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ANALYZING THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002

REMARKS OF ROY SCHOTLAND*

The Bipartisan Campaign Reform Act of 2002 ("BCRA")[1] is the laboratory in campaign finance law. When analyzing BCRA, it is important to look at the Missouri state law that led to the Supreme Court case, *Nixon v. Shrink Missouri Government PAC.*[2] In *Shrink Missouri*, five justices upheld Missouri's relatively low simple limit on contributions to candidates. The law in Missouri limited contributions by anyone to candidates, but there was no limit as to how much a person or entity could give to a political party committee or to a political action committee (PAC). Further, there was no limit on how much a committee could give to another committee or any limits on contributions or spending by corporations, unions, or PACs.

One exception existed to the *Shrink Missouri* law. A party committee could give ten times the limit, plus another ten times the limit in-kind. It is justifiable that these separate treatments existed for entities rather than for individuals, as entities are different than people. However, the different rules for party committees present some problems because there are so many party committees. With Missouri's system, every party committee in the state could arguably give an unlimited amount to a candidate and such a system favors incumbents. For proof that this system favors incumbents,

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1. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (to be codified at 2 U.S.C. § 431 *et seq.*).

2. 528 U.S. 377 (2000).

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one need only look to statistics: Missouri has the tenth highest incumbent reelection rate for its legislators in the nation.

Reform needs to take place so that incumbents are not favored and so challengers get the funds needed to compete against incumbents. BCRA is one such reform tool that is designed to help balance the playing field between incumbents and new candidates.

With regard to BCRA's effect on state campaign finance law, there are two important aspects: (1) disclosure and (2) appropriation of funds. With regard to the first, online Internet reports offer the public a tremendous amount of raw data. A person may log onto the Internet and search through a database of candidate information. The database is so massive, however, that if your interest is anything other than finding out what Ken Gross or Trevor Potter filed about their own campaigns, forget it. The database's large volume of information makes it extremely difficult to find necessary information.

The second important aspect of BCRA's effect on state campaign finance law is the appropriation of funds. This aspect is best seen in one of my favorite stunts in campaign finance. Joe Bruno, of the New York State Senate, supported campaign finance disclosure online and proposed to appropriate $10,000 to accomplish it. When Bruno first announced his ideas, he got a lot of good ink out of the first time; the second time, of course, never caught up. The dominate theme of Bruno's story is SHAM, as seen in the *McConnell v. F.E.C.*[3] case, which focuses on the level-down approach.

The "level-down" approach is trying to dam or bottle-up the money and it simply will not work. As David Broder stated: The question is whether the limited purifying effects of a law like BCRA are worth the restrictions. Justice Scalia contends that BCRA is not worth the restrictions; the juice is not worth the squeeze. Justice Breyer, in *Missouri Shrink*,[4] agreed with Scalia's statement in *McConnell*.[5] Justice Breyer stated, "Where a law significantly implicates competing constitutionally protected interests in complex ways, the law closely scrutinizes the statute's impacts on those interests, but refrains from employing a simple test. Rather, it balances interests. In practice, this is asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the other interests at stake. I believe that Justice Breyer should have restated this opinion in *McConnell* because that case dealt with similar issues.

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3. 540 U.S. 93, 124 S. Ct. 619 (2003).
4. *Shrink Missouri*, 528 U.S. at 377.
5. 540 U.S. at _, 124 S. Ct. at 619.

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Laws like BCRA are complex and have both positive and negative impacts. The negative aspects of BCRA, however, are daunting and far outweigh the benefits. For example, BCRA significantly increases the incumbent's advantage because a key source of support for challengers is party money and BCRA diminishes party money. Any adjustments made to fix this negative impact will not likely make up what the challengers lose.

One provision that deals with the incumbent's money is the new "millionaire's amendment," [6] which will be receive more visibility soon. This new amendment allows someone opposed by a deep-pocket candidate to get much higher hard money contributions. This new amendment, however, is not the "millionaire's amendment," but rather the "anti-millionaire's amendment" or the "pro-incumbent amendment." As John McCain stated, "We wake up in the middle of the night worrying that some heir or heiress will come after us."

Besides the "millionaire's amendment," many other provisions exist that will aid an incumbent. One example is found in the candidacy of Tom DeLay. In November 2003, DeLay sent out invitations to potential donors for the 2004 Republican National Convention, which will take place in August 2004, in New York City. The invitations asked potential donors to give as much as $500,000 for "face time" with DeLay and other VIPS during the convention. *The New York Times* donned the package the "Upper East Side Package." The donations that DeLay solicited did not go to DeLay. Rather, the donations went to a charity, "Celebrations for Children." Off the top of the donations, DeLay deducted the expenses from the convention events, which could have been 80 to 90 percent. The rest of the money, 10 to 20 percent, went to the 501(c)(3) charity.

BCRA attacks plans like DeLay's that try to maneuver around BCRA. BCRA is designed to reduce preferential access, but such access still occurs. For example, BCRA specifically authorizes candidates or federal officials to raise money for charities. BCRA explicitly states that the charity does not have to be in existence; the charity need only have submitted an application for tax-exempt status. If the charity's application does not go through, of course, then there will not be tax deductibility.

There is, however, every reason to think that these applications will go through, which means the person making the contribution will get the benefit of tax deductions for at least most of the contributions. And

6. *See* Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates (Millionaires' Amendment) (Jan. 24, 2003), *available at* http://www.fec.gov/pdf/nprm/millionaire_amend/fr68n017p03969.pdf (detailing the Federal Election Commission's interim rules for the Millionaire's Amendment).

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although the candidate does not get the money that is donated to the charity, they get the publicity in their hometown of donating enormous amounts towards a charity; the candidate receives positive publicity. A few years of helping the charity and enjoying that spotlight will build as much support as substantial sums into the campaign. BCRA is supposed to reduce preferential access, but it specifically states that candidates should raise money for charities, which helps incumbents.

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