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Shame on You: Campaign Finance Reform Through Social Norms

I. INTRODUCTION

In 1998, Senator Russell Feingold squared off against Representative Mark Neumann in a heated contest for a Wisconsin Senate seat. During the campaign, Representative Neumann and Senator Feingold voluntarily entered into a number of campaign finance restrictions.[1] Representative Neumann, despite losing the race to Senator Feingold, asserted that those restrictions "showed that campaign finance reform didn't require changes in law and was best handled on a voluntary basis."[2] In the 2000 New York Senate race, Representative Rick Lazio echoed Representative Neumann's sentiment and declared that it was he and "Mrs. Clinton's opportunity, to make a statement about our commitment to campaign-finance reform, to demonstrate that we don't need a law to do the right thing."[3] Soon thereafter, Representative Lazio and Mrs. Clinton agreed to several voluntary campaign finance restrictions that, among other things, banned soft money expenditures by political parties and numerous interest groups.[4] Ironically, Senator Feingold, who is now an avid supporter of increased government regulation of campaign

1. *See* Alan J. Borsuk & Richard P. Jones, *Senate Rivals Offer Restraint in Campaign Spending*, MILWAUKEE J. SENTINEL, Jan. 27, 1998, at 1. For examples, see *infra* Part IV.B.4.
2. Alan J. Borsuk, *Feingold Asks Neumann for Campaign Reform Plan*, MILWAUKEE J. SENTINEL, Sept. 4, 1998, at 3.
3. Stephanie Saul & John Riley, *A Divide on Soft-Money; Lazio, Clinton Camps Meet on Ban, but Pact Is Doubted*, NEWSDAY, Sept. 22, 2000, at A06.
4. *See infra* Part IV.B.5.

finance, originally proposed the *voluntary* restrictions, praised by Representative Neumann and used effectively in the 2000 New York Senate campaign.[5]

Historically, political scandal and public outcry have prompted new regulations and restrictions on political expression and freedom of speech. For instance, the Federal Elections and Campaign Act ("FECA") of 1971 was passed in response to allegedly large and questionable contributions to President Nixon's successful presidential campaign, and the subsequent regulations of 1974 sprung from the Watergate crisis.[6] Unlike in the early 1970s, recent campaign finance reform legislation has preceded public outcry and political scandal.[7] For example, polls suggest that campaign finance reform has and continues to trail significantly in importance to other issues such as social security, combating terrorism, and education.[8] Nonetheless, for several years, Senators John McCain and Feingold have trumpeted the corruptive influence of "soft money"[9] in politics to generate support for campaign finance reform.[10] On March 20, 2002, their tireless

5. Senator Feingold and Senator John McCain were coauthors and the primary supporters of the most comprehensive campaign finance scheme since the Federal Elections and Campaign Acts of 1971 and 1974. *See* Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong. (2001).

6. Kurt D. Dykstra, Comment, *Sending the Parties "PAC-ing"? The Constitution, Congressional Control, and Campaign Spending After* Colorado Republican Federal Campaign Committee v. Federal Elections Commission, 81 MARQ. L. REV. 1201, 1211 (1998).

7. *But see* Dan Balz, *In Long Battle, Small Victories Added Up*, WASH. POST, Mar. 21, 2002, at A01 (suggesting that "final shove" for the passage of the Bipartisan Campaign Reform Act of 2002 was the Enron bankruptcy scandal).

8. In the summer of 1999, a USA Today/CNN/Gallup poll revealed that only 15% of eligible voters felt campaign finance reform was an extremely important issue in determining their vote in the 2000 elections, while 20% said the issue was not important at all. USA TODAY, *Polls/Surveys, USA Today/CNN/Gallup poll results*, *at* http://www.usatoday.com/news/poll024.htm (last visited Oct. 24, 2001) (on file with Vanderbilt Law Review). A year later, a Gallup poll revealed that campaign finance reform was not even in the top fifteen issues that voters thougbt the next president should address upon taking office. Gallup News Service, *Education Reform: The Public's Opinion*, *at* http://www.gallup.com/poll/release/pr010124b.asp (last visited Oct. 24, 2001). In December 2000, only 1% of eligible voters thought campaign finance reform should be the Bush Administration's top priority, compared with 13% for uniting the county and 8% for education. *Id.* Another Gallup poll taken in January 2001 echoed the poll taken in the summer of 1999, with only 16% of respondents indicating that campaign finance reform was an extremely important issue. Gallup News Service, *Public Dissatisfied with Campaign Finance Laws, Support Limits on Contributions*, *at* http://www.gallup.com/poll/releases/pr010803.asp (last visited Oct. 24, 2001) (on file with Vanderbilt Law Review).

9. Soft money is defined as "contributions made to the national parties for 'party-building' activities that [are] exempt from the limits and restrictions of normal contributions." Larry Makinson, *The Old Soft Money Ain't What it Used to Be*, CAP. EYE (Ctr. For Responsive Politics, Washington, D.C.), Winter 2001, *available at* http://www.opensecrets.org/newsletter/ce74/softmoney.asp (last visited Apr. 4, 2002).

10. *See* Russell D. Feingold, *Representative Democracy Versus Corporate Democracy: How Soft Money Erodes the Principle of "One Person, One Vote,"* 35 HARV. J. ON LEGIS. 377, 383 (1998) (articulating recent history of campaign finance reform efforts). The Senators' message has

efforts prevailed as the Senate passed the most comprehensive campaign finance legislation in nearly three decades—the Bipartisan Campaign Reform Act of 2002 ("the Act").[11]

Unlike other public policy issues, campaign finance reform is unique because corrective legislation represents efforts by legislators to regulate their own actions. While Senators McCain and Feingold should be applauded for overcoming significant opposition and waning public interest to pass campaign finance legislation, we should be wary of the motives behind such legislation. For instance, legislators are plausibly seen as largely motivated by self-interest.[12] In the name of the public interest, they often advocate views and vote for propositions that further their individual interests.[13] The behavior of the legislature is no different regarding the issue of campaign finance reform. For example, incumbents have an incentive to regulate themselves to the disadvantage of would-be challengers.[14] In addition, the legislators of the majority race and gender may appear to implement regulations to assure they remain in the majority.[15] Legislators are also driven by a desire for uniformity and control at the expense of flexibility and freedom. The effectuation of these perverse incentives is a prime example of how self-interested legislators undermine the public purpose of legislation, thereby creating inefficiencies and additional transaction costs within the campaign finance system.[16]

This Note has three primary objectives. First, it will show that public choice theory, particularly interest group competition, when applied to campaign finance reform demonstrates the inherent and unavoidable flaws of government-imposed campaign finance

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apparently reached the voters because when addressed separately, campaign finance reform is generally viewed favorably. For instance, a July 2001 Gallup poll suggested that when asked directly, sixty-five percent of respondents favored Congress passing new campaign finance laws. Gallup News Service, *Gallup Poll Topics: Campaign Finance*, *at* http://www.gallup.com/poll/indicators/indcamp_fin.asp (last visited Oct. 24, 2001) (on file with Vanderhilt Law Review). In addition, an October 2000 poll indicated that seventy-two percent of respondents favored new laws limiting the amount of soft money that an individual or group could contribute to a national party. *Id.*

11. Bipartisan Campaign Reform Act of 2002, H.R. 2356, 107th Cong. (2002).

12. *See* Sidney A. Shapiro, *Keeping the Baby and Throwing out the Bathwater: Justice Breyer's Critique of Regulation*, 8 ADMIN. L.J. AM. U. 721, 722 (1995) (describing how legislators make regulatory decisions according to their own self-interest).

13. *See id.*

14. *See* Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83, 168 (1997).

15. *Cf.* Terry Smith, *Race and Money in Politics*, 79 N.C. L. REV. 1469, 1473-74 (2001) (describing the negative impacts of the current campaign finance system on people of color).

16. *See* John L. Flynn, Note, *Mixed-Motive Causation Under the ADA: Linked Statutes, Fuzzy Thinking, and Clear Statements*, 83 GEO. L.J. 2009, 2053-54 (1995).

regulation. Second, assuming campaign finance legislation is flawed, this Note recommends that candidates supercede government initiatives and regulate themselves based upon voter preferences by entering into voluntary campaign finance agreements. Third, to encourage the development of voluntary campaign finance agreements, this Note draws upon social norms theory and discusses ways in which voluntary agreements or the prohibition of soft money could become a social norm. Part II summarizes the theoretical concepts of public choice theory, free bargaining, and social norms theory. Part III provides a brief history of campaign finance regulation and jurisprudence, describes recent legislative efforts, and applies interest group theory to the campaign finance debate of the summer of 2001 to illustrate why the public interest will not be served by government-imposed campaign finance reform. This Note demonstrates that the Act will do little to curb campaign finance abuses, and will likely create additional loopholes for interested parties to exploit. Part IV addresses an alternative to government-imposed campaign finance reform. This part proposes that candidates for public office enter into voluntary campaign finance agreements and allow the electorate to determine what level of "corruption" or the "appearance thereof" they are willing to tolerate.[17] As a model, Part IV describes several types of voluntary campaign finance agreements and assesses their relative success or failure. Specifically, Part IV focuses on the incentives that induced Representative Lazio and Mrs. Clinton to enter into a historic, voluntary soft money ban in the 2000 New York Senate race. This part also explains the creation of these voluntary agreements and why they serve the public interest better than government-imposed campaign finance reform. Lastly, in Part IV, this Note draws upon social norms theory and suggests that voluntary agreements could be an alternative to additional campaign finance legislation through the creation and enforcement of social campaign finance norms.

II. LEGAL THEORY BACKGROUND

A. *Public Choice Theory and Interest Group Competition*

In many ways, the theoretical underpinnings of public choice theory can be traced to James Madison's distaste for factions.[18] At the

17. *See* Buckley v. Valeo, 424 U.S. 1, 25-29 (1976) (per curiam).

18. *See* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 280 (1988).

founding of the American republic, Madison perceived that self-interested factions were inevitable and that the government should be structured to minimize their influence.[19] He hoped that the combination of the structural features of the legislature, bicameralism, and the executive veto would protect representatives from being captured by any single faction.[20] This faith in the balance between legitimate majoritarian government and rational public-seeking government prevailed in political theory well into the twentieth century.[21] As late as the 1950s, optimistic pluralists were hopeful that interest groups would develop on all sides of an issue and that the protective procedures of lawmaking would ensure rational accommodation of interest groups' demands.[22] Since that time, political theory has come of age and the romantic notion of suppressed interest group influence has been discarded by the wide acceptance of public choice theory.[23]

Public choice theory first found its way into legal literature in the early to mid-1980s.[24] Soon thereafter, Professor William Eskridge, in a symposium on public choice, described the theory as having three distinct arguments.[25] First, public choice theory demonstrates that decisionmaking by majority rule yields arbitrary and discriminatory results.[26] This facet of public choice theory uses game theory[27] to examine legislation and voting to demonstrate that rational behavior by the game players yields poor results for the entire group.[28] Second, the theory depicts how interest groups skew public decisionmaking toward private rent-seeking[29] and away from public interest

19. *Id.*; *see also* THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter, ed., 1961) ("It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic.").

20. Eskridge, *supra* note 18, at 280.

21. *See id.* at 281.

22. *Id.*

23. *See id.* at 283.

24. Maxwell L. Stearns, *Restoring Positive Law and Economics: Introduction to Public Choice Theme Issue*, 6 GEO. MASON L. REV. 709, 711 (1998).

25. Eskridge, *supra* note 18, at 283.

26. *Id.*

27. *See* Martin Shubik, *Just Winners and Losers: The Application of Game Theory to Corporate Law and Practice: Game Theory, Law, and the Concept of Competition*, 60 U. CIN. L. REV. 285, 285 (1991) (describing game theory as "the study of the basic elements of many person conscious conflict and cooperation," and as "deal[ing] at a high level of abstraction, with the description and analysis of multiperson cross-purposes optimization").

28. Eskridge, *supra* note 18, at 283.

29. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Intcrest Group Model*, 86 COLUM. L. REV. 223, 224 n.6 (1986) ("Rent-seeking

statutes.[30] These theorists treat legislation as an economic transaction and illustrate how the market for legislation is inefficient, producing too few laws that provide "public goods" and too many laws that are "rent-seeking."[31] Lastly, the theory shows Madison's "protections" do little to safeguard the public from rent-seeking legislators.[32] For example, public choice scholars, such as James Buchanan and Gordon Tullock, argue that the procedural protections designed in 1789 are wholly inadequate today.[33] They suggest that overlapping constituencies in the House of Representatives and Senate dilute the benefits of bicameralism and that the protections tend to discourage legislatures from passing public goods legislation and do little to prevent the approval of rent-seeking laws.[34]

Public choice theory argues that legislative behavior is driven by one primary goal—the representative's desire to be reelected.[35] At the heart of this argument is the concept of interest group competition. The origin of interest group theory can be traced to two publications, James Buchanan and Gordon Tullock's *The Calculus of Consent*, and George Stigler's *The Theory of Economic Regulation*.[36] The theory suggests that government cannot be trusted to act in the public interest because organized interest groups heavily influence legislators and administrative agencies.[37] These groups compete for "rent-seeking" legislation to benefit their own purpose at the expense of another.[38] Statutes are viewed as commodities that are purchased[39] by competing interest groups, thereby undermining the public interest that government is supposed to serve.[40] Therefore, interest group

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refers to the attempt to obtain economic rents (i.e., payments for the use of an economic asset in excess of the market price) through government intervention in the market."). An example of an economic rent is the increased income enjoyed by a corporation that is awarded a monopoly market position from the government. *Id.*

30. *Id.* at 224.

31. Eskridge, *supra* note 18, at 285.

32. *Id.* at 283.

33. *See id.* at 290-91.

34. *Id.* at 291 (citing JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 246-48, 286-91 (1962)).

35. *Id.* at 287.

36. Macey, *supra* note 29, at 224 n.6.

37. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 32 (1991). For a discussion of how groups act to articulate their policy preferences and why they choose particular strategies for advocacy, see Marie Hojnacki, *Interest Groups' Decisions to Join Alliances or Work Alone*, 41 AM. J. POL. SCI. 61 (1997).

38. *Sec* Macey, *supra* note 29, at 224.

39. *Id.* at 227. The currency through which laws are bought and sold consists of political support, promises of future favors, outright bribes, and campaign contributions. *Id.* at 228.

40. *Id.* at 224. This process is often described as legislators responding to market forces (i.e., strong incentives) by enacting laws that serve private rather than public interests. *Id.* This

theory predicts that all the participants in the political process act to further their own self-interest.[41]

As with Madison's fear of factions, interest group theory "predicts that laws are likely to benefit the few at the expense of the many, because no one has an incentive to enact" public interest legislation.[42] In other words, "all groups face a collective action problem that may make [their] willingness to expend resources an inaccurate proxy for the degree of group interest."[43] Focused, special interest groups, however, can overcome the "free rider" problem[44] and lobby effectively for targeted wealth transfers.[45] In addition, the costs of procuring special interest legislation are relatively low. A majority of the tangible expenses incurred in the process are borne by taxpayers, and the legislators' only costs are loss of support from adversely affected interest groups and the value of their time.[46] Taxpayers are effectively shielded from the process because interest groups and legislators filter the information the public receives about special interest legislation.[47]

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interaction can be diagrammed by a supply and demand curve, where interest groups make the demands for favorable legislation and legislators supply the interest group legislation. *See id.* at 224 n.5. The amount of special interest legislation that is procured occurs at the equilibrium of price and quantity between the two sets of preferences. *See id.*

41. Elhauge, *supra* note 37, at 35. *But see generally* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987) (arguing that noneconomic factors such as ideology and altruism play some role in political participation and decisionmaking and that public interest preferences sometimes prevail over private interests).

42. Macey, *supra* note 29, at 231. Under the Wilson and Hayes Static Model, special interest legislation has widely distributed costs and narrowly distributed benefits. Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385, 403 (1992). The model predicts that special interest legislation will be oversupplied, while public interest legislation (widely distributed costs and benefits) will be undersupplied. *See id.*

43. Elhauge, *supra* note 37, at 36.

44. For example, although every American presumably benefits from the National Parks System, a single individual's action in support of the improvement of the national parks will have a nominal effect. Therefore, someone acting rationally will "free-ride" on the efforts of others, contributing nothing to the betterment of the National Parks System but benefiting from the actions of others.

45. *See* Macey, *supra* note 29, at 231-32.

46. *Id.* at 232.

47. *See id.* at 230-31. For instance, in the debate over the Senate's Bipartisan Campaign Finance Reform Act of 2001, supporters believed House Republicans would push for passage of compromise legislation, the Ney bill, in order to force a House-Senate conference committee that would reconcile the differences between the House and Senate bills. Center for Responsive Politics, *Campaign Finance Reform—House, available at* http://www.opensecrets.org/news/campaignfinance/house.debate.asp (last modified Feb. 6, 2002). Reformers believed, that once in the conference committee and out of the public eye, the "powers that be" would kill the legislation. *See id. But see* Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 395 (1983) (arguing that increased dead weight costs of regulation discourage interest groups' proponents while encouraging taxpayer opposition).

Despite the negative implications, interest group theory is often credited with benefits such as providing a balancing test for conflicting interests in the political process.[48] In addition, the political process requires significant amounts of time and money to advocate a position effectively. Therefore, an interest group's willingness to expend resources is a proxy for the degree of that group's interest and, consequently, their influence on the legislative process.[49] If you also assume that interest groups compete amongst themselves for those limited resources, then a higher level of expenditure is a signal of the most valued public or private interests. In addition, competition, as a general rule, tends to breed more efficient outcomes. In the marketplace of policy ideas, the more proposals put forward, arguably, the better the legislative outcome.

As further discussed in Part III, the recent campaign finance reform debate and the Act were heavily influenced by interest group competition. Similar to proposals for tax reform or increased environmental regulation, there were identifiable sets of interest groups in support of, or in opposition to, comprehensive campaign finance reform.[50] As expected, these groups spent significant resources to present their models for campaign finance legislation to members of Congress and the American public.[51] However, their lobbying was somewhat complicated given the unique nature of campaign finance reform. Unlike other legislative proposals, campaign finance regulation has a *direct* impact upon the behavior of legislators and their chances for reelection. Thus, the personal nature of the issue increases the legislators' self-interest in the outcome of the legislation. The combination of intense interest group pressure and increased legislator self-awareness ensures that the public interest will be sacrificed in the name of bipartisan campaign finance reform.

B. The Promise of Free Bargaining

Public choice theory suggests that regulations by self-interested parties will yield inefficient results. As an alternative to legal regulation, the freedom to contract offers a nonlegal alternative to securing similar results. The freedom to contract is deeply embedded in the American experience. The Framers of the Constitution included the Contract Clause to prevent states from enacting any law

48. *See* Macey, *supra* note 29, at 231-32 (suggesting that only those special interest groups that lobby the most effectively will obtain beneficial legislation).

49. *See id.* (suggesting that majoritarianism fails to account for intensity of preferences).

50. *See infra* Part III.C.1.

51. *See infra* Part III.C.1.

impairing the obligation of contracts.[52] Early interpretations of the Clause include Chief Justice Marshall's only dissent on a constitutional issue in which he suggested that the Contract Clause generally secures to private parties the liberty to contract freely without interference by the state.[53] For these reasons, the Contract Clause is often attributed as one of the Framers' principal vehicles to promote personal freedom and autonomy as the best source of economic prosperity and development.[54]

Despite the historical belief in the freedom to contract, modern scholarship has increasingly attacked free bargaining on several fronts. First, some commentators suggest that free bargaining rests exclusively on a laissez-faire ideology that is ill-suited for the complexities of modern life.[55] Second, free bargaining is questioned because of the unavoidable obstacles of transaction costs and strategic behavior problems involved in forming an agreement.[56] Third, due to the increased effect of advertisements and external prejudices, free bargaining is thought to be incapable of serving the consumer's best interests.[57] Lastly, in the business context, neoinstitutional theorists mock the validity of free bargaining when a deal goes bad and informal agreements are relaxed or even ignored.[58] Echoing modern Contract Clause jurisprudence, all of these attacks center around the preservation of public contracts, however defined, rather than private contracts.[59]

Recently, the "modernist" critiques have been answered by three groups of scholars who provide explanations for why contracts should be binding, whether in morals or in law.[60] Of particular relevance to this Note, free bargaining is defended by law and

52. *See* U.S. CONST. art. 1, § 10, cl. 1.

53. *See* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 356-57 (1827) (Marshall, C.J., dissenting) (arguing that the bankruptcy law in question, which operated prospectively, did not violate the Constitution).

54. Bernard H. Siegan, *One People as to Commercial Objects*, *in* LIBERTY, PROPERTY & THE FOUNDATIONS OF THE AMERICAN CONSTITUTION 101, 117 (Ellen Frankel Paul & Howard Dickman eds., 1989).

55. F.H. BUCKLEY, THE FALL AND RISE OF FREEDOM OF CONTRACT 1 (F.H. Buckley ed., 1999).

56. *Id.*

57. *Id.*

58. *Id.*

59. *See id.* (suggesting attacks influenced a generation of law students and lawyers into looking for clever ways to avoid enforcement of private contracts); Michael W. McConnell, *Contract Rights and Property Rights*, *in* LIBERTY, PROPERTY & THE FOUNDATIONS OF THE AMERICAN CONSTITUTION, *supra* note 54, at 101, 159.

60. BUCKLEY, *supra* note 55, at 2.

economics scholars from a consequentialist perspective.[61] That is, they "test legal rules by reference to the social goals they serve" but with an "understanding of the incentive effects of [those] legal rules."[62] Specifically, law and economics scholars examine promissory conventions on the basis of the consequences of nonperformance.[63] For example, by entering into a private contract, the promisor is undertaking a legal obligation to perform.[64] The incentives for entering the agreement could be to bind himself to perform on the agreement or perhaps to invite stronger promisee reliance.[65] If the promisor chooses to breach the contract, he places his assets as well as his reputation on the line.[66] This consequentialist account of free bargaining suggests that inherent in every decision to contract is an individual economic analysis of the costs and benefits of performance or nonperformance.[67]

In promoting free bargaining over legal rules, law and economics scholars are mindful to point out its limitations. For instance, "concerns about information costs, third-party effects, and holdouts suggest the need for continued restrictions on bargaining freedom."[68] An important tool in "analyzing potentially inefficient legal rules, especially those that thwart the ex ante expectations of contracting parties," is best explained by the Coase Theorem.[69]

The Coase Theorem postulates that in situations where parties have no significant impediments to reaching an agreement, they will bargain for an efficient result.[70] Specifically, the Coase Theorem suggests that "in a world with zero transaction costs and perfect information, resources will flow to their most highly valued uses without regard to existing liability rules."[71] Coase's insight was that because transacting is costly, regulatory efforts succeed only to the extent that rules are devised consistent with the ex ante expectations

61. *Id.* The other groups include the Neoformalists and the Kantians. *Id.* The Neoformalists object to the politicization of private law and advocate "a return to the traditional ideal of the law as an independent discipline." *Id.* Alternatively, the Kantians defend free bargaining by suggesting "that private law institutions sbould respect abstract personal rights, including the right to promise and the right to contract." *Id.* at 4.

62. *Id.* at 2.

63. *Id.* at 6.

64. *Id.*

65. *Id.*

66. *Id.*

67. *See id.*

68. *Id.* at 23.

69. Stearns, *supra* note 24, at 713.

70. *See id.*

71. *Id.*

of the affected parties.[72] When inefficient rules are crafted, regulators increase the odds of inefficient outcomes that parties might be unable to avoid through contracting.[73] Therefore, a primary benefit of private contracting is that it allows the bargaining parties to exploit government inefficiencies and to create a more beneficial outcome for themselves.[74]

Law and economics scholars have argued for the extension of free bargaining principles to areas such as tort law, real estate zoning, family law, corporate reorganization law, and conflicts of law.[75] For instance, in the area of domestic bankruptcy reorganization, Professor Robert Rasmussen argues that free bargaining could create efficiency gains over government regulation in the areas of domestic and transnational bankruptcy reorganization.[76] He proposes a "menu" approach for domestic reorganizations in which parties would choose from a list of possible options in the reorganization law that best fits their financial situation.[77] The menu might include present Chapter 11 provisions or perhaps more restrictive reorganization structures, such as private receivership.[78] For multinational corporations, Professor Rasmussen suggests, similar to contracting for choice of law provisions, allowing firms to select the forum to adjudicate their bankruptcy.[79] Ultimately, Professor Rasmussen concludes that firms, prior to reaching a state of financial distress, are better able to select the appropriate bankruptcy procedure than a mandatory rule that allows managers a restricted choice between reorganization and liquidation.[80]

In Part IV, this Note posits that the principles of free bargaining could also be extended to the rules governing campaign finance. Under current law, when a candidate wishes to raise funds in an election for federal office, he agrees to a host of federal campaign

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72. *Id.*

73. *Id.*

74. *See id.* at 714-15.

75. *See generally* BUCKLEY, *supra* note 55, pts. II-VI.

76. *See* Robert K. Rasmussen, *Free Contracting in Bankruptcy at Home and Abroad, in* THE FALL AND RISE OF FREEDOM OF CONTRACT, 311-24 (F.H. Buckley ed., 1999) [hereinafter Rasmussen, *Free Contracting in Bankruptcy*]; *see also* Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51, 53 (1992) (rejecting the idea "that bankruptcy law is a mandatory rule . . . by the government that cannot be altered by those whom it affects").

77. *See* Rasmussen, *Free Contracting in Bankruptcy, supra* note 76, at 312-19.

78. *See id.*

79. *Id.* at 321-22.

80. *Id.* at 318-19.

finance regulations.[81] A candidate has neither a choice in the type of restrictions that govern his actions nor an opportunity to discuss those conditions with his opponent. Essentially, a candidate enters some form of "social contract" that is consistently breached by exploiting inefficiencies in the campaign finance system. Recently, several sets of candidates have sought to cure these inefficiencies by entering mutually beneficial, voluntary campaign finance agreements to govern their behavior.[82] Drawing on Professor Rasmussen's argument for contract-driven bankruptcy regimes, this Note suggests that voluntary campaign finance agreements would not only allow candidates to bargain for rules better suited for their individual needs but also to produce campaigns more in line with public expectations. One central difference between the approaches is that Professor Rasmussen's "freedom" involves the choice of regulatory regimes, while this Note argues that the "freedom" of voluntary campaign finance agreements involves the absence of a regulatory regime. Nonetheless, both types of "freedom" are supported by the principles of private bargaining.

C. Production of Social Norms

The promise of voluntary agreements is plagued by a general lack of cooperation between candidates. In order for candidates and society to benefit from the gains of voluntary agreements, there must be some enforcement mechanism to encourage cooperation.[83] The Prisoner's Dilemma illustrates the difficulty with voluntary cooperation.[84] The following table provides the payoffs of the dilemma faced by Candidate *A* and Candidate *B*, each of whom can choose to refrain or spend soft money.[85]

81. *See* 2 U.S.C. §§ 431-442 (2000).

82. *See infra* Part IV.B.

83. *See* ERIC A. POSNER, LAW AND SOCIAL NORMS 13 (2000). Posner argues that institutional enforcement mechanisms can be divided into legal and nonlegal mechanisms. *Id.* at 14-15.

84. The Prisoner's Dilemma is a tool for analyzing situations in which mutual cooperation can henefit both parties; however, each party has a dominant incentive to maximize its own gains by refusing to cooperate as long as the other party continues to cooperate. Linda Cohen & Matthew Spitzer, *Term Limits*, 80 GEO. L.J. 477, 498-500 (1992) (applying the Prisoner's Dilemma to the political environment). *See generally* RUSSELL HARDIN, COLLECTIVE ACTION 16-35 (1982) (discussing the logic of collective action, game theory, and the Prisoner's Dilemma). For a discussion of the same type of "group action problem" in the context of the selection process for judicial clerks, see Jonathan Groner, *Disarming the Clerks Race: Judge Offers Proposal to Slow Recruitment Process*, LEGAL TIMES, Dec. 10, 2001, at 1, WESTLAW, Legal Times.

85. While this model depicts a two-party interaction, the same analysis would apply to interactions among multiple parties.

		Candidate *B*	
		Refrain	Spend
Candidate *A*	Refrain	2,2	0,3
	Spend	3,0	1,1

Generally, each candidate reasons that no matter how the other candidate chooses to proceed, his best option is to spend soft money.[86] That is because a defining feature of the Prisoner's Dilemma is that defection is a player's dominant strategy regardless of what the other party chooses to do.[87] Therefore, both candidates spend and the lowest payoff is achieved (1,1). The optimal outcome for the candidates and society is achieved if both candidates choose to refrain (2,2); however, individual incentives routinely override the collective benefit, and society suffers.[88]

Assuming additional campaign finance legislation does not serve the public interest, what forms of nonlegal cooperation are available to encourage candidates to overcome the Prisoner's Dilemma and consent to voluntary agreements? The most common approach to solving the dilemma is to repeat the game.[89] However, in the electoral context, the likelihood of the same candidates facing one another again is relatively small.[90] Another approach to induce cooperation could be to change the candidates' payoffs through the informal enforcement of social norms by voters, other politicians, and the media.[91] These unofficial enforcers could use punishments, such as vote switching, negative gossip, and poor media coverage, to discipline malefactors and use rewards, such as esteem and enhanced political opportunities, to applaud those who cooperate.[92] These informal systems of external control are often more influential than the law in many contexts, especially where the interacting parties have a continuing relationship and nontangible assets are at stake.[93]

86. *See* Cohen & Spitzer, *supra* note 84, at 497-98.

87. *Id.* at 498-500.

88. For example, both candidates are faced with need to raise money to win the election, and why should they refrain from raising money when the other candidate is still raising money.

89. Cohen & Spitzer, *supra* note 84, at 498-500.

90. It is possible, however, to suppose that Senator Clinton and Lazio, for example, will interact on other fronts, and this may be enough for cooperation to be rational.

91. Cohen & Spitzer, *supra* note 84, at 502-03 (suggesting legislative self-enforcement as a mechanism to overcome the Prisoner's Dilemma).

92. Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 540 (1998) (discussing the way in which "acquaintances, bystanders, [and] trading partners" are able to enforce social mores by informal methods).

93. *Id.* Using Coase's example of cattle trespass between a farmer and a rancher on adjoining lands, Ellickson challenges Coase's conclusion and suggests that because of the

Sociologists, psychologists, and anthropologists have long studied the creation and enforcement of norms as well as the pairing of norms with social roles.[94] Only recently have law professors and political scientists begun to stress the role of informal social controls and their relation to "the public institutions that promulgate and enforce legal rules."[95] Their work has developed into a legal theory referred to as "social norms theory," which examines how informal social controls and behavioral regularities can fundamentally alter the analysis of a social problem.[96] For instance, a pattern of behavior may develop in a community even though a rule is never explicitly formulated, or, on the other hand, a pattern of behavior may not evolve in a community despite the existence of a rule.[97] Therefore, the existence of a norm, or rationally governed behavior, can be logically separate from an articulated rule.[98]

Of particular relevance to the production of social norms are the concepts of reputation, signaling, and the existence of norm entrepreneurs.[99] One way to enhance agreement is to replace the conditions of the Prisoner's Dilemma with an environment that promotes cooperation, especially circumstances that facilitate the development of reputation.[100] In this model, reputation can facilitate cooperation through a repeated game,[101] or reputation can alter a candidate's payoff based upon negative or positive reaction from the public. Another important aspect of the creation of social norms is that patterns of behavior emerge from "signaling."[102] Signaling facilitates

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continuing relationship between neighbors, the farmer and rancher would apply social norms to govern their behavior rather than turning to the legal system. *Id.* While this might make it seem that Coase promotes formal resolution of such situations, Coase's point is, rather, that the law establishes the legal entitlements that then serve as the starting point for bargaining. *See* Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEGAL STUD. 67, 81-83 (1987) (criticizing the "legal centralism" of modern law and economics scholars).

94. Ellickson, *supra* note 92, at 542.

95. *Id.* at 543. For instance, "in the mid-1990s norms became one of the hottest topics in the legal academy," with several major symposia devoted to the subject. *Id.*

96. *See id.*; *see also* POSNER, *supra* note 83, at 34 (describing social norms as the "behavioral regularities that occur in equilibrium when people use signals to show that they belong to the 'good' type").

97. Steven Hetcher, Spies in the House of Online Privacy 6 (Aug. 28, 2001) (unpublished manuscript, on file with author).

98. *Id.* at 7.

99. *See* POSNER, *supra* note 83.

100. *Id.* at 16.

101. *Id.* (explaining that "people are more likely to cooperate when they expect to have repeated dealings with each other than when they expect never to see each other again").

102. *Id.* at 18. Assume that there are two types of individuals: "cooperative" types and "opportunistic" types. *Id.* "Holding everything else equal, a good type is more likely to cooperate" in the Prisoner's Dilemma because they care "more about the future payoffs that are lost if

social norms in two ways. First, people engage in costly actions, such as gift-giving or shunning a particular form of behavior, to signal that they value future payoffs and wish to cooperate.[103] Second, when people engage in cheap, noncooperative actions, like waiting patiently in line, their deviation from the norm will be punished by others who will signal their desire to cooperate by shunning the unaccepted pattern of behavior.[104] Therefore, social norms become the patterns of behavior reflecting the individual signaling behaviors of the actors seeking to indicate their desire to cooperate.[105] Lastly, the individuals who promote the change of social norms are referred to as norm entrepreneurs.[106] These entrepreneurs, or change agents, stimulate demand and supply new norms by promoting a type of behavior that takes on a symbolic value.[107]

Law and economics scholars have used social norms theory to understand and criticize a variety of laws,[108] while others have used the theory to examine self-regulatory efforts.[109] For instance, as Internet use has exploded, the concern for personal privacy has become an important public policy issue.[110] In an effort to subvert regulatory efforts, several website operators have responded to demands for greater online privacy with a set of industry norms

cooperation fails." *Id.* Cooperative types prefer interacting with each other and avoiding the opportunistic types. *Id.* at 19. In order to distinguish themselves from the opportunistic types, cooperative types engage in actions that are called signals. *Id.* Because a cooperative type "is a person who values future returns" more than an opportunistic type, his signal is likely to involve "large, observable costs prior to entering a relationship." *Id.* In equilibrium, the cooperative types "send the signal and match up with each other," and the opportunistic types "do not send a signal and eitber match up with each other or not at all." *Id.* The equilibrium results in a "separating equilibrium." *Id.*

103. *Id.* at 25.

104. *Id.* at 25-26.

105. Hetcher, *supra* note 97, at 60-61.

106. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996).

107. *See* Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1, 10-12 (2001).

108. *See generally* POSNER, *supra* note 83 (applying social norms theory to family law, criminal law, racial discrimination, and contract law).

109. *See, e.g.*, Steven Hetcher, *The Emergence of Website Privacy Norms*, 7 MICH. TELECOMM. & TECH. L. REV. 97, 116 (2000) (modeling the relationships in the online privacy debate as iterated collective action problems).

110. *See* Mike Hatch, *The Privatization of Big Brother: Protecting Sensitive Personal Information from Commercial Interests in the 21st Century*, 27 WM. MITCHELL L. REV. 1457, 1479 (2001) (citing a 1997 survey indicating that a "majority of consumers engaging in online activities are worried about the confidentiality and security of the Internet"); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 552 (1999) (citing concerns by privacy advocates that processor identification systems threaten personal privacy on the Internet).

regarding the collection and use of consumer data.[111] These norms include extensive "privacy policies with varying elements of choice, notice, access and security" and the creation of "Chief Privacy Officers" within the organizations.[112] The "cooperative" websites are those "willing to forgo the short-term benefit of not respecting user privacy in order to promote the long-term benefits" of "cooperative relationships with more trusting users."[113] While some privacy advocates have called self-regulation an "abject failure,"[114] the development of online privacy norms is an example of overcoming the Prisoner's Dilemma through cooperation and signaling.

In Part IV, this Note applies the concepts of reputation, signaling, and norm entrepreneurs to the cooperation problems of voluntary campaign finance agreements. Similar to online privacy concerns, legislators are anxious to cure perceived corruptive influences with new campaign finance restrictions. Political innovators, however, have superceded legislative efforts with self-regulatory schemes designed to accommodate the public's expectations of reasonable campaign finance limitations.[115] Despite the innovator's relative success, the question remains whether isolated voluntary agreements could develop into a national standard to replace additional campaign finance reform. This Note concludes that the development and enforcement of social campaign finance norms is possible and would be more efficient than additional government regulation.

III. PUBLIC CHOICE APPLICATION TO CAMPAIGN FINANCE REFORM

A. History of Campaign Finance Regulation

Before applying public choice theory and interest group competition to the campaign finance debate of the summer of 2001, it is important to understand the regulatory and judicial context from which the current system has developed.[116] Of particular importance are the initial regulatory efforts contained in the FECA of 1971 and 1974 and the Supreme Court's interpretation of that law in the

111. Hetcher, *supra* note 97, at 2.

112. *Id.* at 61.

113. *Id.*

114. Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1287 (2000) (citing studies that show self-regulation "works far better at enhancing commerce in personal data that it does in protecting personal data privacy").

115. *See infra* Part IV.B.

116. This part is written under the assumption that the Bipartisan Campaign Reform Act of 2002 will not take effect until November of 2002, and only if it survives a challenge in the courts.

seminal campaign finance case *Buckley v. Valeo*.[117] While these events took place nearly three decades ago, their importance is still felt today as legislators attempt to deal with their resulting uncertainties and ambiguities. In addition, this section attempts to shed some light on a particular form of campaign finance—soft money, which in recent years has become the primary target for campaign finance reformers.

1. The FECA of 1971 and 1974

Congress first attempted to regulate the campaign finance industry in response to allegations that large campaign contributions by a wealthy individual led to President Nixon's successful presidential campaign.[118] The FECA of 1971 included several major regulations,[119] but it also contained various deficiencies that rendered it ineffective.[120] The Watergate scandal three years later led Congress to pass the most comprehensive campaign finance reform to date, the FECA of 1974, substantially amending the FECA of 1971.[121] The FECA of 1974 contained four basic reforms: (1) disclosure requirements;[122] (2) limits on campaign contributions to candidates, political action committees ("PACs"), and political parties;[123] (3) partial public funding of presidential elections;[124] and (4) limits on campaign expenditures by candidates and political parties.[125] Most importantly, the FECA of 1974 created the Federal Election Commission ("FEC") to administer and enforce the new regulations.[126] Consequently, the statute transformed "running for federal office into a regulated industry."[127]

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117. 424 U.S. 1, 6 (1976) (per curiam).

118. *See* Dykstra, *supra* note 6, at 1211.

119. The Act had five major components: (1) it repealed the Federal Corrupt Practices Act of 1925; (2) it required the disclosure of contributions exceeding $1,000 by political committees; (3) it required the disclosure of contributions by individuals in excess of $100; (4) it limited expenditures for use in the media; and (5) it limited contributions and expenditures from a candidate's personal funds. *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, 15-20 (codified at 2 U.S.C. §§ 431-442 (2000)).

120. Similar to previous attempts to reform the campaign finance system, the FECA of 1971 failed to establish an administrative body to implement and enforce the law, and the expenditure limits only applied to the media. *See id.*

121. The Federal Election and Campaign Finance Act of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263-68 (codified at 2 U.S.C. §§ 431-442 (2000)).

122. 2 U.S.C § 434 (2000).

123. *Id.* § 441a(a).

124. 26 U.S.C. §§ 9003-04 (1994).

125. § 441a(b), (d).

126. *Id.* § 437(c).

127. Daniel D. Polsby, Buckley v. Valeo*: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 4.

The regulatory scheme created by the FECA limits and monitors the amount of "hard money"[128] used to finance elections for federal office.[129] Different limits apply depending on whether the money is characterized as a "contribution" or an "expenditure."[130] For example, money given directly to a candidate by an individual or a political party is considered a contribution, while money spent by an individual or party to support the candidate represents an expenditure on the candidate's behalf.[131] In addition, the regulations differentiate between the types of entities that contribute or spend campaign resources. For instance, the FECA limits the amount of "hard money" that political parties can receive, contribute to, and spend on behalf of candidates in a federal election.[132] In addition, the FECA limits an individual's contribution to a political committee that is established and maintained by a national political party to $20,000 per year.[133] The FECA also limits the expenditure levels of national and state party committees that are made in coordination with candidates for federal office.[134]

While relatively effective in controlling the flow of "hard money" in elections for federal office, the FECA's regulatory scheme, until recently, did not treat "soft money" with the same degree of scrutiny.[135] Soft money is generally described as the "unlimited funds raised by party committees that can be used for a wide array of activities that can indirectly benefit federal candidates."[136] Prior to the Bipartisan Campaign Reform Act of 2002, FECA's lack of attention to

128. Hard money generally refers to the money raised and spent in accordance with federal law that may be used in connection with election for federal office. JOSEPH E. CANTOR, CONG. RESEARCH Serv., Soft and Hard Money in Contemporary Elections: What Federal Law Does and Does Not Regulate (Jan. 10, 1997) [hereinafter CANTOR], *available at* http://www.opensecrets.org/parties/s97-91.htm (last visited Apr. 4, 2002).

129. *Id.*

130. *See id.*

131. *See* 2 U.S.C. § 431(8)(A) (2000) (defining contributions); *id.* § 431(9)(A) (defining expenditures).

132. *Id.* § 441a(a) (limiting contributions from political parties); *id.* § 441a(d) (limiting expenditures by political parties).

133. *Id.* § 441a(a)(1)(B).

134. Charles Lane, *High Court to Review FEC Limits; Case Challenges Parties' Spending on House, Senate Candidates*, WASH. POST, Oct. 11, 2000, at A08 ("For the 2000 race, the [hard money] limits [were] $13.7 million for the presidential nominees, about $67,000 for House races and between $135,000 and $3.3 million for Senate races, depending on state population.").

135. *See* CANOTR, *supra* note 128.

136. Farrah Nawaz, *Campaign Finance Reform "Dollar for Votes"—The American Democracy*, 14 ST. JOHN'S J. LEGAL COMMENT. 155, 162 n.44 (1999) (quoting Investigation of Illegal or Improper Activities in Connection With the 1996 Federal Election Campaign—Part VIII: Hearings Before the Senate Comm. on Government Affairs, 105th Cong. 128 (1997) [hereinafter *Hearings*] (testimony of Anthony Corrado, Professor of Government, Colby College)).

soft money contributions was evident in three primary areas: (1) unregulated contributions to state and local political parties; (2) unlimited transfers between federal, state, and local political party committees; and (3) the lack of a discernible definition of "federal election activity."[137] These gaps in the FECA aided the proliferation of soft money and constituted the "loopholes" that Senators McCain and Feingold sought to plug.[138]

2. *Buckley v. Valeo*

In the seminal campaign finance case, *Buckley v. Valeo*, the petitioners challenged the regulations of the FECA of 1974 as a violation of the First Amendment.[139] In its first interpretation of the FECA, the Supreme Court declared, that both the contribution and expenditure regulations limited First Amendment rights.[140] For example, the Court believed that placing limits upon a political party in a campaign ran facially afoul of the First Amendment.[141] Nevertheless, the Court reasoned that contribution limits could be justified by a governmental interest in protecting the electoral system from real or apparent corruption arising from donations to or activity coordinated with candidates.[142] Therefore, the Court struck down certain limits on expenditures, including those by a candidate from personal funds, a campaign committee, and an independent group appealing directly to voters, but it left intact the FECA's contribution regulations for money involved in federal elections.[143]

137. *See* Senator Russell D. Feingold, *Special Interests and Soft Money*, 10 STAN. L. & POL'Y REV. 59, 59 (1998).

138. For a discussion of the development of the "soft money" loophole, see ANTHONY J. CORRADO, INTRODUCTION TO PARTY SOFT MONEY IN CAMPAIGN FINANCE REFORM, A SOURCEBOOK 167-73 (Anthony J. Corrado et al. eds., 1997).

139. State v. Alaska Civil Liberties Union, 978 P.2d 597, 603 (Alaska 1999) (stating that the wellspring of modern campaign finance jurisprudence is *Buckley v. Valeo*).

140. *See* Buckley v. Valeo, 424 U.S. 1, 22 (1976) (per curiam) (indicating that contributing to or expending money on behalf of a candidate is equivalent to political speech).

141. *Id.* at 29, 58-59 (reasoning that only contributions can be limited).

142. *Id.* at 25-29 (stating purpose of the Act is to prevent corruption).

143. *See id.* at 39-58. The Court's decision left intact only *voluntary* spending limits, such as in the presidential public funding system. *See id.* Following the Court's decision, Congress amended the FECA to comply with *Buckley*'s holding that the Act's expenditure limits were unconstitutional. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified at 2 U.S.C. §§ 431-442 (2000)). In 1980, the Act was amended yet again (Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980) (codified at 2 U.S.C. §§ 431-442 (2000))) in response to a Harvard commission's determination that the FECA weakened political parties and unduly burdened campaigns for federal office. INST. OF POLITICS, HARVARD UNIV., 96TH CONG., AN ANALYSIS OF THE IMPACT OF THE FEDERAL ELECTION CAMPAIGN ACT 1972-78, at vii (Comm. Print 1979). Since that time, Congress has refrained from instituting any major changes to the structure of the federal campaign finance

In *Buckley*, several federal officeholders and supporting political organizations sought a declaratory judgment and injunctive relief from the FECA of 1974, alleging violations of the First Amendment and the Equal Protection Clause.[144] The lower courts sustained the FECA; the court of appeals commented favorably that the legislation was "by far the most comprehensive reform legislation [ever] passed by Congress concerning the election of President, Vice-President, and members of Congress."[145] The Supreme Court, however, applied a different interpretation of the First Amendment and affirmed in part and reversed in part.[146] Relying largely on a First Amendment distinction between political expression and political association, the Court created a dichotomy[147] that set into motion the modern campaign finance system.[148]

system. *But see* Full and Fair Political Activity Disclosure Act of 2000, Pub. L. 106-230, 114 Stat. 477 (to be codified at 26 U.S.C. §§ 527, 6012, 6033, 6104, 6652) (mandating full disclosure of contributions to organizations claiming tax-exempt status under § 527 of the tax code ("the 527 law")). The 527 law, the first major campaign finance reform to pass Congress in twenty years, was designed to force into view undisclosed, election-related contributions and spending to and from both hard and soft money accounts. Press Release, Office of Senator John McCain, 527 Reformers Clarify Intentions, Send Letters to IRS, Treasury (July 26, 2000), *at* http://www.senate.gov/~mccain/527irs.htm (last visited Apr. 4, 2002).

144. *Buckley*, 424 U.S. at 8-11. Specifically, the petitioners argued that the court of appeals failed to give the FECA the critical scrutiny demanded under the First Amendment and equal protection guarantees. *Id.* at 11. In their view, limiting the use of money for political purposes constituted a restriction on communication in violation of the First Amendment, since virtually all meaningful political communications involve the expenditure of money. *Id.*

145. *Id.* at 7 (quoting Buckley v. Valeo, 519 F.2d 821, 831 (D.C. Cir. 1975)). The court of appeals found a "clear and compelling interest" in preserving the integrity of the electoral process. *Id.* at 10 (quoting *Buckley*, 519 F.2d at 841). On that basis, the court upheld, with one exception, the substantive provisions of the FECA, including the constitutionality of the newly established FEC. *Id.* at 10.

146. *Id.* at 143-44. Commentators at the time suggested that the Supreme Court's conclusion on the First Amendment issues differed so much from that of the court of appeals that one might have thought their perceptions of the underlying facts or law were entirely different. Polsby, *supra* note 127, at 17.

147. For instance, the Court declared that contributor speech, whether made by an individual or a political party, was simply an expression of support for the candidate made with the first dollar contributed. *Buckley*, 424 U.S. at 21 (adding that quantity of communication does not increase with the size of the donor's contribution, since the expression rests solely on the act of contributing). Therefore, "a limitation on the amount of money a person may give to a candidate . . . involves little direct restraint on his political communication, for it permits the symbolic expression of support . . . but does not . . . infringe the contributor's freedom to discuss candidates and issues." *Id.* In contrast, the Court held expenditure limits on nonparty entities unconstitutional because they "substantially" restrained political expression and were not supported by compelling state interests. *Id.* at 19, 55-58.

148. *See id.* at 17-18. By refusing to separate "campaign speech" and "spending money," the Court struck down all expenditure limitations, including limitations on a candidate's use of his own private fortune and expenditures by persons unconnected with a campaign organization, each of which have helped fuel the escalation in the cost of running for elective office. *See id.* at 18.

3. The Emergence of Soft Money

The arrival of soft money as an important campaign financing tool further complicated the campaign finance system developed under the FECA and modified by *Buckley*. In 1978, the FEC issued an advisory opinion[149] that allowed political parties to pay for party building activities[150] with money raised pursuant to federal rules (i.e., hard money) *and* money raised outside the federal rules (i.e., soft money).[151] The advisory opinion was later codified in the 1979 FECA amendments.[152] The purpose behind this modification was to encourage the involvement of state and local political parties in federal and nonfederal elections.[153] This new rule gave rise to the concept of "mixed activities,"[154] which allows state and local parties to use soft money to promote an entire slate of candidates, while limiting what hard money could be spent to directly benefit an individual candidate for federal office.[155] The difficulty in distinguishing the benefit of "mixed activities" to federal candidates or state and local

149. *See* FEC Advisory Op. 1978-10, *available at* http://herdon3.sdrdc.com/ao/ao780010.html (on file with Vanderbilt Law Review).

150. This ruling further increased the role of state and local parties by also exempting certain grassroots, registration, and voter drive activities. CANTOR, *supra* note 128.

151. *See* FEC Advisory Op. 1978-10 (1978), *supra* note 149 (discussing exceptions for party-building activities); Feingold, *supra* note 10, at 380 (describing the soft money loophole).

152. *See* 2 U.S.C. § 431(8)(B) (2000) ("The term 'contribution' does not include . . . (v) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing . . . with respect to a printed slate card or sample ballot . . . ; (x) the payment by a State or local committee of a political party of the costs of campaign materials . . . provided that—(3) such payments are not made from contributions designated to be spent on behalf of a particular candidate . . . ; (xii) the payment by a State or local committee of a political party of the costs of voter registration and get-out-the-vote activities . . . ."); *see also id.* § 431(9)(B) ("The term 'expenditure' does not include . . . (ii) nonpartisan activity designed to encourage individuals to vote or to register to vote . . . ; (iv) the payment by a State or local party of . . . the costs of . . . a printed slate card or sample ballot . . . ; (viii) the payment by a State or local party of the costs of campaign materials . . . used by such committee in connection with volunteer activities on behalf of nominees of such party . . . ; (ix) the payment by a State or local committee of a party of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President.").

153. This action has been called "a conscious effort by Congress to empower state and local party committees in federal campaigns." HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM 67 (4th ed. 1992). Interestingly, labor unions actually developed the concept of soft money after a 1943 ban on union money in federal elections. CANTOR, *supra* note 128. In addition to creating PACs composed of union members to donate directly to candidates, unions also found ways to influence public policy through state and local candidate donations and "nonpartisan" education, voter, and registration drives. *Id.*

154. The term refers to contributions that are spent on activities that benefit both federal and state or local candidates.

155. *See* CANOTR, *supra* note 128.

candidates reflects the FEC's and Congress's general reluctance to formally define and separate the activities.[156] Critics argue that these gaps in federal campaign finance law allow individuals, corporations, and labor unions to circumvent federal contribution limits by using political parties as a conduit for large contributions of soft money intended to benefit a particular candidate.[157]

The last three presidential election cycles have seen an explosion in campaign spending, resulting in nearly $3 billion in total expenditures during the 2000 campaign season.[158] Soft money is at the core of this explosive growth, as demonstrated by the Democratic and Republican national party committees record $463 million in soft money collections from January 1, 1999 through January 12, 2001.[159] This amount represented a 100 percent increase over the same period in 1996 and an astonishing 459 percent increase over the 1992 election.[160] More notably, in 1992, soft money accounted for only eighteen percent of the parties' overall fundraising, whereas it represented thirty-five percent of total Republican contributions and forty-seven percent of money raised by the Democratic Party in

156. Clarisa Long, Note, *Shouting Down the Voice of the People: Political Parties, Powerful PACs, and Concerns About Corruption*, 46 STAN. L. REV. 1161, 1190 (1994). However, in 1991, the FEC implemented regulations that now require political committees that have federal and nonfederal accounts and engage in mixed activities to allocate their expenditures according to specified formulae. CANTOR, *supra* note 128. The FEC has never formally elaborated on tbese guidelines. *Id.* In addition, to monitor the amount of soft money being raised, the regulations require the disclosure of (1) all national party activity; and (2) state and local party nonfederal account spending on mixed activities. *Id.* (referring to 11 C.F.R. §§ 102, 104, 106 (1994)). *But see also* Bipartisan Campaign Reform Act of 2002, H.R. 2356, 107th Cong. § 101 (2002) (defining federal election activity and probibiting soft money in federal elections).

157. *See* Feingold, *supra* note 10, at 379-83 (describing the soft money channel as "deeper than a well and far wider than a church door," and claiming tbat parties pay for much of their television advertising supporting candidates with soft money); *see also Hearings*, *supra* note 136, at 128 (testimony of Prof. Antbony Corrado) (underscoring gently the general presumption that soft money is the greatest corruptive influence in the modern campaign finance system.).

158. *See* Nawaz, *supra* note 136, at 165 (citing studies tbat estimated total campaign spending to be $1.6 billion in 1992 and $2.2 billion in 1996). This estimate represents all funds spent on the presidential and congressional races, including tbe money spent by outside groups to influence the elections primarily through issue ads. Holly Bailey, *The Final Day: A Look at What Made Campaign 2000 the Most Expensive Ever*, *at* http://www.opensecrets.org/alerts/v5/alertv5_63.asp (Nov. 6, 2000).

159. Common Cause, *National Parties Raise Record $463 Million in Soft Money During 1999-2000 Election Cycle*, *at* http://commoncause.org/publications/feb01/020701st.btm (Feb. 7, 2001).

160. Total soft money collected in 1995-96 was $236 million, while the parties raised only $84 million in 1991-92. *Id.* These increases are even more dramatic wben compared to tbe $9 million raised for the 1980 presidential election, $12 million in 1984, and $45 million in 1988. Nawaz, *supra* note 136, at 165.

2000.[161] The large soft money transfers from national to state and local political parties are of particular concern to soft money opponents.[162] In 1999-2000, the national parties sent $289 million, or sixty-two percent of their total soft money contributions, to state or local political parties.[163] Not surprisingly, eighty-three percent of the soft money transfers were concentrated in the top twenty battleground states.[164] These figures illustrate that soft money has evolved from an obscure feature of an underutilized FEC ruling into one of the most effective, and therefore, viciously contested campaign financing tools.

B. Latest Attempt at Reform: The Bipartisan Campaign Financc Reform Act of 2002

Throughout the 1980s and 1990s, federal lawmakers largely ignored the issue of campaign finance reform.[165] Legislators often campaigned for the need to "clean up" the campaign finance system, but comprehensive reform was not galvanized until the mid-1990s.[166] In 1996, Senators John McCain and Russell Feingold began work on a bipartisan, comprehensive campaign finance reform effort.[167] Driven by the belief that large contributions elevated candidates' allegiance to their chief donors above their ideologies and responsibilities to

161. Center for Responsive Politics, *Total Raised: Democratic and Republican Parties, at* http://www.opensecrets.org/parties/total.asp? (last visited May 14, 2002) (providing figures on fundraising for both Democratic and Republican parties).

162. Generally, supporters contribute to political parties at the national level, and that money is then transferred to state or local parties for use in party-building activities. Nawaz, *supra* note 136, at 163. For example, suppose Bonnie Benevolent, a known supporter of Senate candidate *C* from state *Z*, donates the maximum amount of hard money allowed under federal law to candidate *C* and political party *P*. Benevolent also contributes $500,000 to a campaign committee of political party *P*, which then transfers the money to the *P*'s state political party in state *Z*. The contribution is then spent on an advertising campaign addressing federal issues crucial to candidate *C*'s campaign. State political party *P* describes the advertisement as legal party-building activities, while critics contend the contribution and expenditure subvert federal campaign finance law.

163. Center for Responsive Politics, *Election Overview, 2000 Cycle, Soft Money Transfers to States, at* http://www.opensecrets.org/overview/party2state.asp (last visited May 14, 2002) (basing results on data released by the FEC on November 1, 2001). While an inordinate amount of money, these figures illustrate that twenty-two years later, soft money is being used as the original FEC Advisory Opinion intended. *See supra* text accompanying notes 149-67.

164. Center for Responsive Politics, *supra* note 163. The top twenty jurisdictions to receive soft money transfers were (in descending order): Florida, Michigan, Pennsylvania, Missouri, California, Washington, Ohio, New York, Illinois, Virginia, Oregon, North Carolina, Wisconsin, Kentucky, Texas, District of Columbia, Iowa, Minnesota, Arkansas, and Louisiana. *Id.*

165. *See supra* note 156 and accompanying text.

166. The battle for reform began in the mid-1980s, suffered a 1992 veto by then-President Bush, and repeated parliamentary roadblocks by opponents in the Senate. Balz, *supra* note 7.

167. *See* Feingold, *supra* note 10, at 383 (describing the history of campaign finance reform proposals in the Senate).

national concerns, the Senators fought tirelessly against the perceived evils of soft money and negative issue advertisements.[168] Specifically, they claimed that soft money did little to encourage political participation, and instead, increased the public's political indifference and cynicism by underwriting much of the negative advertising that was intended to decrease voter turnout.[169] Despite the Senators' passionate arguments for reform, the McCain-Feingold bill, as their legislative effort became known, never made it off the Senate floor.[170]

In the 2000 race for the Republican Party's presidential nomination, Senator McCain took his campaign finance reform message to the voters.[171] While ultimately unsuccessful in the presidential race, his anthem propelled his popularity and power within the Senate, and in March 2001, Senator McCain and his supporters negotiated a deal with Senate Republican leaders to debate the McCain-Feingold-Cochran bill[172] on the Senate floor.[173] Following two weeks of intense debate,[174] on April 2, 2001, the reformers prevailed, and the Senate voted 59-41 in favor of the Bipartisan

168. Senator John McCain, Editorial, *Ban the Soft Money*, WASH. POST, Nov. 19, 2000, at B07.

169. *Id. But see* Ray LaRaja, *A Ban on Soft Money Could Backfire*, NEWSDAY, Apr. 11, 2001, at A35 (stating that in 1998, almost eighty-five percent of soft money spent by state parties was not related to issue ads, and in presidential years, where the portion of soft money spent on media tends to be higher, sixty-five percent of the soft money went to things other than ads).

170. Center for Responsive Politics, *Campaign Finance Reform—Senate*, *at* http://www.opensecrets.org/news/campaignfinance/senate.debate.asp (last visited Apr. 5, 2002).

171. G. Robert Hillman, *McCain Seeks to Cancel Bush Meeting*, DALLAS MORNING NEWS, Apr. 28, 2000, at 9A (indicating that campaign finance reform was a "keystone of his maverick campaign that appealed to many independent voters").

172. Historically referred to as the McCain-Feingold bill, the bill's name was changed when Senator Thad Cochran agreed to support the bill. This version of the McCain-Feingold bill was introduced in the Senate on January 22, 2001. *See* Press Release, Office of Senator John McCain, McCain, Feingold, Cochran Introduce Bipartisan Campaign Reform Act of 2001 (Jan. 22, 2001), *at* http://www.senate.gov/~mccain/cfr01coch.htm (last visited Oct. 5, 2001).

173. Center for Responsive Politics, *Campaign Finance Reform*, *at* http://www.opensecrets.org/news/campaign.finance.asp(last visited Oct. 5, 2001).

174. Conservative Republicans, led by Senator Mitch McConnell, opposed the bill, and continue to believe that virtually any limitation on campaign fundraising or spending is a violation of free speech protected by the First Amendment. Center for Responsive Politics, *supra* note 173. President Bush, seeking the middle ground on an issue largely ignored in his campaign, proposed his own set of reforms just days before the Senate debate. *Id.* Specifically, President Bush suggested a ban on soft money contributions from corporations and labor unions (but not from individuals) and a requirement that those groups obtain permission before using shareholder or member funds for political activities. *Id.* In addition to rejecting this alternative, the bill also survived three "poison pill" amendments that could have doomed the legislation. First, Senator Hagel introduced an amendment that would have capped soft money contributions to national party committees at $60,000 per year. *Id.* Also, Senator Hatch proposed a "paycheck protection" amendment designed to dissolve union support for the bill. *Id.* Last, Senator Frist introduced a crafty amendment that, if passed, would have made the bill "nonseverable," meaning that the whole bill would be discarded if any part of it was ruled unconstitutional. *Id.*

Campaign Reform Act of 2001.[175] The centerpiece of the Act of 2001 was a ban on soft money.[176] Specifically, the legislation would ban soft money by prohibiting the transfer of funds from national to state or local political parties, thus subjecting amounts spent by state or local political parties for "federal election activity" to the limitations of the FECA.[177] Most importantly, the bill defined "federal election activity" broadly to incorporate a number of state and local activities that were immune from federal regulation.[178] The bill likewise provided for (1) an increase in hard money contribution limits;[179] (2) restrictions on so-called "phony issue ads" that prohibited corporate and union spending on advertisements that mention federal candidates within sixty days of a general election and thirty days of a primary; (3) an increase in reporting and disclosure requirements; (4) guidelines for determining what constitutes "coordinated" spending by outside groups with candidates; and (5) prohibitions on political fundraising on federal

175. Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong. (2001).

176. For comparison purposes, the earlier versions had three major provisions: (1) all contributions to national political parties comply with the current restrictions on hard money contributions in the FECA; (2) prohibition on soft money spending from state and local parties on any activity that might affect a federal election; and (3) a prohibition on political parties fundraising for, or transferring money to, nonprofit organizations. *See* Feingold, *supra* note 10, at 383-84 (describing the primary features of the McCain-Feingold bill).

177. *See* S. 27, § 101(a)-(b).

178. *See id.*

179. New hard money limits proposed by the Act of 2001:

Type of Contribution	Current Limit	Proposed Limit
Individual to candidate	$1,000 per election	$2,000 per election, to be indexed for inflation
Individual to PAC	$5,000 per year	Same
Individual to state or local party committee	$5,000 per year	$10,000 per year
Individual to national party committee	$20,000 per year	$25,000 per year, to be indexed for inflation
Aggregate individual contribution to candidates, parties, and PACs	$25,000 per year	$37,500 per year, to be indexed for inflation
Party committee to candidate	$17,500 per campaign	$35,000 per campaign, to be indexed for inflation

Center for Responsive Politics, *Campaign Finance Reform: New Hard Money Limits Proposed by McCain-Feingold Bill, at* http://www.opensecrets.org/news/campaignfinance/fein-steinthompson.asp (last visited Dec. 2, 2001).

property, contributions by foreign nationals, and candidates' use of campaign funds for their own benefit.[180]

The issue then went to the House of Representatives, which on two previous occasions had passed similar reform proposals, both entitled the Shays-Meehan bill.[181] In July 2001, the House was scheduled to consider a pair of competing campaign finance reform proposals, the Shays-Meehan bill and a proposal put forth by Representatives Robert Ney and Albert Wynn.[182] The primary differences between the two bills were that the Shays-Meehan bill would ban all soft money contributions and limit issue ads paid for by outside groups, while the Ney-Wynn proposal would cap soft money contributions at $75,000 and place no prohibitions on issue ads.[183]

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180. *See* S. 27, §§ 101-304 (outlining provisions of the bill); *see also* Press Release, Office of Senator John McCain, The Bipartisan Campaign Reform Act of 2001 (McCain-Feingold-Cochran) Section by Section Analysis, *at* http://www.senate.gov/~mccain/cfrsecxsec.htm (last visited Feb. 21, 2001) (n.d.) (describing provisions of the bill).

181. The 2001 version of the bill was reintroduced in the House on January 31, 2001. Similar to the Act of 2001, the Shays-Meehan Bipartisan Campaign Reform Act of 2001 prohibited the solicitation of soft money by political parties, increased the contribution limit for state committees of political parties, prohibited a committee of a political party from making both coordinated and independent expenditures on behalf of a candidate following their nomination, and required coordinated activity to be considered a contribution to the candidate and an expenditure by the candidate. *See* Bipartisan Campaign Reform Act of 2001, H.R. 380, 107th Cong. (2001). In 1999, the House passed a similar bill by a vote of 252-177.

182. Juliet Eilperin & Helen Dewar, *Campaign Bill Heads for a Vote in House*, WASH. POST, Jan. 25, 2002, at A1.

183. Center for Responsive Politics, *supra* note 47. Specifically, summarized below is a comparison of the major provisions of the competing proposals:

	Current Law	Shays-Meehan Bill	Ney-Wynn Bill
Soft Money	Unlimited.	Bans all soft money.	Caps soft money contributions to $75,000 per year.
Hard Money - individuals to candidates	$1,000 per election to any federal candidate.	$1,000 to House; $2,000 to President and Senate candidates.	Retains current limits.
Hard Money - annual individual limits to political parties, PACs, and candidates	$25,000	$37,500	$37,500. Exempts amounts to national parties.
Issue Ads - run independently of, not coordinated with, an individual campaign	No prohibition on who can pay for "issue ads" or when they can run.	Prohibits "issue ads" shortly before an election when paid for by corporations and unions. Also strengthens disclosure rules.	No prohibition. Toughens disclosure laws for broadcast and non-broadcast communications.

However, due to the combination of interest group pressure and a disagreement over the rules for debate, the Shays-Meehan bill stalled in the House Rules Committee and the reform movement lost momentum.[184]

Several months later, Senator McCain finally got the scandal worthy of pushing campaign finance reform over the top. The fallout from the Enron bankruptcy scandal put the national spotlight on potential abuses in the campaign finance system and provided the catalyst for reopening the campaign finance debate.[185] Following the defeat of two rival bills and a series of amendments, on February 14, 2002, the House approved 240-189[186] the Bipartisan Campaign Finance Reform of 2002 ("Act of 2002").[187] A month later, the Senate voted 60-40 to send the legislation to President Bush for his signature.[188] The Act of 2002 is nearly identical to the Act of 2001,[189] and is scheduled to take effect following the November 2002 elections.[190] Shortly after passage, Senator Mitch McConnell reiterated his intentions to challenge the Act of 2002 in the federal courts.[191] On March 27, 2002, immediately following President Bush's private signing of the legislation, Senator McConnell's legal team[192] launched the next stage of the campaign finance battle by filing a

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Id.

184. Center for Responsive Politics, *Tracking the Payback—Campaign Finance Reform, at* http://www.opensecrets.org/payback/issue.asp?issueid=CFR (last visited Oct. 5, 2001).

185. *See* Juliet Eilperin & Helen Dewar, *House Passes Campaign Finance Bill*, WASH. POST, Feb. 14, 2002.

186. Helen Dewar & Juliet Eilperin, *Campaign Reform Momentum Builds*, WASH. POST, Feb. 15, 2002, at A1.

187. Bipartisan Campaign Finance Reform Act of 2002, H.R. 2356, 107th Cong. (2002).

188. Helen Dewar, *Campaign Reform Wins Final Approval*, WASH. POST, Mar. 21, 2002, at A1 (indicating that President Bush will sign the "flawed" legislation despite "present[ing] some legitimate constitutional questions"). President Bush signed the legislation into law on March 27, 2002.

189. *See supra* text accompanying notes 158-64.

190. *See* § 402. This delay in the effective date has prompted leaders of both political parties to launch "all-out, last chance" drives to raise millions of dollars in soft money. Juliet Eilperin, *Parties Racing to Bag Last of 'Soft Money'*, WASH. POST, Feb. 25, 2002, at A2. For instance, Terry McAuliffe, the Chairman of the Democratic National Committee, is promising potential donors some of the perks they would traditionally receive during a presidential campaign, such as access to exclusive receptions at the 2004 Democratic convention, in exchange for large soft money contributions now. *Id.*

191. *See* Dewar, *supra* note 188. Campaign finance reform opponents believe that the Supreme Court will have the final say on the validity of a soft money ban. *See* Charles Lane, *Court Backs Limits on Campaign Spending; Justices Cite Need to Curb 'Hard Money' Contributions*, WASH. POST, June 26, 2001, at A1.

192. Senator McConnell's "dream team" of attorneys includes former Independent Counsel Kenneth W. Starr and First Amendment specialist Floyd Abrams. Charles Lane, *Campaign Finance Fight Not Over*, WASH. POST, Mar. 22, 2002, at A4.

lawsuit in the U.S. District Court for the District of Columbia challenging the constitutionality of the new law.[193]

Reaction to the Act of 2002 has been strong from both sides of the aisle. Opponents in the House and Senate maintain that the soft money ban and issue advertisement prohibitions are an unconstitutional restriction of free speech.[194] In particular, critics believe that the soft money ban will severely limit the role of political parties in the democratic process,[195] and the limitations on issue ads will reduce voter turnout, create less competitive campaigns, and proliferate single-issue congressional campaigns.[196] Alternatively, the proponents rely on a broad reading of *Buckley v. Valeo*[197] and an endorsement from one hundred and twenty-six constitutional scholars[198] to bolster their contention that the campaign finance restrictions in the Act of 2002 are constitutional.[199] According to FEC Commissioner Bradley Smith, the biggest effect of new regulations

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193. *Id.* The legal team plans to argue that the Act of 2002 violates the First Amendment's protection of free speech and the Equal Protection Clause of the Fourteenth Amendment because it restricts the political speech of political parties and interest groups, but not the news media. *See id.* As of April 19, 2002, a total of three lawsuits have been filed challenging tbe Act's constitutionality. Marcia Coyle, *Squaring Off Over Campaign Finance*, NAT'L L.J., Apr. 15, 2002.

194. *See* Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 635 (2000) (mentioning that one constitutional argument against a soft money ban is to the extent that soft money is used to fund issue advocacy (political speech immune from regulation), the contributions that fund such spending must be constitutionally protected as well).

195 *See* Dante Chinni, *The Future Path of Soft Money*, CHRISTIAN SCI. MONITOR, Apr. 26, 2001, at 1 (suggesting political parties are the latest addition to the endangered species list).

196. LaRaja, *supra* note 169.

197. *See* Feingold, *supra* note 10, at 384 (relying upon the Court's holding that restrictions on the source and size of contributions to candidates are permissible in order to protect the electoral system from corruption or the appearance of corruption).

198. *See* Letter from tbe Brennan Center for Justice to Senators John McCain and Russell Feingold (Sept. 22, 1997), *reprinted in* 143 CONG. REC. S10,105 (daily ed. Sept. 29, 1997). Taken in context, the letter is not a ringing recommendation for the Act of 2002. First, the letter was written in 1997 and specifically addressed two provisions of S. 25, the 1997 version of the McCain-Feingold bill. *Id.* Second, the authors qualified their analysis in the opening paragraph by stating, "Nor are we endorsing every aspect of the bill's soft money and voluntary spending limits provisions." *Id.* Lastly, their endorsement of limiting contributions to political parties rests upon "combating the appearance and reality of corruption" developed in "*Buckley* and its progeny." *Id.* However, "*Buckley* and its progeny" have evolved significantly since 1997, and lower federal courts have begun to question if the corruption rationale actually applies to contributions to political parties. *See* Jacobus v. Alaska, 182 F. Supp. 2d 881, 893 (D. Alaska 2001) (holding state campaign finance statute unconstitutional in attempting to limit donations to political parties for a purpose other tban influencing the nomination or election of a candidate, or any limit on volunteer services).

199. *See also* Long, *supra* note 156, at 1190 (arguing that the First Amendment is not violated because an individual can still express his or her views about a particular federal candidate by contributing directly to the candidate's campaign under the FECA's limits or by purchasing his or her own ads).

could be a weaker separation between parties, candidates, and special interests—the exact opposite of the bill's intention.[200] Supporters counter that an increase in the hard money contribution limits will more than offset any negative effects from the elimination of soft money.[201] Interestingly, politicians on both sides of the issue believe that soft money will ultimately find another way into the system, whether it is through independent expenditures, new PACs, quasi-party organizations,[202] or some yet to be created financing mechanism.[203]

C. Interest Group Competition and the Collapse of Campaign Finance Reform

In Friedrich Hayek's *Road to Serfdom*, he explained that central economic planning becomes more difficult as an economy becomes increasingly complex, in part because planners at the center become increasingly incapable of obtaining and processing needed information.[204] In 1971, and again in 1974, Congress "centralized" the running for federal office with the enactment of the FECA and the creation of the FEC.[205] In 1976, the Supreme Court passed judgment on the FECA in *Buckley v. Valeo* and established the contribution versus expenditure distinction still relied upon today.[206] Since that time, federal campaigns and the issues surrounding campaign finance

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200. Chinni, *supra* note 195 (discussing FEC Commissioner Bradley Smith's opinion of the effect of a soft money ban).

201. *See* Bipartisan Campaign Finance Reform Act of 2002, H.R. 2356, 107th Cong. § 102 (2002). *But see* Center for Responsive Politics, *The Shell Game: The Potential Consequences of McCain-Feingold*, *at* http://www.opensecrets.org/alerts/v6/alertv6_14.asp (last visited Oct. 15, 2001) (reporting that coordinated hard money contributions from individual donors were a powerful financing tool for President Bush's campaign and suggesting that this type of bundling could replace the reliance on soft money for some candidates).

202. Many analysts agree that political parties will work more closely with interest groups to create quasi-party organizations that essentially fulfill the soft money role of the parties but are much more closely associated with specific interests. Chinni, *supra* note 195 (suggesting that "as a result, even more money could end up pouring into quasi-party groups that have even less accountability than the parties themselves").

203. For instance, the amount of independent expenditures ads purchased by outside groups has significantly increased since soft money came under attack. Justin A. Nelson, Note, *The Supply and Demand of Campaign Finance Reform*, 100 COLUM. L. REV. 524, 541 (2000). Even some Democratic supporters, such as Senator Robert G. Torricelli of New Jersey, worry that a soft money ban alone would simply shift such donations to issue advertisements. Eric Schmitt, *Senate Democrats Win Virtual Guarantee of Test Votes on Campaign Finance Overhaul*, N.Y. TIMES, Oct. 16, 1999, at A1.

204. *See* FRIEDRICH HAYEK, THE ROAD TO SERFDOM 35-37 (1944).

205. *See supra* Part III.A.1.

206. *See* 424 U.S. 1, 12-59 (1976) (per curiam) (finding that the FECA's contribution limits were constitutional and that the FECA's expenditure limits violated the First Amendment).

regulations have become increasingly complicated. As "planners" struggled to maintain legislative control over campaigns and elections, interest groups with specific agendas have become the primary sources for information. Congress's increased reliance on interest groups' information and campaign contributions has fostered the groups' ability to compete for campaign finance legislation and thwart legislators' attempts to benefit the public interest through meaningful campaign finance reform.

1. The Players in the Campaign Finance Debate: Making Friends Out of Enemies

Pundits have long remarked that "politics makes strange bedfellows," and the issue of campaign finance reform was no exception.[207] As the debate over the campaign finance reform debate recommenced in the summer of 2001, an odd coalition of interest groups, including the American Federation of Labor, American Civil Liberties Union, U.S. Chamber of Commerce, Christian Coalition, National Rifle Association, National Association of Manufacturers, and several others, came together with Senator Mitch McConnell to announce their formal opposition to the bill.[208] Specifically, the groups opposed the limitations on issue ads funded by external groups because the restrictions would have an adverse impact on their ability to communicate with the public.[209] These groups also opposed the soft money ban because they believed it would infringe upon their constitutionally protected free speech rights as political contributors.[210] Not surprisingly, these groups were among the largest soft money donors and spenders on issue advertising during the 1999-2000 election cycle.[211]

207. Center for Responsive Politics, *Campaign Finance Reform: The Issue, at* http://www.opensecrets.org/news/campaignfinance/index.asp (last visited Oct. 15, 2001).

208. *Id.* In the House of Representatives, Majority Whip Tom DeLay led the group of legislators opposed to comprehensive campaign finance reform. *Id.*

209. The particular provisions are a ban on ads paid for by outside groups that identify a specific candidate within sixty days of a general election and increased disclosure requirements for anyone spending more than $10,000 a year on television ads to disclose who paid for them. Center for Responsive Politics, *Strange Bedfellows: A Look at the Lobbying Behind the Campaign Finance Debate, at* http://www.opensecrets.org/alerts/v6/alertv6_10.asp (last visited Mar. 24, 2002).

210. *Id.*

211. The University of Pennsylvania's Annenberg Public Policy Center reported that following Super Tuesday in 2000, the AFL-CIO spent $9.5 million on issue advertising, while the U.S. Chamber of Commerce spent $6 million, and the National Rifle Association spent $1.6 million. *Id.* The leading soft money contributor was the National Rifle Association with nearly $1.5 million all to Republicans, while the AFL-CIO and other labor unions contributed more than $30 million in soft money, ninety-eight percent to Democrats. Center for Responsive Politics, *Top*

On the other side of the issue, interest groups such as Common Cause, Democracy 21, Public Citizen, Sierra Club, and New York University's Brennan Center for Justice have long pressed for legislation similar to the Act of 2002.[212] Similar to Senators McCain and Feingold, these groups believe that reform is necessary because voter concerns have been usurped by the money and influence of powerful industries and interest groups.[213] Unlike the organizations opposed to campaign finance reform, these groups do not have significant financial resources to influence members of Congress directly.[214] Instead, they rely upon a combination of grassroots mobilization and individual lobbying efforts to push for campaign finance reform.[215] Long associated with Democratic causes, these organizations have also been successful in influencing Republicans. For instance, FEC Commissioner Bradley Smith suggested that Senator McCain and his office "take their marching orders from Scott Harshbarger," the president of Common Cause.[216]

Also weighing in on the campaign finance reform debate are "nonpartisan" interest groups providing disclosure and research resources. These groups include the University of Pennsylvania's Annenberg Public Policy Center, Center for Responsive Politics, Campaign Finance Institute, Center for Public Integrity, Interfaith Alliance, and Project Vote Smart.[217] Such organizations are generally reliable as nonbiased sources of information, but often their agendas are revealed in subtle ways.[218]

Soft Money Donors: 2000 Election Cycle, at http://www.opensecrets.org/parties/asp/soft-top.asp?txtCycle=2000&txtSort=amnt (last visited Oct. 15, 2001).

212. Center for Responsive Politics, *supra* note 207.

213. *Id.*

214. *See, e.g.*, Common Cause, *Common Cause: Frequently Asked Questions, at* http://www.commoncause.org/about/faq.htm (last visited Oct. 15, 2001) (indicating that "Common Cause is funded through member dues and contributions. Member dues and contributions of $100 or less provide approximately 84% of all income; contributions of over $1,000 provide approximately 5%. Common Cause accepts no government grants. The Common Cause Governing Board has adopted a policy of not accepting any monetary contributions from corporations or labor unions in excess of $100 in a calendar year").

215. *See, e.g.*, Common Cause, *About Common Cause, at* http://www.commoncause.org/about/today.htm (last visited Oct. 15, 2001) (suggesting Common Cause was created as a "movement propelled by the focused and concerted grassroots lobbying activities of Common Cause members and reinforced with professional lobbying on Capitol Hill").

216. Steven Weiss, *Commissioner of Controversy*, CAP. EYE (Ctr. for Responsive Politics, Washington, D.C.), Summer 2000, at 2, *available at* http://www.opensecrets.org/newsletter/cc72/03interview.asp.

217. For more information on these organizations and the information they provide, see Center for Responsive Politics, *Links: National Disclosure and Research Resources, at* http://www.opensecrets.org/basics/links/disclosure.asp (last visited Mar. 26, 2002).

218. *See, e.g.*, Press Release, The Annenberg Public Policy Center, Annenberg Public Policy Center Tracks over $509 Million in Reported Expenditures on Issue Advocacy (Feb. 1, 2001) (on

2. Interest Group Theory at Work in the Summer of 2001

As described in Part II, interest group theory suggests that the political marketplace is subject to competitive pressures just like the private marketplace. In short, bills are "sold" by the legislature and "bought" by the beneficiaries of legislation.[219] The marketplace for campaign finance legislation in the summer of 2001 was no exception. Following the passage of the Act of 2001 in the Senate, opponents of campaign finance reform scrambled to create an alternative to the Shays-Meehan bill in the House. Interest groups and Republican leaders targeted Representative Robert Ney to be the facilitator of a compromise package.[220] As Chairman of the House Administration Committee, Representative Ney was in an ideal position to control the pace and outcome of the debate.[221] His proposal, while advancing some level of reform, contained provisions that appealed predominantly to those opposed to campaign finance reform.[222] Representative Ney also recruited a key cosponsor, Representative Albert Wynn, who, along with approximately fifteen members of the Congressional Black Caucus ("CBC"), were instrumental in burying the Shays-Meehan bill.[223] In exchange for their efforts and a few days of critical media coverage, the reelection campaign funds of Representatives Ney and Wynn were handsomely rewarded.[224]

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file with Vanderhilt Law Review) (including comments from Kathleen Hall Jamieson questioning the amount and content of issue ads); Press Release, Center for Responsive Politics, CRP to Launch FEC Watch Project (Dec. 3, 2001) (on file with Vanderhilt Law Review) (creating new project to monitor enforcement activities of FEC and other government entities, including the U.S. Department of Justice, and will "aggressively" seek to have those entities enforce the law).

219. For instance, imagine a simple supply and demand curve with Price ("P") of campaign finance reform on the y-axis and Quantity ("Q") of campaign finance legislation on the x-axis. The demand for campaign finance reform curve represents interest groups' demand for legislation, while the supply of campaign finance legislation curve reflects the amount of legislation offered by legislators. The equilibrium point represents the optimal amount of campaign finance reform legislation demanded and offered. At that P and Q, interest groups are willing to pay the "price" of achieving some type of reform, and legislators are willing to offer that level of reform.

220. *See* Janet Hook, *Democrats Try to Keep Campaign Reform Package Intact*, L.A. TIMES, June 29, 2001, at A20.

221. Representative Ney held hearings on campaign finance reform in the spring and subsequently introduced his own bill, which he intended as a compromise to the Shays-Meehan proposal. Center for Responsive Politics, *supra* note 207.

222. Specifically, the Ney bill did not ban soft money, but instead capped soft money contributions at $75,000 per year per organization. *See supra* note 221. In addition, and arguably most important to the interest groups lobbying against the Act, the proposal did not contain any prohibition on issue ads funded by external groups. *See supra* note 221.

223. David S. Broder, *Different Chamber, Familiar Burial*, WASH. POST, July 13, 2001, at A1; *see also* Albert R. Wynn, *Why I Oppose Shays-Meehan*, WASH. POST, July 12, 2001, at A27.

224. For example, as of October 1, 2001, Representative Wynn had received $48,000 in PAC contributions from Lawyers/Lobbyists and Labor groups. Center for Responsive Politics, *PAC*

Interest group theory also suggests that legislative behavior is driven by one primary goal—the representative's desire to get reelected.[225] This desire can also be understood as each political party's hope to remain in power or ascend to the majority. In the 1999-2000 election cycle, the Democratic and Republican parties combined to raise a record $1.24 billion.[226] Of that total, Republicans raised $465.8 million in hard money, compared to $275.2 million by the Democrats.[227] In the race for unregulated soft money contributions, for the first time, Republicans and Democrats were nearly even, having raised $249.9 million and $245.2 million, respectively.[228] In fact, the Democratic Senatorial Campaign Committee raised $50 million in soft money, compared to only $41 million for the National Republican Senatorial Campaign Committee.[229] These figures were released by the FEC shortly before the Senate's passage of the Act and were not fully digested until the issue reached the House. Interest groups aggressively used these figures to lobby undecided House members that a soft money ban would either help or hinder their respective political party and implicitly their own chances for reelection.[230]

In addition, interest group theory proposes that to procure beneficial legislation, interest groups need to target those legislators who are opposed to their position at the margin.[231] An example of interest groups' ability to affect legislators at the margin was the intense lobbying of Republican moderates, the CBC, and several Hispanic members in the final days of the House debate on the Act of

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Contributions to Albert R. Wynn (D-Md), at http://www.opensecrets.org/ (last visited Mar. 26, 2002). Of that total, $31,500 was received in May and June 2001. *Id.* Similarly, Representative Ney has received $40,750 in PAC contrihutions from Lawyers/Lobbyists and Labor groups. Center for Responsive Politics, *PAC Contributions to Bob Ney (R-Ohio), at* http://www.opensecrets.org/ (last visited Apr. 5, 2002). Of that amount, $18,500 was received in May and June 2001. *Id.* Representative Ney has also received $2,000 from the National Rifle Association as of October 1, 2001. *Id.*

225. *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation,* 108 HARV. L. REV. 593, 638-39 (1995).

226. Center for Responsive Politics, *Campaign Finance Reform: What's the Issue, at* http://www.opensecrets.org/news/campaignfinance/index.asp (last visited Mar. 26, 2002) (citing Federal Election Commission statistics).

227. *Id.*

228. *Id.*

229. *Democrats Wear Soft-Money Crown,* ORLANDO SENTINEL, Mar. 16, 2001, at A3.

230. *See, e.g.,* Juliet Eilperin, *New Campaign Finance Bills Offered in House; Two Sides Focus on Key Blocs: GOP Moderates and Congressional Black Caucus,* WASH. POST, June 29, 2001, at A13 (indicating that some Congressional Black Caucus members were concerned about the national party having resources available to mount get-out-the-vote efforts).

231. *See* Daniel A. Farber, *Positive Theory as Normative Critique,* 68 S. CAL. L. REV. 1565, 1569-73 (1995) (explaining the concepts behind interest group theory).

2001.[232] Interest groups, such as Common Cause and the National Rifle Association, bought newspaper advertisements, set up telephone banks, and blitzed the country with faxes, e-mails, and other communications to sway these pivotal members.[233] Led by Representative Wynn, head of the CBC's task force on campaign finance reform, supporters of the Ney bill successfully swayed one-third of the CBC to oppose the Shays-Meehan proposal.[234] In particular, Representative Wynn argued that an outright ban on soft money would inhibit the ability of the Democratic Party and outside groups to orchestrate voter registration and get-out-the-vote drives and that increases in hard money contribution limits would have an adverse impact on minority politicians whose constituents could not contribute at that level.[235] The effect of the margin lobbying will never be fully known as neither the Shays-Meehan nor the Ney-Wynn proposals were ever put to a vote.[236] Instead, the campaign finance reform debate in the summer of 2001 bitterly collapsed when the House voted 228 to 203 to reject the Republican leadership's proposed rules for debate between the two versions of reform.[237]

Looking back at the campaign finance debate of the summer of 2001, several things are evident. First, interest group competition successfully produced several pieces of legislation designed to promote private over public concerns.[238] Second, those interest groups

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232. Helen Dewar & Juliet Eilperin, *Campaign Reform Lacks Votes; Backers Try to Attract Hill Minorities, GOP Moderates to Bill*, WASH. POST, July 12, 2001, at A1.

233. *Id.* Common Cause indicated they worked around the clock, while the National Rifle Association let it be known that it would use the campaign finance vote as one measure in rating members of Congress for the 2002 elections. *Id.*

234. Broder, *supra* note 223.

235. Darryl Fears, *Keys to a Campaign Bill; Divided Black Caucus Is Heavily Lobbied*, WASH. POST, July 11, 2001, at A1; *see also* Wynn, *supra* note 223.

236. *See* Juliet Eilperin & Helen Dewar, *Campaign Bill Heads for a Vote in House*, WASH. POST, Jan. 25, 2002, at A01 (indicating the vote scheduled for July 2001 never took place).

237. *See* Broder, *supra* note 223; *see also* Helen Dewar & Juliet Eilperin, *Campaign Reform Bill Stalls; House GOP Leaders Shelve Measure After Losing Procedural Vote*, WASH. POST, July 13, 2001, at A01. The Republican leaders' plan would have required fourteen separate votes on the changes Representatives Shays and Meehan wished to make to their bill to broaden support for it. *Id.* Nineteen Republicans joined 208 Democrats in defeating the proposed procedural rules, while one Democrat joined the remaining Republicans. *Id.* After losing his first procedural vote as Speaker of the House, Representative Hastert stated, "Right now, I have no plans to bring up this bill. I'm going to step back and assess the whole thing." *Id.* Supporters of the Shays-Meehan bill vowed to bring the issue to the House floor, even if it took a discharge petition by which a majority of members can force a vote when the House leadership refuses to act. *Id.*

238 Interest groups that lost their battle in the Senate continued their struggle when the debate recommenced in the House. *See* Holly Bailey, *The Ad Busters: Broadcasters and Campaign Finance Reform*, Feb. 13, 2002, *at* http://www.opensecrets.org/alerts/v6/alerts6_41.asp. For instance, television and radio stations, represented by the National Association of Broadcasters ("NAB"), were successful in stripping language in the

determined to derail campaign finance reform used their resources effectively and ended the debate, albeit temporarily. Lastly, despite the rhetoric, political parties and members of Congress continued to raise soft money at an unprecedented level. For instance, contribution totals for 2001 reveal that Republican Party committees raised $100.1 million in soft money, while the Democrats raised $68.6 million.[239] In addition, Republicans continued to dominate the area of hard money fundraising, collecting $131 million in 2001, compared to only $59.6 million by the Democrats.[240] These figures suggest that even though members of Congress were advocating reform, they had no intention of reforming themselves.[241] In the alternative, Congress could eliminate interest group competition for comprehensive campaign finance reform by encouraging candidates to regulate themselves through private agreements. As the next part demonstrates, voluntary campaign finance agreements could be a viable alternative to government-imposed campaign finance reform.

IV. THE SOLUTION: VOLUNTARY CAMPAIGN FINANCE REFORM THROUGH PRIVATE AGREEMENTS

A. *What Is a Voluntary Campaign Finance Agreement?*

Perhaps the best way to define a voluntary campaign finance agreement is by describing what it is not. First, a voluntary agreement is not a government-induced scheme where the government offers a benefit in exchange for the candidate's acceptance of restrictions.[242] The most common example of a government-induced agreement is the government financing system for presidential elections established by the FECA of 1971.[243] The primary purpose of

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Shays-Meehan bill that would make television ads cheaper for politicians to purchase. *Id.* The provision was inserted in the Act of 2001 by Senator Robert Torricelli, and prompted the NAB to begin lobbying various House members and make significant contributions to various Republican and Democrat campaign committees. *Id.*

239. Center for Responsive Politics, *Soft Money's Impact at a Glance, at* http://www.opensecrets.org/parties/softglance.asp (last visited Mar. 26, 2002).

240. *Id.*

241. *See, e.g.,* Sharon Theimer, *Dems May Get Soft-Money Break,* ASSOCIATED PRESS, Nov. 29, 2001 (reporting Democratic National Committee's request to the FEC to extend the amount of time it had to cover operating expenses using soft money campaign contributions).

242. John Copeland Nagle, *Voluntary Campaign Finance Reform,* 85 MINN. L. REV. 1809, 1815 (2001).

243. *Id.* at 1817. Most presidential candidates have agreed to the presidential funding scheme since it was first offered in 1976. *Id.* at 1828. Under this system, major presidential candidates are entitled to as much as $70 million in public funds in exchange for their pledge not to spend more than the government provides them. *Id.* at 1817. Interestingly, President Bush

government-induced plans is to control candidates' total campaign expenditures.[244] Second, voluntary agreements are not comparable to international deals on exchange rates or nuclear arms disarmament. While often decided by informal agreements or oral bargains, these arrangements typically have the support of some type of government entity.[245] Purely voluntary agreements, on the other hand, are developed and consummated without any type of government action.[246] Therefore, voluntary campaign finance agreements might best be described as private agreements among candidates that balance the competing public and private concerns over various campaign finance issues.[247]

The structure of any voluntary agreement begins with an existing legal framework, namely federal and state campaign finance regulations and judicial interpretations of those regulations. The agreements are intended to supplement existing legal obligations and typically develop in response to media pressure, candidate challenge, or fear of electoral rebuke.[248] The benefits of voluntary agreements over campaign finance legislation are very similar to those achieved in the private marketplace. By acting rationally and bargaining with one another, candidates are able to achieve a level of efficiency unattainable through government regulation. Specifically, voluntary agreements allow candidates to: (1) respond to the specific demands of their electorate; (2) establish restrictions that each believes are enforceable; (3) authorize a nonpartisan source to report infractions; and (4) provide flexibility to adapt to the latest perceived evil of campaign finance.[249] Nevertheless, voluntary agreements also present a number of costs, including problems with monitoring and enforcement. Most importantly, competing candidates who create

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declined to participate in public financing program in the 2000 presidential election. *Id.* at 1829. Beyond direct campaign funding, other government inducements to reduce candidate expenditures have included free television time, tax credits, franking privileges, statements in official voter guides, notations on the ballot, and reduced reporting requirements. *Id.* at 1816.

244. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 57 n.65 (1976) (per curiam) (sustaining the public financing system and the conditioning of public funds upon an agreement by the candidate to limit their total expenditures).

245. Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495, 495-96 (1991) (describing informal monetary agreements and the reliance on unspoken understandings between the governments of the United States and the Soviet Union).

246. Nagle, *supra* note 242, at 1815.

247. *See id.* at 1830 (describing voluntary agreements as formalization of ad hoc decisions in response to campaign finance concerns).

248. *Id.* at 1815.

249. *See id.* at 1839 (discussing the benefits of voluntary campaign finance agreements).

effective voluntary agreements must overcome the Prisoner's Dilemma to encourage their proliferation.[250]

This Note does not suggest that there is an ideal form for a voluntary campaign finance agreement. Instead, it seeks to illustrate the benefits of voluntary agreements and how they can accurately balance candidate and electoral preferences to serve the public interest.[251] The following section describes five voluntary agreements and the relative successes and failures of each. While the agreements were designed to fit the needs of a particular campaign, they contain similarities that could act as models for structuring future voluntary agreements. Nonetheless, voluntary agreements remain the exception and not the rule.[252] This Note concludes with a discussion of how to encourage the development of voluntary agreements through social norms.

B. Success and Failure of Recent Voluntary Campaign Finance Agreements

1. 1996 Massachusetts Senate Campaign: Senator John Kerry (D) v. Governor William Weld (R)

One of the first voluntary campaign finance agreements involving a federal election occurred in the 1996 Massachusetts Senate race. In response to political pressure to limit campaign expenditures,[253] Senator Kerry and Governor Weld, in August of 1996, entered into a relatively successful agreement that capped total

250. *See id.* at 1830, 1839 (noting the promise and limitations of purely voluntary campaign finance agreements); *see also* discussion *supra* Part 11.C (discussing Prisoner's Dilemma).

251. Interestingly, lawmakers often claim that public financing of elections is the ultimate solution to the campaign finance crisis and would best effectuate the national interest. While several states have experimented with public financing of elections, the citizens of Missouri recently voted down a public financing scheme by a 2-1 margin. Terry Ganey, *Missourians Reject Public Financing of Election Campaigns; Proposal to Restrict Billboards Appeared to Pass*, ST. LOUIS POST-DISPATCH, Nov. 8, 2000, at A15. In addition, the lack of support for public financing of elections is demonstrated by the fact that only one in eight taxpayers elect on their tax returns to pay the three dollars for the presidential campaign fund. Nagle, *supra* note 242, at 1840.

252. For instance, for every voluntary agreement in the last three Senate election years, there were more than thirty other Senate races where no agreement was reached. Nagle, *supra* note 242, at 1837.

253. In 1996, Massachusetts's voters were concerned with the amount of money pouring into campaigns for elected office. *See generally* Francis X. Clines, *Most Doubt a Resolve to Change Campaign Financing, Poll Finds,* N.Y. TIMES, Oct. 7, 1997, at A5 (finding that three in four respondents expressed agreement with the statement that "many public officials make or change policy decisions as a result of money they receive from major contributors"). Massachusetts's voters also expressed their desire for reform by passing a comprehensive ballot initiative on campaign finance reform. *See* MASS. GEN. LAWS ch. 55A, §§ 2851-2856 (1998).

campaign spending after July 1 at $6.9 million per candidate.[254] The agreement specified that media spending could constitute $5 million of total expenditures and the candidates could only use $500,000 of their own money in the campaign.[255] In addition, political parties were limited to spending $600,000 on behalf of their candidates, and only $2 million in soft money could be directed at the campaign.[256] Most significantly, spending by outside groups such as corporations, unions, and interest groups counted *against* the $6.9 million cap.[257]

The agreement proved effective until the waning days of the campaign when Senator Kerry charged that the Governor Weld breached the agreement by exceeding the $5 million cap on media spending.[258] Senator Kerry argued that the $5 million cap included a fifteen percent buyer's fee, so that the total amount spent on advertisements would not exceed $4.25 million for each candidate.[259] Governor Weld disagreed that the cap accounted for a fifteen percent buyer's fee, especially since he had been able to negotiate a lower buyer's fee and consequently spent more than the total amount on advertisements.[260] Governor Weld then filed suit in federal court alleging that Senator Kerry breached the $500,000 cap on personal campaign expenditures by securing a $400,000 loan on his home and spending in excess of the cap.[261] The suit was unsuccessful, and each candidate publicly blamed the other for violating the agreement.[262] On election day, Senator Kerry defeated Governor Weld fifty-two percent to forty-five percent; it remains unclear as to how each candidate's "breach" affected the outcome of the election.[263]

2. The Minnesota Compact

At approximately the same time, interest groups in Minnesota mounted a campaign to encourage voluntary campaign restrictions that became known as the Minnesota Compact. In June 1995, Tom

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254. Alliance for Better Campaigns, *Case Study: The 1996 Massachusetts Senate Race, at* http://www.bettercampaigns.org/documents/mass.htm (last visited Oct. 1, 2001).

255. *Id.*

256. *Id.*

257. *Id.* This portion of the agreement proved the most effective as issue advertising by outside groups was marginalized. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Biography of Senator John F. Kerry, in* THE ALMANAC OF AMERICAN POLITICS 2000, at 778 (Nat'l Journal Group, Inc. ed., 1999) (describing the election results from his 1996 Senate race).

Hamburger, Washington Bureau Chief of the *Minneapolis Star Tribune*, challenged candidates to declare a cease-fire on television attack ads and reinstate the tradition of debates and community discussions, and suggested that news organizations commit to covering the substance of political campaigns.[264] From tbese comments, a coalition of academic, civic, business, and media groups drafted what became known as the Minnesota Compact.[265] Promoted and publicized during the 1996 and 1998 elections, the Compact is a voluntary agreement that seeks to improve campaign discourse by challenging candidates, news media, and citizens to meet their civic duties.[266] Specifically, it asks candidates to refrain from misleading attacks and participate in substantive debates.[267] It requests the press to identify and broadcast stories on voter concerns and deemphasize predictions on election outcomes.[268] The Compact also encourages citizens to discuss the issues and demand more from news media and candidates.[269]

The 1996 Minnesota Compact is often hailed as the most comprehensive and effective voluntary campaign finance initiative to date.[270] For instance, two hundred and eighty-three candidates seeking elected office in Minnesota signed onto the Compact for the 1996 elections.[271] Of those candidates, only five or six departed from their agreement to run "clean" campaign ads.[272] In addition, Minnesota's news media was effective in providing substantive coverage of the issues and critically appraising the candidates' campaign advertisements.[273] Unfortunately, only 65% of eligible voters turned out to vote in 1996, down from 72% in 1992, 67% in 1988, and

264. Tom Hamburger, *The Minnesota Compact*, MINNEAPOLIS STAR TRIB., June 23, 1995, at 16A.

265. Alliance for Better Campaigns, *Case Study: The Minnesota Compact*, *at* http://www.bettercampaigns.org/documents/compact.htm (last visited Oct. 1, 2001).

266. *Id.*

267. *Id.* Planks #1 and #2 of the Minnesota Compact set forth standards for debates and a code of conduct for campaign communications, referred to as the "Ten Commandments of Clean Campaign Ads." THE ANNENBERG PUBLIC POLICY CENTER, REPORT, NO. 22, THE MINNESOTA COMPACT AND THE ELECTION OF 1996, at 27 (1998).

268. Alliance for Better Campaigns, *supra* note 265. Plank #3 of the Minnesota Compact describes the role of journalists. THE ANNENBERG PUBLIC POLICY CENTER, *supra* note 267, at 28.

269. Alliance for Better Campaigns, *supra* note 265. Plank #4 of the Minnesota Compact lays out four suggestions of how citizens can actively participate in Minnesota elections. THE ANNENBERG PUBLIC POLICY CENTER, *supra* note 267, at 28-29.

270. Nagle, *supra* note 242, at 1836.

271. *Id.*

272. *Id.* at 1840 n.128.

273. *Id.* at 17-23.

69.5% in 1984.[274] The lower turnout could be attributed to decreased interest nationally in the 1996 presidential election or possibly to the negative advertising that took place in Minnesota's Senate race, as neither Senator Paul Wellstone nor his unsuccessful challenger, Rudy Boschwitz, signed onto the Compact.[275]

3. Voluntary Reform at the Local Level: Chapel Hill, North Carolina

Voluntary campaign finance agreements have also sprung up in local politics. For example, in 1995, citizen activists in Chapel Hill, North Carolina, concerned by a recent increase in campaign spending, large contributions by developers, and the success of pro-development candidates in recent elections, promoted a voluntary campaign finance reform program for local elections.[276] Aided by the North Carolina Alliance for Democracy, the Green Party, and the Sierra Club, local activists developed a package of reforms that included disclosure of all contributions, spending limits of $4,000 for council candidates and $7,000 for mayoral candidates, and contribution limits of $100.[277] In 1995, four of the nine candidates for city council and one of the two candidates for mayor agreed to the voluntary reform program.[278] Only one of the pledging challengers was elected.[279] In 1997, the voluntary program was again promoted, and four of the seven city council candidates accepted the pledge.[280] Two of those candidates, one incumbent and one challenger, were elected to the council.[281]

The Chapel Hill voluntary reform program, similar to the Minnesota Compact, utilized the media and public awareness campaigns to pressure candidates into accepting the campaign finance restrictions.[282] The proponents of the voluntary program felt their efforts were successful when full disclosure of campaign contributions became a significant issue and the local media began to run stories about campaign contributors and overall campaign spending.[283] In addition, as the data suggests, not only did a higher percentage of candidates accept the pledge in 1997 but also a higher percentage of

274. *Id.* at 15.

275. *See id.*

276. The National Civic League, *The New Politics Program, Recognizing and Promoting Innovative Political Reforms*, *at* http://www.ncl.org/ncl/nppsum.htm (last visited Oct. 5, 2001).

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *See id.*

283. *Id.*

those who accepted it won.[284] Realizing the limitations of the legislative system, these reformers focused on a viable political issue and presented a set of reforms that benefited the public as well as several political candidates.[285]

4. 1998 Wisconsin Senate Campaign: Senator Russell Feingold (D) v. Representative Mark Neumann (R)

In 1998, two years following the Kerry-Weld agreement in Massachusetts, Senator Feingold and Representative Neumann entered into a comprehensive voluntary campaign finance agreement.[286] Representative Neumann initially challenged Senator Feingold to agree to four principles for managing their campaigns.[287] Two weeks later, Senator Feingold responded by issuing ten promises to which he would hold while campaigning.[288] The "gentleman's agreement" reached between the two candidates incorporated portions of both proposals. Specifically, the voluntary pact included a one dollar per voter spending cap,[289] a requirement that no more than twenty-five percent of their contributions come from outside of Wisconsin, a limit of ten percent of their funds raised from PACs, a $2,000 ceiling on the use of personal funds in the campaign, a prohibition on raising soft money,[290] and full reporting of all contributions.[291] Unlike the 1996 pact between Senator Kerry and Governor Weld, this agreement did not restrict spending by outside interest groups or include their expenditures in the candidate's total spending cap.[292] Also in contrast

284. *Id.*

285. *See id.* In 1997, citizen groups in Boulder, Colorado promoted the Chapel Hill voluntary reform program for their local elections. *Id.* The program had similar results with nine of twenty candidates in the city council elections signing a pledge to limit campaign spending to $11,000 and not to accept contributions in excess of $100. *Id.*

286. Nagle, *supra* note 242, at 1832.

287. Representative Neumann signed a four-point pledge at a press conference at the state capitol in Madison and challenged Senator Feingold to sign the same pledge. Alan J. Borsuk & Richard P. Jones, *Senate Rivals Offer Restraint in Campaign Spending*, MILWAUKEE J. SENTINEL, Jan. 27, 1998, at 1. Senator Feingold quickly responded hy claiming that Representative Neumann's pledge was an attempt to jump on the campaign finance reform train, one of his central issues. *Id.*

288. *See* Nagle, *supra* note 242, at 1832 n.97.

289. In 1998, Wisconsin had 3.82 million eligible voters. FEC, *Voter Registration and Turnout—1998*, *at* http://www.fec.gov/pages/reg&to98.htm (last visited Mar. 20, 2002).

290. Representative Neumann allowed the Republican Party to *spend* soft money on his behalf, while Senator Feingold did not allow the Democratic Party to do the same. Alan J. Borsuk, *Soft Money Floods TV in Feingold-Neumann Race*, MILWAUKEE J. SENTINEL, Oct. 16, 1998, at 1.

291. Nagle, *supra* note 242, at 1832.

292. *See id.*

to the Kerry-Weld agreement, Senator Feingold and Representative Neumann honored the terms of their agreement.[293] In November, Wisconsin voters reelected Senator Feingold in one of the closest races in the nation, fifty percent to forty-eight percent.[294]

5. 2000 New York Senate Campaign: First Lady Hilary Rodham Clinton (D) v. Representative Rick Lazio (R)

Another example of a nonregulatory approach to campaign finance reform, this time directly confronting the issue of soft money, was a voluntary agreement between Representative Rick Lazio and First Lady Hillary Rodham Clinton during the 2000 New York Senate campaign. On September 24, 2000, after nearly seven weeks of political posturing,[295] the two candidates reached an agreement to forgo the use of millions of dollars in soft money for advertising in the New York Senate race.[296] Specifically, the agreement barred the candidate's use of soft money on radio and television advertisements but allowed soft money expenditures for get-out-the-vote efforts and direct mail.[297] In a significant departure from previous agreements, Clinton and Lazio also expressly requested that twenty-six interest groups not use soft money to pay for advertisements for or against them.[298] The agreement did not bar the candidates from *raising* soft

293. *See id.* at 1833.

294. *Wisconsin*, in THE ALMANAC OF AMERICAN POLITICS 2000, *supra* note 263, at 1726, 1726 (1999) (describing tbe razor-tbin reelection of Senator Feingold over Representative Neumann).

295. Initially, Mrs. Clinton was tbe first to propose a voluntary agreement, but that agreement was intended for her anticipated Republican opponent, New York Mayor Rudolph Guiliani. *See* Nagle, *supra* note 242, at 1833. The Clinton-Lazio agreement came about after Representative Lazio strode across the stage during a debate on September 13, 2000 and demanded that Clinton sign an agreement that he had drafted. *See id.*

296. Dean E. Murphy, *Candidates Back 'Soft Money' Ban in New York Race*, N.Y. TIMES, Sept. 24, 2000, at A1.

297. Jim Drinkard & Kathy Kiely, *RevoltsThreaten Clinton-Lazio Cease-fire on Ads*, USA TODAY, Sept. 26, 2000, at 6A; *see also* Robert Hardt, Jr., *Clinton and Lazio Skirted Soft-$ Ban Here*, N.Y. POST, Jan. 4, 2001, at 9 (reporting that in the final two weeks of the campaign, the candidates spent a combined $3.23 million on a variety of other campaign expenses).

298. Drinkard & Kiely, *supra* note 297. Representative Lazio requested that the American Conservative Union, AmeriPAC, Citizens for a Sound Economy, Coalition for a Better America, The Conservative Campaign Fund, The Conservative Leadership PAC, Conservatives for Effective Leadership, ConnserveAmerica, National Conservative Campaign Fun, The Republican Jewish Coalition, The Republican National Committee, The Republican Leadership Council, RuffPac, and Save Our Senate abide by the agreement. *Id.* Mrs. Clinton requested that the AFL-CIO, American Federation of Teachers, Association of Trial Lawyers of America, Democratic National Committee, Democratic Senatorial Campaign Committee, Democratic Congressional Campaign Committee, Liberal Party of New York, National Abortion and Reproductive Rights Action League, National Education Association, New York Democratic Party, Planned Parenthood, Sierra Club, and Working Families Party abide by the agreement. *Id.* Initially, the AFL-CIO called this portion of the agreement "undemocratic and unworkable." *Id.* Nonetheless,

money to help other candidates and their respective parties, but it did require the use of hard money for the purchase of all radio and television ads in the remaining six weeks of the campaign.[299]

Initially, observers had mixed reactions about the scope and potential effectiveness of the voluntary agreement. For instance, the candidates were praised for the ban on soft money expenditures for advertisements because it spared the public from additional negative propaganda and eliminated last minute large media buys from outside groups.[300] In addition, one commentator suggested that the agreement was "faithful to the true intent of our campaign finance laws . . . . [a]nd it showed the power of the public's desire for clean elections."[301] Alternatively, political analysts viewed the agreement as a tactical attempt by Representative Lazio to salvage his campaign and a potentially dangerous decision by First Lady Clinton.[302] Supporters of government-imposed campaign finance reform criticized the agreement and compared its effectiveness to voluntary bans on toxic dumping as an acceptable environmental solution.[303] Whatever the spin might have been, the voluntary agreement proved to be an innovative and effective approach to lessening the impact of soft money in a campaign.[304] A study by the Brennan Center for Justice at New York University Law School indicates that candidates and interest groups abided by the agreement and that the candidates paid for all ads run during the final six weeks of the campaign with hard money.[305] Nonetheless, the agreement's effect remains somewhat unclear, as any apparent advantages to Representative Lazio in entering the agreement were surpassed by First Lady Clinton as she won handily, fifty-five percent to forty-three percent.[306]

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once the agreement was signed, the groups held true to the agreement, possibly fearing any backlash would damage their candidate. *See* Editorial, *Hard Gains from Soft Money Ban*, N.Y. DAILY NEWS, Dec. 27, 2000, at 34.

299. Drinkard & Kiely, *supra* note 297.

300. Editorial, *supra* note 298.

301. *Brennan Center: Sen.-Elect Clinton Benefited from Huge Soft Money Edge in NY Senate Campaign*, U.S. NEWSWIRE, Dec. 14, 2000 [hereinafter *Brennan Center*], 2000 WL 26852150.

302. *See* William Kristol & Jeffrey Bell, *Soft Money Is No Longer an Advantage for the Republican Party*, PLAIN DEALER, Sept. 29, 2000, at 11B (indicating the soft money ban was a victory for Representative Lazio because the Democratic senatorial campaign organization was planning to spend a lot more soft money on television ads in New York).

303. Press Release, Common Cause, Statement of Common Cause President Scott Harshbarger on New York Senate Race Soft Money Deal (Sept. 25, 2000), *at* http://www.commoncause.org/publications/sept00/0925002.htm (last visited Oct. 5, 2001).

304. *See* Todd S. Purdum, *Tea with Cher, and Other Stops on the Fund-Raising Trail*, N.Y. TIMES, Sept. 30, 2000, at B1.

305. *Brennan Center*, *supra* note 301.

306. *The Senate: Results by State*, NAT'L J., Nov. 11, 2000.

C. *Factors that Affect the Development of Voluntary Agreements*

1. Looking Back: How Candidates Overcame the Prisoner's Dilemma

As discussed in Part II, law and economic scholars examine promissory conventions on the basis of the consequences of nonperformance. The consequentialist theory of free bargaining suggests that inherent in every decision to contract is an individual economic analysis of the costs and benefits of performance or nonperformance.[307] The aforementioned examples of voluntary campaign finance agreements indicate that perhaps the most important factor in forming an agreement is a candidate's weighing of the costs and benefits associated with failing to enter a proposed agreement, or perhaps, the consequences of breaking an already entered into agreement.[308] For example, by entering a voluntary agreement, the candidate is undertaking a moral and political obligation to perform. If the candidate chooses to breach the agreement, he places his political capital as well as his reputation on the line. In addition, if the candidate fails to respond to a proposed agreement, he risks the loss of popular support and the chance that his rebuke will haunt him for the rest of the campaign. In the Clinton-Lazio agreement, Representative Lazio seized upon Mrs. Clinton's earlier statements regarding campaign finance limitations and forced her to enter some form of voluntary agreement.[309] For Mrs. Clinton, the benefits of continued soft money expenditures were evidently outweighed by the cost of going back on her earlier remarks and repudiating Representative Lazio's proposed agreement.

Related to the cost-benefit analysis is a candidate's determination of how likely his or her opponent is to benefit from a voluntary agreement.[310] Specifically, candidates will not enter into agreements that they perceive to be a last-ditch effort by desperate challengers.[311] For example, in the 2000 elections, Senator Richard Lugar never responded to his opponent's proposed voluntary campaign finance agreement because he correctly calculated that his reelection was assured.[312] On the other hand, Representative Lazio approached

307. *See supra* Part III.C.
308. Nagle, *supra* note 242, at 1838.
309. *See supra* note 285.
310. Nagle, *supra* note 242, at 1838.
311. *Id.*
312. *Id.*

Mrs. Clinton when he was still a viable candidate, and a refusal to negotiate could have been unfavorable to her campaign.

The specific provisions of a proposed agreement are another important factor that encourage candidates to enter into some form of voluntary agreement. Recall that Coase's insight—that transactions are costly and sometimes prohibitively so—suggests that regulatory efforts succeed only to the extent that rules are devised which fall in line with the ex ante expectations of the affected parties.[313] Similarly, entering into a voluntary campaign finance agreement can be a complex and costly transaction, particularly because the agreement will affect the candidates' primary weapon in a campaign—the resources to communicate to the electorate. Therefore, as demonstrated by the voluntary agreement examples, only those arrangements containing precise provisions were effective.[314] For instance, the failure of the Kerry-Weld agreement can partly be explained by the lack of a clear definition of what constituted total media expenditures.[315] Alternatively, the success of the Clinton-Lazio agreement can be attributed to the careful attention to detail and an understanding of what the agreement actually governed.[316]

2. Looking Ahead: Issues that Could Affect the Structure of Voluntary Agreements

As discussed previously, some of the primary benefits of voluntary campaign finance agreements include their ability to respond to electorate-specific campaign finance preferences, and exist or not exist based upon the cost-benefit analysis of a particular candidate. This section highlights several issues that could help bring about voluntary agreements or provide justification as to why certain components of the Act of 2002 would not be appropriate for particular campaigns. The uncertain nature of political campaigns reveals that voluntary campaign finance agreements should be preferred over government-imposed campaign finance regulation because the incentive for candidates to regulate their behavior is determined by

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313. Stearns, *supra* note 24, at 713.

314. *See* Nagle, *supra* note 242, at 1838.

315. *See id.*

316. *See* Stephanie Saul & John Riley, *A Divide on Soft-Money/Lazio, Clinton Camps Meet on Ban, but Pact Is Doubted*, NEWSDAY, Sept. 22, 2000, at A6 (chronicling early negotiations on an agreement and identifying the presence of election law experts at the meetings); *see also* Hardt, *supra* note 297 (reporting that soft money was spent on other campaign expenditures, including "production costs" for media guru, Mandy Grunwald, which were not a violation of the agreement because it was not "buying TV airtime").

the will of the voters, who can most effectively resolve what issues matter the most.

One of the major goals of campaign finance reform is to ban the use of unregulated soft money.[317] The recently passed Act of 2002 will diminish the use of soft money by subjecting all contributions to candidates and national political parties to the limitations and regulations proscribed in the FECA.[318] Challengers seeking public office will be greatly affected by this type of prohibition because incumbents generally have a significant advantage over challengers in raising funds from individuals, PACs, and political parties.[319] Challengers, more so than incumbents, depend on resources from their political parties to mount successful campaigns, and a soft money ban will eliminate a critical source of their funding.[320] Predictably, incumbents acting in their own self-interest will generally seek to enact legislation that increases their chances for reelection. Therefore, an electorate that values the challenger's role in the political process might prefer voluntary agreements (over new campaign finance regulations) that allow the use of soft money and limit incumbents' ability to enact self-serving regulation.

In 1986, former California Secretary of State March Fong Eu described raising political donations as "the greatest barrier to the election of more women."[321] According to a recent study, the barrier remains high as the world of political contributors continues to be dominated by men.[322] In the 1999-2000 election cycle, women contributed twenty-eight percent of all hard money given by individuals and only fifteen percent of all soft money.[323] Soft money has become an important ally for female candidates, as they are typically in need of strong party support to compete against male

317. Alison Mitchell, *Vote Boosts McCain-Feingold; By 60-40, Senate Rejects Diluted Soft-money Curb*, CHI. TRIB., Mar. 28, 2001, at 1 (statement of Sen. Feingold).

318. *See* Bipartisan Campaign Finance Reform Act of 2002, H.R. 2356, 107th Cong. (2002).

319. *See, e.g.*, Press Release, Center for Responsive Politics, Women's Political Giving Increasing, but Stagnant Compared to Giving by Men, Study of 2000 Election Financing Finds, *available at* http://www.opensecrets.org/pressreleases/BigPicture2001.htm (Oct. 25, 2001) (indicating that the cost of beating a House incumbent in 2000 increased to over $2 million, nearly double what it cost two years earlier).

320. Bill Walsh, *Campaign Bill Raises Limit on Donations; Amendments Said to Favor Incumbents*, TIMES-PICAYUNE, Mar. 31, 2001, at 1.

321. *See* Doug Brown, *Women in Politics; Candidates Face Money Problems*, L.A. TIMES, June 27, 1986, at 1.

322. *See* Press Release, *supra* note 319 (discussing the results of a study entitled "The Big Picture," which provide a comprehensive analysis of campaign spending in the 2000 election cycle).

323. *Id.*

candidates.[324] For these reasons, many female candidates oppose the elimination of soft money.[325] Mrs. Clinton's decision to enter a voluntary soft money ban with Representative Lazio angered many party loyalists and interest groups and was seen as financially dangerous.[326] However, Mrs. Clinton was not the typical female candidate since she benefited from a level of popularity and notoriety unseen in female electoral politics.[327] Therefore, providing female candidates with the flexibility to raise sufficient resources is another reason the public might demand voluntary campaign finance restrictions that could level the playing field between men and women.

Lastly, as seen in the Clinton-Lazio agreement, candidates appear increasingly willing to enter into voluntary agreements that seek to silence, or significantly limit, the influence of outside interest groups. Similarly, the recently passed Act of 2002 contains restrictions on communications by outside groups within a certain number of days of a federal election.[328] These trends appear to be driven by the public's perceived desire to limit negative issue advertisements and in turn increase voter participation. Predictably, affected interest groups have vigorously opposed voluntary agreements and legislative efforts that limit their ability to communicate with voters.[329] Despite their objections, interest groups involved with the Clinton-Lazio race complied with the agreement for fear that their breach would have a negative impact on their candidate.[330] Somewhat ironically, policy proposals that are seen by many as unconstitutional First Amendment

324. Jason P. Conti, *The Money Chase: How Proposed Changes to Campaign Finance Laws Could Impact Female Candidates*, 21 B.C. THIRD WORLD L.J. 105, 115 (2001) (reviewing GLEANOR CLIFT & TOM BRAZAITIS, MADAM PRESIDENT: SHATTERING THE LAST GLASS CEILING (2000)).

325. *Id.* at 115 n.59. Similarly, in the summer of 2001, several members of the Congressional Black Caucus realized that an outright soft money ban would have an adverse impact on the election chances of minority candidates. *See* Wynn, *supra* note 223. Specifically, a ban would eliminate a critical resource in registering some of their constituents to vote and encouraging them to get to the polls on election day. *Id.* Therefore, Representative Wynn joined with Representative Ney in cosponsoring a bill that would cap soft money contributions at $75,000 per group per year. *See* Campaign Reform and Citizen Participation Act of 2001, H.R. 2360, 107th Cong. (2001).

326. *See* Kristol & Bell, *supra* note 302.

327. *See* Conti, *supra* note 324, at 115.

328. *See* Bipartisan Campaign Finance Reform Act of 2002, H.R. 2356, 107th Cong. (2002). Even if these new restrictions survive constitutional scrutiny, some commentators believe they are inadequate to address innovations in campaign communications over the Internet. *See* Paul A. Werner, Note, *e-Pluribus Unum? The Problem of Anonymous Election-Related Communications on the Internet: A Conceptual Methodology for Evaluating Regulatory Interferences with Anonymous Speech*, 4 VAND. J. ENT. L. & PRAC. 47, 51-53 (2002).

329. Drinkard & Kiely, *supra* note 297 (reporting that the AFL-CIO and other interest groups threatened not to abide by the ban).

330. *See supra* note 305.

restrictions can be enforced freely through voluntary campaign finance agreements. This voluntary speech limitation underscores the power of the electorate to control the type of information they receive about a candidate.

D. Voluntary Agreements as a Social Norm

Soon after Representative Lazio and First Lady Clinton reached their agreement to ban soft money in the New York Senate campaign, Senator McCain suggested that the arrangement "should be followed by every federal campaign in America."[331] However, no other campaign took his advice.[332] The mystery is why this is the case. As described in Part II, candidates considering a voluntary agreement are confronted with the collective action problems of the Prisoner's Dilemma. One possible nonregulatory method to overcome these problems is the development of social campaign finance norms.

As described earlier, social norms are best understood as patterns of rationally governed behavior.[333] Of particular relevance to the production of these patterns of behavior are the concepts of reputation, signaling, and the existence of norm entrepreneurs. In the context of campaign finance reform, and specifically the proposed ban on soft money, two distinct social norm application questions are relevant. First, are the mechanisms in place or do the forces exist in society for voluntary campaign finance agreements to become a norm within the campaign and elections community? Second, and more specifically, as an alternative to voluntary agreements or legislation, could politicians themselves develop a norm to resist soft money? The answers to these questions might help predict whether Senator McCain's suggestion of nationwide implementation of voluntary campaign finance agreements might ever be realized.

1. Development of Voluntary Campaign Finance Agreements as a Social Norm?

Similar to online privacy concerns, legislators have expressed an intense desire to cure perceived corruptive electoral influences with additional campaign finance restrictions. However, political entrepreneurs superceded legislative efforts with creative self-regulatory schemes designed to accommodate the public's expectations

331. Nagle, *supra* note 242, at 1839 (quoting *Senate Report—New York: Vegas Odds on the Ban Lasting*, THE HOTLINE, Sept. 26, 2000, at 2), *at* http://nationaljournal.com/pubs/hotline).

332. *Id.*

333. Hetcher, *supra* note 97, at 6.

of reasonable campaign finance limitations.[334] In Professor Steven Hetcher's article, he suggests that formal agreements between website operators, though desirable, were not necessary to developing an online privacy norm.[335] Instead, unilateral movements by privacy activists to satisfy a consumer's demand for online privacy stimulated the creation of new social norms.[336] Similarly, this Note proposes that unilateral movements by political candidates can serve to stimulate the creation of social campaign finance norms. However, to overcome the collective action problems associated with voluntary campaign finance agreements, candidates must be encouraged to act in concert. This leads to the question of how society should encourage these types of bilateral movements.

As the voluntary agreement examples illustrate, there are several norm entrepreneurs in the campaign finance marketplace. They have attempted to overcome the collective action problems of the Prisoner's Dilemma and move candidates, and thus society, to the most beneficial outcome for campaign finance restrictions. These entrepreneurs signaled to their challengers and the electorate that they perceived some sort of reputational benefit from agreeing to additional campaign finance restrictions. In those instances where the opponent perceived a similar level of reputational benefit, some form of voluntary agreement was more likely than not to develop.[337] In those situations where the opponent did not observe a similar benefit, or perceived additional restrictions would pose a significant cost, the development of a voluntary agreement was more likely than not to fail.[338] Therefore, the success or failure of entering voluntary agreements was primarily driven by perceived reputational gains or losses.[339]

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334. *See supra* Part IV.B.

335. *See* Hetcher, *supra* note 97, at 35-38.

336. *See id.* at 10-32 (documenting the methods by which privacy norm proselytizers created a demand for online privacy norms).

337. *See, e.g., supra* Part IV.B (discussing the voluntary campaign finance agreements).

338. *See, e.g.*, text accompanying note 312 (discussing the failed attempt by Senator Lugar's challenger to entice the Senator to enter a voluntary campaign finance agreement); *see also* James Gerstenzang & Michael Finnegan, *Campaign 2000; Candidates Offer Likely Glimpse of Debate Plans*, L.A. TIMES, Sept. 29, 2000, at 25A (describing Senator McCain's failed attempt to convince the presidential nominees, Al Gore and George W. Bush, to enter a voluntary soft money ban during the final weeks of the campaign).

339. This Note does not specifically address the issues surrounding the enforceability of voluntary campaign finance agreements successfully entered into. However, in many ways, voter preference would also provide for accountability because election results are a candidate's ultimate payoff. In addition, the FEC could continue to serve a critical role in providing a nonpartisan source of financial data to help inform voters.

At the core of a candidate's perception of reputational gains or losses is the electorate's preference for additional campaign finance restrictions. These preferences are in turn driven by what the electorate believes to be the latest corruptive influence in politics. Therefore, society's current "taste" for corruption will most likely dictate a candidate's decision to enter or not enter a voluntary campaign finance agreement. In those regions of the country where preferences are strong enough, candidates could be encouraged to enter voluntary agreements through the concept of shaming. Shaming has been defined as "the process by which citizens publicly and self-consciously draw attention to the bad dispositions or actions of an offender, as a way of punishing him for having those dispositions or engaging in those activities."[340] To the extent that candidates violate voter preferences as to campaign finance tactics, shaming could help encourage the development of social campaign finance norms.[341] These norms could be captured in voluntary campaign finance agreements, and any deviation from the agreements would affect what candidates care about most—poll results on election day.

2. Individual Resistance of Soft Money as a Social Norm?

While Senator McCain is generally viewed as the spokesman for the campaign finance reform movement, Senator Feingold is more accurately described as the *true* reformer.[342] Both politicians are ardent supporters of a soft money ban and have publicly supported the

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340. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 631-32 (1996). Professor Kahan cites several examples of shaming, including the City of Hoboken's practice of advertising the identities of those convicted of public urination as well as requiring that the individuals clean the city's streets. *See id.* at 633. Stanford Law School Professor Deborah Rhode recently suggested that federal judges use the informal sanction of shaming to regulate themselves in the judicial clerk selection process. Groner, *supra* note 84. Professor Rhode stated that the "judges have to exercise some reputational sanctions on their colleagues. If they made it professionally unacceptable to buck the system, you'd have only a few renegades, and we could live with a few renegades." *Id.*

341. *See* Toni M. Massaro, *The Meaning of Shame Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645, 650 (1997) (suggesting that shaming influences the creation and enforcement of social norms). *But see* John B. Owens, *Have We No Shame?: Thoughts on Shaming, "White Collar" Criminals, and the Federal Sentencing Guidelines*, 49 AM. U. L. REV. 1047, 1051-53 (2000) (challenging Kahan's positions and presumptions about shaming "white collar" criminals and arguing that "white collar" criminals do not fit into the "one size fits all" model that Kahan uses to promote shaming).

342. This division of labor is found frequently among United States Senators. As many commentators suggest, some Senators are "show horses," that is, they use their elected office to gain publicity for themselves and their positions, while others are "work horses" who work steadfastly behind the scenes to forge legislation and champion their rhetoric with action. *See, e.g.*, Marshall J. Breger, *The Administrative Conference of the United States: A Quarter Century Perspective*, 53 U. PITT. L. REV. 813, 825 (1992).

prohibition for many years.[343] However, Senator Feingold, in contrast to Senator McCain, actually practices what he preaches. As already noted, Senator Feingold demonstrated his commitment to campaign finance reform by entering into a voluntary campaign finance agreement with Representative Mark Neumann in his 1998 Senate campaign.[344] In addition to the restrictions outlined in the agreement, Senator Feingold went a step further and refused to allow the Democratic Party to spend soft money on his behalf.[345] Senator McCain, on the other hand, has benefited in the past from substantial soft money donations.[346]

These actions suggest that Senator Feingold is a norm entrepreneur in the campaign finance reform context.[347] Not only has he demonstrated the viability of voluntary campaign finance agreements, but he has also taken unilateral action in his attempt to convince the electorate and fellow politicians that soft money should not be tolerated in the campaign finance system.[348] Senator Feingold's refusal to accept soft money contributions during his 1998 campaign was a signal to voters, as well as to present and future challengers, that he believes that there is a significant reputational benefit to prohibiting soft money contributions. The 2000 presidential primaries suggest that his behavior did take on some of the symbolic value necessary to develop a social norm. For instance, Senator McCain and former Senator Bill Bradley voluntarily agreed to ban their parties from accepting soft money if they became the presidential nominees, and Senator McCain went on to vow to refuse soft money regardless of whom was the Democratic nominee.[349] Nevertheless, individual resistance to soft money as a social norm appears more difficult to develop than acceptance of voluntary campaign finance agreements because of the mixed success of unilateral disarmament and the

343. *See, e.g.*, Feingold, *supra* note 137, at 59-60 (explaining history of McCain-Feingold bill and the impetus for its introduction).

344. *See supra* Part IV.B.4.

345. Nagle, *supra* note 242, at 1832 (reporting that both candidates agreed not to raise soft money but that Representative Neumann allowed the Republican Party to spend money on his campaign).

346. Editorial, *'Tag Team' Right to Battle Soft Money*, SUN-SENTINEL, Dec. 18, 1999, at 16A.

347. As discussed *supra* Part II.C, norm entrepreneurs are actors who promote the change of social norms.

348. In this respect, Senator Feingold represents a norm proselytizer, someone who promotes social norms for moral reasons which they themselves accept. *See* Hetcher, *supra* note 97, at 2 n.4.

349. Ken Foskett, *Campaign 2000: McCain, Bradley Take the Pledge on Soft Money; Gore Takes Out an Ad Saying He'll Go Along if the GOP Nominee Agrees; Bush Calls the Idea Unfair*, ATLANTA J. CONST., Dec. 17, 1999, at 1E. Evidently these pledges were not as successful as the candidates had hoped, as neither received their party's presidential nomination.

numerous incentives affecting a candidate's personal decision to accept or reject soft money contributions.

V. CONCLUSION

Not all legislation is bad, but Congress should avoid the regulation of campaign finance. As the last three decades have revealed, legislative attempts to correct campaign finance abuses inevitably yield unintended consequences that "keep reformers a step behind in their battle against monetary influence and other campaign tactics."[350] In addition, interest group theory demonstrates that self-regulatory legislation is inherently flawed and will not effectuate the public interest.[351] Alternatively, Congress should take advantage of the benefits of private ordering and encourage candidates to experiment with voluntary campaign finance agreements, rather than imposing additional restrictions.

As this Note suggests, not all soft money is inherently evil, and voters should be allowed to demand the type of campaign finance restrictions they deem necessary. Voluntary campaign finance agreements are attractive because they are more flexible than legal regulations and can adapt to a specific perceived corruptive influence.[352] Similar to many cooperative interactions, voluntary campaign finance agreements are subject to the collective action problems of the Prisoner's Dilemma. Norm entrepreneurs, such as Senator Feingold, have stimulated the creation of social campaign finance norms to overcome these collective action failures. If voluntary campaign finance agreements or individual resistance to soft money could be accepted as a social norm, then perhaps shaming and fear of electoral rebuke could encourage their development as national alternatives to additional campaign finance legislation.

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350. Nagle, *supra* note 242, at 1839.

351. *See supra* Part III.C.2.

352. *See supra* Part III.C.2.

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