NOTE

CAMPAIGN COUNTERSPEECH: A NEW STRATEGY TO CONTROL SHAM ISSUE ADVOCACY IN THE WAKE OF *FEC V. WISCONSIN RIGHT TO LIFE*

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The rise of unregulated, veiled campaign advertising (i.e. "sham" issue advocacy) has frustrated the framework of campaign-finance law, and has played an influential role in the 2008 election cycle. Confronting this issue, this Note sets forth a proposal to constitutionally address the harmful effects of sham issue advocacy. Heeding lessons from the Supreme Court's recent decision in *FEC v. Wisconsin Right to Life*, this Note posits that regulatory limitations on political speech and spending too often conflict with established First Amendment principles. Therefore, campaign-finance reformers should employ legal controls utilizing "counterspeech" rather than censorship. Counterspeech doctrine envisions additional, opposing speech as the appropriate remedy for problematic expression. Embracing that concept, this Note advocates a bright-line regulation providing for immediate candidate response to preelection ads referencing those candidates. This method can enhance debate and campaign accountability in a manner consistent with First Amendment values.

Introduction 796
I. The *Buckley* Framework and the Magic Words Test 799
II. The Ascendance of Sham Issue Advocacy 800
A. The Proliferation of Sham Issue Advocacy 801
B. The Consequences of Unregulated Campaign Ads 803
1. Disclosure and Accountability 804
2. Excessive Negativity 805
3. Corruption and Inequality 807
III. *WRTL II* and the Curse of Political "Censorship" 808
A. BCRA's Regulation of "Electioneering Communications" 809
B. The *WRTL II* Decision 810
1. Wisconsin Right to Life's Challenge 811
2. "Protecting Rather than Stifling Speech" 812
3. The Continuation of Sham Issue Advocacy 813
C. The Problem of Regulatory Overbreadth 815
IV. A Counterspeech Solution for Sham Issue Advocacy 817
A. Counterspeech's History 817
1. Counterspeech Principles 817
2. Preventing Strict Scrutiny 819
3. The Delicate Balance Facing Counterspeech Laws ... 820
a. Public-Financing Systems 821

b. The Fairness Doctrine and Equal-Time Rules 823
c. The Millionaire's Amendment and *Davis* 825
B. Dual Airtime 826
1. An Approach Lacking in Political Censorship......... 827
2. A Modernization of Previous Fairness Laws? 829
a. The Fairness Doctrine 829
b. Equal-Time Rules 830
c. Danforth-Hollings 830
3. Controlling the Effects of Sham Issue Advocacy 831
a. Enhancing Accountability 831
b. Countering Negativity 832
c. Curbing Corruption 834
4. An Imperfect but Feasible Solution 834
5. A Method in Line with the First Amendment 836
Conclusion 838

INTRODUCTION

> *If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.*[1]

Defining the First Amendment's wide purpose and expanse, Justice Louis Brandeis quipped the above statement in condemnation of a Red Scare law outlawing anti-capitalist speech.[2] Concurring in *Whitney v. California*,[3] Brandeis's quote set forth the underpinnings of the principle known as "counterspeech."[4] Put simply, when forms of

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1. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

2. *Id.* at 372–408.

3. *Id.*

4. Professors Robert Richards and Clay Calvert, codirectors of the Pennsylvania Center for the First Amendment, have identified Justice Brandeis's statement as the cornerstone of counterspeech doctrine. Robert D. Richards & Clay

expression carry detrimental effects for democracy, counterspeech doctrine envisions additional speech as the prescribed solution, not imposed silence.[5]

As guardians of the First Amendment, judges adhering to these principles often strike down laws that silence words deemed harmful. Courts afford political speech utmost First Amendment protection, employing strict scrutiny's onerous requirements to any form of government suppression.[6] In that vein, the Supreme Court handed down its ruling in *Federal Election Commission v. Wisconsin Right to Life, Inc.*[7] ("*WRTL II*") eighty years after Brandeis's famous recommendation.

Demonstrating the First Amendment's recurrent discord with campaign-finance regulation, *WRTL II* limited the application of the Bipartisan Campaign Finance Reform Act of 2002 (BCRA).[8] To reduce money's electoral impact, BCRA restricted the funding of preelection ads referencing candidates.[9] This followed research confirming that "issue" advocacy—political ads refraining from candidate support and outside the coverage of campaign-finance laws—is often purposed towards influencing elections.[10] By disguising campaign ads as issue ads, this speech created a harmful effect: unaccountable election messaging that undermined the spirit of campaign-finance law.[11]

In response, Congress restricted the funding source of election-related issue advocacy.[12] BCRA banned direct corporate- and

Calvert, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 BYU L. REV. 553, 553.

5. *Id.* at 553–55; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 834 (2d ed. 1988) (discussing judicial rejection of speech regulation when more speech exists as an alternative remedy).

6. *Buckley v. Valeo*, 424 U.S. 1, 14–15, 64–65 (1976); *see also Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.").

7. 127 S. Ct. 2652 (2007). The first *WRTL* case held that groups could bring forth as-applied challenges to the Bipartisan Campaign Finance Reform Act of 2002. *Wis. Right to Life, Inc. v. FEC* ("*WRTL I*"), 546 U.S. 410, 411–12 (2006) (per curium).

8. Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified at 2 U.S.C. § 431 (2006)).

9. *Id.* § 441b(b)2.

10. CRAIG B. HOLMAN & LUKE P. MCLOUGHLIN, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS 14–15 (2001).

11. John McCain & Russell Feingold, *S. 25: Bipartisan Campaign Reform Act*, *in* POLITICAL MONEY: DEREGULATING AMERICAN POLITICS 234, 236 (Annelise Anderson ed., 2000).

12. 2 U.S.C. § 441b(a)-(b)2.

union-treasury spending on pre-election commercials that identified candidates.[13] Then, despite upholding BCRA in an immediate facial challenge,[14] the Court in *WRTL II* called the corporate-spending restriction censorship, imposed strict-scrutiny review, and failed to find the narrow tailoring or compelling justification required for judicial assent.[15]

The *WRTL II* controlling opinion grounded its holding in reasoning presumptively hostile to political-speech regulation.[16] Invalidating Congress's overbroad "electioneering communications" standard, Chief Justice John Roberts emphasized the Court's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[17] By restricting protected expression's funding, BCRA violated the First Amendment.

In light of *WRTL II*, counterspeech principles provide a scheme that can avoid the pitfalls suffered by traditional statutory approaches. As a cautionary tale for future legislation, *WRTL II* treated BCRA's source restrictions as censorship and struck down the legislation.[18] Thus, future attempts to control the proliferation of sham issue advocacy should turn to counterspeech principles. Instead of limiting speech or its funding, a counterspeech alternative can presume that contrary messages may better serve the recipients of sham issue advocacy.

Adopting that framework, this Note calls for a solution to sham issue advocacy referred to as "dual airtime." A simple scheme, dual airtime would mandate immediate and reasonably priced advertising slots to candidates referred to in commercials before an election. Like any regulation, the approach carries several contingencies, benefits, and possible drawbacks; notwithstanding these factors, the solution presents one method to control sham issue advocacy in a manner consistent with established free-speech principles.

Part I of this Note explicates the legal foundation allowing for unregulated sham issue advocacy. Part II outlines the problems surrounding sham issue advocacy in the current electoral environment. Part III reviews *WRTL II*'s treatment of BCRA as part of a long history of judicial hostility towards laws construed as censorship. Part IV discusses counterspeech's tenets, practicality, and applicability to

13. *Id.*

14. *See McConnell v. FEC*, 540 U.S. 93 (2003). It should be noted, however, that while *McConnell* upheld much of BCRA, the Court did strike down two specific provisions beyond the scope of this Note. *See id.*

15. *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2663–70 (2007).

16. *Id.* at 2666–67.

17. *Id.* at 2665 (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)).

18. *Id.* at 2673–74.

campaign finance, along with an effective counterspeech solution to sham issue advocacy consistent with the First Amendment.

This Note concludes that a counterspeech approach would allow policy makers to control sham issue advocacy's impact without censoring speech. Instead of judging the rationales behind *WRTL II*,[19] this Note explains the Court's patterns with campaign-finance law and a new proposal to constitutionally combat sham issue advocacy's effects. Policy makers should view *WRTL II* as a warning sign in drafting new legislation. With that consideration, dual airtime may present the only avenue towards meaningful reform.

I. THE *BUCKLEY* FRAMEWORK AND THE MAGIC WORDS TEST

The Supreme Court's landmark ruling in *Buckley v. Valeo*[20] paved the way for campaign groups wishing to escape legal restriction. To protect discussion of public issues, the Court created an arena of political advertising left untouched by legal constraints; these ads have been labeled "issue" advocacy.[21] Thereafter, groups took advantage of this loophole, Congress attempted to close it, and courts struggled to apply the law in a consistent manner.[22]

In response to public discontent following Watergate, Congress passed the Federal Election Campaign Act (FECA)[23] to reform the election system. An ambitious attempt to reign in the role of money in campaigns, FECA placed spending and contribution limits on political actors.[24] To prevent circumvention, the Act limited "independent" expenditures and imposed obligations on groups that distributed promotions "relative" to a "clearly identified candidate."[25]

19. The *WRTL II* decision also addressed several contentious issues within the field of campaign-finance law and First Amendment jurisprudence, including the equality rationale and the efficacy of the express/issue-advocacy distinction, which are beyond the scope of this Note.

20. 424 U.S. 1.

21. HOLMAN & MCLOUGHLIN, *supra* note 10, at 24–25.

22. *See infra* Part II.

23. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. § 431 (2006)). For background information on the 1974 BCRA amendments, see ROBERT E. MUTCH, CAMPAIGNS, CONGRESS AND THE COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 47–51 (1988).

24. 2 U.S.C. § 441a. FECA also restricted the amount a candidate could spend on his or her own behalf, limited a person's contributions on behalf of a candidate, imposed disclosure requirements on sizeable contributions, and created a presidential public-financing system. *Id.* §§ 431–456.

25. *See Buckley*, 424 U.S. at 41.

In *Buckley*, the Supreme Court interpreted FECA to only regulate advertisements expressly supporting or opposing candidates.[26] The Court found the "relative to a clearly identified candidate" standard impermissibly vague.[27] Accordingly, such an ambiguous standard would chill speech aimed at informing the electorate on public issues.[28] To avoid striking down the provision on First Amendment grounds, the Court confined the law's scope to ads containing words intimating express campaign activity.[29]

Buckley, therefore, created a distinction between regulated express advocacy and unrestrained issue advocacy. Issue advocacy consists of educational messages promoting policy goals.[30] Such ads receive full First Amendment protection and remain free from legal control.[31] Regulated express advocacy, on the other hand, includes ads with explicit campaign language.[32]

II. THE ASCENDANCE OF SHAM ISSUE ADVOCACY

Stemming from *Buckley*, campaign-finance law has allowed for the explosion of election-related messages aired under the guise of protected issue advocacy.[33] Often negative and misleading, this

26. *Id.* at 44. The *Buckley* Court also upheld FECA's disclosure requirements, public-financing system, and limits on contributions to candidates; however, the Act struck down the campaign expenditure limits and limits on candidates' personal spending. *Id.* at 40–108.

27. *Id.* at 41, 44.

28. *Id.* at 42–44.

29. *Id.* The magic words included "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." *Id.* at 44 n.52.

30. *See* DARRELL M. WEST, CHECKBOOK DEMOCRACY 41–42 (2000).

31. *Id.*

32. *Buckley*, 424 U.S. at 43–44; WEST, *supra* note 30, at 41–42. Though *Buckley* described the "magic words" test, courts varied their treatment of the test when faced with promotions walking the line between express and issue advocacy. *See* Ryan Ellis, "*Electioneering Communication" Under the Bipartisan Campaign Reform Act of 2002: A Constitutional Reclassification of "Express Advocacy,"* 54 CASE W. RES. L. REV. 187, 195–200 (2003). The First and Ninth Circuits adopted divergent interpretations over implementation of *Buckley*'s test. *Compare Faucher v. FEC*, 928 F.2d 468, 472 (1st Cir. 1991) (adopting a "bright-line express advocacy test" requiring magic words), *with FEC v. Furgatch*, 807 F.2d 857, 862, 864–65 (9th Cir. 1987) (finding campaign ad without magic words the equivalent of express advocacy), *cert. denied*, 484 U.S. 850 (1987).

33. *See infra* Part II.A.

phenomenon has worked to impede a fair and informed democratic system.[34]

A. The Proliferation of Sham Issue Advocacy

To avoid FECA coverage, campaign advertisers have refrained from using *Buckley*'s "magic words."[35] Election-related advertisements that avoid magic words to escape regulation, thus, are termed "sham" issue advocacy.[36] As groups increased spending and adjusted to legal distinctions, sham issue advocacy ascended as a powerful force in elections.[37] Almost every television viewer has endured the brunt of these ads, which often personally attack a candidate before summoning viewers to contact that candidate to express dissatisfaction.

Though difficult to differentiate based on objective criteria, sham issue advocacy is readily apparent as election related.[38] The form of issue advocacy the Court sought to protect promotes awareness of pending legislation or public issues.[39] Contrarily, sham issue advocacy admonishes or extols candidates before elections.[40] As an example, the following ad appeared before Ohio voters shortly before the 2000 presidential primaries:

> Last year, John McCain voted against solar and renewable energy. That means more use of coal-burning plants that pollute our air. Ohio Republicans care about clean air. So does Governor Bush. He led one of the first states in America to clamp down on old coal-burning electric power plants. Bush's clean air laws will reduce air pollution more than a quarter million tons a year. That's like taking five million cars

34. *See* WEST, *supra* note 30, at 42; Allan J. Cigler, *Issue Advocacy Electioneering: The Role of Money and Organized Interests*, *in* LAW AND ELECTION POLITICS 59, 59–75 (Mathew J. Streb ed., 2005).

35. McCain & Feingold, *supra* note 11, at 236.

36. Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 MINN. L. REV. 1773, 1775–78 (2001).

37. *Id.* at 1777.

38. HOLMAN & MCLOUGHLIN, *supra* note 10, at 31–33.

39. *First Nat'l Bank of Boston v. Belotti*, 435 U.S. 765, 777 n.12 (1978) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (highlighting the country's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open")); *see also* WEST, *supra* note 30, at 41.

40. Hasen, *supra* note 36, at 1775–77.

off the road. Governor Bush, leading, for each day dawns brighter.[41]

Despite an obvious purpose to influence the Republican primary, the financers of this ad eluded disclosures by excluding express advocacy.[42] The ad typifies the new standard practice in interest group advertising.

For the last decade, sham issue advocacy has permeated the American election system.[43] Markedly, the 1996 election cycle witnessed the full arrival of issue advocacy with the purpose of influencing elections.[44] That year, political entities realized the value in unrestricted campaigning through avoidance of magic words.[45] Issue advocacy accounted for up to $150 million in 1996 election spending, increasing to $341 million in 1998.[46] In the 2000 election cycle, issue advocacy spending rose to $509 million.[47] Studies then confirmed that 83 percent of issue ads aired during the 2000 election cycle were aimed at electing candidates rather than informing citizens about policy issues.[48]

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41. HOLMAN & MCLOUGHLIN, *supra* note 10, at 25.

42. John Mintz, *Texan Aired "Clean Air" Ads*, WASH. POST, Mar. 4, 2000, at A6.

43. The rise of issue advocacy has arrived in confluence with a general exponential increase in total election-cycle spending. Total spending during presidential election cycles rose from $2.8 billion in 1996 to an expected $6 billion in 2008. Brody Mullins, *Interest Groups Gain in Election Cash Quest,* WALL ST. J., Dec. 19, 2007, at A1.

44. *See* WEST, *supra* note 30, at 52–58; Anthony Corrado, *Financing the 1996 Elections*, *in* THE ELECTION OF 1996: REPORTS AND INTERPRETATIONS 135, 145–50 (Gerald M. Pomper et al. eds., 1997).

45. *See* DEBORAH BECK ET AL., ANNENBERG PUB. POL'Y CTR., ISSUE ADVOCACY ADVERTISING DURING THE 1996 CAMPAIGN 3–4 (1997). Aside from the legal benefits of avoiding the magic words, political advertisers have found that subtle directions are an effective message strategy. HOLMAN & MCLOUGHLIN, *supra* note 10, at 29–31. For this reason, most candidate ads otherwise under hard-money controls use the subtle pleas of sham issue ads in their campaigns. *Id.* Accordingly, more than twenty-four different groups began to run issue ads in 1996 with the aim of influencing elections. *Id.* at 25.

46. Lorie Slass, Annenberg Pub. Pol'y Ctr., *Spending on Issue Advocacy in the 2000 Cycle*, *in* ISSUE ADVERTISING IN THE 1999–2000 ELECTION CYCLE 3, 4 (2001), *available at* http://www.annenbergpublicpolicycenter.org/Downloads/Political Communication/IssueAdIn19992000Election/2001_19992000issueadvocacy.pdf.

47. *Id.*

48. HOLMAN & MCLOUGHLIN, *supra* note 10, at 31–33. Coders distinguished genuine from sham ads through consistent differences in content between the two categories. *Id.* For instance, almost all genuine issue ads leave out candidate references. *Id.* at 31–32. Meanwhile, electioneering ads feature candidates as the focus of their ads. *Id.* at 32. Other factors that distinguish an electioneering ad include tarnishing

In 2004, "527" groups rose to prominence using sham issue advocacy. While FEC regulation applies to political committees, groups registered as election-centered under section 527 of the tax code shirk registration by airing unrestricted issue advocacy that they claim precludes them from FEC control.[49] These groups spent over $653 million during the 2004 presidential election cycle, much of it on sham issue advocacy.[50] Untouched by FECA safeguards, these groups can receive funding from large corporate and union contributions.[51] Notably, 527s like MoveOn.org, Americans Coming Together, and Swift Boat Veterans for Truth heavily influenced the 2004 election.[52] And in the 2008 election cycle, independent groups swamped caucus- and primary-goers with an onslaught of campaign-related issue advocacy.[53] Independent, unregulated groups were expected to spend around $18 million before Super Tuesday alone, up from $1 million in 2000, a sure precursor of significant action in the 2008 general election.[54]

B. The Consequences of Unregulated Campaign Ads

Sham issue advocacy presents serious risks to informed political decision making. Regardless of their intent, preelection issue ads that discuss candidates impact election outcomes. For this reason, veiled and unaddressed campaign ads thwart the spirit of campaign-finance

adjectives describing candidates, an emphasis on personal traits of candidates, and a negative tone towards candidates. *Id.* at 32–33.

49. FECA regulates "political committees," which include parties, campaigns, PACs, and groups, the "major purpose of which is the nomination or election of a candidate." *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (interpreting section 431 of FECA). For a discussion on the "major purpose" analysis, see Edward B. Foley, *The "Major Purpose" Test: Distinguishing Between Election-Focused and Issue-Focused Groups*, 31 N. KY. L. REV. 341, 352 (2004). Most recently, groups have begun claiming 501(c)(4) status as "advocacy" groups, allowing them to hide donors and directly advocate candidates without FEC regulation. Mullins, *supra* note 43, at A1.

50. Mullins, *supra* note 43, at A1.

51. Allan J. Cigler, *Interest Groups and Financing the 2004 Elections*, *in* FINANCING THE 2004 ELECTION 226 (David B. Magleby et al. eds., 2006). The FEC is beginning to fine these groups for not registering as political committees; however, the fines are relatively small and come well after the end of the election cycle. Fred Wertheimer & J. Gerald Hebert, *Another "Cost of Doing Business" Fine for Media Fund's 527*, CLCBLOG.COM, Nov. 20, 2007, http://www.clcblog.org/blog_item-192.html.

52. Cigler, *supra* note 51, at 229; Leslie Wayne, *Outside Groups Spend Heavily and Visibly to Sway '08 Races*, N.Y. TIMES, Jan. 1, 2008, at A1.

53. Brody Mullins, *Stealthy Groups Shake Up Races*, WALL ST. J., Feb. 4, 2008, at A12.

54. *Id.*; *cf.* John Solomon & Matthew Mosk, *Nonprofits Become a Force in Primaries*, WASH. POST, Dec. 5, 2007, at A1; Wayne, *supra* note 52.

law. Accordingly, these ads lack disclosure, use overly negative tactics, and evade anticorruption rules.

1. DISCLOSURE AND ACCOUNTABILITY

When covertly conducting campaign dirty work, sham issue advocacy deprives the electorate of information needed to make informed decisions.[55] A well-functioning electoral process demands traceable campaign speech.[56] With information on the speaker, voters can judge the messenger's bias and reliability.[57] For this reason, FECA obligates groups to disclose their financial sources and expenditures.[58] In *Buckley*, the Supreme Court recognized the important "informational interest" in disclosures.[59]

Lacking disclosure, covert speech misinforms the public and "mocks the First Amendment."[60] Unregistered 527 groups can use anonymous campaign tactics.[61] As an example, the "Bush Clean Air" ad above[62] appeared to come from an Ohio environmental group when in fact two Texas confidants of candidate Bush financed the ad.[63] Thus, by disguising their identities,[64] groups escape evaluation for their credibility, depriving the electorate of needed information.[65]

Disclosure-avoidance also confuses responsibility for unsavory campaign tactics. Upon witnessing sham issue advocacy, viewers are regularly left under the mistaken belief that candidates themselves are

55. Ellis, *supra* note 32, at 205–07.

56. *Buckley v. Valeo*, 424 U.S. 1, 66–68 (1976) (describing the benefits of campaign disclosures).

57. *Id.*

58. 2 U.S.C. § 434(e) (2006).

59. 424 U.S. at 81; *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (holding that informational interest alone does not allow ban on anonymous, low-volume leafleting).

60. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 405–07 (2000) (Kennedy, J., dissenting) (discussing covert speech as a result of unreasonably low contribution limits).

61. *See supra* notes 49–54 and accompanying text.

62. *Supra* text accompanying note 41.

63. Mintz, *supra* note 42, at A6.

64. Powerful groups have created misleading names to steer public opinion, including "The Coalition-Americans Working for Real Change," sponsored by the National Association of Manufacturers, and "Citizens for Better Medicare," which acts as a platform for pharmaceutical companies. *McConnell v. FEC*, 124 S. Ct. 619, 651, 691 (2003); David B. Magleby, *Interest-Group Election Ads*, *in* OUTSIDE MONEY: SOFT MONEY AND ISSUE ADVOCACY IN THE 1998 CONGRESSIONAL ELECTIONS 41, 53–54 (David B. Magleby ed., 2000).

65. *Buckley v. Valeo*, 424 U.S. 1, 66–68 (1976) (quoting H.R. REP. NO. 92-564, at 4 (1971)).

the source.[66] Election-related ads by interest groups often contain the same images, themes, and rhetoric of candidate commercials.[67] When issue advocacy turns negative, voters often place blame for mudslinging on the candidates.[68]

On the other hand, when campaigns distance themselves from sham issue ads, they capitalize on attacks without facing accountability for unscrupulous tactics.[69] A striking example of this maneuver, the "Swift Boat" campaign of the 2004 presidential election controversially attacked candidate John Kerry's integrity during the Vietnam War.[70] By condemning the ads, however, candidate Bush enjoyed their effect while facing minimal backlash.[71] In this way, campaigns can benefit from a denigrating attack while maintaining the high ground.

2. EXCESSIVE NEGATIVITY

Sham issue advocacy tends to feature character assassinations and often misleading negativity.[72] Though some negative ads provide positive effects to democracy, egregious tactics have been shown to amplify the public's cynicism in the political process and depress political engagement.[73]

The classic example of the negative issue ad phenomenon is the oft-referenced "Yellowtail Ad," run against congressional candidate William Yellowtail of Montana.[74] The ad stated, "Who is Bill Yellowtail? He preaches family values, but he took a swing at his wife. And Yellowtail's explanation? He only 'slapped' her, but 'her nose was broken.'"[75] A group named "Citizens for Reform" ran the campaign message that many believed lost Yellowtail the election.[76]

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66. *See* WEST, *supra* note 30, at 56; Magleby, *supra* note 63, at 57.

67. WEST, *supra* note 30, at 56; Magleby, *supra* note 63, at 49.

68. Magleby, *supra* note 64, at 49.

69. Wayne, *supra* note 52.

70. Kate Zernike & Jim Rutenberg, *Friendly Fire: The Birth of an Attack on Kerry*, N.Y. TIMES, Aug. 20, 2004, at A1.

71. Jim Rutenberg, *Delegates Mock Kerry's Wounds, Angering Veterans*, N.Y. TIMES, Sept. 1, 2004, at P1; *see also* STEPHEN ANSOLABEHERE & SHANTO IYENGAR, GOING NEGATIVE 59–61 (1995) (discussing the benefits to candidates of political advertising).

72. HOLMAN & MCLOUGHLIN, *supra* note 10, at 33.

73. ANSOLABEHERE & IYENGAR, *supra* note 71, at 9; Kim Fridkin Kahn & Patrick J. Kenney, *Do Negative Campaigns Mobilize or Suppress Turnout?*, 93 AM. POL. SCI. REV. 877, 885 (1999).

74. Glenn F. Bunting et al., *Nonprofits Behind Attack Ads Prompt Senate Probe*, L.A. TIMES, May 5, 1997, at A1.

75. *Id.*

76. *Id.*

More notably, the Swift Boat ads also demonstrate a prime example of negative sham issue advocacy run amok.[77] All told, the Swift Boat Veterans for Truth spent nearly $26 million, running over 6,600 advertisements three months before the 2004 election.[78] Despite obvious election-related goals, however, neither the Swift Boat nor the Yellowtail ads faced campaign-finance restrictions.

Negative campaigning, a constant since the country's founding,[79] has reached a new level with the predominance of television broadcasting.[80] The effectiveness of attack ads results from television's power to trigger emotions and long-lasting impressions.[81] Television spots provide cues for voters and increase political awareness.[82] As a result, negative ads present a potent tactic for attracting undecided voters.[83]

Despite their positive capabilities, however, severely negative attacks are shown to have a deteriorative effect on democracy. Though criticism may enhance voter engagement,[84] negativity's positive effects dissipate if uninterested viewers are bombarded with shrill mudslinging.[85] Attack ads often work to exploit stereotypes and downplay important issues.[86] This often distracts the media from substantive policy arguments.[87] Ultimately, negative ads can dishearten the public to the political process[88] and "may pose a serious

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77. MICHAEL M. FRANZ ET AL., CAMPAIGN ADVERTISING AND AMERICAN DEMOCRACY 60 (2007).

78. *Id.*

79. KATHLEEN HALL JAMIESON, DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY 43–44 (1992).

80. *Id.* at 50–54.

81. TED BRADER, CAMPAIGNING FOR HEARTS AND MINDS 174 (2006); DARRELL M. WEST, AIR WARS: TELEVISION ADVERTISING IN ELECTION CAMPAIGNS, 1952-1992 17 (1993).

82. Steven E. Finkel & John G. Geer, *A Spot Check: Casting Doubt on the Demobilizing Effect of Attack Advertising*, 42 AM. J. POL. SCI. 573 *passim* (1998). *But see* ANSOLABEHERE & IYENGAR, *supra* note 71, at 59–61.

83. ANSOLABEHERE & IYENGAR, *supra* note 71, at 64, 66–67 (finding that independents do not respond to positive messages, but do respond exceedingly to negative advertising).

84. FINKEL & GEER, *supra* note 82, at 592 ("It seems to us that effective competition requires the candidates to stress not only their own accomplishments, but also to point out the weaknesses of the opposition's political program and qualifications for office.").

85. Kahn & Kenney, *supra* note 73, at 885.

86. JAMIESON, *supra* note 79, at 64–101.

87. *Id.* at 31.

88. ANSOLABEHERE & IYENGAR, *supra* note 71, at 9; Kahn & Kenney, *supra* note 73, at 885.

antidemocratic threat."[89] The unfettered growth of valueless negativity presents another harm resulting from the sham-issue-advocacy loophole.

3. CORRUPTION AND INEQUALITY

By allowing advantaged contributors to dominate campaign discourse without regulation, sham issue advocacy has a corrupting influence on elections. The ambit of campaign "corruption" remains a point of constant debate in campaign-finance circles.[90] However, the Supreme Court acknowledged the concern caused by disproportionately large campaign war chests.[91] In *Austin v. Michigan Chamber of Commerce*,[92] the Court recognized "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form."[93] In passing FECA, Congress also acknowledged the interest in preventing wealthy actors from exerting too much electoral influence.[94]

Against that backdrop, large war chests found a haven in sham-issue-advocacy spending. FECA created "hard-money"[95] controls to limit the effect of large contributors.[96] This framework limited contributions, funneled corporate and union spending into regulated "political action committees" (PACs),[97] and mandated reporting and disclosures.[98] Now that the law restricts contributions to parties and

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89. ANSOLABEHERE & IYENGAR, *supra* note 71, at 9.

90. Marlene Arnold Nicholson, *Basic Principles of Theoretical Tangles: Analyzing the Constitutionality of Government Regulation of Campaign Finance*, 38 CASE W. RES. L. REV. 589, 599 (1988) (explaining the expanded version of corruption adopted by the Supreme Court). Many oppose political equality as a legitimate goal of campaign-finance laws. In this view, the ability to spend and raise unlimited amounts of money is fundamental to a free society and the principal of campaign money as speech. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 703–04 (1990) (Kennedy, J., dissenting) ("In *Buckley* and *Bellotti* . . . we rejected the argument that the expenditure of money to increase the quantity of political speech somehow fosters corruption.").

91. *See Austin*, 494 U.S. at 658–59.

92. 494 U.S. 652.

93. *Id.* at 660.

94. *See* 2 U.S.C. § 441a (2006) (creating hard-money rules); *see also id.* § 441i(a)(1) (extending hard-money rules to political parties).

95. *See infra* note 115.

96. 2 U.S.C. at § 441b; *see generally Buckley v. Valeo*, 424 U.S. 1 (1975).

97. PACs are legally proscribed funds created by labor unions and corporations for purposes of campaign contributions and expenditures. *See* 2 U.S.C. § 441b.

98. *Id.* FECA carried a provision limiting campaign expenditures that was struck down by the Supreme Court as an unconstitutional restriction on political expression. *Buckley*, 424 U.S. at 54–58.

candidates, wealthy interests have turned to independent groups with the ability to wage unlimited sham issue advocacy.[99] Bypassing FECA coverage, sham issue advocacy stymies laws guarding against corruption.[100]

With the opportunity for limitless campaign spending, candidates develop allegiances to issue-advocacy groups.[101] Large donors become repeat players every election cycle, and candidates pay attention.[102] The limitless spending of wealthy groups makes elected officials more prone to becoming beholden to the wrath or support of those advantaged interests.[103] Corruption occurs, then, "through the creation of [elected officials'] political debts."[104] Candidates are discouraged from discussing sticky issues for fear that interest groups will limitlessly attack them.[105] Indeed, some groups view their heightened ability to influence the electorate as a true hallmark of democracy.[106] In such a scenario, however, the interests of well-funded groups tend to dominate over those of the general public.

III. *WRTL II* AND THE CURSE OF POLITICAL "CENSORSHIP"

In a sweeping reform of campaign-finance law, Congress passed, and President George W. Bush signed, BCRA to control the unbounded spending afflicting the then-current system.[107] As part of that reform, Congress prevented corporate and union treasuries from financing many forms of sham issue advocacy, termed "electioneering communications" by the Act.[108] Though the Supreme Court upheld the

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99. Mullins, *supra* note 43 (noting that independent groups have replaced political parties in soft-money fundraising).

100. *See id.*

101. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978).

102. *See, e.g.*, Eliza Newlin Carney, *Air Strikes*, NAT'L J., June 15, 1996, at 1313; Marty Jezer & Ellen Miller, *Money Politics: Campaign Finance and the Subversion of American Democracy*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 467, 470–72, 479–80 (1994); Jill Abramson, *Tobacco Industry Steps Up Flow of Campaign Money*, N.Y. TIMES, Mar. 8, 1998, at 1 (noting that the tobacco industry, which seeks favorable legislation, donated millions of dollars to candidates in a nonelection year); Ken Foskett, *Tax Exempts: The Hidden Force*, ATLANTA J. CONST., Aug. 24, 1998, at 6A; *Rule of the PAC Drives Voters to Third Parties*, STAR-LEDGER (Newark, N.J.), Mar. 25, 1996, at State-1.

103. *See Bellotti*, 435 U.S. at 788 n.26.

104. *Id.*

105. ANSOLABEHERE & IYENGAR, *supra* note 71, at 133.

106 . George F. Will, Op-Ed., *The First Amendment on Trial*, WASH. POST, Dec. 1, 2002, at B7.

107. Gregory Comeau, *Bipartisan Campaign Reform Act*, 40 HARV. J. ON LEGIS. 253, 253, 280 (2003).

108. 2 U.S.C. § 441b(b)(2) (2006).

provision on a facial challenge in *McConnell v. FEC*,[109] it struck down the ban on corporate-treasury spending in an as-applied challenge in *WRTL II*.[110] *WRTL II* demonstrates that campaign-finance laws construed as speech limitations face guaranteed difficulties under judicial review. This strict review protects speech, but can inhibit meaningful reform. Thus, policy makers can better succeed by using alternative methods.

A. BCRA's Regulation of "Electioneering Communications"

BCRA imposed controls on sham issue advocacy falling under the "electioneering communications" standard.[111] The Act, sponsored by Republicans and Democrats,[112] set forth two primary prohibitions: the first to ban party "soft money,"[113] the second to prevent corporation- and union-treasury funds from financing sham issue advocacy.[114] In effect, the Act forced hard-money[115] controls upon previously unregulated groups. The law's sponsors argued that interests had exploited the issue-advocacy distinction.[116] To prevent such abuse, BCRA set a bright-line standard subjecting election-related issue advocacy to regulation.[117]

To control sham issue advocacy, BCRA prohibited corporate and union treasuries from sponsoring ads falling under a clear standard.[118] Termed "electioneering communications," regulated ads were defined as any "[television] broadcast . . . which . . . refers to a clearly identified candidate for Federal office; . . . is made within . . . 60 days

109. 540 U.S. 93, 194, 224 (2003).

110. 127 S. Ct. 2652, 2673 (2007).

111. Ellis, *supra* note 32, at 208–10.

112. Representatives Martin Meehan (D-Mass.) and Christopher Shays (R-Conn.) sponsored the Act in the House of Representatives. *See* Andrew Kratenstein, *Recent Legislation: Campaign Finance Reform*, 36 HARV. J. ON LEGIS. 219, 219 n.1 (1999). Senators Russell Feingold (D-Wis.) and John McCain (R-Ariz.) sponsored the bill in the Senate. *See id.*

113. BCRA, Pub. L. No. 107-155, § 101, 116 Stat. 81, 82 (2002) (codified at 2 U.S.C. § 323 (2006)). The Supreme Court upheld the soft-money ban in an immediate challenge in *McConnell*. 540 U.S. at 154–56. This Note does not address the Court's treatment of BCRA's soft-money provision.

114. BCRA, Pub. L. No. 107-155, § 201.

115. "Hard money" refers to campaign dollars raised and spent in compliance with the disclosure and reporting requirements, contribution limits, and source restrictions set forth in FECA. *Buckley v. Valeo*, 424 U.S. at 1, 1–2 (1976). *See supra* notes 95–98 and accompanying text.

116. McCain & Feingold, *supra* note 11, at 236.

117. *McConnell*, 540 U.S. at 194.

118. 2 U.S.C. § 441b(b)(2) (2006).

before [an] . . . election for the office sought by the candidate . . . [and is] targeted at the relevant electorate."[119] The new standard avoided the vagueness of the "relative to a clearly identified candidate" test that *Buckley* found chillingly vague.[120] Additionally, corporations and unions could still run issue advocacy if financed through a PAC.[121] Though individuals or PACs could pay for such ads, the Act subjected expenditures to disclosure and reporting requirements.[122] For practical purposes, the electioneering-communications standard replaced the magic words test in deciding what advertisements faced the source restrictions and disclosure requirements set forth under FECA.[123]

Facing an immediate challenge, BCRA received temporary validation in *McConnell*.[124] Writing for the 5-4 majority, Justices John Paul Stevens and Sandra Day O'Connor upheld section 203 of BCRA, reasoning that corporations and unions retained the ability to exercise speech rights through PACs.[125] The mild prohibition was justified by affirming an interest in preventing the distorting effect of large war chests.[126] Though the Court initially upheld BCRA, it determined that *McConnell* opened the door to as-applied challenges in *WRTL I*.[127] Three years after *McConnell*, this challenge would come in *WRTL II*.

B. The WRTL II *Decision*

The *WRTL II* opinion created a setback in reformers' efforts to curb the proliferation of sham issue advocacy. Section 203 of BCRA suppressed political speech, according to Chief Justice John Roberts, by blocking corporate or union money from airing legitimate issue advocacy.[128] To avoid striking down the regulation as overly broad, Roberts narrowed the FEC's ability to regulate advertising to the point where most issue ads could easily circumvent the law.[129] In

119. BCRA, Pub. L. No. 107-155, § 201.
120. 424 U.S. at 41–43.
121. BCRA, Pub. L. No. 107-155, § 203.
122. *Id.* § 201.
123. *See* Ellis, *supra* note 32, at 208–09; McCain & Feingold, *supra* note 11, at 236–37.
124. 540 U.S. 93 (2003).
125. *Id.* at 206–07.
126. *Id.* at 205.
127. *Wis. Right to Life, Inc. v. FEC* (*WRTL I*), 546 U.S. 410, 411–12 (2006) (per curium).
128. *FEC v. Wis. Right to Life, Inc.* (*WRTL II*), 127 S. Ct. 2652, 2664 (2007).
129. *Id.* at 2667.

confining BCRA's coverage to a "severely limited"[130] range of advertising, *WRTL II* left the sham-issue-advocacy loophole effectively intact.

1. WISCONSIN RIGHT TO LIFE'S CHALLENGE

Wisconsin Right to Life, a nonprofit advocacy group, attempted to run what it called a grassroots campaign in the summer of 2004.[131] The campaign included the airing of an issue-advocacy message titled "Wedding," which criticized "a group of Senators" for using filibusters to delay the confirmation of judicial nominees.[132] The ad told viewers to "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster."[133] It then directed those viewers to a Web site expressly urging opposition to Senator Feingold's reelection.[134] The message was funded with corporate-treasury monies,[135] identified Senate candidate Feingold, and ran in Wisconsin thirty days prior to the primary; therefore, the electioneering-communications rule barred the ad.[136]

Wisconsin Right to Life sought a declaratory judgment that its ads were constitutionally protected.[137] After a three-judge panel denied the request based on *McConnell*,[138] Wisconsin Right to Life appealed directly to the Supreme Court.[139] In *WRTL I*, the Court ruled that *McConnell* did not preclude as-applied challenges to BCRA and remanded.[140] On remand, the district court found Wisconsin Right to Life's ad exempt from regulation since it was not the functional equivalent of express advocacy, thus making it constitutionally

130. *Id.* at 2699 (Souter, J., dissenting).

131. *Id.* at 2660.

132. *Id.*

133. *Id.*

134. *Id.*

135. Though *McConnell* exempted certain ideological nonprofit corporations known as "MCFL" organizations from BCRA restrictions, 540 U.S. 93, 209–10 (2003), Wisconsin Right to Life fell outside the exemption since it received for-profit corporate-treasury funds to run its ads. 127 S. Ct. at 2697 (Souter, J., dissenting).

136. 127 S. Ct. at 2661.

137. *Id.*

138. *Id.*

139. The Supreme Court granted direct review pursuant to 28 U.S.C. § 1253 (direct appeal from decisions of district courts denying permanent injunctions) and BCRA § 403(a)(3) (direct appeal to the Supreme Court of the district court's "final decision").

140. *Wis. Right to Life, Inc. v. FEC* (*WRTL I*), 546 U.S. 410, 411–12 (2006) (per curium).

protected.[141] The FEC appealed to the Supreme Court for final resolution.[142]

Writing the principal opinion of the Court, the newly appointed Justices Roberts and Alito affirmed that Wisconsin Right to Life's ads did not rise to the functional equivalent of express advocacy.[143] The opinion did not expressly overrule *McConnell*, but did narrow BCRA's coverage to allow for easy circumvention.[144] The decision came amidst three differing interpretations of the case. Justices Antonin Scalia, Anthony Kennedy, and Clarence Thomas concurred, believing that *McConnell* should be overruled and that corporate treasuries should be able to run any kind of political advertising.[145] Justices Souter, Breyer, Ginsberg, and Stevens dissented on grounds that, applying a contextual analysis, the Wisconsin Right to Life ad fell under the type constitutionally subject to regulation under *McConnell*.[146] The decision divided the Court, with the two newest members expounding the rule of law regarding sham-issue-advocacy regulation.

2. "PROTECTING RATHER THAN STIFLING SPEECH"[147]

BCRA's bright-line ban prompted the principal opinion to impose a high standard on the law's supporters. From the outset, the opinion in *WRTL II* adopted a tone separate from *McConnell* and unreceptive to the regulation imposed under BCRA.[148] Instead of finding a slight burden within the PAC-spending requirement, the Roberts Court imposed "formidable" strict scrutiny on the Act.[149] According to the Chief Justice, preventing corporate and union treasuries from spending on electioneering communications amounted to censorship of a political speaker.[150] This suppression warranted strict scrutiny.[151]

Strict scrutiny, applied when Courts find enforced silence within a law, requires the Government to prove (1) a compelling state interest

141. *Wis. Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195, 208–10 (D.C. Cir. 2006).

142. 127 S. Ct. at 2662.

143. *Id.* at 2658–74.

144. *See* Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in* FEC v. Wisconsin Right to Life, 92 MINN. L. REV. 1064, 1064–85 (2008).

145. 127 S. Ct. at 2674–87 (Scalia, J., concurring).

146. *Id.* at 2687–705 (Souter, J., dissenting).

147. *Id.* at 2667.

148. Hasen, *supra* note 144, at 1085–90.

149. 127 S. Ct. at 2664.

150. *Id.* at 2663–64.

151. *Id.* at 2664.

and (2) narrow tailoring to achieve that interest.[152] Under this review, the Court stated that it had "never recognized a compelling interest in regulating ads, like WRTL's, that are neither express advocacy nor its functional equivalent."[153] This statement appears to differ with the Court's ruling in *McConnell* that Congress could funnel such spending through PACs.[154] Regardless, the Court asserted its reliance on precedent, and rejected BCRA's electioneering-communications standard as overbroad.[155] Any suppression of speech that is not equivalent to express advocacy would unnecessarily silence protected expression outside the parameters of the law's justification.[156]

To allow the electioneering-communications provision to target only the functional equivalent of express advocacy, thereby satisfying strict scrutiny, the Court invalidated BCRA's bright-line standard.[157] In its place, the Court adopted an "objective" test for judging the functional equivalent of express advocacy based purely on the ad's content.[158] Only messages "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" were subject to limits.[159] This test avoids inquiry into the speaker's intent, and involves "minimal if any discovery."[160] In effect, the ruling limited BCRA's coverage to the few most obvious examples of direct campaign ads.

3. THE CONTINUATION OF SHAM ISSUE ADVOCACY

Following *WRTL II*, sham issue advocacy will continue to saturate the airwaves. Typical sham issue advocacy is designed to influence elections, but uses subtle tactics to evade legal constrictions.[161] The Wisconsin Right to Life ad itself, though more modest in its electoral leanings than much issue advocacy, showed signs that it intended to

152. *Id.*

153. *Id.* at 2671.

154. Hasen, *supra* note 144, at 1088. Unlike in *McConnell*, the Court in *WRTL II* found a substantial burden on speech freedoms within the PAC requirement. *See* 127 S. Ct. at 2671.

155. 127 S. Ct. at 2671–72.

156. *Id.* ("A court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech. That a compelling interest justifies restrictions on express advocacy tells us little about whether a compelling interest justifies restrictions on issue advocacy.").

157. *Id.* at 2666.

158. *Id.* at 2666–67.

159. *Id.* at 2667.

160. *Id.* at 2666.

161. *See supra* Part II.A.

affect the senatorial election.[162] Yet, the group evaded review by calling on viewers to "contact" Senator Feingold instead of entreating a vote against him.[163]

In adopting Roberts's test, the principal opinion largely preserved the sham issue ad loophole. In many ways, the test created a result similar to the magic words test adopted in *Buckley*.[164] Only advertisers blatantly pushing for a candidate's election or defeat would fall subject to regulation.[165] As Justice Souter's dissent highlighted, even the Yellowtail ad above[166] would likely fall outside the *WRTL II* test.[167] The ad instructed viewers to call the candidate with their grievance, a common indicator of an interpretation other than campaigning.[168]

In November 2007, the FEC approved its final rules for the new electioneering-communications standard.[169] In accordance with *WRTL II*, the Commission's promulgation allows issue advocacy to evade regulation so long as it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate."[170] Indicia of ads outside legal coverage include the discussion of a policy issue or the urging of the public to contact a candidate.[171] Election-related issue advocacy, then, will continue to overload the airwaves and shirk hard-money controls.

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162. Rhetoric and slogans on the Web site referred in the ad make clear the group's opposition to Senator Feingold, no filibuster vote was approaching at the time of the ad's airing, and the filibuster issue was a major attack theme during the 2004 election. 127 S. Ct. at 2697–98 (Souter, J., dissenting). The ad itself is very suggestive in its "purpose . . . to put political pressure upon Senator Feingold . . . through the very existence of an ad bringing to the public's attention that he . . . stood athwart the allowance of a vote on judicial nominees." *Id.* at 2684 n.8 (Scalia, J., concurring).

163. Hasen, *supra* note 144, at 1083.

164. *Id.* at 1089, 1090, 1096–97, 1100.

165. *Id.* at 1089–90, 1096–99, 1100–03. Since *WRTL II*, one case has applied the opinion to a political communication. In *Citizens United v. FEC*, a three-judge panel ruled that the film, "Hillary: the Movie," triggered the new electioneering-communications provision. 530 F. Supp. 2d 274, 276–78 (D.C. Cir. 2008). The panel rejected the argument that express advocacy was required, but applied *WRTL II*'s standard to a movie that "does not focus on legislative issues," and "takes a position on [a candidates] . . . fitness for office." *Id.* at 279.

166. *See supra* notes 74–76 and accompanying text.

167. 127 S. Ct. at 2693 (Souter, J. dissenting).

168. *See id.* at 2683–84 n.7 (Scalia, J., dissenting). Justice Scalia derided the principal opinion as "faux judicial restraint" for allowing the most "striking" example of sham issue advocacy, the Yellowtail ad, to bypass legal controls while still upholding the Act. *Id.*

169. 11 C.F.R. §§ 104, 114 (2008); *see also* Matthew Mosk, *Translating a Ruling Into New Limits for Issue Ads*, WASH. POST, Aug. 22, 2007, at A15.

170. 11 C.F.R. § 114.15.

171. *Id.*

C. The Problem of Regulatory Overbreadth

WRTL II demonstrates the obstacles facing prescribed limits on political spending or speech. Content-based limits, according to established doctrine, are unconstitutional unless "narrowly tailored to serve a compelling state interest."[172] This review requires the government to show an interest that is "compelling, or extremely important, or of the 'first order.'"[173] Even then, the regulation must narrowly target only that interest "evidenced by factors of relatedness between the regulation and the stated governmental interest."[174] Any overbreadth into areas not subject to the stated interest runs afoul of the Constitution. Requirements are onerous to the point where the Court has stated, "it is the rare case in which . . . a law survives strict scrutiny."[175]

For campaign-finance laws, strict-scrutiny review presents an arduous test. Such laws undoubtedly target the essence or "core" of the First Amendment.[176] As stated in *Buckley*, "it can hardly be doubted that the [freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office."[177] In pursuit of protecting this sacred aspect of democracy, the Court has struck down limits on campaign contributions,[178] expenditures,[179] speech by judicial candidates,[180] and corporate contributions,[181] respectively.

For proposed sham-issue-advocacy controls, the overbreadth hurdle results in a no-win situation for reformers. Bright-line rules risk overbreadth by limiting protected, genuine issue ads. However, case-sensitive triggers invoke vagueness concerns. Ambiguous legal standards create a chilling effect on speakers attempting to comply.[182] This catch-22 plagued BCRA's implementation. To satisfy vagueness

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172. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 655 (1990); *see also Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989); *Boos v. Barry*, 485 U.S. 312, 334 (1988) (plurality); *United States v. Grace*, 461 U.S. 171, 177 (1983).

173. David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases*, 56 FLA. L. REV. 483, 498 (2004).

174. *Republican Party of Minn. v. White*, 416 F.3d 738, 751 (8th Cir. 2005).

175. *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

176. *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976).

177. *Id.* at 15 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

178. *Randall v. Sorrell*, 126 S. Ct. 2479, 2499–500 (2006).

179. *Buckley*, 424 U.S. at 23.

180. *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002).

181. *FEC v. Mass. Citizens Concerned for Life, Inc.*, 479 U.S. 238, 263–65 (1986).

182. Hasen, *supra* note 36, at 1773–74.

problems found in *Buckley*,[183] Congress added the bright-line electioneering-communications provision to define regulated issue advocacy.[184] The simple yet expansive rule, however, unconstitutionally swallowed genuine issue advocacy.[185] As *WRTL II* confirms, strict scrutiny subjects issue-advocacy limits to an enormously difficult standard of review.

Adding to those obstacles, the Roberts Court appears increasingly hostile toward campaign regulation. Though a string of cases coined the "New Deference" quartet granted more authority for campaign intervention by Congress,[186] the Court has taken a turn signaling the contrary.[187] The Court's newest additions, Justices Roberts and Alito, have exhibited heavy skepticism towards campaign-finance laws.[188] This trend derives from the unspoken overruling of *McConnell* in *WRTL II*, the Court's first rejection of contribution limits in *Randall v. Sorrell*,[189] and the recent ruling in *Davis v. FEC*[190] striking down the Millionaire's Amendment.[191] These rulings may highlight a sea change in the Court's campaign-finance jurisprudence.

With the already arduous challenges facing issue-advocacy limits, the Roberts Court's deregulatory approach makes review seemingly insurmountable.[192] Given this reality, future legislation stands its best chance by avoiding strict scrutiny all together.

183. 424 U.S. at 44.

184. *See* 2 U.S.C. § 434(f)(3)(A) (2006) (defining "electioneering communications").

185. *See FEC v. Wis. Right to Life, Inc. (WRTL II),* 127 S. Ct. 2652, 2672 (2007). The amount of genuine issue ads falling under the standard was a point of significant disagreement among judges and academics. Hasen, *supra* note 36, at 1799–800.

186. Professor Richard Hasen of Loyola University Law School names *McConnell v. FEC*, 540 U.S. 93 (2003); *FEC v. Beaumont*, 539 U.S. 146 (2003); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001); and *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) as the "New Deference Quartet." Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885, 891 (2005). The cases represented a new trend in the Rehnquist Court giving Congress authority to regulate campaign finance. *Id.*

187. *See* Hasen, *supra* note 144, at 1103; Bradley A. Smith, *A Moderate, Modern Campaign Finance Reform Agenda*, 12 NEXUS 3, 8 (2007).

188. Hasen, *supra* note 144, at 1104.

189. 126 S. Ct. 2479 (2006); *see also* Hasen, *supra* note 144, at 1105.

190. 128 S. Ct. 2759 (2008).

191. *Id.*

192. Hasen, *supra* note 144, at 1104–05.

IV. A COUNTERSPEECH SOLUTION FOR SHAM ISSUE ADVOCACY

The reform community should take cues from *WRTL II* and adopt an alternative remedy for sham issue advocacy. The age-old concept of fighting speech with more speech may provide a helpful starting point. To support that principle, this Part argues in favor of a counterspeech scheme that can both promote speech and control the effects of sham issue advocacy.

A. Counterspeech's History

Counterspeech presents a convenient alternative to speech and/or spending restrictions in campaign-finance law. The doctrine is invoked historically as the preferred remedy for problematic expression. Though legislative mandates enhancing counterspeech face a difficult task in not punishing the speaker, fair-minded proposals can effectively enhance speech and pass judicial review.

1. COUNTERSPEECH PRINCIPLES

Justice Brandeis's articulation of counterspeech policy[193] has been applied to numerous situations where forms of protected speech are deemed harmful. Well before Brandeis championed opposing speech as the ideal remedy, however, James Madison addressed the harms of ardent factions along similar lines.[194] In *The Federalist*, Madison described two methods for addressing fervent interest groups: "[t]he one by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests."[195] For Madison, the alternative to banning associational rights was the promotion of divergent opinions to democratically counter others.

Madison's philosophy translates well into issues of speech. Rigorous debate and counterproposals can subject malicious speakers to scrutiny and flesh out policies most attractive to the populace. Instead of government-imposed silence within the marketplace of ideas, the best remedy for unwanted speech is countering speech that can qualify or

193. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

194. THE FEDERALIST NO. 10 (James Madison).

195. *Id.*

refute harmful rhetoric.[196] This is the bedrock principle behind counterspeech methods.[197]

Counterspeech, often thought of as a "self-help" rather than legal solution,[198] has drawbacks. Counterspeech falters when it cannot address the same audience as the original "harmful" speech.[199] Victims of attack speech may also suffer from discredit before they can respond.[200] First Amendment scholars Robert Richards and Clay Calvert see this weakness as that of "unequal access to the means of communication."[201] Though an ideal method of constitutional review, counterspeech is not as effective when unable to address the original listening audience.

In numerous areas of unfair or hurtful speech, however, aggrieved persons can vindicate themselves through response. Richards and Calvert point out contexts of hate speech, unsavory journalism tactics, and disagreeable art exhibits, where counterspeech subdued disliked expression more effectively than censorship.[202] In one example, counterspeech was "a legally enforceable remedy" to combat cigarettes' image as portrayed by Big Tobacco.[203] As part of a settlement reached between forty-six states and the cigarette industry, governments dedicated $1.5 billion to antismoking campaigns.[204] Instead of banning

196. The "marketplace" metaphor emanates from Justice Oliver Wendell Holmes's quip that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See* Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1. Blasi asserts five basic values "served by a robust free speech principle": (1) individual autonomy, (2) truth seeking, (3) self-government, (4) the checking of abuses of power, and (5) the promotion of good character. *Id.* at 1.

197. Richards & Calvert, *supra* note 4, at 553–54.

198. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) ("The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation.").

199. Richards & Calvert, *supra* note 4, at 554.

200. *See* OWEN M. FISS, THE IRONY OF FREE SPEECH 16 (1996) ("[T]he fear is that the speech will make it impossible for . . . disadvantaged groups even to participate in the discussion. In this context, the classic remedy of more speech rings hollow."); *see also* John A. Powell, *As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society*, 16 LAW & INEQ. 97, 103 (1998) (discussing how racist speech can deter minority counterspeech).

201. Richards & Calvert, *supra* note 4, at 555.

202. *Id.* at 585.

203. *Id.* at 576.

204. *Id.*

cigarette ads, this state solution countered those messages with education.[205]

Courts have also indicated a strong preference for counterspeech over censorship in defamation law. When public figures bring lawsuits for slander or libel, the Court's strict requirements that statements be false[206] and carry "actual malice"[207] make it difficult to combat insidious commentary. As an alternative to punishing statements, the Court has suggested that injured parties use "available opportunities to contradict the lie or correct the error and thereby . . . minimize its adverse impact on reputation."[208] Counterspeech supposes that "[i]f the naiveté of the public will cause advertising . . . to be misleading, then it is the [aggrieved party's] role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective."[209]

This discussion carries special relevance to affronted political candidates. As Justice Brennan noted in the watershed defamation case, *New York Times Co. v. Sullivan*,[210] "uninhibited, robust, and wide-open [debate] . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[211] Heeding Brennan's words, the best remedy for derogatory messages like the Yellowtail ad is response and education.

2. PREVENTING STRICT SCRUTINY

Courts treat political speech as "the very stuff of the First Amendment,"[212] and carefully examine any regulation on the subject.[213] While this judicial vigilance can hamper spending caps and source restrictions,[214] counterspeech laws can overcome traditional barriers if crafted to enhance, rather than punish, political speech.

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205. *Id.* at 577–78. Until recently, statistics have shown a decline in smoking rates attributable to state advertising efforts. Marc Kaufman, *Decades-Long U.S. Decrease in Smoking Rates Levels Off*, WASH. POST, Nov. 9, 2007, at A7.

206. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

207. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

208. *Gertz*, 418 U.S. at 344.

209. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 375 (1977).

210. 376 U.S. 254 (1964).

211. *Id.* at 270.

212. *Republican Party of Minn. v. White*, 416 F.3d 738, 748 (8th Cir. 2005).

213. *Id.*; *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

214. *Buckley*, 424 U.S. at 19 ("[E]xpenditure limitations . . . represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.").

When courts find the First Amendment inhibited, they impose strict scrutiny on the triggering regulation.[215] To withstand this scrutiny, the law must be narrowly tailored to achieve a compelling governmental interest.[216] Outside of preventing corruption, the Court has acknowledged few rationales as compelling enough to silence political speakers.[217] If legislation satisfies a compelling governmental interest, narrow tailoring presents another immense hurdle. If the law restricts speech not implicated in the recognized interest, it is unconstitutionally overbroad.[218] Failure to reach all speech implicated in the compelling interest, or underinclusiveness, also can negate a law's validity.[219] This review creates a nearly insatiable barrier to reform.

If counterspeech initiatives avoid punishing political speakers, they can fare better under judicial review. In *WRTL II*, BCRA's source restrictions were construed as censorship.[220] From there, the Court dismissed the egalitarian rationales put forward by the law's supporters as uncompelling.[221] To cure the ills of sham issue advocacy, counterspeech presents an attractive alternative to traditional reforms.[222] Enhanced debate should fare better than traditional restrictions in campaign-finance law for a simple reason: if a law targeting sham issue advocacy "quiets no speech at all,"[223] strict scrutiny should be bypassed.

3. THE DELICATE BALANCE FACING COUNTERSPEECH LAWS

Within campaign finance, counterspeech-based laws present a more viable—but still problematic—alternative to traditional restrictions. Policy makers have designed systems, such as publicly

215. *See, e.g.*, *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2664 (2007); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658 (1990).

216. *Wis. Right to Life,* 127 S. Ct. at 2664.

217. Though the Court has moved toward allowing laws aimed at equalizing political capital to pass scrutiny, the Court often returns to the principle that "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48–49. This stance echoes the treatment of the corporate and union restrictions in *WRTL II.* Hasen, *supra* note 144, at 1092–93.

218. *See, e.g.*, *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989); *see also* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2422–23 (1996) (describing strict-scrutiny analysis).

219. *See* Volokh, *supra* note 218, at 2422; *Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

220. *Wis. Right to Life, Inc.*, 127 S. Ct. at 2674.

221. *Id.* at 2671.

222. *See* Richards & Calvert, *supra* note 4, at 555.

223. *Davis v. FEC*, 128 S. Ct. 2759, 2780 (2008) (Stevens, J., dissenting).

financed elections and the equal-time rules, which have constitutionally counterbalanced debate. Other provisions, such as the Fairness Doctrine and the Millionaire's Amendment, have unwarily treaded into indirect speech punishment. As evidenced by these examples, any counterspeech-driven scheme must be carefully crafted to avoid placing burdens on selected political speakers.[224]

a. Public-financing systems

State-imposed public-financing schemes demonstrate a key example of judicial preference for enhanced counterspeech over spending limits. In *Buckley*, the Court allowed the government to limit campaign spending as part of a candidate's voluntary acceptance of public funds.[225] Public-financing schemes have since been used to successfully limit expenditures in state election systems.[226]

These systems have also been enhanced to even the playing field between participating and nonparticipating candidates. In the 1990s, an increasing number of candidates began bypassing public funding so they could raise unlimited private monies.[227] Additionally, wealthy independent interests began circumventing the rules by expending "independent" funds on behalf of candidates.[228] These practices allowed one candidate to exploit a lopsided ability to distribute his or her message to the public. To respond to this problem, systems in Minnesota[229] and Maine[230] grant participating candidates increased public money if they face nonparticipating candidates.[231] In effect, this

224. *See id.* at 2771 (admonishing law that requires speaker "to choose between the First Amendment right to engage in unfettered political speech" and endure legally imposed disadvantages).

225. 424 U.S. 1, 108 (1976).

226. *See* BURT NEUBORNE, A SURVEY OF EXISTING EFFORTS TO REFORM THE CAMPAIGN FINANCE SYSTEM 16–21 (1997).

227. John Cochran, *Public Financing: Rebirth or Irrelevance*, CQ WKLY., Mar. 19, 2007, at 802; *see also* MICHAEL J. MALBIN & THOMAS L. GAIS, THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES 158 (1998) (explaining disincentives of accepting public financing).

228. Michael E. Campion, *The Maine Clean Election Act: The Future of Campaign Finance Reform*, 66 FORDHAM L. REV. 2391, 2399–400 (1998); *see also* Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470, 2471 (1997) ("[A]lthough those who accept public funds are barred from receiving private contributions and must limit the expenditures of their own money, others are free to spend on their behalf.").

229. MINN. STAT. § 10A.25 subd. 10 (2006).

230. ME. REV. STAT. ANN. tit. 21-A, § 1125(9) (2007).

231. Public funding systems give subsidies to legally qualified candidates who volunteer to limit expenditures and/or accept limited private contributions. Other strings may be attached to acceptance of public money, and other rewards may come to participating candidates who face non-participating candidates. *See* NEUBORNE, *supra*

additional money counteracts the increased financial abilities of nonparticipating opposition candidates.

The United States Court of Appeals for the Sixth Circuit validated this counterspeech remedy.[232] According to the appellate court, a reasonably increased subsidy did not inhibit speech to any significant degree.[233] The United States Court of Appeals for the Eighth Circuit also validated Minnesota's incentives against nonparticipating candidates in *Rosenstiel v. Rodriguez*.[234] Writing for the court, Judge Hansen ruled that Minnesota's system "presents candidates with an . . . optional campaign funding choice . . . [that] promotes, rather than detracts from, cherished First Amendment values."[235] In both decisions, awarding money and/or speech was a constitutional means of controlling private fundraising.

Along similar lines, the United States Court of Appeals for the First Circuit upheld a Maine law providing matching funds to compensate for independent expenditures.[236] The law granted public monies to correspond with spending by outside groups against the participating candidate.[237] The First Circuit found matching-funds laws constitutional so long as candidates remain "free to engage in unlimited private funding and spending instead of limited public funding."[238] Without a "burden on speakers' First Amendment rights," the law bypassed heavy scrutiny.[239] Though the judiciary struck down limits on independent expenditures in *Buckley*, it permitted Maine to legally proscribe counterspeech against independent spending.[240]

Public-funding systems lack source restrictions or coerced spending limits, thus tempering judicial scrutiny.[241] These examples,

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note 226, at 16–21; *see also* Jason B. Frasco, *Full Public Funding: An Effective and Legally Viable Model for Campaign Finance Reform in the States*, 92 CORNELL L. REV. 733, 743–88 (2007).

232. *Gable v. Patton*, 142 F.3d 940, 953 (6th Cir. 1998).

233. *Id.* at 948–49.

234. 101 F.3d 1544, 1552 (8th Cir. 1996).

235. *Id.*

236. *Daggett v. Comm'n on Gov't Ethics & Election Practices*, 205 F.3d 445, 469 (1st Cir. 2000). *But see Day v. Holahan*, 34 F.3d 1356, 1359–60 (8th Cir. 1994) (finding differing public-funding treatment for wealthy candidates unconstitutional).

237. *Daggett*, 205 F.3d at 451.

238. *Id.* at 467.

239. *Id.* at 464.

240. 424 U.S. 1, 45 (1976).

241. *See, e.g.*, *Gable v. Patton*, 142 F.3d 940, 944–45 (6th Cir. 1998); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1547 (8th Cir. 1996). In reviewing public funding of elections and voluntary limits on speech, courts will generally not strike down systems unless the incentives and punishments rise to coercion. *Daggett*, 205

then, demonstrate how publicly sanctioned counterspeech can control undesirable campaign tactics within the bounds of the Constitution.

b. The fairness doctrine and equal-time rules

The history of the fair-broadcasting rules also demonstrates the acceptability, but constitutional dilemma, underlying legally imposed counterbalance.[242] In 1934, Congress passed the Communications Act to create licensing restrictions on broadcasters as a condition for using the public airwaves.[243] To prevent monopolization of broadcasted viewpoints, the FCC banned licensee editorials.[244] This harsh restriction proved problematic, however, and the FCC adopted a counterspeech method as an alternative.[245]

In 1948, the Commission implemented a rule requiring broadcasters to (1) dedicate an adequate amount of airtime to public issues, and (2) provide opposing viewpoints on those discussions.[246] Termed the "fairness doctrine," the FCC enacted the second requirement to prevent broadcasters from monopolizing the market with their own political viewpoints.[247] In carrying out that provision, and most relevant to political campaigns, the "personal attack" rule required broadcasters to provide on-air responses following programs that attacked an individual's personal character.[248]

In *Red Lion Broadcasting Co. v. FCC*,[249] the Court sustained the constitutionality of the fairness doctrine and the personal-attack rule.[250]

F.3d at 470. Some commentators have expressed the concern that the Supreme Court's recent decision in *Davis v. FEC* gives cause to overrule circuit-court approval of public-funding systems. *See, e.g.*, Bart Jansen, *High Court's Campaign Finance Ruling Poses Threat to State Laws*, CQPOLITICS.COM, July 2, 2008, http://www.cqpolitics.com/wmspage.cfm?docID=news-000002910318&cpage=1. These concerns are based on the feeling that *Davis* raised the bar for finding speech "punishment" in funding help for opponents. *Id.*

242. *See Red Lion Broad. Co., Inc. v. FCC*, 395 U.S. 367 (1969).

243. DONALD J. JUNG, THE FEDERAL COMMUNICATIONS COMMISSION, THE BROADCAST INDUSTRY, AND THE FAIRNESS DOCTRINE 1981–1987 at 8–9 (1996).

244. *Mayflower Broad. Corp.*, 8 F.C.C. 333, 339 (1940).

245. *Editorializing by Broad. Licensees* (*Fairness Report*), 13 F.C.C. 1246 (1949); *see also* JUNG, *supra* note 243, at 8–9; CHARLES H. TILLINGHAST, AMERICAN BROADCAST REGULATION AND THE FIRST AMENDMENT 72–73 (2000).

246. *Fairness Report*, 13 F.C.C. at ¶ 7; *see also* JUNG, *supra* note 243, at 8–9.

247. *Fairness Report*, 13 F.C.C. at ¶ 7; *see also* RICHARD E. LABUNSKI, THE FIRST AMENDMENT UNDER SIEGE 17 (1981).

248. 47 C.F.R. § 73.1920 (repealed Oct. 26, 2000). Accompanying the personal-attack rule, the "political editorial" rule required broadcasters that endorsed or opposed candidates to give free response time to opposing candidates. *Id.*

249. 395 U.S. 367 (1969).

250. *Id.*

During the heat of the 1964 election, a Philadelphia broadcaster refused to grant response time after its commentator attacked the character of Fred Cook, author of a book critical of Republican nominee Barry Goldwater.[251] After the FCC ordered a time allotment to Cook, the radio station challenged the personal-attack rule as an unreasonable First Amendment intrusion.[252]

In a unanimous decision, the Court found that the rules had the potential to enhance rather than infringe the marketplace of ideas.[253] The Court viewed the counterspeech law as a minimal burden, justified by the station's privilege as licensee.[254] Broadcasters, the opinion stated, did not have a First Amendment right "to monopolize a radio frequency."[255] The Court also allowed regulation because the networks' success would forever owe itself to their "initial government selection" for broadcast license.[256]

Though *Red Lion* remains the "law of the land,"[257] the fairness doctrine has endured significant disapproval and was repealed in 1987.[258] Because broadcasters were forced to give free airtime to attacked petitioners, they claimed they were deterred from airing political commentary in the first place.[259] Moreover, the decline of broadcast scarcity took away a key rationale of the *Red Lion* decision.[260] These complaints eventually led the FCC to discard the regulations.[261] Although the fairness doctrine received judicial approval as a counterspeech method, its application became too punitive.

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251. *Id.* at 371–72.

252. *Id.* at 386.

253. *Id.* at 390.

254. *Id.* at 394; *see also* JUNG, *supra* note 243, at 114.

255. *Red Lion*, 395 U.S. at 389.

256. *Id.* at 400.

257. JUNG, *supra* note 243, at 168; *see also* TILLINGHAST, *supra* note 245, at 115 ("[T]he legal status of the fairness doctrine remains unimpaired.").

258. *Syracuse Peace Council*, 2 F.C.C. 5043 (1987); *see also Syracuse Peace Council v. FCC*, 867 F.2d 654, 669 (D.C. Cir. 1989) (holding that FCC determination to end the fairness doctrine was not arbitrary or capricious). Despite FCC reports denouncing the fairness doctrine, regulations remained until 2000, when the D.C. Circuit ordered the repeal of the personal-attack and political-editorial rules because the regulations were unjustified. *Radio-Television News Dir. Ass'n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000). Recently, members of Congress have proposed legislation to reinstate the fairness doctrine. *E.g.*, Media Ownership Reform Act of 2005, H.R. 3302, 109th Cong. (2005).

259. *Inquiry into Section 73.1910 of the Comm'n's Rules & Regs. Concerning the Gen. Fairness Doctrine Obligations of Broad Licensees (1985 Report)*, 102 F.C.C.2d 145, ¶ 5 (1985).

260. *Syracuse Peace Council*, 2 F.C.C. at ¶ 5.

261. *See* JUNG, *supra* note 243, at 166–67. The reasoning of *Red Lion* remains heavily disputed; however, several factors still support the Court's holding, including:

Despite the doctrine's demise, the FCC's "equal-time" rules remain in place. Similar to some aspects of the fairness doctrine, the equal-time rules mandate parallel treatment to political candidates over the airwaves.[262] If broadcasters allow one candidate ad to air, they must give opposing candidates comparable timeslots at comparable rates.[263]

Though not as forceful as the fairness doctrine, the equal-time rules assure that candidates have equal access to the airwaves. Thus, they target possible broadcaster favoritism by providing fair means of counterspeech. In addition, the softer approach employed by the equal-time rules carries less detriment for broadcasters, thereby avoiding indirect censorship.

c. The Millionaire's Amendment and Davis

In *Davis v. FEC*,[264] the Roberts Court again exhibited its hostility towards campaign-finance regulation.[265] More importantly, the Court showcased the quandary facing counterspeech initiatives that overly punish political speakers. In the ruling, the Court rejected a provision alleviating the contribution limits of opponents facing candidates spending excess personal wealth.[266]

As part of BCRA, Congress added the "Millionaire's Amendment" to even the playing field between wealthy and nonwealthy candidates.[267] The Amendment somewhat embodied a counterspeech solution in that it enhanced the fundraising abilities (translated into increased spending) of the opponent rather than suppressing the speech of the wealthy candidate.[268]

According to the Court, however, the unmatched advantage given to the nonmillionaire candidate amounted to an unlawful punishment for political speech.[269] Because the counterbalance was too one-sided, the Roberts Court fell back to strict scrutiny.[270] This designation led to the downfall of the Amendment. Indeed, the provision at issue would have

(1) the current number of licensed broadcasters is largely expanded but still limited, (2) media ownership remains heavily consolidated, and (3) networks still owe their profits to initial licensing awards. TILLINGHAST, *supra* note 245, at 115.

262. TILLINGHAST, *supra* note 245, at 79.

263. 47 U.S.C. § 315 (2000); 47 C.F.R. §§ 73.1941-73.1942 (2007).

264. 128 S. Ct. 2759 (2008).

265. *Id.*

266. *Id.* at 2768.

267. Bipartisan Campaign Reform Act, Pub. L. No. 107-155, § 304, 116 Stat. 81, 97 (2002) (codified as 2 U.S.C. § 441a-1 (2006)).

268. *Davis*, 128 S. Ct. at 2780 (Stevens, J., dissenting).

269. *Id.* at 2764.

270. *Id.* at 2772.

passed muster if Congress had proscribed a more even-handed mechanism.[271]

Though the Supreme Court has passed off on counterspeech initiatives, it showcased its reluctance to validate laws that benefit one candidate too unevenly. This notion is reinforced by the controversy surrounding the fairness doctrine.[272] Despite the ruling in *Davis*, however, it remains clear that legislation that is least punitive to potential candidates presents the best chance of judicial passage. With that in mind, policy makers should seek to draft a provision to address sham issue advocacy without condemning the campaign of one candidate over another. Counterspeech initiatives can pass review when they equably enhance debate without an unjustified burden on political speakers.

B. Dual Airtime

Lawmakers should explore adopting a law guaranteeing counterspeech as a remedy for sham issue advocacy.[273] Along those lines, this Note advocates a proposal compelling broadcasters to allow candidates identified in ads to respond with their own immediate "counter-ad." This counterspeech solution could limit sham issue advocacy's negative effects without resorting to censorship.

To remedy problems in campaign finance, this Note encourages laws enhancing counterspeech rather than spending or speech restrictions. "Dual airtime" harnesses one such approach by utilizing candidate response as a remedy for sham issue advocacy. The proposal addresses sham issue advocacy by accepting its right to air while also accounting for its undoubted, often intended, effect on elections.[274] Though it may present logistical and political hurdles, which are largely outside the scope of this Note, dual airtime better aligns with the nation's high regard for discourse of public issues.

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271. *Id.* at 2764 ("If §319(a)'s elevated contribution limits applied across the board to all candidates, Davis would have no constitutional basis for challenging them.").

272. *See supra* notes 257–61 and accompanying text.

273. *See* TILLINGHAST, *supra* note 245, at 123 ("[R]estoration of the fairness doctrine and a new invigoration of the Zapple doctrine might be . . . a legal way around hurdles involved in either overruling [*Buckley v.*] *Valeo* or changing the First Amendment . . . . it could resolve many issues presented by so-called 'issue' advertising.").

274. *See infra* Part IV.B.1.

1. AN APPROACH LACKING IN POLITICAL CENSORSHIP

A dual airtime proposal at the state or federal level would address sham issue advocacy within a simple, counterspeech-driven framework. The rule would require broadcasters to (1) provide airtime (2) to any legally qualified candidate for elected office (3) immediately following an advertisement (4) that identifies that candidate[275] (5) during a specified period before an election.[276] Like the electioneering-communications provision, dual airtime sets forth a bright-line standard.[277] If ads identify candidates or their likeness during an established election period, those candidates shall receive an opportunity for a short response.[278]

Resting upon that structure, dual airtime could carry several contingencies. Though the counter-ad timeslot could be free of cost, this could cause great harm to broadcasters. To avoid that result, a proposal should carry an enforceable "lowest unit charge" requirement attached to counter-ads.[279] Under this rule, candidates are entitled to the same rates as those given to stations' most favored commercial advertisers for comparable time.[280] This rule would ensure an equitable counter-ad price for broadcasters and candidates. Though a lowest-unit-charge requirement would still preclude a broadcaster from charging unlimited rates, reasonable rules upon broadcasters have previously been justified as a condition of their broadcast license.[281]

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275. The dual-airtime trigger need not require the initiating advertisement to be negative. If the goal of dual airtime is to address an issue ad's impact on an election, then positive ads could also spur the timeslot for the candidate to address the audience. This, at the very least, allows the candidate to control his or her own campaign strategy when issue ads weigh in.

276. The electioneering communications provision serves as a good example of a proposed standard. The law uses an "election period" window of sixty days before a general election and thirty days before a primary election. Bipartisan Campaign Reform Act, Pub. L. No. 107-155, § 201(a), 116 Stat. 81, 89 (2002).

277. *See* Ellis, *supra* note 32, at 214–15.

278. This scheme is a bare, catch-all version covering any ad naming a candidate before an election. This simplified version would, of course, target more than sham issue ads. And, while some policy support for dual airtime does not pertain to candidates' ads, this broader approach would apply consistent treatment without loopholes. This would address unsavory tactics for all political actors and prevent evasion.

279. Before elections, broadcasters can charge no more than the "lowest unit charge of the station for the same class and amount of time for the same period." 47 U.S.C. § 315(b)(1) (Supp. V 2006).

280. *Id.*

281. As a benefit of receiving their licenses, broadcasters are bound to serve "the public interest, convenience, and necessity" under the Communications Act of 1934. 47 U.S.C. § 309(a) (2000). Though the scarcity rationale has been questioned with the advent of cable, satellite, and internet distribution, there remains a tradition

Dual airtime should also include a provision addressing the possibility of amplified negativity. Candidates may desire to respond with more negativity, resulting in a ceaseless tit-for-tat of mudslinging.[282] To prevent this problem, the dual airtime allotment should end after only one counter-ad. Though this provision would allow a negative counter-ad without immediate response, the nominal inequity of such a result would fall on the original advertiser who accepted this result by running the first negative ad. An alternative solution could place conditions on the content of the voluntarily accepted counter-ad timeslot, mandating that the actual candidate narrate the ad or refrain from mentioning opposing candidates.[283] Also, because candidates must claim responsibility for their own ads,[284] dual airtime could apply only to noncandidate groups. This would leave unregulated any attack ad easily accountable to the benefited candidate.

Lastly, dual airtime should correspond with other legal structures to ensure congruity in the law. The disclosures and source restrictions placed upon the post-*WRTL II* electioneering-communications[285] provision could remain alongside dual airtime. Though corporate and union treasuries cannot finance utterly obvious examples of election-related issue advocacy, ads not covered under electioneering communications, but impacting elections nonetheless, would be subjected to the counter-ad requirement.

In addition to existing rules, pending bills[286] granting full public funding of congressional elections should align with any dual airtime approach. If reform measures provide reduced prices or public money for broadcast time,[287] those proposals should grant additional funds for

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that broadcast stations retain a public duty as a condition for receiving permission to use the airwaves. *Inquiry into Section 73.1910 of the Comm'n's Rules & Regs. Concerning the Gen. Fairness Doctrine Obligations of Broad Licensees (1985 Report)*, 102 F.C.C.2d 145, ¶ 15 (1985).

282. *See* ANSOLABEHERE & IYENGAR, *supra* note 71, at 120, 150.

283. For discussion of the constitutionality of such content-based speech requirements, see *infra* notes 336–40 and accompanying text.

284. Part of BCRA, the "Stand by Your Ad" provision requires candidates to carry written and oral disclaimer statements when airing their own political advertising. Communications Act of 1934, ch. 47, sec. 305, § 315(b)(1), 116 Stat. 100, 100–01 (2002).

285. *See supra* note 169 and accompanying text.

286. *See* Fair Elections Now Act, S. 936, 110th Cong. (2007) (providing public financing of Senate elections with reduced broadcasting prices for candidates); Fair Elections Now Act, S. 1285, 110th Cong. (2007); Clean Money, Clean Elections Act of 2007, H.R. 1614, 110th Cong. (2007) (providing full public financing of House elections with reduced broadcasting rates).

287. *See, e.g.*, Political Campaign Broadcast Activity Improvement Act (PCBAIA), S. 3124, 107th Cong. (2002). The PCBAIA would mandate that spectrum broadcasters air public-issue-oriented programming before elections, give vouchers for

counter-ad costs. Such proposals should also enforce lowest-unit-charge requirements for all ads, including legally allotted counter-ads.

2. A MODERNIZATION OF PREVIOUS FAIRNESS LAWS?

Legally proscribed campaign counterspeech is not a new idea. The government has mandated broadcasters to allow for political response before. However, the reality of sham issue advocacy may create a new environment for a reformed application of old formulas.

a. The fairness doctrine

As discussed above, the fairness doctrine ordered broadcasters to discuss issues of social importance in an even-handed manner.[288] If a public issue received too much partisan editorial attention, the FCC could order program time for opposing viewpoints.[289] As part of that doctrine, the now defunct personal-attack rule required that when an "attack is made upon the . . . personal qualities of an identified person," the broadcaster must "offer . . . a reasonable opportunity to respond over the licensee's facilities."[290]

An unchallenged remnant of the fairness doctrine, the "Zapple" doctrine still requires equal treatment for campaigns attacked by their opponents' supporters.[291] When a group criticizes a candidate over the air, a group supporting the criticized candidate receives an equal "right of reply."[292] This ensures that one side is not given the advantage of discounted airtime during a campaign period.[293]

Dual airtime could utilize some aspects of the fairness doctrine's scheme, but should refrain from inhibiting broadcaster speech. By placing burdens on the editorial prerogatives of station commentators,

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advertising money to candidates, and close loopholes in the lowest-unit-charge rule. *Id.* These reforms would aim to reduce the exploding amount of television ad costs and reduce the great need for private fundraising and television advertising. *Id*; John S. McCain, *Free Air Time: The Continuing Reform Battle*, 2 ELECTION L.J. 171, 171–75 (2003).

288. *See supra* notes 242–48 and accompanying text.

289. FORD ROWAN, BROADCAST FAIRNESS 4–6 (1984).

290. 47 C.F.R. § 73.1920 (1999) (repealed 2000).

291. The Zapple doctrine is named for Nicholas Zapple, former counsel for the Senate Communications Subcommittee on Communications. *In re Nicholas Zapple*, 23 F.C.C.2d 707 (1970); TILLINGHAST, *supra* note 245, at 122–23. Zapple inquired whether the fairness doctrine applied to campaign spokespersons. TILLINGHAST, *supra* note 245, at 122–23. In response, the FCC ruled that noncandidates did spur the rule and would prompt an equal right to an opposing supporter at the same fee as the original ad. *Id.*

292. TILLINGHAST, *supra* note 245, at 122–23.

293. ROWAN, *supra* note 289, at 191.

the fairness doctrine was alleged to inhibit rather than promote speech.[294] Any successful law, therefore, must exempt news and editorial or documentary programming from legal restriction and apply only to advertising. This measure would prevent commentators from being deterred from expressing controversial opinions. In addition, to avoid the indirect censorship alleged as caused by the fairness doctrine, broadcasters should receive the standard cost for the advertising slot.[295]

To further ensure robust discussion of public issues, existing laws requiring broadcasters to accept political messages for a reasonable price should be strengthened to include issue advocacy that falls under dual airtime.[296] This would preclude broadcasters from refusing to air issue advocacy and would not substantially disturb broadcast revenues.

b. Equal-time rules

A dual airtime law would bolster the equal-time rules discussed above[297] by enhancing enforcement and strengthening response capabilities. Reply time, in the form of the counter-ad, should be immediate. This would allow the candidate to directly address the same audience as the original attack ad. In addition, the law should carry a higher enforcement mechanism and not force candidates to petition for time. Also, unlike the equal-time rules, dual airtime would apply to all forms of issue advocacy if they mention candidates before an election. The bright-line standard should allow broadcasters to notify attacked candidates of their response opportunity promptly.

c. Danforth-Hollings

Congress has previously considered legislation to enable response against third-party attack ads. The Clean Campaign Act of 1993,or "Danforth-Hollings" bill,[298] would have required broadcasters to give

294. *See Inquiry into Section 73.1910 of the Comm'n's Rules & Regs. Concerning the Gen. Fairness Doctrine Obligations of Broad Licensees (1985 Report)*, 102 F.C.C.2d 145, ¶¶ 26–68 (1985) ("[T]he evidence . . . leads us to conclude that the fairness doctrine chills speech.").

295. *See supra* notes 279–81 and accompanying text.

296. Currently, only candidates themselves are allowed "reasonable access" to broadcaster airtime. 47 C.F.R. § 73.1944 (2007).

297. *See supra* notes 262–63 and accompanying text.

298. S. 334, 103d Cong. (1993). Danforth-Hollings would also require candidates to speak in person in their advertisements when referring to opposing candidates. *Id.* § 2(b)(1). The Clean Campaign Act of 1993 was sponsored by Senators Ernest Hollings (D-SC), John Danforth (R-MO), and Daniel Inouye (D-HA). *Id.* Congressman Sid Morrison (R-WA) had proposed it in the House of Representatives. H.R. 5065, 102d Cong. (1992).

candidates subjected to independent opposition ads free response time within a "reasonable period" after the original ad.[299] According to the bill's chief sponsor, Senator Ernest Hollings, "the very nature of the broadcast media makes [independent, negative] attacks difficult, if not impossible, to rebut . . . . [R]ebuttals take plenty of time and are very expensive."[300] The bill sought to encourage debate and "infring[ed] on no person's free speech rights."[301]

Danforth-Hollings's counterspeech approach, somewhat revived within dual airtime, may currently stand a better chance of success. Dual airtime would exclude substantive requirements on candidate ads and ensure reasonable compensation for broadcasters. This difference could satisfy candidate and broadcaster concerns. What's more, *WRTL II*'s disfavorable treatment of the electioneering-communications standard[302] creates a renewed perspective on campaign regulation. Considering the rampant nature of sham issue advocacy,[303] legally initiated response may present the only viable mechanism for reform.

3. CONTROLLING THE EFFECTS OF SHAM ISSUE ADVOCACY

Dual airtime can neutralize unaccountable and distorted political advertising by encouraging immediate counterspeech. Through improving access to the marketplace of ideas, the solution can indirectly deter problematic ads.[304]

a. Enhancing accountability

Instead of misleading voters as to a speaker's identity, a counter-ad can immediately highlight the source of distasteful attacks. Though such a law could not prevent outside entities from heavily influencing elections, counter-ads can expose the credibility and biases of political attackers. Whereas candidate Kerry had limited means to respond to the Swift Boat ads,[305] a candidate under dual airtime would be guaranteed

299. S. 334, § 2(a).

300. 139 CONG. REC. 2346 (1993) (statement of Sen. Hollings).

301. *Id.*

302. *See supra* notes 149–60 and accompanying text.

303. *See supra* Part II.A.

304. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

305. Elisabeth Bumiller, *Turnout Effort and Kerry, Too, Were G.O.P.'s Keys to Victory*, N.Y. TIMES, Nov. 4, 2004, at A1. Senator Kerry had voluntarily accepted spending caps, and was thus unable to forcefully spend money on a response at the height of the Swift Boat ads. *Id.* This example demonstrates the need for public-financing systems that coincide with laws addressing campaign advertising. *See supra* notes 285–87 and accompanying text.

affordable, immediate broadcast space to retort messages that he or she deems discreditable.

Using the counter-ad opportunity, a maligned candidate can verbally emphasize the source and credibility of an attack ad. Under existing law, broadcasters must ascertain and disclose who pays for broadcasts.[306] Yet, an ad's sponsorship information appears in fine print and often goes unnoticed.[307] A counter-ad could properly highlight this information to its audience. Indeed, questioning an attacker's credibility presents an effective means of counteradvertising.[308] If the "Bush Clean Air" ad[309] played under a dual airtime system, candidate McCain could have immediately questioned the motivation of the Texas billionaires behind the message. Dual airtime may, thus, deter veiled attacks.

b. Countering negativity

With a dual airtime law, candidates can utilize counter-ads to combat perceived impressions created by negativity. Since the advent of televised political advertising, counter-ads have provided one tool to reduce the impact of mudslinging.[310] An effective counter-ad can address accusations in a variety of ways; examples include reframing the issue, taking umbrage, accepting responsibility, or running another attack ad.[311] If original ads are unsubstantiated, counter-ads carry more effect in exposing falsities.[312] An immediate response can highlight discreditable accusations.[313] For attacks showcasing significant enmity, a well-crafted counter-ad can place the original commercial in perspective. Contextualized, unfair attacks will more easily backfire.[314] Thus, by allowing for immediate counter-ads, dual airtime would deter unsupported claims.

Counterspeech could also combat unsavory personal attacks by calling attention to voter considerations not covered by the original trigger ad. Social scientists have demonstrated the large potential of

306. 47 C.F.R. § 73.1212 (2007).

307. *See Codification of the Comm'n's Pol. Broad. Rules*, 9 F.C.C. 5288 (1994).

308. ANSOLABEHERE & IYENGAR, *supra* note 71, at 118–19.

309. *See supra* text accompanying note 41.

310. JAMIESON, *supra* note 79, at 106–20.

311. *Id.*; ANSOLABEHERE & IYENGAR, *supra* note 71, at 118.

312. JAMIESON, *supra* note 79, at 108.

313. *Id.*

314. A poignant example of this tactic occurred in the 1983 Chicago mayoral election, where African-American candidate Harold Washington ran ads illuminating evident racism behind the opposition's ads. JAMIESON, *supra* note 79, at 109–11. Washington's responses presented the racial difficulties the city had faced and asked viewers to make a vote they could "be proud of." *Id.*

elite messaging in shaping an uninformed voter's preferences.[315] Persons lacking political awareness carry less ability to view advertisements critically.[316] These voters do not subscribe to one ideology, but have several, conflicting preferences when assessing political choices.[317] Consequently, elite messaging heavily shapes public opinion.[318] Negative ads especially carry great appeal to candidates due to their ability to invoke emotions and stereotypes.[319] The counter-ad, therefore, can serve an important function for this audience by balancing messages to the viewer. With countering ads, voters can internalize the debate more equally.

Though campaigns can currently exert delayed counter-ads, a dual airtime mandate would guarantee an opportunity for immediate counterspeech. A counter-ad's effect depends on its ability to inform the same audience as the first commercial.[320] If viewers do not receive a prompt reply, the original ad remains the only viewpoint received; the counter-ad loses context when finally aired. Compounding the problem, less well-financed candidates cannot wage replies at all.[321]

Dual airtime would limit the harmful effects of negative advertising while enhancing its function within the electoral process. No law should ban negative campaign tactics, as they have the capability to enhance accountability and issue awareness.[322] Also, issue advocacy—whether genuine or sham—should not be silenced purely

315. *See* SHANTO IYENGAR & DONALD R. KINDER, NEWS THAT MATTERS 112 (1987); JOHN R. ZALLER, THE NATURE AND ORIGINS OF MASS OPINION 50 (1992). Zaller finds that citizens' responses to messages from elites (e.g., news, political advertisements) differ based on level of political awareness. *Id.* at 50–52. Under his model, opinions are based on considerations heard or seen, accepted if consistent with prior conceptions, and "sample[d]" based on which consideration is salient at the time the opinion is measured. *Id.* at 51.

316. *See id.* at 266–67.

317. *See id.* at 64; Philip E. Converse, *The Nature of Belief Systems in Mass Publics*, *in* IDEOLOGY AND DISCONTENT 206, 231–39 (David E. Apter ed.) (1964).

318. *See* IYENGAR & KINDER, *supra* note 315, at 112; ZALLER, *supra* note 315, at 50.

319. BRADER, *supra* note 81, at 174.

320. JAMIESON, *supra* note 79, at 106.

321. *Id.*; 139 CONG. REC. 2346 (1993) (statement of Sen. Hollings) ("[T]he very nature of the broadcast media makes [third-party] attacks difficult, if not impossible, to rebut, especially if they occur late in a campaign. Everyone who has run for office knows that rebuttals take plenty of time and are very expensive."); Bumiller, *supra* note 305, at A1 (noting candidate Kerry's financial inability to refute Swift Boat attacks).

322. Finkel & Geer, *supra* note 82, at 592.

because it impacts elections.[323] However, if issue-advocacy speakers choose to discuss candidates shortly before Election Day, their ads will undoubtedly affect the upcoming vote. Dual airtime acknowledges this reality, and addresses the election matter while also preserving the advertiser's right to discuss public issues. The heart of the problem lies not in the negative issue ad, but in the unbalanced and sometimes misleading information directed at the voter. By controlling the damaging effects of these ads, dual airtime uses counterspeech to both abide expression and enhance the campaign environment.

c. Curbing corruption

Dual airtime would work to disrupt the effect of large spenders' ability to wage unlimited sham issue advocacy. Should unregulated, wealthy interests seek to impair a candidate, dual airtime would allow that candidate to address the attack. Politicians may be more inclined to take positions bettering the public rather than large interests when they possess a guaranteed avenue for response. Indeed, Congress highlighted the inflated power of certain interest groups in punishing candidates,[324] and dual airtime could neutralize the effect of those groups' advertising campaigns. Though dual airtime would only indirectly deter electoral corruption, the underlying intent is to limit sham issue advocacy's heavy influence outside the bounds of hard-money rules.

4. AN IMPERFECT BUT FEASIBLE SOLUTION

Most new laws carry their complications. Treading into campaign finance, political broadcasting, and the First Amendment, the proposal advocated in this Note would no doubt face hurdles. Despite any difficulties, however, dual airtime's simplicity and reliance on counterspeech provide overwhelming advantages. As outlined above,[325] the method can target the harmful effects of sham issue advocacy without the inherent suppression or loopholes associated with traditional approaches. Therefore, the potential drawbacks of dual airtime pale in comparison to those caused by maintaining the status quo or resorting to unconstitutional censorship.

323. *See FEC v. Wis. Right to Life, Inc.* (*WRTL II*), 127 S. Ct. 2652, 2669 (2007) ("Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election.").

324. 139 CONG. REC. 2346 ("We have all seen how PACs can damage seriously the balance in a campaign through the expenditure of enormous amounts of money.").

325. *See supra* Section IV.B.3.

As a primary concern, the law does carry the remote capability of inducing more negativity rather than less. Certainly, counterattack is a common method in combating negative ads.[326] To prevent never-ending mudslinging, the law could limit the counter-ad opportunity to one commercial or place reasonable restrictions on the counter-ad.[327] Foremost, any effective dual airtime law must attach safeguards that prevent more negative ads from pervading the airwaves.

Another possible flaw may arise in regard to the effectiveness of the counter-ad upon negative attack. Counterspeech cannot achieve its end if speakers entirely discredit the opponent.[328] When broadcasts such as the Yellowtail ad[329] disparage candidates personally, the counter-ad's potential may diminish. Admittedly, the provision could not prevent brazen criticism. Total discredit of the counterspeaker, however, is unlikely. A single ad, given an immediate response following its completion, should exert some influence on a voter's opinion but not close out the opportunity for counterargument. Where a shred of open-mindedness to reasoned debate exists, a counter-ad can serve the listening audience with a needed opposing message.

Dual airtime also runs the risk of promoting incumbents at a time of generally low legislative turnover. Modern incumbents hold a high reelection rate commonly viewed as inhibitive to responsive government.[330] Dual airtime carries the remote potential to uphold that disturbing rate should it strip challengers of their most effective weapon for removing entrenched officials. Since incumbents are most vulnerable to criticism based on their voting records and conduct in office, any mechanism neutralizing negativity may provide an unintended boon to office-holders. This concern echoes complaints against other laws that control uninhibited campaign speech.[331] Counterspeech, however, would most likely not diminish the opposing voices of challengers. Incumbents enjoy the benefits of large war chests and an enhanced ability to communicate their message.[332] Therefore, any law evening the playing field for campaign speech enhances rather than diminishes competition.

326. *See* JAMIESON, *supra* note 79, at 106.

327. *See supra* notes 282–84 and accompanying text.

328. *See* Richards & Calvert, *supra* note 4, at 554 (noting hate speech's capacity to discredit the would-be speaker).

329. *See supra* notes 74–76 and accompanying text.

330. Robert Toner, *Getting Pumped? Get Real*, N.Y. TIMES, Nov. 13, 2005, at D1 ("In the last three Congressional elections, the incumbent re-election rate has hovered from 96 to 98 percent.").

331. *See* Will, *supra* note 106, at B7.

332. *See* Janet M. Box-Steffensmeier, *A Dynamic Analysis of the Role of War Chests in Campaign Strategy*, 40 AM. J. POL. SCI. 352, 353–55 (1996).

5. A METHOD IN LINE WITH THE FIRST AMENDMENT

The ultimate strength of dual airtime lies in its lack of speech suppression. Despite the proposal's lack of censorship, however, it would undoubtedly face constitutional challenges like any regulation dealing with broadcasters and campaign finance. Without silencing speech or limiting spending, however, the proposal owns a large advantage over traditional approaches.

Dual airtime would avoid ambiguity capable of chilling speech. To prevent unconstitutional vagueness,[333] dual airtime would create a bright-line rule for determining when political ads trigger the law. Clear to political advertisers and broadcasters, specified identification of a candidate within a period before an election would invoke the allotment for a subsequent counter-ad. Like the electioneering-communications provision,[334] this rule would plainly direct broadcasters and groups towards clear compliance.

Without content-based restrictions, dual airtime can also avoid strict scrutiny. The law would not preclude speech on any issue. Without spending limits or source restrictions, the proposal preserves the right to conduct issue advocacy. Indeed, the grassroots interests underlying high protection for issue advocacy deserve sanctity.[335] However, if groups discuss candidates before elections, those candidates should have a right to address their involvement in the issue with the same audience. This guarantees a robust dialogue over issues while also addressing the ad's electoral impact.

In line with that reasoning, courts have upheld campaign-finance laws that achieve counterspeech through legal incentives.[336] When candidates accept public money, they voluntarily accept restrictions on the amount and type of speech they express.[337] Courts, in turn, have allowed such systems to impose restrictions without violating the First Amendment.[338] Because candidates opt into limits voluntarily, the law does not unlawfully suppress speech.[339] Under the reasoning of those

333. *See supra* notes 27–28 and accompanying text.

334. *See* Ellis, *supra* note 32, at 214.

335. *See Me. Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 12 (D. Me. 1996) ("What the Supreme Court did was draw a bright line that may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues.").

336. *See supra* Part IV.A.2.

337. *Supra* note 215 and accompanying text.

338. *See supra* Part IV.A.3.a; *see also* ELIZABETH DANIEL, SUBSIDIZING POLITICAL CAMPAIGNS 8 (2000).

339. *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998); *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996).

decisions, the law can take reasonable measures to enhance response when opponents operate at an unfair capacity.[340]

The avoidance of strict scrutiny may come down to whether dual airtime indirectly punishes speech. Should the law function to heavily deter broadcasters or political actors from airing issue advocacy, high scrutiny may and should result. Upholding the fairness doctrine, *Red Lion* warned of "serious" concerns that "editorials . . . will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time . . . forc[ing] self-censorship."[341] Networks' exercise of this concern eventually prompted the downfall of the regulation.[342] Along similar lines, the Millionaire's Amendment was too punitive in its application, condemning the campaign of a wealthy candidate by imposing discriminatory fundraising systems.[343]

To avoid the fate of the fairness doctrine, a proper proposal should exempt editorial programming choices and guarantee compensation for stations. As discussed above, dual airtime could avoid the pitfalls of previous rules by imposing a most-favored-advertiser rate on counter-ads.[344] Broadcasters would, of course, still bear some burden in accommodating the law.[345] Yet, requirements would be minimal. And most importantly, broadcasters would not face penalties for expressing any viewpoint.[346]

Dual airtime must also be cautiously drafted to avoid deterring those who finance campaign ads. After all, the goal of dual airtime is to address unsavory tactics through rebuttal, not dissuade groups from commenting on candidates. To that end, the approach advocated by this Note refrains from punishing candidates as the Millionaire's Amendment did. The Millionaire's Amendment, invoked by a candidate's expenditure of personal funds, inhibited the entire campaign of that candidate by imposing discriminatory fundraising schemes.[347]

340. *See supra* Part IV.A.3.a.

341. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 392–93 (1969).

342. *Inquiry into Section 73.1910 of the Comm'n's Rules & Regs. Concerning the Gen. Fairness Doctrine Obligations of Broad Licensees (1985 Report)*, 102 F.C.C.2d 145, ¶ 32 (1985).

343. *Davis v. FEC*, 128 S. Ct. 2759, 2772 (2008).

344. *See supra* notes 279–81 and accompanying text.

345. Conceivable problems in implementing a dual-airtime mandate would include requirements that broadcasters adjust their airtime purchase procedures, screen ads for identification of candidates, and notify candidates identified in advertisements during the preelection period subject to the law. Any further intricacies of the law or practical difficulties, common to any regulation, are beyond the scope of this Note.

346. To justify this regulation, the Supreme Court has held that the FCC can "put restraints on licensees in favor of others whose views should be expressed on this unique medium." *Red Lion*, 395 U.S. at 390.

347. *Davis*, 128 S. Ct. at 2771.

This proposal, on the other hand, gives no unjustified advantage to selected candidates. Named candidates receive no free advertising, nor do they operate under an advantaged financing framework. Instead, they receive only a slight benefit in the form of a suitable timeslot for reply. Dual airtime does not punish speech; however, it ferrets out unsavory and covert tactics for the public's attention.

Instead of unfairly benefiting one candidate, dual airtime significantly aids the viewing audience. The recipient of dual airtime receives information about a candidate that is contextualized and balanced. This will better allow voters to make informed choices. As stated in *Buckley*, the awareness of the electorate is a paramount interest: "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."[348]

CONCLUSION

WRTL II demonstrates the constitutional perils encountering any law that restricts political speech. In response to that decision, policy makers should use counterspeech principles as a foundation for neutralizing sham issue advocacy's effects. To that end, a law allowing for immediate response presents a workable solution. This proposal would avoid censorship, fall in line with constitutional precedent, and enhance campaign discourse before voters.

The proposal put forward by this Note could benefit from research in waging its effectiveness. This Note has espoused a new strategy that can satisfy First Amendment concerns. Further study could enhance the details of execution. Also, a state-by-state proposal may present the best path for novel counterspeech proposals, including dual airtime. Research assessing incumbency rates, the volume of negative advertising, and independent spending amounts could steer future proposals or a federal regulation to the utmost potential for success.

Overall, government solutions that enhance response rather than limit speech present a viable regulatory method within campaign finance. Regardless of whether future proposals adopt a dual airtime framework, those laws will fare better should they heed Justice Brandeis's words and refrain from censorship. First Amendment protections preserve uninhibited debate on public issues. Ideally, the marketplace of ideas acts as the arbiter in defining "harmful" speech. By enriching that marketplace with countered campaign speech, popular

348. 424 U.S. 1, 14–15 (1976).

opinion, rather than government suppression, may deflect harmful political advertising.