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The Finger in the Dike: Campaign Finance Regulation After *McConnell*

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I. INTRODUCTION

In *McConnell v. FEC*,¹ the Supreme Court largely rejected the plaintiff's claims that the Bipartisan Campaign Reform Act of 2002 (BCRA),² commonly known as McCain-Feingold, violated the First Amendment. In deferring to the congressional judgment declaring additional restrictions on the financing of campaigns for federal office necessary, the Court read its own First Amendment case law narrowly, but adhered to the fundamentals laid down in *Buckley v. Valeo*,³ its landmark precedent from 1976. In so doing, the Court once again left federal campaign finance law as a hodge-podge of limitations and loopholes. Moreover, a general lack of enthusiasm from Congress, the President, the courts, and the Federal Election Commission (FEC) assures the continued influence of big money in the national political scene.

II. HISTORY

In *McConnell*, the Court recited the history of campaign finance regulation as beginning in 1907 with the Tillman Act, which banned corporate contributions in federal elections.⁴ The modern era of campaign finance

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1. 540 U.S. 93 (2003).

2. Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 and 47 U.S.C.).

3. 424 U.S. 1 (1976).

4. *McConnell*, 540 U.S. at 115 (discussing early Congressional efforts to prohibit corporate campaign contributions); see also Hoover Institution, *Important Dates: Federal Campaign Finance Legislation*

regulation essentially began in 1971, when the Federal Election Campaign Act (FECA) replaced the concededly impotent Federal Corrupt Practices Act (FCPA).⁵ FECA created a comprehensive regulatory framework applicable to federal financing of primaries, runoff, general elections, and conventions. FECA required full and timely disclosure of contributions in excess of \$100 and expenditures in excess of \$1,000, set ceilings on expenditures for media advertising, and established limits on contributions from candidates and their families.⁶ The statute also limited corporate and union spending to political action committees (PACs) established pursuant to strict limitations.⁷ The Clerk of the House, the Secretary of the Senate, and the Comptroller General of the United States General Accounting Office (GAO) monitored compliance with FECA. The Justice Department was responsible for prosecuting violations of the law referred to overseeing officials.⁸ That same year, Congress also enacted the Revenue Act of 1971 which created a system of public finance for

[hereinafter *Important Dates*] (presenting chronology of campaign finance legislation), at <http://www.campaignfinance.org/history/financing1.html> (last visited Feb. 18, 2006). In fact, the history of campaign finance reform dates back to the Civil War. The Naval Appropriations Bill of 1867 prohibited government officers and employees from soliciting contributions from naval yard workers. The Civil Service Reform Act of 1883 extended the prohibition against solicitation to all federal civil service workers. The Tillman Act of 1907 prohibited corporations and nationally chartered banks from making direct financial contributions to federal candidates. The Federal Corrupt Practices Act (FCPA) of 1910 established disclosure requirements for U.S. House candidates. In 1911, Congress extended the act to cover U.S. Senate candidates and established expenditure limits for congressional campaigns. The Federal Corrupt Practices Act of 1925 codified and revised previous expenditure limits and disclosure legislation. In 1940, the Hatch Act Amendments imposed limits of \$5000 annually on individual contributions to a federal candidate or political committee and barred contributions to federal candidates from individuals and businesses working for the federal government. The Hatch Act also made campaign finance legislation applicable to both primary and general elections. In 1943, the Smith-Connally Act extended the prohibition on contributions to federal candidates to unions. The Taft-Hartley Act, enacted in 1947, reiterated the ban on contributions to federal candidates from unions, corporations, and interstate banks, in primaries as well as general elections. See generally Hoover Institution, *Important Dates*, supra (summarizing history of campaign finance-related legislation).

5. See Federal Election Campaign Act (FECA) of 1971, Pub. L. No. 102-408, 86 Stat. 3 (codified as amended at 2 U.S.C. § 431-55 (2000 & Supp. III 2003)). As early as 1932, political scientist Louise Overacker—a pioneer in the field of campaign finance research—demonstrated that the FCPA was not mitigating the influence of wealth in politics by revealing that nearly seventy percent of the disclosed contributions to candidates of both major parties were in the amount of \$1000 or higher. See generally LOUISE OVERACKER, *MONEY IN ELECTIONS* (1932) (demonstrating corrupt influence of money on elections and criticizing legislative efforts to combat corruption).

6. See Campaign Legal Center, *The Campaign Finance Guide: The Federal Election Campaign Act, A New Era of Reform* [hereinafter *A New Era*] (describing reforms implemented through FECA), at <http://www.campaignfinanceguide.org/guide-34.html> (last visited Feb. 26, 2006).

7. See Federal Election Commission, *Federal Election Campaign Laws: A Short History* [hereinafter *A Short History*] (discussing fundamental changes to campaign finance law implemented through FECA), at <https://www.fec.gov/info/appfour.htm> (last visited Feb. 25, 2006). PAC stands for political action committee. It includes separate segregated funds established by corporations and labor unions and funded from their own constituents. The term is also applied to issue organizations that raise monies from their membership to further the political goals of the organization. If they seek to specifically influence a campaign for federal office, they must register with the FEC. See 11 C.F.R. § 100.5 (2006) (defining political action committee).

8. Federal Election Commission, *A Short History*, supra note 7.

eligible presidential candidates through a voluntary one-dollar check-off on federal income tax returns.⁹

Despite FECA's strict disclosure provisions and new media spending limits, campaign spending continued to rapidly increase. In 1972, campaign spending rose to \$425 million. The Watergate scandal and other campaign finance abuses in the 1972 election spurred Congress to overhaul FECA and establish a more comprehensive regulatory regime.¹⁰

The FECA Amendments of 1974 continued full public financing for presidential nominating conventions, primaries, and general elections.¹¹ The amendments set spending limits for both presidential and congressional primaries and general elections.¹² Additionally, they limited contributions to candidates as follows: \$1000 from each individual and \$5000 from each political committee per election, defined as including both a general and a primary.¹³ Individuals were further limited to an annual federal contribution of \$25,000 per year, as were PACs not qualifying for multi-candidate committee status.¹⁴ Political committees that receive contributions had to register with the FEC and report contribution amounts.¹⁵ Independent expenditures on behalf of a federal candidate were unlimited, although they had to be disclosed.¹⁶

Section 441b of FECA prohibited national banks, corporations, and labor unions from making contributions out of their general treasury funds.¹⁷ Most

9. See Federal Election Commission, *A Short History*, supra note 9 (discussing early efforts to publicly finance federal elections).

10. Campaign Legal Center, *A New Era*, supra note 6.

11. FECA Amendments of 1974, Pub. L. No. 93-443, § 403, 88 Stat. 1263, 1291-93 (codified as amended at 2 U.S.C. §§ 9001-9013 (2000)); see also *A Short History*, supra note 7 (presenting overview of expanded public financing provisions).

12. FECA Amendments of 1974, Pub. L. No. 93-443, § 101(c), 88 Stat. 1263, 1264 (codified as amended at 2 U.S.C. § 441a(b), (d) (2000 & Supp. III 2003)).

13. *Id.* § 101(b), 88 Stat. at 1263-64 (codified as amended at 2 U.S.C. § 441a(a) (Supp. III 2003)); see also 2 U.S.C. § 431(1)(A) (2000 & Supp. III 2003) (defining "election").

14. FECA Amendments of 1974, Pub. L. No. 93-443, § 101(b), 88 Stat. 1263, 1263 (codified as amended at 2 U.S.C. § 441a(a)(3) (Supp. III 2003)); see also 11 C.F.R. § 100.5(e)(3) (2006) (establishing qualifications for multi-candidate committee status). A committee must make three showings to qualify as a multi-candidate committee. Specifically, it must prove that it "(i) has been registered with the Commission or Secretary of the Senate for at least 6 months; (ii) has received contributions for Federal elections from more than 50 persons; and (iii) (except for any State political party organization) has made contributions to 5 or more Federal candidates." 11 C.F.R. § 100.5(e)(3) (2006).

15. See FECA Amendments of 1974, Pub. L. No. 93-443, § 201, 88 Stat. 1263, 1272 (codified as amended at 2 U.S.C. § 431(4) (2000)) (defining political committee to which reporting and disclosure requirements apply); *id.* § 204, 88 Stat. at 1276-78 (codified as amended at 2 U.S.C. § 434 (2000 & Supp. III 2003)) (establishing political committee reporting and disclosure requirements).

16. See FECA Amendments of 1974, Pub. L. No. 93-443, § 204, 88 Stat. 1263, 1276-78 (codified as amended at 2 U.S.C. § 434 (2000)) (establishing content and timing reports PACs must file with FEC).

17. See 2 U.S.C. § 441b(a) (2000) (maintaining contribution prohibition introduced through 1974 amendments). FECA exempted the following from the ban: contributions of nonprofit issue advocacy groups, see 11 C.F.R. § 114.10 (2006); news and commentary by mass media, 2 U.S.C. § 431(9)(B)(i) (2000); and internal communications to the entity's own constituents, see 11 C.F.R. § 114.3(9a) (2006). Unions and corporations could also create separate segregated funds from which contributions can be made. See 2 U.S.C. §

importantly, the statute corrected a decades-old defect in campaign finance law by finally establishing an independent agency to administer the system. The newly created agency, the FEC, would have six commissioners, four of which would be appointed by Congress. The FEC would be responsible for enforcing federal campaign finance law.¹⁸

Within weeks of the enactment of the FECA amendments, an ideologically varied group of plaintiffs sought their invalidation. Included in this group were conservative New York Senator James Buckley, liberal Wisconsin Senator Eugene McCarthy, the American Civil Liberties Union, the American Conservative Union, and other smaller groups.¹⁹ On January 30, 1976, in a long per curiam opinion,²⁰ the Court upheld the limitations on contributions but invalidated the limitations on expenditures as direct limitations on speech in contravention to the First Amendment.²¹

Buckley was essentially the synthesized product of three decisions the Court made concerning the constitutional status of political money.²² First, the Court decided to subject restrictions on political money to the most rigorous standard of First Amendment review. Second, the Court elected to bifurcate political money into contributions and expenditures.²³ Third, the Court decided to accept only certain governmental justifications for the regulation of political money.²⁴

The Court began its analysis by suggesting FECA's "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities."²⁵ Thus, the Court opted to regard political spending as pure speech despite the availability of more moderate First Amendment doctrines that provided varying degrees of analytical latitude. Most notably,

441b(b)(2)(C) (Supp. III 2003).

18. See FECA Amendments of 1974, Pub. L. No. 93-443, § 208, 88 Stat. 1263, 1280-88 (codified as amended at 2 U.S.C. § 437c (2000)) (establishing structure, duties, and responsibilities of FEC).

19. The *Buckley* lawsuit produced an intriguing set of antagonisms and alliances. Senator Buckley was opposed by his own party's Senate leadership; Minority Leader Senator Hugh Scott was one of FECA's leading Congressional proponents. Scott, a Pennsylvania Republican, submitted an amicus brief supporting the amendments and retained Archibald Cox to present his arguments. This filing created the single-most bizarre set of bedfellows in the entire case. By writing this brief, Cox aligned himself with the Ford administration, which felt obligated to defend FECA despite President Ford's unseemly distaste for campaign finance regulation. Thus, Cox became a legal teammate of the Ford administration's Solicitor General, none other than Robert Bork. Earlier, Bork had notoriously fired Cox in the "Saturday Night Massacre" after two of Bork's Justice Department superiors had resigned in protest rather than conduct the firings themselves.

20. See generally Richard Hasen, *The Untold Drafting History of Buckley v. Valeo*, 2 ELECTION L.J. 241 (2003) (providing account of writing of *Buckley* opinion).

21. See generally *Buckley v. Valeo*, 424 U.S. 1 (1976) (considering constitutionality of FECA).

22. See *id.* at 14-23 (concluding contribution and expenditure limitations impose restrictions on core political speech).

23. See *id.* at 23-38 (considering constitutionality of contribution limitations); see also *id.* at 38-59 (evaluating constitutionality of expenditure limitations).

24. See *id.* at 24-27 (delineating acceptable justifications for campaign finance reform legislation).

25. *Buckley*, 424 U.S. at 14.

the Court declined to apply the commercial speech doctrine, the time place and manner regulation approach, or the "symbolic speech" approach they had announced in *United States v. O'Brien*.²⁶ The Court's orthodoxy on political money had been foreshadowed by Justice Stewart's statement at oral argument: "We are talking about speech, money is speech and speech is money, whether it is buying television or radio time or newspaper advertising, or even buying pencils and paper and microphones."²⁷ Justice Stewart's line of inquiry subsequently found its way into the per curiam opinion:

The expenditure of money simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.²⁸

Buckley represents the first Supreme Court evaluation of a serious government attempt to regulate campaign finance. Legislation preceding FECA was limply written and rarely enforced. Had the Court adopted symbolic speech or another less rigid doctrine as the standard of review for laws burdening political money, it would have placed both Congress and the Court itself on a path of flexibility in this area. Instead, the Court committed itself to a course that would lock in doctrine and strictly circumscribe all campaign finance reform efforts in the future.

No less important was the Court's conclusion that campaign contributions did not necessarily raise identical constitutional issues as campaign expenditures. The per curiam drew a distinction between expenditure limitations, which limit "the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience,"²⁹ and contributions, which serve as a "general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."³⁰ Following this logic, a ceiling on candidate spending would reduce the amount of political speech that could be produced and made available to the polity. A ceiling on the size of a donation to a candidate, in comparison, had no comparable effect:

26. 391 U.S. 367 (1968).

27. The Oyez Project, Oral Argument Recording, *Buckley v. Valeo*, No. 75-436, Nov. 10, 1975, available at <http://www.oyez.org/oyez/resource/case/57/audiorecources>.

28. *Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

29. *Id.* at 19.

30. *Id.* at 21.

The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.³¹

This sudden embrace of the "symbolic" nature of political money—an approach it had rejected earlier in the opinion—illuminated the Court's thinking. The Court opted against "O'Brienizing" expenditures because it considered the symbolic angle a sham; capping the amount of money to be expended on producing speech would necessarily reduce the amount of speech to be produced. Capping the amount of money to be contributed to a candidate, however, would do so only indirectly; thus contributions could be regulated while expenditures could not.³²

Distinguishing political money into contributions and expenditures made perfect sense in light of the Court's third crucial decision—its willingness to accept only the prevention of actual corruption and the appearance of corruption as constitutional justifications for campaign finance regulation. The drafters of the FECA amendments had invoked a trio of justifications: preventing corruption, leveling the political playing field between rich and poor, and reining in the skyrocketing costs of campaigns.³³ The Court,

31. *Id.* at 21 (footnote omitted).

32. *But see Buckley*, 424 U.S. at 241-46 (Burger, C.J., concurring in part and dissenting in part) (rejecting the Court's rationale for invalidating expenditure limitations but upholding contribution limitations). Writing separately, Chief Justice Burger questioned the utility of the distinction: "For me, contributions and expenditures are two sides of the same First Amendment coin." *Id.* at 241. He further insisted,

The Court's attempt to distinguish the communication inherent in political contributions from the speech aspects of political expenditures simply "will not wash." We do little but engage in word games unless we recognize that people—candidates and contributors—spend money on political activity because they wish to communicate ideas, and their constitutional interest in doing so is precisely the same whether they or someone else utters the words.

Id. at 244.

Justice White shared Chief Justice Burger's skepticism about the utility of the contributions-expenditures distinction.

It would make little sense to me, and apparently made none to Congress, to limit the amounts an individual may give to a candidate or spend with his approval but fail to limit the amounts that could be spent on his behalf. Yet the Court permits the former while striking down the latter limitation.

Id. at 26 (White, J., concurring in part and dissenting in part).

33. *Id.* at 26-27.

however, brusquely rejected the latter two arguments. Leveling was unacceptable justification because "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."³⁴ The cost argument was rejected because of its counter intuitiveness in a capitalist system that stresses individualist market corrections over statist controls.

[T]he mere growth in the cost of federal elections campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.³⁵

The Court thus failed to recognize the significance of Congress' determination that the people lose control of political debate when spiraling costs of basic campaign function inhibit all by the independently wealthy from running for office. Furthermore, the Court pointedly declined to adopt a broad definition of "corruption" which might include increased access to the decision-maker or the decision-making process. In order to stand as an actionable justification for restricting campaign contributions, corruption could only mean a quid pro quo: a campaign gift made with a tacit agreement that the candidate-recipient would subsequently deliver something in exchange for the gift.³⁶ A

34. *Id.* at 48-49. Justice Breyer would later point out, however, "[t]he Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000). In support of this proposition, Justice Breyer cited equal debate rules in Congress and ballot access rules. *Id.* See generally Martin H. Redish & Kirk J. Kaluhis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW U.L. REV. 1083 (1999) (presenting comprehensive defense of leveling or equality argument).

35. *Buckley v. Valeo*, 424 U.S. 1, 57 (1975). In later cases, however, the Court would express heightened wariness of the potentially corrosive influence of vast aggregations of wealth on the political process. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990) (approving restriction on funding political activity with money taken from general corporate treasuries).

36. *Buckley*, 424 at 26-27 (acknowledging dangers of quid pro quo arrangements in politics). Existing bribery laws were deemed an insufficient means of tackling the problem. See 18 U.S.C. § 201 (2000) (establishing parameters of punishable bribery of public officials). Section 201 provides in relevant part:

Whoever—

- (1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(A) to influence any official act; or

more generalized sense of systemic corruption, manifested as the average citizen's feelings of discontent that candidates were for sale to the highest bidder or that "politics" was dirty, was insufficient. Nor was corruption implicated, on a constitutionally-cognizable level, if a campaign contribution was proffered as a means of securing future access to the recipient; corruption only attached when the donor received something tangible in return (such as a vote), not a vague promise of future availability.

Following *Buckley*, Congress amended FECA to bring the law into conformity with the Supreme Court's mandate. The new amendments imposed a \$20,000 annual limitation on individual contributions to national parties and a \$5,000 annual limitation on individual contributions to PACs.³⁷ Congress further amended FECA in 1979 to alleviate some critics' concerns regarding the statute's overly burdensome reporting requirements and to lessen restrictions on party spending. The 1979 amendments modified FECA so that only contributions or expenditures exceeding \$200 had to be reported to the FEC. The new rules also permitted political parties to spend unlimited funds on get-out-the-vote and voter registration activities conducted principally for presidential elections. Congress crafted this exemption to promote political party grass-roots activity, while curtailing the money parties used to finance political advertisements.³⁸

Over time, aggressive party fundraising practices significantly undermined FECA's restrictions on campaign funding. In the 1988 campaign, both presidential campaigns for the first time concentrated on raising large sums of so-called "soft money"—money that may be contributed and spent free from controls imposed by the federal law.³⁹ Following the 1988 election, soft money

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person . . . shall be fined under this title.

Id.

37. FECA Amendments of 1976, Pub. L. No. 94-283, § 112, 90 Stat. 475, 486-87 (1976).

38. Campaign Legal Center, *A New Era*, *supra* note 6; see also Trevor Potter, *The Current State of Campaign Finance Law*, reprinted in *CAMPAIGN FINANCE REFORM: A SOURCEBOOK 5-24* (Anthony Corrado et al., eds., 1997) (reviewing post-FECA campaign finance law developments).

39. Campaign Legal Center, *A New Era*, *supra* note 6.

39. Campaign Legal Center, *A New Era*, *supra* note 6. Federal law requires reports to the FEC of contributions and expenditures. It also imposes limitations on contribution amounts with varying limits

became a major part of the financing of presidential and congressional elections for the next fifteen years.⁴⁰

It was not, however, only the behavior of the political parties that undermined FECA. An equally significant factor was the way in which the FEC responded to this behavior. Although there were isolated instances of rigorous supervision, the FEC's regulatory posture usually fluctuated between weak and nonexistent. In fact, at times, the FEC undertook deregulatory steps that completely contravened congressional intent. In the 1979 amendments, Congress specifically excepted television advertising from the range of functions it considered to be "party-building activities;" money for ads was still to be subjected to hard money limits.⁴¹ In a 1984 advisory opinion, however, the FEC implicitly characterized party-sponsored advertisements as falling within the scope of party-building activities after all.⁴² The significance of this ruling, which was not fully understood for several years, was that political parties could suddenly finance an infinite number of television commercials. As far as the FEC was concerned, if the ads were about party issues and party themes, featured party symbols, and were not explicitly linked to a candidate for federal office, the political parties could raise and spend unlimited amounts of money to produce them, notwithstanding that Congress had sought to prevent precisely this result. The FEC failed to even require parties to disclose how much soft money they were spending; a disclosure requirement was not implemented until 1991.⁴³

Eventually, party committees capitalized on the FEC's fecklessness and aggressively utilized new ways to spend these funds to affect federal elections. In the 1996 election, state and national party committees first used soft money to finance candidate-specific *issue ads*. These ads "featured their respective presidential nominees, but were not subject to the contribution or spending

depending on the identity of the donor. Hard money, on the other hand, is money subject to federal controls.

Id.

40. Campaign Legal Center, *A New Era*, *supra* note 6.

41. Campaign Legal Center, *A New Era*, *supra* note 6.

42. Federal Election Commission, Advisory Opinion No. 1984-15 (1984), available at <http://so.nichusa.com/ao/840015.html>. Characterizing the advertisements in question as "advertisements promoting the Republican Party over the Democratic Party and to encourage voters to support the Republican Party generally," the Commission ruled that

[D]isbursements for such advertising would not be reportable as contributions to any specific candidate or as coordinated party expenditures in connection with any specific general election campaign for President, Senator, or Representative. Such disbursements would be reportable as operating expenditures of the Republican National Committee that are generally related to Federal elections although not on behalf of any clearly identified candidate for Federal office, nor directly attributable to such a candidate.

Id. (citations omitted).

43. 11 C.F.R. §§ 104.8(e), (f) (2006) (requiring national parties to disclose soft money donors).

limits imposed on parties or publicly funded presidential candidates.⁴⁴ The FEC required no more than adherence to a few procedural niceties, such as avoiding words that "in express terms advocate the election or defeat or a clearly identified candidate."⁴⁵ This pretext perpetuated the ads' veneer of issue-orientation, even though the ads were clearly crafted as a means of supporting (or, more often, attacking) a particular candidate. Consequently, the ads could be financed with *soft money*, which the political parties now raised in energetic fashion. In each election between 1996 and 2002, the parties spent millions of dollars in *soft money* on *issue ads* to help elect their candidates.⁴⁶ In the words of Anthony Corrado, one of the most astute observers of the byzantine world of money and politics, "suddenly the federal campaign finance system seemed to be awash in undisclosed money from sources that were supposed to be banned by the FECA."⁴⁷

III. BIPARTISAN CAMPAIGN REFORM ACT OF 2002

BCRA was the product of interminable debate, extensive amendments, and much political maneuvering. Once enacted, the statute introduced two primary changes: first, it expanded the coverage of pre-existing limitations to cover contributions to political parties; and second, it restored the nearly century-old ban on corporate money (established in the Tillman Act of 1907) and the half-century-old limits on union treasury expenditures in federal elections (established in the Taft-Hartley Act of 1947).

Title I regulates soft money. Its core provision, Section 323(a) prohibits national, state, district, or local political parties from soliciting or receiving contributions or making expenditures except as allowed by the statute. BCRA's soft money provision limits contributions by individuals to national parties to \$25,000.⁴⁸ It also raises the limits on contributions to candidates to

44. Campaign Legal Center, *A New Era*, *supra* note 6.

45. *See Buckley v. Valeo*, 424 U.S. 1, 44 (1976) (evaluating FECA's express advocacy provisions and establishing so-called "magic words" doctrine).

46. Campaign Legal Center, *A New Era*, *supra* note 6.

47. Anthony Corrado, *The Legislative Odyssey of BCRA, in LIFE AFTER REFORM—WHEN THE BIPARTISAN CAMPAIGN REFORM ACT MEETS POLITICS* 28 (Michael Malbin ed., 2003).

48. 2 U.S.C. § 441a(a)(1)(B) (2000 & Supp. III 2003). In addition, BCRA imposes a \$95,000 aggregate limit on individual contributions. Up to \$7,500 (per two-year cycle) may be given to individual candidates and their authorized committees. The remaining \$57,500 may be given to national party committees and PACs. Within this \$57,500, there is a further limit of \$37,500 that may be given to all committees other than the national party committees. Contributions to state committees are limited to \$10,000. The ceiling on PAC contributions remains unchanged: \$5,000 to candidates, other PACs, or state parties; and \$15,000 to national parties. These limits are still not indexed to inflation. National party committees are permitted to receive contributions of up to \$25,000 per year from any individual or non-multicandidate PAC and up to \$15,000 per year from a multicandidate PAC. In addition, national party committees can make coordinated expenditures on behalf of their House candidates subject to a limit of \$30,000 per candidate. In the Senate, the allowed amount depends on the population of the state, but ranges from approximately \$60,000 in the smallest states to over \$1 million in the largest states. *See* 2 U.S.C. §§ 441a(e)-(f) (2000 & Supp. III 2003).

\$2000.⁴⁹ Furthermore, the statute requires the reporting to the FEC of contributions and expenditures in excess of \$200.⁵⁰

BCRA also contains a variety of anti-circumvention limitations and exceptions. Indeed, the limitation on receipt of contributions at the state and local level serves an anti-circumvention purpose, as do the prohibitions on parties raising federal election funds for non-profit organizations.⁵¹ BCRA's prohibitions and limitations do not apply to generic campaign activity, voter identification, and get-out-the-vote activity. Additionally, the millionaire's provision lifts contribution limits to an individual candidate when an opponent spends large sums from personal resources.⁵²

Title II of BCRA imposes disclosure requirements and other limitations on "electioneering communications." Section 434(f) defines electioneering communications as any broadcast, cable, or satellite communication that "refers to clearly identified candidate for Federal office" and is made within thirty days of a general election or thirty days of a primary and in presidential campaigns can be received by 50,000 persons or more.⁵³ Expenditures in excess of \$10,000 for these communications must be reported and disclosed to the FEC.⁵⁴ Furthermore, unions and corporations⁵⁵ may not use general treasury funds for these expenses but may disburse monies from separate segregated funds or PACs.⁵⁶

49. 2 U.S.C. § 441a(a)(1)(A) (Supp. III 2003).

50. 2 U.S.C. § 434(b)(3) (2000).

51. *See* 2 U.S.C. § 441a(f) (Supp. III 2003) (permitting state, district, and local committees to accept limited funds from ordinarily impermissible sources). Only state, district, and local party committees can raise Levin funds. *Id.* These committees can spend Levin funds, with some restrictions, on certain federal election activities: voter registration, voter identification, get-out-the-vote and "generic campaign activity" (party promotion). *Id.* Levin funds are subject to less stringent contribution limits than federal funds, but may be subject to state limits if they are stricter than federal limits. *Id.*

52. 2 U.S.C. §§ 441a(f), 441a-1 (Supp. III 2003) (easing limitations as applied to elections involving candidates spending large sums of personal money). If a Senate candidate spends more than \$150,000 plus .04 times the state population of eligible voters, the other candidate may increase the amount of hard money contributions up to six times, and may receive soft money contributions if their opponent spends over ten times the above amount. *Id.*

53. 2 U.S.C. § 434(f) (Supp. III 2003).

54. 2 U.S.C. § 434(f)(1) (Supp. III 2003).

55. *But see* 2 U.S.C. § 441b(c)(2) (Supp. III 2003). Congress and the Supreme Court have defined features that may place an incorporated organization outside the scope of Section 441b. *See id.* (exempting 501(c)(4) and 527 organizations from electioneering communication limitations); *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 264 (1986) (listing features of MCFE warranting Court's placement outside Section 441b's reach).

56. 2 U.S.C. § 441a(b)(2) (2000). A PAC may, of course, raise and spend limited hard money to expressly advocate the election or defeat of candidates.

Organizations that raise soft money for issue advocacy may also set up a PAC. Most PACs represent business, such as the Microsoft PAC; labor, such as the Teamsters PAC; or ideological interests, such as the EMILY's List PAC or the National Rifle Association PAC. An organization's PAC will collect money from the group's employees or members and make contributions in the name of the PAC to candidates and political parties. Individuals contributing to a PAC may also

Although opposed to BCRA in principle, President Bush understood the political ramifications of appearing to stand against reform, and at eight o'clock in the morning on March 27, 2002, he quietly signed the bill into law, with no cameras present. Indeed, few members of the White House press corps were even aware that a bill-signing was occurring.⁵⁷ On the same day, the leading legislative critic of campaign finance reform, Republican Senator Mitch McConnell from Kentucky, filed a lawsuit challenging the constitutionality of its basic provisions. In all, over eighty different legal challenges to the BCRA were filed. The list of plaintiffs reflected a diverse set of political viewpoints, including the National Rifle Association, the American Civil Liberties Union, the AFL-CIO, and the National Right to Work Committee. Eventually, the challenges were consolidated into one lawsuit, with Senator McConnell accorded the privilege of being the named plaintiff.⁵⁸

Similar to the 1974 FECA amendments, BCRA contained an acceleration provision designed to produce a ruling on its constitutionality in time for an upcoming presidential election. Consequently, the lawsuit went directly before a special panel of three federal judges: District Judges Colleen Kollar-Kotelly and Richard Leon, and D.C. Circuit Judge Karen LeCraft Henderson. The hoped-for expedited review, however, took significantly longer than anticipated. On May 1, 2003, five months after oral argument, the panel at last announced its decision. The reason for delay was immediately clear. The three judges had comprehensively failed to find common ground on the issues. In an orgy of actrimony and dissension, they produced a monstrous 1638 page ruling so spectacularly incomprehensible it required a four-page spreadsheet to summarize each judge's findings on each issue.⁵⁹ The Supreme Court then took the unusual step of cutting their summer recess short and scheduled four hours of oral argument for each side (instead of the customary one hour) for

contribute directly to candidates and political parties, even those also supported by the PAC. A PAC can give \$5,000 to a candidate per election (primary, general or special) and up to \$15,000 annually to a national political party. PACs may receive up to \$5,000 each from individuals, other PACs and party committees per year. A PAC must register with the Federal Election Commission within 10 days of its formation, providing the name and address of the PAC, its treasurer and any affiliated organizations.

Center for Responsive Politics, *Types of Advocacy Groups*, at <http://www.opensecrets.org/527s/types.asp> (last visited Feb. 27, 2006).

57. See Mike Allen, *Bush Signs Campaign Bill, Hits Road to Raise Money*, WASH. POST, Mar. 28, 2002, at A1 (describing circumstances surrounding President Bush signing BCRA into law).

58. See generally *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (summarizing *McConnell's* early procedural history), *aff'd in part and rev'd in part*, 540 U.S. 93 (2003).

59. See Linda Greenhouse, *1,638 Pages, But Little Weight In Supreme Court*, N.Y. TIMES, May 3, 2003, at A14. Judges Kollar-Kotelly and Leon upheld the ban on soft money. Judge Leon, however, qualified his support with his belief that an organization may raise soft money if it applies those funds to get-out-the-vote drives. All three judges invalidated BCRA's provision banning broadcast of "issue ads" within a thirty- or sixty-day window before a primary or general election. See generally *McConnell*, 251 F. Supp. 2d 176 (presenting varied and conflicting holdings of panel judges).

September 8, 2003.

IV. MCCONNELL V. FEC

The *McConnell* opinion, handed down on December 10, 2003, is over 250 pages long in the United States Reporter.⁶⁰ Likely because of the length of the opinion, the complexity of the issues, and the press of time, Justices Stevens and O'Connor jointly authored the most important part of the decision, with Justices Souter, Ginsburg, and Breyer joining. In the joint opinion, the Court upheld the substantial majority of the statute. The Court reaffirmed the *Buckley* framework while expressing the need for deference to Congress in dealing with the potentially corrosive effects of money in the political system. The Court approved the specific provisions of the statute limiting soft money raised or spent by national political parties and imposing limitations on state and local political parties. Additionally, it upheld restrictions on electioneering communications. Somewhat surprisingly, the Court was able to do so without altering its core campaign finance principles the basic *Buckley* framework, all the while expressing the need for deference to Congress in dealing with the potentially corrosive effects of money in the political system.

The *McConnell* opinion began with a brief history of campaign finance legislation, beginning in 1907 with the Tillman Act's ban on corporate contributions in federal elections.⁶¹ The discussion proceeded to the 1974 FECA amendments and the Court's treatment of FECA in *Buckley*.⁶² Then, the Court reviewed testimony and findings of the 1998 Senate Committee on Governmental Affairs hearings, noting outrageous examples of unregulated contributions buying access to government and the use of sham issue ads in which disguised people of wealth sought to mislead the unsuspecting public.⁶³ The Court accepted the Senate Committee's characterization of a "meltdown" of the system.⁶⁴

In Part III of the opinion, the Court reviewed the contributions-expenditures distinction. Contribution limits, the Court recognized, do not have to meet strict scrutiny because they entail "only a marginal restriction upon the contributor's ability to engage in free communication."⁶⁵ Likewise, the Court noted, they need only meet the right of association's lesser demand of being closely drawn to match a "sufficiently important interest" because they leave the contributor free to "become a member of any political association."⁶⁶ Contribution limits, the Court noted, advance the twin governmental interests

60. *McConnell v. FEC*, 540 U.S. 93 (2003). The opinion begins on page 93 and ends on page 365. *Id.*

61. *Id.* at 115-16.

62. *Id.* at 118-22.

63. *Id.* at 129-32.

64. *McConnell*, 540 U.S. at 122-29.

65. *Id.* at 135 (quoting *Buckley v. Valeo*, 424 U.S. 1, 20 (1976)).

66. *Id.* at 136.

of combating actual corruption and preventing the "eros[ion] of the public confidence in the electoral process through the appearance of corruption."⁶⁷ The Court acknowledged the importance of the electoral process, describing it as the "means through which a free society democratically translates political speech into concrete governmental action."⁶⁸ Further, the Court explained that contribution limits serve not to chill free speech, but only tend to increase the dissemination of information "to a wider array of potential donors."⁶⁹

The Court then characterized the goal of the act—"a return to the scheme that was approved in *Buckley*"—as "modest."⁷⁰ The various provisions of Title I were designed to prevent circumvention of the limits.⁷¹ The *McCormell* court's somewhat muted discussion, however, disguises significant changes wrought by its opinion. After *Buckley*, the Court had consistently adhered to two basic principles in its campaign finance cases. First, the only constitutionally acceptable rationale for campaign finance regulation was to combat the corruption or the appearance of corruption. Restricting political money to level the playing field between rich and poor candidates and to holding down the cost of running for office were repeatedly rejected as unworthy reasons to encroach upon the First Amendment. Second, prevention of only quid pro quo corruption—the exchange of a campaign contribution for a cooperative vote on legislation—justified burdening free speech. A more general view of corruption signaling that the political system was generally "for sale" was insufficient to justify campaign finance rules. The *McCormell* court abandoned neither of these principles.

The Court did not, however, entirely adhere to campaign finance precedent. In *McCormell*, the Court underwent what one could describe as an attitude adjustment. Rather than considering alternatives to quid pro quo corruption as acceptable rationales for campaign finance legislation, the Court reconsidered what qualified as quid pro quo corruption.⁷²

Prior to *McCormell*, the Court insisted that only the tangible result of the legislative process—e.g., a vote in favor of friendly legislation, a regulatory exemption, or a pork-barrel project—triggered the possibility of corruption.

67. *Id.*

68. *McCormell v. FEC*, 540 U.S. 93, 137 (2003).

69. *Id.* at 140.

70. *Id.* at 142.

71. *Id.* at 144-45.

72. See *McCormell*, 540 U.S. at 95-96 (stating prevention of undue influence sufficient justification for campaign finance restrictions). Some commentators have argued that the Court began to lower this bar before *McCormell*. Richard Hasen has implied that much of the groundwork was laid in *Shrink Missouri*, suggesting that the Court's language about the dangers of having officials "too compliant with the wishes of large contributors" was a liberalization of its definition of corruption. See Richard Hasen, Shrink Missouri, *Campaign Finance*, and "The Thing That Wouldn't Leave", 17 CONST. COMMENT. 483, 493 (2000) (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000)) (noting Court's apprehension regarding improper influence extends beyond concern about bribery).

The fact that campaign contributions may have been buying access to the process was insufficient. The Court required some evidence that a vote was promised. In *McCormell*, however, the Court read reams of congressional testimony suggesting the pervasiveness of promises that a lawmaker's door would be held open. The Court was most alarmed by the evidence that such promises were being made by the political parties. Referring to a 1998 Senate Committee on Governmental Affairs report on the 1996 elections, Justices O'Connor and Stevens not only noted that "[t]he report was critical of both parties' methods of raising soft money, as well as their use of those funds," but also highlighted the finding that "both parties promised and provided access to candidates and senior Government officials in exchange for large soft money contributions."⁷³ The shamelessness with which participants bought and sold access and the brazenness of political actors' admissions that these transactions occurred was striking:

For their part, lobbyists, CEOs, and wealthy individuals alike all have candidly admitted donating substantial sums of soft money to national committees not on ideological grounds, but for the express purpose of securing influence over federal officials 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.⁷⁴

This evidence, from which Justices O'Connor and Stevens quoted extensively, led them to determine that the act of holding open a legislator or government official's office door was a purchasable service. Therefore, they concluded, the open door had become a commodity bought and sold in the same manner as the actual legislative support addressed in *Buckley*. In this fashion, Justices O'Connor and Stevens presented their argument in such a way as to preserve the basic core of the *Buckley* precedent—soft money donations to political parties conjured the specter of traditional quid pro quo corruption sufficiently to activate a regulatory impulse that had been constitutionally acceptable all along.

Justice Kennedy dissented sharply from Justices Stevens and O'Connor's new view of political access. He urged the Court to adhere to a system which monitored only "actual corrupt, vote-buying exchanges, as opposed to interactions that possessed quid pro quo potential."⁷⁵ Justices O'Connor and Stevens, however, tartly dismissed Justice Kennedy's plea to leave things as

73. *McCormell*, 540 U.S. at 130.

74. *Id.* at 147 (emphasis in original) (footnote omitted).

75. *Id.* at 293 (Kennedy, J., concurring in the judgment and dissenting in part).

they existed. "This crabbed view of corruption, and particularly of the appearance of corruption, ignores precedent, common sense, and the realities of political fundraising exposed by the record in this litigation."⁷⁶ Justice Kennedy's *quid pro quo* argument implies a bargain that, if specifically provable, constitutes the federal and state crime of bribery. Such a bargain, however, is difficult or impossible to prove. Consequently, the majority sanctioned elimination of some incentives on the candidates' side of the bargain as serving an important governmental interest. The majority sought more an elimination of a conflict of interest.⁷⁷ The majority suggested that preventing a financially interested constituent from purchasing face time with a committee chair constituted an interest Congress has a right to advance through legislation. Conversely, Justice Kennedy suggested that political affiliation of individuals and groups with like interests is a normal result of the democratic process.

Chief Justice Rehnquist argued that the ban on national parties' soft money fundraising was overly broad because it covered money that would be spent on state and local elections, which were beyond Congress' regulatory purview. According to the Chief Justice, national parties should be allowed to continue raising soft money that could be distributed to those races.⁷⁸ Most analysts of the system, however, felt that creating such a loophole would be fatal to the electoral process. Because federal officials were running national party organizations, soft money contributions would be seen as currying favor and access even if the funds were later deployed for a state race—recipients would still have sufficient gratitude to unlatch their office doors at the appropriate time.⁷⁹ Experts advised that the only way to fight the soft money problem was

76. *Id.* at 152.

77. *But see* Richard Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. Pa. L. Rev. 31, 32-34 (2004) (criticizing *McConnell* court's apparent acceptance of political equality justifications for campaign finance reform). Indeed, Richard Hasen is highly critical of the *McConnell* court's insistence on jamming a square peg of an opinion that seems to espouse a "participatory self-government" theory of campaign finance into the preexisting round hole of the customary anticorruption paradigm. *See id.*

78. *McConnell v. FEC*, 540 U.S. 93, 351-53 (2003) (Rehnquist, C.J., dissenting).

79. *See* Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 371, 390-95 (2000) (describing potential corrupting effect of large campaign contributions in state races). In *Shrink Missouri*, a Missouri PAC made the maximum contribution under Missouri campaign finance law to a state auditor campaign. The PAC stated that, absent the law, it would make additional contributions to Fredman's campaign. *Id.* at 383. The plaintiffs claimed that, when adjusted for inflation, the \$1075 Missouri limit was below the \$1000 minimum established in the *Buckley* decision. *Id.* at 384. The Court, per Justice Souter, stated that limits on expenditures have been found to be a direct restraint on speech where contributions have not. *Id.* at 386. Expenditure limits also have a greater impact on the association right, the Court observed. *Id.* at 387. Specifically, the Court stated, "We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." *Id.*

Next, the Court discussed what qualified as a valid justification in campaign finance cases. *Id.* at 390. The Court reiterated that prevention of actual and perceived corruption was justified. *Id.* "Leave the perception of impropriety unanswered," the Court stated, "and the cynical assumptions that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Id.* at 390. Finally, the Court

to completely eradicate it. Justices O'Connor and Stevens agreed: "Given this close connection and alignment of interests, large soft money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used."⁸⁰

The *McConnell* court also accepted Congress's finding that national parties are closely affiliated with the candidates.⁸¹ The Court agreed with Congress that state and local parties required similar regulation in order to close off another obvious method of diverting funds to a favored candidate for federal office.⁸² Likewise, the Court approved BCRA's prohibition against parties funneling contributions into tax exempt organizations based upon Congress's concerns about circumvention.⁸³ The Court also observed that BCRA's limitations on candidates serve the act's overall purpose.⁸⁴

Title II of BCRA placed new restrictions on electioneering communications, which the statute defines as broadcast, cable, or satellite communications that refer to a clearly identified candidate for federal office and air within sixty days of a general election or thirty days of a primary.⁸⁵ In analyzing BCRA's electioneering communications provisions, the Court returned to the *Buckley* "magic words" discussion which had established a clear line between express advocacy and issue advocacy.⁸⁶ This distinction allowed regulation only when an advertisement explicitly advocated the election of a candidate or the defeat of his opponent.⁸⁷ The *McConnell* opinion explained that the *Buckley* Court drew the distinction to cure the vagueness and over breadth of FECA which regulated advocacy "relative to" a candidate.⁸⁸ The Court noted that the clarity of BCRA's new definition of electioneering communications cured any concerns about vagueness.⁸⁹ The Court went on to find that requiring disclosure of expenditures in excess of \$10,000 to fund electioneering communications was justified given a factual record that suggests campaign advertising where the speaker hides behind dubious and misleading names.⁹⁰

The Court found no problem with Title II's prohibition on corporations or unions from engaging in electioneering communications.⁹¹ It first noted that

acknowledged that the *Buckley* decision "demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible." *Id.* at 391.

80. *McConnell*, 540 U.S. at 155.

81. *Id.*

82. *Id.* at 161-62.

83. *Id.* at 177.

84. *McConnell v. FEC*, 540 U.S. 93, 181-82 (2003).

85. *Id.* at 189.

86. *See id.* at 191-93 (discussing significance of magic words doctrine).

87. *Id.* at 190.

88. *McConnell*, 540 U.S. at 191.

89. *Id.* at 194.

90. *Id.* at 197.

91. *Id.* at 202-12.

union and corporate PACs could engage in electioneering communications.⁹² Second, it cited precedent suggesting that limitations directed at organizations are justified by the "special characteristics" of the corporate structure" that require "particularly careful regulation."⁹³ Further, the Court found that the statute's exemption of media organizations was justified.⁹⁴ It also read an exception in the statute exempting "MCFL organizations."⁹⁵ If *Buckley's* virtual declaration that money spent on speech was itself speech is true, then Title II imposed a direct restriction on speech. By forcing unions and corporations to spend only hard money on these ads, BCRA effectuated an inevitable reduction in the quantum of speech.

A real-world look at politics also supported the *McConnell* decision. The

92. *McConnell v. FEC*, 540 U.S. 93, 204 (2003).

93. *Id.* at 205. In *Austin*, the Court upheld a Michigan criminal statute preventing corporations from spending general funds as independent expenditures in support of candidates in state elections. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 654-55 (1990). The Court found that Michigan had a compelling interest in combating a "different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660. When election campaign spending is unlimited, the degree of political participation a citizen enjoys becomes directly tied to his or her financial resources. If money equals speech—a statement that *Buckley* never really made—then those without wealth have no political voice.

The members of the sitting Court do not agree, however, that money is speech. As Justice Stevens noted in *Shrink Missouri*, "Money is property; it is not speech." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring). He explained:

Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results.

Id. Justice Stevens made the same point in somewhat different terms in an earlier case. See *Colo. Republican Fed. Campaign Comm. v. FEC (Colorado D)*, 518 U.S. 604, 649-50 (1996) (Stevens, J. dissenting) (urging judiciary to "accord special deference" to Congress on campaign finance matters). He stated:

I believe the Government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns. As Justice White pointed out in his opinion in *Buckley*, "money is not always equivalent to or used for speech, even in the context of political campaigns." It is quite wrong to assume that the net effect of limits on contributions and expenditures—which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials—will be adverse to the interest in informed debate protected by the First Amendment.

Id. (citation omitted).

94. *McConnell*, 540 U.S. at 209.

95. *Id.* at 210. The reference comes from a Supreme Court case decided in 1986. See generally *FEC v. Mass. Citizens for Life (MCFI)*, 479 U.S. 238 (1986) (considering campaign finance restrictions as applied to non-profit advocacy organization). In *MCFI*, the Court suggested that the First Amendment requires certain non-profit advocacy organizations be treated differently from for-profit organizations. *Id.* at 258.

larger and infinitely more sinister problem with the old system, Justices O'Connor and Stevens noted, was that it created a world in which shadowy pseudo-organizations were launching vicious attacks on political candidates, without enabling the public to identify the responsible party. Featured prominently in the decision was the district court's observation that "[p]laintiffs never satisfactorily answer[ed] the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public."⁹⁶

Concluding their analysis, Justices O'Connor and Stevens reinforced the pragmatic nature of the campaign finance process, and did so in language that parroted Senator John McCain's comments. As the battle in the Senate moved toward endgame, McCain had conceded, "Twenty years from now, there will be two more senators who will be arguing for reform because we've gone continuously through cycles of corruption and reform."⁹⁷ Closing their remarkable *McConnell* odyssey, Justices O'Connor and Stevens echoed Senator McCain's sentiment: "We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day."⁹⁸

The language of the main *McConnell* opinion bears the hallmarks of John Paul Stevens's twenty-seven years of frustration concerning the Court's campaign finance decisions. While the language may be pure Stevens, the result in *McConnell* is classic Sandra Day O'Connor because it employs a pragmatism that emphasizes political realities that result from the Court's work, deference to congressional fact-finding, and studious avoidance of broad principle-based statements in favor of crafted compromise.

The Court also addressed other claims of BCRA's unconstitutionality. It struck down Section 213 which requires parties to choose between independent or coordinated spending strategies. The Court concluded that Section 213 unconstitutionally burdens a party's right to make unlimited independent expenditures.⁹⁹ In addition, the Court approved BCRA's direction to the FEC

96. *McConnell v. FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003) (quoting N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964)).

97. Katherine Q. Seelye & Alison Mitchell, *Pocketing Soft Money Till Pocket Is Sewn Up*, N.Y. TIMES, Mar. 4, 2002, at A1. The multi-million-dollar ad buy from "Republicans for Clean Air" in the days leading up to the New York primary is the most notorious example of this phenomenon. The commercial touted George W. Bush's record on the environment and slammed the record of his primary opponent, John McCain. The ad buy confounded political observers because nobody had ever heard of a group called "Republicans for Clean Air." As it turned out, the group had been founded days before the New York primary. Notwithstanding its carefully-chosen populist name, "Republicans for Clean Air" had only two members: brothers Sam and Charles Wily, longtime Bush confidants. See *Texas Brothers Launch \$2.5 Million Television Ad Campaign For Bush: Ads Tout His Record on the Environment as the Governor of Texas*, ST. LOUIS POST-DISPATCH, Mar. 5, 2000, at A3.

98. *McConnell v. FEC*, 540 U.S. 93, 224 (2003).

99. *Id.* at 213-19 (affirming district court's invalidation of Section 213).

to limit its coordination of donors and political parties' spending strategies.¹⁰⁰

In the portion of the McConnell opinion authored by Chief Justice Rehnquist, the Court dismissed challenges to three provisions of the statute: the requirement that broadcast stations charge candidates the "lowest unit charge" for certain advertisements, the indexing for inflation of the Act's contribution limits, and the millionaire's provision. The Court dismissed these challenges because the plaintiffs lacked standing.¹⁰¹ The Court, per Chief Justice Rehnquist, also declared unconstitutional the provision of BCRA which prohibits individuals seventeen years old and younger from contributing to candidates and political parties.¹⁰² Congress intended the provision to prevent parents from circumventing contribution limits by donating money in the names of their children.¹⁰³ The Court, however, observed that "the Government offers scant evidence of this form of evasion" and, therefore, invalidated the provision.¹⁰⁴

Justice Scalia, in dissent, suggested BCRA constitutes "incumbency protection."¹⁰⁵ Scalia argued that BCRA's restrictions fell disproportionately hard on challengers, and thus had the effect of further insulating incumbents from electoral pressures.¹⁰⁶ He also insisted that precedent requires full First Amendment protection of both contributions and expenditures. Justice Scalia analogized contribution and expenditure limitations to England's historical use of taxation as a method to harass press deemed overly critical of the crown.¹⁰⁷ In reaching his conclusion, he cited *Schaumburg v. Citizens for a Better Environment*¹⁰⁸ and *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*¹⁰⁹ in which the Court struck down laws that deprived speakers of remuneration.¹¹⁰ He further suggested that the right of association

100. *Id.* at 704.

101. *Id.* at 224-30.

102. *McCormell*, 540 U.S. at 231-32.

103. *Id.* at 232.

104. *Id.* Justice Breyer authored yet another opinion for the Court. In his opinion, the Court approved BCRA's requirement that broadcasters keep records of "requests" for advertising related to campaigns for federal office. *Id.* at 233-46.

105. *Id.* at 93, 306 (2003) (Scalia, J., concurring in part and dissenting in part).

106. See generally Nathaniel Persily, *Reply: In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002) (discussing redistricting's effect on political competition and incumbent safety). Data suggests that the flow of soft money favors incumbents. Contributors donated soft money to ensure political access. Thus, such donations were made with an eye toward who would likely be in office. Given that incumbent reelection rates were already very high, it is fair to infer that more soft money would benefit officeholders, not their challengers.

107. *McCormell v. FEC*, 540 U.S. 93, 252-53 (2003) (Scalia, J., concurring in part and dissenting in part).

108. 444 U.S. 629 (1980). In *Schaumburg*, the Court invalidated an ordinance imposing limitations on the amounts charities could pay their solicitors.

109. 502 U.S. 105 (1991). In *Simon & Schuster*, the Court struck down an ordinance that appropriated profits from criminals' biographies.

110. *McCormell*, 540 U.S. at 252-55 (Scalia, J., concurring in part and dissenting in part).

protects the pooling of one's resources with others to achieve political goals.¹¹¹ Finally, Justice Scalia disagreed with the line of cases that suggesting that corporate speech deserves less protection from the First Amendment.¹¹²

In his dissent, Justice Thomas suggested that the real evil is bribery and that contribution prohibitions are simply anti-circumvention measures.¹¹³ He further contended that BCRA's soft money prohibitions are simply third order anti-circumventions moving further and further from the real problem. With each step away from addressing the actual problem, the prohibitions silence speech about vital political matters.¹¹⁴ The First Amendment, Justice Thomas argued, should not protect flag-burners, nude dancers, and pornographers while withholding protection from citizens who seek to influence politics with their contributions.¹¹⁵ He suggested that both the anti-coordination rules and electioneering rules are blatant expenditure regulations which restrict the marketplace of ideas.¹¹⁶ Justice Thomas was alone on the Court in viewing the disclosure requirements as violative of the right of anonymous speech.¹¹⁷ He again called for the overruling of *Buckley*.¹¹⁸ Finally, he warned that the majority rationale will undermine freedom of the press.¹¹⁹

Justice Kennedy, in dissent, reviewed *Buckley* and suggested that the only accepted justification for contribution restrictions was the quid pro quo arrangement wherein the candidate agreed to deliver a governmental benefit to a constituent in return for a contribution.¹²⁰ He accused the majority of changing the rationale to the prevention of influence-peddling or buying access or good will.¹²¹ Justice Kennedy acknowledged that officeholders grant access to those they favor and those that favor the officeholder. Loyalty to one's constituents and supporters, he contended, can not be a predicate for remedial measures.¹²² Finally, Justice Kennedy suggested that party contributions to

111. *Id.* at 255-56.

112. *Id.* at 256-58.

113. *Id.* at 267-68 (Thomas, J., concurring in part and dissenting in part).

114. *McCormell v. FEC*, 540 U.S. 93, 268 (Thomas, J., concurring in part and dissenting in part).

115. *Id.* at 265.

116. *Id.* at 275.

117. *Id.* at 276.

118. *McCormell*, 540 U.S. at 277 (Thomas, J., concurring in part and dissenting in part).

119. *Id.* at 282-86.

120. *Id.* at 296 (Kennedy, J., concurring in part and dissenting in part).

121. *Id.*

122. *McCormell v. FEC*, 540 U.S. 93, (2003) (Kennedy, J., concurring in part and dissenting in part). Political associations including those that occur inside a political party are relationships the First Amendment right of association independently protects. See generally *Cal. Democratic Party v. Jones*, 536 U.S. 567 (2000) (invalidating blanket primary statute requiring primary ballot to list every candidate regardless of political affiliation); *Tinnons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (upholding anti-fusion statute); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986) (striking down statute permitting only registered party members to vote in party primary); *Cousins v. Wigoda*, 409 U.S. 1201 (1972) (holding judicial interference in dispute regarding seats at Democratic National Convention violates right of association).

candidates pose very little danger of quid pro quo corruption.¹²³

V. MCCONNELL AND THE PRECEDENT

Throughout its campaign finance jurisprudence, beginning with *Buckley* and ending with *McCormell*, the Court has identified the appearance of corruption along with corruption itself as independent and legitimate justifications for regulation. Appearance is, of course, in the eye of the beholder—the audience. Beholders may, for instance, conclude that political influence is for sale or that only the rich can run for federal office. In embracing the appearance rationale, the Court appears to be accepting, although with little or no discussion, the avoidance of public alienation from the process as a legitimate governmental interest. This interest, however, seems to closely resemble the cost and leveling justifications the Court so forcefully rejected in *Buckley*.

The appearance rationale is surprising also because the Court has rejected it so often in other contexts. In *Cohen v. California*,¹²⁴ the Court overturned a defendant's conviction for wearing, in a public courthouse, a jacket emblazoned on the back with "Fuck the Draft."¹²⁵ The Court was unimpressed with the government's argument that the conviction was justified in order to guard public morality and to prevent a violent reaction. The Court seemed unconcerned about the negativity of the epithet, or whether its utterance would contribute to an informed public debate. The Court recognized that, while freedom may produce "verbal tumult, discord, and even offensive utterance,"¹²⁶ such results are "in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve."¹²⁷ The Court protected the epithet even though it was uttered in a courthouse, a place which raises valid concerns about disruption and interference in the deliberative process, and a place where all segments of society, including the most easily offended, are often involuntarily present.

Likewise, in *Texas v. Johnson*,¹²⁸ the Court overturned Johnson's conviction for the desecration of a venerated object when he burned an American flag at the Republican National Convention in Dallas. The Court suggested that a principal function of free speech is "to invite dispute."¹²⁹ Free speech, the Court stated, "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."¹³⁰

123. *McCormell*, 540 U.S. at 301 (Kennedy, J., concurring in part and dissenting in part).

124. 403 U.S. 15 (1971).

125. *Id.* at 16-17.

126. *Id.* at 24-25.

127. *Id.* at 25.

128. 491 U.S. 397 (1989).

129. *Id.* at 408.

130. *Id.*

In *Erznoznik v. Jacksonville*,¹³¹ the Court invalidated an ordinance prohibiting drive-in movie theaters with screens visible to the public streets from showing films that contained nudity.¹³² The Court noted that the ordinance prohibited speech based almost entirely on content.¹³³ Concerning the sensibilities of the passengers of automobiles passing by the theater, the Court said:

The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, "we are inescapably captive audiences for many purposes." Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above, the burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes."¹³⁴

In *R.A.V. v. City of St. Paul*,¹³⁵ the Court reversed the conviction of a group of teenagers who burned a make-shift cross on the lawn of a minority family's home. Justice Scalia wrote that the hate speech ordinance in question was invalid because it prohibited otherwise permitted speech on the basis of the disfavored subjects the speech addressed.

What makes the anger, fear, sense of dishonor, etc., produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc., produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily. It is obvious that the symbols which will arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" are those symbols that communicate a message of hostility based on

131. 422 U.S. 205 (1975).

132. *Id.* at 206-07. The ordinance stated:

It shall be unlawful and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theater in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human bare public areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a Class C offense.

Id.

133. *Id.* at 211.

134. *Id.* (footnote and citations omitted).

135. 505 U.S. 377 (1992).

one of these characteristics.¹³⁶

In *Gentile v. State Bar of Nevada*,¹³⁷ the Court reviewed a private reprimand of Gentile, a criminal defense lawyer who held a press conference during which he attacked the prosecutorial authorities for indicting his client. During the press conference, Gentile suggested that a named Las Vegas detective stole money and drugs from a vault owned by the defendant, Gentile's client. He also insinuated that the police created the case against his client by literally buying the testimony of informers.¹³⁸ The State Bar of Nevada brought a disciplinary charge against Gentile alleging he violated Nevada Supreme Court Rule 177. Rule 177 prohibits "extrajudicial statements" by attorneys in pending cases.¹³⁹

The Court, per Justice Kennedy, identified the issue as "the constitutionality of a ban on political speech critical of the government and its officials."¹⁴⁰ Such speech has "traditionally been recognized as lying at the core of the First Amendment."¹⁴¹ The Court continued:

Whenever the fundamental rights of free speech . . . are alleged to have been invaded, it must remain open to a defendant to present the issue

¹³⁶ *Id.* at 392-93.

¹³⁷ 501 U.S. 1030 (1991).

¹³⁸ See *id.* at 1059-60 (reproducing Gentile's opening statements made at February 5, 1988, press conference). An excerpt follows.

There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living human being. And I have to say that I feel that Grady Saunders is being used as a scapegoat to try to cover up for what has to be obvious to people at the Las Vegas Metropolitan Police Department and at the District Attorney's office. Now, with respect to these other charges that are contained in this indictment, the so-called other victims, as I sit here today I can tell you that one, two—four of them are known drug dealers and convicted money launderers and drug dealers; three of whom didn't say a word about anything until after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something.

Id. at 1059.

¹³⁹ *Id.* at 1033.

¹⁴⁰ *Id.* at 1034.

¹⁴¹ *Gentile*, 501 U.S. at 1035; see also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610-11 (1982) (declaring unconstitutional statute excluding public and press from courtrooms during testimony of minor victims of sex offenses); *Craig v. Harney*, 331 U.S. 367, 376-78 (1947) (reversing contempt order against newspaper for unfairly criticizing trial judge). In *Globe Newspaper*, the Court suggested that "the free discussion of governmental affairs" is central to the First Amendment's purpose "to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Globe Newspaper*, 457 U.S. at 604. In *Craig*, the Court explained that the power to punish for contempt should not interfere with First Amendment rights "unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice." *Craig*, 331 U.S. at 373. The Court suggested that judges are "supposed to be men of fortitude able to thrive in a hardy climate," and thus no imminent threat to the administration of justice existed. *Id.* at 376.

whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature.¹⁴²

After a close examination of the proceedings before the Bar disciplinary authorities, the Court concluded that no such danger existed.¹⁴³

In *New York Times Co. v. Sullivan*,¹⁴⁴ the Court famously affirmed our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."¹⁴⁵ In *Sullivan*, the Court created a constitutional privilege to make false statements. The Court created the privilege because it thought such a privilege was a necessary means of preserving genuinely uninhibited, robust and wide-open debate. In fact, the Court condemned attempts to punish seditious libel. It announced that the Seditious Act of 1789, "because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."¹⁴⁶

[A] representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.¹⁴⁷

It is noteworthy in this regard that during the floor debates on BCRA legislative supporters of electioneering communications limitations commonly expressed that the restrictions would reduce the flow of negative attack ads. The legislators' statements about why they desired to reduce this flow elucidated their legislative purpose. They sought precisely to stifle speech that was critical of them and, similar to the speech made unlawful by the Seditious Act, speech that brought them "into contempt or disrepute; or . . . excite[d] against them . . . the hatred of the good people of the United States."¹⁴⁸

¹⁴² *Gentile*, 501 U.S. at 1038-39 (citing Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 844 (1978)).

¹⁴³ *Id.* at 1058; see also *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996) (invalidating statute prohibiting liquor price advertisements).

¹⁴⁴ 376 U.S. 254 (1964).

¹⁴⁵ *Id.* at 270. The *McCormell* court similarly recognized the importance of protecting a citizen's right to

"make informed choices in the political marketplace." *McCormell v. FEC*, 540 U.S. 93, 197 (2003).

¹⁴⁶ 146 N.Y. Times v. Sullivan, 376 U.S. 254, 276 (1964).

¹⁴⁷ *Id.* at 297 (Black, J., concurring) (quoting 1 HENRY ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 297 (1803) (ed. app.)).

¹⁴⁸ *Id.* at 273-74 (quoting Seditious Act of 1778, ch. 75, §2, 1 Stat. 596) (alteration in original).

Finally, in *Brandenburg v. Ohio*,¹⁴⁹ the Court announced the following principle:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.¹⁵⁰

The *Brandenburg* principle "combines the most protective ingredients of the *Masses* incitement emphasis with the most useful elements of the clear and present danger heritage" to produce "the most speech-protective standard yet evolved by the Supreme Court."¹⁵¹

In isolated cases, for example *Florida Bar v. Went For It, Inc.*,¹⁵² the Court allowed for audience protections. The *Went For It* court permitted Florida Bar authorities to limit plaintiffs' lawyers contact with the surviving relatives of wrongful death victims.¹⁵³ In *Posadas de Puerto Rico Associates v. Tourism*

149. 395 U.S. 444 (1969).

150. *Id.* at 447.

151. Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 754-55 (1975); see also *Masses Publ'g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917) (considering legality of postmaster's refusal to mail anti-war literature not directly advocating readers to violate law). In *Masses*, the court evaluated whether certain words constituted "direct incitement to violence" in considering the legality of words uttered with an intent to obstruct World War I. *Id.*

152. 515 U.S. 618 (1994).

153. *Id.* at 632-33. In *Went For It*, the Court reviewed a Florida Bar Rule that prohibited direct mail advertising for thirty days to the relatives of a deceased who died in an accident. *Id.* at 620. The Court recited the history of the protection of commercial speech and stated the controlling test:

Mindful of these concerns, we engage in "intermediate" scrutiny of restrictions on commercial speech, analyzing them under the framework set forth in *Central Hudson*. Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading. Commercial speech that falls into neither of those categories, like the advertising at issue here, may be regulated if the government satisfies a test consisting of three related prongs: First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be "narrowly drawn."

Id. at 623-624 (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-64 (1980)) (citations omitted). The Court recited two interests advanced by the Florida Bar: "protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers" and, preserv[ing] the integrity of the profession." *Id.* at 624. The Court characterized contact with the relatives of accident victims too soon after an accident as "universally regarded as deplorable and beneath common decency. . . ." *Id.* at 625. With respect to the second prong of the *Central Hudson* test, the Court found that outright prohibition directly advanced the state interest and distinguished other direct solicitation cases. *Id.* at 625-26. The Court cited studies submitted by the Florida Bar affirming the offense that recipients of these solicitations felt upon their receipts. *Id.* at 631. Concerning the third prong, the Court found that the thirty day ban was an appropriate response to the problem the Bar perceived. *Id.* at 633. The Bar did not have

Company of Puerto Rico,¹⁵⁴ the Court allowed Puerto Rico to prohibit gambling advertising for aimed at native Puerto Ricans.¹⁵⁵ These two cases, however, are of dubious jurisprudential authority vis-à-vis the Court's supposed solicitude of audience concerns. *Posadas* was only on the books for a decade before it was repudiated by the Court in 44 *Liquormart v. Rhode Island*.¹⁵⁶ In 44 *Liquormart*, the Court abandoned the *Posadas* formulation that the "greater" power to regulate an activity also inevitably included the "lesser" power to regulate advertising of that activity.¹⁵⁷ *Went For It*, by contrast, is one case in a series of self-dealing decisions in which the Court exempted regulations on legal advertising from its general trend of hostility towards regulation of other professions.¹⁵⁸

The famous dissents of Justices Holmes and Brandeis in *Abrams v. United States*,¹⁵⁹ *Gilow v. New York*,¹⁶⁰ and *Whitney v. California*¹⁶¹ made two

the burden of demonstrating that the ban was the least restrictive means of achieving the solution. *Id.* at 640. Justice Kennedy's dissent suggested that the receipt of unsolicited mail implicated no serious privacy interest of the recipient. *Id.* at 637 (Kennedy, J., dissenting). It stated that the ban was "nothing more than manipulating the public's opinion [of lawyers] by suppressing speech that informs us how the legal system works." *Id.* at 639-40.

154. 478 U.S. 328 (1986).

155. *Id.* at 344.

156. 517 U.S. 484 (1996).

157. *Id.* at 486.

158. See generally *Ibanez v. Fla. Bd. of Accountancy*, 512 U.S. 761 (1994); *Edenfield v. Fane*, 507 U.S. 761 (1993). In *Ibanez* and *Edenfield*, for example, the Court invalidated restrictions on accountant advertising. In each case, the accounting profession expected the same level of professional deference that the Court previously accorded the legal profession. At the time of *Edenfield* and *Ibanez*, the court appeared to prioritize freedom of speech concerns over a profession's need to set ethical norms and police the behavior of its practitioners. In *Went For It*, however, it became clear that the Court was only de-prioritizing, some professions' need to set ethical norms; the Court preserved its own profession's ability to do this. Taken in context, then, it is impossible to read *Went For It* as any semblance of a broad theoretical push to preserve audience sensibilities; it is merely the Supreme Court trying to maintain the aura of the bar.

159. 250 U.S. 616 (1919).

160. 268 U.S. 652 (1925).

161. 274 U.S. 357 (1927), *overruled by*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Justice Holmes joined Justice Brandeis' concurrence which dissented in principle from the majority's approach. The opinion stated in part:

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to

principal points. First, the dissents stressed that speech could not be punished unless it in fact created a genuinely clear and present—and substantial—danger of bringing about a proscribable evil. Second, the dissenting justices argued that it was for the Court to determine whether the speech charged as criminal did in fact create the alleged danger.¹⁶² Deferring to the judgment of the legislature that particular kinds of speech were particularly dangerous, the dissenters concluded, was inappropriate. Yet, in the context of the facial attack on the statute presented in *McConnell*, the Court stopped short of finding any kind of clear and present danger that large contributions to political parties offended audiences or caused other harms sufficient under the test. The same can be said for electioneering communications or attack ads. True, there was evidence (and counter-evidence) in the congressional record that both were evils which Congress found problematic, but the Court stopped short of making its own independent assessment of these issues.

VI. THE FEDERAL ELECTION COMMISSION

The FEC's unique structure features an even number of commissioners (six). Furthermore, the FEC may only take action on a proposal if the proposal has the support of a four-commissioner majority. No more than three of the six commissioners can be from the same political party. Thus, in reality, three Republicans and three Democrats always sit on the Commission. The President formally nominates commissioners and the Senate confirms. Practically, however, the leaders of each political party select "their" commissioners and provide those names the President. The President, in turn, typically nominates the proposed individuals.¹⁶³ Perhaps the most outrageous appointment to the

effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. Thus, a State might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this Court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.

Id. at 377-78 (footnote omitted).

162. See *id.* 274 U.S. at 372-80 (Brandeis, J., concurring); *Gitlow*, 268 U.S. at 672-73 (Holmes, J., dissenting); *Abrams*, 250 U.S. at 624-31 (Holmes, J., dissenting); see also Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 153, 155-60 (Lee C. Bollinger & Geoffrey R. Stone, eds., 2002) (analyzing Justice Holmes' dissent in *Abrams*).

163. See Campaign Legal Center, *The Campaign Finance Guide: History and Purpose of the FEC*

FEC was that of Bradley Smith, a long-time opponent of regulating campaign finance who had advocated the repeal of the law.¹⁶⁴ The commissioners serve staggered six year terms, with one seat from each party open for a new appointment every two years.¹⁶⁵

The FEC chairman position is unusually "weak" compared to the chairman position in other federal agencies. The chair rotates annually between the commissioners. Additionally, no power to hire or fire senior FEC personnel accompanies the chairman position. The overall structure obviously serves to limit the FEC's ability to act and thus undermines its ability to effectively employ its regulatory and enforcement powers. In fact, the FEC has split three-three on a number of important enforcement and policy issues, resulting in no FEC action.¹⁶⁶

The FEC primarily has responsibility to: "disclose campaign finance information to the public; clarify the law through advisory opinions and regulations; enforce the law through investigations, audits and fines; and administer the presidential public funding system."¹⁶⁷ In structuring the FEC, Congress sought to establish an enforcement agency that would not become an overly powerful or autonomous agency. Thus, Congress denied the FEC authority to investigate anonymous complaints and the ability to conduct random financial audits of candidates. Before imposing a civil penalty, the FEC must reach an agreement with a respondent in the conciliation process. The FEC may seek a sanction from the court if it does not reach an agreement. Additionally, the FEC does not handle criminal prosecutions, but rather refers them to the Justice Department.¹⁶⁸

The FEC's enforcement process is often cumbersome and lengthy. Former FEC Commissioner Scott Thomas stated that the "procedural requirements and their attendant time allowances make it difficult—if not impossible—for the Commission to resolve a complaint in the same election cycle in which it is filed."¹⁶⁹ In some instances, the FEC sometimes takes four to five years to

[hereinafter *History and Purpose*] (providing overview of FEC structure), at <http://www.campaignfinanceguide.org/guide-55.html> (last visited Feb. 25, 2006).

164. Project FEC, *No Bank, No Bite, No Point: The Case for Closing the Federal Election Commission and Establishing a New System for Enforcing the Nation's Campaign Finance Laws*, 17 (2002) (highlighting Smith's record of opposition to campaign finance regulation), at <http://www.campaignfinanceguide.org/FEA.html>. See generally BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM (2003) (criticizing campaign finance reform efforts and arguing any limitation on campaign spending violates First Amendment).

165. Campaign Legal Center, *History and Purpose*, *supra* note 163.

166. *Id.*

167. Campaign Legal Center, *The Campaign Finance Guide: FEC Responsibilities* [hereinafter *FEC Responsibilities*], at <http://www.campaignfinanceguide.org/guide-56.html> (last visited Feb. 25, 2006).

168. Campaign Legal Center, *The Campaign Finance Guide: Concern with FEC Structure and Enforcement* (highlighting flaws and inadequacies in FEC structure and authority), at <http://www.campaignfinanceguide.org/guide-57.html> (last visited Feb. 25, 2006).

169. Campaign Legal Center, *FEC Responsibilities*, *supra* note 167.

resolve a complaint. The FEC has dismissed other complaints without investigation because it lacks the resources to manage all the complaints it receives. As previously noted, three-three deadlines, and thus no FEC action, commonly occur in controversial partisan matters.¹⁷⁰

VII. THE REALITIES

A. Hard Money Summary

In the 2004 election cycle, President Bush raised \$367,228,801, while Senator Kerry raised \$326,236,288.¹⁷¹ Their combined total showed an increase of about \$350 million over the amounts collected by the major party presidential candidates in the 2000 election cycle.¹⁷² The Republican Party raised \$892,792,542, up from \$715,701,784 in 2000; the Democratic Party raised \$730,935,853, up from \$520,433,199.¹⁷³ Each candidate received \$74.6 million in federal funds allocated by the FEC.¹⁷⁴ In total, House candidates raised \$696,520,320, while Senate candidates raised \$488,241,916.¹⁷⁵ The most expensive Senate race was for Tom Daschle's seat: \$36,005,713. The most expensive race for the House was in the 32nd District in Texas between Martin Frost and Pete Sessions: \$9,257,252.¹⁷⁶ In addition, PACs contributed approximately \$292.1 million to candidates for federal office.¹⁷⁷ Political committees expended more than \$58 million on electioneering communications alone.¹⁷⁸ Throughout the 2004 election cycle, in excess of \$4 billion in federal

170. *Id.*

171. Center for Responsive Politics, 2004 Presidential Election, at <http://www.opensecrets.org/presidential/index.asp> (last visited Mar. 22, 2006).

172. Compare *id.* (indicating Kerry and Bush raised combined \$693,465,089), with Center for Responsive Politics, 2000 Presidential Race Total Raised and Spent (indicating Gore and Bush raised combined \$325,892,689), at <http://www.opensecrets.org/2000elec/index/AJCands.htm> (last visited Mar. 22, 2006).

173. Center for Responsive Politics, Political Parties (setting forth party spending totals for 2000, 2002, 2004, and 2006 election cycles), at <http://www.opensecrets.org/parties/index.asp> (last visited Mar. 22, 2006).

174. Center for Responsive Politics, 2004 Presidential Election, *supra* note 171.

175. Center for Responsive Politics, The Big Picture 2004 Cycle: Price of Admission, at <http://www.opensecrets.org/bigpicture/stats.asp?cycle=2004&display=Type-A> (last visited Mar. 22, 2006).

176. Center for Responsive Politics, The Big Picture 2004 Cycle: Most Expensive Races (July 21, 2005), at <http://www.opensecrets.org/bigpicture/topraces.asp>, see also Charles Babington & Juliet Eilperin, *GOP Hopes to Expand its Majority: Four Democratic Veterans Lost in Texas Contests*, WASH. POST, Nov. 3, 2004, at A17 (discussing Republican efforts to oust Texas Democrats). This race was expensive primarily because the Republican-controlled Texas legislature—at the urging of House Majority Leader Tom DeLay—had engineered a mid-decade redrawing of legislative districts intended to imperil several prominent Democrats, particularly Frost, and flip their seats into the Republican column. *Id.* The defeat of Frost, and other Democrats, indicated that this endeavor was successful. *Id.*

177. Press Release, Federal Election Commission, PAC Activity Increases for 2004 Elections (Apr. 13, 2005), at <http://www.fec.gov/press/press2005/20050412pac/FACFinal2004.html>.

178. Press Release, Center for Public Integrity, Center for Public Integrity 2004 Election TipSheet; Tap the Center for Election and Finance Data Experts (Oct. 29, 2004), at <http://www.commondreams.org/news2004/1029-14.htm>.

money was spent on elections for federal office. This is an increase of more than ten percent over the amounts spent in 2000. Thus, if BRCA sought to reduce the effect of big money in federal election, it appears to have failed. Even the statute's direct target, the political parties, raised significantly more money in 2004 after the imposition of BCRA's limitations.

B. Loopholes and Exceptions

The reported expenditures of hard money may account for less than half of what was spent in the 2004 federal elections. Expenditures that often escape statutory limitations include: independent expenditures, issue advocacy, expenditures of 527 and 501(c) organizations, monies expended by the parties for party building, funding for the national conventions, certain corporate and union expenditures, candidate self funding, and certain leadership PAC expenditures.

1. Independent Expenditures

In the years since *Buckley*, the Court has actively restricted FEC attempts to limit independent expenditures. *FEC v. National Conservative PAC*¹⁷⁹ involved a constitutional challenge to provisions of the Presidential Campaign Fund Act (Fund Act) "that make it a criminal offense for political committees . . . to make independent expenditures in support of a candidate who has elected to accept public financing."¹⁸⁰ The Court ruled that the prohibition of expenditures over \$1000 violated the PAC's First Amendment right of expression:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of . . . the audience reached . . . [E]very means of communication ideas in today's mass society requires the expenditure of money.¹⁸¹

The Court continued, "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."¹⁸² The Court added that even if it deemed the danger of corruption

179. 470 U.S. 480 (1985).

180. *Id.* at 491.

181. *Id.* at 493-94 (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976)).

182. *Id.* at 497 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)).

more than hypothetical, "Section 9012(f) is a fatally overbroad response to that evil."¹⁸³ "It is not limited to multimillion dollar war chests; its terms apply equally to informal discussion groups that solicit neighborhood contributions to publicize their views about a particular Presidential candidate."¹⁸⁴

In *FEC v. Massachusetts Citizens for Life (MCFL)*,¹⁸⁵ the Court broadened the definition of express advocacy.¹⁸⁶ It also declared unconstitutional the ban on federal election expenditures by issue oriented organizations, such as MCFL and other 501(c)(4)-type organizations that are not themselves funded by for-profit corporations.¹⁸⁷ The Court first noted that MCFL's expenditures were made independently of any candidate.¹⁸⁸ Later, the Court highlighted that

183. *National Conservative PAC*, 470 U.S. at 498.

184. *Id.*

185. 479 U.S. 238 (1986).

186. See *id.* at 249-50 (concluding MCFL's publication constituted express advocacy). MCFL was a nonprofit, non-stock corporation organized to advance anti-abortion goals. *Id.* at 241. In 1973, MCFL began publishing a newsletter that contained information on the organization's activities, including the status of various proposed bills and constitutional amendments. *Id.* at 242. In September 1978, just weeks before the primary elections, MCFL published a special edition of the newsletter. *Id.* at 243. While MCFL sent prior editions of its newsletter to approximately 2000 to 3000 people, it published more than 100,000 copies of the special edition. *Id.* The headline of the newsletter read "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," and readers were reminded that "[n]o pro-life candidate can win in November without your vote in September." *Id.* (alteration in original). "VOTE PRO-LIFE" appeared in large black letters on the back page, and a coupon was available to clip and take to the polls "to remind voters of the names of the 'pro-life' candidates." *Id.* Next to this statement read the following disclaimer: "This special election edition does not represent an endorsement of any particular candidate." *Id.* An accompanying flyer placed a "y" next to the names of candidates who supported the MCFL view on a particular issue; an "n" indicated that a candidate opposed MCFL's position. *Id.*

Section 441b of FECA prohibits any corporation from using treasury funds "in connection with" a federal election, and requires that any expenditure for such purpose be financed by voluntary contributions into a PAC. *Id.* at 241. The FEC alleged that MCFL's expenditures in financing the special election newsletter constituted an illegal corporate contribution to the candidates named in the newsletter. *Id.* at 244-45. As in *Buckley*, the Court ruled that an expenditure "must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *Id.* at 249.

The Court, however, went on to hold that the MCFL newsletter constituted express advocacy because it urged readers "to vote for 'pro-life' candidates," and provided the names and photographs of candidates meeting that description. *Id.* at 249-50. The Court stated:

The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. *The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature.* The Edition goes beyond issue discussion to express electoral advocacy. The disclaimer of endorsement cannot negate this fact.

Id. at 249 (emphasis added). Thus, the Court clarified the *Buckley* definition of express advocacy to include words that are "in effect" an explicit directive, although "marginally less direct" than the *Buckley* language. *Id.* Because the Court found the MCFL newsletter to be express advocacy, it ruled that MCFL's expenditures violated FECA's prohibitions. *Id.* at 250-51.

187. *Id.* at 263 (concluding restriction on independent expenditures burdens protected speech without compelling justification).

188. See *id.* at 251 (analyzing constitutionality of independent expenditure restrictions as applied to MCFL's publication). The Court also noted that "independent expenditures 'produce speech at the core of the

MCFL was "formed for the express purpose of promoting political ideas, and cannot engage in business activities;" "has no shareholders or other persons affiliated so as to have a claim on its assets or earnings;" and "was not established by a business corporation or a labor union, and [has a] policy not to accept contributions from such entities."¹⁸⁹ In light of these three characteristics, the Court concluded that Section 441b's limitations on independent spending do not apply to MCFL.¹⁹⁰

In *Colorado Republican Federal Campaign Committee v. FEC (Colorado I)*,¹⁹¹ the Court extended MCFL's reasoning to political parties.¹⁹² Specifically, the Court stated that "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees."¹⁹³ *FEC v. Colorado Republican Federal Campaign Committee (Colorado II)*,¹⁹⁴ however, made clear that the FEC could regulate party expenditures coordinated with the candidate.¹⁹⁵

First Amendment." *Id.* (quoting *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 493 (1985)).

189. *MCFL*, 479 U.S. at 264.

190. *Id.* at 263-64.

191. 518 U.S. 604 (1996).

192. See *id.* at 609-16 (reviewing and applying Supreme Court independent expenditure jurisprudence). *Colorado I* concerned a 1986 senatorial election, in which the Colorado Republican Party (the Party) purchased a series of radio advertisements attacking the likely Democratic Senatorial candidate for the upcoming election. *Id.* at 608. At the time of the purchase, the Party had not selected its candidate for the race. *Id.* The Party had already assigned its full Senatorial campaign allotment to the National Republican Senatorial Committee. *Id.* at 612. The FEC brought suit against the Party claiming the advertisements were made in connection with the general election and, as a result, caused the Party to exceed the expenditure limit imposed by FECA's Party Expenditure Provision. *Id.* In response, the Party claimed that the expenditures were not coordinated with any specific candidate for office and, therefore, were not subject to the expenditure limits. *Id.* at 613-14. Furthermore, the Party argued that the expenditure provision violated the First Amendment and challenged the constitutionality of the entire provision. *Id.* at 612.

In an opinion authored by Justice Breyer, the Court held that the First Amendment prohibits the FEC from regulating independent expenditures made by political parties without the coordination of a candidate. *Id.* at 615-16. As discussed in *Buckley*, limits on independent expenditures not only drastically impair the quantity of political speech, but also inhibit an individual's ability to engage in political advocacy. *Id.* at 615. In earlier cases, the Court had determined that restrictions on independent expenditures are less likely to cause corruption given that there is no prearranged, improper quid pro quo transaction between the contributor and the candidate. *Id.*

Conversely, provisions found constitutional typically limit contributions including coordinated contributions from individuals or PACs made directly or indirectly to candidates. *Id.* at 610. In *Colorado I*, the Court compared the current limitations imposed on individual and PAC contributions to candidates running for federal office to limitations imposed on political parties. *Id.* at 616-19. The Court concluded that Constitution does not permit the FEC to permit individuals and PACs. Finally, the Court determined that the Party's radio expenditure was not a "coordinated" expenditure, which FECA treats as a form of contribution, but rather it was what *Buckley* referred to as an "independent" expenditure. *Id.* at 619.

193. *Id.* at 616.

194. 533 U.S. 431 (2001).

195. See *id.* at 437. In *Colorado II*, the Court considered the Party's argument that "all limits on expenditures by a political party in connection with congressional campaigns are facially unconstitutional." *Id.* *Buckley* held that limits on campaign expenditures are generally unconstitutional, although limits on campaign contributions are generally constitutional. *Id.* Under FECA, however, expenditures coordinated with a

BCRA revised the definition of "independent expenditures" by eliminating the magic words requirement.¹⁹⁶ Now, an expenditure for a communication that "expressly advocates the election or the defeat of a clearly identified candidate" qualifies for coverage.¹⁹⁷ An individual who makes independent expenditures in excess of \$250 in any year must report such expenditures to the FEC.¹⁹⁸

2. 527 and 501(c) Organizations

The 2004 election was the first presidential campaign conducted since BCRA removed soft money from the scene. Political actors, however, were quick to adjust. Taking the place of the political parties in the race to raise unregulated money were so-called "527" groups, named for the section of the Internal Revenue Code that covers them.¹⁹⁹ During the 2004 election, several 527s run by special interest groups raised unlimited soft money, which they used not only for voter mobilization, but also for issue advocacy and for the advocacy of the election or defeat of specific federal candidates. Among the most prominent 527s were the pro-Republican Swift Boat Veterans For Truth and George Soros' pro-Democrat Americans Coming Together. The hard-hitting attack ads that these groups ran were paid for with the exact kind of uncapped contributions that BCRA sought to remove from the system. But in yet another episode of undercutting congressional regulatory intent, the FEC announced in the middle of the 2004 campaign that much of this behavior was perfectly legal and passed a tepid set of regulations concerning 527s that would not take effect until after the presidential election.²⁰⁰ In total, 527 organizations

candidate have been treated as the functional equivalent of a contribution. *Id.* at 438. Thus, the *Colorado II* court, per Justice Souter, held that FECA's limits on political party expenditures made in coordination with a congressional candidate do not infringe upon the Party's First Amendment rights. *Id.* at 447. With coordinated expenditures, the Court explained, a more direct causal exists between contribution limits and the prevention of actual or perceived corruption in the campaign process. *Id.* at 464-65.

196. See *McConnell v. FEC*, 540 U.S. 93, 193-94 (2003) (acknowledging Congress enacted BCRA to eliminate "functionally meaningless" magic words requirement).

197. 2 U.S.C. 431(9)(B)(iii) (2000).

198. 11 C.F.R. § 109.10(b) (2006).

199. See I.R.C. § 527 (2000). Section 527 of the Internal Revenue Code governs the tax treatment of political organizations. These are defined by the IRS as entities "organized and operated primarily" for the purpose of influencing the selection of candidates to elected or appointed office. I.R.C. § 527(e)(1) (2000). All Section 527 groups are subject to a provision in the tax law that requires them to report contributions of over \$200 per year and disbursements of over \$500 to the Internal Revenue Service (IRS), which makes that data available to the public. I.R.C. § 527(f) (2000). Section 527's disclosure requirements do not apply to an organization already required to disclose to the FEC or a state disclosure agency. I.R.C. § 527(j)(5) (2000). 527 organizations' disclosure reports filed with the IRS can be accessed via the IRS Web site. Virtually all political committees—whether candidate committees, party committees, or PACs—are registered with the IRS under section 527. This section of the tax code provides that the contributions received and expenditures made by these committees will not be taxed. I.R.C. § 527(g) (2000).

200. See Glen Justice, *Panel Compromises on Soft Money Rules*, N.Y. TIMES, Aug. 20, 2004, at A16. Congress has since struck back at the FEC; in April of 2005, the Senate rules committee approved a bill that

raised \$434 million in the 2004 election season, led by Americans Coming Together, which raised \$78 million. 527 organization spending, which reached just over a half-billion dollars, doubled compared to the 2000 election cycles. Democratic and Republican 527s combined spent more than \$142 million on broadcast advertising alone.²⁰¹

3. Issue Advocacy

Issue advocacy avoids federal coverage because it does not advocate the election or defeat of a candidate for a federal election. Since *Citizens Against Rent Control v. City of Berkeley*,²⁰² it has been clear that ballot initiatives, like rent control, have full First Amendment protection because corruption or the appearance of corruption of a candidate is remote.²⁰³ Ballot initiative sponsors

would bar 527s from running television ads. See Thomas B. Edsall, *Panel Backs Bill to Rein in 527 Advocacy Groups*, WASH. POST, Apr. 28, 2005, at A21.

201. Center for Public Integrity, *Silent Partners* (Dec. 16, 2004), at <http://www.publicintegrity.org/527/report.aspx?aid=435>.

202. *Id.* at 297-99. In *Citizens Against Rent Control*, the Court considered the constitutionality of a section of a Berkeley, California, ordinance which placed a limit of \$250 on contributions to committees formed to support or oppose ballot measures. *Id.* at 291. Section 602 of the ordinance provided: "No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars (\$250)." *Id.* at 292.

Citizens Against Rent Control, an unincorporated association, formed to oppose a ballot measure that would have imposed rent control on some Berkeley rental units. *Id.* The association raised over \$108,000 from approximately 1,300 contributors. *Id.* at 292-93. Nine contributions exceeded the \$250 limit. *Id.* Those contributions totaled \$20,850, or \$18,600 in excess of the allowed amount. *Id.* Pursuant to Section 604 of the ordinance, the Berkeley Fair Campaign Practices Commission ordered *Citizens Against Rent Control* to pay \$18,600 into the city treasury. *Id.*

The Court's analysis began by stating that "regulation of First Amendment rights is always subject to exacting judicial review." *Id.* at 294. Next, the Court described the tradition in the United States of people with common views banding together to make their views known in the marketplace of conflicting ideas. *Id.* The First Amendment protects this marketplace, the Court stated, and the Berkeley ordinance places a restriction on it.

The Court ruled that Section 602's contribution limits imposed a restraint on the appellant's right of association. *Id.* at 296. In reaching this conclusion, the Court stated: "Under the Berkeley ordinance an affluent person can, acting alone, spend without limit to advocate individual views on a ballot measure. It is only when contributions are made in concert with one or more others in the exercise of the right of association that they are restricted by § 602." *Id.*

The Court also ruled that the exception in *Buckley* for limits on contributions to candidates and their committees did not apply in this case because appellant *Citizens Against Rent Control* was a committee formed to influence the vote on a ballot measure. *Id.* at 297 (emphasis added). The city argued that Section 602 advanced the public interest of making known the identity of supporters and opponents of ballot measures. *Id.* at 298. The Court agreed that corporations could conceal their support for a measure by speaking through a committee. *Id.* It ruled, however, that this public interest was insubstantial because it is addressed by Section 112 of the ordinance, which requires contributors to make their identities known, and that a list of contributors be published in advance of the vote. *Id.*

Furthermore, the Court ruled that "the record does not support the California Supreme Court's conclusion that § 602 is needed to preserve voters' confidence in the ballot measure process." *Id.* at 299. The Court reasoned: "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases

are thus free to underwrite such campaigns with money that is prohibited or severely restricted—including corporate and labor treasury funds and individual contributions—when used in connection with federal elections. The demarcation between issue advocacy and candidate advocacy, however, is unclear; many advertisements may not expressly advocate the election or defeat of a clearly identified federal candidate, and yet may be thinly veiled candidate advocacy.²⁰⁴

4. Corporate Expenditures

The desire to curb corporate influence in politics extends at least as far back as Teddy Roosevelt and the Tillman Act. In *Austin v. Michigan Chamber of Commerce*²⁰⁵ and *FEC v. Beaumont*,²⁰⁶ the Court made clear that regulation of

involving candidate elections simply is not present in a popular vote on a public issue." *Id.* at 298 (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790 (1998)). Thus, the Court concluded that Section 602 does not further a legitimate governmental interest "significant enough to justify its infringement of First Amendment rights." *Id.* at 299.

The Court also noted, in its conclusion, that Section 602 "also imposes a significant restraint on the freedom of expression of groups and those individuals who wish to express their views through committees." *Id.* Contributions made by such groups and individuals are a form of political expression, the Court reasoned. *Id.* at 298. Concluding, the Court stated: "The contribution limit thus automatically affects expenditures, and limits on expenditures operate as a direct restraint on freedom of expression of a group or committee desiring to engage in political dialog concerning a ballot measure." *Id.* at 299.

²⁰⁴ See Trevor Potter & Kirk L. Jowers, *The Brookings Institution, Issue and Express Advocacy*, at 3-4 (July 2002) (explaining distinction between express advocacy and issue advocacy), at <http://www.brook.edu/dydocroov/gsf/sourcebk/IssueExpressAd.pdf>; see also Allison R. Hayward, *When Does an Advertisement About Issues Become an "Issue Ad"?*, 49 CATH. U.L. REV. 63, 63-64 (1999) (suggesting line between issue advocacy and express advocacy difficult to draw).

²⁰⁵ 494 U.S. 652 (1990). In *Austin*, the Court reviewed the Michigan Campaign Finance Act (the Act) which prohibited corporations from making independent state campaign expenditures from their general treasuries. *Id.* at 654. The Act required corporations to pay for these kinds of expenditures from a separate political fund that consists exclusively of contributions solicited from persons closely associated with the corporation. *Id.* at 655-56. The Michigan State Chamber of Commerce sought to purchase a newspaper ad supporting a candidate running for a vacancy in the Michigan House of Representatives. *Id.* at 656. Although the Chamber had a special political fund already created, it sought to pay for the advertisement out of its general treasury. *Id.* The Chamber challenged the law prohibiting such an expenditure as a violation of its First and Fourteenth Amendments. *Id.* In response, Michigan claimed that the "unique legal and economic characteristics of corporations necessitates some regulations of their political expenditures to avoid corruption or the appearance of corruption." *Id.* at 658.

The Court held that the Act, as applied to corporations, is "narrowly tailored to serve a compelling governmental interest" and therefore does not violate the First and Fourteenth Amendments. *Id.* at 655. The Court also found that the state provided corporations with many legal advantages to promote economic activity. *Id.* These advantages would give corporations "an unfair advantage in the political marketplace." *Id.* Moreover, the Court explained that the Act's purpose was not to balance the political expenditure playing field but rather to prevent "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660. Finally, the Court concluded that the Act was "sufficiently narrowly tailored to achieve its goals." *Id.* The Act, the Court observed, does not ban all corporate political expenditures but rather requires such expenditures be made through segregated funds. *Id.*

²⁰⁶ 539 U.S. 146 (2003). *Beaumont* involved a challenge to the long-standing statutory rule prohibiting corporations from making direct contributions to political candidates. *Id.* at 149-50. The corporation at bar

corporate and union influence is much more acceptable than regulation of individuals or advocacy groups. Additionally, a major goal of BCRA was to re-establish corporate and union limits that had eroded over time. Notwithstanding these efforts, both corporations and unions continue to have a wide variety of methods to wield their influence.

First, as described earlier, both may establish "separate segregated funds," commonly known PACs.²⁰⁷ A corporation or union may solicit its restricted class of employees and shareholders (or members in the case of a union) and their families²⁰⁸ to contribute up to \$5000 per person per year to its PAC; in fact, corporations widely use payroll "check off" plans for these contributions.²⁰⁹ The PAC may then contribute up to \$5000 per election to a federal candidate.²¹⁰ The primary and general elections count as separate elections. The corporation or union may also use its treasury funds to pay the PAC's administrative costs, including legal, accounting, and fund-raising solicitation expenses.²¹¹

Second, both may use treasury funds to communicate with their restricted classes "on any subject."²¹² FEC regulations explicitly allow corporations and unions to make communications expressly advocating the election or defeat of a clearly identified federal candidate. Further, they may attempt to persuade restricted class members to vote for or contribute to particular candidates. Although there is no legal limit on the amount that may be spent on restricted class communications, FEC regulations require amounts in excess of \$2000 to be reported. Restricted class members and their families include a corporation's stockholders and its employees. Trade associations may similarly communicate with their members.²¹³ Finally, corporations may sponsor political events that are open to the general public. For example, a corporation

is a nonprofit ideological corporation—North Carolina Right to Life. *Id.* at 150. The seven-two decision, in which the Court held that the rule could be applied, was unexceptional. Justice Souter's reasoning was similarly unexceptional; he essentially offered a boilerplate recitation of the themes that had been covered in *Austin*, *MCFL*, and *National Right to Work Committee v. FEC (NRWC)*, 459 U.S. 197 (1982). See generally *Beaumont*, 539 U.S. 146 (citing *Austin*, *MCFL*, and *NRWC* repeatedly throughout opinion).

²⁰⁷ See *supra* notes 7, 56 and accompanying text (acknowledging unions and corporations may raise and spend campaign funds through their separate segregated funds).

²⁰⁸ But see *NRWC*, 459 U.S. 197, 205-06 (1982) (limiting scope of restricted class). In *NRWC*, the Court rejected a political advocacy corporation's claim that every individual who ever contributed money to the organization was a member of its restricted class. *Id.*

²⁰⁹ 11 C.F.R. § 110.1(d) (2006); see also Bobby B. Burchfield & Robert K. Kehler, *FindLaw, Campaign Contributions* (2002) (noting prevalent use of check off plans by corporate PACs), at <http://library.findlaw.com/2002/Aug/14/131015.html>.

²¹⁰ 11 C.F.R. § 110.2(b) (2006).

²¹¹ See Burchfield & Kehler, *supra* note 209 (describing permitted corporate PAC activities).

²¹² See 11 C.F.R. § 114.1(a)(2)(1) (2006) (excluding all communications to restricted class from definition of contribution and expenditure).

²¹³ See 11 C.F.R. § 114.3 (2006) (establishing rules regarding corporation, union, and trade association disbursements to communicate with restricted class); see also 11 C.F.R. § 100.134(a) (2006) (setting monetary threshold beyond which corporation, union, or trade association must report disbursements).

may invite candidates to speak to all employees, or even to speak at events attended by the general public.²¹⁴

In the 2000 election cycle, the AFL-CIO alone reported spending over \$4.1 million in union funds on federal campaign communications to its members; the ten largest component members of the AFL-CIO reported spending an additional \$3.8 million.²¹⁵

5. Party-Building

FECA excludes numerous activities from the definition of expenditure, many of which may be referred to as party-building. These exclusions free party building expenditures from FECA's coverage; as such, they can continue to be paid out of soft money, and contributions for them need not be reported. Party-building activities include expenditures for identifying voters and encouraging individuals to vote or to register to vote, expenditures by state and local committees to print and distribute slate cards or sample ballots, and payments for legal or accounting services.²¹⁶

6. Conventions

The money used to finance official party convention committees comes from federal grants that are adjusted for inflation. In 1976, the first year grants were given, each party received \$2 million. In 1979, Congress increased the grant level to \$4 million. The federal grant level approximated \$15 million in 2004.

FECA prohibits party committees themselves from making additional convention-related expenditures. Unlimited funds from the public treasuries of host cities and of related state and local agencies may be expended to support conventions. Current FEC regulations also permit party conventions to benefit made by private civic "host committees" and city government organized and business-financed "municipal funds." In 2004, the final convention-related expenditure figures include \$25 million in federal security grants to each city. Pending legislation could increase to \$50 million under pending legislation. Private, overwhelmingly corporate, financing planned for the 2004 conventions amounted to \$64 million for the Republicans and \$39.5 million for the Democrats.²¹⁷

214. See 11 C.F.R. § 114.4 (2006) (delineating circumstances in which corporations, unions, and trade associations may communicate beyond restricted class).

215. Burchfield & Keizer, *supra* note 209 (providing overview of restricted class communications during 2000 election cycle).

216. 2 U.S.C. § 431(9) (2000).

217. Campaign Finance Institute, *Convention Financing 101*, at <http://www.cfmst.org/eguide/partyconventions/financing/conventions101.html> (last visited Mar. 21, 2006).

7. Self-funded Candidates

The First Amendment protects all candidates' right to use their own monies to fund their own campaigns. This has put a premium on wealthy candidates who are willing to fund their won campaigns out of their personal fortunes. In 2004, Blair Hull, an Illinois Democrat, spent over \$28 million in his failed attempt to secure the democratic nomination for the United States Senate.²¹⁸ In the 2000 New Jersey Senate race, Jon Corzine spent \$60 million of his own money.²¹⁹ Ross Perot's 1992 campaign for the presidency was completely self-funded.²²⁰

8. Leadership PACs

Through leadership PACs candidates may raise money independent of their own campaign and direct it to colleagues and other candidates. These PACs act as vehicles for promoting a candidate's own ambitions for higher office or bankrolling certain political activities without having to utilize precious campaign funds. Leadership PACs can accept limited hard money. Up until the 2002 elections, they could also accept unlimited soft money.²²¹

In the past, candidates raised soft money through their leadership PACs. While candidates could not spend leadership PAC soft money directly on campaigns for federal office, they could spend such proceeds on items that indirectly benefit a federal candidate and a political party, such as travel, consultants, polling, events, and "issue advertising" campaigns. Presidential candidates often used their leadership PACs' soft money accounts to curry favor from state parties and candidates in places including New Hampshire and Iowa, which hold early presidential nomination battles.²²²

VIII. CONCLUSION

Alexander Meiklejohn, in his seminal 1948 work *Free Speech and Its Relationship to Self-Government*, saw free speech as a facilitator of democratic politics, enabling the voter to receive sufficient information so as to be able to

218. Center for Responsive Politics, 2004 Election Overview: Top Self Funders, at <http://www.opensecrets.org/overview/topspend.asp?cycle=2004> (last visited Feb. 26, 2005).

219. Larry Makinson, *The Bottom Line in 2000*, CAPITAL EYE, Summer 2000, available at <http://www.opensecrets.org/newsletter/ce76/index.asp>.

220. See Anthony Corrado, *Financing the 1991 Elections, in THE ELECTION OF 1996* 135, 150 (Gerald M. Pomper ed., 1997). In Perot's 1996 bid for the White House, he did accept public funding, but only as a means of assisting the institutional development of the political party he now represented, the Reform Party. *Id.*

221. Center for Responsive Politics, *What Are Leadership PACs?*, at http://www.opensecrets.org/presidential/leadpac_about.asp?id=N00000245&cycle=2004 (last visited Feb. 26, 2005).

222. *Id.* John Edwards' New Optimist Leadership PAC donated \$212,000 to the Democratic Party in Iowa. John Kerry's Citizen Soldier fund donated \$137,000 in Iowa and New Hampshire. Richard Gephardt's Effective Government Committee donated \$360,000 in both states. Steven Weiss, *Laying the Foundation*, THE CAPITAL EYE, Jan. 9, 2003, available at <http://www.capitaleye.org/inside.asp?ID=58>.

competently make political decisions.²²³

For Meiklejohn, an individualistic or rights-based conception of free speech threatened cacophony that would impede the workings of the democratic process. Democracy, Meiklejohn argued, sometimes required individual forbearance on speech, even to the point where such forbearance might have to be imposed. His famous example was the democratic town meeting, the smooth and effective running of which depended on a moderator—and the moderator's power to silence those who spoke out of turn or in overly-aggressive fashion.

The First Amendment is not the guardian of unregulated talkativeness. It does not require that, on every occasion, every citizen shall take part in public debate. Nor can it even give assurance that everyone shall have an opportunity to do so. What is essential is not that everyone shall speak, but that everything worth saying shall be said.²²⁴

Advocates of campaign finance reform seek to improve the quality of the political system. Not all systems of democracy, however, are the same.²²⁵ Some are superior to others. The values of a superior, well-functioning democracy might include: elucidation of the issues, democratic deliberation, collective self-determination, prevention of the abuse of power, the search for truth, wide spread participation, efficiency, widely accepted results, opportunities for individual self-expression, and others. As the organizer and sponsor of elections, government should clearly pursue these goals; they are better served, not by treating government intervention as the "unqualified enemy," but by accepting the role of the state in fostering these values.²²⁶

Thomas Emerson sits at the other pole of First Amendment theory. In his equally influential 1970 book, *The System of Free Expression*, Emerson

223. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT* (1948). Meiklejohn's book is a towering achievement on its own; that he released the book during the inception of the McCarthy Red Scare era serves to redouble its majesty.

224. *Id.* at 25; see also Owen Fiss, *Free Speech and Social Structure*, 71 *IOWA L. REV.* 1405, 1416 (1986) (arguing in favor of curtailing an overly individualistic free speech tradition to "safeguard the conditions for true and free collective self-determination"). Meiklejohn has not been universally embraced, however. Most prominently, Robert Post has criticized the Meiklejohn model—and implicitly, all collectivist theories of the First Amendment—for its "subordination of public discourse to a framework of managerial authority." Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 *U. COLO. L. REV.* 1109, 1120 (1993).

225. Richard H. Pildes, *Forward: The Constitutionalization of Democratic Politics*, 118 *HARV. L. REV.* 29, 37 (2004) (describing democratization as ever-spreading world-wide phenomenon).

226. See Fredrick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 *TEX. L. REV.* 1803, 1806 (1999); see also Burt Neuborne, *Is Money Different?*, 77 *TEX. L. REV.* 1609, 1625 (1999) (recognizing prevalence of subconscious embrace of such arguments). Nevertheless, Neuborne characterizes them as "both normatively and instrumentally bankrupt." *Id.* See generally *IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS* (Joshua E. Rosenkranz ed., 1999).

suggested that "[f]reedom of expression is essential as a means of assuring individual self-fulfillment."²²⁷

It is not a general measure of the individual's right to freedom of expression that any particular exercise of that right may be thought to promote or retard other goals of the society . . . freedom of expression, while not the sole or sufficient end of society, is a good in itself, or at least an essential element in a good society.²²⁸

Political and institutional imperatives for free speech were assuredly subordinate to more individualistic notions.

Buckley's and *McCormell's* treatment of expenditures is Emersonian. The right of a politician or a wealthy supporter to unlimited spending is an unqualified good and supersedes all else. Money, as the facilitator of political speech, is core political expression. Campaign regulation is acceptable as long as wealthy candidates and constituents, who make up the so-called donor class, can exercise their rights to fully exploit their available resources.²²⁹ One might expect this kind of result in the United States capitalist system in which wealth inequalities are not only tolerated, but embraced as a tenet of the American creed of promoting competition and guaranteeing freedom. Viewed in this context, limiting costs and equalizing campaign expenditures necessarily mean a loss of freedom,²³⁰ it would be counterintuitive to say that "wealth matters" in just about every facet of American life except the most important—democracy.²³¹ And yet, as Paul Freund commented to a former student, "They

227. THOMAS I. EMERSON, *THE SYSTEM OF FREE EXPRESSION* 6 (1970).

228. *Id.* at 8. Other notable advocates of an individualistic approach to the First Amendment include C. Edwin Baker and Martin H. Redish. See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989); MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* (1984); see also David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 *COLUM. L. REV.* 334 (1991).

229. Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 *U. PA. L. REV.* 73, 74-75 & n.6 (2004) (reviewing demographics of contributors). *Id.* The donor class is made up of less than one quarter of one percent of the United States' voting population.

230. Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 *UTAH L. REV.* 311, 313, 323-24 (1998) (charging FECA's restrictions have caused "closing of frank electoral speech"); Robert Post, *Regulating Election Speech Under the First Amendment*, 77 *TEX. L. REV.* 1837 (1999) [hereinafter *Regulating Election Speech*] (arguing ceilings or limitations-based campaign finance laws violate First Amendment while scheme based on floors would not). Post advocates a scheme in which broadcast licensees, in order to obtain a license, must reserve a fixed amount of time for candidate speech. Post, *Regulating Election Speech*, *supra*, at 1837.

231. See Brice Claggett & John Bolton, *Buckley v. Valeo: Its Aftermath, and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 29 *VAND. L. REV.* 1327, 1335 (1976). Indeed, Buckley's lead attorney made this very point shortly after the decision came down: "[I] can be argued persuasively that so long as our social system is based on the premise that inequalities of wealth serve valid and useful purposes, the wealthy need means to defend themselves politically against the greater numbers who may believe that their economic interest militate toward leveling." *Id.*

say that money talks. We thought that was the problem, not the solution."²³² In a perfect world, candidates would not need money to win elections. Candidates would simply submit their names along with their qualifications and political views to election officials who would impartially distribute that information to the public, a sort of Meikeljohnian ideal. In a slightly less perfect world, candidates would need money to win elections but all would be of equal means.²³³ Alternatively, every registered voter would be given a fixed government stipend for political expenditures. *Buckley* and *McConnell* clearly undermine any such proposals. But these cases notwithstanding, the parameters of an ideal system for the elections for federal office is anything but clear. One tinkers with election reform with only the greatest of trepidation. Cures and diseases are not easily distinguished. Further, the proposal must be passed by a congress whose members have conflicts of interest in considering proposals for change, because they achieved their status by navigating the vagaries of the present system. Finally, it is placed into the hands of a hostile Federal Election Commission.

BCRA was a long time coming. It sat in Congress for over five years. It went through countless renditions. The resulting legislation is modest and riddled with exceptions. Congress seems unlikely to want to go back to the drawing board to craft another reform bill. Reform of the FEC seems equally unlikely.

Expenditures in the 2004 election exceeded those in previous elections. Even the political parties, the targets of BCRA's Title I, raised more money than ever before. And yet, the argument that campaigns "cost too much" seems to be a complaint about a horse that left the barn and is now long gone. The high cost of the campaign did not appear to scandalize the American people, who contributed significant sums to the non-profit advocacy organizations that played very significant roles in 2004. Indeed, voter interest and participation in the 2004 elections was very high.

Nor did there seem to be a great need for equalizing. Democrats and Republicans both had a great deal of fund-raising success and effectively disseminated their messages. Concerns about buying access remain very serious, but the Court remains badly divided regarding whether alleviating such concerns is a legitimate governmental interest. Congress also seems very unlikely to agree on a solution to this problem that showers upon them attention, perks, and benefits. Furthermore, no President has taken a leadership

232. See Anthony Lewis, *In Memoriam: Paul A. Freund*, 106 HARV. L. REV. 16, 17 (1992).

233. See Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 58-59 (1996) (proposing voucher-based election funding); see also BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE REFORM* 6 (2002) (advocating creation of a "secret donations booth"). In this secret donations booth, ordinary voters are given publicly-financed campaign vouchers to distribute to the candidates of their choice, thus transforming the money chase into something partially plebiscitary. *Id.*

position on the question.

Thus, we are where we are: it takes huge amounts of money to run for federal office, campaigns are spending orgies, direct contributions to candidates and parties are limited but only against extravagant contributions, members of the executive and legislative branches fundraise for twelve months each year, and disclosure of contributions and expenditures are fully available to anyone connected to the Internet and interested to look. While there is a degree of public discontent with this reality, this discontent has neither been marshaled into a major grassroots pressure aimed at producing reform, nor been seized upon by candidates who sense that arguing for campaign reform is a winning electoral issue. True change seems elusive.