

NOTES

REGULATING COORDINATED COMMUNICATIONS: HOW THE FEC RULES RESTRICT BUSINESS COMMUNICATIONS AND BENEFIT INCUMBENTS

CRAIG A. DEFOE*

INTRODUCTION

Every two years business owners and executives and media personalities attempt to make the transition to politics by running for federal office. Overbroad campaign finance laws can hinder their success. Consider the owner of a successful auto dealership. He stars in the dealership's local television advertisements, which the dealership relies upon to bring in customers and stay profitable. The owner enjoys selling cars, but he always wanted to try his hand in the political arena, confident that his success selling cars would translate into success on the campaign trail. His district's incumbent congressman seems vulnerable, and he decides to run for Congress. However, during the campaign the owner's business success becomes a liability. Though his dealership's advertisements are unrelated to his congressional campaign, in the months before the primary and general elections they could become campaign finance law violations. If he continues to advertise for the dealership, he risks violating campaign finance law and being labeled a cheater by the incumbent. If he ceases advertising, he risks harming his dealership. The dealership owner is forced to choose between selling cars and running for office. This situation is reality for some federal candidates.¹

The preceding scenario results from the coordinated communications rules drafted and approved by the Federal Election Commission ("FEC"). The Bipartisan Campaign Reform Act of 2002 ("BCRA") forced the FEC to broaden the rules that restrict third parties from coordinating communications with federal candidates.² The FEC drafted over-inclusive rules, which now restrict federal

* J.D. Candidate, 2007, Indiana University School of Law—Indianapolis; A.B., *magna cum laude*, 2004, Washington University, Saint Louis, Missouri. Recipient of the Papke Prize for Best Note in Volume 40, endowed by and named in honor of David R. Papke, former R. Bruce Townsend Professor of Law and faculty advisor to the Indiana Law Review.

1. *E.g.*, George Will, Editorial, *Campaign Cops and Car Ads*, WASH. POST, Aug. 22, 2004, at B7 (discussing the 2002 Wisconsin Senate candidate and dealership owner Russ Darrow).

2. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 214(c), 116 Stat. 81, 95 (2002). The BCRA is popularly known as the McCain-Feingold Act. *See* Amy Keller,

candidates' legitimate business communications in situations similar to the one recounted above.

The coordinated communications rules exist to prevent candidates from recruiting third parties to pay for communications that serve as de facto political advertisements. If a third party pays for a communication and coordinates it with a federal candidate and circumstances indicate that it will influence a federal election, it is considered a coordinated communication.³ Coordinated communications are treated as campaign contributions to the federal candidate involved, but if the third party otherwise is barred from making contributions, it is barred from making the communications.⁴

Although these communications must be regulated to close a loophole, the rules sweep too broadly. They bar some candidates' legitimate business communications unrelated to the candidates' campaigns. Regulation of such communications serves no legitimate government purpose, but harms candidates' businesses and campaigns. This problem bypasses incumbents, whose involvement with outside businesses is limited by their role as public servants. However, the problem harms political outsiders who engage in business communications while campaigning—usually challengers.

By barring the business communications of some challengers, the rules impair these challengers' ability to benefit from their business experience and prominence in the community. The rules can injure challengers' campaigns and businesses and can dissuade potential challengers from entering a race. This harm to challengers limits their access to the democratic process, thus benefiting incumbents and further contributing to the incumbency advantage. In this way the rules' overregulation unfairly disadvantages challengers and insulates incumbents from constituents—damaging American democracy.

This problem demands a solution. The coordinated communications rules should be redrafted to provide a safe harbor for legitimate business communications. Such a change would prevent the rules' over-inclusion of legitimate business communications and solve the problem.

Part I of this Note provides a brief overview of the problem presented by the FEC's coordinated communications rules and identifies the class of candidates for federal office likely affected by the problem. Part II explains why coordinated communications are regulated, why the rules changed, and why the FEC adopted the changed rules. Part III focuses on the language of the rules drafted by the FEC following the passage of the BCRA and their effect on candidates in subsequent election cycles. Part IV discusses the challenges made to the post-BCRA rules in federal court and the resulting changes in the rules. Part V discusses why this problem affects political outsiders, usually challengers, and bypasses incumbents. Part VI exposes the extent of the incumbency advantage and explains why that advantage conflicts with the democratic principles of fairness and political accountability. Part VII outlines the factors

Campaign Reform Foes Cheered by Minnesota Case, ROLL CALL, July 11, 2002.

3. Coordinated and Independent Expenditures, 11 C.F.R. § 109.21 (2005).

4. *Id.* § 109.22.

contributing to the incumbency advantage, and shows how the rules harm challengers by preventing them from counteracting some of those factors. Finally, Part VIII explains how the FEC could solve this problem by adopting rules that explicitly exclude legitimate business communications from regulation.

I. INTRODUCING THE PROBLEM

A. *The Coordinated Communications Rules in Brief*

The BCRA forced the FEC to broaden the rules on coordinated communications—which it accomplished by creating a three-pronged test to judge whether a communication was coordinated.⁵ That test looks at who paid for the communication (the “payment prong”), the content of the communication (the “content prong”), and the conduct of the parties who potentially coordinated on the communication (the “conduct prong”).⁶

The payment prong is satisfied when a party other than the candidate or her campaign pays for the communication.⁷ Thus, when a candidate’s business or employer pays for an advertisement, the payment prong is satisfied. The content prong is satisfied when the communication is public, mentions a candidate for federal office, is directed to voters in that candidate’s district, and is made within 120 days of an election.⁸ Consequently, if a business owner is running for federal office and appears in the business’s advertisements, then those advertisements likely satisfy the content prong when aired within several months of an election. Finally, the conduct prong is satisfied when a candidate or her campaign is materially involved with the third party in the making or distribution of the communication.⁹ If a candidate is materially involved in her business’s public communications, then the conduct prong is satisfied.

B. *The Affected Federal Candidates*

As the brief explanation above indicates, the coordinated communications rules can affect some communications entirely unrelated to federal elections. For example, this problem arises when a federal candidate owns a business or occupies a high-ranking position therein and that business bears the candidate’s name. If that business relies on advertising, as so many do, it may find itself hamstrung by these rules. Similarly, if a candidate’s occupation regularly involves public communications—whether on television, in print, or otherwise—his job may become illegal in the months before the primary and general elections.

This problem results from the language of the content prong—it does not

5. *Id.* § 109.21(a).

6. *Id.*

7. *Id.* § 109.21(a)(1).

8. *Id.* § 109.21(c)(4).

9. *Id.* § 109.21(d)(2).

require that the communication actually involve a federal election.¹⁰ It presumes that when the payment and conduct prongs are satisfied, and the public communication mentions a federal candidate, is directed to that candidate's voters, and is made within 120 days of an election, then the communicator intends to influence a federal election.¹¹ However, as noted above, some candidates and their legitimate business communications disprove that presumption.

In such situations, the rules have several effects: (1) they could harm a candidate's campaign by reducing his status within the community; (2) they could harm a candidate's business or professional life by forcing him to curtail his professional obligations and business operations for a chance to run for federal office; and (3) they could prevent an aspiring candidate from entering a federal race. In summary, the FEC rules on coordinated communications potentially harm a candidate's business life, professional life, and campaign.¹² They could also reduce the candidate pool. One common theme runs between all these potential effects: challengers are harmed and incumbents benefit.

II. REASONS BEHIND THE RULES

A. *The Purpose of Regulating Coordinated Communications*

The Federal Election Campaign Act ("FECA") imposes a set of campaign contribution limitations on individuals, political parties, and political action committees.¹³ Such limitations are permissible in order to "limit the actuality and appearance of corruption" in federal elections.¹⁴ However, those entities could circumvent the contribution limitations by coordinating political advertising with third parties who also pay for the advertising, rather than purchasing the advertising directly. FECA's coordinated communications rules seek to close this loophole by treating such coordinated communications as contributions.¹⁵

In the landmark decision, *Buckley v. Valeo*, the Supreme Court noted that treating coordinated expenditures as contributions would "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting

10. *Id.* § 109.21(c)(4).

11. *Id.*

12. This problem also raises First Amendment concerns due to the potential limitations on business speech. That problem intensifies when media-related business is involved. This Note will not address the free speech issues raised by the rules' over-inclusion of business communications. However, the rules' free speech implications have been addressed elsewhere. See James Bopp, Jr. & Heidi Abegg, *The Developing Constitutional Standards for "Coordinated Expenditures": Has the Federal Election Commission Finally Found a Way To Regulate Issue Advocacy?*, 1 ELECTION L.J. 209 (2002).

13. 2 U.S.C. § 441a (2005); see also FEDERAL ELECTION COMMISSION, CONTRIBUTION LIMITS 2005-06, <http://www.fec.gov/pages/brochures/contriblimits.shtml>.

14. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976).

15. 11 C.F.R. § 100.52(d) (2005).

to disguised contributions.”¹⁶ Again in 2003, the Court in *McConnell v. FEC* reaffirmed the view that tighter regulation of coordinated communications prevents actual and apparent corruption, noting, “[T]here is no reason why Congress may not treat coordinated disbursements for electioneering communications” as contributions.¹⁷ Thus, the FEC regulates coordinated communications in order to close what would otherwise be a gaping loophole in the current regulatory scheme.

B. The Purpose of Changing the Rules

Little more than a year before the passage of the BCRA, the FEC adopted new coordinated communications rules.¹⁸ The FEC drafted these pre-BCRA rules in response to a district court decision calling the FEC’s interpretation of coordination “overbroad.”¹⁹ The court limited the definition of coordination to cases involving “substantial discussion or negotiation between the campaign and the spender.”²⁰

The BCRA rejected this narrow coordination standard by repealing the prior set of coordinated communications rules.²¹ It directed the FEC to “promulgate new regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees.”²² However, it offered only minimal guidance to the FEC for redrafting the rules. It provided only that “[t]he regulations shall not require agreement or formal collaboration to establish coordination.”²³

16. *Buckley*, 424 U.S. at 47. In rejecting a provision of FECA that limited independent expenditures “for express advocacy of candidates made totally independently of the candidate and his campaign,” the Court noted:

Unlike contributions, such independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.

Id.

17. *McConnell v. FEC*, 540 U.S. 93, 104 (2003).

18. General Public Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 Fed. Reg. 76,138, 76,138-47 (Dec. 6, 2000) (to be codified at 11 C.F.R. pts. 100, 109, 110).

19. *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 90 (D.D.C. 1999).

20. *Id.* at 92.

21. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 214(c), 116 Stat. 81, 95 (2002).

22. *Id.*

23. *Id.* The BCRA also directed the FEC to address several specific situations in the rules, including:

(1) payments for the republication of campaign materials; (2) payments for the use of

While lacking detail, this BCRA provision represented Congress's intent to expand the definition of coordinated communications.²⁴ Such an expansion was apparently necessary to ensure that candidates and parties did not use de facto coordination to circumvent the BCRA's new ban on soft money.²⁵ According to Senator John McCain, one of the bill's sponsors, this provision "represents a determination that the current FEC regulation is far too narrow to be effective in defining coordination in the real world of campaigns and elections and threatens to seriously undermine the soft money restrictions contained in the bill."²⁶ Congress determined such an expansion of the rules was necessary because of their ineffectiveness in prior elections. For example, claims that members of the "labor and business communities had 'coordinated' massive expenditures, illegally, with candidates and political party committees" surfaced after the 1996 election cycle.²⁷

C. *The Purpose of the Three-Pronged Approach*

After settling on the three-pronged approach to regulating coordinated communications pursuant to the BCRA directives, the FEC published a lengthy explanation and justification of the rulemaking process and the final rules.²⁸ In a very general sense, the FEC explained that "the satisfaction of all three prongs of the test . . . justifies the conclusion that payments for the coordinated communication are made for the purpose of influencing a Federal election, and therefore constitute in-kind contributions."²⁹ Of course, the extent to which that statement is true is the subject of this Note and was the subject of several public comments received by the FEC in the rulemaking process.³⁰

Only two of the seven public commenters supported the three-pronged approach, while the other five argued that the FEC should "emphasize the actual

a common vendor; (3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and (4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.

Id.

24. 148 CONG. REC. S2096, 2144 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold) ("This current FEC regulation fails to cover a range of de facto and informal coordination between outside groups and candidates or parties that, if permitted, could frustrate the purposes of the bill.").

25. *Id.*

26. *Id.* at 2145 (statement of Sen. McCain).

27. Robert F. Bauer, *The McCain-Feingold Coordination Rules: The Ongoing Program to Keep Politics Under Control*, 32 FORDHAM URB. L.J. 507, 512 (2005).

28. Coordinated and Independent Expenditures, 68 Fed. Reg. 421 (Jan. 3, 2003) (to be codified at 11 C.F.R. pts. 100, 102, 109, 110, 114).

29. *Id.* at 426.

30. *Id.* The public comments received during the rulemaking process may be found at: Federal Election Commission, Comments on This Rulemaking, http://www.fec.gov/pdf/nprm/coord_and_ind_expenditures/comments.shtml (last visited May 21, 2006).

conduct and minimize the importance of any content standard.”³¹ Those five commenters, including the BCRA’s principal sponsors, apparently believed that the focus on content would make the rules under-inclusive.³² The FEC acknowledged that the content prong could “exclude some communications that are made with the subjective intent of influencing a Federal election.”³³ Still, the FEC kept the content prong because “it helps ensure that the coordination regulations do not inadvertently encompass communications that are not made for the purpose of influencing a federal election.”³⁴

Commenter support for the specific content standards varied. Several commenters urged the FEC to look at what the communications actually say, rather than “‘external criteria’ such as the timing or distribution of the communication.”³⁵ For example, the Democratic National Committee argued: “The farther the standard strays from a secure mooring in ‘express advocacy,’ the more complex—and constitutionally frail—the application of the coordination rule.”³⁶ The FEC disagreed. It was confident the final content standards “all provide bright-line tests and subject to regulation only those communications whose contents, in combination with the manner of its creation and distribution, indicate that the communication is made for the purpose of influencing the election of a candidate for Federal office.”³⁷ Despite that assurance from the FEC, few laws or rules are tailored perfectly to the problem they address, and the coordinated communications rules are no exception.

III. THE COORDINATED COMMUNICATIONS RULES EXPLAINED

A. *Post-BCRA Rules*

After the BCRA became law, the FEC began an expedited rulemaking process culminating in the passage of new coordinated communications rules in early 2003.³⁸ The new rules employed a three-pronged test to determine whether communications were coordinated.³⁹ Coordinated communications were defined as follows:

A communication is coordinated with a candidate, an authorized

31. Coordinated and Independent Expenditures, 68 Fed. Reg. at 426.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 428.

36. Letter from Democratic National Committee, Democratic Senatorial Campaign Committee, and Democratic Congressional Campaign Committee to John Vergelli, Acting Assistant General Counsel, Federal Election Commission 4 (Oct. 11, 2002), http://www.fec.gov/pdf/nprm/coor_and_ind_expenditures/dnc.pdf.

37. Coordinated and Independent Expenditures, 68 Fed. Reg. at 428.

38. Coordinated and Independent Expenditures, 68 Fed. Reg. at 421.

39. Coordinated and Independent Expenditures, 11 C.F.R. § 109.21(a), *amended by* 71 Fed. Reg. 33,190 (2005).

committee, a political party committee, or an agent of any of the foregoing when the communication:

- (1) Is paid for by a person other than that candidate, authorized committee, political party committee, or agent of any of the foregoing;
- (2) Satisfies at least one of the content standards in paragraph (c) of this section; and
- (3) Satisfies at least one of the conduct standards in paragraph (d) of this section.⁴⁰

Thus, a communication is considered coordinated if it satisfies the payment prong from subparagraph one, the content prong from subparagraph two, and the conduct prong from subparagraph three. The payment prong contains the least ambiguity of the three; it simply includes all communications not paid for by the candidate or his committee. The content and conduct prongs, however, require further explanation.

The content prong is satisfied when one of several content standards is met. For example, if a communication republishes the candidate's campaign material, promotes the election or defeat of a candidate, or qualifies as an electioneering communication,⁴¹ then it satisfies the content prong.⁴² However, the fourth and most relevant content standard includes:

A communication that is a public communication, as defined in 11 CFR 100.26, and about which each of the following statements in paragraphs (c)(4)(i), (ii), and (iii) of this section are true.

- (i) The communication refers to a political party or to a clearly identified candidate for Federal office;
- (ii) The public communication is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special, or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and

40. *Id.*

41. Electioneering communications are defined as:

any broadcast, cable, or satellite communication that:

- (1) Refers to a clearly identified candidate for Federal office;
- (2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and
- (3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

Id. § 100.29(a). The FEC recently amended the definition of electioneering communications. Electioneering Communications, 70 Fed. Reg. 75,713 (Dec. 21, 2005) (to be codified at 11 C.F.R. pt. 100).

42. 11 C.F.R. § 109.21(c).

(iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot.⁴³

The fourth content standard refers to public communications, which are defined as

communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising. The term general public political advertising shall not include communications over the Internet.⁴⁴

Although the FEC calls these “content standards,” that is a misnomer. The fourth content standard ignores the content of the communication, instead focusing on outside criteria like the communication’s timing and audience.⁴⁵

The relevant conduct standards cover the following types of communication: those made at the “request or suggestion” of the candidate, those “assented to” by the candidate, those in which the candidate had “material involvement,” and those about which the candidate engaged in “substantial discussion.”⁴⁶ True to the language of the BCRA, the rules also note that communications may fall under these content standards “whether or not there is agreement or formal collaboration.”⁴⁷

By definition, any communication that satisfies this three-pronged test “is made for the purpose of influencing a federal election, and is an in-kind

43. *Id.* § 109.21(c)(4).

44. *Id.* § 100.26. The exemption for internet communications in this definition has been the subject of litigation, legislation, and rulemaking. *See* Shays v. FEC, 337 F. Supp. 2d 28, 111 (D.D.C. 2004), *aff’d*, 414 F.3d 76 (D.C. Cir. 2005); Rick Klein, *Internet Campaign Exemption Defeated*, BOSTON GLOBE, Nov. 3, 2005, at A1; Internet Communications, 70 Fed. Reg. 16,967 (Apr. 4, 2005) (to be codified at 11 C.F.R. pts. 100, 110, and 114).

45. 11 C.F.R. § 109.21(c)(4).

46. *Id.* § 109.21(d). Specifically, regarding material involvement, the conduct prong is met when:

A candidate . . . is materially involved in decisions regarding:

- (i) The content of the communication;
- (ii) The intended audience for the communication;
- (iii) The means or mode of the communication;
- (iv) The specific media outlet used for the communication;
- (v) The timing or frequency of the communication; or
- (vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

Id. § 109.21(d)(2). Thus, if a candidate helped create or appears in her business’s communications, then she almost certainly was materially involved with the communication.

47. *Id.* § 109.21(d).

contribution under 11 C.F.R. 100.52(d).⁴⁸ Furthermore, the rules provide that “[a]ny person who is otherwise prohibited from making contributions or expenditures under any part of the Act or Commission regulations is prohibited from paying for a coordinated communication.”⁴⁹ Corporations are prohibited from making federal campaign contributions or expenditures, including “anything of value.”⁵⁰ Thus, corporations are barred from making coordinated communications.

Taken alone, the rules on coordinated communications appear daunting. The simple three-prong test becomes more complicated with each additional sub-prong and cross reference. However, the rules are clarified by their application to actual federal campaigns. Those campaigns also show how the rules restrict business communications.

B. *The Rules in Action*

The new rules first affected the 2004 federal election cycle and produced similar effects in the 2006 cycle. These election cycles offer several examples of the problem this Note addresses—the rules’ over-inclusion of legitimate business communications. Several federal candidates were involved in businesses in which they regularly engaged in public communications. Those business-related public communications satisfied the payment prong because they were paid for by the business rather than the candidate.⁵¹ In addition, the communications threatened to satisfy the content prong by triggering the fourth content standard, which covers communications that refer to a federal candidate, and are directed at the relevant electorate before an election.⁵² Finally, if the candidate was “materially involved” in his business’s public communications, then the conduct prong was satisfied.⁵³

Russ Darrow ran for U.S. Senate in Wisconsin in 2004. Ironically, he sought to unseat incumbent and BCRA sponsor, Russ Feingold.⁵⁴ Darrow founded a large automotive group bearing his name, which relied on public advertising.⁵⁵ Because those television and radio advertisements mentioned the candidate Darrow’s name, “the automotive group . . . worried that the ads would have to be taken off the air.”⁵⁶ Their worries were legitimate; in July 2004 a spokesman for the FEC warned, “[i]t would appear as if such (car) advertisements might be

48. *Id.* § 109.21(b).

49. *Id.* § 109.22.

50. Corporate and Labor Organization Activity, 11 C.F.R. §§ 114.1(a), 114(b)(1), 114(b)(2).

51. 11 C.F.R. § 109.21(a)(1).

52. *Id.* § 109.21(c)(4).

53. *Id.* § 109.21(d).

54. Graeme Zielinski, *Folksy Style Has Served Him Well; Car Salesman Darrow Deals to Voters*, MILWAUKEE J. SENTINEL, Sept. 10, 2004, at 1B.

55. *Id.*

56. Graeme Zielinski, *State Group Pressing Case Against McCain-Feingold*, MILWAUKEE J. SENTINEL, Aug. 12, 2004, at 1A.

considered electioneering communications,' and thus prohibited."⁵⁷ A Wisconsin newspaper and pundit George Will editorialized against such a prohibition as the controversy grew.⁵⁸ Eventually Darrow requested an advisory opinion from the FEC, which allowed the advertisements based on a fact-intensive analysis hinging on the fact that Darrow did not speak or appear in the advertisements.⁵⁹ That controversy involved the narrower determination of whether the ads were electioneering communications.⁶⁰ Nonetheless, because the electioneering communications satisfy the content prong and because their definition mirrors the fourth content prong, the dealership advertising implicated the coordinated communications rules.⁶¹

Additionally, Pete Coors, of Coors Brewing Company fame, ran for Colorado's open Senate seat in 2004 against the state's Attorney General, Ken Salazar.⁶² During his campaign he planned to "remain firmly at the helm of both the holding company and subsidiary Coors Brewing even though he wo[uld]n't be getting paid."⁶³ Prior to the campaign Coors regularly appeared in beer commercials, touting Coors beer.⁶⁴ But in Colorado, the advertisements could have ran "afoul of . . . the McCain-Feingold Act . . . even if the commercials make no mention of the candidacy."⁶⁵ Thus, the company pulled the advertisements.⁶⁶ Still, on the eve of the election, Coors was criticized when the brewery ran ads defending its corporate name.⁶⁷ A political watchdog group labeled the advertisements "an attempt to help Pete Coors win election to the Senate," and tried to persuade the brewery to pull them.⁶⁸ The brewery defended the advertisements and denied coordinating them with Coors' campaign.⁶⁹ Coors lost to Salazar in the general election.⁷⁰

The problem arose again in the 2006 election cycle. Andy Mayberry chose to run against the Democrat incumbent in Arkansas's second congressional

57. Graeme Zielinski, *Name Recognition Cuts Both Ways For Darrow; Campaign Law May Limit Car Dealership Ads*, MILWAUKEE J. SENTINEL, July 9, 2004, at 1A.

58. Editorial, *Common-Sense Campaigns*, MILWAUKEE J. SENTINEL, July 12, 2004, at 10A; see also Will, *supra* note 1.

59. 2004 Op. Fed. Election Comm'n 31 (2004).

60. *Id.*

61. See 11 C.F.R. §§ 109.21(c)(4), 100.29 (2005).

62. T.R. Reid, *Democrats May Use Results in Colorado as Political Primer*, WASH. POST, Nov. 21, 2004, at A18.

63. John Accola, *Coors to Remain at Helm of Brewery—At No Pay; Company Denies Candidacy Means Family Stepping Back*, ROCKY MTN. NEWS, Apr. 13, 2004, at 1B.

64. *Id.*

65. *Id.*

66. *Id.*; *Political Notes*, WHITE HOUSE BULLETIN, Apr. 13, 2004; Will, *supra* note 1.

67. Rachel Brand & David Kesmodel, *Timing of Coors Co. Ads Called Improper*, ROCKY MTN. NEWS, Oct. 30, 2004, at 3C.

68. *Id.*

69. *Id.*

70. Reid, *supra* note 62.

district.⁷¹ He co-owned two periodicals in which he regularly wrote editorials and commentaries.⁷² Mayberry requested an advisory opinion from the FEC regarding his ability to continue publishing the periodicals and writing editorials.⁷³ The FEC found that he could continue publishing the periodicals and that the news pieces would be exempted from regulation.⁷⁴ However, the communications were paid for by Mayberry's business, satisfying the payment prong.⁷⁵ Additionally, the fact that Mayberry was "simultaneously, the author of the opinion columns in the Periodicals, the editor of the Periodicals, and a candidate for Federal office" satisfied the conduct prong.⁷⁶ Thus, the rules barred any of Mayberry's editorials that satisfied the content standard—including any expressly advocating the election or defeat of a federal candidate and any with Mayberry's byline or picture published within 120 days of an election.⁷⁷

The FEC restrictions quickly took their toll on Mayberry's business. He sold his newspaper in order to "avoid various conflicts that could arise" regarding the rules.⁷⁸ That sale "negatively impacted by a substantial amount" his personal financial situation.⁷⁹ In addition, the rules forced Mayberry to make some changes to the magazine he published to prevent any potential violation.⁸⁰

Yet another example of this problem arose during the 2006 election cycle. Mike Whalen ran for an open House seat in Iowa, but in the Republican primary his business communications angered opponents.⁸¹ Whalen founded and owned a small chain of restaurants, which was "a central part of his personal history and has been integrated into his congressional campaign."⁸² Whalen ran a television advertisement for his restaurants in which he was "feature[d] . . . prominently."⁸³ Whalen's primary opponent filed a complaint with the FEC regarding the advertisement, alleging that "[t]he themes in the corporate advertising prominently featuring Whalen and the theme put forward by the campaign have been nearly identical."⁸⁴ Thus, the complaint alleged, "[s]uch activity is a

71. *Formicola Planning to Run for Congress*, ARK. DEMOCRAT-GAZETTE, Dec. 31, 2005.

72. 2005 Op. Fed. Election Comm'n 7 (2005).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. E-mail from Andy Mayberry, Candidate, Arkansas 2nd Congressional District, to author (Jan. 12, 2006, 11:27 EST) (on file with author) [hereinafter Mayberry E-mail].

79. *Id.*

80. *Id.*

81. Alexander Bolton, *Candidates to Replace Nussle in a Tussle Over Television Ad*, THE HILL, Dec. 6, 2005, at 3.

82. Ed Tibbetts, *TV Ads Become Issue In Campaign*, QUAD-CITY TIMES, Nov. 12, 2005, available at <http://www.qctimes.net/articles/2005/11/12/news/local/doc437582de1c25d919646495.txt>.

83. Bolton, *supra* note 81.

84. Letter from Carol Earnhardt, Manager, Brian Kennedy for Congress, to Scott E. Thomas,

calculated effort to evade the strict prohibition on corporate contributions to federal campaigns and has resulted in illegal corporate contributions and illegal coordinated communications.”⁸⁵ This case remains unresolved.

These situations illustrate the problem created by over-inclusive coordinated communications rules. Business owners and executives and media personalities often choose to run for political office. But if the business is engaged in advertising (as many are) or other public communications, and if the business shares its name with the candidate or the candidate appears in the advertising, then the content prong is triggered. With the payment and conduct prongs also easily satisfied in such situations, a candidate is forced to choose between her business or her campaign.

The rules’ over-inclusion of business communications creates a recurring problem. The candidates discussed above show that in every election cycle federal candidates will see their business communications proscribed by the coordinated communications rules. Perhaps only a handful of candidates per election cycle will be affected in this way, but those situations are neither isolated nor anomalous. Because federal elections attract high-profile challengers, the problem will recur.

The coordinated communications rules will restrict the business communications of many additional federal candidates. The Supreme Court observed that many challengers are “well known and influential in their community or state.”⁸⁶ Surely many challengers establish such repute and influence in their community by virtue of their business-related public communications. The above-noted candidates were all involved with the media or business advertising. However, Andy Mayberry was not the only federal candidate with a business and media background.⁸⁷ Russ Darrow, Pete Coors,

Chairman, Federal Election Commission 2 (Nov. 30, 2005), <http://www.briankennedy.com/news/20051130.pdf> [hereinafter Earnhardt Letter].

85. *Id.* at 1.

86. *Buckley v. Valeo*, 424 U.S. 1, 32 (1976).

87. One notable federal candidate faced with similar problems, albeit under a prior version of the rules, was Steve Forbes. Forbes owned a majority interest in and was CEO of Forbes Inc., the publisher of Forbes Magazine. Kenneth A. Gross, *Steve Forbes: Candidate or Journalist?*, THE HILL, Sept. 23, 1998, at 30. When running for president in 1996 Forbes continued to author a column in the magazine. *Id.* The FEC initially viewed those columns as “prohibited corporate contributions to the campaign.” FED. ELECTION COMM’N, MUR 4305—FIRST GENERAL COUNSEL’S REPORT 3 (1996), available at <http://eqs.nictusa.com/eqsdocs/000039EF.pdf>. The FEC eventually brought suit against Forbes, but chose to withdraw from the suit in 1999. FED. ELECTION COMM’N, STATEMENT OF REASONS FOR VOTING TO WITHDRAW THE COMMISSION’S COMPLAINT IN *FEC V. FORBES, ET. AL.* 1 (1999), available at <http://eqs.nictusa.com/eqsdocs/00003A06.pdf> [hereinafter *FEC V. FORBES WITHDRAWAL*].

Indiana produced another media personality turned politician. Before successfully running for Congress in 2000, Mike Pence hosted his own talk radio program in east-central Indiana named The Mike Pence Show. Danielle Knight, *And Now, Batting Right*, U.S. NEWS & WORLD REP., Apr. 24, 2006, at 26-27.

and Mike Whalen were not the only candidates controlling businesses that bear their names.⁸⁸ Other federal candidates affected in similar ways included a radio program host and a named partner in a law firm engaged in advertising.⁸⁹ Any candidate who regularly engages in business-related public communications could be affected, including many business owners and professional practitioners who rely on advertising, media personalities, and others. Every two years all members of the House and one-third of the members of the Senate are up for re-election.⁹⁰ Future elections will see many more cases of federal candidates adversely affected by the coordinated communications rules.

IV. CHANGES IN THE RULES

A. BCRA Sponsors' Dissatisfaction with the Rules

Although this Note argues that the coordinated communications rules are over-inclusive, the principal sponsors of BCRA felt the opposite. They thought the new rules were under-inclusive and voiced their dissatisfaction early on. They urged the FEC to "emphasize the actual conduct and minimize the importance of any content standard."⁹¹ They feared that the content prong would render the rules under-inclusive, arguing that the payment and conduct prongs alone were sufficient to infer coordination.⁹²

The FEC rejected that argument,⁹³ but the sponsors revived it soon thereafter in *Shays v. FEC*.⁹⁴ Christopher Shays, a principal sponsor of the BCRA in the House of Representatives, and another sponsor challenged the FEC's final rules on coordinated communications.⁹⁵ Shays specifically attacked the content prong, arguing that the 120-day limitation was insufficient because it would allow coordinated communications outside of that timeframe as long as they did not constitute "express advocacy" or republication of campaign materials.⁹⁶ The district court agreed, finding that the BCRA was meant to "enlarge the concept

88. Eric Dickerson, owner of Eric Dickerson Buick in Indianapolis (not the famed NFL running back), faced a situation similar to Russ Darrow's. See Eric Dickerson Buick, <http://www.ericdickerson.com> (last visited May 19, 2006). He decided to challenge a popular Democratic congressional incumbent. Matthew Tully, *Carson's Foe Has A Colt's Name, Edgy Fan Base*, INDIANAPOLIS STAR, May 12, 2006. He won the Republican primary in 2006 with the help of his business experience and recognizable name. *Id.* But he still faced long odds against the popular Democratic incumbent. *Id.*

89. *FEC v. FORBES WITHDRAWAL*, *supra* note 87, at 4-5.

90. U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. amend. XVII.

91. Coordinated and Independent Expenditures, 68 Fed. Reg. 426 (Jan. 3, 2003) (to be codified at 11 C.F.R. pts. 100, 102, 109, 110, 114).

92. *Id.* at 427.

93. *Id.*

94. 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005).

95. *Id.* at 38.

96. *Id.* at 57.

of what constitutes ‘coordination’ under campaign finance law.’⁹⁷ Thus, the 120-day limitation in the content prong “would create an immense loophole that would facilitate circumvention of the Act’s contribution limits, thereby creating ‘the potential for gross abuse.’”⁹⁸ The court ordered the FEC to rewrite the rules on coordinated communications.⁹⁹

The FEC appealed *Shays* to the District of Columbia Circuit, which in 2005 affirmed the district court holding regarding coordinated communications.¹⁰⁰ In affirming, the circuit court found that a content prong was permissible, but that the 120-day window was without sufficient justification.¹⁰¹ It instructed the FEC to more “carefully consider” where to draw the line regarding the content of the communications in order to prevent “evasion of campaign finance restrictions through unregulated collaboration.”¹⁰² The FEC petitioned for a rehearing en banc with the circuit court on August 25, 2005,¹⁰³ which was denied in October 2005.¹⁰⁴

B. *Post-Shays Changes to the Rules*

After the court denied the FEC’s request for a rehearing, the FEC proceeded with the rule changes mandated by the *Shays* decisions.¹⁰⁵ Initially, the FEC sought public comments on seven different alternatives for the new content prong of the coordinated communications rules.¹⁰⁶ The Commission later sought a second round of public comments regarding data it gathered on the timing of campaign advertisements in federal elections.¹⁰⁷ The rulemaking process

97. *Id.* at 64.

98. *Id.* at 65 (quoting *Orloski v. FEC*, 795 F.2d 156, 165 (1986)). The district court invalidated the rules “pursuant to step two of the *Chevron* analysis.” *Id.* The *Chevron* analysis involves a two step inquiry:

At step one, we inquire whether Congress “has directly spoken to the precise question at issue,” in which case “we must give effect to the unambiguously expressed intent of Congress.” If the statute is silent or ambiguous on the issue we will defer at step two to any reasonable agency interpretation.

Castro v. Chicago Hous. Auth., 360 F.3d 721, 727 (2004) (citations omitted) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837, 842-43 (1984)).

99. *Shays*, 337 F. Supp. 2d at 130.

100. *Shays v. FEC*, 414 F.3d 76, 102 (2005).

101. *Id.*

102. *Id.*

103. Press Release, Federal Election Commission, FEC Files Petition For Rehearing in *Shays v. FEC* (Aug. 29, 2005), http://www.fec.gov/press/press2005/20050829Shays_Rehearing.html.

104. Alexander Bolton, *It’s Back to Square One for the FEC*, THE HILL, Oct. 25, 2005, at 1.

105. Press Release, Federal Election Commission, FEC Describes Plans for Rulemakings (Nov. 3, 2005), <http://www.fec.gov/press/press2005/20051103shays.html>.

106. Coordinated Communications, 70 Fed. Reg. 73,946 (Dec. 14, 2005) (to be codified at 11 C.F.R. pt. 109).

107. Press Release, Federal Election Commission, FEC Seeks Comment on Political

concluded on April 7, 2006 at an open meeting of the Commission. At that meeting the commissioners hammered out compromises between two dueling final rule proposals.¹⁰⁸ The changes adopted at that meeting will have little, if any, effect on the underlying problem at issue: over-inclusion of legitimate business communications.

C. *The Problem Persists*

The rules will continue to restrict legitimate business communications because the FEC failed to either address or remedy the problem at issue.¹⁰⁹ The three-prong approach remains with few substantive changes to any of the prongs. Most of the changes adopted by the FEC will not touch the parts of the rules that create this problem. For example, the rules now stipulate that the conduct prong is not satisfied by substantial discussion between the third party and the candidate if the third party used publicly available information for the communication.¹¹⁰ The commission also created a safe harbor allowing candidates to endorse each other and convey those endorsements in public communications.¹¹¹ Though these changes should reduce the rules' overall level of over-inclusion, they fail to address the main problem.

The content prong underwent only minor changes. The fourth content standard now differentiates between presidential and congressional races. For presidential races, the content prong still is satisfied by public communications within 120 days of an election which refer to a clearly identified candidate and target the relevant electorate.¹¹² For congressional races, that 120-day window before election is reduced to ninety days.¹¹³ Such a slight reduction in the reach of the content prong will have little effect on the problem. For three months

Advertising Data in Coordination Rulemaking (Mar. 13, 2006), <http://www.fec.gov/press/press2006/20060313coord.html>.

108. FED. ELECTION COMM'N, AGENDA DOCUMENT NO. 06-27, MINUTES OF AN OPEN MEETING OF THE FEDERAL ELECTION COMMISSION (Apr. 7, 2006) [hereinafter MINUTES]; Memorandum from Vice Chairman Robert D. Lenhard, Comm'r Steven T. Walther & Comm'r Ellen L. Weintraub to the Fed. Election Comm'n, Agenda Document No. 06-26 (Apr. 7, 2006), available at <http://www.fec.gov/agenda/2006/mtgdoc06-26.pdf> [hereinafter Proposed Rules].

109. MINUTES, *supra* note 108; see also Bob Bauer & Donna Lovecchio, *The FEC Has Promulgated New "Coordination" Rules*, MORE SOFT MONEY HARD LAW, Apr. 7, 2006, http://www.moresoftmoneyhardlaw.com/updates/federal_candidates_officeholders.html?AID=682.

110. Proposed Rules, *supra* note 108, at 4, 6-7.

111. MINUTES, *supra* note 108, at 6-7; Proposed Rules, *supra* note 108, at 8. The FEC approved other changes to the rules that will not affect this problem. Bauer & Lovecchio, *supra* note 109.

112. Bauer & Lovecchio, *supra* note 109; MINUTES, *supra* note 108, at 4.

113. Bauer & Lovecchio, *supra* note 109; MINUTES, *supra* note 108, at 4. This change was accompanied by a slight change in the structure of the fourth content prong. That prong is now broken down by the nature of the regulated party, rather than by the individual content requirements. Proposed Rules, *supra* note 108, at 2.

before the primary election and three months before the general election the rules will continue to swallow legitimate business communications.

Although the Commission failed to remedy this problem, its willingness to address other over-inclusion problems offers hope. The FEC acted within BCRA's congressional mandate to narrow the scope of the rules, even though the BCRA sponsors initiated the *Shays* litigation in order to broaden the rules. The FEC should create another safe harbor for legitimate business communications, as it did for candidate endorsements. That solution will be discussed further in Part VIII.

V. WHY INCUMBENTS BENEFIT

The coordinated communications rules apply equally to all candidates, but the business communications they snare come from political outsiders—usually challengers. Congressional rules and realities inhibit incumbents from being involved with business communications. Challengers, however, often come from outside the professional political arena and from inside the business arena. When the rules harm those challengers, incumbents benefit.

A. *Incumbents' Limited Business Involvement*

Incumbents are professional politicians. They must represent their constituents full-time and their official and unofficial Senate and House duties keep them busy. These congressional duties would make it implausible, if not impossible, for incumbents to be materially involved in an outside business' public communications.

Furthermore, congressional ethics rules virtually eliminate the possibility of incumbents engaging in outside business communications that could be snared by these rules. First, congressmen are barred from earning outside income in excess of fifteen percent of their annual salary.¹¹⁴ In addition, congressmen generally cannot affiliate with or be employed by any business entity providing professional services which involves a fiduciary relationship.¹¹⁵ Nor can they

114. RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 108-241, at 905 (2005) (Rule XXV(1)(a)(1)), STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, at 66-67 (2000) (Rule XXXVI); see 5 U.S.C. app. § 501(a)(1) (2005). In the House, outside earned income includes money received from a business in which the member or his family holds a controlling interest, unless "both personal services and capital are income-producing factors" and "the personal services actually rendered by him in the trade or business do not generate a significant amount of income." RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 108-241, at 910 (2005) (Rule XXV(4)(d)(1)D)).

115. RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 108-241, at 907 (2005) (Rule XXV(2)); STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, at 67 (2000) (Rule XXVII(5)). These professional services include, for example, "law, real estate or insurance sales, financial services, or consulting or advising." COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT, HIGHLIGHTS OF HOUSE ETHICS RULES (2005), <http://www.house.gov/ethics/Highlights2005a.htm>.

allow any of those business entities to use their name.¹¹⁶ Congressmen are also subject to more general conflict of interest rules, which limit their involvement with outside businesses.¹¹⁷ Taken together, these ethics rules preclude members of Congress from involving themselves with private businesses.

The rules of Congress and the practical effects of full time office-holding limit incumbents' involvement with outside businesses. Because of those limitations, incumbents are highly unlikely to engage in public communications coordinated with outside businesses. Incumbents' version of business-related public communications is called news coverage,¹¹⁸ and the rules cannot limit news coverage.¹¹⁹

B. Challengers as Candidates and Businessmen

Challengers often come from outside politics and thus from professions that may involve public communications. Although some challengers come from other elected offices, in Senate and especially in House elections most challengers are not seeking to merely swap elected offices. In the last half-century nearly eighty percent of challengers and fifty percent of open-seat candidates for the House had never before held elected office.¹²⁰ Even though prominent members of the community often challenge incumbents, most are political amateurs who could see their business communications affected.

Because challengers likely come from outside the political area, the coordinated communications rules potentially harm their businesses and campaigns. If a challenger comes from a profession that uses public communications regularly, the rules may apply to those communications. For example, Andy Mayberry and Russ Darrow both ran against incumbents and were harmed by the rules. While congressional incumbents are immune to this problem, some of their strongest outsider challengers—successful businessmen with high profiles in their communities—may suffer from the rules' over-inclusion.

The BCRA produces similar problems in open-seat elections, which also involve large numbers of political outsiders. In House elections nearly half of the candidates in such elections were political newcomers.¹²¹ Pete Coors and Mike Whalen both sought open seats when the rules impacted their campaigns. Even though open-seat candidates do not run against incumbents, they often run against office-holders. Over fifty percent of the candidates in open-seat House

116. RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 108-241, at 907 (2005) (Rule XXV(2)); STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, at 67 (2000) (Rule XXVII(5)).

117. *E.g.*, STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, at 67 (2000) (Rule XXXVII(2)).

118. *See infra* Part VI.B.

119. 11 C.F.R. § 100.73 (2005) (exempting news coverage from qualifying as a contribution).

120. GARY C. JACOBSON, THE POLITICS OF CONGRESSIONAL ELECTIONS 37 (5th ed. 2001).

121. *Id.*

elections brought political experience with them.¹²² Inevitably, some of those were office holders unaffected by the rules for the same reasons incumbents are unaffected.

Thus, only political outsiders suffer from the damage produced by the rules regardless of whether that outsider is running against an incumbent or for an open seat. Most political outsiders run against incumbents, and incumbents directly benefit when the rules constrain these challengers. However, even in open seat elections outside office-holders benefit indirectly when running against political amateurs who are adversely affected by the rules.

VI. THE INCUMBENCY ADVANTAGE

The coordinated communications add to incumbents' preexisting electoral advantage. The incumbency advantage perpetuates unfairness to challengers and greater disconnects between incumbents and constituents. Any rules that add to the incumbency advantage should be avoided.

A. *Evidence of the Incumbency Advantage*

Countless studies document the existence of incumbency advantage in congressional elections.¹²³ Incumbents enjoyed a relatively small advantage in the first half of the twentieth century, but that "rapidly increased during the 1950s and 1960s, and has been relatively high for the past thirty years."¹²⁴ That advantage approached ten percentage points on average in recent elections.¹²⁵

Recent congressional elections demonstrate the effects of the incumbency advantage. For example, in 2004 only eight incumbent congressmen running for re-election—one senator and seven representatives—lost their seats in the general election.¹²⁶ In House races, almost ninety percent of those incumbents won re-election by "landslide" margins of at least 20 percent."¹²⁷ Previous elections produced similar numbers. Only seven House incumbents in 2002 and

122. *Id.*

123. *See, e.g.,* Stephen Ansolabehere & James M. Snyder, Jr., *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942-2000*, 1 ELECTION L.J. 315 (2002).

124. ANDREW GELMAN & ZAIYING HUANG, ESTIMATING INCUMBENCY ADVANTAGE AND ITS VARIATION, AS AN EXAMPLE OF A BEFORE-AFTER STUDY 19 (2004), <http://www.stat.columbia.edu/~gelman/research/published/inc6.pdf>.

125. *Id.*

126. Rhodes Cook, *The Election of 2004: A First Take*, <http://www.rhodescook.com/first.take.html> (last visited Mar. 7, 2006). Four of those incumbent losers in the House were Texas Democrats, two of whom were running against Republican incumbents. *Id.* New Republican-drawn congressional districts played a significant role in the failed re-election bids of these Texas Democrats. *See* Robin Toner, *Slim Pickings; Getting Pumped? Get Real*, N.Y. TIMES, Nov. 13, 2005, § 4, at 1.

127. THE CTR. FOR VOTING AND DEMOCRACY, DUBIOUS DEMOCRACY 2005: OVERVIEW (2005), <http://www.fairvote.org/?page=1460>.

five in 2000 were defeated.¹²⁸ The House incumbent re-election rate in the last three federal elections ranged from ninety-six to ninety-eight percent.¹²⁹ As noted earlier, this advantage is not merely a recent phenomenon. Indeed, for forty years the re-election rate has hovered around ninety-five percent in the House.¹³⁰ Still, the numbers from recent elections show that challengers have much to fear. By one research group's calculations, the last two federal elections were among "the least competitive elections in American history."¹³¹ Challengers clearly face long odds in federal elections.

B. Problems Created by the Incumbency Advantage

The incumbency advantage unfairly disadvantages challengers and reduces elected officials' responsiveness to constituents. The American public's support for term limits evidences its general unease with entrenched incumbents.¹³² Most major newspaper editorial boards, even as imperfect barometers of public sentiment, decry the advantages given to incumbents.¹³³ In a democracy, public opposition to entrenched incumbents, taken alone, indicates that the incumbency advantage is a problem that should be addressed. The reasons for such opposition are rooted in principles of American democracy. Although House incumbents now benefit greatly from the incumbency advantage, the founders envisioned something different.

First, the incumbency advantage unfairly closes the doors of government to potential challengers. Centuries ago James Madison documented the founders' vision that congressional campaigns be open to all. In Federalist No. 52 Madison wrote, "[T]he door of [the House of Representatives] is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith."¹³⁴ Later, the Seventeenth Amendment extended that ideal to the Senate by

128. Press Release, Campaign Finance Institute, House Winners Average \$1 Million for the First time: Senate Winners Up 47%, tbl. 2: House Incumbents and Challengers, Safe and Contested Races 2000-2004 (Nov. 5, 2004), <http://www.cfinst.org/pr/110504a.html> (follow Table 2 hyperlink). Three of the seven incumbents defeated in 2002 ran against fellow incumbents. *Id.*

129. Toner, *supra* note 126, at 1.

130. David Plotz, *The House Incumbent*, SLATE, Nov. 3, 2000, available at <http://www.slate.com/id/92692/>.

131. THE CTR. FOR VOTING AND DEMOCRACY, *supra* note 127.

132. James Rosen, *Is Time Up On Term Limits?*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 22, 1999, at A25 ("Nationwide, about two-thirds of Americans support term limits for elected officials, according to polls.").

133. See, e.g. Editorial, *The Campaign Reform Fraud*, CHI. TRIB., Dec. 7, 2002, at 24 ("The McCain-Feingold campaign finance law is desperately flawed. . . . [A]ll the advantages go to incumbent members of Congress. McCain-Feingold is, if anything, a self-preservation tool for the people who voted to make it law.").

134. THE FEDERALIST NO. 52 (James Madison).

mandating the popular election of Senators.¹³⁵ Perhaps the sentiment reflected by Madison's prose is more idealistic than realistic—but that ideal cannot be dismissed. With House races now often reduced to landslide victories for incumbents, the door to the House may not be as open as the framers intended.

The Supreme Court also noted the fundamental unfairness of giving incumbents advantages over challengers. In *Buckley v. Valeo*, the Court expressed its willingness to declare a statute unconstitutional if that statute would “invariably and invidiously benefit incumbents as a class.”¹³⁶ Such discrimination against challengers would violate the Fifth Amendment Due Process Clause by denying challengers equal protection under the law.¹³⁷ The Court's opposition to “restrictions on access to the electoral process” confirms the seriousness of the problem with the coordinated communications rules.¹³⁸

Second, the incumbency advantage can reduce the connection between constituents and their representatives. Madison stressed the importance that Congress be “restrained by its dependence on its people.”¹³⁹ Biennial elections for Representatives were intended to ensure “a due connection between” the people and their representatives, thus securing for the people “every degree of liberty.”¹⁴⁰ Madison envisioned a close connection between constituents and congressmen, but when re-election is assured the connection wanes.

Congress members' incentive to be responsive to their constituents surely decreases when their incumbent status all but guarantees re-election. Ninety-four House incumbents running for re-election in 1998 faced no major party challengers.¹⁴¹ In uncontested races, voters are left with no real choice. Elections become mere formalities, and incumbents need not rely on the people. Although some incumbents probably are re-elected precisely because of their responsiveness to constituents, many factors that contribute to the incumbency advantage are unrelated to incumbents' interaction with constituents. The job security incumbents derive from these factors would allow them to depart from their constituents' ideological preferences without suffering at the polls. By closing the doors of government to challengers and constituents, the incumbency advantage damages democracy.

VII. NEUTRALIZING THE INCUMBENCY ADVANTAGE

The coordinated communications rules add to the incumbency advantage by barring challengers from taking advantage of their status within the community. Incumbents benefit from several systemic factors in elections and also from their

135. U.S. CONST. amend. XVII.

136. *Buckley v. Valeo*, 424 U.S. 1, 32 (1976).

137. *Id.* at 93 (“Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”).

138. *Id.* at 94.

139. THE FEDERALIST NO. 52 (James Madison).

140. *Id.*

141. JACOBSON, *supra* note 120, at 48.

status within their communities. Challengers appearing in legitimate business communications could neutralize incumbents' community status advantage. Those legitimate business communications could indirectly convey to voters the challenger's qualifications for office and increase the challenger's name recognition. However, the rules limit the ability of challengers to fight the incumbency advantage in that manner.

A. *Advantages Unrelated to Community Status*

Incumbents enjoy several systemic advantages that contribute to the overall incumbency advantage, including gerrymandered districts, fundraising capabilities, the congressional seniority system, and declining party affiliation among voters. Even the most well-known challenger often cannot combat the advantages incumbents derive in these areas because these factors are largely unrelated to community status. Therefore, these factors automatically disadvantage challengers.

Critics frequently cite gerrymandering as a main cause of incumbency advantage. Incumbents usually bear the responsibility of redrawing district lines, and they can use that power to draw less competitive districts and protect their seats.¹⁴² Because congressional districts are usually drawn by incumbents,¹⁴³ commentators presume that they are drawn to protect incumbents.¹⁴⁴ Some studies attempt to gauge the impact of redistricting on incumbency advantage. One such study compared the results of congressional elections in 2000 and then in 2002, after most districts were redrawn.¹⁴⁵ According to the study, thirty-seven of the total forty-six competitive districts in 2000 became safer for incumbents in 2002.¹⁴⁶ Another study estimated that the redistricting that occurred between 2000 and 2002 made three quarters of the marginal congressional districts safer for incumbents.¹⁴⁷

Though supporters billed the BCRA as a measure to level the playing field in fundraising,¹⁴⁸ incumbents maintained their huge fundraising advantage in

142. *Id.*

143. NAT'L CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2000 app. D (1999), <http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/Apdauth.htm>.

144. *See, e.g.*, Editorial, *Incumbents Shake Their Money Tree*, N.Y. TIMES, Nov. 2, 2005, at A28 (noting the power of political parties "to gerrymander legislative lines to grossly favor incumbents").

145. VOTING AND DEMOCRACY RESEARCH CTR., *Redistricting and Incumbent Protection in 2001-2002*, <http://www.fairvote.org/?page=715> (last visited Mar. 7, 2006).

146. *Id.*

147. Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 POL. SCI. Q. 1, 10 (2003).

148. David S. Broder, Editorial, *Reform: The Doubt . . .*, WASH. POST, Apr. 3, 2001, at A21 (noting the BCRA authors' attempt to "'level the playing field' for all those involved in the political game")

2004.¹⁴⁹ On average, House incumbents in 2002 who won competitive races also won the fundraising battle by a count of \$1.2 million to the challengers' \$700,000.¹⁵⁰ In 2004, that gap widened with incumbents pulling in \$1.6 million compared to the challengers' stagnant total of \$700,000.¹⁵¹ Even when challengers beat incumbents in 2004 they were out-fundraised by over \$400,000.¹⁵² The fundraising numbers for Senate races mirror those of House races.¹⁵³ These numbers demonstrate that the incumbency fundraising advantage can hinder even the most viable challengers.

Because the congressional power structure rewards seniority, voters favor incumbents in order to gain more powerful representation in Congress. All incumbents enjoy some level of seniority, whereas newly elected challengers start with none.¹⁵⁴ Seniority in Congress is tied to power, which can benefit constituents.¹⁵⁵ Thus, the seniority system adds an incentive for voters to choose incumbents.¹⁵⁶ The 2004 Senate primary in Pennsylvania battle between incumbent Arlen Specter and challenger Pat Toomey illustrates this point. Specter had over twenty years of Senate experience and was in line to chair the Senate Judiciary Committee.¹⁵⁷ Though Toomey was considered more ideologically in line with the primary voters, Specter touted his seniority.¹⁵⁸ Specter emerged victorious from the primary.¹⁵⁹ That campaign demonstrates the power of incumbent seniority over voters.

Finally, incumbents benefit from declining party affiliation among voters. Voters who feel less attachment to political parties, the theory goes, identify more with individual candidates.¹⁶⁰ As a result, incumbents can garner votes as an individual candidate that otherwise may have been party-line votes against them.¹⁶¹ This theory receives support from the fact that decreases in party affiliation corresponded with increases in incumbency advantage.¹⁶²

149. Campaign Finance Institute, *supra* note 128.

150. *Id.*

151. *Id.*

152. *Id.*

153. Press Release, Campaign Finance Institute, House Winners Average \$1 Million for the First time: Senate Winners Up 47%, tbl.3: Senate Incumbents and Challengers, Safe and Contested Races 2000-2004 (Nov. 5, 2004), <http://www.cfinst.org/pr/110504a.html> (follow Table 3 hyperlink).

154. Ansolabehere & Snyder, *supra* note 123, at 315.

155. *Id.*

156. *Id.*

157. James Dao, *Conservative Takes on Moderate G.O.P. Senator in Pennsylvania*, N.Y. TIMES, Apr. 3, 2004, at A8.

158. *Id.*

159. Lauren Sheperd et al., *Specter Could Be Losing Support in Pa.*, THE HILL, May 4, 2004, at 19.

160. Ansolabehere & Snyder, *supra* note 123, at 327.

161. *Id.*

162. *Id.*

Thus, incumbents derive advantages from gerrymandering, fundraising, seniority, and declining party affiliation. These factors relate to the current political structure of the country rather than voter-candidate relations. Consequently, challengers cannot use their reputation in the community to contest these incumbent advantages.

B. Advantages Related to Community Status

Incumbents' status within their constituent community gives them an additional advantage. With earmarks,¹⁶³ constituent services, and constant media attention, incumbents increase their status within their community and improve their relations with voters. The Supreme Court called the incumbency advantage stemming from these factors "axiomatic."¹⁶⁴ The Court further elaborated:

In addition to the factors of voter recognition and the status accruing to holding federal office, the incumbent has access to substantial resources provided by the Government. These include local and Washington offices, staff support, and the franking privilege. Where the incumbent has the support of major special-interest groups . . . and is further supported by the media, . . . contribution and expenditure limitations . . . could foreclose any fair opportunity of a successful challenge.¹⁶⁵

Incumbents are professional politicians, and FEC rules place no limitations on their ability to exploit the aforementioned advantages of federal office-holding.

Congressmen often earmark federal funds for projects in their districts in order to improve their status with constituents. In the last decade the number of earmark projects increased nearly ten fold, from 1439 in 1995 to 13,997 in 2005.¹⁶⁶ Congress now spends \$27.3 billion on earmarks, whereas in 1995 it spent \$10 billion.¹⁶⁷ Alaska led the way in earmarks, receiving nearly \$1000 per person in federal earmarks in 2005.¹⁶⁸

Incumbents surely benefit from the local projects for which they secure earmarked federal funds. Even though many consider earmarks a significant

163. Earmarks are often referred to as pork barrel legislation. Such legislation "favors a particular local district by allocating funds or resources to projects (such as constructing a highway or a post office) of economic value to the district and of political advantage to the district's legislator." BLACK'S LAW DICTIONARY 918 (8th ed. 2004).

164. *Buckley v. Valeo*, 424 U.S. 1, 31 n.33 (1976).

165. *Id.* The franking privilege is "[t]he privilege of sending certain mail free of charge, accorded to certain government officials, such as members of Congress and federal courts." BLACK'S LAW DICTIONARY 684 (8th ed. 2004).

166. CITIZENS AGAINST GOV'T WASTE, CONGRESSIONAL PIG BOOK 3 (2005), available at http://www.cagw.org/site/PageServer?pagename=reports_pigbook2005.

167. *Id.*

168. *Id.*

problem,¹⁶⁹ individual districts and states undoubtedly appreciate the funding they receive. These funds can create infrastructure and jobs for constituents. Additionally, constituents remain fully aware of the earmarks their representatives secure for the district because the local media covers these benefits comprehensively.¹⁷⁰ Thus, earmarks benefit many incumbents when it comes time for re-election.

Incumbents maintain constituent services programs, paid for with tax dollars, whereby they directly communicate with constituents. Congressional rules sanction numerous forms of constituent services.¹⁷¹ For example, House members are allotted on average over \$100,000 for direct mailings to constituents.¹⁷² Also, they can advertise for and conduct town hall meetings and maintain official web sites.¹⁷³ Through these programs Congress gives incumbents ample resources to improve their standing with constituents.

Finally, incumbents enjoy a large advantage in overall media attention. Much of this advantage stems from press coverage unrelated to congressional campaigns. The press covers members of the House year-round, documenting their actions as lawmakers in Congress and at home.¹⁷⁴ Incumbents enjoy this non-campaign coverage both in off years and during the campaign season.¹⁷⁵ As a result, House incumbents maintain a huge advantage in total news coverage over challengers.¹⁷⁶ The same advantage could be expected for incumbent Senators because local media rely on their incumbent Senators for news about the federal government.¹⁷⁷

Campaign coverage depends upon the competitiveness of the race, which also benefits incumbents. In competitive races the media balances coverage of

169. See Shailagh Murray, *Capital's New Four-Letter Word*, WASH. POST, Jan. 27, 2006, at A21. Due to this opposition, Congress may soon reform its practice of rubber-stamping earmarks. Jeffrey H. Birnbaum, *Senate Draft on Lobbying Clamps Down on Earmarks*, WASH. POST, Feb. 28, 2006, at A7.

170. R. DOUGLAS ARNOLD, CONGRESS, THE PRESS, AND POLITICAL ACCOUNTABILITY 146 (2004).

171. COMMITTEE ON HOUSE ADMINISTRATION, MEMBERS' CONGRESSIONAL HANDBOOK, available at <http://cha.house.gov/services/memberhandbook.htm> [hereinafter MEMBERS' CONGRESSIONAL HANDBOOK].

172. COMMITTEE ON HOUSE ADMINISTRATION, WHAT IS THE FRANK?, http://cha.house.gov/services/franking_commission_whatisfrank.htm (last visited Mar. 7, 2006).

173. MEMBERS' CONGRESSIONAL HANDBOOK, *supra* note 171.

174. ARNOLD, *supra* note 170, at 167.

175. *Id.*

176. *Id.* The imbalance in media coverage of campaigns is made possible, at least in part, by the ineffectiveness of the Federal Communications Commission's equal time provisions. See Anne Kramer Ricchiuto, Note, *The End of Time for Equal Time?: Revealing the Statutory Myth of Fair Election Coverage*, 38 IND. L. REV. 267 (2005).

177. KIM FRIDKIN KAHN & PATRICK J. KENNEY, THE SPECTACLE OF U.S. SENATE CAMPAIGNS 106 (1999).

incumbents and challengers.¹⁷⁸ However, the media gives scant coverage to uncompetitive races, where the challenger's electoral success is less likely.¹⁷⁹ In these uncompetitive races, coverage of incumbents outpaces that of challengers.¹⁸⁰ Because so few races are now competitive, incumbents benefit from the media's hands-off approach to races deemed uncompetitive.¹⁸¹ The media may contribute to challengers' lack of success in the polls by denying them the attention necessary to improve their electoral prospects.¹⁸²

Media coverage directly relates to electoral success. Increased media coverage helps candidates raise money and prove their viability.¹⁸³ In addition, voters' recognition of a candidate's name, familiarity with a candidate, exposure to a candidate, and personal contact with a candidate all typically increase that candidate's probability of success.¹⁸⁴ Therefore, the disproportionate amount of media attention garnered by incumbents further boosts their chances of retaining office.

C. Neutralizing the Incumbency Advantage

While some systemic factors automatically disadvantage challengers, those same challengers could use their status in the community to combat incumbents' status-related advantages. Challengers with strong business reputations could convert that reputation into political capital in federal campaigns. For example, challengers running successful businesses in their communities provide jobs to potential voters. Those challengers can also tout their business success as a qualification for federal office. Therefore a challenger's business experience could operate as his version of earmarks for the community, demonstrating to voters his fitness for office. In addition, challengers regularly engaging in business-related public communications increase their exposure to voters. Those legitimate business communications could indirectly demonstrate a challenger's qualifications for office and increase her name recognition among voters. Those communications could help challengers combat incumbents' advantage relating to media exposure.

178. *Id.*; ARNOLD, *supra* note 170, at 167.

179. KAHN & KENNEY, *supra* note 177, at 158; ARNOLD, *supra* note 170, at 167.

180. KAHN & KENNEY, *supra* note 177, at 156. Measures of incumbents' actual advantage in news coverage vary. One group, for example, estimates that incumbents receive five times the coverage of challengers. Darlisa Crawford, *Media Coverage of U.S. Elections Closely Monitored*, WASH. FILE (U.S. State Dep't), May 21, 2004, available at <http://usinfo.state.gov/dhr/Archive/2004/May/21-398977.html>.

181. ARNOLD, *supra* note 170, at 156 (arguing that the decision of the media to ignore uncompetitive races "contribute[s] to the safety of incumbents").

182. KAHN & KENNEY, *supra* note 177, at 214.

183. *Id.* at 17.

184. *Id.* at 214, 220.

D. How the Rules Impair Challengers

The rules on coordinated communications impair challengers' ability to convert their status within the community into electoral success. This impairment results from three distinct problems the rules create for some challengers: (1) they harm a candidate's campaign by reducing his status within the community, (2) they harm a candidate's business or professional life by forcing him to curtail his professional obligations and business operations for a chance to run for federal office; and (3) they prevent an aspiring candidate from entering a federal race.

1. *Harm to Campaigns.*—The rules can directly harm a challenger's campaign by reducing his status within the community in several ways. First, if a challenger chooses to continue engaging in business-related public communications during the campaign, he risks being branded a rule-breaker by opponents. Pete Coors experienced this firsthand when critics labeled the brewery's pre-election ads "inappropriate" and possibly illegal.¹⁸⁵ If opponents believe the communications violate the rules, they may even file a complaint with the FEC. Mike Whalen's restaurant commercials triggered such a complaint.¹⁸⁶ This criticism could significantly reduce a challenger's support among voters.

Second, the rules could create confusion within a challenger's campaign. A challenger aware of the rules could question their applicability to her business-related public communications. Though the rules attempt to create a bright-line test, their application can be fact intensive and thus subject to the FEC's discretion.¹⁸⁷ Such a distraction could impair a challenger's ability to effectively campaign.

Third, if a challenger chooses to cease engaging in business-related public communications, his exposure to voters would decrease. In order to avoid breaking the rules, a challenger may choose to shelve his business-related public communications during the campaign. That would automatically reduce his exposure to voters, decreasing his likelihood of electoral success.

2. *Harm to Businesses.*—The rules could harm a challenger's business or professional life by forcing her to curtail her business or professional obligations during the campaign. First, the rules create uncertainty for businesses disseminating the communications. Russ Darrow's auto dealership group feared its advertisements could bring "the threat of criminal penalties for an unlawful in-kind corporate contribution to a political campaign."¹⁸⁸

That confusion could force businesses to limit their communications, with potentially devastating effects. Darrow's dealerships typically spent half a million dollars per month on advertising, and elimination of that advertising for four months before November elections could harm both the dealerships and the

185. Brand & Kesmodel, *supra* note 67.

186. Earnhardt Letter, *supra* note 84.

187. See *supra* note 59 and accompanying text.

188. Will, *supra* note 1.

salesmen who rely on commissions from sales.¹⁸⁹ The rules led Andy Mayberry to sell one of his publications to his financial detriment and to reduce activities in another.¹⁹⁰ Clearly the rules can inflict significant harm on candidates' businesses.

3. *Reductions in the Candidate Pool.*—The rules could even dissuade potential challengers from entering the race. A potential challenger aware of the harm the rules could inflict on her campaign and business, and the benefit that harm confers on the incumbent, may forgo a shot at federal office. Even a potential challenger willing to accept the business-related harm could still be dissuaded from running because the campaign-related harm could decrease his overall chances of electoral success. The harm inflicted by the rules can raise the cost of running for office, and this higher cost of running “dissuades potentially higher quality challengers from seeking office and allows lower quality incumbents to persist.”¹⁹¹

VIII. THE SOLUTION

The coordinated communications rules could close a campaign finance loophole while sparing legitimate business communications from undue regulation. However, the FEC cannot prevent the rules' capture of business communications without directly addressing the problem that results. Thus, the FEC must tailor the rules to ensure these business communications are excluded without creating excessive uncertainty for candidates. Challengers should be able to examine the rules and be assured that their legitimate business communications will not be barred or limited by the FEC.

First, the excluded business communications must be legitimate and not attempts to circumvent campaign finance limitations. Candidates should not be allowed to use business communications as de facto campaign advertisements. Any direct support for the person's federal candidacy or opposition to opponent candidates should eliminate business legitimacy. In judging business legitimacy, the FEC should consider whether the candidate used similar business communications before he entered the race.

Still, business legitimacy is a broad concept, and it should retain that breadth in the safe harbor. The FEC should not substitute its business judgment for that of the business in question. Changes in the form or number of business communications should not automatically strip the communications of their business legitimacy. Legitimate business considerations could prompt such changes.¹⁹² Nor should the candidate's campaign message affect the legitimacy

189. *Id.*

190. Mayberry E-mail, *supra* note 78.

191. Einer Elhauge et al., *How Term Limits Enhance the Expression of Democratic Preferences*, 5 SUP. CT. ECON. REV. 59, 68 (1997).

192. For example, the Coors brewery created ads outside of its regular ad campaign in response to ads attacking the company. Brand & Kesmodel, *supra* note 67. Ads such as those should be considered legitimate.

of his business communications. A challenger should be able to tout his business experience as a campaign theme. Business communications should not be rendered illegitimate merely because they reinforce or remind voters of the candidate's campaign themes.

Second, the rules should avoid creating undue uncertainty for candidates. Uncertainty is a problem because it prevents candidates and businesses from making decisions with full knowledge of the likely consequences. Uncertainty could lead cautious challengers to curtail their business communications or risk-taking challengers to continue business communications that ultimately are found to violate the rules. Such uncertainty also opens the door for opponents to label each other rule-breakers, even if the FEC ultimately vindicates the accused.

Therefore, the rules should retain the bright line tests currently found in the content prong, but they should include a safe harbor for legitimate business communications. That safe harbor provision could read as follows:

Safe harbor for legitimate business communications. The content standards are not met if: (1) the public communication is paid for by a business associated with a federal candidate; (2) the public communication is made for legitimate business purposes; and (3) the public communication does not promote, support, attack, or oppose the federal candidate associated with the business, that candidate's opponent, or another candidate who seeks election to the same office as that candidate.¹⁹³

The language above is meant only to illustrate a general solution. Other language could accomplish the same result—ensuring candidates that their legitimate business communications remain free from FEC regulation.

This approach would retain the structure of the rules and the bright-line tests to which federal candidates have grown accustomed, but the safe harbor would save legitimate business communications from undue regulation. Admittedly, some ambiguity would persist—for example, regarding whether the communication was made for legitimate business purposes. Still, common sense considerations could guide this determination. The FEC could consider whether the business has a history of using similar public communications and whether similar businesses in the industry use similar public communications. However, those factors should not narrow the scope of business legitimacy. In the end, the safe harbor should protect nearly all business communications that do “not promote, support, attack, or oppose” a relevant federal candidate.¹⁹⁴

This safe harbor solves the problem of over-inclusion by shielding legitimate business communications from unnecessary regulation by the FEC. The safe harbor would protect regular business advertisements as well as most communications by candidates employed in the media industry. With this safe harbor, Pete Coors, Russ Darrow, and Mike Whalen could have campaigned

193. The language and structure of this proposal mirrors that of two safe harbor provisions adopted by the FEC in the post-*Shays* rulemaking. Proposed Rules, *supra* note 108, at 8.

194. *Id.*

without the fear that their beer, automobile, and restaurant advertisements were breaking the FEC's rules. Andy Mayberry could still own his newspaper and could have continued penning columns therein. This rule change would allow challengers to compete more effectively with congressional incumbents. Such a change would be a small step towards greater fairness for challengers and a healthier democracy in America.

CONCLUSION

The BCRA expanded the rules on coordinated communications to the point where they now proscribe legitimate business communications unrelated to federal elections. These business communications comprise yet another form of speech "made problematic by the campaign reformers' itch to extend government supervision of speech."¹⁹⁵ One problematic aspect of the coordinated communications rules is the electoral advantage they give incumbents. Opportunities abound for incumbents to increase their community status. The rules prohibit challengers from doing the same by outlawing many of their legitimate business communications. The rules should be rewritten to ensure that they leave the legitimate business communications of federal candidates untouched. The FEC's coordinated communications rules should include a safe harbor for legitimate business communications to promote fairness for political outsiders in federal elections.

195. Will, *supra* note 1.