The Finger in the Dike: Campaign Finance Regulation After McConnell

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I. INTRODUCTION

In McConnell v. FEC, the Supreme Court largely rejected the plaintiff's claims that the Bipartisan Campaign Reform Act of 2002 (BCRA), 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, its landmark precedent from 1976. In so doing, the Court once again left federal campaign finance law as a hodgepodge 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. The modern era of campaign finance...
regulation essentially began in 1971, when the Federal Election Campaign Act (FECA) replaced the concededly impotent Federal Corrupt Practices Act (FCPA). FECA created a comprehensive regulatory framework applicable to federal financing of primaries, runoffs, 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 contributions to federal candidates and committees, and established limits on contributions from candidates and their families. The statute also limited corporate and union spending to political action committees (PACs) established pursuant to strict limitations. 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 by overseeing officials. 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.net/history/financingl.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 House candidates. In 1911, Congress expanded 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 public officials or political committees 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-Coneley Act extended the prohibition on contributions to federal candidates to unions. The Taft-Hartley Act, enacted in 1947, prohibited the use of contributions to federal candidates from unions, corporations, and labor unions in primary elections as well as general elections. See generally Hoover Institution, Important Dates, supra (summarizing history of campaign finance-related legislation).

4. 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 2005)). As early as 1932, political scientist Louis Oberg said, "The field of campaign finance research...has limited the influence of wealth in politics by revealing that nearly seventy percent of the disclosure requirements refer to candidates of both parties were in the amount of $100 or higher. See generally Louis Oberg, Money in Elections (1932) (demonstrating influence of money on elections and criticizing legislative efforts to combat corruption).


6. See Federal Election Commission, Federal Election Campaign Laws: A Short History [hereinafter A Short History] (describing fundamental changes to campaign finance law implemented through FECA), at http://www.fec.gov/financeicap/law/index.htm (last visited Feb. 25, 2006). PAC funds for political action committees (PACs) includes separate segregated funds established by labor unions and corporations from their own funds. It is also used to issue organizations that raise money 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. § 102.5 (2006) (defining political action committee).


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

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


14. FECA Amendments of 1974, Pub. L. No. 93-443, § 101(e), 88 Stat. 1263, 1264 (codified as amended at 2 U.S.C. § 441a(a)(5) (Supp. III 2003)); see also 26 U.S.C. § 105(b)(3) (2006) (establishing qualifications for multi-candidate committee status). A committee must make two 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 two years; and (ii) has received contributions for Federal elections from more than 50 persons; and (iii) (except for state political party organizations) has made contributions to 5 or more Federal candidates. 11 C.F.R. § 102.50(a)(3) (2006).


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.\footnote{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.\footnote{19} On January 30, 1976, in a long per curiam opinion,\footnote{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.\footnote{21}

*Buckley* was essentially the synthesized product of three decisions the Court made concerning the constitutional status of political money.\footnote{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.\footnote{23} Third, the Court decided to accept only certain governmental Justifications for the regulation of political money.\footnote{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.”\footnote{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,

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441 U.S. 125 (1979) (alteration in original).
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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*.\footnote{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.”\footnote{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 form 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.”\footnote{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,”\footnote{29} and contributions, which serve as a “general expression of support for the candidate and his views, but does not view the underlying basis for the support.”\footnote{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:

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28. Id. at 19.
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29. Id. at 19.
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30. Id. at 21.
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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 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 communicative 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 with the public, 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.
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 $25,000 annual limitation on individual contributions to national parties and a $20,000 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 grassroots 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 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.


29. 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 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.


[D]isclosures 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 disclosures would be reportable at 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. §§ 104.6(e), (g) (2005) (requiring national parties to disclose soft money donors).
limits imposed on parties or publicly funded presidential candidates. 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 of a clearly identified candidate.” 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. 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.”

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. 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.
48. 2 U.S.C. § 441a(c)(1)(B) (2000 & Supp. III 2003). In addition, BCRA imposes a $55,000 aggregate limit on individual contributions. Up to $37,500 (per two-year cycle) may be given to individuals and their affiliated 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 within the national party committees. Contributions to state committees are limited to $10,000. The ceiling on PAC contributions remains unchanged: $5000 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 $10,000 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(c)-(l) (2000 & Supp. III 2003).
51. See 2 U.S.C. §§ 441a(a)(5) (prohibiting 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 activity 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(g), 441a-1 (Supp. III 2003) (raising limitations as applied to elections involving candidates spending large sums of personal money). If a Senate candidate spends more than $150,000 plus 0.4 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.
55. But see 2 U.S.C. § 440b(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. (comprising 501(c)(4) and 527 organizations from electioneering communications limitations); FEC v. Mass. Citizens for Life, 479 U.S. 238, 264 (1986) (listing features of MCFL 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. 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.

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 L. Clark. 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 acrimony 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. 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 August 6.

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.


79. See Linds 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 pre-mobile-vote drivers. All three judges invalidated BCRA’s provision banning Croatia 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. 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 the 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. The discussion proceeded to the 1974 FECA amendments and the Court’s treatment of FECA in Buckley. 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. The Court accepted the Senate Committee’s characterization of a “meltdown” of the system.

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. 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.”

Contribution limits, the Court noted, advance the two governmental interests


61. Id. at 115-16.

62. Id. at 116-22.

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 "erosion" of the public confidence in the electoral process through the appearance of corruption.\textsuperscript{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."\textsuperscript{68} Further, the Court explained that contribution limits serve to chill free speech, but only tend to increase the dissemination of information "to a wider array of potential donors."\textsuperscript{69} The Court then characterized the goal of the act—"a return to the scheme that was approved in Buckley"—as "modest."\textsuperscript{70} The various provisions of Title I were designed to prevent circumvention of the limits.\textsuperscript{71} The McConnell 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 McConnell court abandoned neither of these principles.

The Court did not, however, entirely adhere to campaign finance precedent. In McConnell, 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.\textsuperscript{72}

Prior to McConnell, 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. For their part, lobbyists, CEOs, and wealthy individuals alike 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.\textsuperscript{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."\textsuperscript{75} Justices O'Connor and Stevens, however, tartly dismissed Justice Kennedy's plea to leave things as

\textsuperscript{67} Id.
\textsuperscript{68} McConnell v. FEC, 540 U.S. 93, 137 (2003).
\textsuperscript{69} Id. at 140.
\textsuperscript{70} Id. at 142.
\textsuperscript{71} Id. at 144-45.
\textsuperscript{72} See McConnell, 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 lose this bar before McConnell. Richard Hasen has argued 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. 493 (2000) (quoting Nixon v. Shrink Mo., Gov’t Pay, 528 U.S. 377, 389 (2000)) (noting Court’s apprehension regarding improper influence extends beyond concerns about bribery).
\textsuperscript{73} McConnell, 540 U.S. at 130.
\textsuperscript{74} Id. at 147 (emphases in original)/footnote omitted.
\textsuperscript{75} Id at 291 (Kennedy, J., concurring in the judgment and dissenting in part).
they existed: “This cradled 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 quasi quo pro 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 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

76. Id. at 152.
79. Id.
80. Id.
81. Id.
82. Id. at 161-62.
83. Id. at 177.
85. Id. at 189.
86. Id.
88. Id. at 189.
89. Id. at 190.
90. Id. at 191-93 (discussing significance of magic words doctrine).
91. Id. at 190.
union and corporate PACs could engage in electioneering communications.

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." Further, the Court found that the statute's exemption of media organizations was justified. It also read an exception in the statute exempting "MCFL organizations." 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

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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 lose 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., dissenting). He explained:

Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, or in 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 II), 518 U.S. 604, 649-50 (1996) (Stevens, J., dissenting) (arguing for a "separation of duties" in Congress on campaign finance matters). He stated:

I believe the Government has an important interest in limiting the electoral playing field by restraining 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 intolerable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials—will be adverse to the interest in informed election choices 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. Massachusetts Citizens for Life (MCFL), 479 U.S. 238 (1986) (considering campaign finance expe,nences as applied to non-profit advocacy organization). In MCFL, the Court suggested that the First Amendment requires certain non-profit advocacy organizations to be treated differently from for-profit organizations. Id. at 238.

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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 answered the question of how "uninhibited, robust, and wide-open" speech can occur when organizations hide themselves from the scrutiny of the voting public.

Concluding their analysis, Justices O'Connor and Stevens reinforced the pragmatic nature of the campaign finance process, and did so language that paralleled Senator John McCain's comments. As the battle in the Senate moved toward endgame, McCain had conceded, "Twenty years from now, there will be more than two senators who will be arguing for reform because we've gone continuously through cycles of corruption and reform." 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.

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 judicious 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. In addition, the Court approved BCRA's direction to the FEC

97. Katherine Q. Seelye & Allison Michelle, Pitchforking Soft Money Till Pocket Is Stomped Out, 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 notable example of this phenomenon. The commercial treated George W. Bush's record on the environment and slammed the record of his primary opponent, John McCain. The ad buy emphasized political observers because nobody had ever heard of a group called "Republicans for Clean Air." As it turned out, the group had been formed days before the New York primary. Nonetheless, its carefully-chosen popular name, "Republicans for Clean Air" had only two members: brothers Sam and Charles Wyly, 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.
99. Id. at 213-19 (affirming district court's invalidation of Section 213).
to limit its coordination of donors and political parties' spending strategies.\textsuperscript{100}

In the portion of the McConnell opinion authored by Chief Justice Rehnquist, the Court dismissed challenges to the 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.\textsuperscript{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.\textsuperscript{102} Congress intended the provision to prevent parents from circumventing contribution limits by donating money in the names of their children.\textsuperscript{103} The Court, however, observed that "the Government offers scant evidence of this form of evasion" and, therefore, invalidated the provision.\textsuperscript{104}

Justice Scalia, in dissent, suggested BCRA constitutes "incumbency protection."\textsuperscript{105} Scalia argued that BCRA's restrictions fell disproportionately hard on challengers, and thus had the effect of further insulating incumbents from electoral pressures.\textsuperscript{106} He also insisted that precedent requires 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.\textsuperscript{107} In reaching his conclusion, he cited Schaumburg v. Citizens for a Better Environment\textsuperscript{108} and Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board\textsuperscript{109} in which the Court struck down laws that deprived speakers of remuneration.\textsuperscript{110} He further suggested that the right of association

\textsuperscript{100} Id. at 794.
\textsuperscript{101} Id. at 224-70.
\textsuperscript{102} McConnell, 540 U.S. at 271-32.
\textsuperscript{103} Id. at 232.
\textsuperscript{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.
\textsuperscript{105} See generally Nathaniel Persily, Reply: In Defense of Fears of Corrupting Echowhooes: The Case for Judicial Acquiescence in Incumbent-Protecting Gerrymanders, 116 HARV. L. REV. 649 (2002) (discussing redistricting's effect on political competition and incumbent safety). Does suggest that the flow of soft money favors incumbents. Contributions donated soft money to ensure political access. Thus, such donations were made with an eye toward who would likely be in office. Given that incumbency rates were already very high, it is fair to infer that more soft money would benefit officeholders, not their challengers.
\textsuperscript{107} 444 U.S. 629 (1980). In Schaumburg, the Court invalidated as undue burden imposing limitations on the amount charities could pay their solicitors.
\textsuperscript{108} 502 U.S. 105 (1991). In Simon & Schuster, the Court struck down an ordinance that appropriated profits from criminals' biographies.
\textsuperscript{109} 540 U.S. at 252-55 (Scalia, J., concurring in part and dissenting in part).
\textsuperscript{110} 255-56.
\textsuperscript{111} Id. at 256-58.
\textsuperscript{112} Id. at 267-68 (Thomas, J., concurring in part and dissenting in part).
\textsuperscript{114} Id. at 265.
\textsuperscript{115} Id. at 275.
\textsuperscript{116} Id. at 276.
\textsuperscript{117} Id. at 277.
\textsuperscript{118} McConnell v. FEC, 540 U.S. at 277 (Thomas, J., concurring in part and dissenting in part).
\textsuperscript{119} Id. at 282-84.
\textsuperscript{120} Id. at 296 (Kennedy, J., concurring in part and dissenting in part).
\textsuperscript{121} Id.
\textsuperscript{122} McConnell v. FEC, 540 U.S. 93, 2003 (Kennedy, J., concurring in part and dissenting in part).

candidates pose very little danger of quid pro quo corruption.\footnote{123}

V. McConnell and the Precedent

Throughout its campaign finance jurisprudence, beginning with Buckley and ending with McConnell, 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,\footnote{124} the Court overturned a defendant’s conviction for wearing, in a public courthouse, a jacket emblazoned on the back with “Fuck the Draft.”\footnote{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,”\footnote{126} such results are “in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve.”\footnote{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,\footnote{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.”\footnote{129} Free speech, the Court stated, “induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”\footnote{130}

\begin{itemize}
\item[123.] McConnell, 540 U.S. at 301 (Kennedy, J., concurring in part and dissenting in part).
\item[124.] 405 U.S. 15 (1971).
\item[125.] Id. at 16-17.
\item[126.] Id. at 24-25.
\item[127.] Id. at 25.
\item[128.] 491 U.S. 397 (1989).
\item[129.] Id. at 400.
\item[130.] Id.
\end{itemize}

In Erznoznik v. Jacksonville,\footnote{131} the Court invalidated an ordinance prohibiting drive-in movie theaters with screens visible to the public streets from showing films that contained nudity.\footnote{132} The Court noted that the ordinance prohibited speech based almost entirely on content.\footnote{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.”\footnote{134}

In R.A.V. v. City of St. Paul,\footnote{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

\begin{itemize}
\item[131.] 422 U.S. 205 (1975).
\item[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 pubic 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.

\item[133.] Id.
\item[134.] Id. at 211.
\item[135.] Id. (Footnote and citations omitted).
\item[136.] 505 U.S. 377 (1992).
\end{itemize}
one of these characteristics.\footnote{36}

In \textit{Gentile v. State Bar of Nevada},\footnote{37} 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 vindictively prosecuting him. 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 indicated that the police created the case against his client by literally buying the testimony of informers.\footnote{38} 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.\footnote{39}

The Court, per Justice Kennedy, identified the issue as "the constitutionality of a ban on political speech critical of the government and its officials."\footnote{40} Such speech has "traditionally been recognized as lying at the core of the First Amendment."\footnote{41} The Court continued:

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

\begin{itemize}
\item [\textit{Id. at 392-93.}]
\item [\textit{Id. at 1030 (1991).}]
\item [\textit{Id. at 1098-99 (reproducing Gentile's opening statements made at February 5, 1988, press conference).}]
\item [\textit{Id. at 1059.}]
\item [\textit{Id. at 103.}]
\item [\textit{Id. at 104.}]
\item [\textit{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 courtroom during testimony of minor victims of sex offenses); Craig v. Harney, 331 U.S. 307, 376-78 (1947) (reversing contempt order against newspaper for unfairly criticizing trial judge). In \textit{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." \textit{Globe Newspaper}, 457 U.S. at 604. In \textit{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." \textit{Craig}, 331 U.S. at 373. The Court suggested that judges are "supposed to be men of fortitude able to thrive in a hostile climate," and thus no imminent threat to the administration of justice existed. \textit{Id. at 376.}]
\item [\textit{2006}]
\item [\textit{Id. at 392-93.}]
\item [\textit{Id. at 1030 (1991).}]
\item [\textit{Id. at 1098-99 (reproducing Gentile's opening statements made at February 5, 1988, press conference).}]
\item [\textit{Id. at 1059.}]
\item [\textit{Id. at 103.}]
\item [\textit{Id. at 104.}]
\item [\textit{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 courtroom during testimony of minor victims of sex offenses); Craig v. Harney, 331 U.S. 307, 376-78 (1947) (reversing contempt order against newspaper for unfairly criticizing trial judge). In \textit{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." \textit{Globe Newspaper}, 457 U.S. at 604. In \textit{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." \textit{Craig}, 331 U.S. at 373. The Court suggested that judges are "supposed to be men of fortitude able to thrive in a hostile climate," and thus no imminent threat to the administration of justice existed. \textit{Id. at 376.}]
\end{itemize}

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.\footnote{42}

After a close examination of the proceedings before the Bar disciplinary authorities, the Court concluded that no such danger existed.\footnote{43}

In \textit{New York Times Co. v. Sullivan},\footnote{44} the Court famously affirmed our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."\footnote{45} In \textit{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 Sedition Act of 1789, "because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."

[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.\footnote{47}

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 Sedition Act, speech that brought them "into contempt or disrepute; or ... excite[d] against them ... the hatred of the good people of the United States."\footnote{48}

\begin{itemize}
\item [\textit{Id. at 1038-39 (citing Landmark Communications, Inc. v. Virginia, 455 U.S. 210 (1982)).}]
\item [\textit{Id. at 1038; see also \textit{Lipke v. North Dakota School for the Blind & Visually Handicapped}, 350 U.S. 249 (1955) (invalidating statute prohibiting liquor price advertisements).}]
\item [\textit{Id. at 270. The McConnell court similarly recognized the importance of protecting a citizen's right to make informed choices in the political marketplace." McConnell v. FEC, 540 U.S. 93, 197 (2003).}]
\item [\textit{Id. at 274.}]
\item [\textit{Id. at 274-75 (quoting Sedition Act of 1978, ch. 75, \$2, 1 Stat. 596) (alteration in original).}]
\end{itemize}
Finally, in *Brandenburg v. Ohio*, the Court announced the following principle:

>[The 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.]

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."

In isolated cases, for example *Florida Bar v. Went for It, Inc.*, 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. In *Posadas de Puerto Rico Associates v. Tourism*...
principal points. First, the dissent 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 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 ejectioneering 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 in the exercise of its police power, may 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 peddlers had the moral right to carry unlicensed, unposted, waste leads and to advocate their use, 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 repression. There must be the probability of serious injury to the State. Among free men, the demagogues 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 470-73 (Holmes, J., dissenting); Abrams, 250 U.S. at 624-31 (Holmes, J., dissenting); see also Robert Post, Rereading Theory and Doctrine in First Amendment Jurisprudence, in ETERNALLY VIOLANT: 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


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

166. Id.


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 deadlocks, and thus no FEC action, commonly occur in controversial partisan matters.\footnote{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{173} Each candidate received $74.6 million in federal funds allocated by the FEC.\textsuperscript{174} In total, House candidates raised $696,520,320, while Senate candidates raised $488,241,916.\textsuperscript{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.\textsuperscript{176} In addition, PACs contributed approximately $292.1 million to candidates for federal office.\textsuperscript{177} Political committees expended more than $58 million on electioneering communications alone.\textsuperscript{178} Throughout the 2004 election cycle, in excess of $4 billion in federal

more than hypothetical. "Section 9012(f) is a fatally overbroad response to that evil."193 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."194

In *FEC v. Massachusetts Citizens for Life (MCFL)*,185 the Court broadened the definition of express advocacy. 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 the expenditures were made independently of any candidate.188 Later, the Court highlighted that


184. Id.


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 2,000 to 3,000 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 Wisconsin without your vote in September." Id. (Italics 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." Id. "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. In a subsequent statement the Court noted, "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; as "n" indicated a candidate opposed MCFL's position. Id. Section 44(b) 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 a result, the Court ruled that an expenditure must constitute "express advocacy" in order to be subject to the prohibitions of § 44(b). Id. at 249.

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

The Court cannot be held accountable for the sweep of its decisions on public issues that by their nature raise the causes of certain politicians. Kusay v. Chafee (1984), it provides for an express [sic] as explicit directive: vote for these (name) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature. The Court gives no less discussion to express electoral advocacy. The disclosure of endorsement of this sort is not protected by the First Amendment. Id. at 249 (emphasis added). Thus, the Court clarified the Buckley definition of express advocacy to include words that are "in effect another [sic] as explicit directive, although 'inconspicuous direct' than the Buckley language. Id. Because the Court found that the MCFL newsletter was an 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."196 In light of these three characteristics, the Court held that Section 44(b)'s limitations on independent spending do not apply to MCFL.197 In *Colorado Republican Federal Campaign Committee v. FEC (Colorado I)*,198 the Court extended MCFL's reasoning to political parties.199 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."200 FECA v. Colorado Republican Federal Campaign Committee (Colorado II),194 however, made clear that the FEC could regulate party expenditures coordinated with the candidate.201

First Amendment. Id. (quoting *FEC v. Nat'l Conservative PAC*, 470 U.S. 489, 493 (1985)).

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

190. Id. at 263-64.


192. See id. at 690-91 (reviewing and applying Supreme Court independent expenditure jurisprudence).

193. Colorado I concerned r 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. When the time of the candidate's 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 were 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 Corporation does not permit the FEC to penalize 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.


195. Id. at 437.

196. 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." 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. Now, an expenditure for a communication that "expressly advocates the election or defeat of a clearly identified candidate" qualifies for coverage. An individual who makes independent expenditures in excess of $250 in any year must report such expenditures to the FEC.

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. 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 for paid 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. In total, 527 organizations would bar 527s from running television ads.

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raised $343 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.

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, 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. Ballot initiative sponsors would bar 527s from running television ads.


198. 11 C.F.R. § 109.10(b) (2000).

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 IRC as entities "organized and operated primarily" for the purpose of influencing the selection of candidates to elected or appointed office. I.R.C. § 527(a)(1) (2000). As 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(j) (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(k)(5) (2000). 527 organizations' disclosure reports filed with the IRS can be accessed via the IRS website. Virtually all political committees—whether candidate committees, party committees, or PACs—are required to file 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 included. I.R.C. § 527(a) (2000).

200. See Glenn 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
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

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 Commerce205 and FEC v. Beaumont206 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 (1988)). 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 said: "The contribution limit thus automatically affects expenditures, and limits on expenditures operate as restraints on the ability to engage in political dialogue concerning a ballot measure." Id. at 299.


205. 496 U.S. 652 (1990). In Austin, the Court reviewed the Michigan Campaign Finance Act (the Act) which prohibited corporations from making independent 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 in the state's general election campaign. The campaign directly attacked the opposition candidate. 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 expenditures as a violation of its First and Fourteenth Amendment. Id. in response, Michigan claimed that the "unique legal and economic characteristics of corporations necessitate 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 Amendment. Id. at 655. The Court also said 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 expenditures but rather requires such expenditures be made through segregated funds. Id. at 660. 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 $5,000 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 $5,000 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 $2,000 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

was a nonprofit ideological corporation—North Carolina Right to Life. Id. at 150. The seven- to one decision, in which the Court held that the rule could be applied, was unexceptional. Justice Souter's reasoning was similarly unexceptional; he would have held that the Citizens United lawsuit, which had been covered in Austin, McCFL, and National Right to Work Committee v. FEC (NRWC), 459 U.S. 197 (1982). See generally Beaumont, 319 U.S. 146 (citing Austin, McCFL, and NRWC repeatedly throughout opinion).

207. See supra notes 5, 56 and accompanying text (acknowledging unions and corporations may raise and spend campaign funds through their separate segregated funds).

208. See but 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.


210. 11 C.F.R. § 110.3(c) (2006).

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


213. See 11 C.F.R. § 114.3 (2006) (establishing rules regarding corporate, union, and trade association disbursements to candidates with restricted class); see also 11 C.F.R. § 100.124(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.\textsuperscript{114}

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.\textsuperscript{115}

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.\textsuperscript{116}

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 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.\textsuperscript{117}

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 own 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.\textsuperscript{118} In the 2000 New Jersey Senate race, Jon Corzine spent $60 million of his own money.\textsuperscript{119} Ross Perot's 1992 campaign for the presidency was completely self-funded.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{114} See 11 C.F.R. § 114.4 (2009) (Defining circumstances in which corporations, unions, and trade associations may communicate beyond restricted class).

\textsuperscript{115} Burdick v. Schabs, supra note 209 (providing overview of restricted-class communications during 2000 election cycle).


\textsuperscript{120} 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 on a menu of excul ing the institutional development of the political party he now represents, the Reform Party. Id.


competently make political decisions.\textsuperscript{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 take part in public debate. Nor can it ever give assurance that everyone shall have an opportunity to do so. What is essential is that everyone shall speak, but that everything worth saying shall be said.\textsuperscript{224}

Advocates of campaign finance reform seek to improve the quality of the political system. Not all systems of democracy, however, are the same.\textsuperscript{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, protection 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.\textsuperscript{226}

Thomas Emerson was at the other pole of First Amendment theory. In his equally influential 1970 book, *The System of Free Expression*, Emerson suggested that “[f]reedom of expression is essential as a means of assuring individual self-fulfillment.”\textsuperscript{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.\textsuperscript{228}

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

Buckley’s and McConnells’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.\textsuperscript{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;\textsuperscript{230} it would be counterintuitive to say that “wealth matters” in just about every facet of American life except the most important—democracy.\textsuperscript{231} And yet, as Paul Freund commented to a former student, “They

\textsuperscript{223} ALEXANDER MEIKLEJOHN, FREE SPEECH AND THE RELATIONSHIP TO SELF-GOVERNMENT (1948).

\textsuperscript{224} Id. at 25; see also Owen Fiss, Free Speech and Social Structure, 71 IOWA L. REV. 1405, 1416 (1986) (arguing in favor of curtailment of an overall individual 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 utilized the Meiklejohn model—and implicitly, all collective 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 Disclosure, 64 U. CHI. L. REV. 1109, 1120 (1993).


\textsuperscript{229} Spencer Overton, The Color Line: Campaign Finance, Democracy, and Partisanship, 153 U. PA. L. REV. 73, 74-75 & n.6 (2004) (reviewing demographics of contributors). The donor class is made up of less than one quarter of one percent of the United States voting population. Id.


\textsuperscript{231} See Bruce Coggegg & John Bolon, Buckley v. Valeo: Its Aftermath, and Its Prospects: The Constitutionality of Government Regulations on Political Campaign Financing, 20 VAND. L. REV. 1327, 1355 (1976). Indeed, Buckley’s lead attorney made this very point shortly after the decision came down: "I think we can argue persuasively that so long as our political system is based on the premise that inequalities of wealth serve valid and useful purposes, the wealthy must needs 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.\textsuperscript{222} 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 Meiklojohnian ideal. In a slightly less perfect world, candidates would need money to win elections but all would be of equal means.\textsuperscript{23} Alternatively, every registered voter would be given a fixed government stipend for political expenditures. \textit{Buckley} and \textit{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.

\textit{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 \textit{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 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 harnessed 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.


\textsuperscript{23} See Richard L. Hasen, \textit{Clipping Coupons for Democracy: An Equalitarian/Public Choice Defense of Campaign Finance Fines}, 84 CAL. L. REV. 1, 58-59 (1996) (proposing vouchers-based election funding); see also BRIAN ACKERMAN & LAW AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE REFORM (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 philanthropic. Id.