
***MCCONNELL V. FEDERAL ELECTION
COMMISSION: THE SUPREME COURT
REWRITES THE BOOK ON CAMPAIGN
FINANCE LAW. WILL POLITICAL SPEECH
SURVIVE THIS MOST RECENT
ONSLAUGHT?***

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I. INTRODUCTION

On a chilly spring morning in the Oval Office, and without the fanfare typical of major legislative enactments, President Bush put his pen to a bill that he acknowledged contained “serious constitutional concerns.”¹ The McCain-Feingold legislation was the culmination of six years of congressional wrangling to produce fairer campaign finance laws, aimed at banning so-called “soft money” from the national parties.² In the end, the law did more harm than good. Why would the President sign a bill he knew would limit the free speech of the national parties and the American people? Why would members of Congress limit the funding of their parties and impair their abilities to run effective campaigns? The answers to these questions depend on who you ask and when you ask them. In the world of campaign finance reform, success is measured not by the virtue of a particular reform, but by the perverse indicator of the level of money and speech that reform curtails. McCain-Feingold represents an example of one such reform.

The Bipartisan Campaign Reform Act of 2002³ (“BCRA”, “the Act”, or

¹ Mike Allen, *Bush Signs Campaign Bill, Hits Road to Raise Money*, WASH. POST, Mar. 28, 2002, at A1.

² *See id.*

³ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as 2 U.S.C.A. §§431, 434, 441a, 441i, and 47 U.S.C. §315(e) (2000)) [hereinafter BCRA].

“McCain-Feingold”) was passed by Congress and signed into law by President Bush on March 27, 2002, with the intent of curbing the influence of special interest groups in politics.⁴ Title I of BCRA, *inter alia*, eliminated the donations of so-called “soft money” or unregulated large contributions to the national parties.⁵ Title II restricted the broadcasting of so-called “issue ads” funded by soft money thirty days prior to a primary election and sixty days prior to a general election.⁶ The Supreme Court sustained that provision as well.⁷ Soft money and issue advocacy are two sides of the same First Amendment coin. As one commentator has explained, “[i]ssue ads are advertisements which fall outside the contribution and expenditure limits of [BCRA] because they stop short of expressly advocating the election or defeat of any particular candidate.”⁸ Issue ads are funded by soft money from special interest groups to promote a certain cause. By providing a public forum to groups, these advertisements add to the nation’s political speech.⁹ Because

Even though BCRA was signed on March 27, it did not become effective until November 6, 2002, the day after that year’s congressional elections.

⁴ Charles Lane, *Rehnquist May Be Key for Campaign Finance*, WASH. POST, Aug. 31, 2003, at A6. See generally Bradley A. Smith, *Soft Money. Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. LEGIS. 179, 182 (1998) (explaining the background history on soft money).

⁵ 2 U.S.C. §441i (2000).

(1) A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) The prohibition established by paragraph (1) applies to any such national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee.

Id. §441i (a)(1)-(2).

⁶ See 2 U.S.C. §434 (2000). Stating in relevant part:

“[E]lectioneering communications” which is defined broadly to encompass any “broadcast, cable, or satellite communication that (I) refers to a clearly identified candidate for Federal office; (II) is made within—(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (III) in the case of a communication which refers to a candidate other than President or Vice President, is targeted to the relevant electorate.”

Id. §434(f)(3)(A)(i)(I)-(III).

⁷ *McConnell v. FEC*, 124 S. Ct. 619, 650 (2003) (stating that the statute was strictly construed to allow soft money to be used in issue ads only).

⁸ See Smith, *supra* note 4, at 182.

⁹ See Jonathon S. Krasno and Frank J. Sorauf, *Report: Evaluating the Bipartisan Campaign Reform Act of 2003(BCRA)*, 28 N.Y.U. REV. L. & SOC. CHANGE 121, 155 (2003) (noting that “[i]ssue advocates may even rename themselves; so, in 2000 the Pharmaceutical Research and Manufacturers Association became ‘Citizens for Better Medicare’ and two

these issue ads are funded by unregulated soft money, interest groups use them as a means to circumvent campaign finance laws as interpreted in the landmark case of *Buckley v. Valeo*.¹⁰ Issue ads are also important because they are the predominant mode of expression of single-issue interest groups, which have assumed a greater role following the decision in *McConnell v. FEC*.¹¹

Soft money consists of unregulated donations by large corporations, labor unions, and wealthy individuals which are given to state, local, and national parties to be ultimately distributed to their candidates' campaigns. Such donations are also used by the parties for administrative and day-to-day expenses.¹² In the 2002 election cycle, the ten largest contributors to each major party donated 70% of their money as soft money and the remaining 30% came from a combination of political action committees ("PACs") and individual contributors, both of which are statutorily regulated.¹³ McCain-Feingold categorically forbids soft money donations, requiring all political contributions to be made in the form of regulated hard money.¹⁴

The First Amendment of the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . ."¹⁵ In *Buckley*, the Supreme Court reviewed congressionally imposed contribution and expenditure limits to determine if they restricted the ability of individuals and public officials to engage in protected political speech.¹⁶ The *Buckley* court held that the only justification for infringing upon political speech is the prevention of "corruption and the appearance of corruption" in the political process.¹⁷ The Court ruled that the prevention of corruption did not justify limits on campaign expenditures by candidates and thus were unconstitutional

brothers from Texas became 'Republicans for Clean Air,' organizations that sound more impressive and credible than their true sponsors.").

¹⁰ 424 U.S. 1 (1976).

¹¹ 124 S. Ct. 619 (2003) (allowing soft money to be used in issue ads).

¹² *Id.* at 648-49. See generally Jason P. Conti, *The Forgotten Few: Campaign Finance Reform and its Impact on Minority and Female Candidates*, 22 B.C. THIRD WORLD L.J. 99, 130 (2002) (describing how soft money helped revitalize state political parties).

¹³ See, e.g., Center for Responsive Politics, *The Money Behind the Elections*, at <http://www.opensecrets.org/bigpicture/topcontribs.asp?Bkdn=Source&Cycle=2002> (last visited Nov. 5, 2004).

¹⁴ See Eric L. Richards, *Federal Election Commission v. Colorado Republican Federal Campaign Committee: Implications for Parties, Corporate Political Dialogue, and Campaign Finance Reform*, 40 AM. BUS. L.J. 83, 87 (2002) (defining hard money as funds which fall within BCRA's regulatory ambit such as contributions to federal candidates, PACs, and political parties as well as expenditures that expressly advocate the election or defeat of a candidate for federal office).

¹⁵ U.S. CONST. amend. I.

¹⁶ *Buckley*, 424 U.S. 1 (1976) (holding that the law did not violate free speech except when the candidate was restricted from contributing on their own behalf).

¹⁷ *Id.* at 25.

because they impeded people's ability to engage in protected political expression.¹⁸ The Court did, however, state that the prevention of corruption was sufficient to justify contribution limitations (including a \$1,000 limitation per candidate per election) without significantly restricting the peoples' or the candidates' abilities to engage in political speech.¹⁹ Thus, the Court fashioned the precedent that it adheres to today; that campaign contribution limits are less of a burden on free speech than expenditure limits and therefore, as long as they are created to stem corruption or the appearance of corruption, they are constitutional infringements on free speech.²⁰

The Court errs in *McConnell* by applying the *Buckley* standard to BCRA. The soft money prohibition in BCRA has far broader implications than the \$1,000 individual contribution limitation in *Buckley*, yet the Court looks at the restrictions using the same standard of review.²¹ Because soft money goes to the major parties' committees, prohibiting it substantially reduces the funding of the parties, thereby reducing their ability to engage in party-building activities that enhance the nation's political speech. In addition, restricting contributions to the parties diminishes their ability to engage in political speech, which diminishes their role as the consensus builders of American politics. Because the Court upheld the soft money prohibition of BCRA, new groups are being formed to circumvent the law by channeling soft money contributions to candidates, which was previously the role of the parties.²² By taking away the power of the parties, not only will *their* political speech be limited, but also the right of individuals to engage in protected political speech will be limited. People wanting to express their political choices will be forced to do it through extreme, single-issue oriented groups rather than through the inclusive national parties.²³

¹⁸ *Id.* at 39-59.

¹⁹ *Id.* at 23-38.

²⁰ *Id.*

²¹ *Buckley*, 424 U.S. at 21. The Court in *Buckley* stated:

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.

Id.; see also *McConnell*, 124 S. Ct. at 655 ("In *Buckley* and subsequent cases, we have subjected restrictions on campaign expenditures to closer scrutiny than limits on campaign contributions . . . In these cases we have recognized that contribution limits, unlike limits on expenditures, 'entail[] only a marginal restriction upon the contributor's ability to engage in free communication.'")

²² See, e.g., Thomas B. Edsall, *Democrats' Financing Plan Challenged; Watchdog Groups File Complaint With FEC Over Party's 'Soft Money' Network*, WASH. POST., Jan. 16, 2004, at A4.

²³ See, e.g., Matthew Cooper and Karen Tumulty, *Bring On the Cash*, TIME, Feb. 23, 2004, at 18.

This Note will begin by examining the Supreme Court's prior jurisprudence in the murky area of campaign finance law. From *Buckley* to *McConnell*, the Supreme Court has tried to explain the discrepancies in its campaign finance decisions under the broad justification of attempting to diminish the corruption in the political process. Next, this Note will examine the majority and dissenting opinions in *McConnell* and explain how the slim majority wrongly reasoned that a limitation on campaign contributions is a constitutional trespass into protected political speech under the First Amendment. Finally, this Note will examine the post-*McConnell* impact on the major parties and the effect of the soft money ban on the ability of the parties and individuals to engage in protected political speech. This Note will conclude that despite the Supreme Court's best efforts to curb the omnipresent corruption in the political process, it has only shifted the weight of political speech from the people and the parties to single-issue interest groups that now wield greater power by replacing the parties as repositories for unregulated soft money.

II. FROM *BUCKLEY* TO *MCCONNELL*: THE COURT'S QUEST TO PREVENT CORRUPTION BY LIMITING SPEECH

A. *Buckley*: The Court Leaves the Door Open for Soft Money

The seminal Supreme Court decision on modern campaign finance reform is the 1976 case, *Buckley v. Valeo*.²⁴ The case was brought by diverse groups including a sitting senator, an ex-presidential candidate, and interest groups spanning both sides of the political spectrum.²⁵ At issue in *Buckley* was the constitutionality of contribution and expenditure limitations set forth in the Federal Election Campaign Act of 1971 ("FECA") and its 1974 amendments.²⁶

²⁴ 424 U.S. 1 (1976).

²⁵ *Id.* at 7-8, 9, n.5. Some of the more famous plaintiffs included James Buckley, Eugene McCarthy, The American Conservative Union, and Common Cause. Some commentators question the justifiability issue, dismissed by the Court, of whether these plaintiffs were directly affected by the statute. *Id.* See generally Roland S. Homet, Jr., *Fact-Finding in First Amendment Litigation: The Case of Campaign Finance Reform*, 21 OKLA. CITY U.L. REV. 97, 103 (1996) (discussing the standing issues in *Buckley*).

²⁶ *Buckley*, 424 U.S. at 12. The Court further explained that:

[T]he statutes at issue summarized in broad terms, contain the following provisions: (8)(a) individual political contributions are limited to \$1,000 to any single candidate per election, with an overall annual limitation of \$ 25,000 by any contributor; independent expenditures by individuals and groups "relative to a clearly identified candidate" are limited to \$1,000 a year; campaign spending by candidates for various federal offices and spending for national conventions by political parties are subject to prescribed limits; (b) contributions and expenditures above certain threshold levels must

The Court, in a *per curiam* decision, upheld the congressionally imposed limitations from individuals to candidates of \$1,000 a year and not more than \$25,000 per election, and limited contributions from PACs to candidates of \$25,000 per year.²⁷ The Court did not address the constitutionality of money that fell outside the regulatory restrictions of FECA, otherwise known as soft money.²⁸ Absent a constitutional justification, the Court's decision to uphold these dollar limits would be an arbitrary and capricious exercise of power. Therefore, as its only justification for upholding these limits, the Court asserted that the government has a legitimate government interest in preventing corruption and the appearance of corruption of the political process, which it defined broadly to include improper influence and opportunities for abuse, as well as *quid pro quo* arrangements.²⁹

However, in the case of soft money, this corruption rationale cannot be analogously applied. There cannot be corruption or *quid pro quo* arrangements, as the majority in *Buckley* envisioned them, between a national party (the initial recipient of the soft money) and one of its candidates (who receives soft money from the party) who because of their similar party affiliations, will have the same interest. Inevitably, a candidate and a party will clash on certain issues and the party is free to deny them funding as a result. Senator John McCain's 2000 White House bid is a prime example.³⁰ Despite such rarities, the *quid pro quo* corruption justification of *Buckley* is inapplicable to soft money because the contributions are not going directly to candidates but must first go through the party. The restrictions in FECA that

be reported and publicly disclosed; (c) a system for public funding of Presidential campaign activities is established by Subtitle H of the Internal Revenue Code; . . . and (d) a Federal Election Commission is established to administer and enforce the legislation.

Id. at 7.

²⁷ *Id.* at 58-59.

²⁸ See generally James Weinstein, *Campaign Finance Reform And The First Amendment: An Introduction*, 34 ARIZ. ST. L.J. 1057, 1068 (2002) (discussing the effect of FEC Advisory Op. 1978-10 in creating the so-called "soft-money loophole").

²⁹ *Buckley*, 424 U.S. at 27-28.

[T]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined . . . Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'

Id. at 27 (quoting *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 565 (1973)).

³⁰ See generally Trevor Potter and Marianne H. Viray, *Election Reform: A Barrier to Participation*, 36 U. MICH. J.L. REF. 547, 555 (2003) (noting that "GOP primary ballot requirements were crafted to severely burden candidates like Senator McCain from participating and his supporters from exercising their First Amendment right to vote.").

were upheld in *Buckley* referred to contributions made directly to candidates and not to national parties because at the time of the decision, national parties were not conduits of soft money.³¹ Because of the differences in the laws at issue, it is wrong for the majority in *McConnell* to so strongly rely on *Buckley* to support the soft money ban.

Buckley and its progeny establish that because of the importance of reducing corruption in the political process, campaign contribution limits deserve to be reviewed under the less demanding “closely drawn scrutiny” rather than “strict scrutiny,” the standard normally reserved for infringements on free speech.³² The Court cited its precedent that “[n]either the right to associate nor the right to participate in political activities is absolute,”³³ and “[e]ven a ‘significant interference with protected rights of political association’ may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.”³⁴ Under this lower standard, the Court had no problem justifying the contribution limitations as reasonable interferences with free speech in order to prevent further corruption of the political process.³⁵ However, many members of the current Court have rightly raised doubts whether this lowered standard is still applicable in the area of campaign finance reform and, to its credit, the Court’s majority in *McConnell* concedes that.³⁶

Buckley established that the FECA restrictions and its subsequent amendments were constitutional.³⁷ On the heels of that decision, in a 1978 advisory opinion, the Federal Election Commission (“FEC”) further paved the

³¹ See Richard Briffault, *Symposium: Law and Political Parties: The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 629 (2000) (noting that soft money totals in 1980, four years after *Buckley*, were just \$19 million, compared with over \$400 million raised in the 2000 election). See also Center for Responsive Politics, at <http://www.opensecrets.org/payback/issue.asp?issueid=CFR&CongNo=107> (last modified Jan. 9, 2003).

³² *Buckley*, 424 U.S. at 20-21 (noting that unlike restrictions on campaign expenditures, contribution limits “entail only a marginal restriction upon the contributor’s ability to engage in free communication.”); see also *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 208 (1982) (discussing the relation between this decreased standard of review and the importance “[b]oth the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.”).

³³ *Buckley*, 424 U.S. at 25 (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 567 (1973)).

³⁴ *Id.* (quoting *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

³⁵ *Id.* at 28.

³⁶ See, e.g., *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 405-410 (2000) (Kennedy, J., dissenting); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 635-644 (1996) (Thomas, J., dissenting).

³⁷ See Federal Election Campaign Act of 1971, as amended, codified at 2 U.S.C. §§431-455.

way for soft money contributions by introducing a narrow exception to the hard money requirements of FECA.³⁸ The advisory opinion's ruling allowed national political parties to accept some unregulated money, i.e., money that fell outside the scope of FECA, for party-building purposes and get-out-the-vote ("GOTV") drives that benefited both state and federal elections.³⁹ At the same time, the parties were only allowed to allocate hard money for election purposes that were strictly for federal candidates.⁴⁰ That FEC opinion stood as the last interpretation on the legality of soft money's role in political speech for over twenty years.⁴¹

B. *Shrink Missouri*: The Supremes Reveal Their True Intentions

Buckley stood as the most important interpretation of campaign finance law until 2000. In that year, the Court handed down *Nixon v. Shrink Missouri Government PAC*,⁴² in which a Missouri statute limiting contributions to candidates for state office,⁴³ including a \$1,000 ceiling for statewide offices, was held to be a constitutional limit on free speech.⁴⁴ In *Shrink Missouri*, a PAC and a state candidate seeking its donations filed suit against the state of Missouri on the grounds that the law limiting contributions violated their First Amendment free speech and associational rights.⁴⁵ On the surface, this holding implied an acceptance of the principle laid down in *Buckley*, that in order to stem the spread or appearance of corruption, limitations on contributions are constitutionally permissible.⁴⁶

³⁸ FEC Advisory Op. 1978-10 (1978), at <http://herndon3.sdrdc.com/ao/ao/780010.html> (last visited Nov. 30, 2004). The questions the FEC answered in this advisory opinion were: (1) Is a voter registration drive allocable as a contribution to a candidate? (2) If a get-out-the-vote effort contacts voters on behalf of non-Federal candidates only, do the expenses of this effort have to be paid for from a Federal account? (3) If a part of such an effort is in behalf of Federal candidates, does the entire cost have to be paid from a Federal committee?

Id.

³⁹ *Id.*

⁴⁰ See Weinstein, *supra* note 28, at 1068.

⁴¹ See, e.g., *Shrink Missouri*, 528 U.S. at 377; Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996); FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2000).

⁴² 528 U.S. 377 (2000).

⁴³ MO. REV. STAT. §130.032.1(1) (2003) (stating in relevant part that "to elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor or attorney general, [the amount of contributions made by or accepted from any person other than the candidate in any one election shall not exceed] one thousand dollars").

⁴⁴ *Shrink Missouri*, 528 U.S. at 385.

⁴⁵ *Id.* at 383.

⁴⁶ *Buckley*, 424 U.S. at 25 ("[T]he primary interest served by the limitations and, indeed, by the Act as a whole, is the prevention of corruption and the appearance of corruption

The Court made a damaging concession, however, when it discussed the effects of contribution limits on interfering with the ability of a candidate to finance campaigns. The Court noted that an extreme restriction on contributions would be unconstitutional if “the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.”⁴⁷ The Court then rightly pointed out that the Missouri statute did not come close to meeting this bar by emphasizing that the overwhelming majority of contributions in that state’s most recent election were of the statutory permissible amount, meaning that the candidates were not overly burdened by the restrictions.⁴⁸

Similar reasoning in *McConnell* would prove disastrous to the majority’s holding because, unlike the fact situation in *Shrink Missouri*, a great deal of the money that Democrats and Republicans raised prior to the enactment of BCRA came in the form of soft money, *i.e.*, the contributions banned by BCRA.⁴⁹ The major parties used soft money to facilitate their speech in a variety of forms, from GOTV drives, to establishing the parties’ platforms and organizing the national conventions, to engaging in public policy debates in the media with the other parties.⁵⁰ If, as *Shrink Missouri* states, an important measure of constitutionality of contribution limitations is the degree to which candidates rely on a certain form of contribution, a ban on soft money today would not be a constitutional limitation on free speech because the national parties rely on soft money for nearly half of their contributions.⁵¹ As will be discussed, the *McConnell* majority ignored the rationale it gave in *Shrink Missouri* and curtailed the right of the parties to engage in the forms of political speech to which they had traditionally been permitted.

spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office.”).

⁴⁷ *Shrink Missouri*, 528 U.S. at 397.

⁴⁸ *Id.* at 395-96.

⁴⁹ *See, e.g.*, Center for Responsive Politics, at <http://www.opensecrets.org/soft-money/softglance.asp> (last visited Nov. 7, 2004) [hereinafter Center for Responsive Politics] (illustrating that in 2001, 54% of the Democratic and 43% of the Republican Party funds came from soft money).

⁵⁰ *See, e.g.*, *McConnell v. FEC*, 251 F. Supp. 2d 176, 334-37 (D.D.C. 2003) (Henderson, J. dissenting).

⁵¹ *Shrink Missouri*, 528 U.S. at 395-96. *Compare* Center for Responsive Politics, *supra* note 49 (noting that 54% and 43% of the Democratic and Republican party funds respectively came from soft money), *with Buckley*, 424 U.S. at 26, n.27 (“In 1974 . . . 94.9% of the funds raised by candidates for Congress came from contributions of \$1,000 or less.”).

C. *Colorado I* and *II*: Who's Corrupting Whom?

Another case after *Buckley* that shaped the decision in *McConnell* was *Colorado Republican Fed. Campaign Comm. v. FEC (Colorado I)*.⁵² Handed down in 1996, this decision is important for what it says about the supposed corrupting influence parties have on candidates, a crucial factor to the Court's holding in *McConnell*.⁵³ In its discussion of soft money, the Court in *Colorado I* stated, "We are not aware of any special dangers of corruption associated with political parties . . ."⁵⁴ The Court contradicts itself here when compared to *McConnell*, where the soft money ban to the parties was upheld because it gave the appearance of corruption.⁵⁵ How can the Court reconcile its statement in *Colorado I*, that fears of corruption of political parties are unfounded, with its statement in *McConnell*, that "[S]oft money contributions to national party committees have a corrupting influence or give rise to the appearance of corruption . . .?"⁵⁶

Colorado I also recognized that FECA, at the time of *Buckley*, permitted contributions to the political parties in the amount of \$20,000, which was greatly in excess of contribution limits of \$1,000 placed on individuals or \$5,000 placed on PACs.⁵⁷ The Court concluded that the "[o]pportunity for corruption posed by these greater opportunities for contributions [the contributions of soft money to political parties] is, at best, attenuated."⁵⁸ If the Court's reasoning in *Colorado I* is carried to its logical conclusion, higher levels of contributions do not mean greater corruption or opportunity for

⁵² 518 U.S. 604 (1996).

⁵³ *Id.* at 617-18 ("This fact [the lack of coordination between the candidate and the party] prevents us from assuming, absent convincing evidence to the contrary, that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system.").

⁵⁴ *Id.* at 616. The Court goes on to say that:

When this Court considered, and held unconstitutional, limits that FECA had set on certain independent expenditures by PAC's, it reiterated *Buckley*'s observation that 'the absence of prearrangement and coordination' does not eliminate, but it does help to 'alleviate,' any 'danger' that a candidate will understand the expenditure as an effort to obtain a 'quid pro quo.'

Id. (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. at 498 (1985)).

⁵⁵ *McConnell*, 124 S. Ct. at 660 (noting that "the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits.").

⁵⁶ *Id.* at 661. See also *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 299 (1981) (noting that "placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression.").

⁵⁷ *Colorado I*, 518 U.S. at 616 (citing 2 U.S.C. §441a(a) (West Supp. 2003)). The Court also points out that "FECA permits unregulated 'soft money' contributions to a party for certain activities, such as electing candidates for state office, see §431(8)(A)(i), or for voter registration and 'get out the vote' drives, see §431(8)(B)(xii)." *Id.*

⁵⁸ *Id.*

corruption, but rather enhanced levels of political speech for all citizens. Again, this holding is completely at odds with the Court's reasoning in *McConnell* where the majority relied on corruption, or the appearance thereof, to justify its soft money ban.⁵⁹ Ironically, three members of the majority in *McConnell* agreed with *Colorado I's* reasoning, and yet found the soft money ban of BCRA to be constitutional as a means to prevent corruption or the appearance of corruption.⁶⁰

Following remand of *Colorado I*, the Court reheard *FEC v. Colorado Republican Fed. Campaign Comm. (Colorado II)* four years later.⁶¹ At issue before the Court was the constitutionality of federal spending limits imposed on the Colorado Republican Party's expenditures to a candidate.⁶² The majority, led by Justice Souter, rejected the Republican Party's statutory challenge and held that, "a party's coordinated expenditures, unlike expenditures that are truly independent, may be restricted to minimize circumvention of contribution limits."⁶³

The Court's decision is also significant for what it says about political parties. By holding as it did, *Colorado II* discerned the role of parties in our system, and did so in a way that is at odds with the holding of *McConnell*. The Court was given a choice between examining parties under a stricter standard because of their role in political speech, or under a more generous standard given to other associations.⁶⁴ The Court chose to define political parties like other non-political groups in that they have many roles, not just "electing their candidates."⁶⁵ In other words, political parties, since they are similar in form to any other association, do not deserve any heightened level of scrutiny and deserve all the protections of free speech and association that the First Amendment provides. This begs the question to be discussed later, why the *McConnell* Court, in upholding soft money restrictions handicapping the

⁵⁹ *McConnell*, 124 S. Ct. at 660.

⁶⁰ *See Colorado I*, 518 U.S. at 616 (opinion of Breyer, J., joined by O'Connor and Souter, JJ.); *Cf. McConnell v. FEC*, 124 S. Ct. 619 (2003) (opinion of Stevens and O'Connor, JJ, joined by Breyer, J.).

⁶¹ 533 U.S. 431 (2001).

⁶² *Id.* at 437.

⁶³ *Id.* at 465.

⁶⁴ *See id.* at 452.

⁶⁵ *Id.* The Court continued that some of these roles include:

[C]ombin[ing] its members' power to speak by aggregating contributions and broadcasting messages more widely than individual contributors generally could afford to do, and the party marshals this power with greater sophistication than individuals generally could, using such mechanisms as speech coordinated with a candidate. In other words, the party is efficient in generating large sums to spend and in pinpointing effective ways to spend them.

Id. at 453.

power of the parties, reviewed those restrictions under the most exacting constitutional standard.

III. THE DECISION IN *MCCONNELL V. FEC*: ABRIDGING POLITICAL SPEECH IN THE NAME OF PREVENTING CORRUPTION

A. The Majority Decision: Overlooking the Implications of a Soft Money Ban

In a special session on September 8, 2003, the Supreme Court heard oral arguments on the constitutionality of the McCain-Feingold legislation from numerous interest groups and governmental entities.⁶⁶ In a majority opinion released on December 10, 2003 penned by Justices Stevens and O'Connor, the Court upheld Title I of BCRA, the cornerstone of which is FECA §323(a), the soft money ban.⁶⁷ This provision prohibits national party committees and their agents from soliciting, receiving, directing, or spending any soft money.⁶⁸ The majority also upheld Title II, which contains limitations on issue ads.⁶⁹ The majority, dissenting, and concurring opinions fill close to 300 pages and are so fractured that it is difficult to determine all of the precise holdings.⁷⁰ What is

⁶⁶ *McConnell*, 124 S. Ct. at 643, n.1; see also Lane, *supra* note 4 (discussing the political implications of the decision in *McConnell*, as well as internal politics of the Court's decision making). A representative group of plaintiffs include members of Congress such as Mitch McConnell (R-KY), the National Rifle Association, Republican National Committee, National Right to Life Committee, American Civil Liberties Union, the California Democratic Party, AFL-CIO, and the U.S. Chamber of Commerce. See 251 F. Supp. 2d 176, 221-226 (D.D.C. 2003).

⁶⁷ 2 U.S.C. §441i (2000).

⁶⁸ *Id.* As the majority says, "In short, §323(a) takes national parties out of the soft-money business." *McConnell*, 124 S. Ct. at 654.

⁶⁹ 2 U.S.C. §434 (2000).

⁷⁰ *McConnell*, 124 S. Ct. at 642. Stevens and O'Connor, JJ., delivered the opinion of the Court with respect to BCRA Titles I and II, in which Souter, Ginsburg, and Breyer, JJ., joined. Rehnquist, C. J., delivered the opinion of the Court with respect to BCRA Titles III and IV, in which O'Connor, Scalia, Kennedy, and Souter, JJ., joined, in which Stevens, Ginsburg, and Breyer, JJ., joined except with respect to BCRA §305, and in which Thomas, J., joined with respect to BCRA §§304, 305, 307, 316, 319, and 403(b). Breyer, J., delivered the opinion of the Court with respect to BCRA Title V, in which Stevens, O'Connor, Souter, and Ginsburg, JJ., joined. Scalia, J., filed an opinion concurring with respect to BCRA Titles III and IV, dissenting with respect to BCRA Titles I and V, and concurring in the judgment in part and dissenting in part with respect to BCRA Title II. Thomas, J., filed an opinion concurring with respect to BCRA Titles III and IV, except for BCRA §§311 and 318, concurring in the result with respect to BCRA §318, concurring in the judgment in part and dissenting in part with respect to BCRA Title II, and dissenting with respect to BCRA Titles I, V, and §311, in which opinion Scalia, J., joined as to Parts I, II-A, and II-B. Kennedy, J., filed an opinion concurring in the judgment in part and dissenting in part with respect to BCRA Titles I and II, in which Rehnquist, C. J., joined, in which Scalia, J., joined except to

clear is that the Court upholds Titles I and II; the provisions upholding the soft money ban and issue ad restriction respectively, as constitutional limitations on protected First Amendment speech.⁷¹

B. The Majority's Analysis: When is Speech Corrupting?

In *Buckley* and subsequent campaign contribution decisions, the majority employed a closely-drawn standard of review as opposed to strict scrutiny.⁷² As its rationale for this lowered standard, the Court explained that contribution limits “entail only a marginal restriction upon the contributor’s ability to engage in free communication.”⁷³ They also stated that the lowered standard of review is important in preventing the “corruption” and the “appearance of corruption” that may result through the contributions of large sums.⁷⁴ This less exacting standard of review is meant to show a degree of deference to Congress in an area in which it is thought to have expertise.⁷⁵

Despite the majority’s attempts to cast *McConnell* in the same mold as *Buckley*, the challengers here correctly contended that strict scrutiny should be employed as the standard because “many of its provisions restrict not only contributions but also the spending and solicitation of funds raised outside of

the extent the opinion upholds new FECA § 323(e) and BCRA §202, and in which Thomas, J., joined with respect to BCRA §213. Rehnquist, C. J., filed an opinion dissenting with respect to BCRA Titles I and V, in which Scalia and Kennedy, JJ., joined. Stevens, J., filed an opinion dissenting with respect to BCRA §305, in which Ginsburg and Breyer, JJ. joined. *Id.*

⁷¹ *Id.* at 670. Other challenged provisions of BCRA include: a prohibition on donations made by minors, *Id.* at 711; requirement that parties must distinguish between independent and coordinated expenditures on behalf of its candidates, *Id.* at 686; requirement that state parties cannot pay for federal election activities with soft money. *Id.* at 654-55, 686, 711.

⁷² *Buckley*, 424 U.S. at 25 (noting that “even a ‘significant interference’ with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.”).

⁷³ *Id.* at 20-21.

⁷⁴ *Id.*

⁷⁵ *McConnell*, 124 S. Ct. at 656. The Court noted that:

The less rigorous standard of review we have applied to contribution limits (*Buckley*’s “closely drawn” scrutiny) shows proper deference to Congress’ ability to weigh competing constitutional interests in an area in which it enjoys particular expertise. It also provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process.

Id. But see *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 410-411 (2000) (“Political speech is the primary object of First Amendment protection . . . [t]he Founders sought to protect the rights . . . to engage in political speech . . . and that free exchange should receive the most protection when it matters the most—during campaigns for elective office.”) (Thomas, J., dissenting).

FECA's contribution limits.⁷⁶ The majority dispenses with that argument simply by saying that the soft money ban only limits donations made to political parties and not amounts spent by political parties.⁷⁷ This overlooks the palpable fact that most of the donations made to political parties are used for expenditures by the party not only for campaigns, but also for party building activities and administrative costs.⁷⁸

Alternatively, the plaintiffs argued that *McConnell* should be distinguished from *Buckley* because "the type of associational burdens that the soft money ban imposes are fundamentally different from the burdens that accompanied *Buckley*'s contribution limits, and merit the type of strict scrutiny we have applied to attempts to regulate the internal processes of political parties."⁷⁹ The Court characterized the plaintiff's argument as "greatly exaggerate[d]" and countered that "[s]ection 323 merely subjects a greater percentage of contributions to parties and candidates to FECA's source and amount limitations."⁸⁰ To characterize the plaintiff's arguments in this manner is an exaggeration itself. The plaintiffs correctly pointed out that the soft money restrictions will greatly impede the parties from carrying out their traditional functions of GOTV drives and party building activities, *i.e.*, functions not covered under FECA's statutory restrictions.⁸¹ The thrust of the plaintiffs argument is that the restrictions in BCRA, *i.e.*, the soft money ban and issue advocacy limitation, chip away more at the public's right to engage in political speech than do the hard money restrictions at stake in *Buckley*.⁸² Comparing the minor hard money restrictions in *Buckley* (\$1,000 from individuals) to the blanket soft money prohibition in *McConnell*, the plaintiffs were correct in

⁷⁶ *McConnell*, 124 S. Ct. at 657.

⁷⁷ *Id.*

⁷⁸ See Center for Responsive Politics, at <http://www.opensecrets.org/parties/index.asp?type=R&cycle=2002> (last visited Nov. 7, 2004) (showing that of the \$463,312,470 raised by the DNC in 2002, it spent \$459,331,677 on that year's congressional races).

⁷⁹ *Id.* at 659. See, *e.g.*, *California Democratic Party v. Jones*, 530 U.S. 567, 573-574 (2000) ("[W]hen States regulate parties' internal processes they must act within limits imposed by the Constitution.").

⁸⁰ *McConnell*, 124 S. Ct. at 659. The Court elaborated:

Buckley has already acknowledged that such limitations "leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates." [citation omitted] The modest impact that §323 has on the ability of committees within a party to associate with each other does not independently occasion strict scrutiny. None of this is to suggest that the alleged associational burdens imposed on parties by §323 have no place in the First Amendment analysis; it is only that we account for them in the application, rather than the choice, of the appropriate level of scrutiny.

Id.

⁸¹ *Id.* at 657.

⁸² *Id.* at 659.

asserting that a stronger standard of review is demanded.⁸³

Next, the majority argued in *McConnell* that all BCRA does is place a greater percentage of party contributions under FECA's limitations, which is partially true.⁸⁴ BCRA does more, however, than just limit those soft money contributions; Title I effectively bans them.⁸⁵ One indicator of the effect that the soft money ban will have on limiting political speech can be seen in the percentage of soft money the parties raised in 2000. The Republican Party and all of its state committees raised 35% of its contributions, and the Democratic Party and its state committees raised 47% of all its contributions through soft money.⁸⁶ Thus, by understating the effect of banning these portions of the parties' revenue, *Buckley* unwittingly understated the effect BCRA will have on the two major parties and in the process validated a restriction on political speech.

C. A Different Beast Altogether: Why *Buckley* Cannot Be Considered Precedent in *McConnell*

The laws banning soft money and restricting issue advocacy in *McConnell* are much different than the laws setting contribution limits in *Buckley*, and should therefore be treated differently by the Court in *McConnell*. Title I of BCRA is much broader than what *McConnell* claims. It prohibits the national party committees from "solicit[ing]," "receiv[ing]," "direct[ing] to another person," and "spend[ing]" any funds, not subject to federal regulation, even if those funds are used for non-election related activities.⁸⁷ This means that *all* funds received by the national parties, not just funds distributed to the party's candidates, must come in the form of statutorily regulated hard money. The majority's logic behind Title I might be more persuasive if the national parties only acted as middlemen for large donors and federal candidates. However, like the District Court found, the national parties also contribute to the national political discourse through other channels including: promoting the political messages of the parties; increasing public participation in the political process through get-out-the-vote drives; by nominating and electing candidates; by engaging in public policy debates; by building coalitions among the extremes

⁸³ Compare *Buckley*, 424 U.S. at 7, with *McConnell*, 124 S. Ct. at 656.

⁸⁴ *McConnell*, 124 S. Ct. at 659.

⁸⁵ 2 U.S.C. §441i(a)(b) (2000).

⁸⁶ See Center for Responsive Politics, at <http://www.opensecrets.org/parties/total.asp?Cmte=RPC&cycle=2000> (last visited Nov. 7, 2004), and <http://www.opensecrets.org/parties/total.asp?Cmte=DPC&cycle=2000> (last visited Nov. 7, 2004).

⁸⁷ 2 U.S.C. §441i(a)(1) (2000).

in the party; and by helping develop the parties on the state levels.⁸⁸ And as Justice Kennedy points out in his dissent to Title I, in addition to the two national parties, smaller parties exist only for the purpose of generating debate.⁸⁹

Besides the national party committees, BCRA even limits the state and local parties' abilities to engage in political speech. It prohibits state parties from using soft money for general activities such as voter registration, voter identification, and GOTV drives for state candidates even if federal candidates are not mentioned.⁹⁰ It even goes so far as to restrict state and local political party committees from soliciting or donating "any funds" to any non-profit, non-political group, regardless of whether the group is seeking to promote an issue or not.⁹¹ Not only are these restrictions overly broad as the plaintiffs argue, but it is unsupported by the record that they reduce "corruption" or the "appearance of corruption".⁹²

GOTV drives or the Presidential nominating convention should not be denied funding on account of their corrupt nature or because they appear so corrupt that they are inherently suspect. However, that is exactly what the majority in *McConnell* says through upholding these soft money prohibitions.⁹³ By banning all soft money to the national, state, and local parties, BCRA greatly hinders the efforts of the two major parties to carry out their important functions in politics, other than funneling money to candidates. The majority justified these broad restrictions by stating that the "close relationship between federal officeholders and the national parties" makes all donations to the national parties "suspect."⁹⁴

⁸⁸ *McConnell v. FEC*, 251 F. Supp. 2d 176, 334-37 (D.D.C. 2003):

[P]olitical parties have played and continue to play at least four critical roles in our country's political process . . . First, the parties have coordinated the political activities and messages of various national, state and local entities within the federal system. . . Second, the parties encourage "democratic nationalism" by nominating and electing candidates and by engaging in discussions about public policy issues of national importance. . . For example, the RNC has recently participated in public policy debates regarding a balanced budget amendment, welfare reform and education policy. . . Third, the parties act as critical agents in developing consensus in the United States . . . Fourth, the parties cultivate a sense of community and collective responsibility in American political culture. . . Parties have been integral in forming a consensus on such divisive issues as social welfare policy.

Id.

⁸⁹ *McConnell*, 124 S. Ct. at 779 (Kennedy, J., dissenting) (citing the example of the Libertarian Party).

⁹⁰ *See* 2 U.S.C.A. §§441i(b), 431(20)(A)(i)(ii) (West Supp. 2003).

⁹¹ *See* 2 U.S.C. §441i(d) (2000).

⁹² *Buckley*, 424 U.S. at 25.

⁹³ *McConnell*, 124 S. Ct. at 667-68.

⁹⁴ *Id.* at 667.

By holding that the contribution of soft money to political parties is inherently corrupting, the Court implied that relationships of political speech between a party and its candidate are presumptively suspect.⁹⁵ In reality, the candidate-party relationship is a model of free speech in politics.⁹⁶ Just because a candidate is a member of a party and may accept donations from that party it should not be presumed that there is corruption. Instead, the candidate-party relationship should be viewed as a practical vehicle to dispel corruption in the political process. Group associations should be given more deference by the current Court and not considered invalid simply because of the nature of the association. While contributions to political parties should be viewed objectively, we should heed the words of Chief Justice Rehnquist, who in his dissent to Title I writes, “[w]ho knows what association will be deemed too close to federal officeholders next?”⁹⁷

D. BCRA’s Force Field for Incumbents – The Scalia Perspective

BCRA has been criticized by individuals and groups from both sides of the political spectrum. A vociferous critic on the *McConnell* Court is Justice Scalia, who characterizes the majority’s upholding of the soft money prohibition as “a sad day for the freedom of speech.”⁹⁸ His argument against the majority, however, takes an interesting approach. He persuasively argued that campaign finance laws in general, and BCRA in particular, tend to disproportionately favor incumbents at the expense of challengers by making it harder to gain access to soft money.⁹⁹ Do you think it is accidental, his question dripping with derision, that “incumbents raise about three times as much ‘hard money’ [*i.e.*, money not restricted by BCRA], as do their challengers?”¹⁰⁰ . . . “Or that lobbyists,” who are always seeking the favor of

⁹⁵ See *McConnell*, 124 S. Ct. at 654-55.

⁹⁶ See generally Weinstein, *supra* note 28 (discussing how campaign finance regulation falls at the intersection of the public discourse and election domains).

⁹⁷ *McConnell*, 124 S. Ct. at 778.

⁹⁸ *Id.* at 720 (Scalia, J., dissenting).

⁹⁹ *Id.* at 721. Scalia continued:

[T]he legislation is evenhanded: It similarly prohibits criticism of the candidates who oppose Members of Congress in their reelection bid . . . If all electioneering were evenhandedly prohibited, incumbents would have an enormous advantage . . . In other words, any restriction . . . of campaign speech that is equally available to challengers and incumbents tends to favor incumbents.

Id. at 720-21.

¹⁰⁰ *Id.* at 721 (citing FEC, 1999-2000 FINANCIAL ACTIVITY OF ALL SENATE AND HOUSE CAMPAIGNS (JAN. 1, 1999-DEC. 31, 2000), at <http://www.fec.gov/press/051-501congfinact/tables/all-cong2000.xls> (all Internet materials as visited Dec. 4, 2003, and available in Clerk of Court’s case file)).

incumbents, “give 92% of their money in hard contributions?”¹⁰¹ Perhaps most persuasively he questions the so-called “millionaire provisions,” which raise the contribution limits for an individual running against someone who donates great personal wealth to the campaign (as challengers often do), “but do not raise the limit for a candidate running against an individual who devotes to the campaign (as incumbents often do) a massive election ‘war chest’?”¹⁰²

At first glance, these charges seem conspiratorial. It is unlikely that our elected officials would brazenly plot to solidify their positions by limiting their challengers’ access to contributions. But, an examination of the legislative history behind McCain-Feingold gives weight to Scalia’s arguments.¹⁰³ Besides the “millionaire provisions,” there were numerous amendments the Senate defeated which would have benefited challengers.¹⁰⁴ For example, the Bennett amendment, which would have banned corporations and labor unions from using their funds to pay the administrative expenses of PACs, a common vehicle of financing by challengers, was voted down in the Senate.¹⁰⁵ Also, the Smith amendment, which tried to ban lobbyist and PAC contributions while Congress was in session, a measure that would have limited incumbents’ fundraising abilities, was similarly voted down.¹⁰⁶ Ostensibly, these amendments would have stemmed the appearance of corruption, so important in *Buckley*, by making incumbents more beholden to the interests of their constituents and less to special interests. But Congress declined to adopt these amendments and as a result produced a bill favoring themselves. Considering the evidence in the legislative record, Scalia is justified in criticizing BCRA. The view that BCRA is an example of the inmates running the asylum is not as far-fetched as it initially sounds.

¹⁰¹ *Id.* (citing U.S. PUBLIC INTEREST RESEARCH GROUP (PIRG), THE LOBBYIST’S LAST LAUGH: HOW K STREET LOBBYISTS WOULD BENEFIT FROM THE MCCAIN-FEINGOLD CAMPAIGN FINANCE BILL 3, at <http://www.pirgorg/democracy/democracy.asp?id2=5068> (July 5, 2001)).

¹⁰² *Id.* at 721 (“And is it mere happenstance . . . that national-party funding . . . is more likely to assist cash-strapped challengers than flush-with-hard-money incumbents? . . . Was it unintended . . . that incumbents are free personally to receive some soft money and even to solicit it for other organizations, while national parties are not?”). It is important to note though that the so-called millionaire provisions were not decided on by the Court because the plaintiffs lacked standing. *See id.* at 710.

¹⁰³ *See, e.g., infra* notes 105-108.

¹⁰⁴ *See supra* note 102 (discussing Scalia’s perspective on the “millionaire provisions”).

¹⁰⁵ 147 CONG. REC. S2550-60 (daily ed. Mar. 20, 2001) (Bennett amendment, Senate Amend. 117).

¹⁰⁶ 147 CONG. REC. S2561-67 (daily ed. Mar. 20, 2001) (Smith amendment, Senate Amend. 118).

IV. *MCCONNELL*: THE BEGINNING OF THE END OF POLITICAL FREE SPEECH

“This is a modest step, it is a first step, it is an essential step, but it does not even begin to address, in some ways, the fundamental problems that exist with the hard money aspect of the system.”¹⁰⁷

-Senator Russ Feingold on the implications of BCRA.

Judging by this and other comments made during debate over BCRA,¹⁰⁸ it seems that this is just the beginning of campaign finance “reform.” The risks inherent in Congress regulating itself in any area, let alone campaign finance, should be apparent to even a casual political observer. Having Congressmen author the laws that govern themselves presents numerous conflicts of interest, especially when, as with BCRA, the laws are seen as injurious to challengers and protective of incumbents.¹⁰⁹ Instead of Congress penning laws governing themselves, and to prevent Congress from appearing to create laws for their benefit, more deference should be given to the FEC’s rulemaking capacity. Advisory opinions and rules issued by the politically neutral FEC would be more credible than politically motivated legislation passed by Congress.¹¹⁰ Opponents argue this would abdicate Congress’ legislative function to the executive branch.¹¹¹ However, the alternative is for Congress to continue regulating themselves, a situation which will continue producing laws favoring incumbents at the expense of challengers and the national parties.¹¹² This may only be wishful thinking by campaign finance purists, but it should be considered as a viable alternative to the current system where politics

¹⁰⁷ 148 CONG. REC. S2096, 2101 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold).

¹⁰⁸ See *id.* (Statement of Sen. Boxer) (“This bill is not the be-all or the end-all, but it is a strong start.”); *Id.* (statement of Sen. Corzine) (“This should not and will not be the last time campaign finance reform is debated on the Senate floor. We have many more important campaign finance issues to explore.”); *Id.* at S2157 (Statement of Sen. Torricelli) (“Make [BCRA] the beginning of a reform, not the end of reform.”).

¹⁰⁹ *McConnell*, 124 S. Ct. at 720 (Scalia, J., dissenting).

¹¹⁰ By statute, no more than three of the six total commissioners can be of the same party and the vote of four is needed for any official Commission action. See Federal Election Campaign Act of 1971 at <http://www.fec.gov/about.html> (last visited Mar. 20, 2004).

¹¹¹ See generally Peter S. Guryan, *Reconsidering FEC v. NRA Political Victory Fund Through a Bolstered Functionalism*, 81 CORNELL L. REV. 1338, 1346 (1996) (citing to *Nixon v. Admin. of Gen. Serv.*, 433 U.S. 425, 443 (1977)):

“In determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.”

Id.

¹¹² See *supra* notes 102-106 (describing Scalia’s perspective).

supersedes attempts at real reform.

A. Restrictions on Free Speech Must Be Reviewed Under Strict Scrutiny

Normally, restrictions on free speech are reviewed by courts under a strict scrutiny standard that requires a compelling governmental interest and a narrowly tailored means to meet that interest.¹¹³ By upholding the soft money ban in *McConnell* and reviewing BCRA with closely-drawn rather than strict scrutiny, the Court holds that contributions to political parties are not as protected as other forms of speech.¹¹⁴

This is at odds with the Court's prior holdings. In *Buckley*, the Court observed that, "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."¹¹⁵ In other words, just because money has to be expended to communicate an idea does not make it fall outside strict scrutiny under which all restrictions on speech should be reviewed. The Court's majority opinion dispenses with this rationale and subjects all restrictions on funding of speech to less exacting scrutiny.¹¹⁶ Justice Scalia underscores this point in his dissent by suggesting, "Today's cavalier attitude toward regulating the financing of speech . . . frustrates the fundamental purpose of the First Amendment."¹¹⁷ He goes on to highlight the realities of political speech in a modern society, *i.e.*, that because there are so many actors involved in the dissemination of ideas, a restriction on an essential actor that prevents ideas from being produced can be an unconstitutional limitation on free speech.¹¹⁸

¹¹³ See, e.g., *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982) (describing the standard of review for limits on association and speech rights to be "subject to the closest scrutiny") (quoting *NAACP v. Alabama*, 357 U.S. at 460-61 (1958)).

¹¹⁴ See, e.g., *Buckley*, 424 U.S. at 19 (describing the expenditure as opposed to the contribution limits at issue as imposing "substantial rather than merely theoretical restraints on the quantity and diversity of political speech.").

¹¹⁵ *Buckley*, 424 U.S. at 16.

¹¹⁶ *McConnell*, 124 S. Ct. at 659.

¹¹⁷ *Id.* at 722.

¹¹⁸ *Id.* Justice Scalia continued:

In any economy operated on even the most rudimentary principles of division of labor, effective public communication requires the speaker to make use of the services of others. An author may write a novel, but he will seldom publish and distribute it himself. A freelance reporter may write a story, but he will rarely edit, print, and deliver it to subscribers. To a government bent on suppressing speech, this mode of organization presents opportunities: Control any cog in the machine, and you can halt the whole apparatus. License printers, and it matters little whether authors are still free to write. Restrict the sale of books, and it matters little who prints them.

Id.

As mentioned earlier, three members of the *McConnell* majority previously held that the corrupting effect of soft money is “at best, attenuated.”¹¹⁹ Even though the majority premises its arguments on the notion that soft money contributions corrupt the process, there is very little evidence on the record that soft money has this effect.¹²⁰ As Justice Kennedy wrote in his dissent, “[t]o reach today’s decision, the Court surpasses *Buckley*’s limits and expands Congress’ regulatory power . . . replac[ing] discrete and respected First Amendment principles with new, amorphous, and unsound rules, rules which dismantle basic protections for speech.”¹²¹

As stated above, *Buckley*’s limitations concerned \$1,000 donations to candidates and \$25,000 donations to PACs, and the justification for those limitations was to prevent “corruption or the appearance of corruption” in the political process.¹²² The *McConnell* Court cites this same justification for upholding the soft money ban.¹²³ What the majority in *McConnell* forgets is the major difference between the hard money restrictions in *Buckley* and BCRA’s total prohibition of soft money. *Buckley* was primarily concerned with the corruption of *quid pro quo* contributions to candidates,¹²⁴ and the limitations imposed by the Court were narrowly tailored to protect that

¹¹⁹ See *Colorado I*, 518 U.S. at 616.

¹²⁰ *McConnell*, 124 S. Ct. at 732 (Thomas, J., dissenting in part) (noting that “The evidence cited by the joint opinion does not meet this standard and would barely suffice for anything more than rational-basis review.”).

¹²¹ *Id.* at 742. Justice Kennedy continued:

A few examples show how BCRA reorders speech rights and codifies the Government’s own preferences for certain speakers. BCRA would have imposed felony punishment on Ross Perot’s 1996 efforts to build the Reform Party. Compare Federal Election Campaign Act of 1971 (FECA) §§309(d)(1)(A), 315(a)(1)(B), and 323(a)(1) (prohibiting, by up to five years’ imprisonment, any individual from giving over \$25,000 annually to a national party) with *Spending By Perot*, THE HOUSTON CHRONICLE, Dec. 13, 1996, p. 43 (reporting Perot’s \$8 million founding contribution to the Reform Party). BCRA makes it a felony for an environmental group to broadcast an ad, within 60 days of an election, exhorting the public to protest a Congressman’s impending vote to permit logging in national forests. See BCRA §203. BCRA escalates Congress’ discrimination in favor of the speech rights of giant media corporations and against the speech rights of other corporations, both profit and nonprofit. Compare BCRA §203, with *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659-660 (1990) (first sanctioning this type of discrimination).

McConnell, 124 S. Ct. at 742.

¹²² *Buckley*, 424 U.S. at 26 (“It is unnecessary to look beyond the Act’s primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation.”).

¹²³ *McConnell*, 124 S. Ct. at 656.

¹²⁴ *Id.* at 745 (Kennedy, J., dissenting in part) (“*Buckley* made clear . . . that the corruption interest only justifies regulating candidates’ and officeholders’ receipt of . . . ‘quids’ in the *quid pro quo* formulation.”).

interest.¹²⁵

In *McConnell*, despite the majority's bald assertion that donations to political parties are inherently suspect,¹²⁶ there are no *quid pro quo* dangers precisely because the political parties are the recipients of the soft money, not the candidates, as was the case in *Buckley*.¹²⁷ In his dissent, Justice Kennedy stated, "*Buckley*'s standard, however, was to define undue influence by reference to the presence of *quid pro quo* involving the officeholder."¹²⁸ In *McConnell*, Justice Kennedy continued "that access, without more, proves influence is undue," and the Court equates access with "actual or apparent corruption of officeholders."¹²⁹ Attempting to compare the limits in *Buckley* to the limits in *McConnell*, the Court attempted to justify upholding BCRA using its rationale in *Buckley*.¹³⁰ However, it is a perverse distortion indeed to equate statutory hard money limits, as in *Buckley*, to the blanket soft money prohibition in *McConnell*.

B. Shifting Free Speech: How *McConnell* Has Limited Speech By Subduing the Parties and Creating the 527s

Even though it claims to rely on *Buckley* as precedent, *McConnell* goes far beyond the comparably minor restrictions in *Buckley* to effectually rearrange the manner of American political speech. In his oral arguments representing the challengers, Kenneth Starr argued that BCRA shifts resources and power away from political parties, which have long been a source of stability for the nation, and in the direction of politically divisive special interest groups.¹³¹ It is no secret that following the passage of BCRA and the *McConnell* decision, political parties will lose a large part of their funding.¹³² By banning soft money to political parties, BCRA's own language leaves open non-party committees and interest groups to continue raising and spending soft money, while concomitantly restricting the money and speech of the two major national parties.¹³³

¹²⁵ *Buckley*, 424 U.S. at 26-27 ("To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.").

¹²⁶ *McConnell*, 124 S. Ct. at 667.

¹²⁷ *Buckley*, 424 U.S. at 13.

¹²⁸ *McConnell*, 124 S. Ct. at 746.

¹²⁹ *Id.*

¹³⁰ *McConnell*, 124 S. Ct. at 744-45; *see also Buckley*, 424 U.S. at 23-36.

¹³¹ *See, e.g.*, Excerpts from the Supreme Court's Arguments, at http://www.ilcampaign.org/press/news/national/articles/9-9-03_Excerpts.html (Sept. 9, 2003) [hereinafter Starr].

¹³² *See, e.g.*, Center for Responsive Politics, *supra* note 49.

¹³³ *See* 2 U.S.C.A. 441i(a)(2) (West Supp. 2003) (stating in relevant part, "[T]he [soft money] prohibition . . . applies to any such national committee, any officer or agent acting

Prior to the passage of BCRA and the Court's decision in *McConnell*, the political parties used large volumes of soft money to finance their activities.¹³⁴ What has yet to be determined is the lasting effect of these new restrictions on the political parties. Prior cases held that parties have significant roles in promoting and protecting political speech.¹³⁵ With the banning of practically half of the national parties' contributions, a large part of the parties' role is lessened by diminishing their capacity to engage in political speech.

As Justices Stevens and O'Connor stated in the majority in *McConnell*, "[m]oney, like water, will always find an outlet."¹³⁶ Thus, it should come as no surprise that as soon as *McConnell* was handed down, "shadow parties" began to emerge as the recipients of the soft money that BCRA banned to the national parties.¹³⁷ Groups such as America Coming Together ("ACT") and Americans for a Better Country ("ABC") have been stealthily created by party operatives and funded by wealthy donors to do the same thing national parties do: funnel money to candidates they support.¹³⁸ Named after the Internal Revenue Code section that allowed for their creation,¹³⁹ 527s have been created mainly by Democrats, who have always been more dependent on soft money contributions than Republicans,¹⁴⁰ to collect large donations of money banned by BCRA.¹⁴¹ 527s have been around for years, but have only gained notoriety after the passage of McCain-Feingold.¹⁴² International financier George Soros, whose political agenda includes a professed desire to beat George W. Bush in his 2004 reelection at any cost,¹⁴³ has already pledged \$10 million to these

on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee").

¹³⁴ See, e.g., Center for Responsive Politics, *supra* note 49.

¹³⁵ See *Colorado I*, 518 U.S. 604 (1996); *Colorado II*, 533 U.S. 431 (2001).

¹³⁶ *McConnell*, 124 S. Ct. at 706.

¹³⁷ See generally Edsall, *supra* note 22 ("The shadow party is a network of organizations established to fill the vacuum created by the McCain-Feingold law's ban on party-raised 'soft money,' or large contributions from corporations, unions and rich individuals").

¹³⁸ See *id.* Essentially, ABC and ACT are conduits of soft money legally organized under §527 of the I.R.C. to allow them tax-exempt status. *Id.*

¹³⁹ 26 U.S.C §527 (2004).

¹⁴⁰ See Center for Responsive Politics, *supra* note 49.

¹⁴¹ See generally Cooper, *supra* note 23, at 18 (noting ironically that "Democrats have spent the past year searching for exemptions in the McCain-Feingold campaign-finance-reform law that they themselves had long championed.").

¹⁴² See generally Gregory Comeau, *Bipartisan Campaign Reform Act*, 40 HARV. J. ON LEGIS. 253, 279 (2003) (noting that "[d]onations to Section 527 nonprofit corporations, and spending by these corporations, will likely increase as a result of the BCRA.").

¹⁴³ Laura Blumenfeld, *Soros's Deep Pockets vs. Bush; Financier Contributes \$5 Million More in Effort to Oust President*, WASH. POST, Nov. 11, 2003, at A3 (quoting Soros as saying beating Bush is "[t]he central focus of my life," and "America, under Bush is a danger to the world. . . [a]nd I'm willing to put my money where my mouth is.").

groups.¹⁴⁴ Republicans, who have always been better at raising hard money contributions from a larger base of contributors, hope the 527s activities' will be severely restricted by the FEC.¹⁴⁵ If 527s are allowed to operate freely by the FEC, Republicans have vowed to produce more of their own.¹⁴⁶

On February 18, 2004, the FEC ruled in a 4-2 decision that these groups' raising of soft money may be subject to regulation, but it postponed a decision on how tough those restrictions should be.¹⁴⁷ The ruling, in essence, warned groups like ACT and ABC that activities that "promote, attack, support, or oppose" federal candidates must be paid for partly with hard money.¹⁴⁸ Both Republicans and Democrats predictably claimed the ruling as a victory,¹⁴⁹ but the FEC's action opened the door to further rulings by leaving many questions unanswered: What is the allowable ratio of hard money to soft money? Will 527s and similar groups become subject to FEC disclosure regulation?¹⁵⁰ It is still unclear how the FEC will rule on these details but for the time being, the 527s are free to collect and spend as they wish.¹⁵¹

The creation of 527s highlights one of the main problems in the enactment of campaign finance laws in general, and BCRA in particular. Campaign finance enthusiasts irrationally presumed that when soft money contributions were banned, the corporations and individuals who previously donated such money would be deterred by the soft money ban and decide to only contribute hard money in the statutorily regulated amounts.¹⁵² The major donors to both major parties, undeterred by McCain-Feingold, simply redirected their money

¹⁴⁴ See Cooper, *supra* note 23.

¹⁴⁵ See Edsall, *supra* note 22.

¹⁴⁶ See Cooper, *supra* note 23. Frank Donatelli, a former Reagan administration official has claimed that if the FEC allows 527s to continue the GOP will use them too. "We have to play . . . [W]e have no choice in the matter." *Id.*

¹⁴⁷ Thomas B. Edsall, *FEC Moves to Regulate Groups Opposing Bush*, WASH. POST, Feb. 19, 2004, at A6.

¹⁴⁸ *Id.*

¹⁴⁹ Glen Justice, *Advocacy Groups Win Fund Ruling*, N.Y. TIMES, Feb. 19, 2004, at A1 (Ed Gillespie, Chairman of the Republican National Committee, noted, "The Federal Election Commission should be commended for its campaign finance ruling to uphold the new law of the land . . . [T]oday's ruling effectively shuts down illicit 527 groups that operate in the shadows by using unregulated soft money to influence federal elections."). A spokesman for America Coming Together stated, "We'll be plowing forward as planned . . . [I]t's clear that today's action is limited in its scope. We remain confident that we'll have the room we need to operate robustly and effectively." *Id.*

¹⁵⁰ See Edsall, *supra* note 22.

¹⁵¹ See Justice, *supra* note 149.

¹⁵² 148 CONG. REC. S2096, 2100 (daily ed. Mar. 20, 2002) (statement of Sen. Boxer) (Senator Boxer said in support of BCRA, "No longer will Federal candidates have to go and ask for unlimited sums of money for our parties and be put in a position where . . . it has that appearance of a conflict of interest.").

to other outlets, as the majority in *McConnell* predicted they would.¹⁵³ Proponents of McCain-Feingold did not predict how influential these 527s would be as shadow parties to accomplish the same goal as the parties: to influence elections by filling the candidate's campaign coffers with unregulated money.¹⁵⁴

The next logical question is why does it matter that parties are losing their political speech function at the expense of these 527s? So what if the 527s take over as the major conduits of soft money rather than the parties? The problem with 527s is that they are formed (mostly on the left) by the fringes of the party, particularly with single-issue agendas and often promoting bitterly partisan agendas.¹⁵⁵ Dozens of these committees have already been created and their donations total in the millions.¹⁵⁶ Because all of this money is bypassing the parties, the parties and the public alike are being deprived of the critical role the major parties play in protecting political speech. Like the District Court stated in *McConnell*, parties have many important roles in developing and protecting the political speech of the country: they nominate and elect candidates, engage in public policy debates, build coalitions among the extremes in the party, and help develop the parties on the state levels.¹⁵⁷ Granted, they will still be able to continue some of these functions by using hard money donations, but by losing nearly half of their funding, it is impossible to imagine they can continue their strong positions as stabilizers between the extremes in the parties.

It is axiomatic that candidates depend on contributions for their campaigns and those same officials frequently vote the way those contributors want.¹⁵⁸ Once candidates start receiving the benefit of 527s, they will feel beholden to those same groups rather than their party, from where soft money traditionally came. Not only will this spell a diminished role for national parties, but by

¹⁵³ *McConnell v. FEC*, 124 S. Ct. 619, 706 (2003) (quoting the majority opinion, "Money, like water, will always find an outlet.").

¹⁵⁴ See, e.g., Comeau, *supra* note 142, at 279.

¹⁵⁵ See Blumenfeld, *supra* note 143 (noting that the people who are running these left-leaning 527s include former Clinton Chief of Staff, John Podesta, Morton Halperin, a "liberal think-tank veteran", Steve Rosenthal, CEO of ACT, Ellen Malcolm, ACT's President, and other democratic strategists).

¹⁵⁶ See Center for Responsive Politics: 527 Committee Activity, at <http://www.opensecrets.org/527s/527cmtes.asp> (last visited Apr. 17, 2004). Some of the Democratic 527s include America Coming Together (\$12,515,000 raised), Moveon.org (\$4,799,433 raised), and the Media Fund (\$3,000,000 raised). *Id.*

¹⁵⁷ *McConnell v. FEC*, 251 F. Supp. 2d 176, 334-37 (2003).

¹⁵⁸ See generally Paul Bender, *The Constitutionality of Campaign Finance Legislation: After Buckley v. Valeo*, 34 ARIZ. ST. L. J. 1105, 1107 (2002) (noting that, "The Buckley Court was aware in 1976 that the problem of large campaign contributions corruptly buying political influence was, in the Court's words, 'not an illusory one.'").

making candidates more dependent on these ideological, single-issue groups, these same officials will undoubtedly begin pursuing their donor's more extreme agendas in order to keep their support. Additionally, because 527s are not subject to the same disclosure requirements as the parties, they can rely on large individual contributions by wealthy donors; an idea that would have made the sponsors of BCRA cringe.¹⁵⁹ Also, the party-run system inherently placed more importance on advocating a range of views and reaching a common ground.¹⁶⁰ Under the new interest group dominated system, there is no room for dissent and the only ideas encouraged are those pushed by its members.¹⁶¹

Characteristic of these groups is MoveOn.org, a 527 whose stated mission is to "encourage greater participation in the democratic process and thus make government more representative."¹⁶² MoveOn.org's contributions go solely to Democratic candidates.¹⁶³ Fueled by recent contributions of \$5 million from Soros and friend Peter Lewis, Moveon.org was originally started as an online petition against the 1998 impeachment of President Bill Clinton and transformed into a tool for its members to punish those involved in prosecuting the impeachment.¹⁶⁴ Claiming 1.7 million members, it portrays itself on its website and in various media as a grassroots organization concerned with "bringing ordinary people back into politics."¹⁶⁵ Even though there is a clear disconnect with its stated mission and its funding activities, legally MoveOn.org and other similar groups can collect any amount of money from whatever source derived.¹⁶⁶ They can then funnel that money to any candidate

¹⁵⁹ See 26 U.S.C. §527(a) (2000). Stating in relevant part that:

A political organization which accepts a contribution, or makes an expenditure, for an exempt function during any calendar year shall file with the Secretary either . . . a pre-election report, which shall be filed not later than the twelfth day before . . . any election with respect to which the organization makes a contribution or expenditure, and which shall be complete as of the twentieth day before the election.

Id.

¹⁶⁰ *McConnell v. FEC*, 251 F. Supp. 2d at 335 ("The parties act as critical agents in developing consensus in the United States . . . In the words of one defense expert [in the *McConnell* case], parties are 'the main coalition building institution[s] . . . by a good measure.'). *Id.*

¹⁶¹ See, e.g., discussion of MoveOn.org, *infra* note 165 (Moveon.org describes its role as "build[ing] electronic advocacy groups.").

¹⁶² Scott Duke Harris, L.A. TIMES MAGAZINE, Feb. 29, 2004, Part I, at 22.

¹⁶³ See Center for Responsive Politics, at <http://www.opensecrets.org/pacs/lookup2.asp?strid=C00341396&cycle=2004> (last visited Apr. 17, 2004).

¹⁶⁴ See Harris, *supra* note 162 (noting that "Soros and Lewis made a 50% matching gift, meaning they will contribute \$1 for every \$2 that MoveOn.org raises.").

¹⁶⁵ See, e.g., MoveOn.org, at www.moveon.org/about/ (last visited Nov. 7, 2004) (Their website goes on to say that "MoveOn.org is a catalyst for a new kind of grassroots involvement, supporting busy but concerned citizens in finding their political voice.").

¹⁶⁶ See 2 U.S.C. §441i(a)-(b) (2000) (restricting the spending and soliciting of *party*

they desire; in this case to liberal Democrats who support their issues, in the form of television or internet advertising.¹⁶⁷ If this pattern of contributing and distributing to candidates looks familiar, it should. Before the abolition of soft money, the national parties did the same thing. Now the only difference is the group acting as the middleman is not the party but a “razor-sharp” interest group.¹⁶⁸

MoveOn.org and the other 527s cannot be blamed for what they are doing. They are simply using existing laws to do what the Constitution allows them to do: express their free speech and associational rights by organizing a political group.¹⁶⁹ However, Congress and the FEC should create a legal and political climate that not only allows the free expression of speech by single-issue interest groups, but also by the political parties. The alternative to a party-run democracy is one run by interest groups where parties cease to play their traditional roles as stabilizers of extremes and forums for debate. The FEC is expected to rule on the legality of these 527s sometime prior to the election, but no one is sure what any ruling might say.¹⁷⁰ Until then, the 527s are free to collect and spend as much money as they can and it appears they are doing just that.¹⁷¹

V. CONCLUSION

The Bipartisan Campaign Reform Act of 2002 was hailed by proponents as the second coming of *Buckley*; a set of reforms that would illuminate the campaign finance landscape and operate as a beacon for future reforms. These supporters hoped the subsequent decision in *McConnell* would validate their legislation by laying down immutable principles of campaign finance law to guide future decisions. Instead, the majority in *McConnell* confounded an already confusing area of First Amendment law by upholding McCain-Feingold’s soft money prohibition and issue ad restrictions over the objections of Congressmen, interest groups, and the national parties; the same groups

committees). MoveOn.org and other 527s are not considered parties and are not subject to section 441i’s restrictions. *Id.*

¹⁶⁷ See MoveOn.org, *supra* note 165. In 2003, these issues included opposition to the war in Iraq and media reform.

¹⁶⁸ See Starr, *supra* note 131.

¹⁶⁹ U.S. CONST. amend I.

¹⁷⁰ Dan Balz and Thomas B. Edsall, *Democrats Forming Parallel Campaign; Interest Groups Draw GOP Fire*, WASH. POST, Mar. 10, 2004, at A1 (noting that “the new 527 rules will not be effective until late July at the earliest”).

¹⁷¹ *Id.* (noting that “George Soros and his wife . . . gave \$5 million to ACT and \$1.46 million to MoveOn.org; Peter B. Lewis, chief executive of the Progressive Corp . . . gave \$3 million to ACT and \$500,000 to MoveOn.org . . . and Linda Pritzker, of the Hyatt hotel family . . . gave \$4 million to the joint fundraising committee.”).

their decision claims to protect, all in the name of preventing corruption.

Simply put, the Court erred in applying the *Buckley* standard to BCRA. Whereas *Buckley* upheld minor dollar limitations, the *McConnell* majority upholds a blanket prohibition of soft money to the national parties and issue ad restrictions, both of which significantly limit the power of the people and the parties to engage in political speech. In *Buckley*, there was a serious threat of corruption due to the nature of the *quid pro quo* contributions at issue, the soft money at issue in BCRA does not present that same corruption because the parties' role as middlemen eliminates contributions going directly to the candidates. In *Buckley*, the Court reviewed the restrictions on contributions under closely-drawn scrutiny. Because BCRA restricts more money and prevents the national parties from carrying out their important roles in American politics, it should be reviewed under strict scrutiny. At a time when voter participation is barely 50% of the voting age population,¹⁷² Congress should be encouraging greater participation in the political process rather than diminishing the roles of the national parties and limiting access to funds for challengers.

The long-term ramifications of *McConnell* on free speech remain unclear as individuals and parties struggle to adjust in its aftermath. The creation of shadow parties to fill the void of the national parties highlights this dramatic infringement on free speech and how far the decision goes to rearrange political speech in America. In essence, the *McConnell* decision opened a new loophole while claiming to close another. The statute's own language allows interest groups, such as 527s, to raise as much soft money as they wish to influence elections. These soft money contributions often range in the millions and ironically are the very object that supporters of McCain-Feingold sought to eliminate.¹⁷³ By ruling as it did, the *McConnell* Court took campaign finance reform back to square one. Soft money can still be used to support candidates, now it just has to be contributed to groups like MoveOn.org instead of the Democratic National Committee. Soft money has found a new home with these special interest groups and corruption, that oft-cited justification for infringing upon free speech, is as rampant as ever.

¹⁷² See, e.g., FEDERAL ELECTION COMMISSION, VOTER REGISTRATION AND TURNOUT 2000, at <http://www.fec.gov/pages/2000turnout/reg&to00.htm> (last visited Nov. 7, 2004) (showing that 51.3% of the voting age population voted in 2000).

¹⁷³ See Balz and Edsall, *supra* note 170.