The Same Side of Two Coins:
The Peculiar Phenomenon of Bet-Hedging in Campaign Finance

Jason Cohen†

Contact Information:
Jason Cohen
1801 N. Hancock
Arlington, VA 22201

Word Count: 17,966

(703) 473-1844
jason.cohen@gmail.edu

"For some of us it is performance, for others patronage. They are two sides of the same coin or, being as there are so many of us, the same side of two coins." --The Player, *Rosencrantz & Guildenstern Are Dead*

I. Introduction

In Buckley v. Valeo, the Supreme Court set forth the prevention of "the actuality and appearance of corruption" as a legitimate and (in the case of contributions) compelling government interest in the regulation of campaign finance,[1] a holding that was emphatically reaffirmed in the Court's recent BCRA decision.[2] *Buckley* goes on to say:

> To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined…. Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of

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[1] 424 U.S. 1, 26 (1976).
[2] McConnell v. FEC, 124 S. Ct. 619, 656 (2003)

> appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.[3]

Though the opinion as a whole – and, specifically, the invalidation of the Federal Election Campaign Act's (FECA) expenditure limits on First Amendment grounds – has been assailed by many proponents of campaign finance reform,[4] the anti-corruption rationale remains vibrant and, with *Buckley*'s contribution/expenditure distinction, has shaped the campaign finance landscape of the past twenty-five years.[5] Most recently, the Court in *McConnell v. FEC* upheld the Bipartisan Campaign Reform Act's (BCRA) ban on soft money (non-federal funds to party committees, unregulated by FECA) in federal elections,[6] recognizing that "the prevention of corruption or its appearance constitutes a

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[3] 424 U.S. at 26-27.

[4] Criticisms come in large part because of the way in which the ruling has been perceived to broaden untenably the concept of money as protected speech. *See*, *e.g.*, Cass R. Sunstein, *Exchange; Speech in the Welfare State: Free Speech Now*, 59 U. Chi. L. Rev. 255, 291 (1992) (likening the *Buckley* decision unfavorably to *Lochner v. New York*); Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 Geo. L. J. 45, 46 (1997) (characterizing *Buckley* as "one of the most widely scorned decisions in the recent history of the court"); Burt Neuborne, *Campaign Finance Reform: The Constitutional Questions: Buckley's Analytical Flaws*, 6 J.L. & Pol'y 111, 115 (1997) (opining that "Buckley and the rules it fostered are responsible for much of what is wrong with our current political structure").

[5] Both the rationale and the distinction have also come under fire as going *too* far in regulating campaign finance, rather than not far enough. *See*, *e.g.*, Robert F. Bauer, *Going Nowhere Slowly: The Long Struggle Over Campaign Finance Reform and Some Attempts at Explanation and Alternatives*, 51 Cath. U. L. Rev. 741 (2002) (arguing that there is little empirical evidence that corruption is a real problem, and disfavoring the contribution/expenditure distinction because it slights associative political rights). Additionally, some commentators have suggested that other rationales than corruption should be the concern of campaign finance reform. *See*, *e.g.*, David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum. L. Rev. 1369 (1994) (discussing the promotion of equality and the unshackling of politicians from fundraising duties as valid reasons for reform, rather than the prevention of corruption).

[6] Bipartisan Campaign Reform Act of 2002 (BCRA, also known as the McCain-Feingold Act), Pub. L. No. 107-155, 116 Stat. 181 (2002). *See also* Michael J. Malbin, *Thinking About Reform*, in LIFE AFTER REFORM: WHEN THE BIPARTISAN CAMPAIGN REFORM ACT MEETS POLITICS 8-11 (Michael J. Malbin, ed.) (2003); The Center for Responsive Politics, "Federal Campaign Finance Law: New Contribution Limits," *at* http://www.opensecrets.org/basics/law/index.asp (last visited August 8, 2005). For a critical summary of BCRA's basic soft money provisions, *see* Richard Briffault, *Soft Money Reform and the Constitution*, 1 ELEC. L. J. 343 (2002). For a broad history of the constitutional issues surrounding campaign finance pre-BCRA, *see* D. Bruce La Pierre, *The Bipartisan Campaign Reform Act, Political Parties, and the First Amendment: Lessons from Missouri*, 80 WASH. U. L. Q. 1101 (2002); Trevor Potter, *Campaign Finance Reform: Relevant Constitutional Issues*, 34 Ariz. St. L. J. 1123 (2002). For an analysis of the likely impact of BCRA and *McConnell*, *see* Jonathan S. Krasno and Frank J. Sorauf, *Evaluating the Bipartisan Campaign Reform Act (BCRA)*, 28 N.Y.U. L. REV. & SOC. CHANGE 121 (2003); Craig Holman and Joan

sufficiently important interest to justify political contribution limits."[7] The torrent of soft money seems largely to have been stemmed,[8] but unlimited donations given to party organizations are still legal in a number of states, subject only state regulations and to BCRA's restrictions on state party activity during a federal election.[9] Ostensibly, such money is used only for grass-roots, "party-building" purposes.[10] Absent evidence to the contrary, there is no reason to infer that party-building monies constitute part of an impermissible quid pro quo transaction. By giving money to the party itself, the argument goes, a donor is simply increasing that party's resources and, in so doing, attempting to advance in a generalized way the interests and policies that best align with the donor's own[11] – just as, by giving money to a candidate, a donor is trying to maximize that candidate's chances at victory, and displaying a democratic preference for

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Claybrook, *Outside Groups in the New Campaign Finance Environment: The Meaning of BCRA and the McConnell Decision*, 22 YALE L. & POL'Y REV. 235 (2004).

[7] 124 S. Ct. at 660.

[8] *See* Anthony Corrado, Thomas E. Mann, Daniel Ortiz, Trevor Potter, and Frank Sorauf, CAMPAIGN FINANCE REFORM: A SOURCEBOOK, 163-77 (1997) [hereinafter "Sourcebook"] (chronicling the rise of soft money contributions); The Center for Responsive Politics, "The Rise and Demise of Soft Money," *at* http://www.opensecrets.org/pubs/toporgs/soft.asp (last visited August 8, 2005). Part II, *infra*, relates the ways in which unregulated donations continue to make an impact at the federal level.

[9] As of June 2004, fifteen states allowed unlimited contributions from any source to state party committees. *See* National Conference on State Legislatures, "Limits on Contributions to Political Parties," *available at* http://www.ncsl.org/programs/legman/about/contrib_pol_parties.htm (last visited August 10, 2005)[hereinafter "State Party Contribution Limits"]. Note that in North Dakota and Pennsylvania, corporations are prohibited from donating directly to a state party organization, but may do so through a segregated fund. N.D. Cent. Code § 16.1-08.1-03.3 (2005); 25 PS § 3253 (2005). Some predict that the success of BCRA will lead more states to ban soft money. *See*, *e.g.*, Holman & Claybrook, *supra* note 6, at n.5. Since the legitimation of BCRA, several states have already taken additional measures to regulate the campaign finance process, enacting 'pay-to-play' statutes that "ban or limit state and local political donations of employees who work for companies that bid for government contracts." Kate Ackley, *'Pay to Play' Fix is Backed By House*, ROLL CALL, March 15, 2005 (describing such legislation in New Jersey, South Carolina, Ohio, and West Virginia); *see also* Joseph Picard, *GOP undecided on pay-to-play bill*, ASBURY PARK PRESS, February 27, 2005, at AA1 (reporting on New Jersey's efforts).

[10] *See* Sourcebook, *supra* note 8, at 163.

[11] Supporters of soft money credit its use with "a resurgence of the role of parties in national elections," and characterize it as "an essential means of promoting citizen participation in the political process." *Id. See also* 124 S. Ct. at 777-81 (Rehnquist, J., dissenting) (arguing that banning donations to political parties burdens speech "that does not have the potential to corrupt federal candidates and officeholders," and that parties, *inter alia*, "foster speech crucial to a healthy democracy . . . and fulfill the need for like-minded individuals to ban [sic] together and promote a political philosophy.") (emphasis and citations omitted).

them over other alternatives.[12] Thus, despite the Supreme Court's understandable caution in the matter, it is not necessary to assume that donors to parties *or* to candidates do so to seek specific *ex post* influence following the election; there are plausible reasons that do not raise the specter of actual or perceived corruption, and for which the case for regulation under *Buckley* and *McConnell* is murky at best.

But these reasons are surprisingly flimsy when it comes to one of the most peculiar and, arguably, prevalent features of the current campaign finance system: the practice of a single donor, whether on the state or federal level, giving sizeable contributions to *multiple* parties, or to two candidates competing for the same office, within a given election cycle.[13] Here it makes no sense to say that the donor is just exercising a democratic preference for a particular party or candidate; rather, by giving to *competing* parties or candidates, the donor appears to be hedging its bets so that whatever the outcome of the election, it will enjoy some benefit from its donation by having backed the winner.[14] As the *McConnell* Court observed, in finding that soft money contributions "have a corrupting influence or give rise to the appearance of corruption,"[15]

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[12] What I term "democratic preferences" in this paper is similar to the "ideological sorting" theory propounded by, among others, Steven G. Bronars & John R. Lott, Jr., *Do Campaign Donations Alter How a Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things That They Do?*, 40 J. L. & ECON. 317, 347 (1997) (presenting evidence that "[j]ust like voters, contributors appear able to sort into office politicians who intrinsically value the same things they do.").

[13] This practice, here termed "bet-hedging," has received surprisingly little attention in the literature, earning only passing mention in papers concerning themselves with other campaign finance issues. Representatively, see Kurt D. Dykstra, *Sending the Parties "PAC-ing"? The Constitution, Congressional Control, and Campaign Spending After Colorado Republican Federal Campaign Committee v. Federal Elections Commission*, 81 MARQ. L. REV. 1201, 1230 (1998) ("Some PACs will even contribute to the 'general funds' of both political parties, although usually the amounts given to each are not equal. In a sense, this strategy might well be characterized as a 'hedging all bets' strategy: PACs want to be sure that they do not end up entirely on the wrong side of the election so they will contribute to both candidates."); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1714 (1999) ("The unflattering reality is that campaign expenditures are intended not only to influence voter behavior but to curry favor with sympathetic elected officials…. [H]ence, the propensity of many institutional actors to hedge their bets and contribute on both sides of important elections.").

[14] Although for shorthand purposes the term "bet-hedging" is used throughout this paper, and although all commentators appear to assume that donors who give to both parties do so in order to mitigate the

> Particularly telling is the fact that, in 1996 and 2000, more than half of the top 50 soft-money donors gave substantial sums to *both* major national parties, leaving room for no other conclusion but that these donors were seeking influence, or avoiding retaliation, rather than promoting any particular ideology.[16]

This paper contends that, to the degree that such bet-hedging occurs, it carries with it a strong *prima facie* implication of *ex post* favor seeking in a way that contributions to a single party or single candidate do not, and, therefore, can (constitutionally) and should (normatively) be regulated or prohibited under the *Buckley* framework by Congress or by state legislatures. Further, it argues that the free speech and associative rights inherent in hedged-bet donations do not outweigh the potential threat that such donations pose to the legitimacy of the political system or the public's perception thereof; only the possible effects of bet-hedging regulation on broader donor behavior militate against legislative action.[17]

To put the bet-hedging phenomenon plainly: Mr. Dem and Mrs. Gop are running against each other for a seat in the Senate. If Donor X, who has $40 to contribute, gives it all to Mr. Dem's campaign, it's fair to infer that Donor X is displaying a preference for Mr. Dem as a candidate (or for his party, platform, haircut, or stance on some issue, which all amount to the same thing here). Similarly, if Donor Y gives its $40 to Mrs. Gop's campaign, the reasonable conclusion, assuming Donor Y is a rational actor, is that

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uncertainty of democratic politics and assure that they will be backing the winner, it is important to note that hedged-bet donations are most likely made for a number of reasons, several of which have nothing to do with an expectation of *ex post* benefits. Moreover, to the extent that some donors do engage in strategic bet-hedging behavior, pinpointing the degree to which bet-hedging occurs overall is very difficult: donations made to each party in exchange for quid pro quo benefits from the victor (probably impermissible under *Buckley*), for example, are in practice essentially indistinguishable from donations made to each party in exchange for generalized access (probably permissible under *Buckley*). The problem of parsing the prevalence of and motivations for hedged-bet donations is explored at greater length in Parts III and IV, *infra*.

[15] 124 S. Ct. at 661.

[16] *Id.* at 663 (emphasis in original).

it prefers Mrs. Gop over Mr. Dem. But suppose Donor Z gives $20 to one candidate and $20 to the other. What conclusion may be drawn from that? If the answer is that Donor Z has no preference between the candidates, then why would Donor Z give any money at all? Insofar as the purpose of campaign contributions is to advance the electoral prospects of one candidate or party over another, giving to both sides is an irrational act; because elections are zero-sum, the contributions cancel each other out.[18] However, if some donors contribute not simply to signal a preference, but in order to secure *ex post* benefits, it makes sense for those donors to give to both candidates. As long as either side can give Donor Z the benefits it seeks in exchange for a donation, and as long as the winning candidate will provide Donor Z with the hoped-for benefits even if Donor Z contributed to both sides,[19] Donor Z is acting perfectly rationally by hedging its bets and seeking to ensure a return on its investment.

Of course, behavior that is rational for a private donor might not be normatively desirable for society as a whole. And when the amounts being given to both sides are not usually $20, but $1 million – per donor, per election cycle – one presumes that the expected *ex post* benefits must be significant.[20] Whether the actual benefits accrued live up to donors' expectations, and whether either actual or expected benefits rise to the level

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[17] *See* Part V, *infra*.
[18] Rather, the contributions cancel each other out if an equal amount is given to each side. If more money is given to one side than the other, then only the difference between the contributions matters in the end. That is, if $x is given to Candidate A and $x+y is given to competing Candidate B, only the donor's contribution of $y to Candidate B matters.
[19] That is, whether donors who give to both sides receive fewer *ex post* benefits relative to "loyal" donors who give to only one side – a consideration that is explored further in Part IV, *infra*.
[20] Such numbers are, of course, an approximation of data examined more carefully in Part III, *infra*, and reflect the pre-BCRA landscape of escalating soft money contributions to both major party committees. The true calculation of dollars that will be spent in hedged-bet donations in the wake of the *McConnell* decision is still largely uncertain; we are nearing the end of the first campaign cycle under BCRA. However, as will be seen in Part II, there are several reasons to think that donors will continue to find ways to give substantial amounts of money to competing candidates and parties, even if certain outlets have been closed.

of “political quid pro quo [undermining] the integrity of our system of representative democracy,”[21] is certainly contestable. Nevertheless, the phenomenon surely deserves a more searching analysis than it has thus far received.

Part II of this paper briefly sketches the present state of campaign finance regulation, explains why bet-hedging is an issue even in the wake of BCRA’s ban on federal soft money, and lays out the general arguments for and against campaign reform. Part III differentiates bet-hedging, in which competing parties or candidates are given money in order to secure *ex post* benefits, from donation-splitting, in which alternative explanations exist for similar behavior, and tries to determine the prevalence of the former. Part IV raises a number of issues not heretofore explored regarding the practice of bet-hedging, including a) the motivations behind bet-hedging; specifically, why donors decide to give to competing parties or candidates, and what *ex post* benefits such donors might seek; b) the process by which a donor decides how to split its money; c) informational concerns inherent in bet-hedging; and d) how the closeness of an election might change the degree to which donors are likely to hedge their bets. Part V analyzes the possibility of regulating hedged-bet donations, both as a normative matter (should the behavior be regulated?) and as a legal matter (can the behavior be regulated? how can the regulations be most narrowly drawn?), testing the practice of bet-hedging against the traditional arguments for unregulated political contributions. It concludes that, so long as it is possible to distinguish instances of true bet-hedging from other, more benign forms of political speech, regulation of hedged-bet donations is constitutional under *Buckley*’s anti-corruption rationale. Normatively, however, the question is much tougher. While the prevention of the appearance of corruption almost certainly is a constitutionally

[21] 424 U.S. at 26.

sufficient justification for burdening the speech of donors who are hedging their bets, such a burden will carry with it costs and consequences that may outweigh the positive aspects of regulation. These consequences, as with the motivation behind and effectiveness of the practice of bet-hedging itself, are unfortunately far from clear.

II. The Campaign Finance Landscape

A. Bet-Hedging post-BCRA

When the Supreme Court upheld the Bipartisan Campaign Reform Act, it legitimized an earthshaking change upon the campaign finance landscape, the most significant since the passage of FECA thirty years before. The effects of BCRA were felt immediately: most notably, national party soft money is now banned; individual contribution limits have been doubled, to $2,000 per cycle, and indexed for inflation; and state, district, and local party committees operate under federal contribution limits for elections in which a federal candidate is on the ballot.[22] Although the practice of bet-hedging, I will argue, raises normative concerns in any context, it is tempting to think that these reforms, by putting paid to million-dollar donations and other campaign finance excesses, will remove much of the taint from donors' decisions to give to both sides. If the bulk of bet-hedging in the past has come through enormous soft money contributions, and such contributions are now banned in federal elections, one might suppose that the undesirable aspects of bet-hedging will diminish in turn.[23]

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[22] This last is subject to the Levin Amendment exception, which allows state and local committees' voter registration and get out the vote efforts to be "funded with soft money, limited to $10,000 per source, if such contributions are allowed under state law." Malbin, *supra* note 6, at 8.

[23] *See*, *e.g.*, Editorial, *A Victory for Campaign Reform*, THE OREGONIAN, December 11, 2003, at C8 ("On balance, though, the McCain-Feingold law will be good for the political process. American democracy will not miss the corrupting influence of soft money. It created a system of legalized bribery in which the major parties regularly put the arm on large corporate donors, who often felt compelled to give to both sides, either to win influence or avoid retaliation in Congress.").

Suppose it *is* true that a $25,000 check to each national party committee (the most an individual can contribute to a national committee under the new rules) is less cause for concern, analytically, than a $250,000 check. There are still several conduits, post-BCRA, through which large sums can be transmitted from donors to political organizations; those accustomed to hedging their bets in a big way can, and will, still do so.[24] Indeed, despite the ban on soft money, total giving to national party committees in the 2004 election cycle exceeded 2000's record-breaking totals.[25]

National party conventions, for example, have become "the chief means that corporate donors have found to make large contributions to organizations benefiting political parties" following BCRA's ban on soft money.[26] An exemption from campaign finance laws for donations going to a party's local "host committee," originally intended "to help promote local businesses,"[27] has attracted numerous donations of $1 million or more from corporations, labor unions, and non-profit foundations.[28] Many of these donors, moreover, are giving generously to both parties' conventions – *The New York Times* reports that of the 73 major donors listed for the Republican National Convention as of June 2004, "20 have also given to the Democratic National Convention."[29] Large-scale bet-hedging is alive and well after BCRA.

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[24] As the *McConnell* Court observes, "[m]oney, like water, will always find an outlet." 124 S. Ct. at 706.
[25] David Broder, *A Win for Campaign Reform*, Editorial, WASHINGTON POST, February 3, 2005, at A27 (stating that "the national party committees together raised $1.2 billion in hard money (regulated contributions) in the 2004 election cycle, $140 million more than they had raised in hard and soft money combined for the 2000 contest.").
[26] Michael Slackman, *GOP Nearing Money Record for Convention*, THE NEW YORK TIMES, June 17, 2004, at A1.
[27] *Id.*
[28] *See* Jeffrey H. Birnbaum and Thomas H. Edsell, *For Lobbyists, Big Spending Means Big Presence*, THE WASHINGTON POST, July 28, 2004, at A1.
[29] Slackman, *supra* note 26, at A1.

Another avenue of potential private largesse is the proliferation of 527 groups, ostensibly independent, tax-exempt advocacy organizations, to which donors, including corporations and labor unions barred from contributing to parties and candidates, may give unlimited amounts of money.[30] So called after the section of the Internal Revenue Code that grants the groups their tax-exempt status,[31] 527s are officially "unaffiliated" with a party or candidate (such a designation is more fictive for some groups than others) but spend their money electioneering, engaging in voter mobilization, issue ads, and get out the vote efforts in order to forward their particular policy preferences.[32] While 527s have often comprised the political arms of unions and trade associations, the 2004 election cycle saw the strengthening of unabashedly partisan interest groups under the 527 umbrella, "the explicit purpose [of which] is to pick up where the national parties and federal officeholders left off – that is, to raise huge sums of soft money from corporations, unions, and wealthy individuals" and to spend that money "promoting and attacking candidates."[33] For example, two Democratic interest groups working in concert, The Media Fund and America Coming Together, combined to raise over $140 million in their efforts to defeat President Bush in the 2004 election.[34] With 527s spanning the political spectrum, donors have no shortage of options if they wish to continue to make contributions in excess of the BCRA limits.[35]

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[30] *See* Holman & Claybrook, *supra* note 6, at 238 (arguing that 527 groups have "undermined the objective of BCRA").
[31] I.R.C. 527 (2002).
[32] *See* Holman & Claybrook, *supra* note 6, at 247-48.
[33] *Id.* at 249.
[34] The Center for Responsive Politics, "527 Committee Activity: Top 50 Organizations," *at* http://www.opensecrets.org/527s/527cmtes.asp (last visited August 14, 2005) [hereinafter "527 Committees"].
[35] Interestingly, there are indications that bet-hedging is not nearly as prevalent among donations to opposing 527 groups as it is for competing parties or competing candidates. The implications of this are examined in Part IV, *infra*.

Finally, as earlier noted, state elections are governed by state law and state contribution limits, at least when no federal candidate is on the ballot. Twenty-seven states do not limit contributions by individuals to state party committees; twenty-nine do not limit contributions by PACs.[36] Fifteen states allow unlimited donations by corporations or unions,[37] both of which have been prohibited from contributing to federal elections for decades. The point is not necessarily that state elections are particularly wild or woolly, or that the influence of big money holds some sort of special sway in races for governor or assemblyman. Craig Holman and Joan Claybrook believe that states will soon follow the lead of BCRA and institute far more stringent contribution limits.[38] They may well be right; indeed, in recent years a number of states have, even before the passage of McCain-Feingold, severely tightened campaign giving restraints.[39] But for now, money still flows liberally into the campaign coffers of state campaigns, and bet-hedging behavior occurs with apparent frequency.[40] Whether such behavior is sufficiently worrisome to deserve regulatory attention is one thing (and for this discussion, see Part V) – but to all appearances it does exist, and will continue to exist in some substantial form even despite the sea change caused by BCRA.

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[36] State Party Contribution Limits, *supra* note 9.
[37] *Id.*
[38] Holman & Claybrook, *supra* note 6, at n.5. As mentioned in note 9, *supra*, the pay-to-play legislation enacted by several states may be one indication of a renewed willingness to combat corruption at the state level through campaign reform.
[39] Alaska's broad-based 1996 reforms, for example, were upheld by its Supreme Court in *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (1999), *cert. denied*, 528 U.S. 1153 (2000). And Louisiana barred an entire industry from making campaign contributions. La. R.S. 18:105.2(L) (1999). The resultant case, *Casino Ass'n of Louisiana v. Louisiana*, 820 So.2d 494 (2002), *cert. denied*, 537 U.S. 1226 (2003), in which the Louisiana Supreme Court upheld the ban, is discussed in Part V, *infra*.
[40] *See* Part III, *infra.*

B. Arguments For and Against Campaign Finance Reform

In a 2002 paper, Robert Bauer characterizes the post-*Buckley* campaign finance debate as afflicted with "muddled ferocity."[41] The truth of this characterization is due in large part to the ideological rigidity with which both sides approach the issue; the law review articles, Senate speeches, and op-ed pieces on the subject, while not lacking in impassioned rhetoric, leave little sense even that the terms of the debate have been mutually defined. More precisely, it is unclear what outcome, aside from "less money in politics," most reformers want – what problems, aside from the inchoate bugaboos of "corruption" and "improper influence," such reform, in its particulars, is designed to address.[42] And from the other side, repeated and single-minded appeals to free speech often serve to obscure what is in many respects a subtle and complex set of issues.[43] Nor have the Supreme Court's periodic forays into the doctrinal arena done much to make the foundation for debate any clearer.[44]

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[41] Bauer, *supra* note 5, at 749.

[42] *See* Bruce E. Cain, *Moralism and Legalism in Campaign Finance Reform*, 1995 U. Chi. Legal F. 111, 111 (1995) (observing that "[m]any recent analyses of [campaign finance issues] rely on vaguely defined moralistic terms such as 'corruption,' 'unfairness,' and 'trusteeship'").

[43] Indeed, the "money-is-speech" talk itself appears willfully to ignore the substantive core of the *Buckley* holding: that money-as-speech, like speech, may be regulated if the governmental interest is sufficiently compelling. That *Buckley* specifically singles out contribution limits as a valid exercise of government regulation is paid little heed by those scholars and politicians who invoke the First Amendment, and its use by the Court in the portion of *Buckley* striking down ceilings on expenditures, to advocate that such contribution limits be repealed or that further restrictions are by definition unduly burdensome of liberty or speech interests. *See*, *e.g.*, James Bopp, Jr. & Richard E. Coleson, *The First Amendment Needs No Reform: Protecting Liberty from Campaign Finance "Reformers,"* 51 Cath. U. L. Rev. 785 (2002); Debate on the Bipartisan Campaign Reform Act of 2002, 148 Cong. Rec. S2096 [hereinafter "BCRA Debate"] (March 20, 2002) (Statements of Sens. Hutchison, Gramm, Stevens, and McConnell). But see Neuborne, *supra* note 4, at 115-16 (criticizing the Court's contribution-expenditure distinction as "logically untenable and pragmatically disastrous" in part because it treats contributions as worthy of less First Amendment protection).

[44] *See* FEC v. National Conservative PAC, 470 U.S. 480 (1985); Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990); Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996); Nixon v. Shrink Missouri PAC, 528 U.S. 377 (2000); McConnell v. FEC, 124 S. Ct. 619 (2003). In 2003, the Court also denied certiorari in *Casino Ass'n of Louisiana v. Louisiana*, 820 So.2d 494 (2002), *cert. denied*, 537 U.S. 1226 (2003) (where the Louisiana Supreme Court upheld the state's outright prohibition on campaign contributions from the casino industry, holding that prevention of corruption and

Nevertheless, certain stock arguments for and against proposed reforms to campaign finance recur with some regularity, and certain basic contentions have been agreed upon by all (or nearly all) parties. First, proponents of a more restrictive system of campaign finance argue that new campaign finance laws will be, or should be, designed with one or more of four goals in mind: 1) the mitigation of corruption or 2) the appearance thereof; 3) the facilitation of political fairness, as manifested in equality of participation, access, or influence;[45] and 4) the maximization of political autonomy, in freeing politicians from the burden of perpetual fundraising and donors from the burden of perpetual giving.[46] Each of these goals, by extension, also serves to increase popular confidence in the democratic legitimacy of the government. Furthermore, implicit in the call for reform is the belief that the furtherance of these goals outweighs countervailing interests of free speech, associative rights, and the aggregation of democratic preferences.

Similarly, opponents of restrictive campaign finance laws rely on several objections: 1) that campaign contributions advance democracy by allowing donors to back those candidates or parties whose preferences or policy goals most nearly match their own;[47] 2) that campaign finance regulation represents an unconstitutional abrogation of freedom of speech; and 3) that campaign finance regulation limits a donor's right to political association.[48] Implicit in *these* arguments is a belief that the threat to free

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the appearance of corruption was a sufficient interest to allow a prohibition on contributions in this case). *Casino Ass'n* is discussed further in Part V, *infra*.

[45] *See* Cain, *supra* note 42, at 130-39 (discussing equity issues – fairness of participation, influence, and outcome – in the context of campaign finance regulation).

[46] *See* Cain, *supra* note 42, at 124-25 (noting lobbyists' claim that legislators extort campaign contributions); Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 Nw. U. L. Rev. 1055, 1068 (1999) (arguing that campaign contributions and expenditures are not truly voluntary).

[47] *See*, *e.g.*, Strauss, *supra* note 5, at 1373-75 (arguing that displaying preferences through contributions is in many ways similar or even superior to displaying preferences through votes).

[48] *See* Bauer, *supra* note 5, at 750-53 (discussing campaign finance and associative rights).

speech, free association, and aggregative preferences presented by campaign finance reform outweighs any benefits that such reform might produce. This implication takes shape in the final, overarching objection of reform opponents: that there is no campaign finance crisis, and that concerns about corruption, fairness, legitimacy, or autonomy are overwrought, abstract, and largely unsubstantiated[49] – in short, that the current volume of money in campaigns presents no empirical problem sufficient to justify limits (or tighter limits) on contributions or expenditures.[50]

With these competing arguments in mind, this paper considers bet-hedging and its regulation only in the context of currently compelling governmental interests in regulating campaign finance; that is, per *Buckley* and its progeny, the legitimate restriction of campaign contributions in order to prevent corruption or the appearance thereof.[51] Therefore, while considerations of fairness and autonomy no doubt play a part in a normative analysis of donors contributing to both sides at once, this paper raises these concerns only tangentially,[52] focusing instead on the degree to which such contributions are suggestive of potentially corrupt *ex post* favor-seeking. And while the

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[49] Or, in the case of "appearance of corruption," that it is the reformers themselves who are creating the crisis of legitimacy – that appearance of corruption, absent corruption itself, is only a problem if it is broadcast as such to the public at large. *See*, *e.g.*, BCRA Debate, *supra* note 43 (statements of Sens. Gramm and McConnell); Rich Lowry, *The Campaign Finance Smear*, National Review (February 12, 2000).

[50] *See* Bauer, *supra* note 5, at 744-48 (arguing that the "corruption" argument for reform is not empirically founded); Cain, *supra* note 42, at 114 (characterizing the question of whether or not contributions influence the actions of legislators at all, let alone in such a manner as to constitute corruption, as a "lively topic of dispute").

[51] *See* McConnell v. FEC, *supra* note 2, at 656 (reaffirming the government's interests "in preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption) (internal quotations omitted); FEC v. National Conservative PAC, *supra* note 44, at 496-97 (noting that "preventing corruption or the appearance of corruption are the only legitimate and compelling governmental interests thus far identified for restricting campaign finances").

[52] In fact, because this paper assumes the legitimacy of *Buckley*'s contribution limits, the goal of alleviating politicians' fundraising burdens may run counter to the direction of this analysis; the need to constantly raise funds is arguably much greater in a world where the amount a single donor can give is capped.

prospect of regulating hedged-bet contributions will be tested against the full suite of arguments against reform, it is important to note that the prevention of corruption is a baseline point with which almost every participant on either side of the campaign finance debate agrees: that is, you will find virtually no argument that, as a general matter, "corruption" should not be proscribed.

The trouble comes, of course, in defining what constitutes corruption and pinpointing the ways in which it can be seen to occur – but here, again, both sides seem to concur that bribery or other forms of explicit quid pro quo transactions, in which money is given with the promise or reasonable expectation of a specific and personal material gain, are verboten.[53] Indeed, quid pro quo favor-seeking cuts directly against the argument that campaign contributions are manifestations of democratic preference: if a donor is giving money in exchange for anticipated services rendered, its stake in the process is materially different than if it is merely picking the candidate or party that best matches its preferences and attempting to maximize their chances of victory. And when a donor contributes to *competing* parties or candidates, the likelihood that it is simply manifesting its preferences as between democratic alternatives is vanishingly small: a donor giving to both Bush and Kerry during the 2004 election could not have helped *both* candidates win. That donor's dual contribution makes sense only if a) it expected to gain something from the eventual winner other than a generic advancement of mutual policy

[53] *But see* Strauss, *supra* note 5, at 1372-73 (arguing that even direct quid pro quo campaign contributions are, in themselves, neither inherently corrupt nor inherently objectionable). It should be noted that bribery *qua* bribery is illegal under the relevant statutes regardless of campaign finance law. The difficulty in defining corruption occurs in more ambiguous transactions, whereby campaign contributions are traded for access or influence rather than outright promises that a legislator will vote a certain way on a certain bill. And contributions-for-access, even on a quid pro quo basis, arguably present no legal problem. *See* Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 Stan. L. Rev. 837, 844 at n.21 (quoting then-Attorney General Janet Reno). The

goals, and b) rather than trying to effect a particular outcome to the election, it simply wished to ensure that it would have backed the winner, whoever that turned out to be.

This paper, then, presents a very simple thesis: contributions made by one donor either to both parties in a given election cycle or to two candidates competing for the same office carry with them a uniquely strong *prima facie* implication of *ex post* favor-seeking. Furthermore, to the degree that such contributions are made in order to hedge the donor's bets (rather than other possible strategic reasons, explored in Parts III and IV), they may not be justified through the invocation of democratic preferences. Finally, because donations made in order to secure *ex post* benefits implicate concerns of corruption and undue influence, hedged-bet behavior can and perhaps should be regulated under the *Buckley* framework.

III. The Prevalence of Bet-Hedging

Before reaching the question of whether donors who give money to both parties or to competing candidates within an election cycle are doing so in order to hedge their bets (discussed in Part IV) or whether such behavior is normatively undesirable and may constitutionally be regulated (discussed in Part V), it is first necessary to establish an empirical foundation for the existence of hedged-bet donations – that is, how common is this kind of behavior?

That contributions to competing candidates or competing parties do occur is beyond dispute. It is commonplace to open the newspaper at any point in the election

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problem of separating access from influence in the context of the regulation of bet-hedging is discussed in Parts IV and V, *infra*.

cycle and see accounts of donations being split in races for the presidency,[54] the Senate,[55] the House,[56] state legislatures,[57] governorships,[58] lieutenant governorships,[59] state treasurer,[60] county commissioner,[61] and the mayor's office.[62] Donations are split to national conventions,[63] to party committees[64] and to competing candidates,[65] in general

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[54] *See*, *e.g.*, Richard S. Dunham & Susan Straight, *More Corporate Chiefs Are Hedging Their Bets*, BUSINESS WEEK, March 6, 2000, at 42 ("[M]any pragmatic CEOs want an open door at the White House whichever candidate emerges victorious.").

[55] *See*, *e.g.*, Sean Cockerham, *Alaska business community supports Hawaii incumbent*, ANCHORAGE DAILY NEWS, October 29, 2004, at A1 (donor giving money to Alaska senator Lisa Murkowski and her Democratic challenger).

[56] *See*, *e.g.*, Susan B. Glasser & Juliet Eilperin, *GOP Scrambles to Counter Business's Aid to Democrats; 'Bet Hedging' Evens Campaign Committee Gifts*, WASHINGTON POST, November 10, 1999, at A6 (quoting lobbyist saying, "The prevailing mood downtown is: This could go either way. We better make sure our interests are protected no matter who's in control.")

[57] *See*, *e.g.*, Peter Baker, *Va. Companies Paying to Win in Election; Large Firms Give Similar Amounts to Both Sides in Battle for Legislature*, WASHINGTON POST, October 31, 1995, at C1 (firms donating to both parties in state legislature race).

[58] *See*, *e.g.*, Keith Griffin, *Firm Leaders Hedge Their Political Bets; Some managing partners cover their bases. For others, it's all or nothing*, CONNECTICUT LAW TRIBUNE, November 1, 2004, at 1 (donating to multiple candidates in Connecticut gubernatorial race).

[59] *See*, *e.g.*, B. Drummond Ayres, Jr., *Giving to Both Sides Is Seen as a Safe Bet*, NEW YORK TIMES, April 6, 1998, at A16 (In race for Texas Lieutenant Governor, "some $300,000 of the $4.5 million had come from a hundred or so wealthy individuals and political action committees that hedged their bets and gave equally to each candidate.").

[60] *See*, *e.g.*, Matthew Frank, *In Treasurer's Race, Any Edge Helps*, ST. LOUIS POST-DISPATCH, June 28, 2004 (banking industry giving to candidates in both parties).

[61] *See*, *e.g.*, Jason Garcia, *Donors Spread Wealth Between Rival Camps*, ORLANDO SENTINEL, October 8, 2004, at B1 (bet-hedging in Florida county commissioner race).

[62] *See*, *e.g.*, Matt Carter, *Campaigns raise more than $105,000*, TRI-VALLEY HERALD (PLEASANTON, CA.), November 1, 2004 (bet-hedging in local mayoral race); Eric Lipton, *Hevesi Leads in Money From, and Returned To, Intermediaries*, NEW YORK TIMES, July 19, 2001, at B1 ("[T]he city's real estate industry is, as planned, hedging its bets in the mayor's race by spreading dollars among the candidates…").

[63] *See*, *e.g.*, Slackman, *supra* note 26, at A1; "Executive Excess 2004: Campaign Contributions, Outsourcing, Unexpensed Stock Options and Rising CEO Pay," *available at* http://www.faireconomy.org/press/2004/EE2004.pdf, at 13 ("Of the 69 convention sponsors, 29 supported the [2004] Democratic convention only, 24 sponsored the [2004] Republican convention only, and 16 companies chose to hedge their bets by sponsoring both conventions.").

[64] *See, e.g.*, Chris Mulick, Kennewick, *Wash.-area campaign donations are triple the amount from 2000*, TRI-CITY HERALD, October 31, 2004 (Washington State companies giving to both parties); Ruth Marcus & Charles R. Babcock, *Parties' National Committees Set Records for 'Soft Money'; Much Is Used for Ads Indirectly Promoting Candidates*, WASHINGTON POST, July 18, 1996, at A8 ("And some companies hedged their bets. Anheuser-Busch Inc. gave $100,000 each to the DNC and RNC, as did Joseph E. Seagram & Sons…. MCI Gave $140,000 to Republicans and $100,000 to Democrats.").

[65] *See*, *e.g.*, Eric Krol, *Some Donors Hedging Bets in Pursuit of Political Clout*, THE DAILY HERALD, September 1, 2002, *available at* http://www.ilcampaign.org/news/somedonors9-1-02.html (donor giving $25,000 to each gubernatorial candidate).

elections[66] and in primaries.[67] They come from lobbyists,[68] lawyers,[69] CEOs,[70] industry PACs,[71] casinos,[72] sports team owners,[73] and horse breeders,[74] in campaigns in New York,[75] Washington, D.C.,[76] Virginia,[77] Illinois,[78] Florida,[79] and elsewhere.[80] Moreover,

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[66] *See*, *e.g.*, Adam Clymer, *House Democrats Have Money Edge on GOP*, NEW YORK TIMES, June 11, 2000, at A30 ("[Donors] know it will take a net gain of only six Democratic seats to install Democrats in House positions of power, so they are giving to both sides.").

[67] *See*, *e.g.*, *GOP Donors Not Playing Favorites*, CHICAGO TRIBUNE, September 21, 1995, at 14 (wire service report) (donors giving to multiple GOP presidential candidates).

[68] *See*, *e.g.*, Jeffrey H. Birnbaum, *Lobbyists Spread Campaign Cash; Bush, Kerry Have Benefited Since '97*, THE WASHINGTON POST, May 6, 2004, at A8 ("Several lobbyists and lobbying firms were careful to hedge their bets and donate to both candidates."); Don Van Natta, Jr., *Lobbyists are a Lode for the Leading Presidential Campaigns*, NEW YORK TIMES, June 22, 1999, at A21 ("Most major lobbying firms have hedged their bets by having partners raise money for different candidates. That way, no matter who wins, the firms will have helped the winner.").

[69] *See*, *e.g.*, Saundra Torry, *For Both Political Parties, the Bar Tab is Generous*, WASHINGTON POST, August 19, 1996, at F7 (law firms giving to both national party committees).

[70] *See*, *e.g.*, Richard S. Dunham & Fred Jesperson, *Who the Corporate Bosses Are Backing*, BUSINESS WEEK, November 15, 1999, at 112 (citing 52 of 389 business executives as giving money to presidential candidates from both parties in the 2000 campaign).

[71] *See*, *e.g.*, Amy Keller, *PACs Hedge Their Bets*, ROLL CALL, September 25, 2000 ("With control of Congress up for grabs and many House and Senate races too close to call this campaign season, hundreds of political action committees are hedging their bets and contributing to both candidates engaged in especially tight election contests.").

[72] *See*, *e.g.*, *Nevada's Senate Race: Hoist the Ensign*, THE ECONOMIST, October 28, 2000 (casinos giving to competing Nevada senatorial candidates); *see also* Samantha Young, *Thousands in Nevada play political money game*, LAS VEGAS REVIEW-JOURNAL, October 31, 2004, at 1B (gaming and casino executives donating to both Bush and Kerry).

[73] *See*, *e.g.*, Greg Andrews, *Biz cash fueling election; With race tight, stakes high, executives write huge checks*, INDIANAPOLIS BUSINESS JOURNAL, October 25, 2004, at 1A (Indianapolis Colts owner Jim Irsay contributing $22,500 to each Indiana gubernatorial candidate); Michael Janofsky,*Political Points* , THE NEW YORK TIMES, August 31, 2003, at 26 (Carl Lindner, owner of the Cincinnati Reds, personally contributes "substantial amounts to both parties, about two-thirds to Republicans and the rest to Democrats.").

[74] *See*, *e.g.*, Scott Wilson, Margot Williams, & Bridget Roeber, *Industrial-Strength Money; Special Interests Follow Md. Candidates' Policies*, WASHINGTON POST, October 18, 1998, at A1 (in Maryland gubernatorial race, "[b]ankers, doctors, developers, and horse breeders in particular have essentially hedged the early bets they placed on the governor out of fear they may prove useless if he loses reelection.").

[75] *See*, *e.g.*, Stefan C. Friedman, *Real Estate Bigs Spread the Wealth in Mayor Race*, THE NEW YORK POST, January 23, 2005, at 13 (detailing a real estate developer's contribution of the maximum amount allowable under the law to every New York City mayoral candidate but one);

[76] *See*, *e.g.*, Yolanda Woodlee, *Chavous Trails Evans in Donations; Both Get Big Sums From Outside City*, WASHINGTON POST, March 19, 1998, at J1 (donor contributing to multiple D.C. mayoral candidates).

[77] *See*, *e.g.*, Michael D. Shear & Dan Eggen, *Va. Candidates Play to High-Tech Voters*, WASHINGTON POST, September 17, 2000, at C1 (MCI WorldCom giving $3,000 to competing Senate candidates).

[78] *See*, *e.g.*, Mike Royko, *A Lesson in How to Build a War Chest*, CHICAGO TRIBUNE, December 13, 1988, at 3 (donors contributing to multiple Chicago mayoral candidates, because "[t]here are thousands of people who wish to be on good terms with the mayor of Chicago, regardless of who he is.").

[79] *See*, *e.g.*, John Kennedy, *Money race for '06 heats up*, ORLANDO SENTINEL, July 17, 2005, at B1 (donors giving money to both Republican gubernatorial candidates in Florida).

commentators, including the Supreme Court,[81] seem to believe that such behavior is both frequent and wide-ranging within our political system,[82] and that it is indicative of a desire to guarantee the receipt of *ex post* benefits.[83]

Analytically, however, such anecdotal evidence is not ideal. In order to make the case that bet-hedging deserves greater regulatory attention – and, per Part IV, *infra*, that bet-hedging donors are "seeking influence, or avoiding retaliation, rather than promoting any particular ideology"[84] – it would be nice to demonstrate empirically that the practice is habitual among large donors. The most comprehensive available data, collected by the Center for Responsive Politics (CRP), tell us that most top federal donors give money to both Democrats and Republicans.[85] Of the top 100 donors in the seven election cycles from 1989 to 2002, for example, 79 split their contributions at least 90%-10% between the two parties.[86] During the 2003-2004 election cycle, the most recent cycle for which complete data are collected on national elections, this breakdown is true for 78 of the top

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[80] *See*, *e.g.*, Ayres, *supra* note 53, at A16 (Texas lieutenant governor race); THE ECONOMIST, *supra* note 72 (Nevada Senate race); Sean Wolfe, *Election 2002: Contributors Hedge Their Bets*, ASHLAND DAILY TIDINGS, May 11, 2002, *available at* http://dailytidings.com/2002/news0511/headline/dt_news-02.php (double giving to party committees in Oregon).

[81] 124 S. Ct. at 663.

[82] *See*, *e.g.*, Ruth Marcus, *Common Cause Lists 'Soft' Donors*, WASHINGTON POST, March 13, 1998, at A23 ("As always, a number of companies hedged their bets and contributed generously to both sides. Ten gave $100,000 or more to both parties last year…"); Issacharoff & Karlan, *supra* note 13, at 1714 (describing bet-hedging as a "propensity of many institutional actors"). *But see* Kathleen Gallagher, *Executives get just one vote each*, MILWAUKEE JOURNAL-SENTINEL, September 5, 2004, at 1D ("Charles Franklin, a political science professor at the University of Wisconsin-Madison, says [double giving is] more anecdote than truth. He says he analyzed election data from 1990 through 1996 and found that only 0.7% of all contributors gave to both candidates in the same race.").

[83] *See*, *e.g.*, 124 S. Ct. at 663.

[84] *Id.*

[85] The Center for Reponsive Politics, *Blue Chip Investors: The Top 100 Donors to Federal Elections, 1989-2002*, "The Top 100 Donors," *available at* http://www.opensecrets.org/pubs/toporgs/topdonors.asp (last visited August 14, 2005) [hereinafter "Top Donors 1989-2002]; The Center for Responsive Politics, *Blue Chip Investors: The Top 100 Donors to Federal Elections*, "Appendix: Contributions by the Top 100 Donors in 2001-2002," *available at* http://www.opensecrets.org/pubs/toporgs/appendix.asp (last visited August 14, 2005) [hereinafter "Top Donors 2001-2002"]; The Center for Responsive Politics, "2004 Election Overview: Top Overall Donors," *at* http://www.opensecrets.org/overview/topcontribs.asp?cycle=2004 (last visited August 14, 2005) [hereinafter "Top Donors 2003-2004"].

100 donors.[87] Interestingly, at the federal level only institutional donors (such as corporate PACs and trade organizations) appear to split their donations; individuals are remarkably consistent along party lines.[88] During the 2003-2004 election cycle, for instance, only 43 of the top 100 donors split their contributions between the Democratic and Republican parties.[89] Of those forty-three, thirty-nine gave one party ten percent or less of their contribution total.[90] Bet-hedging behavior by individual donors appears slightly more common in state and local races,[91] for reasons that are further explored in Part IV.A.

Although most discussions of split donations assume that cross-party contributions are, by themselves, evidence that donors are hedging their bets,[92] that assumption is insufficient for the purposes of this paper. To support an inference that donors are covering their bases to ensure *ex post* benefits from the eventual winner, it is not enough to show that a donor's contributions are not confined to a single party. Bet-hedging, in which *ex post* favor-seeking is the most likely explanation for a donor's behavior, must be distinguished from mere donation-splitting, in which there are other, more benign reasons that a donor might be giving money across party lines.

If it is a reasonable inference of *ex post* benefits that separates bet-hedging from donation-splitting, what specific behavior characterizes the former but not the latter? The

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[86] Top Donors 1989-2002, *supra* note 85.
[87] Top Donors 2003-2004, *supra* note 85.
[88] The Center for Responsive Politics, "2004 Election Overview: Top Individual Contributors," *available at* http://www.opensecrets.org/overview/topindivs.asp?cycle=2004 (last visited August 14, 2005) [hereinafter "Top Individual Donors 2003-2004"].
[89] *Id.*
[90] *Id.*
[91] *See*, *e.g.*, Wilson, Williams, & Roeber, *supra* note 74; Carter, *supra* note 62; Royko, *supra* note 78.
[92] *See*, *e.g.*, Mike Allen, *Democrats Gain as Business Hedges Bets; House Campaign Arm Leads GOP in Money*, WASHINGTON POST, October 17, 2000, at A11 (characterizing increased business donations to Democrats as bet-hedging).

strongest presumption of *ex post* favor-seeking occurs when a donor's contribution cannot be explained as a demonstration of its preference for one party or candidate over competing alternatives. Donations to competing candidates or parties are therefore inherently more suspect than a donation to a single candidate or party. As noted above, when Donor Z gives money to competing candidates Mr. Dem and Mrs. Gop, Donor Z is not expressing a preference for one over the other; the likelihood is high that Donor Z would not give to both sides if it did not expect something from the winner after the election, whoever the winner might be.

The gold standard example of bet-hedging, then, is an instance in which a donor gives to candidates competing for the same office. In his article on the 2002 Illinois gubernatorial race, Eric Krol notes that "[a]t least 102 contributors have given cash to both [Democratic candidate] Rod Blagojevich and [Republican candidate] Jim Ryan in the past year."[93] Similarly, in the 2000 Virginia Senate race, MCI WorldCom donated $3,000 each to competitors Charles Robb and George Allen.[94] And in the 2004 election cycle, investment firm Goldman Sachs contributed over $290,000 to John Kerry's presidential campaign and almost $390,000 to the reelection efforts of President Bush.[95] Morgan Stanley, UBS Americas, Citigroup, Bank of America, Microsoft, and JP Morgan Chase & Co are also among the top twenty contributors to each of the major party presidential nominees for 2004.[96] Further examples abound.[97]

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[93] Krol, *supra* note 65.
[94] Shear & Eggen, *supra* note 77, at C1.
[95] The Center for Responsive Politics, "John Kerry: Top Contributors," *at* http://www.opensecrets.org/presidential/contrib.asp?id=N00000245&cycle=2004 (last visited August 14, 2005) [hereinafter "Kerry Donors 2004"]; The Center for Responsive Politics, "George W. Bush: Top Contributors," *at* http://www.opensecrets.org/presidential/contrib.asp?id=N00008072&cycle=2004 (last visited August 14, 2005) [hereinafter "Bush Donors 2004"].
[96] *Id.*
[97] *See*, *e.g.*, Keller, *supra* note 71 (PACs giving to competing candidates in numerous Congressional races).

These are cases where the outcome is zero-sum; either one candidate wins, or the other does. Therefore, it is economically irrational for a donor to give to both sides unless it is maximizing its chances of an *ex post* benefit – that is, unless it believes that giving to both candidates will result in a more favorable *ex post* position than trying to help one candidate beat the other.

A presumption of *ex post* favor-seeking may also be made when a contributor makes soft money donations to competing party committees within a single election cycle. Again, because these donations are ostensibly reserved for "party-building," they do not raise the same concerns of undue influence as do contributions to individual candidates. But "party-building," too, is essentially zero-sum: one party's share of political power must necessarily increase or decrease relative to other parties. Giving money to two competing party committees makes little sense, unless, in the words of a GOP lobbyist, the donor is trying to "make sure [its] interests are protected no matter who's in control."[98] In that way, then, Anheuser-Busch's donations of $100,000 each to the Democratic National Committee (DNC) and the Republican National Committee (RNC) in the 1995-96 election cycle[99] strongly suggest an expectation of *ex post* benefits (there is one circumstance in which donations to competing party committees is not suggestive of *ex post* favor-seeking; this circumstance is dealt with later in the Part).

To summarize: if a donor gives money to sources in multiple parties or, in the case of party primaries, to multiple candidates within the same party, it is engaging in donation-splitting. Donations that are split between competing candidates or competing party organizations within the same election cycle, because they carry with them an

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[98] Glasser & Eilperin, *supra* note 56, at A6.
[99] Marcus & Babcock, *supra* note 64, at A8.

inference of *ex post* expectations, constitute the most suspect form of donation-splitting, here termed bet-hedging. By contrast, other forms of donation-splitting – for example, giving to non-competing candidates of different parties,[100] or giving to the national committee of one party and candidates of another party – do not necessarily suggest *ex post* favor-seeking,[101] and should thus be distinguished from bet-hedging in this analysis. Unfortunately, the CRP data do not make this distinction, and it is therefore difficult to make a precise empirical determination regarding the prevalence of bet-hedging.

The remainder of this part is devoted, first, to detailing the ways in which a contributor might split its donations without crossing the threshold into presumptive bet-hedging and, second, to examining how the CRP data might be interpreted in light of the donation-splitting/bet-hedging distinction. While a discussion of donation-splitting necessarily touches upon issues of donor motivation, this part does not seek to determine what donors hope to gain by hedging their bets, nor how donors decide to apportion their split donations. These issues are explored at length in Part IV.

A. Donation-Splitting

Let's return to Donor Z. Assume that all we know of Donor Z's contribution history is that, over the last eight full election cycles (1989-2004), it has given a total of $2 million to Democrats and $2 million to Republicans. Having given equally to both major parties, Donor Z is certainly donation-splitting; why can we not also presume that it is hedging its bets?

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[100] *See*, *e.g.*, Mike Madden, *Daschle gets some GOP money*, ARGUS LEADER (SIOUX FALLS, SD), October 14, 2004, at 5A (Some top Bush donors gave to Daschle's Senate campaign, but "[n]one of the four Rangers and Pioneers who donated to Daschle has contributed to [Daschle challenger John] Thune's Senate race, federal records show.").
[101] Or, at least, do not do so to any greater degree than campaign contributions generally.

There are a number of answers to this question. First, these cumulative totals leave open the possibility that Donor Z is not giving to both parties simultaneously, but rather switching from one to the other (either on an election-by election basis or, alternatively, gradually and permanently over the course of cycles). That is, Donor Z's equal split of contributions between the two parties since 1989 says nothing about potential bet-hedging if the donor gave 100 percent of its donation monies to the Democrats half the time and 100 percent to the Republicans the other half. This sort of behavior makes little sense for donors like the American Trial Lawyers Association (ATLA) or the National Rifle Association (NRA) whose ideologies consistently and disproportionately dovetail towards one party, but might be a rational donation strategy for pragmatic donors wishing to send the entirety of their contribution to the single party perceived to be in power in a given election cycle.

Of course, it must be pointed out that such pragmatism itself is in all probability unjustifiable under the democratic preferences rationale for campaign contributions. If a donor gives all its money to one party this election cycle and to another party the next, it's much more likely that the donor is using its money to gain favorable *ex post* policy outcomes for itself than that its policy preferences and interests (or those of the two parties) have undergone such a rapid shift. Insofar as *ex post* favor-seeking is our concern, then, a donor's decision to give to the party in power is no less suspect than its decision to give to both parties in order to have *given* to the party in power (although it is a good deal more uncertain).

However, the alternative explanation listed above carries more weight. If Donor Z is not switching donations election by election, but instead has migrated from one party to the other over the course of time, then those donations would be no more suggestive of *ex post* expectations than any other ordinary campaign contribution. That is, it's perfectly plausible that a donor's policy preferences can change over time, even to the degree that it finds its interests more fully advanced by a different party in 2004 than in 1989.[102]

In fact, FedEx Corp provides a real-life example of this kind of gradual shift in preference. From 1989-2004, FedEx gave 57 percent of its total contributions to the Republican Party, with 43 percent going to the Democrats.[103] But the total *amount* donated by FedEx has more than doubled over this period of time, while the amount given to the Democrats stayed roughly the same until 2000, where it began a precipitous decline.[104] As a result of this, FedEx's giving has shifted dramatically from the Democrats to the Republicans. While FedEx has given at least 40 percent to each party in *aggregate* over the last eight full election cycles, in only one of those cycles was giving to each so balanced as to actually exceed 40 percent.[105] FedEx's giving history looks like this:[106]

Election Cycle	Percent Given to Each Party
1989-90	64-36, Democrats
1991-92	64-36, Democrats
1993-94	72-28, Democrats
1995-96	58-42, Republicans
1997-98	72-28, Republicans
1999-2000	65-35, Republicans
2001-02	70-30, Republicans

[102] This would, again, be less true of donors whose ideology – and, by extension, party identification – are well-defined and fairly fixed in place. No union, for example, is very likely to be giving the bulk of its money to the Republicans in the near future.
[103] The Center for Responsive Politics, *Top All-Time Donors*, "FedEx Corp," *available at* http://www.opensecrets.org/orgs/summary.asp?ID=D000000089 [hereinafter "FedEx Corp"].
[104] *Id.*
[105] *Id.*
[106] *Id.* Through July 2004, FedEx's contributions in the 2003-2004 election cycle are weighted 69-31 to the Republicans. *See* Top Donors 2003-2004, *supra* note 85.

2003-04 68-32, Republicans

Notwithstanding that it still donated a substantial portion of its money to each party each cycle (an issue dealt with in Parts IIIB and IV), the shift in FedEx's giving is perfectly consistent with a legitimate democratic preference of one party over alternatives; there is no need to infer *ex post* favor-seeking in order to find a rational explanation for its behavior. In fact, because the CRP data tell us only how much money FedEx contributed to *all* Republicans and *all* Democrats during each of these cycles, the likeliest and simplest explanation for the contribution shift is that, since the 1994 Republican Revolution, there have been more Republicans in Congress than Democrats. If FedEx contributes largely to incumbents, one would expect its donation pattern to reflect the change in party control of the House and Senate.[107]

It should be clear, then, that a donor's cumulative giving history over several election cycles does not provide enough information to conclude anything more than that it has split its donations. If what we know of Donor Z is that it gave equally to both parties from the period 1989-2002, we cannot tell whether or not it has hedged its bets; that is, per the definition of bet-hedging, whether or not it has given to competing candidates or to competing party organizations during the same election cycle.

Does it make matters easier if we know Donor Z's donations to each side within a single election cycle? Yes, but not much. Let's say we know that, from 2001-2002, Donor Z contributed \$100,000 to Democrats and \$100,000 to Republicans. There are

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[107] *See* The Center for Responsive Politics, *Blue Chip Investors: The Top 100 Donors to Federal Elections, 1989-2002*, "Shifting Strategies Over the Years," *available at* http://www.opensecrets.org/pubs/toporgs/strats.asp [hereinafter "Shifting Strategies"] ("contributions to Republican candidates jumped significantly after the GOP takeover of Congress in the 1994 elections").

several ways in which this giving split might be explained without resort to an inference of constitutionally dubious *ex post* favor-seeking.

First, it may be that Donor Z has given money to different candidates in different races. If Donor Z chooses which candidate it will support in each race on the basis of each candidate's ability to advance Donor Z's interests if elected, and pays little attention to party affiliation, it might easily end up giving to Democratic candidates in certain races and Republican candidates in others. There's nothing inherently objectionable about this; as Ameritech vice-president Gary Lytle commented in 1999, "We normally give to people who support our positions. That includes people on both sides of the aisle."[108] Many donors have interests that cannot be comfortably pigeonholed as "Democrat" or "Republican," but rather span the parties; that they would give to noncompeting candidates of different parties should raise no *ex post* warning flags.[109]

Similarly, Donor Z might give to the national committee of one party and individual candidates of the other party. Depending on ideological variances within parties, a donor's policy interests might be better served by the election of candidates from different parties in different districts, depending on the candidate and on the district, even if it normally gives to only one party. For example, finance company MBNA might give some of its money to particular Democratic candidates in an election cycle because those candidates happen to have stronger positions – or, if elected, are likely to have greater influence – on particular important issues, such as bankruptcy reform or banking deregulation, than do their Republican opponents. This doesn't change the fact that, in

[108] *Big Business Reroutes PAC Money; GOP's Hold on House Uncertain, So Wallets Open for Democrats*, CHICAGO TRIBUNE, September 16, 1999, at 11 (wire service report).
[109] *See* Shear & Eggen, *supra* note 77, at C1 (quoting chairman of National Republican Campaign Committee that, "A lot of these guys aren't Republicans or Democrats, they are businessmen.").

the main, Republican candidates (and the Republican Party overall) will be most likely to reflect MBNA's preferences and thus will receive the overwhelming bulk of MBNA's money.[110]

Moreover, the timing of donations often plays a crucial role in supporting an inference of *ex post* expectations. There is evidence that some donors who split donations do so at different stages of the campaign – they will give to one candidate or party at first, and if it appears that others to whom they have not donated are doing better than expected, will shift donations later in the game in order to cover their bases. This seems especially likely to occur at the end of the campaign, when close races cause late flurries of giving as one side finally pulls ahead,[111] but may in fact happen any time an underdog candidate becomes a serious contender. For example, many CEOs, having already donated to presidential candidates Bill Bradley, George W. Bush, and Al Gore the year before, waited until the early spring of 2000, when it became clear that John McCain would challenge for the Republican nomination, before sending checks his way as well.[112] Conversely, donors could spread their money around if it appears that the initial target of their contribution is doing *worse* than expected; witness the 1998 Maryland gubernatorial race, in which "[b]ankers, doctors, developers, and horse

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[110] *See* The Center for Responsive Politics, "MBNA Corp," *available at* http://www.opensecrets.org/orgs/summary.asp?ID=D000000114 [hereinafter "MBNA"].
[111] *See* R.H. Melton, *Corporate PACs Gave $424,299 to Gingrich in '93-94*, WASHINGTON POST, April 17, 1995, at A25 (quoting a campaign finance analyst, with regard to the 1994 elections: "What we saw at the end of the campaign was giving to candidates who looked like winners in close races, and those were Republicans in many cases."). A variation on this strategy involves donors giving to one candidate or party during the campaign and, in the event that they bet on the wrong horse, shore up their allegiances after the election by giving to the victor. To the extent that parties are aware that bet-hedging occurs, however, this is a particularly risky strategy. The party in power is more likely to accept a donor as legitimate (and confer upon it the desired access, influence, or other benefits) if it contributed *during* the election, no matter how eleventh-hour. For more on the informational concerns of bet-hedging, see Part IV.
[112] Dunham & Straight, *supra* note 54, at 42.

breeders…essentially hedged the early bets they placed on the governor out of fear they may prove useless if he loses reelection."[113]

What does timing tell us about the donor's likelihood of *ex post* favor-seeking? Donations that are further apart in time are more plausibly motivated by innocuous donation-splitting than donations that are close together. If Donor Z, having contributed $5,000 to each candidate in a Senate race, discloses that the contributions happened within days of each other, it is extremely likely that Donor Z is seeking *ex post* benefits from the winner of the election. There are few alternative explanations for near-simultaneous giving to competing candidates.[114] If, however, the first $5,000 donation was made in February and the second in early November, it is difficult to say whether Donor Z is hedging its bets. It may be that the recipient of the second donation emerged as a strong enough candidate down the stretch that Donor Z felt justified in covering its bets by giving them money. By contrast, it may be that, over the course of the campaign, the recipient of the first donation espoused policy goals that caused Donor Z to reorder its preferences and to attempt to maximize the second candidate's chances of winning; here there can be no special *ex post* inference to be made at all.[115] Alternately, Donor Z's first choice may prove a weaker candidate than expected, prompting the donor to shift resources to a candidate who, while preferentially second-best, is more likely to win. This is an especially likely scenario in races with three or more candidates,[116] or where

[113] Wilson, Williams, & Roeber, *supra* note 74, at A1.
[114] *See* Part IV.A, *infra*, for an examination of these explanations.
[115] *Cf.* Patricia Sabatini, *Right on the Money; In the Corporate Boardrooms, It's Bush in a Runaway. Then Again, Republicans Usually Are the Beneficiaries of Business*, PITTSBURGH POST-GAZETTE, October 3, 2004, at F-1 (Kerry donor "had a change of heart since Ronald Reagan died" and contributed to Bush).
[116] *See*, *e.g.*, the D.C. mayoral race described in Woodlee, *supra* note 76, at J1. There, a donor gave money to two competing candidates, both belonging to the Democratic Party. The article noted that more candidates might enter the race – faced with no assurance that these additional candidates would be to its

the donor has contributed money during the party primaries, and is now choosing between a pared-down set of candidates.[117] And, of course, it may simply be that one candidate entered the race later than the other, and Donor Z's policies and preferences align better with those of the late entry.[118]

Party primaries engender another circumstance in which donation-splitting by Donor Z might not rise to the level of bet-hedging. Consider this: a Business Week study in November 1999 found that 52 of 389 executives surveyed had already contributed money to presidential candidates in both parties.[119] On the face of it, those executives are clearly hedging their bets; donations to competing candidates, after all, leave no reasonable inference but that the donor seeks *ex post* benefits. At this point in the process, however, candidates in different parties are not yet truly competing; until the primaries have been held, candidates jockey with those in their own party for votes and dollars. Before the primaries, then, it's entirely possible for rational donors with ordered sets of preferences to use their contributions strategically in order to advance the prospects of candidates in each party while implicating bet-hedging only in an abstract, generalized manner.

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liking, a donor is justified in signaling its preference for multiple candidates, each of whom are more agreeable than any likely alternative.

[117] An interesting example of this occurred in Georgia in 2005, when donors who had supported Republican Wayne Hill for district commission chairman during an intraparty runoff donated anew to his victorious GOP opponent, Charles Bannister, even though Bannister was running against a Democratic challenger who was hopelessly financially outmatched. *See* Ben Smith, *Show me the money: Even in easy election, donations roll in*, ATLANTA JOURNAL-CONSTITUTION, June 2, 2005, at 1JJ.

[118] *See*, *e.g.*, Garcia, *supra* note 61, at B1 ("Others say the donations reflect the timing of each candidate's entry into the race. Kallinger began his campaign in the summer of 2003, more than a year before the election. Coming off two terms as a state lawmaker, he immediately became a favorite and had little trouble tapping into Orange County's political fund-raising network. Segal, however, jumped into the race in December. And though he has never held elected office, he has made plenty of friends in Central Florida's business and development circles through the years. They weren't about to let him campaign empty-handed. 'One guy started way before the other guy, and I think that would explain the contributions for some people,' Kantor said, though he did not want to talk about his donations.").

[119] Dunham & Jesperson, *supra* note 70, at 112.

This could manifest itself in one of two ways:

1) Candidates A and B are competing for the Democratic nomination, and Candidates C and D are competing for the Republican nomination. The donor strongly prefers Candidate A to all other candidates, and gauges that, of Candidate A's possible opponents in the general election, Candidate D is demonstrably the weaker. The donor might therefore contribute money to both Candidate A and Candidate D, with the intent of pitting its preferred candidate against a weaker opponent after the primaries.

2) As before, Candidates A and B are competing for the Democratic nomination, and Candidates C and D are competing for the Republican nomination. Of the Democratic candidates, the donor strongly prefers A; of the Republican candidates, the donor strongly prefers C. The donor then gives money to each of his preferred candidates in the hopes that they win their respective primaries. If they do, and the donor is indifferent as between them, it need not contribute any more; it has effected an outcome in which a candidate favorable to its interests will win the election. If the donor prefers one over the other – say, Candidate A over Candidate C – it can then give further money to Candidate A in the hopes of advancing his electoral prospects (but with the knowledge that, should A fail, C is tolerable as well). In neither of these strategies does the donor do anything but demonstrate its democratic preference for one candidate over another; therefore, they cannot be considered bet-hedging *per se*, and there exists no particular suggestion of *ex post* expectation (again, no more so than for any campaign contribution).

This paper contends that only when a donor gives to competing candidates, or to competing parties within a single election cycle, can you be reasonably certain that *ex post* benefits are expected. There are two circumstances, however, in which even donations to competing candidates or parties might possibly be justified without resort to an *ex post* inference. Let me close this section by offering and discarding these situations as being viable explanations for widespread donor behavior.

First, donations to competing candidates – even if the second takes place soon after the first – might be explained by invoking the democratic preferences rationale if, as happened in the 2002 New Jersey Senate race, a candidate drops out and is replaced at the last minute by someone else.[120] In that case, a donor who had given to the now-deposed candidate could reassess its preferences, decide that the original opponent was more likely to advance its policy interests than the replacement candidate, and transfer its support.

Alternately, a donor may find itself giving to competing sides if a candidate who has dropped out of a race decides to re-enter. The 2004 Indiana gubernatorial contest, for example, saw Democrat Joe Kernan regarded as his party's presumptive nominee in 2001,[121] withdrawing his name from consideration in December 2002,[122] and changing his mind and deciding to run in November 2003.[123] As a result, some donors, like Indianapolis businessman James Zink, found themselves backing both Kernan and his Republican opponent Mitch Daniels.[124] Zink, who had contributed $9,000 to Kernan in 2001-02, developed a donor relationship with Daniels after Kern dropped out of the

[120] Or one candidate might die mid-race, as happened to Mel Carnahan in the 2000 Missouri Senate race.
[121] Mary Beth Schneider, "Republicans bolt from starting blocks in governor's race," THE INDIANAPOLIS STAR, October 2, 2001, at 1A (Kernan "doesn't expect to formally announce his campaign until late 2003").
[122] Mary Beth Schneider, "Kernan won't run for governor," THE INDIANAPOLIS STAR, December 9, 2002, at 1A.
[123] Mary Beth Schneider, "Kernan bounds into race," THE INDIANAPOLIS STAR, November 7, 2003, at 1A.
[124] Matthew Tully and Mary Beth Schneider, "Big-money donors feed spending frenzy," THE INDIANAPOLIS STAR, April 4, 2004, at 1A.

race.[125] When Kern became a candidate again, Zink resupported him.[126] Zink gave a total of $25,000 to Daniels and $20,000 to Kernan in 2003.[127]

In situations like these, donation-splitting behavior may legitimately be explained without the need to infer untoward motivations on the part of donors. Such behavior, however legitimate, might potentially be deterred by a regulatory response prohibiting donations to competing candidates (see Part V). However, it must be noted that such scenarios are extremely rare, and exceptions to bet-hedging regulation covering this contingency could easily be crafted.

B. Interpreting the Data

We turn now to the CRP data detailing the giving practices of the top 100 donors from the 1989-2002 election cycles and the 2003-2004 election cycle. Because the data do not distinguish bet hedging from the other forms of donation-splitting discussed above, they should be viewed as an imperfect measure of the prevalence of donor bet-hedging. With that caveat in mind, it should nevertheless be possible to gain a sense of the scope of hedged-bet behavior.

Let's look first at the giving splits of the top 100 donors cumulatively over this period. As mentioned, 79 of the top donors from 1989 to 2002 split their contributions at least 90%-10% between the Democrats and Republicans.[128] The NRA, for example, gave 18 percent of its donations over this time to the Democrats and 82 percent to the Republicans, while ATLA gave 88 percent to the Democrats and 12 percent to the Republicans.

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[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] Top Donors 1989-2002, *supra* note 85.

It is interesting that even stringently ideological groups such as these have given thousands and thousands of dollars to the party to whom they are presumably opposed. While some of this might be explained by the targeting of favorable individual cross-party candidates (as discussed *supra*), it's still likely that both the NRA and the ATLA have engaged in bet-hedging to some degree. Practically speaking, *any* non-zero amount given to competing candidates or party committees appears to strain the democratic preferences argument and raise questions of possible bet-hedging. Whether more extreme splits in donations indicate a smaller likelihood that the donor is engaging in *ex post* favor-seeking – whether, that is, the United Auto Workers giving 1 percent of its total contribution to the Republicans is less indicative of bet-hedging than Citigroup, Inc. giving 47 percent to one and 53 percent to the other,[129] since UAW is presumably tied ideologically to the Democrats far more than is Citigroup – is a question raised in Part IV. Because the likelihood of bet-hedging is more stark where contributions to both sides are equal or nearly equal, this section focuses on instances where a donor indicates no strong preference for giving its money to one party over the other.

To that end, the CRP data also show that 34 of the top 100 donors over these seven election cycles gave at least 40 percent of their total contribution to each party.[130] This roster includes giants from the telecommunications, banking, technology, trade, and insurance sectors, among others.[131] The full slate of 34 top donors who, since the 1989

[129] *Id.*
[130] *Id.*
[131] *Id.*

election cycle, have cumulatively given at least 40 percent of their donations to each major party is as follows (in order of their appearance on the Top 100 Donors list):[132]

Top Donors Giving At Least 40 Percent to Each Party, 1989-2002

Name (Rank)	Split	Party receiving majority
Nat'l Ass'n of Realtors (3)	53-47	Republican (R)
American Medical Ass'n (8)	59-41	(R)
AT&T (12)	54-46	(R)
Citigroup, Inc. (18)	53-47	(R)
American Bankers Ass'n (27)	58-42	(R)
FedEx Corp (28)	57-43	(R)
BellSouth Corp. (29)	54-47	(R)
SBC Communications (30)	56-44	(R)
Ernst & Young (34)	53-46	(R)
Lockheed Martin (35)	58-42	(R)
JP Morgan Chase & Co. (36)	59-41	(R)
Nat'l Ass'n of Insur. & Financial Adv. (38)	57-43	(R)
American Institute of CPAs (39)	56-45	(R)
Microsoft Corp (40)	57-43	(R)
American Dental Ass'n (42)	53-47	(R)
Bank of America (45)	54-46	(R)
American Hospital Ass'n (46)	54-46	Democrat (D)
General Electric (50)	52-48	(R)
Morgan Stanley (51)	57-43	(R)
AFLAC, Inc. (52)	55-46	(R)
Credit Union Nat'l Ass'n (59)	52-48	(R)
WorldCom, Inc. (64)	54-46	(R)
Boeing Co. (65)	57-43	(R)
Prudential Financial (68)	53-47	(R)
Freddie Mac (69)	59-41	(R)
Archer Daniels Midland (75)	57-43	(R)
Anheuser-Busch (78)	50-50	
American Int'l Group (80)	54-46	(R)

132 *Id.* It's worth noting here that of those donors that gave at least 40 percent of their contributions to each party over this period, the overwhelming majority gave more to the Republicans than the Democrats (and only one, Anheuser-Busch, gave approximately equal amounts to both), although the reasons that this might be so are better explored in another paper. And despite this tilt toward the Republicans in donations to both parties, the top 100 donors in toto gave significantly more money to the Democrats than the Republicans – 60 percent to 40 percent from 1989-2002. *Id.* This is attributable in large part to the number of labor unions on the top donors list, as more than 90 percent of the unions' money goes to the Democrats. Still, the the gap between Democratic and Republican contributions on the top donor list has lessened over the past decade – from 71 percent Democratic and 29 percent Republican in 1990 to 57 percent Democratic and 43 percent Republican in 2002. Shifting Strategies, *supra* note 107.

Nat'l Rural Electric Cooperative Ass'n (81)	57-43	(D)
American Academy of Ophthalmology (85)	56-44	(D)
General Dynamics (91)	55-45	(R)
American Airlines (93)	52-48	(R)
Metropolitan Life (96)	56-44	(D)
American Maritime Officers (97)	55-45	(R)

The CRP data, then, confirm at least initially the perception of many commentators: that over the last seven election cycles from 1989 to 2002, top donors have given millions of dollars to each party. This by itself is some evidence that these donors are hedging their bets, as it's fairly unlikely that all 34 donors underwent philosophical shifts mid-decade causing them to switch their party allegiances. Bearing in mind the possibility of gradual shifts, though, let's see whether the data from the 2003-2004 cycle look any different:[133]

Top Donors Giving At Least 40 Percent to Each Party, 2003-04

Name (2003-04 Rank)	Split	Party receiving majority
National Ass'n of Realtors (2)	52-48	Republicans (R)
Morgan Stanley (5)	59-41	(R)
JP Morgan Chase & Co. (7)	53-48	Democrats (D)
Citigroup, Inc. (8)	51-49	(D)
Bank of America (10)	53-47	(R)
General Electric (21)	53-47	(R)
Credit Union National Ass'n (26)	57-42	(R)
American Hospital Ass'n (33)	55-45	(R)
Credit Suisse First Boston (36)	54-46	(R)
Cendant Corp (49)	56-44	(R)
American Dental Ass'n (53)	60-40	(R)
Boeing Co. (59)	54-46	(R)
Bear Stearns (63)	50-50	
WPP Group (66)	56-44	(D)
National Rural Electric Coop. Ass'n (67)	56-44	(R)
BellSouth Corp (71)	60-40	(R)
General Dynamics (76)	57-43	(R)
Comcast Corp (84)	52-48	(D)

[133] Top Donors 2003-2004, *supra* note 85.

Anheuser-Busch (85)	60-40	(R)
Nat'l Cable & Telecomm. Assn (90)	57-43	(R)
News Corp (97)	60-40	(D)

As this shows, 21 top donors have given at least 40 percent to each party in 2003-04, compared with 34 from 1989-2002.[134] The data demonstrate that top donors have essentially mirrored their aggregate giving practices on a cycle-by cycle basis over the past fourteen years.[135] Anheuser-Busch, for example, has given no less than 34 percent of its donations to each major party in every election cycle, although its contribution trend is toward more money to the Republicans and less to the Democrats – a 66-34 split in favor of the Democrats in 1989-90, 51-49 in favor of the Republicans for Election 2000, and 60-40 in favor of the Republicans so far in 2003-04.[136] Most of the donors listed above follow this same trend, shifting the bulk of their money from the Democrats to the Republicans while hovering near the 40 percent threshold every cycle for each party.

As mentioned earlier, this overall shift of monies to the Republican Party is most likely largely attributable to control of Congress changing hands in the mid-1990s.[137] However, to the degree that these contributions are made to the national party committee rather than individual candidates, this shift in donations might also signal changes in fundraising strategy between the two parties or, indeed, changing party policies such that

[134] *Id.*
[135] The Center for Responsive Politics, *Blue Chip Investors: The Top 100 Donors to Federal Elections, 1989-2002*, "Donor Profiles," *available at* http://www.opensecrets.org/orgs/list.asp?order=A [hereinafter "Donor Profiles"]. FedEx Corp, *supra* note 103, is the notable exception.
[136] The Center for Responsive Politics, *Blue Chip Investors: The Top 100 Donors to Federal Elections, 1989-2002,* "Anheuser Busch," *available at* http://www.opensecrets.org/orgs/summary.asp?ID=D000000144 [hereinafter "Anheuser Busch"].
[137] *See* Shifting Strategies, *supra* note 107; E-mail from Robert Bauer, Chair, Political Law Group, Perkins Coie LLP, to author (March 10, 2003, 07:43 EST) ("What you might see, is a tilt in one direction or another, corresponding with the shift in majority status in the relevant institution.") (on file with author).

these donors – while still motivated to give to both parties – feel their interests better represented by the Republicans. Additionally, although the sample size is small, it's notable that the 2003-04 election cycle seems to have brought about a relative resurgence in top donors giving more to the Democrats than to the Republicans. Of those donors who have given at least 40 percent to each party, 5 of 21 in 2003-04 made the bulk of their contributions to the Democrats, compared with only 2 of 24 in 2001-02.[138] This might be explained by the inherent lability of the top donors list; donors crack the top 100 one cycle and miss it the next, but their own donation practices stay relatively stable. Nevertheless, some organizations appear to have broken into the top 100 list in this cycle only because they have ramped up their giving to the Democrats, both as an absolute and a proportional matter. Law firm Akin Gump Strauss gave 84 percent of its $240,000 in soft money campaign contributions to the Republicans in 1999-2000.[139] In the 2002 election cycle, the firm contributed 65 percent of its $218,000 in soft money to the Republicans.[140] And in the 2004 election cycle Akin Gump gave 63 percent of its $1.2 million in contributions to the Democrats.[141]

Furthermore, while top donors have shifted their contributions, proportionally, from Democrats to Republicans over the past decade, there is evidence that Democrats have made up ground in general with bet-hedging business donors.[142] This has become enough of an issue in recent years that the Republicans, in response to the Democratic threat, have taken measures to divert the flow of dollars. For example, the Republican

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[138] Top Donors 2001-2002, *supra* note 85.
[139] The Center for Responsive Politics, *at* http://www.opensecrets.org/softmoney/softcomp1.asp?txtName=akin (last visited August 15, 2005) [Hereinafter "Akin Gump"].
[140] *Id.*
[141] Top Donors 2003-2004, *supra* note 85.
[142] *See* Glasser & Eilperin, *supra* note 56, at A6; Clymer, *supra* note 66, at A30 (both noting increased giving by businesses to Democrats).

National Campaign Committee instituted the "75 Percent Club" explicitly to counter bet-hedging by business; the club gives "special access to political action committees that give at least [75 percent] of their donations to GOP candidates."[143]

It's also interesting to observe that those donors who split their contributions most evenly between the major parties typically are not clumped at the top of the donor lists for each election cycle, but rather are scattered throughout the top 100 donors. For the 2003-2004 election cycle, for example, eleven of the twenty-one top donors giving at least 40 percent to each party appeared in the bottom half of the list.[144] Again, the numbers are rough, but it would seem at least intuitively that a donor would spend more money in giving equally to two parties than it would in making the bulk of its contribution to one side or the other. That is, assume a donor has an amount $x in mind below which it believes its contribution will not have the desired effect, whether that effect is access, recognition, or something else, and an amount $y that is the maximum it is willing to donate. Further assume that the donor believes that there exists an amount $z past which an increased donation will yield diminishing returns as to the effect desired, whatever that may be. The amount a donor gives to one party will be no lower than the threshold $x and no higher than the ceiling $y, and, it seems logical, as close to maximization point $z as the donor is able accurately to assess. Thus, a rational donor giving to two parties should be giving at least twice $x, and optimally twice $z. Yet, from the data, top donors giving in near-equal proportions to both major parties appear to have a significantly lower valuation of $x and/or $z than do donors directing their giving largely to a single party. Or perhaps single-party donors, tending to be less pragmatic

[143] Allen, *supra* note 92, at A11; *see also* Keller, *supra* note 71 (quoting a Republican congressman that PACs have "got to make a decision of how they are going to help their friends and who their friends are.").

and more issue-oriented, are less apt to be concerned with the value of $z and more likely to approach the ceiling amount $y when contributing, even in the face of diminished returns.[145]

The CRP data definitively show that many top donors gave a sizeable proportion of their money to both Democrats and Republicans in the 2003-04 election cycle. They also show that almost *every* top donor has given *some* money to both parties. Of the top 100 donors, only 2 gave 100 percent of their money to a single political party:[146]

Top Donors' Donation Split Between Parties, 2003-04

Between 50-50 and 60-40 percent split:	23 donors (23)
Between 61-39 and 70-30:	29 donors (29)
Between 71-29 and 80-20:	13 donors (13)
Between 81-19 and 90-10:	13 donors (13)
Between 91-9 and 99-1:	20 donors (20)
100-0 split:	2 donors (2)

While such an overwhelmingly high incidence of cross-party giving is certainly suggestive of a good deal of bet-hedging, it isn't conclusive; per the discussion of donation-splitting in Part III.A, we still do not know enough about these donors' behavior to confidently infer *ex post* favor-seeking. The percentages calculated by CRP are "based on contributions from PACs, soft money donors and individuals giving $200 or more to federal candidates, parties and leadership PACs, as reported to the Federal Election

[144] Top Donors 2003-2004, *supra* note 85.
[145] *See* Part IV.B, *infra.*
[146] Top Donors 2003-2004, *supra* note 85. The top donors giving 100 percent to one of the major parties and 0 percent to the other are EMILY's List (6) and Simmons Cooper LLC (94), both donating all of their money to the Democrats. *Id.* The Club for Growth (75) is listed as having given 99 percent of its contributions to the Republicans and 0 percent to the Democrats in 2003-2004, and the United Food & Commercial Workers (47) gave 100 percent to the Democrats and 1 percent to the Republicans. For both these donors, it appears that some donation-splitting took place, however miniscule.

Commission."[147] Although the data for total contributions are further broken down by the method of donation (PAC, individual, or, where applicable, soft money), the data for the recipient of the donation, whether party or candidate, is not broken down at all. That is, the numbers compiled show that AT&T gave 53 percent, or $1.6 million, of its $3 million in 2001-2002 contributions to Republicans and 47 percent, or $1.4 million to Democrats.[148] They also show that 73 percent of that money came from soft money contributions, 20 percent from PACs, and 7 percent from individuals.[149] But there is no way to tell from this data how much of the $1.6 million given to Republicans came from PACs versus soft money, or how much went to the Republican National Committee and how much went to individual candidates.

Absent more detailed data, then, the premise of this paper that bet-hedging is more than an incidental occurrence must largely be assumed. However, given the extensive anecdotal reports in which donors are quoted indicating that they are hedging their bets,[150] and the suggestiveness of the CRP data (in which many, many top donors give a substantial portion of their contribution to both parties), it seems to be a safe assumption to make.

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[147] Top Donors 1989-2002, *supra* note 85.
[148] The Center for Responsive Politics, "AT&T," *available at* http://www.opensecrets.org/orgs/summary.asp?ID=D000000063 [hereinafter "AT&T"] (last visited August 15, 2005).
[149] *Id.*
[150] *See*, *e.g.*, Glasser & Eilperin, *supra* note 56, at A6 (quoting lobbyist, "We better make sure our interests are protected no matter who's in control."); Ayres, *supra* note 59, at A16 (quoting lobbyist, "If you didn't give, you'd probably alienate both of them."); Allen, *supra* note 92, at A11 (quoting SBC spokesperson, "There are people in both parties who support competitive telecommunications markets, which is what we support, so we give to candidates of both parties and both party committees.").

IV. Why, How, and When: Questions About Bet-Hedging

Having ascertained that bet-hedging does occur and is likely fairly prevalent, this paper now explores the details of bet-hedging strategy. Specifically, it asks three questions: 1) Why do donors hedge their bets? What are they seeking in return that justifies the cost of giving? 2) How do donors hedge their bets? What is the optimal apportionment of donation dollars? 3) When do donors hedge their bets? What conditions trigger a decision to hedge or not to hedge? And does it matter if the parties or candidates *know* that the donor is spreading its money around?

Because of the dearth of analysis on the subject, this paper is less concerned with answering all the questions it raises regarding bet-hedging than with raising them in the first place. Each of the questions asked in this section might plausibly be the subject of a separate, detailed examination; for now, however, I am content to touch upon each issue and leave it alone. In gauging the appropriateness of a regulatory response, all that needs be known about bet-hedging is that it is a rational strategy, that it leads to donor expectation of *ex post* benefits, and that it is likely to persist absent regulation.

A. Why Do Donors Hedge Their Bets?

First principles first: why do donors give money at all? If, like votes, political contributions are meant, first, to express a democratic preference for one candidate or platform over competing alternatives and, second, to influence events in favor of that candidate or platform, then bet-hedging fails on both fronts. By giving to competing candidates or parties, a donor is neither expressing a preference for one over the other nor attempting to effect a particular electoral outcome, just as someone who votes for two opposing candidates is canceling her own vote, expressing no preference, and doing nothing to help either candidate win.[151] Thus hedged-bet donations, like hedged-bet votes, cannot rationally be justified as advancing a citizen's personal (or, as is most often the case, institutional) democratic interests.[152]

This is true even if the amounts given to each side are not equivalent. As discussed earlier,[153] if more money is given to one side than the other, then only the difference between the contributions matters in the end. That is, if $x is given to Candidate A and $x+y is given to competing Candidate B, only the donor's contribution of $y to Candidate B matters. Therefore, if Donor Z gives $40,000 to the Arkansas Democratic Party and $60,000 to the Arkansas Republican Party in a nonfederal election,[154] only the $20,000 difference between the contributions matters in effecting a preference for one over the other. If Donor Z's sole intent is to demonstrate its preference between the two candidates, there is no reason not to give $20,000 to the Republicans and be done with it.

It may be that Donor Z wishes to give unequal amounts to each side in order to signal the *intensity* of its preference. That is, perhaps it is not the absolute value of each contribution that matters, but rather their value relative to one another. In this way, assuming perfect information, the RNC would know that Donor Z valued them $20,000

[151] *See* Keller, *supra* note 71 (quoting a PAC fundraiser criticizing the bet-hedging strategy and saying that "if a PAC sees no significant difference between the two candidates . . . the better decision is to sit it out and help the winner after the election.").
[152] More so because donating twice, unlike voting twice, requires an expenditure of money. To vote for competing candidates would be, if legal, a costless enterprise easily to be undertaken in a fit of whimsy. The lack of result is mitigated by the lack of outlay. Assuming some modicum of economic rationality, it simply makes no sense for an institutional donor to spend hundreds of thousands of dollars neutralizing its own contributions, expressing no net preference, and ultimately failing to influence the result of the election. There is an argument that donating to competing candidates is beneficial to our democratic system in a way that voting for competing candidates is not, as giving money to both sides allows greater amounts of political speech and a more informed, more empowered citizenry. This rationale for, or effect of, bet-hedging is explored *infra*.
[153] *See* note 18, *supra*.

greater than their opponents. This possibility is revisited in Part IV.C, *infra*, but for now it is enough to say that this motivation, too, fails under the democratic preferences rationale. If Donor Z does not care about securing a favorable *ex post* position for itself, but wishes only to advance the prospects of its preferred party, then it shouldn't matter whether or not that party knows how much more Donor Z likes them than the alternatives.

Assuming that Donor Z is a rational actor, the most plausible explanation for its donating to competing candidates or parties is that it expects to receive *ex post* benefits from the eventual winner. Just as voting for competing candidates is rational if everyone who votes for the winning candidate is rewarded after the election, so too is bet hedging rational if a donor believes that it will be rewarded by giving to the winning side. This is the crucial feature of bet-hedging that makes it more suspect, and more susceptible to regulation, than regular donor behavior under the *Buckley* and *McConnell* frameworks: if a donor hedges its bets, it is presumptively engaging in a quid pro quo transaction – contributions now, benefits later.[155]

If a donor rationally believes that it will receive some desired benefit from either side after the election, it logically follows that the two sides are ideologically consonant to some degree on issues that are important to that donor. In other words, it would make no sense for a bet-hedging donor to contribute money to a candidate if it did not believe that that candidate, having won the election, would (and *could*) reward the donor for its contribution. Let's say Donor Z desires *ex post* influence in prohibiting the importation

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[154] Arkansas is one of the states allowing unlimited contributions to state party committees in state elections. *See* State Party Contribution Limits, *supra* note 9.
[155] That these benefits may come in the form of increased access, which by itself is arguably insufficiently troublesome to sustain regulation of political speech, is a possibility examined in Part V, *infra*.

of under-priced widgets. It knows that Mr. Dem will provide that influence to his donors in the event that he wins the election, while Mrs. Gop, if she wins, will not. In this case, bet-hedging is not a rational strategy for Donor Z. It is better off conserving its resources or giving the whole of its money to Mr. Dem.

So a bet-hedging donor expects to receive *ex post* benefits from whichever candidate or party happens to gain control after the election. What might these benefits entail? For the purposes of this paper, the particular *ex post* motivation of a donor matters less than the fact that the *ex post* motivation exists at all; that one donor might be seeking influence while another donor fears retaliation from not contributing in no way implicates the normative value or constitutional viability of bet-hedging. (The one potential exception to this statement are donations made for the purposes of increased access. This problem is examined in Part V.) It is interesting, however, to note the many and varied explanations that have been given for hedged-bet behavior. These are quickly summarized here.

It should first be observed that even in the case of donations to competing candidates, many donors will disavow the notion that anything specific is expected in return. A spokesperson for telecommunications giant SBC, for example, offered this explanation for his company's split donations: "There are people in both parties who support competitive telecommunications markets, which is what we support, so we give to candidates of both parties <u>and both party committees</u>."[156] In justifying giving to both party committees, this rationale fails to convince: along the lines of the discussion in Part III.A, even if both parties propound favorable policies to SBC, there is no reason that it

[156] Allen, *supra* note 92, at A11 (emphasis added).

should give to both. Better in that case to save money for individual races in which certain candidates favor SBC's policy goals more than their competitors.

Other reasons given for hedged-bet donations that do not involve *ex post* favor-seeking include neutrality/impartiality[157] or a belief in the personal merits of each candidate, [158] the reflection of a donor's diverse membership,[159] and the generalized advancement of democracy.[160] The first of these reasons largely begs the question; there is no need to try and appear impartial or neutral unless the contributor seeks favorable treatment from the eventual winner. In the words of a Connecticut Republican state party official, "If someone is giving the same amount of funds, it's obvious they are not hurt in either way by the election of one candidate. . . . They do that to show that it's not a personal issue."[161] But if it is true that the donor is "not hurt in either way," to what end does it profit by signaling its impartiality to the candidates? The most logical answer, if that is indeed the donor's aim, is that the donor is seeking individualized *ex post* benefits.

Of course, the appearance of neutrality could be directed elsewhere than at the political actors themselves. A corporation might wish to cultivate a public perception of its evenhandedness and civic virtue.[162] If this is so, however, there would seem to be

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[157] *See, e.g.,* Torry, *supra* note 69, at F7 (a law firm known to be Democratic gives to Republicans in "a conscious effort to be bipartisan").

[158] *See*, *e.g.*, Garcia, *supra* note 61, at B1 ("Some donors said competing contributions are merely a sign that both Kallinger and Segal are qualified for the job. 'They're both great guys,' said Allan Keen, chairman of the Orlando-Orange County Expressway Authority. Both Keen and his business, The Keewin Real Property Company, have written $500 checks to Kallinger and Segal. 'It's not often that you have two really outstanding candidates.'").

[159] *See*, *e.g.*, Shear & Eggen, *supra* note 77, at C1 (CapNet, a technology PAC, feels the need to represent the interests of each of its members).

[160] *See*, *e.g.*, Charles R. Babcock, *Paying Dearly to Be Top Fans of a Winning Team; 8 Contributors Gave At Least $100,000 to Both Major Parties During '88 Campaign*, WASHINGTON POST, February 1, 1989, at A10 (donor gave $100,000 to both Bush and Dukakis because they each "needed more opportunity to be heard").

[161] Griffin, *supra* note 58, at 1.

[162] For an international example, *see* Jack Ewing, *Hard Politics, Soft Money*, BUSINESS WEEK, August 8, 2005, at 86 ("Allianz, a Munich-based insurance and banking colossus, gives exactly 50,001 euros to each

cheaper or more effective ways to achieve this aim than to donate to competing candidates or parties. Neutrality is handily communicated by not putting any money into politics whatsoever; giving to no one runs less risk of public cynicism about the donor's motivations than giving to everyone. In the same way, if a potential donor is "so impressed with both candidates after a round of interviews and questionnaires that they [can't] decide whom to support," why not breathe easily, secure in the knowledge that the electoral outcome will be favorable, and save some cash?[163] All of which is not to say that some donors do not give to opposing sides for exactly these reasons, merely that it strains credibility to believe that most, or even many, of the donors who split their donations are doing so in order to make others think that they are studiously apolitical or to express their appreciation for such a solid field of candidates.

Similarly, it is perfectly plausible that some institutional donors give to both sides in order most fully to represent the diversity of political views held by their members, employees, or shareholders.[164] But this rationale is rarely invoked by donors engaging in apparent bet-hedging, does not account for individuals who give to competing political actors, and is generally an unsatisfying rationale for the sheer prevalence of hedged-bet donations within our political system.

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of the five political parties represented in Germany's Bundestag. Both the donations and the fact that Allianz gives just enough to require full disclosure are 'an expression of our civic duty,' says Nicolai Tewes, the company's director of corporate relations.").

[163] Garcia, *supra* note 61, at B1 ("Kay Behrens, chairwoman of the West Orange Political Alliance, said the group's 17 members were so impressed with both candidates after a round of interviews and questionnaires that they couldn't decide whom to support. So they gave each $500. 'We got down to these two guys, went back and forth, and just felt they were both strong candidates,' Behrens said. 'It's not hedging bets at all.'").

[164] Kent Cooper of Public Disclosure, Inc., agrees that this rationale is in play for certain donors: "You have more PACs that are listening to their employees, and in many cases that's the safest thing for a PAC to do so they represent their donor base." Keller, *supra* note 71. *See also* Andrews, *supra* note 73, at 1A ("Among the biggest contributors to both campaigns was the law firm Baker & Daniels, which records show gave $ 103,460 to Daniels and $ 90,550 to Kernan. Baker & Daniels Chairman Brian Burke said the bipartisanship reflects the differing political views of the lawyers who work at the firm as well as its roots.

The argument that hedged-bet donors, by giving to both sides, advance and secure the stability of representative democracy and the vitality of a two-party system – that they are "civic patriots"[165] – deserves a little more attention. This is an especially potent defense of split giving because the actual effects of the practice are just as important as the motivation of the donors. If donors are giving solely in order to support the American political process or to be good citizens, then they are not looking for specific *ex post* favors or benefits, and they are not hedging their bets.[166] But even if donors *are* bet-hedging, they might be helping to sustain a healthy political system whether they mean to or not. If the result of donation-splitting is positive overall, then perhaps this sort of donor behavior should not be targeted for regulation.[167]

Nevertheless, the evidence again suggests that even if some donors are contributing with the innocuous (and even laudable) goal of making sure that parties and candidates have the resources to disseminate their message,[168] much apparent bet-hedging behavior cannot be characterized in this fashion. Even where donors claim the advancement of democracy as their motivation, such an explanation often seems overly

One of its founding partners served as a Republican governor and another served as a Democratic governor.").

[165] Slackman, *supra* note 26 (quoting Steven Weissman, associate director of policy at the Campaign Finance Institute, as saying that "[h]istorically, double givers are often people seeking access to both parties, rather than civic patriots.").

[166] *See*, *e.g.*, Andrews, *supra* note 73, at 1A (Indianapolis Colts owner Jim Irsay explaining his giving to both Indiana gubernatorial candidates by saying, "I think of my participation as supporting the system, rather than individual candidates, especially when the opponents are equally qualified, as in this year's gubernatorial race.").

[167] This objection to a regulatory response to bet-hedging is considered further in Part V.

[168] *See*, *e.g.*, Griffin, *supra* note 58, at 1 (quoting a bet-hedging donor that "[i]t takes money to get the word out. I'm sympathetic to the needs of the candidates."); Friedman, *supra* note 75, at 13 (quoting a New York real estate developer who donated the maximum allowable contribution to all mayoral candidates but one because "they're all excellent candidates, and . . . they all deserve the opportunity to present their views."); Garcia, *supra* note 61, at B1 ("'We're involved in the community, and we want to make sure that they have the wherewithal to at least get their message out,' said Orlando Evora, a co-managing partner in the Orlando office of the Greenberg Traurig law firm, which has also contributed the maximum to both candidates.").

pat and incomplete. As an example, take the Florida law firm that donated money, through several PACs, to four Miami-Dade mayoral candidates in 2004 (one of these four returned the donation).[169] As quoted in the *Miami Herald*, the founder of the firm explained his support of multiple mayoral campaigns by saying that there are "five good, strong, qualified candidates" in the election.[170] This response raises two reasonable questions. First, if all five candidates are good, strong, and qualified, why is the firm only donating to four? The article proffers a legitimate explanation for this, reporting that the law firm's checks were disbursed before the fifth candidate entered the race.[171] Second, if the firm would, as it appears on the strength of its words, be happy with all of the candidates as the next Miami-Dade mayor, why give to any at all? The general inference that a donor must be seeking *ex post* benefits when it gives to competing candidates can only be strengthened by the knowledge that the donor would find any of the available field of candidates an acceptable victor. This admittedly sidesteps the advancement of democracy rationale, which does carry some strength. But it suggests that, under a system in which public disclosure is valued and candidates easily can discover the source of their funds, it is often very difficult to separate an advancement of democracy in which recognition of giving is an incidental effect from a desire to be recognized by all candidates, whereby democracy just happens to be advanced.[172]

Elections in which candidates identify themselves as representatives of a particular political party, as is the case in most state and federal races, highlight a

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[169] Noah Bierman, *Law Firm Multiplies its Support*, THE MIAMI HERALD, August 4, 2004, at B8.
[170] *Id.*
[171] *Id.*
[172] As will be discussed in Part V, this is one of the reasons that regulation of bet-hedging might be more feasible or more desirable in a framework of anonymous giving like that proposed by Ian Ayres and Jeremy Bulow, *supra* note 53, than in our current campaign finance system.

different vulnerability of the civic patriotism explanation. Bet-hedging behavior is directed almost uniformly at the two major parties.[173] In the interests of promoting political speech and sustaining democratic choice, it would make sense for at least some donors who split their contributions to give money to the parties or candidates that most demonstrably need it: those with no appreciable current voice in the American political system. Yet candidates with little chance of winning an election receive, by and large, no financial support from those donors that are happily supplementing the campaign coffers of the well-financed, front-running campaigns. Dennis Kucinich, for example, collected precious few donations for his failed 2004 presidential run from donors who had given to Bush and Kerry.[174] Ralph Nader's top contributors over the past fourteen years bear almost no relationship to those of the major-party presidential candidates.[175] Surely financial support has great marginal utility to the campaigns of Kucinich and Nader; what better way to foster democracy than by funding those messages that are least heard? To the extent that a bet-hedging donor does not give to these candidates solely because they stand no shot of victory, the advancement of democracy argument sounds a flat note. In the case of Nader, at least, it may be that donors direct their monies to Democrats and Republicans because they prefer the political stability of a two-party system. There are compelling normative arguments for having only two strong political parties. Such a

[173] *See*, *e.g.*, Top Donors 1989-2002, *supra* note 85 (money given by the top 100 donors is split nearly exclusively between the Democrats and Republicans).
[174] The Center for Responsive Politics, "Dennis Kucinich: Top Contributors, 2004 Cycle," *at* http://www.opensecrets.org/presidential/contrib.asp?id=N00003572&cycle=2004 (last visited August 8, 2004) [hereinafter "Kucinich Contributors 2004"]. Those contributors that did give money to Bush, Kerry, and Kucinich, like Microsoft, Boeing, and Viacom, gave far less to Kucinich than to the other two candidates, a counterintuitive result for the advancement of democracy rationale. *Id.*
[175] The Center for Responsive Politics, "Ralph Nader: Top Contributors, All Cycles," *at* http://www.opensecrets.org/presidential/contrib.asp?ID=N00000086&Cycle=All (last visited August 8, 2004) [hereinafter "Nader Contributors 1990-2004"].

preference is perfectly valid.[176] But the two-party system is in scant need of protection or support; whether or not donors who give only to the Democrats and Republicans intend their money to safeguard these institutions from encroachment by competitors, it arguably has no appreciable effect in that regard.[177] Richard Hasen notes that "[t]he two-party system in the United States may be at its strongest point in history."[178] There is little evident danger that the Democratic Party would cease to be an effective foil for the Republicans (or vice-versa) if donors were required to choose no more than one candidate from either of these parties to support in a given race.[179]

One point potentially in favor of the civic patriotism argument is donor behavior with regard to 527 groups. Such groups, as discussed in Part II.A, *infra*, exist in large part specifically in order to increase political speech, whether by voter mobilization, get out the vote efforts, or advertisements touting particular issues. Moreover, the electioneering in which 527s engage cannot include express advocacy of a candidate, or else the groups become subject to federal contribution limits under FECA.[180] It is true that the line between the sort of electioneering that subjects a 527 to FECA's limits and the sort that does not is often quite blurred.[181] Nevertheless, contributions to 527 groups serve to advance democracy (by mobilizing, registering, and educating voters) at least as

[176] And the Supreme Court, for one, agrees. *See*, *e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) (state interest in political stability justifies discrimination in favor of two-party system).
[177] *See* Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition,* 1997 SUP. CT. REV. 331, 367-71 (1997).
[178] *Id.* at 370.
[179] Of course, the actual consequences of regulating bet-hedging are largely unknowable, and the costs of such regulation may, in the end, outweigh the benefits. It may be that some bet-hedging donors, forced to choose, will opt out of the system entirely to avoid explicit affiliation with a party or candidate. The potential impact of this is discussed in Part V.
[180] *See* Holman & Claybrook, *supra* note 6, at 245-48.
[181] *See*, *e.g.*, Potter, *supra* note 6, at 1135 ("As is now manifestly clear, the "bright line" express advocacy test adopted by the Supreme Court in Buckley to implement the expenditure restriction and disclosure system created by Congress has proven to be grossly inadequate in reaching campaign spending.").

well as, and possibly better than, contributions to party committees or to candidates. Donors wishing to be civic patriots are free to give unlimited amounts of money to increase the political speech of 527 groups and help inform and energize the public; contributions to candidates and parties, even if similarly motivated by civic goodwill, are restricted by federal law.

One might expect, then, if civic patriotism drives donors to contribute to competing parties, to see those same donors also give to 527 groups, where much more money can be spent increasing political speech without having to throw support behind a particular political party (or, as it happens, parties). One might also see individuals and organizations giving to multiple and competing 527s, if facilitation of the medium is truly more important than endorsement of the message. In fact, it's a mixed bag: many top donors to competing parties and candidates tend also to donate to 527 groups, and to engage in bet-hedging behavior while they do; Boeing, for example, has given money both to Americans for a Republican Majority[182] and to the New Democrat Network.[183] Conversely, however, top donors to 527 groups are generally ideologically consistent

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[182] The Center for Responsive Politics, Boeing Co: Expenditures, 2003-2004," *available at* http://www.opensecrets.org/pacs/expend.asp?strID=C00142711&Cycle=2004 (last visited August 14, 2005).

[183] The Center for Responsive Politics, "New Democrat Network: Top Contributors, 2004 Cycle," *available at* http://www.opensecrets.org/527s/527cmtedetail.asp?ein=521981307&cycle=2004&format=&tname=New+Democrat+Network (last visited August 14, 2005). The New Democrat Network, however, is a centrist organization tending "to hold liberal positions on social issues and conservative positions on economic and foreign policy issues." The Center for Responsive Politics, "New Democrat Network, 2004 Election Cycle," *available at* http://www.opensecrets.org/527s/527events.asp?orgid=13 (last visited August 14, 2005). Boeing does not give money to other, more liberal PACs like Moveon.org; to the extent that the economic policies of the New Democrat Network are ideologically consonant with those of Boeing, then, a pure civic patriotism explanation looks less likely. Of course, this means that Boeing could very well be giving according to its political preferences and, with regard to the New Democrat Network at least, not bet-hedging at all.

regarding the sorts of groups to which they donate, and do not hedge their bets.[184] It is true that 527s themselves are often quite partisan in their commitment to single issues or ideologies – EMILY's List and the Club for Growth being illustrative examples. However, from a disinterested, civic patriot standpoint, giving to opposing 527s would presumably have a similar net positive effect on the political system as giving to opposing parties or candidates.[185] Definitive answers on donor behavior toward 527s cannot be had until the dust has settled following BCRA; for now, it is enough to say that donors who split their donations both to competing candidates and parties and to ideologically inapposite 527s might more plausibly attribute their pattern of giving to civic patriotism and generalized advancement of democracy than those donors who give to competing candidates and parties but who give only to one sort of 527 group, or who eschew giving to 527s altogether.[186]

Back to the form that *ex post* benefits for bet-hedging might take. First and most basic is the expectation that the donor will receive something positive and individualized from the winner. This might take the form of specific *ex post* influence, special access, or general relationship-building. See, for example, the Republican Party's Team 100, which conferred benefits upon donors giving more than $100,000.[187]

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[184] The Center for Responsive Politics, "527 Committee Activity: Top 50 Committees," *available at* http://www.opensecrets.org/527s/527cmtes.asp?level=C&cycle=2004 (last visited August 14, 2005) [hereinafter "Top 527s"].

[185] The reluctance of top 527 donors to hedge their bets may also be explained by the fact that those who give the most money to 527s tend disproportionately to be individuals, foundations, or small business owners. *See*, *e.g.*, The Center for Responsive Politics, "Club for Growth: Top Contributors, 2004 Cycle," *available at* http://www.opensecrets.org/527s/527cmtedetail.asp?ein=522155986&cycle=2004&format=&tname=Club+for+Growth (last visited August 15, 2005). As noted in Part III, *supra*, such donors generally split their donations between competitors far less than do larger businesses and organizations.

[186] This latter, of course, may simply be donor preference; a donor can legitimately wish only to give its money to political parties and candidates and still be motivated by civic patriotism.

[187] Babcock, *supra* note 160.

Alternatively, some donors may contribute to both sides because they fear retaliation. In the words of Bruce Cain, framing a frequent complaint of lobbyists, "legislators force groups to give money in order to maintain access to the legislator, or to keep the legislator from taking some threatened action (that is, so-called "tree-shaking" activities)."[188] There is likely some basis for this view – according to a 2000 survey of 300 corporate executives, "at least 51 percent…agreed that turning down requests for campaign contributions could bring retaliation in the form of adverse legislation."[189] Gerald Greenwald, former CEO of United Airlines, puts it plainly in a declaration made in connection with the *McConnell* litigation:

> Business and labor leaders believe, based on their experience, that disappointed Members, and their party colleagues, may shun or disfavor them because they have not contributed. Equally, these leaders fear that if they refuse to contribute (enough), competing interests who do contribute generously will have an advantage in gaining access to and influencing key Congressional leaders on matters of importance to the company or union.[190]

Although Greenwald's statement applies to soft money generally without singling out bet-hedging, Bill Phelps, a lobbyist whose oil company contributed $5,000 to each candidate in the 1998 Texas lieutenant governor race, attributes his hedged-bet giving to a desire to avoid negative repercussions: "If you don't give…you'd probably alienate both of them."[191] Whether or not these repercussions are real or imagined is essentially beside the point; if donors will give to both sides on the basis of perceived

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[188] Cain, *supra* note 42, at 124.
[189] Wolfe, *supra* note 80.
[190] Declaration of Gerald Greenwald, quoted in 124 S.Ct. at 649 n.13. *See generally* Brief for Council of Economic Development et al. as *Amici Curiae*, 2002 U.S. Briefs 1674, 1679-89 (August 5, 2003). The *McConnell* Court, summarizing the position of these *amici* on this issue, relate their attestation that "corporate soft-money contributions are coerced and, at bottom, wholly commercial in nature, and that business leaders increasingly wish to be freed from the grip of a system in which they fear the adverse consequences of refusing to pay the coffers of the major parties." 124 S.Ct. at 649 n.13 (internal quotation marks omitted).

benefits, it's easy to imagine them doing so on in the interest of preventing perceived negative consequences.

Finally, donors might not seek anything tangible at all from their hedged-bet contributions, at least in the short term. Some contributors might give to competing candidates in order to support a particular political characteristic that both candidates share, in the hope that each candidate, regardless whether he wins the election, will find future success within his own party.[192] Others might be mindful of alienating candidates who have been helpful to them in the past. In the 2004 South Dakota Senate race, Norfolk Southern Railroad contributed both to incumbent Tom Daschle and to then-Representative John Thune. A Norfolk Southern executive explained this double giving by saying that "Senator Daschle has been helpful to the railroad industry and his opponent has been helpful to the railroad industry, so you have two friends running against each other. . . . I think they would prefer we give to both rather than not give at all."[193]

Many donors claim to give to both sides out of personal friendship with the candidates[194] or with those soliciting money for the candidates[195] – or, in one case, out of

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[191] Ayres, *supra* note 59, at A16.
[192] *See* David Ingram, *Givers Divide Their Giving; Major donors in N.C. governor's race made sure to help each side*, WINSTON-SALEM JOURNAL, November 6, 2004, at B1 (Democratic donor gave money to GOP challenger because "[h]e's the kind of Republican I'd like to see more of").
[193] Christopher Dinsmore, *Paying for Access*, THE VIRGINIAN-PILOT (NORFOLK, VA.), October 3, 2004, at D1.
[194] *See*, *e.g.*, Andrews, *supra* note 73, at 1A (law firm giving to competing gubernatorial candidates because of "long-standing personal relationships" with each); Anemona Hartocollis, *Kerry's Other Band of Brothers*, NEW YORK TIMES, February 29, 2004 (Yale alumnus giving to both Kerry and Bush because "I consider both of these fellas being my friends."); *GOP Donors Not Playing Favorites*, *supra* note 67, at 14 ("It's a question of being there to support someone if you can.").
[195] *See*, *e.g.*, Young, *supra* note 72, at 1B ("Sloan, a politically active Democrat who has organized numerous fund-raisers, said he contributed to Bush out of allegiance to a colleague who asked him to help out with an event. 'That's the nature of the fund-raising game, if you want to call it that,' Sloan said. 'There are occasions when people assist me when they are not overly enthusiastic.' Sloan gave $1,000 to Bush but $10,000 to Kerry. 'When it comes to writing out a check of that magnitude, I put my money where my

appreciation for a timely use of the Heimlich maneuver.[196] The friendship rationale is particularly plausible in local races, where it is more likely that a hedged-bet giver would know each candidate personally and where the desire for continued amity would be strong.[197] Similarly, donors might view the contributions as a precondition of "managing their relationships with political actors;"[198] a cover charge, if you will. In this regard, it's important to remember that political contributions are not a one-time game – it may help three cycles down the line to have been a loyal and consistent contributor to a particular party, even if it nets the donor nothing right now.

One objection to the notion that donors can hedge their bets by contributing to party committees is that committees, unlike elected officials, cannot advance a donor's interests in any concrete way. The RNC serves on no Senate subcommittee, writes no bills, votes on nothing. This is true, in its way, but it misses the larger picture: by establishing itself as a big-money Republican contributor, a donor gains access to the Republican policy process in a way that it would not if it were only contributing to individual candidates. Contributing to parties, for example, allows donors the opportunity to underwrite party events,[199] gaining valuable and broad-based acknowledgment as a friend of the cause.

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convictions are,' he said."); Babcock, *supra* note 160, at A10 ("[P]eople respond because they don't want to say no to someone they know who solicits them.").

[196] Young, *supra* 72, at 1B ("Another Nevadan giving to both sides was former U.S. senator and ambassador Chic Hecht. Hecht, a Republican, said he and his wife Gail gave $2,000 apiece to Kerry because the Massachusetts senator 'saved my life' by applying the Heimlich maneuver when the Nevadan choked on fruit in a U.S. Senate dining room in 1988. 'I'm a good friend of President Bush and a good friend of John Kerry,' Hecht said. 'We thought this was the only fair way.'").

[197] *See*, *e.g.*, Carter, *supra* note 62 ("Asked about his support for both Hosterman and her opponent, Ayala, Molinaro dismissed a suggestion that he's hedging his bets. 'Jennifer and Kay are both good people to be the mayor, and they have [campaign] expenses,' Molinaro said. 'We just feel we should help them along to get good people in office.'").

[198] Bauer E-mail, *supra* note 137.

[199] *See*, *e.g.*, WorldCom's underwriting of a party dinner, Marc J. Ambinder, *Hedging Their Bets: WorldCom Directed Money to Both Democrats and Republicans*, ABC NEWS, June 26, 2002, *at*

Also, donating to parties effectively gives a contributor value on every dollar spent: if Donor Z gives money to competing candidates, only one of them will win. Donor Z's additional outlay in contributing to the losing candidate must thus be recouped in the value of the *ex post* benefits derived from the winner. By contrast, if Donor Z gives money to both party committees, it may gain access and influence with both parties, rather than just the one in control.

B. How Do Donors Hedge Their Bets?

How are donations split? What is the decisional process? Some sort of calculation must be made by the donor in deciding how much to give each side. Sometimes, as we've seen, donors apportion their money equally. This seems the safest bet. But when they do not – and most of the top donors seem to donate different amounts to each side – how do they figure out who gets what?

At base, the amount of a donor's contribution – say, that of Donor Z – may simply be a function of how much they are asked to give. If this is the case, then the differential amount given is *not* an indication that Donor Z values one side over the other – rather, one party or candidate has just solicited more money than their competitor. Donor Z may use other external indicia in deciding how much it will give, as well. If a $50,000 donation to the Democrats confers the same benefits as a $75,000 to the Republicans, then, all else being equal, a bet-hedging donor is likely to give $25,000 less to the former than the latter. A similar possibility is that Donor Z will give enough to each party or candidate as to pass the monetary threshold that triggers receipt of certain benefits – like

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http://www.abcnews.com. And, post-BCRA, national party conventions are one of the only places where donors can contribute an unlimited amount to federal political actors. *See* Part II, *supra*.

the Republicans' Team 100, mentioned earlier.[200] Or Donor Z may gauge the giving behavior of those that have already contributed; giving in the same proportion as those whose expected benefits match Donor Z's, or giving more to one party or candidate than those who Donor Z seeks to outstrip.

Let's assume, however, that the decision to give \$x to one candidate and \$y to another is a purely internal calculation. What might this calculation look like? The perceived benefits of giving to both must be sufficiently preferable to the perceived benefits of giving to only one to justify the additional financial outlay. Put another way, by giving to both sides, the donor is purchasing certainty. If Donor Z knows that it will receive benefits from the winner no matter who the winner is, then it behooves Donor Z to contribute to both sides if the outcome of the race is uncertain. The more uncertain the outcome, the more evenly Donor Z should spread its donations.

The distribution also depends on whether Donor Z has a fixed total sum that it is willing to contribute, or whether its total donation is dependent upon its calculation of the optimal split. That is, if Donor Z's ceiling amount of \$y (see Part III.B, *supra*) is \$50,000, then its preferred *ex post* position must be a) sufficiently certain and/or b) sufficiently desirable to justify splitting this \$50,000 in order to maximize its chances of attaining that position. An equal distribution of its donation, no matter how much it values the *ex post* position, must result in \$25,000 to one candidate and \$25,000 to the other if the outcome is uncertain (and up to \$50,000 to one candidate if the outcome is certain). If, on the other hand, Donor Z plans to spend *at least* \$50,000 on one candidate – and up to \$50,000 on the other candidate – to achieve certainty of *ex post* position, then that position must be sufficiently desirable to justify spending more than \$50,000 in order

[200] Babcock, *supra* note 160.

to attain it. In this case, an equal distribution of Donor Z's total contribution could result in $50,000 going to each candidate (if the outcome is initially uncertain and Donor Z values certainty highly), or $50,000 going only to one candidate (if the outcome is initially certain and/or Donor Z does not value certainty very highly).

While the probability of each side's success factors into the calculation, Donor Z must also take into account the marginal value of each donation. This is true in two ways. First, it may be that there is a threshold amount that a candidate must receive in order to ensure that Donor Z will receive its desired *ex post* benefits. Let's say that Donor Z knows that any contribution under $25,000 will not result in the desired *ex post* benefits, even if the recipient of that contribution is the winner of the election. If Donor Z has only $50,000 to split up between the candidates, it has only two viable choices: it can give between $25,000-$50,000 to one candidate, or it can give $25,000 to each candidate. Any other distribution of the money will result in one candidate receiving at least $1 but less than $25,000, and the money spent on that candidate will be wasted even if he wins. This changes the way Donor Z's valuation of the *ex post* benefit informs its splitting strategy—if the benefit is valued at less than $50,000, there is no point in splitting its donation equally even if each side has a 50 percent chance of winning the election. Donor Z is better served spending $25,000 on one candidate and keeping the rest.

Similarly, marginal value also plays a part to the extent that there is an upper bound to the relationship between donation and expected benefit. Let's say Donor Z has $100,000, and plans to spend at least $50,000 of that money on Candidate A. Assume also that Donor Z would receive no greater benefits from Candidate A by giving

$100,000 than he would by giving $50,000. Donor Z is better served spending its second $50,000 on Candidate B than on Candidate A, even if Candidate B is not likely to win the election. If Donor Z gives $50,000 to each, it secures a positive result no matter the winner. If Donor Z gives $100,000 to Candidate A, it secures no better result from Candidate A than if it had given $50,000, and receives no benefit should Candidate B happen to win. Therefore, dollars $1-$50,000 to Candidate B have greater marginal value than dollars $50,001-$100,000 to Candidate A. Richard Neuborne makes this point regarding free speech and political spending when he says, "even if one agrees that a close correlation exists between speech and the first dollar spent to fund it, or even the thousandth, or ten thousandth dollar, it does not follow that the one-to-one correlation between money and speech holds at the millionth, or ten millionth, or billionth dollar levels."[201] Therefore, whether or not the dollar-to-benefit relationship is linear or asymptotic (and, if the latter, at what point benefits cease to accrue) should inform a donor's calculation of its contribution split.[202]

A final question regarding the apportionment of hedged-bet contributions: How might extreme splits in donations be explained, in which a miniscule amount is given to one side and a large amount to the other? See the donation behavior of the United Auto Workers, mentioned earlier – from 1989-2002, UAW gave 99 percent of its money to Democrats, and only 1 percent to Republicans.[203] Assuming that this disparity is the result of bet-hedging rather than donation-splitting, how is the 1 percent given to the GOP a useful outlay of money? A potential explanation for this appears in the next section.

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[201] Neuborne, *supra* note 4, at 115.
[202] *See* Part III.B, *supra*, for further discussion on this point.

C. When Do Donors Hedge Their Bets?

It seems logical that bet-hedging is more likely in close races. This assumption is supported both by analysis (see Part IV.B) and observation[204] – where the outcome of a race is uncertain, a donor desiring *ex post* benefits will have to spread its money in order to ensure having backed the eventual winner. As Rep. Richard Baker (R-La.) said of the 2004 presidential election, "If you think Kerry is going to win, but you're not sure, you give to both sides."[205] Conversely, there is little reason for a donor to give to multiple candidates in a race that looks to be a landslide, unless the donor wishes to use their support for a doomed candidate as future political capital ("Hey, we supported your guy way back when!").[206] The desire to back only those candidates and parties that have legitimate chances of gaining political power must also explain why bet-hedging is confined to the two major parties (rather than, say, the Greens, the Libertarians, and the Socialists).[207] The propensity of donors to hedge their bets in certain types of elections and not others is fertile ground for future empirical analysis; one such question might be

[203] Top Donors 1989-2002, *supra* note 85.
[204] *See*, *e.g.*, Garcia, *supra* note 61, at B1 ("In a dizzying period stretching from September 2003 to August [2004], lobbyist and land-use lawyer Hal Kantor gave $250 to Kallinger, $150 to Segal, another $250 to Kallinger, and another $350 to Segal -- or $500 each, the maximum amount any single person or company can give to a candidate. . . . And without a clear favorite in the race -- Kallinger served four years in the Florida Legislature, but Segal finished first in the Aug. 31 primary election that whittled a field of four candidates to two -- many of the region's power brokers seem leery of alienating a future county commissioner by backing the wrong one."); Melton, *supra* note 111, at A25 (close House races caused late flurry of giving to apparent winners); Tom Loftus, *Democrats Made Major Donations to State GOP*, LOUISVILLE COURIER-JOURNAL, December 3, 2003, at 1A (quoting top state Democrat that "[b]usinessmen who deal with the state will often hedge their bets in tight elections").
[205] Bill Walsh, *Businesses cover all the bases; Conventional wisdom: Bankroll each party*, TIMES-PICAYUNE (NEW ORLEANS), September 1, 2004, at 11.
[206] *See*, *e.g.*, Stephen F. Huefner, *Term Limits in Legislative Elections: Less Value for Money?*, 79 IND. L. J. 427, 477 (2004) ("In 2000, the Ohio legislature was solidly under Republican control. Campaign supporters in such an environment face greatly diminished prospects that supporting a Democratic candidate will pay off in the long run, either as a result of a change in party control years down the road, or as a minority party legislator nonetheless acquires clout over time. Contributors under term limits therefore have a correspondingly diminished need to hedge their bets for the future by supporting minority candidates. Instead, they may feel an increased need to identify and back a winner early.").
[207] *See* Part III.B, *supra*.

whether bet-hedging is more likely in races with no incumbent candidates. Probably so, since, as already noted, bet-hedging is more rational when the outcome of the race is less certain; because incumbents are almost always heavily favored, there is little point in donors hedging their bets.

More interesting is a question of information: does it matter if the parties or candidates themselves know that a donor is hedging its bets? Is a party likely to treat a donor better if that donor did not give to the other side? And even if parties accept bet-hedging as a typical donor strategy, do they pay attention to the amount they are given relative to their competitor? There is no clear answer to these questions. As mentioned earlier, Republicans have taken steps to preference donors giving GOP candidates greater than 75 percent of their total contributions.[208] Others, like Connecticut Democratic Party Chairman George Jepsen, believe that candidates care more about securing a donor's money for themselves than about worrying whether the donor has also given to their opponent.[209] And there is also some evidence that parties encourage, or at least exploit, the practice of giving to both sides. Witness the testimony of a CEO, as quoted in *McConnell v. FEC*:

> [I]f you're giving a lot of soft money to one side, the other side knows. For many economically-oriented donors, there is a risk in giving to only one side, because the other side may read through FEC reports and have staff or a friendly lobbyist call and indicate that someone with interests before a certain committee has had their contributions to the other side noticed. They'll get a message that basically asks: 'Are you sure you want to be

[208] Allen, *supra* note 92, at A11. It is perhaps more predictable that non-bet-hedging donors have, in the past, been penalized for contributing to the 'wrong' side. *See*, *e.g.*, Bob Cusack, *W. House is blocking Dem donor*, THE HILL, September 16, 2004 ("In 2001, the White House temporarily delayed Tom Scully's nomination to head the Centers for Medicare and Medicaid Services because he contributed to Democrats as well as Republicans. The controversy was short-lived because Scully explained that, as a lobbyist, he needed to give to both sides and that he had personal relationships with the Democrats he contributed to.").
[209] Griffin, *supra* note 58, at 1 (quoting Jepsen saying that "[m]ost candidates have a lot more to worry about than perusing the other guy's list and seeing who donated. . . . If they gave to your opponent, you're at least grateful they gave to you.").

> giving only to one side? Don't you want to have friends on both sides of the aisle?' If your interests are subject to anger from the other side of the aisle, you need to fear that you may suffer a penalty if you don't give. . . . [D]uring the 1990's, it became more and more acceptable to call someone, saying you saw he gave to this person, so he should also give to you or the person's opponent.[210]

Mention of the anonymous campaign finance system proposed by Ian Ayres and Jeremy Bulow is again appropriate here:[211] if recipients of donations did not know who had contributed to them, there would be no way to present an *ex post* reward to those donors who gave to the winning team. There would therefore be no reason to bet-hedge, as only the democratic preferences rationale for campaign contributions would hold sway.

Related is the possible use of donations to signal intensity of donor preferences. Many commentators have remarked on the cardinal nature of campaign contributions;[212] this allows political actors to see how strongly contributors care about particular issues. Votes, by contrast, are binary expressions of preference which bundle the entirety of a political platform into a single valuation. This may provide an explanation for extreme splits in contributions – perhaps giving 99 percent to one side and 1 percent to the other is akin to tipping a penny in a restaurant after receiving awful service.[213] In this case, the donor wants the the recipient of the 99 percent to know how much more highly it values

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[210] 124 S. Ct. at 663 n.47 (quoting from *McConnell v. FEC*, 251 F. Supp. 2d 176, 510 (D.D.C.) (2003)).

[211] Ayres & Bulow, *supra* note 53; *see also* Bruce Ackerman and Ian Ayres, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002).

[212] *See*, *e.g.*, Cain, *supra* note 42, at 127 ("because money is a cardinalized value, individuals and groups can express the intensity of their preferences in a way that the single-valued, equally weighted vote cannot").

[213] In multi-candidate races, donating to all candidates but one could be an effective way of penalizing that candidate by providing each of his opponents with increased opportunity for political speech, regardless of their beliefs. In recent years this kind of donor behavior has been observed in both the 2005 New York mayoral race and the 2004 Miami mayoral race, although in each instance an alternative explanation was given as to why one candidate was snubbed among many. *See* Friedman, *supra* note 75, at 13 (failure to give to one mayoral candidate was "an oversight"); Bierman, *supra* note 169, at B8 (one candidate entered the race later than the others).

them by giving them a benchmark of “anti-preference” by which to compare their own contribution.

V. Regulating Bet-Hedging

A. Can Bet-Hedging Be Regulated?

A normative argument in favor of formal curbs on hedged-bet behavior cannot easily be separated, at least at first, from an inquiry into the constitutionality of such regulation. This is not to say that if the regulation of bet-hedging is constitutional it is normatively desirable. Indeed, there is much government activity that is permissible but unwise. But in this instance, the clearest thing to be said against bet-hedging is that it it lends itself, as I have argued, to a reasonable inference that those who hedge their bets do so with the expectation of receiving value for their dollars after the fact. To the extent that this looks from the outside like political influence being exchanged for money, bet-hedging behavior carries with it the appearance of corruption.[214] And the appearance of corruption, even with nothing more, may constitutionally be regulated. As the *Buckley* Court stated, “Congress could legitimately conclude that the avoidance of the appearance of improper influence is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.”[215]

This is important because it is unclear whether bet-hedging has anything other than its unsavory appearance to recommend it for regulation. There is no concrete evidence that explicit *quid pro quos* exist with hedged-bet donations any more than with donations to single candidates or parties (although they may, in both circumstances), and the increased access and facetime that political contributions will buy, while arguably

[214] *See* 124 S. Ct. at 663.

undesirable, are probably not sufficiently compelling by themselves to support regulation as a constitutional matter.[216] The Court's definition of corruption has been drawn broadly, but not so broadly as to encompass mere access to candidates and officeholders. The appearance of corruption, however, is a compelling state interest on its own, and one which may take the sale of political access for money into account:

> To be sure, mere favoritism or opportunity for influence alone is insufficient to justify regulation. As the record demonstrates, it is the manner in which parties have *sold* access to federal candidates and officeholders that has given rise to the appearance of undue influence. Implicit (and, as the record shows, sometimes explicit) in the sale of access is the suggestion that money buys influence. It is no surprise then that purchasers of such access unabashedly admit that they are seeking to purchase just such influence. It was not unwarranted for Congress to conclude that the selling of access gives rise to the appearance of corruption.[217]

The reasons that the Court finds the appearance of corruption to be a compelling state interest are the same reasons that regulating bet-hedging *because* of its appearance of corruption would be a normatively desirable thing to do – notably, the prevention of "the eroding of public confidence in the electoral process" and the protection of "public participation in political debate."[218] "Take away Congress' authority to regulate the appearance of undue influence," the *McConnell* Court warns, "and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."[219] Favor-seeking, then, is undesirable societally for

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[215] 424 U.S. at 26-27 (internal quotation marks omitted) (unfortunate capitalization in original).
[216] *Cf.* Ayres & Bulow, *supra* note 53, at 844 at n.21 (quoting then-Attorney General Janet Reno regarding the inapplicability of bribery, extortion, and patronage statutes "to providing access in exchange for political contributions").
[217] 124 S. Ct. at 666 (emphasis in original) (citation omitted). *See also* 124 S.Ct. at 549 (noting that bet-hedging practices "corroborate evidence indicating that many corporate contributions were motivated by a desire of access to candidates and a fear of being placed at a disadvantage in the legislative process relative to other contributors, rather than by ideological support for the candidates and parties.").
[218] *Id.* at 656.
[219] 124 S. Ct. at 660-61 (citation omitted) (quoting Nixon v. Shrink Missouri PAC, 528 U.S. 377 (2000)).

the same reasons Congress's desire to prevent it is given such weight in *Buckley* and *McConnell*: the existence of political quid pro quos, both in fact and in perception, erodes the legitimacy of our representative democracy, and raises disturbing questions of money-driven influence. Despite this, commentators have suggested, often persuasively, that regulating on the basis of the appearance of corruption is an unworkable standard, and one which goes too far in corralling legitimate and harmless political behavior.[220] It is certainly possible that remediation of the appearance of corruption engendered by bet-hedging is not a good enough reason to pass a law forbidding the practice; I consider this below. As a constitutional matter, though, I have little doubt that, were Congress or a state legislature to prohibit donations to competing candidates or competing parties within the same election cycle, the Supreme Court would uphold the constitutionality of the legislation on appearance of corruption grounds, especially given the Court's own dicta on the subject.[221] Of course, the Court could nevertheless strike down the legislation as not being sufficiently closely drawn, a danger which, as I discuss *infra*, might be particularly difficult to avoid when attempting to regulate bet-hedging.

The Court's *McConnell* decision must surely stand as an indication that the constitutionality of political contribution limits is alive and well, so long as those limits can be tied to a compelling state interest. One could argue, however, that any proposed regulation of bet-hedging would necessarily go further than did the legislation at issue in

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[220] *See*, *e.g.*, 124 S. Ct. at 731, 740-41 (opining that effective bribery laws would be sufficient to eliminate the appearance of corruption, and arguing that the appearance of corruption standard would allow Congress to pursue "outright regulation of the press"); La Pierre, *supra* note 6, at 1103 (the burden of justifying limits on contributions should be on the government, because "[a]ppearances are in the eye of the beholder, and an appearance of corruption may arise whenever an official votes or takes other actions consistent with the position of a contributor."); Bauer, *supra* note 5, at 744-48; Ronald M. Levin, *Fighting the Appearance of Corruption*, 6 WASH. U. J. L. & POL'Y 171, 174 (2001) (characterizing the appearance of corruption standard as "vague and subjective," and proposing a new standard banning conduct "that tends toward corruption" (emphasis omitted)).

McConnell. BCRA merely subjects all donations to national party committees to contribution limits under FECA; it doesn't actually prohibit a contributor from giving to a particular candidate or party. By contrast, regulating the practice of bet-hedging would more severely constrain the freedom of donors to give to whoever they want – a donor that had contributed to Mr. Dem would be forbidden from contributing to Mr. Dem's competitor, Mrs. Gop, in the same election cycle. Such a blanket restriction of free speech and associational rights goes beyond what the Court has so far sanctioned in its campaign finance jurisprudence.

There is some precedent for non-monetary limitations on donor freedom; the long-standing statutory prohibition on direct political contributions by corporations and unions comes immediately to mind. Further, although denial of certiorari should not be taken as a comment on the merits of the lower court ruling, the Supreme Court has in the past few years declined to hear challenges to state supreme court decisions upholding legislation in which certain classes of donors (out-of-state residents, in Alaska, and the casino industry, in Louisiana) were prohibited from giving anything at all.[222] And the fairly small scope of behavior that would be regulated by a ban on bet-hedging may be relevant as well. As the *McConnell* Court noted, "not every minor restriction on parties' otherwise unrestrained ability to associate is of constitutional dimension."[223]

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[221] 124 S. Ct. at 663.
[222] *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (1999), *cert. denied*, 528 U.S. 1153 (2000); *Casino Ass'n of Louisiana v. Louisiana*, 820 So.2d 494 (2002), *cert. denied*, 537 U.S. 1226 (2003). For critical commentary on these cases, see Andrew Hyman, *Alaska Gives Ninth Circuit the Cold Shoulder: Conflicts in Campaign Finance Jurisprudence*, 152 U. PA. L. REV. 1453 (2004) (note) (comparing Alaska decision to conflicting case in the Ninth Circuit); Scott Mason, *Casino Association of Louisiana v. State: The Louisiana Supreme Court's Retreat from First Amendment Protection for Campaign Contributors*, 48 LOY. L. REV. 795 (2002) (note) (arguing that Louisiana Supreme Court should have held statute unconstitutional). For a list of other state and federal court decisions holding that a complete prohibition on campaign contributions from particularized interests are constitutional under *Buckley*, see 820 So.2d at 503.
[223] 124 S. Ct. at 676.

B. Should Bet-Hedging Be Regulated?

In this paper, I have argued that bet-hedging, more than campaign contributions generally, suggests an expectation of influence on the part of the donor. Indeed, bet-hedging is almost paradigmatic in its elicitation of world-weary cynicism. It has become a truism of campaign finance that big donors will give to both sides in order to ensure that they get in bed with the eventual winner. But, constitutionality aside, is this a good enough reason to target bet-hedging for regulation? As Jonathan Krasno and Frank Sorauf state, "citizens skeptical about the influence of large donations can find agreement from majorities in Congress, from donors, from lobbyists, from reporters and editorial writers, and from academics."[224] If the influence of money in politics is a problem, it is a problem in many more respects than donors giving to competing sides. And, comparatively, the cynicism evoked by bet-hedging is peculiarly free of outrage; people may agree that it is not ideal, but that hedged-bet behavior 'appears' corrupt is itself hardly responsible for all, or even many, of the ills of our campaign finance system.

So can a strong normative case for regulation be made without leaning too much on the "vague and subjective" argument of the appearance of corruption?[225] This is a tricky question; most charges that can be levelled against bet-hedging apply equally to all forms of private campaign contributions, and some that hit their mark for campaign contributions in general, such as "the corrosive and distorting effects of immense aggregations of wealth . . . that have little or no correlation to the public's support for [a] corporation's political ideas,"[226] are less clearcut when it comes to donations that neutralize each other by being given to competing candidates or parties, and that are

[224] Krasno & Sorauf, *supra* note 6, at 132-33.
[225] Levin, *supra* note 220, at 174.

forwarding a political idea not supported by the public only insofar as the idea itself is shared by the Democrats and Republicans receiving the contributions. By the same token, however, bet-hedging could be said to be more pernicious than other forms of donation precisely *because* it isn't, and can't be, rationally justified by reference to democratic preferences or ideological sorting – to the extent opposing sides disagree, a donor is not forwarding its own policy views if it gives to both of them. And to the extent the two sides agree, the donor arguably accrues just as much of a benefit if it saves its money, because its preferred policies will be forwarded regardless.

Another response that distinguishes hedged-bet behavior from typical contributions and argues that the former should be prohibited even if the latter should not is the notion that neither donor nor recipient, at base, really *want* to be involved in the process of bet-hedging. In effect, this argument posits a sort of prisoners' dilemma: donors would rather not spend the money, candidates and officeholders would rather not stump for it, and both sides only persist in the practice out of fear that they will find themselves in competitive disadvantage to other donors and other candidates and officeholders if they do not.[227] Under this conception, forced cessation of bet-hedging behavior would redound to the mutual benefit of all.[228] Burt Neuborne's observation that candidates' "own best interests would almost certainly be served by mutually observed limits on campaign spending, but . . . unilateral action is fatal and a privately negotiated solution almost impossible to achieve" is equally relevant to candidates' ceaseless

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[226] Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 660 (1990).
[227] *Cf.* Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1391 n.9 (describing the prisoners' dilemma faced by candidates who would rather not spend money on political advertising, but decide whether to do so "without knowing what other candidates will do").
[228] *But see* Birnbaum, *supra* note 28 (observing that the ability to raise money is viewed by many candidates as a positive characteristic).

solicitation of campaign contributions;[229] a former Congressman once told me that fully half of his waking life while in office was spent on the phone trying to reach his daily contribution goal. And recall the testimony of the CEO that, because both parties know when a donor has given to one and not the other, and will often specifically solicit money from donors that have only made unilateral contributions, "there is a risk in giving to only one side."[230] In these respects, neither the act of giving nor the act of fundraising, especially in regard to hedged-bet donations, can be seen as wholly voluntary acts.[231] Freeing both donors and politicians from the time- and money-consuming cycle of contributions may be as impossible as candidates agreeing to end the arms race of campaign spending, but imposing a prohibition on donations which, by their very nature, cancel each other out anyway is a legitimate reason to favor regulation of bet-hedging.[232]

The conclusion must be, I think, that there are good but not overwhelming arguments for prohibiting hedged-bet behavior. Moreover, none of the bases for opposing campaign regulation in general resonate with especial strength when applied to contributions to competing candidates or parties. Some, like the ideological sorting theory, are, if anything, less persuasive than usual.[233] It is reasonable to oppose a regulatory response to bet-hedging on the grounds that it limits donor freedom *qua* donor freedom, but this freedom is not an absolute, and the value of eliminating such blatantly favor-seeking behavior as bet-hedging from the campaign finance framework is arguably

[229] Neuborne, *supra* note 46, at 1067 (1999).
[230] 124 S. Ct. at 663 n.47 (quoting from *McConnell v. FEC*, 251 F. Supp. 2d 176, 510 (D.D.C.) (2003)).
[231] *Cf.* Burt Neuborne, *Is Money Different?*, 77 TEX. L. REV. 1609, 1617 (1999) (arguing that the lack of a government-imposed campaign spending cap hinders the autonomy of candidates and officeholders).
[232] It may also be said that prohibiting donors from giving to directly competing candidates or parties is, comparatively, an extremely minimal burden on their speech and associative rights. Under such a regulatory scheme, the donor would still be at liberty to donate to as many different candidates (in different parties!) as it liked, so long as they were not running against each other.
[233] *See generally* Bronars & Lott, *supra* note 12.

not insignificant. Finally, the civic patriotism argument – that donors who give to both sides are contributing to a vibrant democracy and making the democratic political process itself more fully possible – has some strength but, as an initial matter at least, is not convincing: it is a striking proposition indeed, and one which requires evidentiary support, that were the total contributions of all bet-hedging donors roughly halved,[234] our system of democratic governance would ultimately be very much worse off.

Nevertheless, every act of regulation has unexpected costs and unintended consequences,[235] and there is reason to think that regulating bet-hedging would create more problems than it solves. First, it is unclear that a prohibition on giving to competing candidates or parties would actually deter hedged-bet behavior. There is a potential hydraulic effect, providing incentive for donors to redouble their presence in Washington D.C. (or, if the bet-hedging prohibition is statewide, in the state capital) through other means, such as lobbying.[236] Second, although the effects of bet-hedging regulation on donor behavior can only be inferred, it seems likely that a ban on bet-hedging, if effective as a deterrent, would either force large donors to choose a side (or sides, when giving in multiple races) at which to direct the whole of their contributions, or result in them leaving the campaign finance playing field entirely. Both of these scenarios could result in an outcome more normatively undesirable than bet-hedging itself.

For the first, donors could either continue giving relative to their historic levels (that is, the $6.5 million that Goldman Sachs has split evenly between the Democrats and

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[234] This is an intentional over-simplification; as we shall see, the likely effects of a ban on bet-hedging are far less clear than this.

[235] *See generally* Sunstein, *supra* note 227; Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407 (1990); Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998) (surveying theories on the relative values and limitations of direct and indirect government regulatory responses).

[236] *Cf.* Issacharoff & Karlan, *supra* note 13.

Republicans in the 2004 cycle[237] would all still be contributed in a post-regulation regime, just in ways that do not constitute bet-hedging), or, because they no longer have to give to both sides in a particular race, drastically lower their total giving (so Goldman Sachs would save around $3 million),[238] essentially halving the overall contributions to each side. If donors continued to give as much money as they do now, and simply targeted it in more concentrated doses, this would conceivably trigger a reaction on the part of candidates and parties competing for the larger slices of the pie. Competing candidates might be drawn together centripetally in order to maximize their appeal to the widest swath of donors, if bet-hedging were prohibited, or they might seek to separate themselves and stake out newly distinct policy positions to make themselves the clear choice of discerning donors. If, instead, contributors lowered their total amount of giving, this would also force candidates and parties to adjust, either by spending less money or by seeking alternative sources of campaign funds. The latter may be more feasible than ever, now that Howard Dean has revitalized grassroots fundraising.[239]

Alternatively, regulation of bet-hedging might push some corporate donors out of the practice of giving money altogether. While it is unlikely that a desire to be seen as non-ideological drives institutional donors to hedge their bets in the first place,[240] a reflexive fear of being seen as *too* ideological (or even an inability to come to a consensus among its officers regarding which candidates and parties to support) might cause large donors who are forbidden from bet-hedging to severely cut their level of

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[237] Top Donors 2003-2004, *supra* note 85.
[238] Thus going some way towards satisfying Professor Sunstein's "simple interest that enormous sums of money are devoted to something other than political advertising." Sunstein, *supra* note 227, at 1391 n.9.
[239] Following this reasoning, it is possible that through an attenuated series of events a ban on bet-hedging would lead to greater popular participation in politics, as more candidates and parties looked toward, and catered to, smaller donors for financial support.
[240] *See* Part IV.B, *supra*.

campaign contributions, especially if, as noted above, there are other avenues (like lobbying) by which they can try to gain access and influence. Institutional donors might simply play it safe, weighing the marginal value of contributing to one side in an uncertain election as less than the benefit the donors could expect to receive if their guy were to win, and withdraw entirely. If this happens, fears of undercutting or destabilizing a democratic process that, for good or ill, is powered by large campaign contributions start to become justified. As a counterpoint, it is perhaps useful to note that BCRA's sweeping restrictions on sizeable donations have not appreciably, as yet, contributed to the downfall of our political system.

A prohibition on bet-hedging would likely remove some money from politics – perhaps a great deal of money. Say a Donor Z gives $x to Candidate A and $y to competing Candidate B, where both amounts are the product of some presumptively rational calculus in which the donor takes into account the likelihood that each candidate will win, the amount (and proportion) given to the candidates by other donors, the ideological resonance of each candidate with the donor (on the one hand, a resonant candidate will be more likely to pursue policies favorable to the donor without a large contribution; on the other hand, giving a lot of money to a non-resonant candidate might be utterly futile), and so on. Now say bet-hedging is prohibited. The donor can 1) give money to one of the two candidates; 2) give money to neither of the two candidates; or 3) violate the law and give money to both of the candidates. Assuming decent enforcement mechanisms, let's discount the likelihood of 3). Even if the Donor Z chooses 1), it is extremely unlikely to continue to donate $x+$y. (Although the closer the election, the more likely it would be that the donor would give as much in a non-bet-hedging world as it would in a bet-hedging world.) The calculus is completely different. It's hardly even clear that the donor would necessarily give $x or $y to the candidate; the revised donation amount might be smaller than either.

The framing of bet-hedging regulation is also problematic. Specifically, it is difficult to word the restrictions so that they will eliminate obvious loopholes that would allow the practice of bet-hedging to continue while remaining sufficiently closely drawn as to withstand constitutional scrutiny. As an example, a statute that treats all employees of Donor Z as a single entity for the purposes of regulating bet-hedging – so that Joe in Accounting couldn't give to the DNC if Amy in Personnel had already given to the RNC – is almost ridiculously untenable, and would surely be struck down by the courts if it were, by some fluke, passed into law. But many alternative formulations of the statute would allow donors, if they chose, to bundle employee contributions in such a way as to continue, effectively, to give money to both sides.[241] Perhaps a prohibition on corporate officers, their spouses, and corporate PACs would be narrowly drawn enough to prevent overbreadth while regulating most or all hedged-bet behavior.

VI. Conclusion

It may be that a regulatory cure for bet-hedging is worse than the disease itself. But this does not mean that the practice of giving to competing candidates or parties is necessarily benign, or that the subject does not warrant greater attention and analysis. In *Nixon v. Shrink Missouri PAC*, the Court stated that:

> In speaking [in *Buckley v. Valeo*] of "improper influence" and "opportunities for abuse" in addition to "quid pro quo arrangements," we recognized a concern not confined to bribery of public officials, but

[241] *See* The Center for Responsive Politics, "Bundling," *at* http://www.opensecrets.org/pubs/law_bagtricks/loop5.asp (last visited August 16, 2004).

> extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind our recognition that Congress could constitutionally address the power of money "to influence governmental action" in ways "less blatant and specific" than bribery.

Donor bet-hedging, in appearing to distill the act of contributing money to a simple calculus of covering one's own bases because one has the resources to do so, fits squarely within the sort of behavior that has been looked on with opprobrium by scholars, judges, legislators, and the public alike. Unless and until it is impractical or impossible, as it would be under a system of anonymous giving,[242] for a well-heeled donor to achieve recognition – and through it increased access and a maximized chance at *ex post* influence – simply by spreading its money amongst all legitimate candidates for a political office, bet-hedging will be endemic to our system of campaign finance. If we do not wish to regulate it, we should at least attempt to understand it.

[242] *See generally* Ayres & Bulow, *supra* note 53.