers to a clearly identified candidate for Federal office" and targets the clearly identified candidate's electorate.[213] BCRA also imposed new and reformed disclosure requirements on individuals who finance electioneering and express-advocacy communications.[214] The Act prohibited suppliers and candidates from using political parties as "surrogates" and broadened disclosure requirements for communications. BCRA thus reinforced the price ceilings for donations and outlays exchanged between individual-suppliers and candidates.

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disclosure requirements, see Richard Kornylak, *Disclosing the Election-Related Activities of Interest Groups Through § 527 of the Tax Code*, 87 CORNELL L. REV. 230, 241–49 (2001).

209. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C.).

210. *See* Corrado, *supra* note 24, at 39-40 (discussing the ban on soft money, some exceptions, and communications that were newly regulated to strengthen the soft money ban).

211 Bipartisan Campaign Reform Act § 101(a).

212. *Id.*

213. *Id.* § 201(a). Please note that after the U.S. Supreme Court's decision in *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 127 S.Ct. 2652 (2007), corporate and union treasury funds—funds that are outside the scope of this section—are now prohibited from financing "electioneering communications" only to the extent that they are the "functional equivalent of express advocacy"—a standard that is satisfied only if an "ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." Individuals still must disclose spending made for "electioneering communications." 127 S.Ct. at 2667, 2696.

214. Bipartisan Campaign Reform Act § 201(a) (requiring disclosure by any "person" who spends over $10,000 per calendar year on "electioneering communications"); *Id.* § 212(a)(2) (requiring more frequent disclosure from sponsors of "independent expenditure" communications"); *Id.* § 501 (requiring that disclosure reports be made available on the Internet).

b. Circumvention and Substitution after BCRA

Even after BCRA, circumvention and substitution still occurs. But the characteristics of post-BCRA circumvention and substitution suggest that the law has deterred many potential donation-ceiling circumventers.

i. Circumvention

Individual-suppliers' and candidates' circumventive activities continue in the post-BCRA era. Both the donation and outlay ceilings fix prices below the free-market equilibriums of their respective markets. Suppliers still have incentive to extract more access than the price ceiling allows and candidates continue to pay willingly a higher amount of access to receive political money.

In the outlay market, individuals employ surrogate entities to avoid any informal penalty that might result from FEC or IRS disclosure of a particular outlay. Individual-suppliers generally prefer 527 organizations because of advantages relative to other non-profits—"the ability to make elections [a] primary . . . activity[,] [the] absence of the 35% tax on the lesser of their political expenditures or investment income[,] and the exemption of their donations from a steep gift tax."[215] They go to great lengths to circumvent the outlay market's price ceiling, which is backed only by disclosure requirements. Individual-suppliers avoid IRS disclosure rules if their 527 surrogate pays a 35% penalty on the amount not disclosed.[216] They also give to non-profit 501(c)(3), 501(c)(4), 501(c)(5) and 501(c)(6) organizations to avoid FEC and IRS donor-disclosure requirements, despite their other disadvantages relative to 527 entities.[217]

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215. Stephen R. Weissman & Ruth Hassan, *BCRA and the 527 Groups*, *in* THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 79, 97 (Michael J. Malbin ed., 2006) (internal citation omitted). There is some controversy over whether politically oriented 501(c)(4) groups are subject to the gift tax.

216. *See* Press Release, Campaign Legal Center, IRS Must Stop 527s' Evasion of Disclosure Requirements (Aug 4, 2004), http://www.campaignlegalcenter.org/press-1243.html ("If an organization fails to disclose the required information, it becomes subject to a penalty of 35 percent of the amount not disclosed.").

217. *See* Weissman & Hassan, *supra* note 215, at 97 (listing the relative advantages of 527's over other nonprofit entities); Frances R. Hill, *Probing the Limits of Section 527 to Design a New Campaign Finance Vehicle*, 86 TAX NOTES 387, 389 (2000) ("Since one of the main reasons for using section 501(c)(4) structures was to facilitate contributions well in excess of this amount, the gift tax made section 501(c)(4) organizations tax inefficient. The search for an alternative lead [sic] to the creation of the new section 527 organizations."); *see also* Eliza N. Carney, *Rules of the Game: A Risk Worth Taking?*, NAT'L J., May 15, 2006, at 4; Elizabeth Garret & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 309 (2005) ("501(c) nonprofits are increasingly being used by political operatives as flow-through conduits in ballot campaigns, particularly since Congress passed new disclosure rules relating to Section 527 organizations . . . .");

Circumvention allows suppliers and candidates to trade outlays and access at a level that exceeds the ceiling.

Circumvention also continues in the donation market, but not to the extent that it did in the pre-BCRA era. Unlimited donations to political parties, the most common and severe form of circumvention before BCRA, have been eliminated by BCRA's soft-money ban.[218] This suggests that BCRA strengthened the donation-market price ceiling so that it deters more potential circumventers.

ii. Substitution

The majority of notable activity by individual-suppliers after BCRA has been a shift from the supply of donations to the supply of outlays. Individual-suppliers have given more money to outlay surrogates like 527 organizations since BCRA's passage.[219] Critics of BCRA point to substitution by individual-suppliers as evidence of the law's failure.[220] Under a price-ceiling view of regulation, however, this substitution into the outlay market is a sign of BCRA's success in bolstering the donation-market price ceiling. Donors withdrew from the donation market and entered the outlay market because of more favorable exchange conditions. The donation price ceiling encouraged substitution because it successfully reduced the donation-market price below that of the outlay market. Political money's hydraulic movement here is not the result of BCRA's failure, but the consequence of BCRA's donation-market success and outlays' higher price.

Moreover, soft-money donations have not simply displaced into the outlay market. Some ideologically driven individuals have given large sums to outlay projects by 527 and 501(c) organizations after BCRA.[221] But many access-seekers have chosen not to carry their

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Stephen R. Weissman & Kara D. Ryan, *Non-Profit Interest Groups' Election Activities and Federal Campaign Finance Policy* 1 (Campaign Finance Institute, Working Paper, 2006), *available at* http://www.cfinst.org/books_reports/pdf/NonprofitsWorkingPaper.pdf ("[S]ome analysts are concerned that regulation of 527s' contributions would push their donors toward . . . 501(c) 'advocacy' organizations.") (footnote omitted).

218. *See* Anthony Corrado, *Party Finance in the Wake of BCRA: An Overview*, *in* THE ELECTION AFTER REFORM, *supra* note 215, at 19, 26 tbl.2.1 (showing that party soft money has been eliminated since BCRA).

219. *See* Weissman & Hassan, *supra* note 215, at 81 (stating that in 2004, all suppliers, including individual-suppliers, gave $273 million more to 527 organizations than in 2002); Press Release, Campaign Finance Institute, Federal 527s Raise $131 Million, 32% More than in 2002 Election, http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=84 (last visted Mar. 9, 2008) (finding that the amount raised by 527s in 2006 was 32% more than they raised for similar time period in 2002).

220. *See* Glen Justice, *Despite New Financing Rules, Parties Collect Record $1 Billion*, N.Y. TIMES, Oct. 26, 2004, at A22 ("Perhaps the biggest complaint is that outside advocacy groups continue to collect millions in soft money. At least 46 people have contributed $1 million or more to so-called 527 committees . . . .").

221. *See* STEPHEN R. WEISSMAN & KARA D. RYAN, CAMPAIGN FIN. INST., SOFT MONEY IN THE 2006 ELECTION AND THE OUTLOOK FOR 2008: THE CHANGING

political money over to the outlay market. Outlays by 527s in the 2004 presidential elections, for example, "failed to replace $318 million of the $591 million" in political-party soft money raised before BCRA.[222] This trend continued during the 2006 election and is projected to persist in 2008.[223] Some pre-BCRA soft money may have permanently evaporated from campaign-finance markets because many political-money suppliers are unwilling to either circumvent the BCRA-bolstered donation price ceiling or withdraw to the outlay market only to receive a lower access return.[224]

NONPROFITS LANDSCAPE 14 (2007), *available at* http://www.cfinst.org/books_reports/pdf/ NP_SoftMoney_0608.pdf ("Democrat George Soros, Chairman of Soros Fund Management, gave . . . $3,890,000 to 527s; he was also the largest investor in Catalist LLC (amount undisclosed) and one of 100 financing partners in the Democracy Alliance (amount undisclosed). And Republican Carl Lindner, Jr., Chairman of American Financial Group, gave . . . $800,000 to 527s and $479,224 to the 501(c)(4) Common Sense Ohio.").

222. Weissman & Hassan, *supra* note 215, at 81.

223. *See* WEISSMAN & RYAN, *supra* note 221, at 1, 15 (stating both that "527s played a significant role in federal congressional elections during the 2005–06 cycle, raising $117 million and spending $143 million—slightly more than the $114 million and $125 million respectively of the mid-term 2001-02 cycle," and that "the flora and fauna of nonprofit electioneering will be on display in the 2008 election. . . . There is little question that the soft money involved will not approach the approximately $600 million in 2002 political party soft money eliminated by BCRA").

224. *See* Costas Panagopoulos & Daniel Bergan, *Contributions and Contributors in the 2004 Presidential Election Cycle*, 36 PRESIDENTIAL STUD. Q. 155, 161 (2006).

> Many expected that BCRA's soft money prohibition would encourage former soft money donors . . . to direct their contributions to 527 groups. While analysts observe some movement in that direction, the evidence suggests that the vast majority of former soft money donors did not increase their contributions to independent committees organized under section 527 of the tax code. (internal citations omitted).

See also John McCain & Russ Feingold, *Campaign Finance Law is Working*, CINCINNATI POST, June 2, 2004, at A9.

> We knew that some soft money that we banned would flow to outside groups, but we predicted that the bulk of the $500 million given in the last presidential election would not, and so far we have been proven right. The reason is simple. Some ideologically motivated individuals are making large donations to outside groups but corporations and other influence seekers generally are not. A "527" can't deliver a tax break or put a bill on the calendar for floor consideration.

Id.

III. THEORETICAL SOLUTIONS: VIGOROUS ENFORCEMENT AND SUPPLY-SIDE EXPANSION

Even after BCRA, many feel the current campaign-finance system needs more or less regulation.[225] This is a continuation of a campaign-finance debate that has historically centered on restrictions' and prohibitions' desirability.[226] This Part discusses how the price-ceiling view of campaign-finance regulation reorients this debate and points to more promising solutions for the persistent regulation-avoidance problem.

A. *Laws with a "Negative" Character*

Opponents and proponents of campaign-finance regulation have responded predictably after observing new avoidance activities. Opponents typically call for the total or partial repeal of existing campaign-finance regulation.[227] Proponents suggest stricter enforcement or a new round of tighter limits and disclosure requirements.[228] In light of the price-ceiling view of campaign-finance regulation, both proposals seem flawed.

Opponents' calls for reform have gone so far as to suggest the repeal of both limits and disclosure requirements.[229] Completely removing the price ceiling's regulatory tools would allow suppliers and candidates to freely exchange political money and access at the campaign-finance markets' free-market equilibrium.[230] This would eliminate all circumvention and allow the campaign-finance markets to function most efficiently. However, a free-flowing market runs contrary to the interests of a representative democracy. Lifting limits

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225. *See, e.g.*, Potter, *supra* note 4 ("[S]till more changes are needed. . . . McCain-Feingold was a necessary—but not sufficient—start."); Smith, *supra* note 4, at 3 ("It seems to me all but self-evident that one hundred years of regulation, culminating in McCain-Feingold, have failed.").

226. *See* Alexander, *supra* note 71, at 9, 13–14 ("Throughout most of the [history of the United States], federal and state laws relating to political finance were predominantly negative. Their purpose was to prohibit, limit and restrict . . . .").

227. *See, e.g.*, BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 227 (2001) ("Issues pertaining to political campaigns . . . are unlikely to be resolved by piling still more regulations on top of a failed system of campaign finance regulation.").

228. *See, e.g.*, Fred Wertheimer, *Soft Money's Big Comeback*, WASH. POST, Aug. 2, 2002, at A23 (decrying the loopholes in FEC regulations promulgated after BCRA).

229. *Cf.* ALLISON HAYWARD, STRUCK DUMB: THE HISTORY AND CONSEQUENCES OF CAMPAIGN FINANCE REFORM 15, http://www.fed-soc.org/docLib/20070328_StruckDumbExcerpt.pdf (last visited Sept. 29, 2008) (proposing that thresholds for disclosure of information regarding donors to political candidates roughly reflect an inflation-adjusted value of the original itemization threshold, and that the threshold for identifying donors to political parties be even higher).

230. *See generally* MALLOY, *supra* note 31, at 156–57 (explaining the functioning of competitive markets absent government interference).

and disclosure requirements would cause negative externalities—costs imposed on parties other than the suppliers and candidates.[231] Also, simply allowing these markets to function unchecked would result in gross access-distribution inequities. The unlimited and undisclosed exchange of political money and access could prove disastrous to public policy and confidence in government evenhandedness.[232]

Other regulation opponents have called only for the repeal of limits.[233] Discarding limits would supposedly improve regulation's efficacy because "[i]f disclosure is unadorned with the heavy regulatory baggage of limitations, it might be far less likely to produce evasion,"[234] or because inherently, "disclosure does not possess the loopholes associated with [limits]."[235] Yet, abolishing limits to leave only disclosure requirements would render the donation and outlay market price ceilings less effective for two reasons. First, weaker penalties would emasculate price ceilings.[236] With a disclosure-backed price ceiling, penalties are determined by the general public on an ad hoc basis. It brings only negative publicity to bear on price-ceiling circumventers. This makeshift, informal-penalty-only price ceiling would be weaker than the current limit-and-disclosure-backed ceiling, which allows the FEC and the general public to impose both formal and informal penalties for money-access exchanges that exceed a *set* level.[237] A disclosure-

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231. COOTER & ULEN, *supra* note 36, at 40; *see* Nelson, *supra* note 14, at 529–30 ("The corrosive effect that an unregulated market has on democracy necessitates regulation to capture negative externalities that the campaign finance market itself does not take into account.").

232. *See* Smurzynski, *supra* note 15, at 1905–06 (stating that "distortions in the market for access are fairly severe. If the positives of campaign contributions are to outweigh the negatives, the system must be regulated in order to avoid distortions.").

233. *See, e.g.*, Issacharoff & Karlan, *supra* note 5, at 1736 ("Contribution limits have neither reduced the level of campaign expenditures nor limited the influence of money in politics."); Garrett & Smith, *supra* note 217, at 295 (stating that support for disclosure is "fairly widespread," even among "those who opposed contribution and expenditure limits").

234. Issacharoff & Karlan, *supra* note 5, at 1737.

235. Nelson, *supra* note 14, at 551.

236. *See* BUTTERWORTH, *supra* note 58, at 132 ("The use of penalties against a competitive industry obviously reduces supply, and neither the *ex ante* nor the *ex post* efficient points are achievable."); Lochner & Cain, *supra* note 67, at 634 ("[W]ithout a variety of enforcement options it becomes increasingly easy for regulatees to play strategically against agency resource constraints."). *See generally* BUTTERWORTH, *supra* note 58, at 6, 48, 186–87 (discussing historical examples of effective price controls).

237. *See* Bauer, *supra* note 97, at 38–39.

> The reliance on the informational interest of voters assumes wide voter use or interest, neither of which is established. There is something almost quaint about this view of the average citizen's stake in a database described by the Federal Election Commission as 'staggering,' unmanageable for even the

backed price ceiling would therefore exert less control on a market price than would a limit-and-disclosure-backed ceiling.[238] Second, even if disclosure-only and limit-disclosure were equally strong regulatory ceilings, circumvention under a disclosure-backed cap would not be less probable than under a limit-and-disclosure-backed cap.[239] Experience shows that disclosure often allows evasion. After BCRA, for example, individual-suppliers have given to 501(c) entities to avoid disclosure of their outlays that support certain candidates.[240] It is also not clear that the FEC would actually rid itself of heavy regulatory baggage by jettisoning limits. If anything, the FEC carries a heavier burden in administering and enforcing disclosure requirements.[241] And the FEC would be just as likely to struggle with determining reportable transactions as with recognizing contributions.[242] In sum, disclosure-only is less desirable than limit-disclosure because the former would allow a significant price rise without making considerable gains in reducing ceiling circumvention. To the extent that disclosure-only proved ineffective, political money's price would rise to a higher level than under a limit-and-disclosure-

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motivated voter—and which, more generally, is not without its conceptual difficulties.

238. *See* Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1167–69 (2003) (noting the shortcomings of disclosure); Sadowsky, *supra* note 130, at 334 (stating that "disclosure laws are ineffective because the story [they] tell[] will be incomplete.").

239. *See* Issacharoff & Karlan, *supra* note 5, at 1737 (acknowledging that a disclosure-only regime would "leverage the desire to avoid publicity"); *Politicians for Rent*, *supra* note 18, at 23 (stating that European democracies with disclosure-only regimes have "not avoided scandals" because "although [their] disclosure is quite comprehensive . . . ways are always being devised to avoid it: independent spending by 'non-parties' is merely the latest."); Graeme Orr, *Political Disclosure Regulation in Australia: Lackadaisical Law*, 6 ELECTION L.J. 72, 77–78 (2007) (describing regulatory evasion in Australia's disclosure-only campaign finance regulatory regime); Sullivan, *supra* note 44, at 690 (remarking that a disclosure-only regime will still have "unintended consequences").

240. *See* Carney, *supra* note 217, at 4; Garret & Smith, *supra* note 217, at 309 (finding that the use of 501(c) entities as a method to "circumvent" disclosure laws is "a growing phenomenon"); Weissman & Ryan, *supra* note 217, at 22–23 (noting that suppliers use 501(c) entities as "'conduits' that enable them to preserve their anonymity").

241. For 2007, the FEC planned to spend about $21.8 million on "promoting disclosure" and almost $27 million on "obtaining compliance with FECA." FED. ELECTION COMM'N, BUDGET REQUEST CONGRESSIONAL JUSTIFICATION FOR FY 2007, at 12 tbl.7 (Mar. 17, 2006), *available at* http://www.fec.gov/pages/budget/fy2007/fy2007_final_budg_just_0315.pdf. A sizable portion of the "compliance" total was for the audit and administrative fine programs, which are designed to correct and deter incomplete disclosure by reporting entities. *Id.* at 21–22.

242. *See generally* Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265 (2000) (addressing the deficiencies of disclosure laws with regard to 527s and "sham issue advocacy").

backed price ceiling. To the extent that disclosure-only proved effective, market participants would just as likely circumvent a disclosure-backed ceiling as a limit-and-disclosure-backed ceiling.

Alternatively, proponents of campaign-finance regulation typically suggest stricter rules or stepped-up enforcement to reduce avoidance activities. They argue that if additional limits were imposed, if broader disclosure requirements were enacted, or if FEC enforcement were strengthened, then government regulation would control political money.[243] While it is true that a price ceiling suppresses a market's price if backed by meaningful penalty and enforcement mechanisms, the proponents' view ignores underlying economic reality.[244] Political money, like water, will flow around or away from campaign-finance price ceilings, and regulation will be at least partially ineffective due to circumvention and/or substitution.[245] Proponents would respond by claiming that regulation still lowers the aggregate price of political money in the campaign-finance markets.[246] An effective donation price ceiling suppresses the donation market's price in spite of circumvention. And donation-market regulation is worthwhile even when it causes substitution to the outlay market[247] because "[m]oney, like water, may find its own level, [even though] not all forms of money count equally."[248] Candidates are less willing to pay a high amount of access to meet their elastic outlay demand than to meet their inelastic donation demand.[249] Stated differently, political money's hydraulic nature

243. *See, e.g.*, Potter, *supra* note 4.

244. *See* BUTTERWORTH, *supra* note 58, at 188 ("[I]t may be difficult and costly, or impossible, to suppress a black market by purely legal means . . . .").

245. *See generally* Issacharoff & Karlan, *supra* note 5.

> It doesn't take an Einstein to discern a First Law of Political Thermodynamics—the desire for political power cannot be destroyed, but at most, channeled into different forms—nor a Newton to identify a Third Law of Political Motion—every reform effort to constrain political actors produces a corresponding series of reactions by those with power to hold onto it.

Id. at 1705.

246. *See* Sadowsky, *supra* note 130, at 345 ("Contribution limits, although criticized for their ineffectiveness, have had at least limited success.").

247. *See* Ortiz, *supra* note 5, at 1745 (claiming that "[i]ndependent expenditures . . . and issue advocacy are less efficient" at securing access and influence for political actors than contributions or bribery).

248. *Id.*; *cf.* Kang, *supra* note 238, at 1182 ("[W]e ought to evaluate regulatory regimes based on where they will lead money to flow.").

249. *See generally* McCain & Feingold, *supra* note 224.

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may "impl[y] that influence-trading will not cease, [but] regulation can decrease it by forcing it into ever less efficient means."[250] Even if proponents are correct in arguing that regulation is worthwhile, however, circumvention and substitution undermine its effectiveness to a notable degree.

Campaign-finance regulation's opponents and proponents mostly discuss either softening or ratcheting-up rules that have a "negative" character—regulations that aim to restrict, prohibit, or both.[251] The price-ceiling view of regulation highlights the ultimate shortcomings of both approaches. Regardless of whether the limits and disclosure requirements that bolster price ceilings are relaxed or intensified, government regulation will be ineffective to some degree. Negative rules have inherent limitations. Government efforts may further reduce circumvention and substitution by supplementing an effective price ceiling with measures to reduce demand or expand supply.

B. *Theoretical Solutions*

Currently, regulation has focused on limiting the exchange of political money and access between certain suppliers and candidates while doing little, aside from imposing penalties, to shape market participants' underlying motives. To undercut circumvention, the government should influence donations' and outlays' market prices by reducing donation demand, expanding donation supply, or pursuing both strategies. In the paragraphs below, this Note explains donation-supply expansion methods in greater detail because they are better developed than their outlay-market and demand-side counterparts.

1. Reducing Demand

Efforts to reduce political-money demand may either decrease the desirability of political money or diminish the amount of access that candidates possess.

Imposing candidate expenditure limits is a commonly proposed demand-reduction method.[252] Expenditure limits are often misunderstood as directly affecting the campaign-finance markets'

Id.

250. Ortiz, *supra* note 5, at 1745.

251. *See generally* Alexander, *supra* note 71, at 13–14 ("Throughout most of [the history of the U.S.], federal and state laws relating to political finance were predominantly negative. Their purpose was to prohibit, limit and restrict ways of getting, giving and spending."); McBarnet, *supra* note 71 ("Legal avoidance techniques are routine and permeate the range of law.").

252. *See, e.g.*, Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Governmental Interest in Protecting the Time of Candidates and Elected Officials*, 37 LOY. U. CHI. L.J. 669, 716–21 (2006).

demand side.[253] But candidate expenditure limits would not aid donation or outlay market price ceilings, which only concern a candidate's *inflow*. Rather, a candidate-expenditure limit would help cap supply and demand in a market that relates to a candidate's *outflow*—the market for political services. A candidate expenditure limit would reinforce a ceiling on campaign expenses. The ceiling would indirectly decrease demand in the donation and outlay markets by reducing political money's utility. It would, however, result in the same circumvention and substitution that has plagued donation and outlay ceilings. Negative regulations, as mentioned, have inherent shortcomings.[254] Denying campaigns money in this manner may also favor incumbent candidates and decrease political participation.[255] Moreover, the U.S. Supreme Court has twice thwarted past congressional efforts to implement a federal candidate-expenditure limit.[256] Reducing political-money demand indirectly through limiting candidate expenditures does not appear to be a viable option.

A more promising method for reducing demand is diminishing the amount of access that candidates possess. The size of a candidate's access cache corresponds with the extent of her decision-making power.[257] Reforms to congressional rules of procedure such as "earmark" disclosure may therefore reduce the amount of access that a particular candidate possesses.[258] Such an access cut would then reduce demand for political money, just as a drop in income lowers demand for a consumer product. (See Figure 5, below.)

253. *See, e.g.*, Issacharoff & Karlan, *supra* note 5, at 1711–12 (stating that the Supreme Court's *Buckley* opinion has "produced a system in which candidates face an unlimited demand for campaign funds []because expenditures generally cannot be capped[]").

254. *See supra* note 251 and accompanying text.

255. *See* Marshall, *supra* note 99, at 342 (arguing that the 1974 FECA's expenditure limits "caused resources for grass-roots activities in federal campaigns to dry up" because "the most cost-efficient way to garner votes is through broadcast media advertising"); *cf.* Landell v. Sorrell, 406 F.3d 159, 167–74 (2d Cir. 2005) (Walker, Jr., J., dissenting from denial of rehearing en banc).

256. The first effort was struck down in *Newberry v. United States*, 256 U.S. 232 (1921). The latest attempt was ruled unconstitutional in *Buckley v. Valeo* just two years after it took effect. 424 U.S. 1 (1976).

257. *But see* Ansolabehere & Snyder, *supra* note 38, at 1678 ("The total amount of money flowing to politicians is not a reliable measure of power because contributors vary in their motives.").

258. Congress recently enacted new "earmark" disclosure requirements. Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 521, 121 Stat. 735, 760 (enacting new "earmark" disclosure rules for the U.S. Senate); RULES OF THE HOUSE OF REPRESENTATIVES 835, Rule XXI, cl. 6 (2007) (describing U.S. House "earmark" disclosure rules).

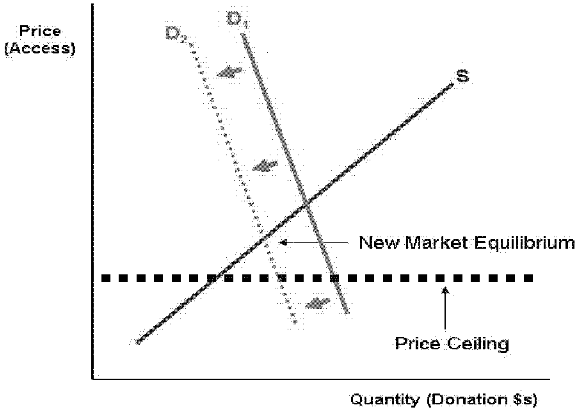

Figure 5: Reducing Demand

2. Expand Supply

Perhaps the best medicine for what ails campaign-finance regulation is a variation on what George H.W. Bush once called "voodoo economics"—a supply-side expansion that reduces political money's price and undermines circumventive activities in an effort to lower the amount of access distributed to political-money suppliers.[259] (See Figure 6, below.) A supply-side solution is most effective if it expands the number of small contributors and brings about a donor pool that is more similar to the general public than it would otherwise be.[260] This would not only lower political money's price, but also make the donor pool a better proxy for the general citizenry, thus mitigating some harms of unequal access distribution that result from campaign-finance market exchanges. Attractive supply-side proposals abound with the most promising plan a tax-incentive program for political donations.

259. *See generally* HERBERT E. ALEXANDER, MONEY IN POLITICS 5 (1972) ("If politicians could otherwise obtain the sums required [for campaigning] . . . groups would have to find other ways of influencing legislation.").

260. Robert G. Boatright & Michael J. Malbin, *Political Contribution Tax Credits and Citizen Participation*, 33 AM. POL. RES. 787, 789 (2005).

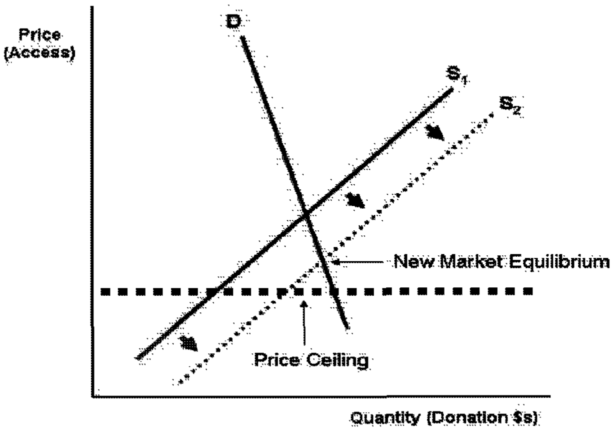

Figure 6: Expanding Supply

Experience suggests that "the structure of a [donation] incentive program plays a significant role in determining its success" in expanding the donation supply and broadening the donor base.[261] Germany and Canada, which have differently structured nationwide donation-incentive programs, may serve as attractive reform models for the United States.

IV. Building on Theory: Contribution Incentive Programs in Foreign Nations

This Part describes and evaluates tax incentive programs' effectiveness in Germany and Canada. These programs aim to both increase political donations' supply and broaden the donor base.

A. *Germany's Tax Deduction*

This Subpart discusses the structure of Germany's tax deduction and evaluates the deduction's historical effectiveness in expanding political donations' supply and broadening the donor base.

261. Thomas Cmar, *Toward a Small Donor Democracy: The Past and Future of Inventive Programs for Small Political Contributions*, 32 FORDHAM URB. L.J. 443, 449 (2005); *see* Boatright & Malbin, *supra* note 260, at 789.

1. Tax Deduction Structure

Germany's political-donation subsidy program includes an income-tax deduction for individuals' political donations.[262] The deduction was created "[i]n order to encourage more . . . contributions" from individuals.[263] Previous versions of the tax deduction were struck down as unconstitutional[264] but were replaced with a constitutionally permissible scheme in 1984.[265] Germany's tax deduction allows individual taxpayers to deduct 50% of their political party donations up to a maximum total of €825.[266] Couples filing jointly may deduct 50% of their donations up to a maximum total of €1,650.[267] Corporations may donate to political parties, but their donations are not tax deductible.[268] Tax deductions are authorized by the *Bundeszentralamtes für Steuern*, the German Federal government's tax agency, after a taxpayer has filed an annual return.[269]

2. Evaluating Germany's Tax Deduction

The German tax deduction program caused "huge increases in small donations to [its] political parties."[270] The structure of Germany's tax deduction has contributed to its success in expanding political donations' supply and inducing new suppliers into the market. The deduction gives taxpayers a potentially large benefit—now, up to €825 (nearly $1,144) or €1,650 (nearly $2,290).[271] Taxpayers are thus motivated to donate to political parties and claim the significant deduction. Germany's flat-rate tax deduction is also simple to calculate. Even inexperienced political donors find the deduction readily understandable and calculable. This simplicity allows the deduction to expand donations' supply and ultimately lower donations' price.

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262. German Embassy, Washington, D.C., Party and Campaign Finance in Germany: An Overview, http://www.germany.info/relaunch/info/archives/background/partyfinance.html (last visited Mar. 8, 2008).

263. Arthur B. Gunlicks, *Campaign and Party Finance in the West German "Party State,"* 50 REV. POLITICS 30, 41 (1988).

264. Issacharoff & Pildes, *supra* note 48, at 695.

265. *See* Gunlicks, *supra* note 263, at 42–44 (discussing the new party finance laws of Dec. 22, 1983).

266. Einkommensteuergesetz [Income Tax Act], Oct. 19, 2002, BGBl. I at 4210, § 34(g) (F.R.G.).

267. *Id.*

268. *Id.*

269. *See generally* Internetauftritt des Bundeszentralamtes für Steuern [Website of the Central Federal Office for Taxes], http://www.bzst.bund.de/index.php (last visited Mar. 8, 2008).

270. *Politicians for Rent*, *supra* note 18, at 23.

271. Einkommensteuergesetz § 34(g).

Despite the success of the German tax deduction in expanding the donation supply and broadening the donor base, implementation of a similar system in the U.S. would require two primary modifications. First, a tax incentive should be available only for candidate donations. Germany gives tax deductions exclusively for donations to political parties. If a donation-incentive program's purpose is to lower the donation market price, the most effective method is to affect the supply of donations to candidates, not parties. Party contributions in the United States do not directly affect the donation-access exchange level because only candidates—due to their decision-making role—innately possess access.[272] A German-style program in the U.S. would therefore more effectively lower the donation price if it was available only for candidate contributions. Second, the incentive should motivate more taxpayers. The "possibility of deducting donations to a political party from taxable income creates an incentive primarily for . . . those with high incomes to make donations."[273] A tax deduction inherently motivates only those with high taxable incomes. In the absence of a tax deduction, individuals with high taxable incomes are already more likely to give political donations than those with lower taxable incomes.[274] To effectively expand donation supply and widen the donor base, a donation-incentive program should appeal to a broader demographic.

B. *Canada's Tax Credit*

This Subpart discusses the structure of Canada's political-donation tax credit and assesses the credit's historical effectiveness in expanding political money's supply.

1. Tax Credit Structure

Canada's public subsidies for electoral activities, which include a donation incentive program, are among the world's most generous.[275]

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272. Parties do, of course, hold sway over candidates. They possess access as well. But, their access is purchased from the candidates and traded on the secondary market to other access-seekers.

273. DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE REPUBLIC OF GERMANY 203 (2d ed. 1997) (translating Bundesverfassungsgericht [BVerwG] [Federal Constitutional Court] June 24, 1958, 8 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 51 (F.R.G.)).

274. *See* Boartright & Malbin, *supra* note 260, at 790 ("19% of the wealthiest 5% of Americans said they made contributions in 2000, compared to only 1% of the bottom 15% of wage earners . . . .").

275. *See generally* Pascale Michaud & Pierre Laferrière, *Economic Analysis of the Funding of Political Parties in Canada*, *in* ISSUES IN PARTY AND ELECTION FINANCE IN CANADA 369 (F. Leslie Seidle ed., 1991) (discussing contribution limits and fund-raising subsidies, including tax exemptions and credits).

In 1974, Canada began offering an income-tax credit to any individual who donated[276] to a political party or candidate.[277] The credit's purpose was to "encourage more Canadians to become actively involved in the political process by contributing to the party or candidate of their choice."[278] The current system gives individual taxpayers credits based on a rising scale that corresponds with the taxpayer's contribution amount.[279] For a contribution of up to C$400, an individual taxpayer receives a 75% credit; for a contribution of C$401 to $750, a credit of C$300 plus 50% of the amount over C$400; for a contribution of over C$750, the lesser of C$650 or C$475 plus 33.33% of the amount over C$750.[280] Tax credits are authorized by the Canada Revenue Agency only after a taxpayer has filed an annual return and furnished a contribution receipt issued by a registered political party or candidate.[281] Tax credits are not available for amounts given to political actors other than parties or candidates.[282]

2. Evaluating Canada's Tax Credit

a. Expanding Supply

Anecdotal and statistical evidence show that Canada's tax credit program has expanded donation supply and increased the number of donors. Before 1974, the political process was predominantly funded by "a few hundred corporations."[283] Today, however, "party officials and academics have generally agreed that the tax credit has 'stimulated contributions by individuals [to parties and candidates] by lowering the net after-tax cost of such contributions.'"[284] Moreover, "tax credits . . . have lessened the amount of money needed

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276. *See* Canada Elections Act, 2000 S.C., ch. 9 (providing the definition of "contribution").

277. Election Expenses Act, 1973–74 S.C., ch. 51 (Can.).

278. Jean-Pierre Kingsley, Chief Electoral Officer of Can., Bill C-24: Presentation to the Standing Committee on Procedure and House Affairs (Apr. 8, 2003), *available at* http://www.elections.ca/content.asp?section=med&document=apr0803&dir=spe&lang=e&textonly=false.

279. Elections Canada On-Line, General Information, Financing of Registered Political Parties—New Rules on January 1, 2004, http://www.elections.ca/content.asp?section=gen&document=ec90532&dir=bkg&lang=e&textonly=false (last visited Mar. 8, 2008).

280. R.S.C., ch. 1 (5th Supp.), § 127(3) (1985).

281. *Id.*

282. *Financing of Registered Political Parties*, *supra* note 279.

283. PETER LORTIE, REFORMING ELECTORAL DEMOCRACY: FINAL REPORT OF THE CANADIAN ROYAL COMMISSION ON ELECTORAL REFORM AND PARTY FINANCING (1991).

284. Lisa Young, *Party, State and Political Competition in Canada: The Cartel Model Reconsidered*, 31 CAN. J. POL. SCI. 339, 353 (1998) (quoting W.T. STANBURY, MONEY IN POLITICS: FINANCING FEDERAL PARTIES AND CANDIDATES IN CANADA 225 (1991)).

from private sources to run a competitive campaign."[285] Although "no comprehensive study of the impact of the political contribution tax credit on propensity to donate in Canada" has ever been conducted, statistical evidence supports these conclusions.[286] A Campaign Finance Institute study showed a 14% drop in the average size of contributions to political parties from 1975 to 1996 and a "strong relationship between increasing use of the small donor tax credit and the decreasing size of an average contribution."[287] The study also revealed a sharp increase in the number of individual donors to political parties.[288] Other data shows that 82% of taxpayers who claim the credit make under C$100,000 annually.[289] Experience indicates that this demographic is far less likely to donate in the absence of a public subsidy.[290] The drop in the average amount contributed to parties, the rise in the number of individual donors, and the large number of low- and middle-income citizens who claim the tax credit all suggest that many who would not otherwise donate are motivated by Canada's political contribution tax credit.

b. Strengths and Weaknesses of the Canadian Tax Credit

The Canadian credit has two main strengths. First, it "provide[s] an incentive of a large enough size that it [has] a significant aggregate impact on election campaigns."[291] The credit can be a significant gain to taxpayers—up to C$650 (about $625).[292] Its significance spurs candidates and political parties to advertise the credit, thus obviating the need for an education program directly funded by public dollars.[293] Second, the credit is more widely

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285. Donald Padget, *Large Contributions to Candidates in the 1988 Federal Election and the Issue of Undue Influence*, *in* ISSUES IN PARTY AND ELECTION FINANCE IN CANADA, *supra* note 275, at 319, 354.

286. Lisa Young, *Regulating Campaign Finance in Canada: Strengths and Weaknesses*, 3 ELECTION L.J. 444, 452 (2004).

287. TASK FORCE ON PRESIDENTIAL NOMINATION FIN., CAMPAIGN FIN. INST., PARTICIPATION, COMPETITION, ENGAGEMENT: HOW TO REVIVE AND IMPROVE PUBLIC FUNDING FOR PRESIDENTIAL NOMINATION POLITICS 82 (2003), *available at* http://www.cfinst.org/president/participation.aspx.

288. *Id.*

289. Young, *supra* note 286, at 452 tbl.4.

290. *See* Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 76 (2004) ("While only 13.4% of American households earned at least $100,000 in 2000, these households gave 85.7% of contributions over $200 collected by presidential candidates." (footnotes omitted)); *see also* Panagopoulos & Bergan, *supra* note 224, at 164 ("Campaign contributors in the 2004 campaign were descriptively unrepresentative of the population as a whole.").

291. Cmar, *supra* note 261, at 490.

292. R.S.C., ch. 1 (5th Supp.), § 127(3) (1985).

293. *See, e.g.*, Conservative Party of Canada, Political Tax Credits, https://secure.conservative.ca/EN/1217 (last visited April 5, 2008); New Democratic

available than a deduction because all taxpayers, not just those with taxes payable in a given year, may claim the credit.[294] These strengths helped expand the donation supply and increase the number of donors.

Canada's tax-credit program also has weaknesses. First, the three-tiered rising scale used to determine the credit's size is more complicated than a flat-rate amount. A simpler credit calculation would likely appeal more to those not accustomed to donating. Second, the credit's rising scale gives back a higher amount to large-dollar donors. The credit's structure thus "reinforces an inequitable pattern of giving to parties and candidates" because it gives greater incentive to large-dollar donors who are already expected to donate more frequently in a subsidy-less campaign-finance system.[295] Third, the political contribution tax credit is the "form of public funding most costly to the public purse."[296] Finally, like Germany, Canada gives tax incentives for contributions to political parties. A donation incentive program can lower the donation market price more effectively by expanding the supply of donations to candidates, not parties.[297] If the United States imported Canada's tax credit, it would want to modify the credit's format to address the above-mentioned concerns.

V. SOLUTION: EXPANDING THE SUPPLY OF POLITICAL MONEY THROUGH A CANDIDATE-DONATION TAX CREDIT PROGRAM

Drawing from the German and Canadian donation-incentive programs, this Part proposes foundational principles for an incentive program that can solve the United States' century-long struggle to regulate political money.

The United States should take lessons from Germany and Canada in crafting a nationwide program that incentivizes donations to candidates and broadens the donor base. Credits, rather than deductions, should be used because credits give greater incentive to a demographic not usually motivated to give political money under the

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Party of Canada, Donation, https://secure.ndp.ca/onetime_e.php (last visited Mar. 9, 2008) (providing a tax credit calculator for potential donors).

294. *See* Burke, *supra* note 182, at 385 (describing the advantages of a tax credit over a tax deduction).

295. Young, *supra* note 286, at 452.

296. *Id.* at 451.

297. As explained in the discussion of Germany's donation-incentive program, *see supra* Part IV.A., only candidates innately possess access because of their decision-making roles. Parties hold access, but their access is obtained first from candidates and officeholders and then either used for political purposes or traded on the secondary market to other access-seekers.

current system.[298] The credit should be a flat-rate, easily calculable amount that does not needlessly intimidate inexperienced donors. Its size should motivate both taxpayers to claim the credit and candidates to publicize the credit. Coupled with the advent of internet campaign donations, this type of credit would allow small-dollar contributors to play a larger role in the future and help eliminate circumventive activities that undermine campaign-finance regulation.

Reformers may look to programs within the United States for ways to transform these general principles into specific proposals. David Rosenberg of the American Enterprise Institute, for example, has put forward a program that would offer a 100% tax credit for donations to federal candidates of up to inflation-adjusted maximums—$200 for individuals or $400 for joint-filing couples.[299] Reformers can also take cues from state donation-incentive programs[300] and a federal political-donation tax credit that was used during the 1970s.[301]

Cost may be a major concern with any new donation-incentive program. The Rosenberg plan, for example, would cost an estimated $774,325,000 each year.[302] Eliminating the now-broken Presidential Election Campaign Fund, which provides primary election matching funds and general election grants to qualified presidential candidates, could partially defray the cost.[303] Further cost-mitigating measures

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298. *See supra* note 291 and accompanying text.

299. DAVID ROSENBERG, BROADENING THE BASE: THE CASE FOR A NEW FEDERAL TAX CREDIT FOR POLITICAL CONTRIBUTIONS 16 (2002), *available at* http://www.aei.org/docLib/20030425_rosenberg.pdf. For alternative supply-side proposals, see BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002); TASK FORCE ON PRESIDENTIAL NOMINATION FIN., CAMPAIGN FIN. INST., *supra* note 287, at 87–88; Cmar, *supra* note 261, at 474–505; *Credits Due*, ROLL CALL, Apr. 21, 2003 (describing a tax credit measure introduced by Sens. Byron Dorgan (D-ND) and John Warner (R-VA)); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996); Thomas E. Petri, *Q: Is a Tax Credit for Individual Donations to National Political Campaigns a Good Idea?*, INSIGHT ON THE NEWS, Aug. 19, 2002, at 40 (describing the CIVIC Act, a bill introduced in Congress in 2002).

300. Ohio, for example, offers a $50 tax credit for contributions to candidates running for state office. Boatright & Malbin, *supra* note 260, at 788.

301. The U.S. previously had a federal income tax credit or tax deduction for small contributions to political candidates at all levels of government and to some political committees, including those associated with national party organizations from 1971 to 1978. Individuals could claim an income tax credit of up to a maximum of $12.50 on a single return or $25 on a joint return. A political contributor could claim a tax deduction for the full amount of any contributions, up to a maximum of $50 on an individual return and $100 on a joint return. Corrado, *supra* note 24, at 25–26. For an illuminating discussion of the federal tax credit, see Cmar, *supra* note 261, at 451–60.

302. ROSENBERG, *supra* note 299, at 66.

303. The Presidential Election Campaign Fund has a current balance of $162,941,492. Press Release, Fed. Election Comm'n, McCain First Presidential Candidate Declared Eligible for Primary Matching Funds in 2008 Race (Aug. 28, 2007),

should be explored.[304] Despite the potential costs, benefits like a lower market price for donations, reduced circumvention of the campaign-finance price ceilings, and greater involvement of individuals in the political process are worthy of taxpayers' dollars. The proposed credit is "a small investment in democracy that could yield substantial dividends in increasing the voice of average Americans."[305]

VI. CONCLUSION

Campaign finance is of vast importance. The exchange of political power and economic power in the campaign-finance markets can effectively transform a *de jure* representative democracy—government that formally represents the voting public—into a *de facto* aristocracy—government that actually represents the elite suppliers of political money. But campaign-finance markets need not be markets of corruption.[306] Government intervention can "prevent illegitimate tying arrangements where actors with economic power . . . seek to leverage that power into an unfair advantage in . . . the political process."[307]

After a century's worth of effort, the first step in controlling the flow of money and access between federal candidates and powerful interests is understanding that campaign-finance regulation is akin to a price ceiling. Under this perspective, political money's hydraulic qualities inform rather than devastate regulation advocates' cause. Past regulatory efforts have both problems and potential. While market forces will indeed cause "water-like" avoidance of the price ceiling in the form of circumvention and substitution, this does not mean that regulation is worthless. A campaign-finance ceiling can successfully suppress a market's price if backed by sufficient formal

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available at http://www.fec.gov/press/press2007/20080828mccain.shtml. The Fund receives over $50 million from the tax check-off program every year. FISCAL MGMT. SERV., U.S. DEP'T OF TREASURY, 2006 COMBINED STATEMENT OF RECEIPTS, OUTLAYS, AND BALANCES 15 tbl. A (2006), *available at* http://fms.treas.gov/annualreport/cs2006/index.html.

304. The Rosenberg plan, for example, would only allow couples who earn $100,000 and under to participate in the program. *See* ROSENBERG, *supra* note 299, at 16.

305. Cmar, *supra* note 261, at 504; *see also* Kenneth A. Gross, *Reinstate Tax Deductions for Political Contributions*, THE HILL, Apr. 15, 1998 (asserting that tax credits are "a modest tax provision but . . . would have the beneficial effect of reinvigorating ordinary taxpayer participation in the election process").

306. *See* Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127, 131 (1997) (arguing that quid pro quo, monetary influence, and distortion have been "jumbled together in the corpus of campaign finance law").

307. Karlan, *supra* note 44, at 1702.

and informal penalties. And substitution from donations to outlays may reduce the aggregate price of access in the campaign-finance markets. Still, circumvention and substitution will remain as long as government intervention takes on a solely negative character. Government can cap the political money-access exchange only if it supplements its price ceilings with market forces that undermine circumvention and substitution. Using methods adapted from German and Canadian donation incentive programs, the federal government can ensure that political money flows through preferred channels. The U.S. Supreme Court's phrase that "[m]oney, like water, will always find an outlet" need not be a prediction of impending doom for campaign-finance regulation.[308] If viewed from a price-ceiling perspective, appreciating money's hydraulic qualities can be the key to solving America's campaign-finance riddles of the past and future.

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308. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 224 (2003).

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