

RESTRICTING POLITICAL CAMPAIGN SPEECH: THE UNEASY LEGACY OF *MCCONNELL V. FEC*

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I. INTRODUCTION

The First Amendment's startlingly simple admonition that Congress shall make no law abridging the freedom of speech stands in stark contrast to the complicated maze of legal prohibitions, restrictions, and disclosure requirements that have increasingly developed over the years in the name of campaign-finance reform and that have recently been approved by the Supreme Court in *McConnell v. Federal Election Commission*,¹ a controversial 5-4 decision upholding the labyrinthine provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA).² The Act, in the eyes of several forceful dissenting opinions in *McConnell*³ and a host of other legal commentators, is a broadside attack on core political speech and the corresponding freedom to criticize the state,⁴ for it has been recognized by the Supreme Court that the First Amendment has its "fullest and most urgent application to speech uttered during a campaign for political office,"⁵ that it is the duty of the Court to approach such restrictions "with the utmost skepticism" and subject them to the "strictest scrutiny,"⁶ and that the very purpose of the First Amendment is to "preserve an

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¹ 124 S. Ct. 619 (2003).

² Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (containing a series of amendments to the Federal Election Campaign Act of 1971); Pub. L. No. 92-225, 86 Stat. 11 (1972) (codified as amended at 2 U.S.C.A. § 431 (main ed. & Supp. 2003)); The Communications Act of 1934, 48 Stat. 1088 (codified as amended at 47 U.S.C.A. § 315 (2004)), and other portions of the United States Code, 18 U.S.C.A. § 607 (Supp. 2003); 36 U.S.C.A. §§ 510-511.

³ Justice Clarence Thomas called the rulings in *McConnell* an "assault on the free exchange of ideas." *McConnell*, 124 S. Ct. at 729 (Thomas, J., concurring in part and dissenting in part).

⁴ In *McConnell*, Justice Scalia asserts that the Court has "smiled with favor upon a law that cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government." *McConnell*, 124 S. Ct. at 720 (Scalia, J., concurring in part and dissenting in part). See also *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 410-11 (2000).

⁵ *Eu v. San Francisco County Democratic Cent. Comm'n*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

⁶ *Shrink Mo.*, 528 U.S. at 412.

uninhibited marketplace of ideas in which truth will ultimately prevail.”⁷ As Justice Scalia observed in his strident dissent to the *McConnell* decision:

It should be obvious, then, that a law limiting the amount a person can spend to broadcast his political views is a direct restriction on speech. That is no different from a law limiting the amount a charity can pay its leafletters. It is equally clear that a limit on the amount a candidate can *raise* from any one individual for the purpose of speaking is also a direct limitation on speech. That is no different from a law limiting the amount a publisher can accept from any one shareholder or lender, or the amount a newspaper can charge any one advertiser or customer.⁸

Despite these criticisms, campaign finance reform—with its publicly repeated warnings about the dangers of “big money” in politics—remains popular among the electorate, even to those who recognize the conflict between such restrictions and the First Amendment.⁹ *McConnell* strongly signaled that free speech can be diminished pursuant to congressional efforts to cleanse the political system of the “corrupting” influence of campaign money.¹⁰ The opinion left in place the legislation’s sweeping prohibition on so-called “soft money,”¹¹ as well as a ban on the use of corporate or union funds for “electioneering communications” which mention candidates’ names in the weeks before elections.¹² *McConnell* also lends support to further “anti-circumvention” efforts by Congress, suggesting that whatever methods interest groups devise to avoid BCRA

⁷ *Red Lion Broad. Co. v. FTC*, 395 U.S. 367, 390 (1969).

⁸ *McConnell*, 124 S. Ct. at 724 (Scalia, J., dissenting). “To reach today’s decision, the Court surpasses *Buckley*’s limits and expands Congress’ regulatory power. In so doing, it replaces discrete and respected First Amendment principles with new, amorphous, and unsound rules, rules which dismantle basic protections for speech.” *Id.* at 742 (Kennedy, J., dissenting).

⁹ For example, it has been noted that surveys commissioned by Fox News found that fifty percent of Americans agreed that political contributions should be protected by the First Amendment, but that sixty-six percent strongly supported campaign-finance reform. In a *Wall Street Journal* poll, seventy-seven percent answered that campaign reform was needed in spite of the Supreme Court finding that campaign spending should be protected as free speech, while only eighteen percent said it was unnecessary. *When Liberty Is Not So Sweet*, THE ECONOMIST, Apr. 2, 1998, at 26.

¹⁰ *McConnell*, 124 S. Ct. at 661-62.

¹¹ *Id.* at 666.

¹² *Id.* at 693-94.

can be stopped by additional legislation.¹³ The Court even maintained that giving the First Amendment too much weight in the context of campaign regulation would have a *detrimental* effect:

[It] would render Congress powerless to address more subtle but equally dispiriting forms of corruption. Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs occasionally, the potential for such undue influence is manifest.¹⁴

Critics of campaign finance reform contend, on the other hand, that political donations to candidates are legitimate expressions of popular interest—not manipulative tools of special interests.¹⁵ In their view, spending by candidates is part of a healthy and vigorous debate over the important political issues of the day, and often the best way to discuss these issues in the modern age is to publicize them through expensive television ads.¹⁶ These critics also point out that not only is complex campaign-finance regulation undesirable, but it is ultimately futile, observing that previous congressional efforts to address perceived electoral abuses have been followed by methods to circumvent that legislation,

¹³ “We are under no illusion that BCRA will be the last congressional statement on the matter,” wrote Justices Stevens and O’Connor in the Court’s main ruling. *Id.* at 706. “Money, like water, will always find an outlet.” *Id.*

¹⁴ *Id.* at 666.

¹⁵ “[A]n attack upon the funding of speech is an attack upon speech itself.” *Id.* at 723 (Scalia, J., concurring in part and dissenting in part).

¹⁶ Justice Scalia remarked in *McConnell*:

Evil corporate (and private affluent) influences are well enough checked (so long as adequate campaign-expenditure disclosure rules exist) by the politician’s fear of being portrayed as “in the pocket” of so-called moneyed interests. The incremental benefit obtained by muzzling corporate speech is more than offset by loss of the information and persuasion that corporate speech can contain. That, at least, is the assumption of a constitutional guarantee which prescribes that Congress shall make no law abridging the freedom of speech.

124 S. Ct. at 726-27 (Scalia, J., concurring in part and dissenting in part).

which in turn has been followed by further legislation to close the resulting loopholes, and so on *ad infinitum*.¹⁷

This tension between preserving the constitutional guarantee of free speech in the political arena and making legitimate efforts to prevent political corruption in the system creates a serious challenge that society and the courts must struggle to resolve.¹⁸ What many find disturbing in the Supreme Court's recent jurisprudence, however, is the notion that largely unproven legislative efforts to prevent vaguely defined concepts of "corruption" or the "appearance of corruption" are in fact sufficient to justify wholesale infringement of important First Amendment rights.

II. A BRIEF HISTORY

A. FECA and the Buckley Decision

The Federal Election Campaign Act (FECA) of 1971,¹⁹ coupled with its substantial 1974 amendments,²⁰ established an extensive regime of campaign-finance regulation based primarily on contribution limits to candidates and spending limits by those candidates.²¹ The Act placed a \$1,000 limit per election on individual contributions to candidates for federal office and a \$5,000 limit on contributions by political action committees (PACs); individuals were also limited to contributing no more than \$25,000 in an election cycle, of which no more than \$20,000 could be made to a national party.²² The Act also sought to limit total spending on House and Senate races by setting expenditure limits on candidates; limits

¹⁷ For a history of campaign finance regulation, see *FEC v. Beaumont*, 123 S. Ct. 2200 (2003); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197 (1982); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam); *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972); *United States v. Automobile Workers*, 352 U.S. 567 (1957); *United States v. CIO*, 335 U.S. 106 (1948).

¹⁸ Article I, § 4 of the U.S. Constitution grants Congress the right to regulate elections of members of the Senate and House of Representatives. See *Smiley v. Holm*, 285 U.S. 355 (1935).

¹⁹ Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C.A. § 431 (main ed. & Supp. 2003)). The Act was called "by far the most comprehensive, reform legislation [ever] passed by Congress concerning the election of the President, Vice-President and members of Congress." *Buckley v. Valeo*, 519 F.2d 821, 831 (1975).

²⁰ Pub. L. No. 93-443, 88 Stat. 1263.

²¹ The Act also required mandatory disclosures of contributions and expenditures above certain threshold levels, provided for public financing of presidential campaigns, and established an effective enforcement mechanism through the creation of the Federal Election Commission (FEC).

²² 18 U.S.C. §§ 608(b)(1)-(3) (1970 ed., Supp. IV).

on House races were set at \$70,000, and limits on Senate races were based on population, starting from a base of \$250,000. Spending by individuals or groups independent of a candidate was limited to \$1,000 if the spending was relative to a federal election.²³ The Act additionally required public disclosure of all political contributions.²⁴

In the landmark decision of *Buckley v. Valeo*²⁵ the Supreme Court held that many of the 1974 revisions to FECA were in fact impermissible under the First Amendment,²⁶ but the opinion conceded that the government has a compelling, though vaguely defined, interest in preventing the corruption of elected officials.²⁷ The Court eventually sustained the contribution limitations of the Act, admitting that such limits do in some ways infringe the First Amendment right to free speech, but finding that prevention of corruption or the “appearance of corruption” was of sufficient governmental interest to justify such infringements.²⁸ The Court was concerned that large contributions might have the potential to lead to *quid pro quo* corruption, and in its view this possibility justified the Act’s limits on contributions.²⁹ Contribution limits were also held to be permissible because they did not “directly” infringe on the speech of the spender,³⁰ as they left open alternate avenues for advocacy of political issues.³¹ The Court struck down as unconstitutional, however, restrictions on total spending by a candidate and on candidate spending from personal resources.³² Spending money raised pursuant to the Act’s contribution limits, the Court reasoned, posed no real threat of corruption, and thus the

²³ 18 U.S.C. § 609 (1970 ed., Supp. IV).

²⁴ 2 U.S.C.A. § 431 (1970 ed., Supp. IV). The *Buckley* case held that such disclosures “alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office” and “deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.” *Buckley v. Valeo*, 424 U.S. 1, 67 (1976).

²⁵ 424 U.S. 1 (1976).

²⁶ *Id.* at 54 (“We therefore hold that [the Act’s] restriction on a candidate’s personal expenditures is unconstitutional.”).

²⁷ *Id.* at 27.

²⁸ *Id.*

²⁹ *Id.* at 26-27.

³⁰ “While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.” *Id.* at 21.

³¹ Contribution limits entail only a “marginal restriction upon the contributor’s ability to engage in free communication.” *Id.* at 20.

³² *Id.* at 19 (“The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.”).

restraints on speech could not be justified.³³ *Buckley* rejected in the strongest possible language the notion that government could restrict political speech in order to advance political equality: “[T]he concept that government may restrict the speech of some element of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”³⁴

A major purpose of the First Amendment, the *Buckley* Court explained, was “to protect the free discussion of governmental affairs.”³⁵ In that regard, the Court noted that contribution and expenditure limitations “operate in an area of the most fundamental First Amendment activities.”³⁶ Thus, such limitations were said to be subject to strict judicial scrutiny—i.e., they must serve a compelling state interest employing the least restrictive means—but the Court eventually did carve out various exceptions to the strict scrutiny ordinarily applied to restrictions on core political speech and association.³⁷ As a result, campaign contributions to candidates were given less protection than independent expenditures for speech in support of a candidate.³⁸ To avoid vagueness concerns, the Court held that FECA could reach only those communications that “expressly advocate” the election or defeat of a clearly identified candidate.³⁹ Therefore, the use of such terms as “Elect John Smith” constituted a bright line between “express advocacy” and “issue advocacy.”⁴⁰ Issue advocacy expenditures that were made independently of candidates had to be reported to the public, but could not be limited.⁴¹ As a result, this unregulated “soft money”⁴² could not be used for promotion of a specific candidate, but could be directed toward more

³³ *Id.* at 45 (“We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [the Act’s] ceiling on independent expenditures.”).

³⁴ *Id.* at 48-49.

³⁵ *Id.* at 14 (quoting *Roth v. U.S.*, 354 U.S. 476, 484 (1957)).

³⁶ *Id.*

³⁷ *Id.* at 25.

³⁸ *Buckley* therefore set up false dichotomies between contributions and expenditures, between “express” advocacy and other forms of political advocacy, and between corporate and union speech and speech by other associations. *Id.* at 44.

³⁹ *Id.* at 42-44.

⁴⁰ *Id.* at 44 n.52.

⁴¹ *Id.* at 44.

⁴² Soft money is the blanket term for unregulated and unlimited contributions made by individuals, corporations, and labor unions to party organizations rather than particular candidates. Whereas “hard,” or regulated money, went to individual candidates, soft money was meant to be used only for “party-building” activities, such as voter-registration. In fact, most of it was funneled to state parties, and thence to individual campaigns.

general advertising whose effect was often clearly aimed toward the election or defeat of a particular candidate.⁴³

Interestingly enough, a few years after the passage of the 1974 amendment, incumbent reelection rates began to rise, and incumbents increased their fund-raising advantage over challengers.⁴⁴ Total spending on congressional campaigns also continued to increase, and special interests, instead of declining, actually seemed to grow in importance.⁴⁵

B. BCRA and the McConnell Decision

After the *Buckley* decision, the Federal Election Commission (FEC) and others fought hard to close what it perceived as numerous “loopholes” created by the case.⁴⁶ The most aggressive of these efforts to reform campaign spending was the Bipartisan Campaign Reform Act of 2002 (BCRA).⁴⁷ Among other things, the Act—commonly known as McCain-Feingold after its tireless sponsors—banned soft-money contributions that avoided federal rules because they were nominally given to political parties,⁴⁸ and it restricted “phony issue ads” which purportedly advanced a cause but were actually an attack on a particular candidate.⁴⁹

Congress claimed that BCRA sought principally to address the potential for corruption of federal officeholders that was created by soft-money donations to political parties and by the growing use of corporate and union general-treasury funds for communication which were designed to influence the outcome of elections.⁵⁰ According to the reformers, the

⁴³ *Buckley*, 424 U.S. at 45-46.

⁴⁴ *Id.* at 33 n.34.

⁴⁵ *Id.*

⁴⁶ See James Bopp, Jr. & Richard E. Coleson, *The First Amendment Is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 UWLA L. REV. 1 (1997).

⁴⁷ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (containing a series of amendments to the Federal Election Campaign Act of 1971); 86 Stat. 11 (codified as amended at 2 U.S.C.A. § 431 (main ed. & Supp. 2003)); The Communications Act of 1934, 48 Stat. 1088 (codified as amended at 47 U.S.C.A. § 315 (2004)), and other portions of the United States Code, 18 U.S.C.A. § 607 (Supp. 2003); 36 U.S.C.A. §§ 510-511.

⁴⁸ 2 U.S.C.A. § 441i(a)(b) (Supp. 2003).

⁴⁹ 2 U.S.C.A. §§ 434(f)(3)(A)(I), (f)(3)(C) (Supp. 2003).

⁵⁰ BCRA proposed, among other things, a ban on soft money, the contributions that could be given without limit into a political party’s coffers (as opposed to the regulated “hard money” for individual candidates); a strict definition of “issue advocacy,” advertisements that are paid for with unregulated money because they are (allegedly) about issues rather than candidates; and a ban on parties making “coordinated expenditures” for candidates who refuse to limit their personal spending for an election.

rising tide of soft money had all but eviscerated the ban on corporate contributions and the limits on individual donations.⁵¹ The soft-money prohibition was based on the premise that a federal officeholder may be tempted to favor the interests of those who have donated large sums of money to a political organization to which the officeholder belongs, and that such donations had a significant impact on the politician's efforts to win reelection.⁵² The Act's other main purpose was to ban electioneering advertising in the sixty days before a general election and thirty days before a primary.⁵³

Opponents of campaign-finance reform opposed the Act, contending that advocacy groups needed instead a well-defined safe harbor from FEC investigations into whether a contribution was secretly "intended" to benefit a candidate.⁵⁴ They argued that otherwise the debate on public issues could not be "uninhibited, robust and wide open," as the First Amendment requires.⁵⁵ BCRA swept aside much of this issue by changing the definition of "contribution" to include any coordinated expenditures or other disbursement made by any person in connection with a candidate's election, regardless of whether the expenditure or disbursement was for a communication that contained express advocacy.⁵⁶

The provisions of BCRA were challenged in court, and the Supreme Court in *McConnell v. FEC* upheld substantially all of the Act.⁵⁷ The

⁵¹ Before BCRA, companies and unions were barred from making direct political donations, but they could spend unlimited amounts of soft money on issue ads. Candidates were banned from taking contributions of more than \$1,000 from individuals or \$5,000 from political action committees in any election, but they could take unlimited sums from outside sources by establishing separate soft-money committees.

⁵² *McConnell v. FEC*, 124 S. Ct. 619, 649 (2003).

⁵³ 2 U.S.C.A. § 441d (Supp. 2003).

⁵⁴ See *McConnell*, 124 S. Ct. at 650 ("While the distinction between 'issue' and 'express' advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects. Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words.").

⁵⁵ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

⁵⁶ 2 U.S.C.A. § 431(8)(A)(I) (Supp. 2003); see *McConnell*, 124 S. Ct. at 648.

⁵⁷ The Supreme Court issued three separate majority opinions to address the BCRA's five challenged "Titles." Justices Stevens and O'Connor—joined by Justices Souter, Ginsburg, and Breyer—delivered the opinion of the Court with respect to Titles I and II. *McConnell*, 124 S. Ct. at 627-38. Chief Justice Rehnquist—joined by all members of the Court to varying degrees—delivered the opinion of the Court with respect to Titles III and IV. *Id.* at 638-39. Justice Breyer—joined by Justices Stevens, O'Connor, Souter, and Ginsburg—delivered the opinion of the Court with respect to Title V. *Id.* at 639-40.

(continued)

Court found by a narrow 5-4 majority that the loopholes in campaign finance law had indeed done damage,⁵⁸ and that “contributions of soft money give rise to corruption and the appearance of corruption.”⁵⁹ The Court ruled that Congress had the power to readdress those wrongs, since the resulting restrictions did not impermissibly infringe the rights of free speech or free association.⁶⁰

The Court upheld BCRA’s most contested provisions—the regulation of soft money and electioneering communications—as well as the coordination provision.⁶¹ Under a less rigorous standard of review allowing Congress to weigh competing constitutional interests, the Court held that soft money contributions to political parties can be restricted to protect the integrity of the political process without unconstitutionally burdening party speech and associational activities financed with soft money.⁶² The Court also held that regulation of electioneering communications was not unconstitutionally overbroad in scope.⁶³ Finally, the Court held that political activity coordinated with political candidates and parties can be regulated even in the absence of an agreement to coordinate.⁶⁴

C. *Level of Scrutiny*

The Supreme Court had announced in *Buckley v. Valeo* that regulations of political contributions and expenditures will be upheld only if they achieve a compelling governmental interest by the least restrictive means.⁶⁵ *Buckley* concluded that both contributions and expenditures “operate in an

Separate dissents and opinions were authored by Chief Justice Rehnquist, Justice Stevens, Justice Scalia, Justice Thomas, and Justice Kennedy. *Id.* at 720-86.

⁵⁸ The rulings of the three district judges in *McConnell* was over 160 pages in length. The three judges produced four findings: a two-to-one ruling for the panel and separate opinions by each judge. *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003). The opinion stands as testament to the inconsistencies and confusion that *Buckley* had wrought. Of the three judges seeking to apply *Buckley* and its progeny, one found cause to sustain virtually all of the challenged provisions of BCRA, another found cause to invalidate all such provisions, and the third straddled the line, picking and choosing various provisions and even separate phrases to sustain or reject. *See id.*

⁵⁹ *McConnell*, 124 S. Ct. at 628.

⁶⁰ *Id.* at 666 (“In sum, there is substantial evidence to support Congress’ determination that large soft-money contributions to national political parties give rise to corruption and the appearance of corruption.”).

⁶¹ *McConnell*, 124 S. Ct. at 705-06.

⁶² *Id.* at 706.

⁶³ *Id.*

⁶⁴ *Id.* at 705.

⁶⁵ *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

area of the most fundamental First Amendment activities,” in which the Constitution affords the “broadest protection” for individual expression and the “fundamental” right to associate.⁶⁶ *Buckley* also found that the ability to expend money for speech and to associate and pool money for group speech were fully protected by the First Amendment.⁶⁷

Applying an “exacting scrutiny” level of review, the *Buckley* Court distinguished between limits on contributions to campaigns and limits on expenditures by citizens and candidates.⁶⁸ Contribution limits, said the Court, entail “only a marginal restriction on the contributor’s ability to engage in free communication”⁶⁹ because “the transformation of contributions into political debate involves speech by someone other than the contributor.”⁷⁰ Expenditure limits, on the other hand, “represent substantial speech rather than merely theoretical restraints on the quality and diversity of speech.”⁷¹ *Buckley*’s diluted scrutiny for campaign contributions was based on premises that (a) contributions involve only symbolic speech by the contributor, (b) any further expression is contingent on “speech by someone other than the contributor,” and (c) the burdens imposed by contribution restrictions are marginal.⁷² The Court in *McConnell* maintained that the less rigorous standard of review given to contribution limits shows proper deference to Congress’ ability to “weigh competing constitutional interests in an area in which it enjoys particular expertise”⁷³ and provides Congress with “sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process.”⁷⁴

The lines defining exceptions to strict scrutiny have never been particularly clear-cut and thus have given rise to attempts to reduce First Amendment protection for election-related speech and association. Many legal scholars have claimed that the unfortunate result has been a system

⁶⁶ *Id.* at 14.

⁶⁷ *Id.* at 15-19.

⁶⁸ “[T]his 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.” *Id.* at 16.

⁶⁹ *Id.* at 20.

⁷⁰ *Id.* at 21.

⁷¹ *Id.* at 19.

⁷² *Id.* at 21-22. The Court in *FEC v. Beaumont* explained that contribution limits are subject to a relaxed standard of review because “[w]hile contributions may result in political expression if spent by a candidate or an association, the transformation of contributions into political debate involves speech by someone other than the contributor.” 123 S. Ct. 2200, 2210 (2003).

⁷³ *McConnell v. FEC*, 124 S. Ct. 619, 656-57 (2003).

⁷⁴ *Id.* at 657.

that does not allow reliable protection for First Amendment activities. The dissenters in *McConnell* thus urged a return to strict scrutiny for all restrictions on political speech and association, including those on campaign contributions, express advocacy, and corporate or union speech.⁷⁵

III. POLITICAL CORRUPTION

It is undeniable that a political system cannot function for long if subject to wholesale corruption.⁷⁶ Arguments for increasing limitations on contributions and expenditures rely primarily on the proposition that money “buys” elections and therefore exerts a powerful corrupting influence on the legislature.⁷⁷ As a result, the primary justification for campaign speech restrictions is the prevention of corruption—and even the so-called “appearance of corruption”—of elected officials,⁷⁸ and the Supreme Court has upheld contribution limitations if the purpose of these limits is one of reducing corruption—“the attempt to secure a political quid pro quo from current or potential office holders.”⁷⁹ Limits on contributions thus have been justified as preventing “both the actual corruption threatened by large financial contributors and the eroding of public confidence in the electoral process through the appearance of corruption.”⁸⁰

In *Austin v. Michigan Chamber of Commerce*⁸¹ the Supreme Court first recognized a “different kind of corruption” from the financial *quid pro quo*—the “corrosive and distorting effects of immense aggregations of

⁷⁵ See *McConnell*, 124 S. Ct. at 730 (Thomas, J., dissenting).

⁷⁶ Federal law contains “an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials.” *United States v. Sun-Diamond Growers*, 526 U.S. 398, 409 (1999). A federal official is subject to criminal penalties if he solicits or accepts a bribe or illegal gratuity (*see* 18 U.S.C. §§ 201(b) and (c) (Supp. 2003); *Sun-Diamond*, 526 U.S. at 404)), participates in his official capacity in a matter in which he has a personal financial interest (*see* 18 U.S.C. § 208 (Supp. 2003)); *U.S. v. Miss. Valley Co.*, 364 U.S. 520, 548-49 (1961)), or receives a supplementation of salary from any source outside the federal government (*see* 18 U.S.C. § 209; *Crandon v. United States*, 494 U.S. 152, 158-66 (1990)).

⁷⁷ Contribution limits are grounded in the important governmental interests of preventing “both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.” *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 208 (1982).

⁷⁸ See *Buckley v. Valeo*, 424 U.S. 1, 67 (1976); *see also* *FEC v. Beaumont*, 123 S. Ct. 2200, 2206 (2003); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 388-89 (2000).

⁷⁹ *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 297 (1981).

⁸⁰ *Nat’l Right to Work*, 459 U.S. at 208; *see also* *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 440-41 (2001).

⁸¹ 494 U.S. 652 (1990).

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."⁸² Campaign reformers start from the premise that too much money is spent on political advertising,⁸³ and they frequently argue that while television ads may enhance the quantity of speech, they subtract from its quality,⁸⁴ and that the barrage of advertising often drowns out those lacking resources to buy countervailing television time.⁸⁵ Advocates of campaign speech restrictions are generally vague about their definition of "corruption," not to mention the even more ambiguous "appearance of corruption," but it seems reasonable to insist on clarity in this regard if the state interest is so compelling that it justifies considerable restrictions on political speech. Otherwise, the label "corruption" simply becomes a generic epithet which is cavalierly bandied about to describe any political influence contrary to the preferences of the individual making the accusation.⁸⁶

Those opposed to restrictions on campaign speech see political contributions as just another form of expressive association and any influence they generate is not necessarily corrupt. To these individuals, campaign reform has the unfortunate effect of preventing criticism of Congress by those most capable of offering such criticism, i.e., national political parties, who are then unable to fund issue ads that incumbents find

⁸² *Id.* at 660; see *Colo. Republican Fed. Campaign*, 533 U.S. at 441 (acknowledging that corruption extends beyond explicit cash-for-votes agreements to "undue influence on an officeholder's judgment"); see also *Shrink Mo.*, 528 U.S. at 389 ("[The Court has] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.").

⁸³ "[In 1996] spending on political ads amounted to only 1% of television advertising. The entire amount spent on the 1996 Congressional campaigns worked out at just \$3.89 per eligible voter—the price, [Senator Mitch] McConnell tirelessly points out, of lunch in a fast-food joint." *Mitch McConnell, Money-Man*, *THE ECONOMIST*, Sept. 13, 1997.

⁸⁴ Justice Scalia posited in his dissent in *McConnell*: "[I]t is not the proper role of those who govern us to judge which campaign speech has 'substance' and 'depth' (do you think it might be that which is least damaging to incumbents?) and to abridge the rest." *McConnell v. FEC*, 124 S. Ct. 619, 728 (2003) (Scalia, J., dissenting).

⁸⁵ Many reform advocates seem to consider it "corruption" if a lawmaker votes in a manner consistent with the desires of those who have contributed to his campaign—unless, of course, the reform advocate thinks that the position is correct.

⁸⁶ Justice Scalia noted in *McConnell* that even if the larger estimates of all campaign spending are considered, Americans spent half as much as they spend on movie tickets, and a fifth as much as they spend on cosmetics and perfume. *McConnell*, 124 S. Ct. at 728 (Scalia, J., dissenting).

so offensive. Justice Kennedy has noted the serious impact of campaign-finance legislation on the ability of political parties to engage in discourse:

The many and varied aspects of [campaign finance] regulations impose far greater burdens on the associational rights of the parties, their officials, candidates, and citizens than do regulations that do no more than cap the amount of money persons can contribute to a political candidate or committee. The evidence shows that national parties have a long tradition of engaging in essential associational activities, such as planning and coordinating fundraising with state and local parties, often with respect to elections that are not federal in nature. This strengthens the conclusion that the regulations now before us have unprecedented impact.⁸⁷

Opponents of soft money believe that such contributions, because they were unlimited, invited wholesale evasion of contribution limits. Indeed, such evasion was exactly what one would expect when citizens were prohibited from contributing directly to candidates of their choice. But because soft money went to parties, not candidates, there was never the possibility of the kind of *quid pro quo* corruption that is said to justify contribution limits. Citizens contribute to political parties, after all, to advance the ideas for which these parties stand, and as a result, these contributions encourage lively and healthy political exchanges.

Furthermore, it is clear that the element of private gain inherent in the concept of corruption cannot include either the personal satisfaction and benefits which come from being elected to public office, nor can corruption encompass the potential electoral benefit which results from speech or association in support of that candidate. As long as the law mandates full disclosure of all substantial cash contributions to candidates and political parties,⁸⁸ the voters themselves can decide on election day whether the fact that a candidate has been heavily supported by a particular individual or group should weigh against his candidacy.⁸⁹

⁸⁷ *Id.* at 757.

⁸⁸ The Court in *Buckley* observed that “[a] public armed with information about a candidate’s most generous supporters is better able to detect any post-election special favors that may be given in return.” *Buckley v. Valeo*, 424 U.S. 1, 67 (1976).

⁸⁹ As Justice Scalia stated in *McConnell*: “[t]he use of corporate wealth (like individual wealth) to speak to the electorate is unlikely to ‘distort’ elections—especially if disclosure requirements tell the people where the speech is coming from.” *McConnell*, 124 S. Ct. at 726.

IV. MONEY AS SPEECH

Justice Scalia has eloquently described an important assumption behind the constitutional guarantee of free speech:

The premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source. If that premise is wrong, our democracy has a much greater problem to overcome than merely the influence of amassed wealth. Given the premises of democracy, there is no such thing as too much speech.⁹⁰

Stated in simplest terms, elections are an exchange between candidates and the citizens who elect them, and every candidate necessarily offers something to the voter in exchange for being elected. Some candidates promise more government programs; others promise less bureaucracy and lower taxes. Some candidates pledge to make immigration laws looser; others, to make them more stringent. Some candidates argue for war; others against it. The citizen in turn says that a vote will be forthcoming if the politician's promises appeal. This exchange of elected office for promised conduct is therefore part of the fabric of a representative democracy, as is the influence that such an exchange necessarily creates. Furthermore, falsely egalitarian notions that the speech of persons and groups should have equal influence indicate fundamental misunderstandings of the First Amendment. Each person may have only one vote, but it has never been seriously suggested that the speech of each person or group should be equally influential; otherwise, the views of politicians would have to be based strictly on opinion polls. As Justice Thomas has aptly observed:

[It is considered corruptive behavior by some campaign reformers] that corporations, on behalf of their shareholders, will be able to convince voters of the correctness of their ideas. Apparently, winning in the marketplace of ideas is no longer a sign that "the ultimate good" has been "reached by free trade in ideas," or that the speaker has survived "the best test of truth" by having "the thought . . . get itself accepted in the competition of the market."⁹¹

⁹⁰ *Id.*

⁹¹ *Id.* at 729 (citations omitted).

The underlying question persists: is too much money being spent on political campaigns?⁹² Even assuming the most liberal estimates, it has been pointed out that total campaign spending for all local, state, and federal elections amounts to no more than \$15 per eligible voter (and this is often spread over a two-year election cycle)⁹³—hardly an extravagant sum. Total expenditures therefore constitute about .05% of gross domestic product—an amount considerably less on a per-voter basis than many other democracies in the world which are much less affluent.⁹⁴ In spite of these modest sums, the public perception is that vast fortunes are spent on political campaigns and that something must be done to rein in the excessive money.

By widening the exposure of the political issues at hand, increased campaign spending does result—and not surprisingly—in a better-informed electorate. Exposing corruption, untenable platforms, or deficient character in an opponent are vital to the education of voters. Without the ability to spend sufficient sums of money, the fate of candidates unfortunately rests at the mercy of a small cadre of professional journalists, who then have the power to interpret and inform the public of the candidate's message. Less spending on campaigns only reduces the amount of the communication; it does not necessarily mitigate against any negative aspects of that discourse. In fact, those candidates who have reached their spending limits are then unable to respond to the late barrage of unfair assaults made by their opponents.

The common assumption is that monetary contributions unfairly influence how a politician will vote, but it is just as logical to assume that contributions typically go to support candidates who already agree with the individual or group making the contribution. The public has been led to assume that campaign dollars and political favors are directly connected, but the world is much more complex. Often there are so many voices competing for a politician's ear that they cancel each other out. Campaign-finance reformers have failed to prove their burden that contributions buy elections, much less the votes of those in office. After all, adopting an unpopular position in exchange for a donation is generally not a wise course of action for a politician, for it is votes—not money—that ultimately win elections. It also makes little sense for a politician to betray his personal convictions, lose the support of his party, and offend public

⁹² The Court in *Buckley* saw increasing expenditures to be of no consequence: “[T]he mere growth in the cost of federal election campaigns in an of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns.” *Buckley*, 424 U.S. at 57.

⁹³ BRADLEY A. SMITH, *UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM* 41-42 (Princeton Univ. Press 2001).

⁹⁴ *Id.* at 42.

opinion in order to obtain a contribution. Contrary to the claims of some reformers, the only thing that well-heeled voters can do with their dollars is attempt to persuade others how to vote, which is the essence of free speech. Those who are attracted to running for public office generally have strong personal views on issues, and it is hardly inappropriate for a legislator to vote in ways that please his constituents, who in turn may help raise future campaign donations.⁹⁵ Furthermore, it has been repeatedly demonstrated that outspending one's opponent does not necessarily guarantee success at the voting booth. The correlation between money and electoral success—unlike the almost-absolute correlation between incumbency and electoral success—is far from certain. And voters who do not care for the legislator's record can always register their disapproval in the next election.

Implicit in the justification for campaign-finance reform is the notion that expenditures of money for speech are regulated, as opposed to speech itself, and therefore the burden it imposes is not subject to full First Amendment scrutiny.⁹⁶ But in any but the most basic economies, effective public communication requires a speaker to use the services of others. The right to speak is largely ineffective if it does not include the ability to engage in financial transactions that make it possible.⁹⁷ Representative democracies are based on political parties, and in order to organize, campaign, and communicate, those parties need resources for permanent staffs, rather than volunteers who gather temporarily before elections and

⁹⁵ As Justice Scalia concluded in *McConnell*:

It cannot be denied, however, that corporate (like noncorporate) allies will have greater access to the officeholder, and that he will tend to favor the same causes as those who support him (which is usually *why* they supported him). That is the nature of politics—if not indeed human nature—and how this can properly be considered “corruption” (or “the appearance of corruption”) with regard to corporate allies and not with regard to other allies is beyond me.

124 S. Ct. at 726 (Scalia, J., dissenting).

⁹⁶ “The right to [speech by proxy is] not entitled to the same protection as the right to say what one pleases.” *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 399 (2000). But in *Buckley*, the Court stated, “[T]his Court has never suggested that the dependence of a communicator on the expenditure of money operates itself to introduce a nonspeech element or to reduce the enacting scrutiny required by the First Amendment.” *Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

⁹⁷ Justice Scalia noted in *McConnell* that: “[W]here the government singles out money used to fund speech as its legislative object, it is acting against speech as such, no less than if it had targeted the paper on which a book was printed or the trucks that deliver it to the bookstore.” *McConnell*, 124 S. Ct. at 722.

then dissipate.⁹⁸ Political parties that attract contributions should be encouraged because they stimulate widespread participation among the electorate.

The freedom to associate with others for the dissemination of ideas—by pooling financial resources for political expression—is an important part of the freedom of speech.⁹⁹ Even the *Buckley* Court acknowledged that contributions enable “like-minded persons to pool their resources in furtherance of common political goals.”¹⁰⁰ Campaign contributions form part of an expressive association organized around a candidate who is both the object of the collective speech and the unifying spokesperson for such speech, and contributions which assist the candidate in getting elected through the legitimate mechanism of political speech are eventually no different than endorsements or votes.¹⁰¹

V. THE CONSEQUENCES OF REFORM

The basic proposition behind campaign-finance reform is the reduction in corruption which money supposedly engenders. These claims of

⁹⁸ The Court in *Buckley* recognized that money is necessary for political discourse:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.

Buckley, 424 U.S. at 19.

⁹⁹ The Supreme Court has held that the First and Fourteenth Amendments guarantee the “freedom to associate with others for the common advancement of political beliefs and ideas” and that this freedom encompasses the right to “associate with the political party of one’s choice.” *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

¹⁰⁰ *Buckley*, 424 U.S. at 22.

¹⁰¹ Justice Scalia remarked in *McConnell*:

In the modern world, giving the government power to exclude corporations from the political debate enables it effectively to muffle the voices that best represent the most significant segments of the economy and the most passionately held social and political views. People who associate—who pool their financial resources—for purposes of economic enterprise overwhelmingly do so in the corporate form; and with increasing frequency, incorporation is chosen by those who associate to defend and promote particular ideas—such as the American Civil Liberties Union and the National Rifle Association.

McConnell, 124 S. Ct. at 725-26 (Scalia, J., dissenting).

corruption seem to rest ultimately on the idea that legislators should be responsible to a higher (and curiously undefined) notion of the “public good” that somehow exists apart from the views of any particular group of voters. Naturally, the lower the contribution limit, the more difficult it becomes for a candidate to raise money quickly from a small number of supporters. Raising campaign funds from a large number of small contributors obviously benefits those candidates who have in place a list of past contributors. But in an unrestricted system, a candidate might be able to propose bolder solutions and rely on a handful of donors to provide “start-up capital” for the campaign. The candidate could then use these funds to persuade voters that his or her approach to issues is the correct one.

And while it is true that all candidates—whether incumbents or challengers—are treated equally in campaign finance reform, incumbents are automatically favored.¹⁰² Justice Scalia points out in *McConnell* that incumbents raise about three times as much unrestricted “hard money” as do their challengers, and that national party funding, severely limited by the Act, is more likely to assist cash-strapped challengers than incumbents with hard money.¹⁰³

Attempts to exclude a particular form of power—in this instance, money—from politics only strengthens the position of those whose resources come from non-monetary sources, such as media access or campaign volunteers. Therefore, limiting contributions and expenditures does not necessarily democratize the process but often transfers power to those whose primary contribution is time, organization, celebrityship, or something other than money. For example, newspapers, magazines, and television/radio stations can provide unlimited coverage to promote the election of favored candidates. And limits on monetary contributions may shift influence from working individuals to retirees and students, who have time to volunteer for political activities. Although the access to such

¹⁰² Justice Scalia noted in *McConnell* the advantages of reform to incumbents:

To be sure, the Legislation is evenhanded. It similarly prohibits criticism of the candidates who oppose Members of Congress in their relation bids. But as everyone knows, this is an area in which evenhandedness is not fairness. If *all* electioneering were evenhandedly prohibited, incumbents would have an enormous advantage. Likewise, if incumbents and challengers are limited to the same quality of electioneering incumbents are favored. In other words, *any* restrictions upon a type of campaign speech that is equally available to challenges and incumbents tend to favor incumbents.

Id. at 720-21 (Scalia, J., dissenting).

¹⁰³ *Id.* (Scalia, J., dissenting).

contributions is nominally the same for all candidates, it does in fact tend to favor certain types of interest groups—and therefore candidates.

Additionally, the complicated nature of campaign-finance legislation has been used offensively by some as a political strategy. Sophisticated political players now routinely file complaints with the FEC, which are often the quickest and least expensive way to tarnish an opponent's image or have him divert valuable resources in defending himself. Justice Scalia has commented:

The federal election campaign laws, which are already (as today's opinions show) so voluminous, so detailed, so complex, that no ordinary citizen dare run for office, or even contribute a significant sum, without hiring an expert advisor in the field, can be expected to grow more voluminous, more detailed, and more complex in the years to come—and always, always, with the objective of reducing the excessive amount of speech.¹⁰⁴

It is also interesting to note that while the Court has restricted political speech in *McConnell*, it has sternly disapproved of restrictions on such forms of speech as child pornography, sexually explicit cable programming, and cross-burning.¹⁰⁵ As for the future of campaign finance reform, Justice Thomas predicts that the news media, which also seek to influence elections through editorials, could be the next target: “The chilling endpoint of the Court’s reasoning is not difficult to see: outright regulation of the press.”¹⁰⁶ And Justice Scalia observes that restrictions on the right of the electorate to pool their financial resources “threatens the existence of all political parties.”¹⁰⁷ These are dire predictions indeed.

VI. CONCLUSION

Under the explicit wording of the Constitution, individuals and organizations have a right to make public their political voices, and prohibiting such activities strikes at the heart of the First Amendment. Even if disparities in actual or apparent influence are sometimes troubling, the government has no right to equalize political strength among elements of society by restricting speech. The First Amendment’s very language, which states that the government “shall make no law abridging the

¹⁰⁴ *Id.* at 729 (Scalia, J., dissenting).

¹⁰⁵ *See, e.g.,* *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *U.S. v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000).

¹⁰⁶ *McConnell*, 124 S. Ct. at 740. Justice Thomas also said that under the theory of the majority, he could envision laws being passed and upheld that would require print media, to give equal time to opposing viewpoints. *Id.* at 741 (dissenting).

¹⁰⁷ *Id.* at 725.

freedom of speech,” makes clear that individual liberty must be protected at all costs.¹⁰⁸

Proponents of campaign-finance reform would have us believe that extensive regulation can somehow rid the political system of corruption. The notion that it is somehow corrupt to persuade elected representatives to vote in a certain way is of course fallacious. Advocating one’s views is the essence of a representative democracy, and legislators are hardly the spineless lot portrayed by reformers. Besides, with full disclosure of all contributions, the electorate is fully informed of any apparent attempts at political maneuvering.

Freedom of speech implies that the quantity and substance of speech ought to be determined by private choices, rather than a government bureaucracy. It has been the experience of our constitutional democracy that the eventual influence of speech will turn on its substance, not its quantity or initial popularity. Through vibrant political dialogue, the First Amendment places its trust in the public—not federal campaign machinery—to make the proper choices among candidates running for office. It may not be the most orderly system in the world, but it’s the freest.

¹⁰⁸ U.S. CONST. amend. I.