

CONSTITUTIONAL ISSUES RAISED BY RECENT CAM-  
PAIGN FINANCE LEGISLATION RESTRICTING  
FREEDOM OF SPEECH

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HEARING  
BEFORE THE  
SUBCOMMITTEE ON THE CONSTITUTION  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED SEVENTH CONGRESS  
FIRST SESSION

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JUNE 12, 2001  
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**CONSTITUTIONAL ISSUES RAISED BY RECENT  
CAMPAIGN FINANCE LEGISLATION RE-  
STRICTING FREEDOM OF SPEECH**

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**TUESDAY, JUNE 12, 2001**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON THE CONSTITUTION,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Subcommittee met, pursuant to call, at 2 p.m., in Room 2141, Rayburn House Office Building, Hon. Steve Chabot [Chairman of the Subcommittee] presiding.

Mr. CHABOT. The Committee will come to order. I am Steve Chabot, the Chairman of the Subcommittee on the Constitution of the Judiciary Committee.

This is an oversight hearing on the constitutional issues raised by recent campaign finance legislation restricting freedom of speech. Campaign finance reform has recently received increased attention from legislators, the media, and the public. Some have said this greater focus can be attributed to the proliferation of issue advertising from unions, corporations, and political parties. Others simply point to the growing costs of campaigns. Of course, the solutions to these problems, real or perceived, vary greatly from increased disclosure all the way to taxpayer-funded elections.

Let me say up front as Chairman of the Subcommittee, and as an individual, and as a Member of Congress that I do support campaign finance reform. I have voted for or cosponsored various proposals that would increase the disclosure requirements, require candidates to raise at least half of their money from inside their home State, and limit so-called soft money contributions. I do, however, have significant concerns about legislation that would use tax dollars to finance political campaigns, and I believe that there are very real constitutional questions surrounding proposals that would severely restrict issue advertising.

While I have been a target of and take issue with the so-called issue advertising that we have seen in recent campaigns, we must not forget that political speech is at the core of expression protected by the first amendment.

The Supreme Court has also long recognized that the ability of individuals to combine their funds and enhance their voices through associations is entitled to full first amendment protection. Still, modern campaign finance reform efforts have tended to focus on restricting such activities.

The Senate has passed S. 27, the Bipartisan Campaign Reform Act of 2001, and a similar bill, H.R. 380, has been introduced here in the House.

The Supreme Court has developed an express advocacy standard that acts as a firewall to protect certain political speech from regulation. That standard distinguishes between express advocacy containing certain words such as “vote for” or “vote against,” combinations of words the Supreme Court has held may be subject to regulation, from so-called issue advocacy, which does not contain such words but, instead, contains, as described by the Supreme Court, discussions of public issues that by their nature raise the names of certain politicians.

Such issue advocacy cannot be subjected to regulation. As the Supreme Court summed up its opinion in the landmark case of *Buckley v. Valeo*, “So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views.” That is a quote from the Supreme Court.

Among other things, S. 27 denies the protection of the express advocacy standard to corporations, labor unions, social welfare groups and political groups who seek to engage in issue advocacy during critical times in campaigns, while maintaining such protection for the media and millionaires. This runs the risk of creating an unbalanced political playing field. S. 27 also bans members of political parties from making independent expenditures; that is, disbursements for communications that are not coordinated with a candidate, despite the Supreme Court’s statement that “we do not see how a Constitution that grants to individuals, candidates and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties.”

For nearly half a century, the Supreme Court has extended first amendment protection to a multitude of forms of “speech,” such as filing lawsuits, burning flags, and using an obscenity to stress a point. Yet the terms of S. 27 would ban corporations, labor unions, social welfare groups and political groups from advocating issues important to them during specific times in campaigns, subjecting them to not only new speech restrictions, but also increased penalties beyond those imposed by current law. At the same time, S. 27 exempts the media and millionaires from the same rules.

The Supreme Court has allowed restrictions on the express advocacy of corporations, but allowable restrictions do not extend to issue advocacy. The Supreme Court has upheld bans on express advocacy made from corporate treasuries, but it has clearly rejected bans on issue advocacy paid for from corporate treasuries. In another case, the Court wrote that when public issues are being discussed, “the inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union or individual.” Yet, S. 27 bans corporations and labor unions from funding “electioneering communications,” which the bill defines as a “broadcast, cable or satellite advertisement” which simply “refers” to a clearly identified candidate for Federal office, and which is made within 60

days before a general, special or runoff election, or 30 days before a primary, or a convention or caucus of a political party, and “which is made to an audience that includes members of the electorate for such election, convention or caucus.” In the case of a Presidential race with primaries and caucuses held almost continuously for several months and the party conventions following in late summer, S. 27’s ban on issue advocacy could prohibit a covered organization from running any broadcast communication that makes reference to a specific candidate for much of an election year.

S. 27 also bans 501(c)(4) social welfare organizations from funding issue advocacy unless the funds used are not “targeted”; that is, broadcast to an audience that “consists primarily of residents of the State for which the clearly identified candidate is seeking office.” Since much of the point of mentioning a candidate’s name is to communicate an idea to the candidate’s electorate, S. 27 may unconstitutionally burden speech by 501(c)(4) organizations to substantially the same extent as it burdens corporate and labor union speech.

Finally, the Supreme Court has held that the media industry and the professional press should be afforded no greater rights under the first amendment than the public at large. Yet, S. 27 exempts the news media from regulation, and, in doing so, it gives corporations that control those media outlets unfair advantage over corporations that are not media-controlled. For example, while newsletters sent out by even a tiny corporation would be subject to S. 27’s restrictions, identical political communications by Disney, the owner of ABC News, would not, nor would the political communications of Microsoft, now in a joint venture with NBC, which is owned by General Electric, which has acquired a broadcasting property, MSNBC, nor would the political communications of AOL Time Warner, which owns CNN.

S. 27 also does not and could not constitutionally prevent the wealthy from spending their own money, either to express their views on public issues and candidates, or to advocate their own election. S. 27 may, therefore, take power from average citizens and give it to the already wealthy and powerful.

S. 27 also bans national, local and State parties from making independent expenditures on express advocacy with respect to candidates during general elections. However, the Supreme Court in *Buckley* held that there was only one constitutionally valid reason for which the government could limit political speech; namely, to prevent quid pro quo corruption of the dollars-for-political-favors variety. Consequently, an argument that Congress could constitutionally deny political parties the right to engage in independent express advocacy must rely on the strange assumption that political parties, when they communicate support for their own candidates or opposition to another party’s candidate, are somehow “corrupting” their own candidates.

The tension between certain campaign finance proposals and the first amendment is clear, even to those supporting such regulations. In 1997, the House Minority Leader Richard Gephardt, stated that in his view, “What we have here is two important values in conflict: freedom of speech and our desire for healthy campaigns

in a healthy democracy. You can't have both." This hearing will explore whether we can under our Constitution have both freedom of speech and healthy campaigns. It is appropriate for the Subcommittee to consider the impact of legislative proposals on our constitutionally protected freedoms, and, to that end, the purpose of today's hearing is to establish the legal framework within which the constitutionality of campaign finance reform proposals must be analyzed.

I look forward to hearing from our witnesses today, and I now yield to the Ranking Member of the Committee Mr. Nadler for the purposes of making an opening statement.

[The prepared statement of Mr. Chabot follows:]

PREPARED STATEMENT OF THE HONORABLE STEVE CHABOT, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF OHIO

Campaign finance reform has recently received increased attention from legislators, the media, and the public. Some have said this greater focus can be attributed to the proliferation of issue advertising from unions, corporations, and political parties. Others simply point to the growing cost of campaigns.

Of course, the solutions to these problems, real or perceived, vary greatly from increased disclosure to taxpayer-funded elections. Let me say up-front, as Chairman of this Subcommittee, that I support campaign finance reform. I have voted for or cosponsored various proposals that would increase disclosure requirements, require candidates to raise at least half of their money from inside their home state, and limit so called soft money contributions.

I do, however, have significant concerns about legislation that would use tax dollars to finance campaigns, and I believe that there are very real constitutional questions surrounding proposals that would severely restrict issue advertising.

While I have been a target of, and take issue with, the so-called issue advertising that we have seen in recent campaigns; we must not forget that political speech is at the core of expression protected by the First Amendment.

The Supreme Court has also long recognized that the ability of individuals to combine their funds and enhance their voices through associations is entitled to "full First Amendment protection." Still, modern campaign finance reform efforts have tended to focus on restricting such activities. The Senate has passed S. 27, the Bipartisan Campaign Reform Act of 2001, and a similar bill, H.R. 380, has been introduced in the House.

The Supreme Court has developed an "express advocacy" standard that acts as a firewall to protect certain political speech from regulation. That standard distinguishes between express advocacy containing certain words such as "vote for" or "vote against"—combinations of words the Supreme Court has held may be subject to regulation—from so-called "issue advocacy," which does not contain such words but instead contains, as described by the Supreme Court, "discussion[s] of public issues that by their nature raise the names of certain politicians." Such issue advocacy cannot be subjected to regulation. As the Supreme Court summed up its opinion in the landmark case of *Buckley v. Valeo*, "So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views."

Among other things, S. 27 denies the protection of the express advocacy standard to corporations, labor unions, social welfare groups, and political groups who seek to engage in issue advocacy during critical times in campaigns, while maintaining such protection for the media and millionaires. This runs the risk of creating an unbalanced political playing field. S. 27 also bans members of political parties from making "independent expenditures"—that is, disbursements for communications that are not coordinated with a candidate—despite the Supreme Court's statement that "[w]e do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties."

For nearly half a century, the Supreme Court has extended First Amendment protection to a multitude of forms of "speech," such as filing lawsuits, burning flags, and using an obscenity to stress a point. Yet the terms of S. 27 would ban corporations, labor unions, social welfare groups, and political groups from advocating issues important to them during specific times in campaigns, subjecting them to not

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Finally, the Supreme Court has held that the media industry and the professional press should be afforded no greater rights under the First Amendment than the public at large. Yet S. 27 exempts the news media from regulation. In doing so, it gives corporations that control those media outlets unfair advantages over corporations that are not media-controlled. For example, while newsletters sent out by even a tiny corporation would be subject to S. 27’s restrictions, identical political communications by Disney, the owner of ABC News, would not; nor would the political communications of Microsoft—now in a joint venture with NBC, which is owned by General Electric—which has acquired a broadcasting property, MSNBC; nor would the political communications of AOL Time Warner, which owns CNN.

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S. 27 also bans national, local, and state parties from making “independent expenditures” on express advocacy with respect to candidates during general elections. However, the Supreme Court in Buckley held that there was only one constitutionally valid reason for which the government could limit political speech, namely to prevent quid pro quo corruption of the dollars-for-political-favors variety. Consequently, an argument that Congress could constitutionally deny political parties the right to engage in independent express advocacy must rely on the strange assumption that political parties, when they communicate support for their own candidates or opposition to another party’s candidate, are somehow “corrupting” their own candidates.

The tension between certain campaign finance proposals and the First Amendment is clear even to those supporting such regulations. In 1997, the House Minority Leader, Richard Gephardt stated that, in his view, “What we have is two important values in conflict: freedom of speech and our desire for healthy campaigns in a healthy democracy. You can’t have both.” This hearing will explore whether we can, under our Constitution, have both freedom of speech and healthy campaigns. It is appropriate for this subcommittee to consider the impact of legislative proposals on our constitutionally protected freedoms, and to that end the purpose of today’s hearing is to establish the legal framework within which the constitutionality of campaign finance reform proposals must be analyzed.

I look forward to hearing from our witnesses today.

Mr. NADLER. Thank you, Mr. Chairman.

I find it ironic that just a few weeks after this Committee adopted legislation to amend the Bill of Rights to allow the prohibition

of unpopular political expression, namely what has come to be known as “flag desecration,” when there is not even any problem to deal with—we all have seen the epidemic of well-publicized flag desecration cases lately—we are presented with a hearing, the main theme of which is that there is a first amendment right to engage in what has become an institutionalized process of corrupting our democratic institutions. Our campaign finance system is an international disgrace, as is the administration of our elections. Reflecting on the current system of disenfranchisement, former President Carter recently observed that our electoral system is so bad that it does not meet the minimum standards of the Carter Center for observing elections in foreign countries. For a Nation that holds itself out as the paragon of electoral democracy in the world, a country that presumes to lecture other countries on their electoral systems, it is a genuine embarrassment.

I want to make it clear that I share many of the concerns about the need to preserve free speech and independent voices in our political system. Our rights to free speech, free association and privacy, if I dare say that in this Committee, go to the core of a healthy democracy.

That democracy is challenged, however, by the large sums of money which have tilted the process in favor of a few moneyed interests and away from the common citizen. Is it any wonder that so few Americans still think that their participation in our political system is meaningful? When I am told, for example, by colleagues in the House, who shall not be identified, that they understand that certain pending legislation is not in the interests of the country, but “I voted against the banks on this, and I voted against the banks on that; I have to throw the banks a vote on something,” why do they have to throw a vote to the banks on something? It is not because there are thousands of bankers in their districts who would vote against them, but because the power of the money of the large financial interests can be used to help or hurt them at election time. And I know, we all know, and every Member of this Committee knows that these financial considerations play a large, I will not say paramount, but certainly a large role in the consideration of much legislation before this Congress.

Money does provide the ways and means for getting a candidate’s message out, but we should not live in a society where those with the most dollars can monopolize the debate. We should not live in a society where, in the name of free speech, one side has a megaphone with which to drown out everyone else.

For those who are concerned about the proposals we have here before us, the onus is really on them, I think, to explain either why the current system is consistent with a healthy democracy, or else what other steps they would take to rectify the situation. Should we make greater demands on those who have been given control over the scarce public airwaves? Should we provide public financing to level the playing field? Should we reconsider the Supreme Court’s unfortunate decision in 1886 that corporations are persons under the meaning of the 14th amendment, from which I think a lot of the problems in our system flow? What restrictions can we place on the use of money consistent with the first amendment to preserve the survival of our democracy?

I must say that I view this in the very, very gravest measure, because I really think that if we do not radically change the way we finance elections, historians in the future will write that the United States, like the Roman Republic, had a good 200- or 250-year run with democracy, but then the system evolved into something else: plutocracy, oligarchy, corporate rule or whatever.

Milton Friedman once characterized freedom in a capitalist system as the freedom to allow everyone to make their own choices by letting them “vote with their dollars.” The implication, of course, is that those with the most dollars get the most votes. That may be fine in choosing corporate officers or in choosing a corporate board of directors; but it is not fine in the selection of the officials of a representative democracy. I fear for our Nation if our system degenerates further into a money chase. We have had too many scandals. We have gone way past the appearance of corruption. We must act, and the question before this Committee is not whether to act, but how to act in such a way as to preserve our democratic system without doing violence to free speech.

I must say parenthetically that I do not agree with the Supreme Court that the only justification for campaign finance regulation is to eliminate corruption or the appearance of corruption. It is also to preserve the ability of different voices to be heard so that the people, and not just those with huge amounts of money, can, in fact, be sovereign in our system.

Thank you very much, Mr. Chairman.

Mr. CHABOT. Thank you.

[The prepared statement of Mr. Nadler follows:]

PREPARED STATEMENT OF THE HONORABLE JERROLD NADLER, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF NEW YORK

Thank you, Mr. Chairman. Just a few weeks after we considered legislation to amend the Bill of Rights to allow the prohibition of unpopular political expression, namely what has come to be known as “flag desecration,” we are present with a hearing, the main theme of which is that there is a First Amendment right to engage in what has become an institutionalized process of corrupting our democratic institutions. Our campaign finance system is an international disgrace, as is the administration of our elections. Reflecting on the current system of disenfranchisement, former President Carter recently observed that our electoral system is so bad that it does not meet the minimum standards of the Carter Center to observe our elections. For a country that holds itself out as the paragon of electoral democracy in the world—a country that presumes to lecture other countries on their electoral systems, it is a genuine embarrassment.

I want to make clear that I share many of the concerns about the need to preserve free speech and independent voices in our political system. Our rights to free speech, free association, and, dare I say it in this committee, privacy, go to the core of a healthy democracy.

That democracy is challenged, however, by the large sums of money which have tilted the process in favor of a few moneyed interests and away from the common citizen. Is it any wonder that so few Americans still think their participation is meaningful? When I am told, for example, by colleagues that they understand that pending bankruptcy legislation will hurt families and small businesses in their districts, but they have to “give the banks a vote occasionally,” I understand why they think they “have to.” It is not because there are thousands of bankers in their districts who would vote against them, but rather that the money of the large financial interests can be used to help or hurt them at election time.

Money does provide the ways and means for getting one’s message out, but we should not live in a society where those with the most dollars can monopolize the debate. That is what we have now, and it is a real problem. For those who are concerned about the proposals we have here before us, the onus is really to explain either why the current system is consistent with a healthy democracy or what other

steps they would take to rectify the situation. Should we make greater demands on those who have been given control over the scarce public airwaves? Should we provide public financing to level the playing field? What restrictions can we place on the use of money, consistent with the First Amendment, to preserve the survival of our democracy?

Milton Friedman once characterized freedom in a capitalist system as the freedom to allow everyone to make their own choices by letting them "vote with their dollars." The implication is, of course, that those with the most dollars get the most votes. That may be fine in the choosing corporate officers, but it is not fine in the selection of the officials in a representative democracy. I fear for our nation if our system degenerates further into a money chase. We have had too many scandals. We have gone way past the "appearance of corruption." We must act, and the question before this committee is not whether to act, but what can we do to preserve our democracy.

Mr. CHABOT. Would the gentleman from Indiana like to make an opening statement?

The gentlewoman from Pennsylvania, or the gentleman from Arkansas?

Mr. HUTCHINSON. Thank you, Mr. Chairman. I just wanted to thank you for conducting this hearing. I think it is a very important and timely subject, and I agree with the Chairman that there are some serious free speech issues in reference to the principal campaign finance bill that passed the Senate.

I do believe it is important that we broadly focus this debate. Sometimes we yield to the temptation that campaign finance reform equals McCain-Feingold, and I think that you can debate campaign finance reform in a little bit broader context. There is a number of bills out there. Some of them are carefully crafted to avoid the constitutional problems.

Generally, whenever we look at campaign finance reform, it falls into the category of banning or restricting the flow of soft money, which, in my judgment, has been identified as probably the greatest problem. The second aspect of it is the restrictions on what I see as restrictions on free speech, which are the third-party issue advocacy groups that are simply trying to participate in the election process. And in reference to those, the McCain-Feingold legislation clamps down numerous restrictions that I think are the subject of a very fair debate on free speech.

I have some serious reservations about those provisions. It is for that reason that I think that Democrats and Republicans can come together and say that we can appropriately reform the system, limit the flow of soft money that creates so much cynicism among the public, but at the same time make sure that free speech is protected by the third-party issue advocacy groups that are trying to exercise their first amendment privileges. So I just hope that that will be the focus of this, not simply just to talk about McCain-Feingold, but to talk about what is the good and what is the bad part of the campaign finance reform proposals that are out there.

So with that, Mr. Chairman, I yield back. I thank you for conducting this hearing.

Mr. CHABOT. Thank you very much.

Mr. CHABOT. Does the gentleman from Detroit wish to make an opening statement?

Mr. CONYERS. Yes. I am from Michigan, thank you, Mr. Chairman.

First of all, I want to begin by commending Jerry Nadler, not that I do not commend him a lot, but I think that was the finest 5-minute statement I have ever heard him make.

We meet here today to discuss the constitutional issues raised by recent campaign finance legislation. The title of this hearing presupposes that such legislation restricts freedom of speech. But the real question today is whether or not these restrictions represent a balanced and constitutional approach.

Every citizen has the right to full participation in the political process, but every wealthy special interest does not have the right to drown out the voices of other American families that do not have the same amount of money as they. American families want a prescription drug benefit under Medicare, but on this issue money talks too loud, and Congress refuses to act. According to the Center for Responsive Politics, the pharmaceutical industry gave more than \$26 million in PAC, soft money and individual contributions to Federal candidates and committees in the past year.

American families want decisions made by doctors, not HMO bureaucrats, but the patients' bill of rights, money talks too loud, and Congress refuses to act. The Health Insurance Association of America contributed over \$200,000 to candidates in the elections last year and were rated by Fortune Magazine as one of the, quote, power 25, unquote, for delaying a vote on the patients' bill of rights.

American families want to protect their children from gun violence. There are 10 children a day killed by guns, but on closing the gun show loophole, money talks too loud, and Congress refuses to act. It is no surprise that the NRA recently was rated the most powerful lobbying group in Congress.

At the core of our discussion today is the Shays-Meehan bill's regulation of issue advocacy advertisements. Does it make any sense that George W. Bush can evade disclosure requirements by crafting an ad that asks his audience to call Al Gore instead of asking his audience to vote against him? That is the test we have today. The same ad, plus or minus a few magic words, can escape our campaign finance law requirements. I think we can do better. I think we can, and I believe that the Shays-Meehan bill does.

The constitutional question confronted by any law that seeks to regulate speech is whether it serves a compelling governmental interest and is narrowly tailored to serve that interest. No one today will argue that there is no compelling government interest at play in this legislation. Preventing the reality or appearance of corruption in our democratic system has been held by the Supreme Court in *Buckley* and its progeny to satisfy the constitutional test. The smoke screen that is being cast today is that somehow the issue advocacy provisions are somehow void for vagueness or being overbroad. Remember the magic words test came from a footnote in *Buckley* in which the words tried to give a clear example of language that would unambiguously make an advertisement or other communication express advocacy. While many courts have been employing the magic words test as the constitutional bright line rule for express advocacy, the Supreme Court has never indicated that an equally clear, perhaps better constructed bright line test constructed by Congress would be unconstitutional.

The legislation at issue today does just that. This bill is not overboard. New evidence is being presented today by the Brennan Center showing that less than 1 percent of legitimate issue ads would be quelled by the legislation as adopted in the Senate. Less than 1 percent. That does not sound very overbroad. It is not vague. It draws a bright line as to what speech will trigger disclosure and what speech will not.

The real question today is whether big money will use phony constitutional arguments and kill this legislation like it has killed prescription drug benefits, HMO reform, and gun safety legislation. Members of Congress do not need to leave their common sense at the door. Reducing the influence of special interests does not suppress free speech. Indeed, it allows the voices of American families to be heard.

Thank you, Mr. Chairman.

[The statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE  
IN CONGRESS FROM THE STATE OF MICHIGAN

We meet here today to discuss the "Constitutional Issues Raised by Recent Campaign Finance Legislation." The title of this hearing pre-supposes that such legislation "Restricts Freedom of Speech," but the real question today is whether or not these restrictions represent a balanced and constitutional approach.

Every citizen has the right to full participation in the political process. But every wealthy special interest does not have the right to drown out the voices of American families.

American families want a prescription drug benefit under medicare. But on this issue, money talks too loud and Congress refuses to act. According to the Center for Responsive Politics, the pharmaceutical industry gave more than \$26 million in PAC, soft money & individual contributions to federal candidates and committees in 2000.

American families want decisions made by doctors, not HMO bureaucrats. But on the Patient's Bill of Rights, money talks too loud and Congress refuses to act. The Health Insurance Association of America contributed over \$200,000 to candidates in the 2000 elections and were rated by Fortune magazine as one of the "Power 25" for "delaying a vote on the Patient's Bill of Rights."

American families want to protect their children from gun violence. 10 children a day are killed by guns. But on closing the gun show loophole, money talks too loud and Congress refuses to act. It is no surprise that the NRA recently was rated the most powerful lobbying group in Congress.

At the core of our discussion today is the Shays-Meehan bill's regulation of issue advocacy advertisements. Does it make any sense that George W. Bush can evade disclosure requirements by crafting an ad that asks his audience to call Al Gore, instead of asking the audience to vote against him? That is the test we have today—the same ad, plus or minus a few magic words can escape our campaign finance laws. Can't we do better?

I think we can and I believe that the Shays-Meehan bill does. The constitutional question confronted by any law that seeks to regulate speech is whether it: (1) serves a compelling governmental interest and (2) is narrowly tailored to serve that interest.

No one today will argue that there is no compelling government interest at play in this legislation. Preventing the reality or appearance of corruption in our democratic system has been held by the Supreme Court in *Buckley v. Valeo* and its progeny to satisfy that constitutional test.

The smokescreen that is being cast today is that somehow the issue advocacy provisions are somehow void for vagueness or overbroad.

Remember that the "Magic Words" test came from a footnote in *Buckley v. Valeo* in which the Court tried to give a clear example of language that would unambiguously make an advertisement or other communication "express advocacy." While many courts have been employing the "magic words" test as the constitutional bright-line rule for express advocacy, the Supreme Court has never indicated that an equally clear, perhaps better constructed bright-line test constructed by Congress would be unconstitutional. The legislation at issue today does just that.

This bill is not over-broad. New evidence is being presented today by the Brennan Center. This study shows that less than 1% of legitimate issue ads would be quelled by the legislation as adopted in the Senate. Less than 1%. That does not see like over-broad legislation to me.

It is not vague. It draws a bright line as to what speech will trigger disclosure and what speech will not.

The real question today is whether big money will use phony constitutional arguments and kill this legislation like it has killed prescription drug benefits, HMO reform and gun safety legislation.

Members of Congress do not need to leave their common-sense at the door. Reducing the influence of special interests does not suppress free speech, it allows the voices of American families to be heard.

Mr. CHABOT. Thank you.

We also have one of the sponsors, the original cosponsors, of the Shays-Meehan Act, one-half of the Shays-Meehan Act, Mr. Meehan of Massachusetts is here. Would the gentleman from Massachusetts like to make an opening statement? I would ask unanimous consent that the gentleman also be permitted to ask questions of the witnesses should he wish to do so. Without objection, we will permit him to do that.

Mr. MEEHAN. Thank you, Mr. Chairman. I will not take all of the 5 minutes, but I first want to express my appreciation to the Chairman for allowing me to participate in this hearing.

Mr. Conyers mentioned that Mr. Nadler's comments were as good an articulation of the constitutional efforts that I have ever heard. I would have to say that the statement by Mr. Conyers was as good an argument that I have heard for campaign finance reform over the last few years.

There have been a lot of arguments as to why we cannot do this, why we cannot reduce the influence of unlimited soft money in American politics. One of the arguments was, well, there is too little money spent in American politics. I heard from the Senate, many of the opponents of reform said, there just is not enough money today in American politics. Then, when that did not work, they said, well, this is an incumbent protection bill. If you pass this bill, all of the incumbents are going to be reelected. Of course, 99 percent of the incumbents were elected under this present money system. Then the argument became, well, if you pass this bill, it will be the end of the political parties. We will not have political parties anymore in America, because that is what soft money is all about, to strengthen the political parties. The reality is the grass-roots of political parties are not nearly as involved in politics today, largely because of the influence of unlimited corporate money and wealthy individuals into the campaign system.

So I thank the Chairman for allowing me to be here. I have a sense that I will be responding to red herrings today. My sense is that the argument of the day and perhaps the argument for the debate in the House will be that we cannot do anything about the corrupting influence of American politics because the Constitution will not let us. I believe that there are red herrings, exaggerations, that will be presented, and I thank the Chairman for an opportunity to be here to perhaps respond to those red herrings. Thank you.

Mr. CHABOT. Thank you very much.

Mr. CHABOT. We have a very distinguished panel here this afternoon. I would like to take this opportunity to introduce them.

Our first witness today is Nadine Strossen, president of the American Civil Liberties Union. Ms. Strossen is a Phi Beta Kappa graduate from Harvard College and Harvard Law School, where she was an editor of the Harvard Law Review. She is also a law professor at New York Law School, where she has written, lectured and practiced extensively in the area of constitutional law, civil liberties, and international and human rights. We welcome you this afternoon.

Our second witness is James Bopp, Jr., general counsel of the James Madison Center for Free Speech. Mr. Bopp has participated in more than 60 election-related cases, including constitutional challenges to State and Federal election laws. He has won numerous legal challenges to election laws that violate Federal constitutional guarantees, and we welcome you here this afternoon, Mr. Bopp.

Our third witness is Daniel Troy, a partner at the firm of Wiley, Rein & Fielding, where Mr. Troy specializes in constitutional law. Mr. Troy is also an associate scholar of legal studies at the American Enterprise Institute. He is a former attorney advisor at the Department of Justice's Office of Legal Counsel, and we welcome you, Mr. Troy.

Our fourth and final witness is Glenn Moramarco, senior attorney at the Brennan Center for Justice at the New York University School of Law, where he concentrates on campaign finance reform and ballot access litigation. Mr. Moramarco recently defended public funding initiatives in Maine and Arizona, and issue advocacy provisions in Wisconsin, North Carolina and Colorado. We welcome you here this afternoon, Mr. Moramarco.

Thank you all for being here with us this afternoon. I would ask that you please try to summarize your testimony in 5 minutes or less. Without objection, your written statement will be made a part of the permanent hearing record, and as I am sure you are probably aware, we have a light system here. When the yellow light comes on, that means you have about a minute to wrap up. When the red light comes on, we appreciate you concluding at that time, although we will be a little generous, but not too generous.

Welcome. We will hear from you now.

**STATEMENT OF NADINE STROSSEN, PRESIDENT, AMERICAN  
CIVIL LIBERTIES UNION**

Ms. STROSSEN. Thank you so much, Chairman Chabot and Members of the Committee. Thank you for the gracious introduction, Mr. Chairman. I would simply like to add that my specialty as a law professor is constitutional law, and in particular the first amendment.

Very respectfully, Congressman Meehan, the first amendment issues that are involved here are not red herrings. They really go to the heart of the preeminent first amendment freedoms in our democratic society; the rights of we, the people, to speech, to petition, and to association, particularly concerning matters of public affairs and public officials. The Supreme Court long has held that these first amendment freedoms, far from being red herrings, are the most fundamental of all of our constitutional rights, since they

are essential not only for individual liberty, but also as the foundation for democratic self-government.

In particular, the Court has consistently recognized, starting with the landmark *Buckley v. Valeo* case in which I am very proud that the ACLU and the New York Civil Liberties Union played a leading role—since then the Court has consistently recognized that campaign finance laws are presumptively unconstitutional. So with due respect, Congressman Nadler, the burden of proof is on those who are seeking to make an exception to these fundamental first amendment protections, not those of us who are advocating that they be respected.

No matter how well-intentioned—and I am not questioning the bona fides of the very eloquent statements of what you are trying to accomplish through this legislation—but no matter how well-intentioned so-called reforms are, the courts look behind the sugar-coated labels and the good intentions and strike them down consistently because they do, in fact, restrict the rights of individuals and groups vigorously to participate in campaigns and to participate in the electoral process. The current legislation blatantly violates these cherished rights. At best, it chills; at worst, it outright gags the most important speech in a democracy: citizen criticism of government policies and officials.

Likewise, this legislation at best disables and at worst destroys the most important associations in our pluralistic society: grass-roots groups that are seeking to influence public policies and politicians. Even advocates of this legislation concede that it abridges fundamental first amendment freedoms. We heard that from Congressman Nadler, and his argument is quite typical, that we have to make a trade-off or balancing between free speech rights on the one hand and equality rights on the other hand.

I absolutely agree, the ACLU absolutely agrees, with the Democratic Members who have so forcefully spoken that the equality rights of equal access and expanded opportunity to the political process are equally fundamental as to first amendment freedoms, and I am proud that the ACLU has been on the forefront, including with respect to the recent deprivations of equality in Florida and elsewhere, as Congressman Nadler notes.

But contrary to the rhetoric, the current legislation is really the worst of both worlds. It violates both free speech and equality rights, far from actually increasing the range and diversity of participants in the political process, far from expanding the opportunities for those who lack power or money. In actual effect, these laws do exactly the opposite.

I am going to accept Congressman Nadler's challenge and the challenge that came from Congressman Hutchinson as well to say, what are reforms that would be constitutional? Because the ACLU does agree, I think one thing we all agree on, is that the current system is fundamentally flawed. In our view, by the way, the flaws have been exacerbated by the limits that are already in effect, and far from fixing those problems, the proposed legislation would actually make them worse.

Yes, Congressman Nadler, the fix that we do advocate is the only one that is effective and the only one that is consistent with the first amendment, and that is increasing expression rather than

limiting expression, and that would come with public financing. It would come with the kind of access to the media that you suggested. The ACLU also long has advocated an equivalent to the franking privilege for those who are challenging incumbents, and also immediate and full disclosure which can be facilitated, thanks to technological innovation such as the Internet, for substantial contributions, for substantial expenditures.

Now, most egregiously, I think, in my waning minute I want to echo a point that the Chairman very strongly emphasized, and Congressman Hutchinson also emphasized, that these laws, these bills would egregiously violate the right to engage in so-called issue advocacy, as the Supreme Court has said, in part in a footnote, in part in the text, Congressman Conyers—and footnotes are very important; as we lawyers all know, much constitutional law has come from footnotes. I just reread that language in response to hearing your comments. This language is not at all precatory, it is very explicit, the only way you can avoid—according to the Court, the only way you can avoid chilling the kind of issue advocacy that, as the Court recognized, clearly will influence electoral outcomes, but you cannot chill it because stopping that influence is doing more damage by chilling the advocacy. This is the heart of democratic freedom, freedom of speech for individuals to band together in citizens' groups, to advocate on issues that are particularly important precisely in the moments before an election, when there will be an outright ban. By eliminating that explicit test, as the Chairman described, this legislation is, in effect, going to completely obliterate effective issue advocacy exactly at the time when most people are listening to it.

This problem is recognized by the so-called safe harbor provision that is inserted in the legislation, but it is not much of a safe harbor. It only applies to certain organizations, it only applies to certain issues, and, worst of all, to call it a safe harbor is really a misnomer. It is more of a dangerous minefield than a safe harbor, because what it would do is to hamper these organizations with such burdensome, expensive, privacy-violating—yes, Congressman Nadler, we care about privacy, too—disclosure and registration requirements that it would do far more harm than good, and organizations such as the ACLU, nonpartisan issue advocacy organizations, clearly would not tolerate that kind of disclosure and registration.

So in short, what this legislation does is make it a crime for citizens and citizens' groups to criticize our government. How can that even be seriously considered in this free and democratic society, much less how can it be considered as a progressive reform? And in so-called safe harbors, yes, maybe some of us would theoretically be able to engage in some criticism, but first we would have to register with our government as a prerequisite for criticizing it. How can this possibly be in a free and democratic society?

In conclusion, I am sorry, I see the red light, I do feel strongly, and I didn't notice it, so I will rapidly conclude by thanking you again, Mr. Chairman and Members of the Subcommittee, for giving me the chance to engage in the very kind of criticism that would be so sweepingly repressed under the proposed legislation.

Mr. CHABOT. Thank you.

[The prepared statement of Ms. Strossen follows:]

## PREPARED STATEMENT OF NADINE STROSSEN

Good afternoon. Chairman Chabot, Members of the Committee, my name is Nadine Strossen, and I am the President of the American Civil Liberties Union. I am also a Professor of Law at New York Law School, where I teach Constitutional Law. I am here on behalf of the American Civil Liberties Union, a non-profit corporation that is devoted to the advancement of civil rights and civil liberties. For over 80 years, the ACLU has been a nation-wide, non-profit, non-partisan membership organization of over 300,000 members devoted to protecting and advancing the rights and the principles of freedom and individual liberty set forth in the Bill of Rights and the Constitution. The ACLU and the ACLU Foundation are 501 (c)4 and 501 (c)3 respectively. We take no federal funds and we are financed through individual gifts, membership dues and/or foundation grants.

For almost 30 years, the ACLU has been at the forefront of the effort to insure that campaign finance reform is consistent with the free speech and democratic values embodied in the First Amendment to the Constitution. For that entire period of time, we have insisted that campaign finance laws must serve two vital goals: protecting freedom of political speech and association and expanding political opportunity and participation. Unfortunately, the McCain-Feingold bill (S. 27, the Bipartisan Campaign Reform Act of 2001) recently passed by the Senate, and its Shays-Meehan counterpart (H.R. 380, the Bipartisan Campaign Reform Act of 2001) introduced in the House earlier this year, are fundamentally inconsistent with these goals. Rather, they are destructive distractions from the serious business of meaningful campaign finance reform which entails easing, not tightening, the legislative controls on the financing of our political campaigns.

Contrary to what many think, the ACLU supports a comprehensive program of public financing of federal campaigns, consistent with the First Amendment. Meaningful campaign finance reform would develop comprehensive programs for providing public resources, benefits and support for all qualified federal political candidates. Because 25 years of experience have shown that limits on political funding simply won't work, constitutionally or practically, it is time to seek a more First Amendment-friendly way to expand political opportunity. As the ACLU has long argued, public financing for all qualified candidates is an option that provides the necessary support for candidacies without the imposition of burdensome and unconstitutional limits and restraints. But instead of being able to press this positive agenda, we must use our time today instead to condemn the ill-conceived provisions of McCain-Feingold and Shays-Meehan that are non-remedies to our national campaign finance problems and are wholly at odds with the essence of the First Amendment.

Simply put, these bills are a recipe for political repression because they egregiously violate longstanding rights of free speech and freedom of association in several ways:

- (1) These bills unconstitutionally stifle issue advocacy. They drive a wedge between the people and their elected representatives by throttling the various advocacy groups and political parties that amplify the voices of average citizens. These bills achieve these egregious results by obliterating the clear and clear constitutional dividing lines, established by 25 years of judicial precedent—between “express advocacy” of electoral outcomes, which can be regulated, and issue advocacy involving electoral candidates and incumbent politicians, which cannot be subject to regulatory controls.
- (2) These bills penalize constitutionally protected contacts that groups and individuals may have with candidates and elected officials. They would suppress effective criticism of government by significant organized entities—labor unions, not-for-profit corporations, and business corporations—with one exception: media corporations and conglomerates would be exempt from the bills’ Draconian controls.
- (3) These bills severely threaten the continued vitality of our political parties. Parties are not merely vehicles that help amplify the voices of their party representatives, they are also issue groups that engage in voter registration, voter education, issue and platform development and the like. The assertion that corporate and union contributions have a “corrupting influence, and that somehow is an adequate justification for the ban of such contributions to political parties is not supported by First Amendment jurisprudence.

These three major flaws in the bills will be addressed in turn. But in the meantime, this Committee should make no mistake about the radical agenda that these bills promote and about the drastic departure from settled First Amendment doctrine that they represent. It is the ACLU’s hope that the Subcommittee on the Con-

stitution will educate its colleagues in the House of Representatives about the grave constitutional defects contained in McCain-Feingold and Shays-Meehan.

I. THESE BILLS UNCONSTITUTIONALLY CONSTRAIN ROBUST CITIZEN SPEECH (ISSUE ADVOCACY) PRIOR TO ELECTIONS

As Virginia Woolf stated, “If we don’t believe in freedom of expression for people we despise, we don’t believe in it at all.” Apparently, the supporters of McCain-Feingold and Shay-Meehan must despise any form of issue advocacy—especially that which is critical of candidates—that has the audacity to discuss the actions or proposals of public officials and candidates for public office, or even mention their name, because they have gone to such lengths to suppress it.

With minor differences in phrasing and coverage, the primary target of both bills is so-called “electioneering communications.” An electioneering communication is any cable or satellite communication that refers to a clearly identified federal candidate and is made within 60 days of a general, special or runoff election or 30 days of a primary, convention or caucus, and is made to an audience that includes members of the electorate. It must be remembered that up to now such a communication has been absolutely free of any government regulation (unless it came within the Supreme Court’s bright line test that it “expressly advocated” the election or defeat of such a candidate). Now, the mere mention of a candidate triggers the statute. Once that happens the consequences are extreme: non-profit corporations, labor unions and trade associations are barred by the legislation from making such communications; individuals and associations may make them but are then subject to burdensome registration, reporting and disclosure requirements.

(The distinction between broadcast communication media and other media bears no relevance to the only recognized justification for campaign finance limitations or prohibitions, namely, the concern with corruption. The legislative goal is transparent: blatant censorship of what incumbents feel is the most effective medium of communication used to criticize them. But suppressing speech in one medium while permitting it in another is not a lesser form of censorship, just a different form.)

These prohibitions and restraints are accomplished in the Senate bill (S. 27) by creating this new legal category—labeled “electioneering communication”—and simply declaring that any communication that meets the new criteria comes within that new category. The House bill (H.R. 380) achieves the same result by a constitutional sleight of hand that gerrymanders the established boundary lines of the “express advocacy” doctrine by simply declaring, wholly in the face of clearly established law, that any broadcast mention of a federal candidate within the time and temporal stipulations comes within that definition. (The House bill also unconstitutionally and dramatically expands the definition of “express advocacy” by having it include any communication in any medium at any time of the year “expressing unmistakable and unambiguous support for or opposition to one or more clearly identified candidates when taken as a whole and with limited reference to external events, such as proximity to an election.” No direct link to electoral advocacy is required.) These new unconstitutional definitions bring with them the whole panoply of FECA regulations and restrictions, applicable to any individual or organization that comes within the new overbroad and vague guidelines.

Each bill has a “sham” safe harbor for issue advocacy. The Senate bill allows certain non-profits to make “electioneering communications” if they are not “targeted” to voters in the State where the “referred to” candidate is up for election. In other words, you can’t criticize the McCain-Feingold bill in Arizona or Wisconsin if either sponsor is up for election; and perhaps in the entire country when Senator McCain is running for President. Under this “safe harbor” a group can urge citizens in Colorado to write a letter to a Senator from California, but if they urge people to write their own Senator—who happens to be an incumbent up for reelection—they could go to jail. The House bill would permit issue organizations to publish and disseminate voting record and guides only if they are “cleansed” of their editorial content.

These bills in effect silence issue advocacy by requiring accelerated and expanded disclosure of the funding of such advocacy, by penalizing issue advocacy as a prohibited contribution if it is “coordinated” in the loosest sense of that term with a federal candidate. They also ban issue advocacy all but completely if it is sponsored by a labor union, a corporation (including such non-profit corporations organized to advance a particular cause like the ACLU or the National Right to Life Committee or Planned Parenthood unless they are willing to obey the government’s stringent new rules) or other similar organized entity. Even an individual or organization that receives financial support from prohibited sources such as corporations, unions, or wealthy individuals, are barred from engaging in “electioneering communications.”

These bills would impose these limitations on communications about issues regardless of whether the communication “expressly advocates” the election or defeat of a particular candidate. Nor is there any requirement of even showing a partisan purpose or intent. Instead, during 60 days before a primary or 30 days before a general election, any such communication is subject to the new controls simply by identifying any person who is a federal candidate, which will often be an incumbent politician.

During the floor debate of the McCain-Feingold bill, a majority of the Senate realized that the restrictions on issue advocacy discussed above would probably be struck down by the courts on constitutional grounds. Thus, they adopted the Specter Amendment, which would be a year-round ban on any broadcast ad that “promotes,” “supports,” “attacks,” or “opposes” a candidate, and that is “suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidates.” This vague and over-broad “back-up” to Snowe-Jeffords is also unconstitutional. If the ACLU finances a broadcast ad criticizing a Democrat for supporting the constitutional amendment banning flag desecration, is it automatically telling voters that they should support the Democratic candidate’s Republican opponent? Absolutely not! Congress cannot, and should not attempt to design a statute to ban or suppress issue groups criticism or praise of them by name or likeness. Whether such ban is year round or before every single primary and general election, such proposals are nothing more than attempt to stifle free speech.

#### A. *These Issue Advocacy Restrictions Would Have Adverse, Real-Life Consequences*

Had these provisions been law during the 2000 elections, for example, they would have effectively silenced messages from issue organizations across the entire political spectrum. The NAACP ads—financed by a sole anonymous donor—vigorously highlighting Governor Bush’s failure to endorse hate crimes legislation is a classic example of robust and uninhibited public debate about the qualifications and actions of political officials. By the same token, when New York Mayor Rudy Giuliani was a candidate for the United States Senate, any broadcast criticism of his record on police brutality as mayor of New York undertaken by the New York Civil Liberties Union would have subjected that organization to the risk of severe legal sanctions and punishment under these proposals. These bills would have prevented the National Right to Life Committee from questioning the constitutionality of the McCain-Feingold bill during all the months when Senator McCain was a candidate for the Republican presidential nomination. The Supreme Court in cases from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) through *Buckley v. Valeo*, 424 U.S. 1 (1976) to *California Democratic Party v. Jones*, 120 S.Ct. 2402 (2000) have repeatedly protected full and vigorous debate during an election season. The provisions of the pending bills would silence that debate.

Second, the ban on “electioneering communications” or the *ipse dixit* treatment of them as “express advocacy” would also stifle legislative advocacy on pending bills. The blackout periods coincide with crucial legislative periods, including the months of September and October as well as months during the Spring. During Presidential years, the blackout periods would include the entire presidential primary season, conceivably right up through the August national nominating conventions. For example, had this provision been law in 2000, for most of the year it would have been illegal for the ACLU or the National Right to Life Committee to criticize the “McCain-Feingold” bill as an example of unconstitutional campaign finance legislation or to urge elected officials to oppose that bill. The only time the blackout ban would be lifted would be in August, when many Americans are on vacation!

During the 106th Congress, for example, the ACLU identified at least ten major controversial bills that it worked on which were debated in either chamber of the Congress or in committee meetings within 60 days prior to the November 2000 general election. The various legislative issues cover an enormous range of critical issues, including freedom of speech (imposing internet filtering in schools and libraries), reproductive rights (restricting abortion in international family planning; attempting to define “human being” in the “born alive” bill and prohibiting funding of “morning-after pill” to minors on school premises), hate crimes (expanding the federal hate crimes law), privacy (restricting law enforcement use of electronic surveillance and enhancing privacy protections for individuals and preventing fraudulent misuse of Social Security numbers), criminal justice (providing grants to states to process backlog of DNA evidence), and secret evidence (making it harder for the INS to use secret evidence to deport immigrants or to deny them asylum). This pattern of legislating close to primary and general elections is repeated during the waning days of every legislative session. For example, Congress is always in a race to enact appropriations bills before the beginning of the federal fiscal year on October 1st. These bills, with their innumerable social policy amendments, are prime exam-

ples of legislation that will undoubtedly be debated in the last 60 days before a general election. Under the proposed campaign finance bills, Congress—merely by adjusting the calendar—could make controversial legislation immune from citizen criticism if such criticism dared to mention bill sponsors or supporters by name.

*B. Why These Limitations Run Afoul of the First Amendment*

Under the reasoning of *Buckley v. Valeo* and all the cases which have followed suit, the funding of any public speech that falls short of such “express advocacy” is wholly immune from campaign finance laws. Speech which comments on, criticizes or praises, applauds or condemns the public records and actions of public officials and political candidates—even though it mentions and discusses candidates, and even though it occurs during an election year or even an election season—is entirely protected by the First Amendment.

The Court made that crystal clear in *Buckley* when it fashioned the express advocacy doctrine. That doctrine holds that the FECA can constitutionally regulate only “communications that in express terms advocate the election or defeat of a clearly identified candidate,” and include “explicit words of advocacy of election or defeat” 424 U.S. at 44, 45. The Court developed that doctrine because it was greatly concerned that giving a broad scope to FECA, and allowing it to control the funding of all discussion of policy and issues that even mentioned a public official or political candidate, would improperly deter and penalize vital criticism of government because speakers would fear running afoul of the FECA’s prohibitions. “The distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical operation. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and government actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.” *Id.* at 42–43. If any reference to a candidate in the context of advocacy of an issue rendered the speech or the speaker subject to campaign finance controls, the consequences for the First Amendment would be intolerable.

Issue advocacy is freed from government control through a number of other doctrines the courts have recognized as well. First, the constitutional right to engage in unfettered issue advocacy is not limited to individuals or cause organizations. Business corporations and unions can speak publicly and without limit on anything short of express advocacy of a candidate’s election. See *First National Bank of Boston v. Bellotti* 435 U. S. 765 (1978). (Of course, media corporations can speak publicly and without limitation on any subject, including editorial endorsements of the election or defeat of candidates, i.e. “express advocacy,” see *Mills v. Alabama*, 384 U.S. 214 (1966).)

Contributions to issue advocacy campaigns cannot be limited in any way, either. See *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981). Finally, issue advocacy may not even be subject to registration and disclosure. See *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Buckley v. Valeo*, 519 F.2d 821, 843–44 (1975) (holding unconstitutional a portion of the FECA which required reporting and disclosure by issue organizations that publicized any voting record or other information “referring to a candidate.”) The rationale for these principles is not just that these various groups have a right to speak, but also that the public has a right to know and a need to hear what they have to say. This freedom is essential to fostering an informed electorate capable of governing its own affairs.

Thus, no limits, no forced disclosure, no forms, no filings, no controls should inhibit any individual’s or group’s ability to support or oppose a tax cut, to argue for more or less regulation of tobacco, to support or oppose abortion, flag burning, campaign finance reform and to discuss the stands of candidates on those issues. That freedom must be preserved whether the speaker is a political party, an issue organization, a labor union, a corporation, a foundation, a newspaper or an individual. That is all protected “issue advocacy,” and the money that funds it is all, in effect, “soft money.” Those who advocate government controls on what they call “sham” or “phony” or “so-called” issue ads, and those who advocate outlawing or severely restricting “soft money” should realize how broad their proposals would sweep and how much First Amendment law they would run afoul of.

Finally, it is no answer to these principled objections that these flawed bills would permit certain non-profit organizations to sponsor “electioneering communications” if they in effect created a Political Action Committee to fund those messages and disclosed the identities of their significant contributors and supporters. Under governing constitutional case law, groups like the ACLU and others cannot be made to jump through the government’s hoops in order to criticize the government’s policies and those who make them. In addition, most non-profits would be unwilling to risk their tax status or incur legal expenses by engaging in what the IRS might

view as partisan communications. Moreover, the groups would still be barred from using organizational or institutional resources for any such communications. They would have to rely solely on individual supporters, whose names would have to be disclosed, with the concomitant threat to the right of privacy and the right to contribute anonymously to controversial organizations that was upheld in landmark cases such as *NAACP v. Alabama*, 357 U.S. 449 (1958). This holding guaranteed the opportunities that donors now have to contribute anonymously—a real concern when a cause is unpopular or divisive.

## II. THE BILLS CHILL AND UNCONSTITUTIONALLY REGULATE CITIZEN AND ISSUE GROUP CONTACT WITH CANDIDATES AND ELECTED OFFICIALS

The second systemic defect in these bills is their grossly expanded concept of coordinated activity between politicians and citizens groups. Such “coordination” then taints and disables any later commentary by that citizen group about that politician. By treating all but the most insignificant contacts between candidates and citizens as potential campaign “coordination,” the bills render any subsequent action which impacts those politicians as a regulated or prohibited “contribution” or “expenditure” to those candidates’ campaigns. These provisions violate established principles of freedom of speech and association.

Under existing law, contact coordination between a candidate or campaign and an outside group can be regulated as coordinated activity only where the group takes some public action at the request or suggestion of the candidate or his representatives, i.e., where the candidate is the driving force behind the outside group’s action. See *Federal Election Commission v. Christian Coalition* 52 F. Supp. 2d 45 (D. D.C. 1999). Under Shays-Meehan, however, the definition of coordination is expanded in dramatic ways with severe consequences, thereby prohibiting certain kinds of contact with candidates. A coordinated activity can be found whenever a group or individual provides “anything of value in connection with a Federal candidate’s election” where that person or group has interacted with the candidate then or in the past in a number of ways. These include, for example, instances which the outside person or group has “previously participated in discussions” with the candidate or their representative, “about the candidate’s campaign strategy . . . including a discussion about . . . message . . .”

The Shays-Meehan bill thus imposes a year-round prohibition on all communications that are deemed “of value” to a federal candidate. The bill wrongly asserts that issue groups are “coordinating” if they merely discuss elements of the lawmaker’s message with the lawmaker or his or her staff anytime during a two-year election cycle. For example, if a veteran’s group suggests to a candidate how best to talk about the flag amendment in order to win the hearts and minds of voters, the group then can’t run ads in Senator McCain’s state praising him for protecting the flag. (The final version of the McCain-Feingold bill, though narrower than the Shays-Meehan approach, still deems as coordination any communication made by any person or group—whether or not it constitutes express advocacy—made “in connection with a candidate’s” election or “pursuant to any general . . . understanding with” with a candidate.)

Once such so-called coordination is established it can trigger a total ban on issuing any communication to the public relating to the candidate by deeming such communication as an illegal corporate contribution (or subjecting it to burdensome regulation if made by an individual). These rules can act as a continuing prior restraint, which bars the individual or group from engaging in core First Amendment speech for the lawmaker’s entire term of office. Even if such an organization has a connected PAC, it can no longer engage in any independent expenditure affecting the lawmaker because by merely speaking to the candidate or his or her staff it may have engaged in illegal “coordination.” Here again, the bills attempt to impose another gag rule on issue advocacy organizations.

Translated into the way in which citizen advocacy groups work, this means that a group cannot urge a candidate to make a particular proposal a part of the candidate’s platform if the group subsequently plans to engage in independent advocacy on that issue. Likewise, a group like the National Rifle Association could not discuss a gun control vote or position with a Representative or Senator if the NRA will subsequently produce a box score that praises or criticizes that official. Similar to the ban on “coordination” of “electioneering activity” resulting in a long blackout period when an outside group or individual can be blocked from broadcasting information about a candidate, the ban on coordination of “anything of value” can operate month in and month out throughout the entire two- or six-year term of office of the pertinent politician. That is why the AFL-CIO, among other groups, is so concerned about the treacherous sweep of the anti-coordination rules. See “Futile Labor: Why

Are The Unions Against McCain-Feingold?" *The New Republic*, March 12, 2001, pp. 14–16.

Thus, these coordination rules will wreak havoc on the ability of the representatives of unions, corporations, non-profits and even citizen groups to interact in important ways with elected representatives for fear that the taint of coordination will silence the voices of those groups in the future. The First Amendment is designed to encourage and foster such face-to-face discussions of government and politics, see *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), not to drive a wedge between the people and their elected representatives.

### III. THE BILLS UNCONSTITUTIONALLY INTERFERE WITH THE FIRST AMENDMENT RIGHTS OF POLITICAL PARTIES

In addition to their disruptive and unconstitutional effect on issue groups and issue advocacy, these bills also would have a disruptive—if not destructive—effect on national political parties in America by outlawing certain sources of funding that support party issue advocacy work. If the constraints embodied in these proposals become law, parties will have to rely solely on hard money contributions for their continued existence. The justification for these limitations are the very similar ones used to restrict issue advocacy and, in fact, make it virtually impossible for parties to continue to engage in issue advocacy work such as grassroots educational activity, platform development, candidate recruitment and get-out-the-vote efforts.

#### A. The Bills Represent a Three-Pronged Attack on Political Parties

First, the bills completely eliminate all “soft money” funding for all national political parties and all of their constituent committees and component parts. This means that no corporate, union or large individual contributions would be permitted. Further, current federal law would be repealed, because these bills impose restrictions on the ability of national parties to share money with state and local parties. The bills regulate all state and local political parties and ban them from raising or spending soft money for any “Federal election activity” that has any bearing on a federal election. Under these bills, all of the funding for the bulk of party issue advocacy work described above would become illegal, unless it came only from individuals, in relatively small dollar amounts. In other words, political parties may only raise and spend highly regulated “hard money” for virtually everything they do.

The bills also prohibit federal candidates or officeholders from having any contact whatsoever with the funding of any “federal election activity” by any organization unless that activity is funded strictly with hard money. The scope of “federal election activity” is extremely broad and encompasses the following activities if they have any connection to any federal election or candidate: (1) voter registration activity within 4 months of a federal election, (2) voter identification, get-out-the-vote activity or “generic campaign activity,” (3) any significant “public communication” by broadcast, print or any other means that refers to a clearly identified federal candidate and “promotes,” “supports,” “attacks,” or “opposes” a candidate for office (regardless of whether the communication contains “express advocacy”). Under this rule, a candidate would attend a NAACP Voters Rights benefit dinner at his or her peril if funds were being raised for any “federal election activity” such as getting people to the polls on election day. The same might be true for one who attended an ACLU Bill of Rights Day fundraiser when the ACLU produces a box score on civil liberties voting records during an election season.

#### B. Political Party Activity is Fully Protected by the First Amendment

Political funding by political parties is strongly protected by the First Amendment no less than political funding by candidates and committees. The only political funding that can be subject to control is either contributions given directly to candidates and their campaigns (or partisan expenditures explicitly coordinated with campaigns) or communications that constitute express advocacy. All other funding of political activity and communication is beyond presumptive constitutional control. That would include soft money activities by political parties. While it is true that parties are advocates for their candidates’ electoral success, they are also issue organizations that influence the public debate. Get-out-the-vote drives, voter registration drives, issue advocacy, policy discussion, grass-roots development and the like are all activities fundamentally protected by the First Amendment and engaged in by a wide variety of individuals and organizations. For example, an issue ad by the ACLU criticizing an incumbent mayor on police brutality is an example of soft money activity, in the broadest sense of that term, as is an editorial on the same subject in *The New York Times*. We need more of all such activity during an election season, not less, from political parties and others.

The right of individuals and organizations, corporate, union or otherwise, to support such issue advocacy traces back to the holding in *Buckley* that only those communications that “expressly advocate” the election or defeat of identified candidates can be subject to control. The Supreme Court in the 1996 case of *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) noted the varying uses of soft money by political parties. In the recent case, *Nixon v. Shrink Missouri Governmental PAC*, 528 U.S. 377 (2000), which upheld hard money contribution limits, the Court’s opinion was silent on whether soft money could be regulated at all. Although certain individual Justices invited Congress to consider doing so, the case itself had nothing to do with soft money.

To be sure, to the extent soft money funds issue advocacy and political activities by political parties, it becomes something of a hybrid: it supports protected and unregulatable issue speech and activities, but by party organizations often more closely tied to candidates and officeholders. The organizational relationship between political parties and public officials might allow greater regulatory flexibility than would be true with respect to issue advocacy by other organizations. Thus, for example, disclosure of large soft money contributions to political parties, as is currently required by regulation, might be acceptable, even though it would be impermissible if imposed on non-party issue organizations. But the total ban on soft money contributions to political parties raises serious constitutional difficulties.

Just last year, the Supreme Court reminded us once again of the vital role that political parties play in our democratic life by serving as the primary vehicles for the political views and voices of millions and millions of Americans. “Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting the electoral candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself.” *California Democratic Party v. Jones*, 530 U.S. 567 2402, 2408 (2000). As Justice Anthony M. Kennedy put it in his separate opinion in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U. S. 604 (1996): “The First Amendment embodies a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. Political parties have a unique role in serving this principle; they exist to advance their members’ shared political beliefs.” *Id.* at 629.

While electing candidates is a central mission of political parties, they do so much more than that. They engage in issue formulation and advocacy on a daily basis, they mobilize their members through voter registration drives, they organize get-out-the-vote efforts, they engage in generic party communications to the public. Much of these activities are supported by what these bills would deem soft money. They would dry up these significant sources of funding for those party activities. That would basically starve the parties’ ability to engage in the grass roots and issue-advocacy work that makes American political parties so vital to American democracy.

*C. The Bills Diminish the Ability of Political Parties to Compete Equitably with Others Who Choose to Speak During Campaigns.*

Finally, the law unfairly bans parties, but no other organizations, from raising or spending soft money. That would mean that any one else—corporations, foundations, media organizations, labor unions, bar associations, wealthy individuals—could use any resources without limit to attack a party and its programs, yet the party would be defenseless to respond except by using limited hard money dollars. The NRA could use unregulated funds to mount ferocious attacks on the Democratic Party’s stand on gun control, and the Party would be effectively silenced and unable to respond. Conversely, NARAL could mercilessly attack the Republican Party’s stand on abortion, using corporate and foundation funds galore, and that Party would likewise be stifled from responding in kind. A system which lets one side of a debate speak, while silencing the other, violates both the First Amendment and equality principles embodied in the Constitution.

*D. The Bills Impedes the Creation of New Parties*

As with issue organizations, fledgling parties that pose an alternative to Democratic and Republican parties often rely on large individual contributions and corporate contributions to get off the ground. Once newer parties have the ability to get their message out, it is then easier to attract supporters and solicit contributions from an expanded donor base. Thus, not only are Shays-Meehan and McCain-Feingold incumbent protection bills, these bills also enshrine the two major parties. The soft money prohibitions that are contained in these bills virtually guarantee that minor parties will not be competitive. Those voters who are disenchanted with the

major parties will not have viable means of mounting third-party challenges to the status quo.

#### IV. SOME ADDITIONAL PROBLEMS

The Shays-Meehan bill contains a number of other provisions which we consider unconstitutional or ill-advised.

##### *The Millionaires Amendment*

The “millionaires amendment” the Senate added to the McCain-Feingold campaign finance bill is intended to protect Senate candidates facing wealthy, self-financed opponents. The primary element would be increases in “hard money” contributions to candidates from individuals and political action committees (PACs). According to the *Congressional Quarterly*, here is how the proposal would work. In Louisiana, for example, if a Senate candidate put about \$554,000 of personal funds into the race, the limits on contributions to his opponents would triple from \$1,000 to \$3,000 per person and from \$5,000 to \$15,000 from each PAC for each election, primary or general. What confounds us is the notion that the Senate is willing to say that massive increases in hard money contributions are permissible, as long as you are running against millionaire. On the other hand, the Senate also says—with a straight face—that all other hard money contribution limits must remain low. The only reason that the Supreme Court approved contributions limits in the first place is to prevent the reality or the appearance of *quid pro quo* corruption. If the Senate has deemed that a \$3000 contribution during the primary and a \$3000 contribution to the same candidate during the general election are not corrupting, then what is the justification for not raising *all* contribution limits to \$6000 per year?

##### *Lowering the Contribution Reporting Threshold*

Lowering the contribution reporting threshold from \$200 down to as low as \$50 will sacrifice a great deal of individual political privacy, chill the average citizen from making a modest contribution to the candidate or party of their choice and bears not the slightest relationship to any real concern with corruption from large contributions. This is an almost gratuitous assault on political privacy. Creating a Big Brother-style clearinghouse of all disclosure and reporting of political activity under a variety of laws strikes us as a similar assault on privacy. Whether or not reporting under any of these laws is valid, the sum total of that information is greater than the sum of its parts in terms of the threat to privacy.

#### CONCLUSION

Neither the House nor the Senate version of the Bipartisan Campaign Finance Reform Act of 2001 is real reform. They are both fatally flawed assaults on First Amendment rights. The ACLU believes that there is a less drastic and constitutionally offensive means to achieve reform: public financing.

If Congress believes that Congressional and Executive Branch deliberations are distorted by large individual, corporate and union contributions to parties, or by effective forms of issues advocacy, then Congress should help qualified candidates mount competitive campaigns. While we realize that many nay-sayers argue that public financing is dead on arrival, we should remember that this country once had a system where private citizens and political parties printed their own ballots. It later became clear that to protect the integrity of the electoral process ballots had to be printed and paid for by the government. For the same reasons, the public treasury pays for voting machines, polling booths, registrars and the salaries of elected officials (although certainly not on an equitable basis, according to the assertions in ACLU lawsuits and a recent report by the U.S. Commission on Civil Rights). We take it as a fundamental premise that elections are a public, not a private, process—a process at the very heart of democracy. If we as a nation are fed up with a system that allows too much private influence and personal and corporate wealth to prevail, then we should complete the task by making public elections publicly financed.

Mr. CHABOT. Mr. Bopp.

#### **STATEMENT OF JAMES BOPP, JR., GENERAL COUNSEL, JAMES MADISON CENTER FOR FREE SPEECH**

Mr. BOPP. Thank you. My name is James Bopp, Jr. I am a member of the law firm of Bopp, Coleson & Bostrom in Terre Haute, Indiana, and a member of the firm of Webster, Chamberlain &

Bean in Washington, D.C. I have had the pleasure of litigating over 50 election law campaign finance cases over the last 20 years of my practice, and, therefore, my views have had, on many occasions, to be tested in the combat of litigation. I am pleased to report, and I think my clients are pleased, that of the over 30 cases that have now been completed in this area that I have litigated, that we have won over 90 percent of those cases, winning 1 or more cases in 8 of the 12 Federal circuit courts of appeal.

It seems to me, and a review of our testimony demonstrates, that there is simply a wealth of authority in litigation, both with the Federal Election Commission and with various States, where provisions just like those in Shays-Meehan and McCain-Feingold have been found to be unconstitutional and struck down. The dearth of authority in support of McCain-Feingold and Shays-Meehan is well reflected in the testimony of Mr. Moramarco, who will testify here in a minute. In his testimony, he does not cite one single case that upholds any provision that is contained in McCain-Feingold, in Shays-Meehan. I have litigated dozens of cases on behalf of citizens' groups and political parties that have struck down provisions just like those contained in McCain-Feingold.

Now, I know some would hope that the heart of the first amendment would be cut out by the Supreme Court in some future case, because political participation by average citizens is exactly what the first amendment is designed to protect. And McCain-Feingold and Shays-Meehan is a broad-based attack on the ability of average citizens to participate in our political system. Why is that? Because the McCain-Feingold bill does not lay a glove on incumbent politicians. It does nothing about candidates for public office. What it does, it imposes no limits on the media or on the wealthy, who can always spend their own money. They do not have to pool their resources. They do not have to join a group. They have the money, and they can spend it to influence an election under McCain-Feingold.

But groups are vitally important. The only effective vehicle for average citizens is a group. They have to pool their resources. Those groups are advocacy groups, labor unions, and political parties, and McCain-Feingold targets those groups for wide-ranging prohibitions and limits, the result being, of course, winners and losers, winners being incumbent Members of Congress, incumbent politicians, the media and the wealthy; the losers, average citizens who have then no vehicle by which to pool their resources and participate.

In my testimony on Thursday in the House Administration Committee, I will talk about the attack on citizens' groups. Here I wish to talk for the time remaining about political parties.

Now, political parties are like other citizens' groups. They advance principles, they lobby with respect to legislation, and they support candidates for public office. They are, however, somewhat special. They are vital for a healthy democracy. Indeed, Sandra Day O'Connor recognized in a recent case the importance of political parties in the vitality and stability of our political system. This is so because political parties are majoritarian; that is, they seek majority support. They, therefore, resist being captured by special

interests or minority groups and—not racial, but groups that represent only small groups of people.

Secondly, they are mediating and moderating. They can mediate among factions because they are seeking majority support rather than advancing some narrow self-interest. They are accountable year after year after year to the voters for what their candidates do while in office and, therefore, promote accountability. They promote participation in ways that candidates do not promote participation, primarily through voter registration, get out the vote—activities funded by nonregulated, lawful money in our political—not regulated by Federal law—in our political system. They encourage electoral competition, because they often support challengers rather than incumbents, of course making incumbent politicians the ones that often are tempted to limit parties to protect their own self-interests.

Now, Shays-Meehan and McCain-Feingold cut the head off and legs off of political parties. The head is cut off by prohibiting soft money to national political parties, assuming that national political parties are not national, but Federal; that is, only interested in Federal elections. Therefore, money is not available for education, for lobbying, for promotion of principles of the party and for involvement in State and local elections the national parties are concerned about.

McCain-Feingold and Shays-Meehan then cuts the legs off of political parties by then requiring hard money to be used for Federal election activity—to get out the vote, voter registration and generic campaign activity. This federalizes a wide range of activities that State and local parties engage in really because they are interested in State and local elections, not Federal elections. The result would be, of course, to limit participation where such activity promotes participation, and it would limit the aid to challengers.

Thus, Shays-Meehan and McCain-Feingold is a direct attack upon one of the most vital institutions in our political system, that of political parties. It would virtually eliminate the ability of average citizens to influence the political process in that way. Frankly, I just do not understand how we can be considering a bill of dozens and dozens of pages in a context in which the first amendment to the Constitution says, quote, Congress shall make no law abridging the freedom of speech and the press. That is an unqualified prohibition directly at protecting political speech and the involvement of average citizens in our process. By McCain-Feingold targeting groups, they have targeted average citizens, leaving the power to incumbent politicians, the media, and the wealthy. Thus, those who say that it is a target of the wealthy is exactly opposite of the truth. The average working man and woman in America that joins a union is not wealthy. They must join a union to pool their resources and participate. The wealthy have their money and can spend it on their own.

Mr. CHABOT. Mr. Bopp, are you close to wrapping up here?

Mr. BOPP. Yes.

Thus, on the basis of that, I believe that these provisions of McCain-Feingold are not only unconstitutional, but bad public policy.

Mr. CHABOT. Thank you.

[The prepared statement of Mr. Bopp follows:]

PREPARED STATEMENT OF JAMES BOPP, JR.<sup>1</sup>

Thank you for the opportunity to testify regarding constitutional issues raised by recent campaign finance legislation. My testimony today will focus on the effect on political parties if current campaign finance “reform” bills—such as McCain-Feingold (S. 27) and Shays-Meehan (H.R. 380)—were enacted into law. On June 14, I will also be testifying on constitutional problems posed by these bills before the House Administration Committee, and that testimony will focus on the effect of such legislation on the constitutional rights of citizen groups. By cross-referencing these two, I will reduce the volume of material to be reproduced, but members of this Subcommittee are respectfully referred to my June 14 testimony, which I incorporate herein by reference.

I am a practicing attorney with the law firm of Bopp, Coleson & Bostrom in Terre Haute, Indiana. Since 1980, a significant portion of my law practice has involved the representation of non-profit corporations—including the National Right to Life Committee and the Christian Coalition—and political action committees regarding compliance with the Federal Election Campaign Act (FECA). I have also represented several state political party committees, including the Vermont and Michigan Republican Parties, in both state and federal courts, including successfully challenging unconstitutional state election laws on their behalf.

I am also the General Counsel for the James Madison Center for Free Speech (a corporation recognized by the Internal Revenue Service as a non-profit organization under 501(c)(3) of the Internal Revenue Code), which advocates and promotes protection of free speech and association rights in the election law context through such avenues as litigation, legislative analysis and testimony, comments on proposed rulemaking by the Federal Election Commission, and publishing scholarly and popular articles.

In these capacities, I have represented parties in numerous FEC investigations and enforcement actions, as well as in pre-enforcement suits against the FEC that resulted in the striking down of five separate FEC regulations and section 441b of the FECA for violating the First Amendment. In addition, I have represented numerous plaintiffs in successful law suits challenging state election statutes and regulations.<sup>2</sup>

Because of my developed expertise in federal election law, I have provided testimony on numerous occasions before federal and state legislative committees on proposed election legislation and before the FEC on proposed regulations. Since 1996, I have served as the Chairman of the Election Law Subcommittee, Free Speech & Election Law Practice Group, The Federalist Society for Law & Public Policy Studies. My resume is attached.

I. THE PROPOSED RESTRICTIONS ON POLITICAL PARTIES ARE UNCONSTITUTIONAL AND BAD PUBLIC POLICY.

A. Provisions Discussed

The proposed bill before the Committee (H.R. 380 or “Shays-Meehan”) and the Senate-passed McCain-Feingold bill (S.27) impose virtually identical restrictions on political parties. To the extent they differ, the differences are insubstantial from a constitutional and practical perspective, so while the following discussion will focus

<sup>1</sup>The witness states, in compliance with the House rule requiring disclosure of grants or contracts relevant to a witness’ testimony received in the current or two preceding fiscal years by the witness or any entity represented by the witness, that no such grants or contracts exist.

<sup>2</sup>In addition to dozens of successful federal district court decisions, I have been privileged to represent numerous plaintiffs in their successful efforts to vindicate their constitutional rights to free speech in the election context, which resulted in reported appellate decisions by the United States Courts of Appeals for the 1st, 2nd, 4th, 7th, 8th, 9th, 10th and 11th circuits. See *Florida Right to Life Committee v. Lamar*, 238 F.3d 1288 (11th Cir. 2001); *Citizens for Responsible Gov’t State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000); *Vermont Right to Life Committee v. Sorrell*, 221 F.3d 376 (2nd Cir. 2000); *Iowa Right to Life Committee v. Williams*, 187 F.3d 963 (8th Cir. 1999); *North Carolina Right To Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999); *California ProLife Council v. Scully*, 164 F.3d 1184 (9th Cir. 1999); *Brownsburg Area Patrons Against Change v. Baldwin*, 137 F.3d 503 (1997); *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997); *Minnesota Concerned Citizens for Life v. FEC*, 113 F.3d 129 (8th Cir. 1997); *Maine Right to Life Committee v. FEC*, 914 F. Supp. 8 (D.Me. 1995, *aff’d per curiam*, 98 F.3d 1 (1st Cir. 1996); *New Hampshire Right to Life v. Gardner*, 99 F.3d 8 (1st Cir.1996); *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994); *Faucher v. FEC*, 928 F.2d 468, 472 (1st Cir. 1991).

on the Shays-Meehan provisions regarding political parties, it is applicable to the Senate-passed bill.

Continuing the modern trend towards significantly reducing the participation of political parties in the political process,<sup>3</sup> Shays-Meehan reflects a woeful ignorance of—or outright disdain for—the constitutionally protected role political parties play in our republican democracy. Section 101(1)(a) of Shays-Meehan bans political party national committees from soliciting, receiving or directing to another person any contribution that exceeds the FECA's limit of \$20,000 for any purpose. This provision eliminates the ability of national committees to raise funds outside of the source and amount restrictions of the FECA for the many national party activities that are not related to electing federal candidates, including supporting state and local party committees and candidates and from advancing state and federal legislative agenda through grassroots lobbying.

Section 101(1)(b) requires state and local party committees to use funds raised under the FECA's limits<sup>4</sup> if spent for a newly created classification of "Federal election activities." Shays-Meehan defines "Federal election activity" as (1) voter registration within 120 days of a federal election, (2) "voter identification, get-out-the-vote activity and generic campaign activity in connection with an election" in which a candidate for federal office is on the ballot even if there are state candidates also on the ballot, (3) if spent on a public communication that refers to federal candidates and that "promotes, attacks, or opposes a candidate for that office" even if the communication does not expressly advocate for or against a candidate, and (4) a State party employee's salary if the employee devotes more than a quarter of her monthly work schedule to "Federal election activities."<sup>5</sup> These provisions effectively federalize state party committees and dramatically limit the ability of state party committees to perform traditional functions that are vital to healthy state elections.<sup>6</sup>

In section 205, Shays-Meehan<sup>7</sup> requires political parties, once they select a nominee, to elect either to make only constitutionally protected independent expenditures with respect to the candidate or to waive the right to do so in order to be free to make coordinated expenditures, which are limited as contributions. This "either/or" approach reflects an unwillingness to accept that the Supreme Court has already decided that political parties enjoy the same First Amendment liberty to both make independent expenditures and to contribute to candidates as individuals and PACs.<sup>8</sup> Section 205 further mandates that all state, local, national and congressional campaign committees of a party shall be considered to be a single committee for purposes of the waiver.

Section 206 mandates that party coordinated expenditures be a contribution to the candidate and be subject to contribution limits. The definition of "coordinated activity" in section 206(a)(1)(C) applies to all "persons," not just political parties. This definition is unconstitutionally overbroad for reasons that will be presented more fully in my testimony before the House Administration Committee on June 14, 2001. My testimony before this committee will be confined to political party coordinated activities, which may not constitutionally be limited in any event, even by a provision that would otherwise be constitutional as applied to other persons. Section 206(a)(1)(E) also treats all party committees as a single legal entity for purposes of coordinated expenditures.

None of these provisions are desirable or constitutional. The Supreme Court has said "[w]e are not aware of any special dangers of corruption associated with political parties. . . ."<sup>9</sup> That assertion is backed both by the case law and by the overwhelming political science evidence of how political parties operate.

<sup>3</sup>See generally, Ralph K. Winter, "THE NEW AGE OF POLITICAL REFORM": LOOKING BACK, 15 Ga. L. Rev. 1 (1980) (tracing the development of the regulation of political parties from the "evolved Madisonian system" through the Progressive Era and the increased regulation of campaign finances beginning in the 1970's.)

<sup>4</sup>H.R.380 and S.27 each raise the limit on contributions to state political party committees to \$10,000 per calendar year.

<sup>5</sup>Section 101(b)(2)(A).

<sup>6</sup>Only Virginia and New Jersey conduct elections for state offices in odd numbered years. This section, then, effectively federalizes state party activity in 48 states.

<sup>7</sup>See section 213 in S.27.

<sup>8</sup>See *FEC v. Colorado Republican Federal Campaign Comm.*, 518 U.S. 614, 618 (1996) (plurality) ("We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties.")

<sup>9</sup>*Colorado Republican*, 518 U.S. at 616.

*B. Political Parties Play a Vital, Constitutionally Significant Role in Republican Democracy*

The First Amendment commands that “Congress shall make no law . . . abridging the freedom of speech.”<sup>10</sup> To abridge is “to contract, to diminish; to deprive of.”<sup>11</sup> The text of this explicit, absolute, constitutional command is often overlooked in discussions of campaign finance laws, even, or perhaps especially, by those sworn to uphold it, but it has no more pressing application. While Shays-Meehan and McCain-Feingold fly under the benign-sounding propaganda banner of “Campaign Finance Reform,” they are in reality nothing more than the latest efforts to subject political speech and association to the most rigorous of regulation to the benefit of incumbent politicians.<sup>12</sup> Federal restrictions on political speech and association “limit political expression ‘at the core of our electoral process and of the First Amendment freedoms.’”<sup>13</sup> Political parties, while not perfect, have traditionally been the most important constitutionally protected citizens’ groups to the maintenance and survival of republican democracy.<sup>14</sup> Accordingly, Congress increases the regulatory burden on these vital institutions at the nation’s peril.<sup>15</sup>

In many contexts the U. S. Supreme Court has recognized the constitutionally significant role played by political parties in our republican democracy. Just last term the High Court struck down California’s blanket primary law because it unconstitutionally interfered with political parties’ protected political association. Justice Scalia wrote for seven Justices: “Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself.”<sup>16</sup> As Justice O’Connor has recognized:

There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government. The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change.<sup>17</sup>

Of course, “measured change” is not often the goal of incumbent politicians before most elections. This unfortunate reality could go a long way toward explaining the zeal with which some incumbent politicians favor reducing the impact political parties traditionally have in mobilizing voters to support challengers in competitive races. Political scientists have long recognized that political parties are the most in-

<sup>10</sup>U.S. CONST. amend I.

<sup>11</sup>T. Sheridan, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796).

<sup>12</sup>As Wisconsin Supreme Court Justice Prosser has warned, “The First Amendment is not what it used to be. It is fashionable today to protect deviant speech and expressive conduct. But pure speech which discusses public issues and public officials is vulnerable to the impulse for government regulation.” *Elections Bd. v. Wisconsin Mfrs. & Commerce*, 227 Wis. 2d 650, 685 (1999) (PROSSER, J. (Concurring in part, dissenting in part)).

<sup>13</sup>*Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).

<sup>14</sup>See Walter Dean Burnham, *Critical Elections and the Mainsprings of American Politics* 133 (1970):

Political parties, with all of their well-known human and structural shortcomings, are the only devices thus far invented by the wit of Western man which with some effectiveness can generate countervailing collective power on behalf of the many individuals powerless against the relatively few who are individually—or organizationally—powerful.

<sup>15</sup>See Winter, *supra* note 3 at 18 (“History has harsh rewards for those who cannot acknowledge progress and who would carelessly abandon the hard-won gains of the past for the ephemeral promises of the unknown. I fear we have hardly begun to pay the price.”).

<sup>16</sup>*California Democratic Party v. Jones*, 120 S. Ct. 2402, 2407 (2000). Moreover, the Supreme Court’s holding has a long and distinguished pedigree:

The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures, and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

A. de Tocqueville, 2 *Democracy in America* 203 (Bradley, ed. 1954) (emphasis added).

<sup>17</sup>*Davis v. Bandemer*, 478 U.S. 109, 144–45 (1986) (O’Connor, J., concurring). See also, *Eu v. San Francisco Democratic Central Committee*, 489 U.S. 214, 244 (1989); *Republican Party of Connecticut v. Tashjian*, 479 U.S. 208, 214–15 (1986); *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 121–22 (1981); *Cousins v. Wigoda*, 419 U.S. 477, 487–88 (1975); *Storer v. Brown*, 415 U.S. 724, 728–29 (1974); *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

fluent institution in the electoral process for creating greater turnover in legislatures.<sup>18</sup> Indeed, *increasing* the role of political parties in voter registration and get-out-the-vote efforts is the practical formula for improving many of the ills the soft-money ban purports to address.<sup>19</sup>

While there are varying opinions about the role of money in campaigns, there is wide-spread agreement among political scientists that political parties ought to be strengthened rather than weakened. A. James Reichley, Visiting Senior Fellow of the Graduate Public Policy Program at Georgetown University testified in 1995 before the House Oversight Committee on the Role of Political Parties, that “there is a broad consensus within the profession [of political scientists] on the desirability of strengthening parties, that parties have been weakened in the overall system.”<sup>20</sup> Parties ought to be strengthened because:

[t]hey promote agreement between different interests and groups. They promote discussion of major issues and educate the electorate. They promote effective government across all divisions of the American system. They provide responsibility and accountability. They promote participation, and perhaps, most relevant, *they promote clean politics.*<sup>21</sup>

Contrary to the widely-held consensus regarding the desirability of strengthening parties, many new restrictions, including the FECA, have had the opposite effect.<sup>22</sup> Indeed, the 1979 amendments to the FECA, which allowed state and local parties to use money raised outside of the restrictions of the FECA to pay for party slate cards, office space and accounting expenses, were specifically adopted in response to a marked decline in grassroots political activity during the 1976 campaign.<sup>23</sup>

In 1972 a diverse group of over 300 professional political scientists and political practitioners formed the Committee for Party Renewal. In 1984 the Committee adopted a manifesto entitled “Principles of Strong Party Organization,”<sup>24</sup> which, based on the consensus views of these political scientists, advocated that:

- Political parties should govern themselves.
- Political party organizations should be open and broadly based at the local level.
- Political parties should advance a public agenda.
- Political parties should be effective campaign organizations.
- Political parties should be a major financier of candidate campaigns.
- Election law should encourage strong political parties.

The new restrictions before the Committee violate each of these principles, weakening political parties to the detriment of the Republic. The current proposal to further restrict the ability of local, state and national elements of political parties to

<sup>18</sup> Malbin & Gais, *THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES* 145–158 (1998) (“Political parties . . . consistently gave disproportionately to candidates who were in close races, especially challengers and open-seat candidates. Party spending, therefore, seems to be an important vehicle for satisfying one of the two major goals of campaign finance reform: encouraging electoral competition.”).

<sup>19</sup> Gierzynski and Breaux, “The Role of Parties in Legislative Campaign Financing,” 15 *The American Review of Politics* 171–189 (1994) (“Increasing the party role would reduce the gap between incumbent revenues and challenger revenues.”). Furthermore, “a larger role for parties in financing elections would result in more equitable distribution of campaign money and a greater level of competition in legislative campaigns.” *Id.* at 172.

<sup>20</sup> *Campaign Finance Reform Legislation: The Role of Political Parties: Hearing Before the House Oversight Comm.*, 104th Cong. 66 (1995).

<sup>21</sup> Gerald M. Pomper, Professor of Political Science, Engleton Institute of Politics, Rutgers University, Testimony, *Campaign Finance Reform Legislation: The Role of Political Parties: Hearing Before the House Oversight Comm.*, 104th Cong. 42 (1995) (emphasis added).

<sup>22</sup> Congressman William Thomas, Chairman of the House Committee on Oversight, Testimony, *Campaign Finance Reform Legislation: The Role of Political Parties: Hearing Before the House Oversight Comm.*, 104th Cong. 27–28 (1995).

[P]olitical parties are unique institutions. Unfortunately, I don’t believe there was adequate knowledge in the 1970s about the role of the political parties in not only recruiting candidates but getting them elected and then programming public policy and the issues, or education that the parties do. Perhaps, the limits that were placed on the ability of political parties to get funds I think significantly hampered parties in a negative way and relatively enhanced the special interests. Now, while people are looking at ways to change the system, I think perhaps unleashing political parties or freeing them from the current legislation would go a long way toward solving our problems

<sup>23</sup> Bradley A. Smith, *Soft Money. Hard Realities: The Constitutional Prohibition On A Soft Money Ban*, 24 *J. Legis.* 169, 182 (1998).

<sup>24</sup> Attached as Appendix B.

form broad-based coalitions and to advance their electoral agenda is a step in the wrong direction.

1. *The soft money ban federalizes many activities of national, state and local political parties.*

Haley Barbour, the former Chairman of the Republican National Committee, defined a political party as “an association of like-minded people who debate issues, who attempt to influence government policy, and who work together to elect like-minded people to local, State and Federal office.”<sup>25</sup> Political parties are primarily an association of people; they are not simply repositories for campaign contributions, or “super-PAC’s.” Second, political parties have a legitimate role in debating issues, promoting ideas and in formulating public policy. Third, national parties have significant local and state components; they are “national” not “federal” committees. National parties exist for the purpose of electing federal and state candidates and for effecting federal and state public policy. National parties have considerable, constitutionally protected interests to participate in state and local elections and to engage in the public policy debate on an equal footing with other associations. The soft money ban ignores this reality and converts national party committees into *federal* party committees as a matter of law.

Additionally, under Shays-Meehan, if there is a federal candidate on the ballot, any state political party “federal election activity” must be paid for with money raised under the limits of federal law, not with money raised lawfully under state law. These activities are traditional activities that state and local parties have always done and the national political parties have supported. The fact that there is a federal candidate on the ballot, along with the state and local candidates for whom state and local parties have the greater concern, does not justify federalizing and limiting these activities.

Those who would attempt to justify the new restrictions on political parties in Shays-Meehan on the ground that the Supreme Court upheld limits on individual and political committee contributions to candidates in *Shrink Missouri Government PAC v. Nixon*,<sup>26</sup> are wrong. Following the Supreme Court’s numerous precedents recognizing the unique associational interests embraced by political parties, four lower federal court’s have struck down restrictions on political party financing *since* the *Shrink Missouri* case was decided.

Indeed, even as the U. S. Senate fiddled with McCain-Feingold, Rome began to burn. On April 10, 2001, the United States District Court for the District of Alaska held that a state statute was unconstitutional as applied to state “soft money” contributions to political parties. The Court held that political parties have a constitutional right to maintain separate accounts to accept unlimited contributions to fund issue advocacy and voter mobilization programs. Furthermore, it held that the government has no interest sufficiently important to justify the imposition of limits on contributions to those accounts.<sup>27</sup> So-called “soft money” bans are unconstitutional.<sup>28</sup>

The Tenth Circuit Court of Appeals went a step farther last year and struck down the federal limit on party coordinated expenditures in 2 U.S.C. § 441a(d) on First Amendment grounds. It held that the government had “not demonstrated . . . that coordinated spending by political parties corrupts, or creates the appearance of corrupting, the electoral process.”<sup>29</sup> The Supreme Court has heard oral argument in that case and a decision is expected by July 2001. Under this ruling, the party coordination provision in section 206(a)(1)(E) will likely be stillborn.

Extending the recognition that political parties are a positive (rather than corrupting) influence on the electoral process to its logical end, the Eighth Circuit Court of Appeals and the United States District Court for the District of Vermont each held that state law limits on political party monetary contributions to candidates violate the First Amendment. The Eighth Circuit held that because a political party speaks through its candidates, limits on a party’s contributions impose unconstitutional burdens on the party’s speech. The First Amendment rights at

<sup>25</sup> *Campaign Finance Reform Legislation: The Role of Political Parties: Hearing Before the House Oversight Comm.*, 104th Cong. 10–11 (1995) (statement of Haley S. Barbour, former chairman, Republican National Committee).

<sup>26</sup> 120 S. Ct. 897 (2000).

<sup>27</sup> *Jacobus v. Alaska*, No. A97–0272 CV (JKS) (D. Ak., April 10, 2001).

<sup>28</sup> See Bradley A. Smith, *Soft Money. Hard Realities: The Constitutional Prohibition On A Soft Money Ban*, 24 J. Legis. 179 (1998).

<sup>29</sup> *FEC v. Colorado Republican Federal Campaign Committee*, 213 F.3d 1221, 1233 (10th Cir.), cert. granted, 121 S. Ct. 296 (2000) (“*Colorado II*”) (footnote omitted).

stake in the context of party contribution limits are “different from, and weightier than, those that were involved in Buckley.”<sup>30</sup>

The main object of a political party is to elect its candidates to office, and, in large measure, the speech of its candidates is its own speech. While political parties employ various methods to speak, a principal way in which they express themselves is through the speech of their candidates. In fact, parties and their candidates are often virtual alter egos.<sup>31</sup>

Based on a fully developed record after a ten day bench trial, the District Court in Vermont likewise struck down recently enacted political party contribution limits and echoed the Eighth Circuit’s view that contributions from political parties to their own candidates enjoy a high degree of constitutional protection:

Political parties speak with a different voice than individuals. Such limits would reduce the voice of political parties to an undesirable, and constitutionally impermissible, whisper. For the stability and consistency of our competitive electoral process, parties must continue to function as they have in the past.<sup>32</sup>

The post-*Shrink* decisions of these four federal courts demonstrate that Shays-Meehan is a move in the wrong direction. Furthermore, they demonstrate that not only is the proposed soft money ban unconstitutional, but that other already-existing restrictions on political parties are also unconstitutional.<sup>33</sup>

In addition to being unconstitutional, the soft money ban in Shays-Meehan is actually counter-productive in the eyes of political scientists based on the unique role political parties play in the electoral process. In a college political science text book about campaign finance published in 2000, the author, himself a proponent of other reforms, praised the effects of soft money for creating increased voter turnout:

Party soft money can be spent on issue advertisements—the “air war”—or on identifying, registering, and getting voters to the polling places—the “ground war.” Both of these uses—especially the latter—should be seen as positive developments. Issue advertisements can strengthen the parties by allowing the parties a role in setting the electoral agenda. Identifying, registering, and getting voters to the polls increases participation—including groups underrepresented in the pluralist system—and cannot be seen as anything but a positive development.<sup>34</sup>

Thus, because of the unique, constitutionally important role played by political parties, any effort to improve the electoral process ought to “steer money to the political parties and encourage them to use that money for activities that reinvigorate U.S. elections.”<sup>35</sup> Furthermore, as one prominent proponent of campaign finance reform has conceded, political parties are the solution rather than the problem:

For political parties, there seems little alternative to simply legitimize what has already happened de facto: the abolition of all limits. . . . [S]uch an outcome is not to be lamented. Political parties deserve more fundraising freedom, which would give these critical institutions a more substantial role in elections.<sup>36</sup>

What’s more, imposing federal limits on virtually all state party committee activity simply because federal and state elections are held on the same day runs counter to the will of the people of many states.<sup>37</sup> For example, the people of California in 2000 approved Proposition 34 by a 60 to 40 percent margin.<sup>38</sup> In the findings section of Proposition 34, they declared that “Political parties play an important role in the American political process and help insulate candidates from the potential cor-

<sup>30</sup> *Missouri Republican Party v. Lamb*, 227 F.3d 1070, 1072 (8th Cir. 2000).

<sup>31</sup> *Id.*

<sup>32</sup> *Landell v. Sorrell*, 118 F. Supp. 2d 459, 487 (2000).

<sup>33</sup> See James Bopp, Jr., *All Contribution Limits Are Not Created Equal: New Hope in the Political Speech Wars*, 49 Cath. L. Rev. 11, 21–26 (1999) (arguing that contribution limits to political parties are unconstitutional because they impose direct restrictions on the parties’ speech).

<sup>34</sup> Anthony Gierzynski, MONEY RULES: FINANCING ELECTIONS IN AMERICA 125 (2000).

<sup>35</sup> Gierzynski, MONEY RULES at 125.

<sup>36</sup> LARRY J. SABATO AND GLENN R. SIMPSON, DIRTY LITTLE SECRETS 334 (1996) (emphasis in original)(referring specifically to “soft” money contributions.)

<sup>37</sup> The following states impose no limits on individual contributions to political party committees: Alabama, Arizona, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Texas, Utah, and Virginia.

<sup>38</sup> California Secretary of State Website; <<<http://vote2000.ss.ca.gov>Returns/prop/00.htm>>>, visited on June 7, 2001.

rupting influence of large contributions.”<sup>39</sup> The Act was specifically adopted to “strengthen the role of political parties in financing political campaigns by means of reasonable limits on contributions to political party committees and by limiting restrictions on contributions to, and expenditures on behalf of, party candidates, to a full, complete, and timely disclosure to the public.”<sup>40</sup> The new \$25,000 per year limit on contributions to state political party committees applies only to those funds the party uses to in turn make contributions to state candidates, which party committees may make in unlimited quantities.<sup>41</sup> In view of the case law, the political science and the will of the American people as reflected by the laws of many States, Shays-Meehan represents unconstitutional, counter-productive, and unwanted federal paternalism at its worst.

*2. Restrictions on Local, State, and National Party Committee Issue Advocacy are Unconstitutional*

“Issue advocacy” refers to advertisements that discuss issues of public concern but do not in express or explicit words advocate the nomination election or defeat of a candidate for public office.<sup>42</sup> The provisions in Shays-Meehan defining which communications are subject to regulation are overbroad because they include far more speech than the Supreme Court and a legion of lower federal courts have held the First Amendment permits.<sup>43</sup> However, even a narrowly tailored definition of express advocacy would not cure the constitutional infirmity in the soft money ban. Forcing political parties, which after all are only broadly based citizens groups, to fund their issue advocacy and grassroots lobbying subject to source and amount contribution limits while other advocacy groups are free to raise money in unlimited amounts from foundations, individuals and business corporations to fund their issue advocacy communications violates the political parties’ rights to equal protection under the Fifth Amendment.<sup>44</sup>

It is well established that corporations, labor unions, associations of all kinds and individuals which engage in issue discussion may fund their issue advocacy without being subject to contribution limits. Because Shays-Meehan prohibits the raising of “soft money” by national political parties, they have no such money available for issue advocacy, legislative, and organizational activities. It treats national political parties as if they were just federal-candidate election machines. As a result, Shays-Meehan has severely restricted the ability of political parties to pursue these other important, historical activities of political parties.

Yet, these restrictions fail constitutional muster. Political parties enjoy the same unfettered right to issue advocacy as other entities, which is especially appropriate because advancing a broad range of issues is their *raison d’etre*. “Reforms” banning political parties from receiving and spending so-called “soft money” cannot be justified as preventing corruption, since the Supreme Court has already held that interest insufficient for restricting issue advocacy in *Buckley*.

If individuals and narrow interest groups enjoy the basic First Amendment freedom to discuss issues and the position of candidates on those issues, how can political parties, which have wide bases of interests that are necessarily tempered and diffused, be deprived of the right to compete on a level playing field in such issue advocacy?<sup>45</sup>

<sup>39</sup>2000 Cal. Stats. 102(1)(a)(3).

<sup>40</sup>2000 Cal. Stats. 1102(1)(b)(7).

<sup>41</sup>2000 Cal. Stats. 102(29)(b-c).

<sup>42</sup>See *Buckley*, 424 U.S. at 45.

<sup>43</sup>See Appendix A, listing federal and state court decisions that have followed *Buckley*’s bright line rule. See also, Bopp & Coleson, *The First Amendment is not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 U.W.L.A. LAW REV. 1, 11–15 (1997). For a thorough analysis of why Shays-Meehan’s provisions violate the *Buckley* bright line rule, the Committee is respectfully referred to my June 14, 2001 testimony before the House Administration Committee.

<sup>44</sup>See *Plyler v. Doe*, 457 U.S. 202, 215 (1982) (The touchstone of equal protection is that “all persons similarly situated be treated alike.”)

<sup>45</sup>For example, Public Campaign’s founder Ellen Miller has criticized the million-dollar contributions to political parties, yet she accepted “\$1 million from former Democratic representative Cecil Heftel of Hawaii and \$3 million from the foundation of philanthropist George Soros to pay for her crusade to have taxpayers finance congressional campaigns.” Chuck Raasch, *Big money, with interest*, USA Today, June 17, 1997, at A7. Such major donors helped Public Campaign to put together “a \$9.2 million, three-year push for the public financing of campaigns.” *Id.* Figures on such major donations are difficult to establish, however, because when asked to disclose donors (as S. 27 would require) groups like Public Citizen, Sierra Club Foundation, and the U.S. Public Interest Research Group all decline. *Id.*

However, proponents of abolishing “soft money” argue that this is simply a “contribution limit.”<sup>46</sup> The fallacy of that argument, of course, is that the Supreme Court has justified contribution limits only on the ground that large contributions create the reality or appearance of *quid pro quo* corruption,<sup>47</sup> which cannot justify a limit on issue advocacy.<sup>48</sup>

The proposed ban on soft money contributions, which would fund party issue advocacy, cannot be justified on the theory that political parties corrupt federal candidates. To justify burdens on political speech, there must be some “real problem” or some “real harm.”<sup>49</sup> The Supreme Court has “never accepted mere conjecture as adequate to carry a First Amendment burden,”<sup>50</sup> and the government “must present more than anecdote and supposition.”<sup>51</sup> Restrictions on issue advocacy must pass strict scrutiny.

Although limits on the amount of financial support provided by political parties to their candidates impose greater burdens on political speech than limits on individual contributions, the Tenth Circuit in *Colorado Republican II*, recently applied the more deferential *Shrink* standard to the federal limits on coordinated expenditures in 2 U.S.C. § 441a(d) and held that those limits violate the First Amendment. The government had “not demonstrated . . . that coordinated spending by political parties corrupts, or creates the appearance of corrupting, the electoral process.”<sup>52</sup> Moreover, given provisions that already address the risk that individuals may attempt to circumvent limits on their contributions by using political parties as conduits, the Tenth Circuit also held that limits on the amount of financial support provided by political parties are not “closely drawn” to enforcing limits on an individual’s own contributions.<sup>53</sup> If limits on coordinated expenditures between a party and its own candidate do not pass constitutional muster because they do not corrupt candidates, *ipso facto* political party issue advocacy poses an even more remote danger of corruption and restrictions cannot be justified.

In *Missouri Republican Party v. Lamb*,<sup>54</sup> the Eighth Circuit also applied the more deferential *Shrink* standard and held that state law limits on direct political party contributions violate the First Amendment because “the record is wholly devoid of any evidence that limiting parties’ campaign contributions will either reduce corruption or measurably decrease the number of occasions on which limitations on individuals’ campaign contributions are circumvented.”<sup>55</sup> Again, if limits on direct monetary contributions by a political party are not closely drawn, neither are issue advocacy restrictions.

In *Colorado Republican I*, the FEC took the position that independent, uncoordinated expenditures by political parties ought to be treated as contributions to the benefitted candidate.<sup>56</sup> Such treatment would have resulted in allowing individuals, candidates, and political action committees to spend unlimited amounts of money on independent expenditures to advocate the election of a candidate, while limiting the amount a political party could spend for the same purpose.

The Supreme Court disagreed with the FEC, noting that “[w]e are not aware of any special dangers of corruption associated with political parties” and, after observing that individuals could contribute more money to political parties (\$20,000) than to candidates (\$1,000) and PACs (\$5,000) and that the “FECA permits unregulated ‘soft money’ contributions to a party for certain activities,” the Court concluded that

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The extended Gannett News Service article, from which the above article was derived, gave evidence that the major donor giving to campaign finance “reform” organizations is on the way up. Chuck Raasch, *Do public interest groups that push campaign reform really represent citizens?*, June 13, 1997, at 3. Raasch noted also that the Schumann Foundation (New Jersey) gave or pledged more than \$14 million to various campaign-finance reform causes (between 1994 and 1997) and that Robert Pambianco, a scholar of campaign-finance reform, stated that contributions to such efforts “had become trendy among foundations” and were expected to expand. *Id.* at 4.

<sup>46</sup>Brief of Amici Curiae U.S. Sens. Carl Levin, John D. McCain and Russell D. Feingold at 9, *Republican National Committee v. FEC*, 1998 U.S. App. LEXIS 28505 (D.C. Cir. 1998) (Nos. 98-5263, 98-5364).

<sup>47</sup>See generally Bopp, *Constitutional Limits on Campaign Contribution Limits*, 11 REGENT U. L. REV. 235 (1998-99).

<sup>48</sup>*Buckley*, 424 U.S. at 45.

<sup>49</sup>*United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1888-93 (2000).

<sup>50</sup>*Shrink*, 120 S. Ct. at 907.

<sup>51</sup>*Playboy*, 120 S. Ct. at 1891.

<sup>52</sup>*FEC v. Colorado Republican Federal Campaign Committee*, 213 F.3d 1221, 1233 (10th Cir.), cert. granted, 121 S. Ct. 296 (2000) (“*Colorado II*”) (footnote omitted).

<sup>53</sup>*Id.* at 1232-33.

<sup>54</sup>227 F.3d 1070 (8th Cir. 2000).

<sup>55</sup>*Id.* at 1073.

<sup>56</sup>518 U.S. at 619.

the “opportunity for corruption posed by these greater opportunities for contributions is, at best, attenuated.”<sup>57</sup> The Court continued in this vein with respect to the FEC’s proposed ban on political party independent expenditures, which has direct application to Shays-Meehan’s ban on soft money contributions:

[R]ather than indicating a special fear of the corruptive influence of political parties, the legislative history [of the Act] demonstrates Congress’ general desire to enhance what was seen as an important and legitimate role for political parties in American elections. . . .

We therefore believe that this Court’s prior case law controls the outcome here. We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties.<sup>58</sup>

The concurring justices also found little, if any, opportunity for party corruption of candidates because of their very nature and structure.<sup>59</sup>

The Supreme Court echoed the same theme with respect to the independent expenditures of political action committees:

The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.<sup>60</sup>

If this is true of PACs, then *a fortiori* there can be no corruption or appearance of corruption resulting from issue advocacy by political parties.

In addition, the Supreme Court in *MCFL* provided further guidance on whether the threat of corruption is posed by an organization such as a political party. The Court considered the ban on independent expenditures by corporations under 2 U.S.C. § 441b. The *MCFL* Court evaluated whether there was any risk of corruption with regard to an MCFL-type organization that would justify such a ban on its political speech. While *MCFL* considered whether an ideological corporation was sufficiently like a business corporation to justify the ban on using corporate dollars for independent expenditures, there are several transferable concepts to evaluating the threat of corruption posed by a political party.

The concern raised by the FEC in *MCFL* was that § 441b served to prevent corruption by “prevent[ing] an organization from using an individual’s money for purposes that the individual may not support.”<sup>61</sup> The Court found that “[t]his rationale for regulation is not compelling with respect” to MCFL-type organizations because “[i]ndividuals who contribute to [an MCFL-type organization] are fully aware of its political purposes, and in fact contribute precisely because they support those purposes.”<sup>62</sup> “[I]ndividuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction.”<sup>63</sup> “Finally, a contributor dissatisfied with how funds are used can simply stop contributing.”<sup>64</sup> Thus, the Court held that the prohibitions on corporate contributions and expenditures in § 441b could not be constitutionally applied to non-profit ideological corporations which do not serve as a conduit for business corporation contributions.<sup>65</sup>

Political parties similarly pose no risk of corruption because people give money to parties precisely because they support what the political party stands for. A contribution to a political party is for the purpose of enhancing advocacy of the issues the party represents. Any individual unhappy with the use of the money may simply quit contributing and leave the political party. In sum, the threat of corruption cannot justify a limit on issue advocacy and, even if it could, political parties pose no threat of corruption to their candidates.

### *3. Aggregating the Activities of All Party Committees Based on the Activity of One Committee is Unconstitutional*

<sup>57</sup>*Id.* at 616.

<sup>58</sup>*Id.* at 618.

<sup>59</sup>*Id.* at 626 (Kennedy, J., Rehnquist, C.J., Scalia, J., concurring in the judgment); see also *id.* at 631 (Thomas, J., Rehnquist, C.J., Scalia, J., concurring in the judgment).

<sup>60</sup>*FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985).

<sup>61</sup>*MCFL*, 479 U.S. at 260.

<sup>62</sup>*Id.* at 260–61.

<sup>63</sup>*Id.* at 261.

<sup>64</sup>*Id.*; see also *Day v. Hollahan*, 34 F.3d 1356, 1363–65 (8th Cir. 1994).

<sup>65</sup>See *Appendix C*.

Shays-Meehan mandates that all state, local and national committees be presumed in law to be a single legal entity for the purpose of the independent expenditure waiver in section 205 and for the purpose of aggregating coordinated expenditures in section 206, even if they in fact are independent of each other. This presumption is predicated on a factually faulty view of the structure of political parties and is unconstitutional.

Political parties are not monolithic, top-down organizations subject to the direction and control of the central committee. Rather, they are built from the ground up and are comprised of a confederation of independent committees who share similar values and electoral and public policy goals. In this sense they are similar to the Federal union of sovereign States.

In *FEC v. Sailor's Union*,<sup>66</sup> the Ninth Circuit examined the relationship between associated unions and concluded that before political contributions involving more than one committee may be aggregated, one of the entities must have actual authority over the other. Mere association is not enough.<sup>67</sup> Furthermore, this determination cannot be made without "examining the organization's division of power . . . to determine the *degree of control*" one organization exercises over another.<sup>68</sup> Thus, imputing the independent decisions of one party committee to each of the thousands of other committees of the same political party overreaches Congress's legitimate authority.

*4. Forbidding Political Parties from Making Independent Expenditures if They Make Even One Coordinated Expenditure With a Candidate is Unconstitutional.*

In section 205, Shays-Meehan forbids political party committees from making both independent expenditures and coordinated expenditures with respect to the party's nominee. In other words, after the party has nominated a candidate it must completely forego making all independent expenditures if it elects to coordinate even one advertisement with its candidate. This provision reflects what can only be described as an intentional misreading of the Supreme Court's decision in *FEC v. Colorado Republican Federal Campaign Committee*.

*Colorado Republican I* began as an enforcement action by the FEC in which it was alleged that a certain advertisement that was critical of the Democratic candidate for Senator exceeded party coordinated spending limits. As a matter of fact, the critical advertisement was published before the Republican Party had nominated its own candidate. Based in part on this fact, the Court concluded that the advertisement was not, in fact, coordinated with the Republican Party's candidate. The issue before the Court then was whether all expenditures by a party committee could be conclusively presumed to be coordinated with the party's candidate. The Court concluded, "We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties."<sup>69</sup> Nothing in the opinion even remotely suggests that once a party nominates its own candidate, Congress may put the party to a choice either to make only independent expenditures or to make only coordinated expenditures.

Indeed, the Court's entire discussion turned on an examination of whether the particular communication had been coordinated. In other words, if a particular communication is made independently from a candidate it is an independent expenditure and may not be subject to limits. On the other hand, if a particular communication is coordinated it may be treated as an in-kind contribution. The two are in no way dependent on each other. By predicating the right to make unlimited independent expenditures on the condition that a party not make any coordinated expenditures, Shays-Meehan imposes an unconstitutional condition.<sup>70</sup>

Section 205 appears to reflect the view that a single coordinated expenditure leavens the whole loaf, justifying treating all expenditures, even if made independently, as if they were coordinated. In *Christian Coalition v. FEC*, the court rejected the FEC "insider trading" theory of coordination and concluded that the First Amendment demands a definition of "coordination" that involves an extremely high level of collaboration over a *particular* communication between the candidate and

<sup>66</sup> 828 F.2d 502, 506 (9th Cir. 1987).

<sup>67</sup> See also *Michigan State AFL-CIO v. Miller*, 891 F. Supp. 1210 (E.D. Mich 1995), *rev'd in part on other grounds*, 103 F.3d 1240 (6th Cir. 1996).

<sup>68</sup> *Sailor's*, 828 F.2d at 506-07 (emphasis added).

<sup>69</sup> *FEC v. Colorado Republican Federal Campaign Comm.*, 518 U.S. 614, 618 (1996) (plurality).

<sup>70</sup> "[T]he government . . . may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (emphasis added).

the speaker.<sup>71</sup> In the real world, it is perfectly reasonable for a political party to coordinate a direct mail piece with its candidates while simultaneously independently publishing a television ad that is critical of the opposing party's candidate. Section 205 is unconstitutional. Of course, if the Supreme Court rules in *Colorado Republican II* that limits on party coordinated expenditures are unconstitutional, this provision will have no practical consequences.

#### CONCLUSION

The restrictions on political parties being considered in the Congress today are there because of the incessant drum beat of a few self-styled "reformers" whose appetite for ever more regulation of political speech and association is insatiable. Restrictions adopted in the past have not satisfied these regulators, and indeed, they have made citizen participation in the political process ever more cumbersome and the risk of criminal or civil prosecution ever more likely. True reform would recognize that strong political parties would promote both a healthy electoral system and the liberties guaranteed by the First Amendment. There is no justification, in either policy or law, for the severe limits on national, state, and local political parties imposed by Shays-Meehan and McCain Feingold.

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<sup>71</sup>*Christian Coalition v. FEC*, 52 F.Supp.2d 45, 91–92 (D.D.C. 1999).

I take from *Buckley* and its progeny the directive to tread carefully, acknowledging that considerable coordination will convert an expressive expenditure into a contribution but that the spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some consultations or coordination with a federal candidate.

First Amendment clarity demands a definition of "coordination" that provides the clearest possible guidance to candidates and constituents, while balancing the Government's compelling interest in preventing corruption of the electoral process with fundamental First Amendment rights to engage in political speech and political association. . . . A narrowly tailored definition of expressive coordinated expenditures must focus on *those expenditures* that are of the type that would be made to circumvent the contribution limitations. . . .

In the absence of a request or suggestion from the campaign, an expressive expenditure becomes "coordinated," where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over *a communication's*: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and spender emerge as partners or joint venturers in *the expressive expenditure*, but the candidate and spender need not be equal partners.

## APPENDIX A

### Cases Recognizing First Amendment Protection of Issue Advocacy

**Supreme Court Cases:**

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

*FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986)

**Lower Federal Cases:**

*Florida Right to Life v. Mortham*, 98-770-CIV-ORL-19A, 11 n.8, 9 (M.D.Fla. Dec. 15, 1999),  
*aff'd per curiam*, *Florida Right to Life v. Lamar*, 2001 U.S. App. LEXIS 613 (11th Cir.  
Jan. 17, 2001)

*Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 2000 U.S. App. LEXIS  
33727, \*22-26 (10th Cir. Dec. 26, 2000)

*Perry v. Bartlett*, 231 F.3d 155, 160-162 (4th Cir. 2000)

*Vermont Right to Life Comm. v. Sorrell*, 216 F.3d 264, 275-77 (2d Cir. 2000);

*Iowa Right to Life Comm. v. Williams*, 187 F.3d 963, 969-970 (8th Cir. 1999)

*North Carolina Right To Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999)

*Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 506 (7th Cir. 1998)

*Virginia Soc'y For Human Life v. Caldwell*, 152 F. 3d 268 (4th Cir. 1998)

*FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997) (*CAN II*)

*FEC v. Christian Action Network*, 894 F. Supp. 946 (W.D. Va. 1995), *aff'd per curiam*, 92 F.3d  
1178 (4th Cir. 1996) (*CAN I*)

*Maine Right To Life Comm.*, 914 F. Supp. 8, 12 (D. Me. 1996), *aff'd per curiam*, 98 F.3d 1 (1st  
Cir. 1996)

*Faucher v. FEC*, 928 F.2d 468, 472 (1st Cir. 1991)

*FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987)

*FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980) (*en  
banc*)

*North Carolina Right to Life v. Leake*, 108 F. Supp. 2d 498 (E.D. N.C. 2000)

*Richey v. Tyson*, 120 F. Supp. 2d 1298, 1309 (S.D. Ala. 2000)

*South Carolina Citizens for Life v. Davis*, C.A. No. 3:00-124-19 (D.S.C. Feb. 9, 2000)

*Virginia Society for Human Life v. FEC*, 83 F. Supp. 2d 668 (E.D. Va. 2000)

*FEC v. Freedom's Heritage Forum*, Civil Action No. 3:98 CV-549-S, slip op. at \*5-\*8 (W.D.

KY Sept. 29, 1999)

*FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 62 (D.D.C. 1999)

*Kansans for Life v. Gaede*, 38 F. Supp. 2d 928 (D. Kan. 1999)

*Planned Parenthood Affiliates of Mich. v. Miller*, 21 F. Supp. 2d 740 (E.D. Mich. 1998)

*Right To Life of Dutchess County v. FEC*, 6 F. Supp. 2d 248 (S.D. N.Y. 1998)

*Right to Life of Mich. v. Miller*, 23 F. Supp. 2d 766 (W.D. Mich. 1998)

*Clifton v. FEC*, 927 F. Supp. 493 (D. Me. 1996), *aff'd on other grounds*, 114 F.3d 1309 (1st Cir. 1997)

*West Virginians For Life v. Smith*, 919 F. Supp. 954 (S.D. W. Va. 1996)

*FEC v. Survival Educ. Fund*, 1994 WL 9658, (S.D. N.Y. Jan. 12, 1994), *aff'd in part and rev'd in part on other grounds*, 65 F.3d 285 (2d Cir. 1995)

*FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448 (D. Colo. 1993), *rev'd* 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded on other grounds*, 518 U.S. 604 (1996)

*FEC v. NOW*, 713 F. Supp. 428 (1989)

*FEC v. AFSCME*, 471 F. Supp. 315, 317 (D. D.C. 1979)

**State Cases:**

*Osterberg v. Peca*, 12 S.W.3d 31, 51-65 (Tex. 2000)

*Washington State Republican Party v. Washington State Public Disclosure Comm'n*, 4 P.3d 808, 814-829 (Wash. 2000)

*Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 614 (Alaska 1999)

*Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E. 2d 135 (Ind. 1999)

*Elections Bd. v. Wisconsin Mfr. & Commerce*, 597 N.W.2d 721, 737 (Wisc. 1999)

*Doe v. Mortham*, 708 So. 2d 929, 932 (Fla. 1998)

*Virginia Soc'y for Human Life v. Caldwell*, 500 S.E.2d 814 (Va. 1998)

*State v. Proto*, 526 A.2d 1297, 1310-11 (Conn. 1987)

*Klepper v. Christian Coalition*, 259 A.D.2d 926 (N.Y. App. Div. 1999)

Mr. CHABOT. Mr. Moramarco?

**STATEMENT OF GLENN J. MORAMARCO, SENIOR ATTORNEY,  
BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY  
SCHOOL OF LAW**

Mr. MORAMARCO. Thank you, Mr. Chairman and Members of the Committee. I would like to spend my few minutes before the Committee trying to shed some light on some of the criticisms that have been made today and are routinely made against the McCain-Feingold and Shays-Meehan provisions. The first one I would like to tackle is the argument that Snowe-Jeffords, the provisions in McCain-Feingold dealing with electioneering, are some type of ban on speech.

The Snowe-Jeffords provisions are primarily disclosure provisions. They are trying to enable people to know where the source of the money for these television commercials comes from. There is

a ban in these bills, but it is a ban only on unions and corporations using their general treasury funds for these ads.

Now, the restrictions on unions and corporations go way back in the law in the United States. Unions were prohibited from using their general treasury funds for electioneering purposes in 1947; corporations back to 1907. So this is building on long-standing principles that have been known to our law.

Now, it is not even a complete ban, because both of these institutions can fund their electioneering activity through the use of PACs. This means it will be voluntary contributions given for a specific purpose, rather than funds that just accrue to the corporation because of its business ventures.

So there is also an enormous safe harbor in the Snowe-Jeffords language, because it limits things that are within 60 days of an election or 30 days of a primary, and because it requires the naming of a candidate. If someone wants to run a true issue ad, they can do it outside that time frame, or they can simply refrain from naming a candidate. Remember, we are talking about issue ads. If you want to talk about health care, if you want to talk about violence against women, talk about those issues and do not attack a candidate, because we know what these ads are. We have seen them.

The Brennan Center conducted a study looking at the advertising over the last two Federal election cycles. There were over 3,000 unique political ads in 2000. Of those, 2,382 were run within 60 days of an election. Most of those were candidate and political party ads. Groups sponsored only 252 unique ads during the last 60 days of an election. These were examined by researchers, and they found that only three of those ads were genuine issue ads that did not have the intent of electing or defeating the candidate who was named in their opinion. So we are talking about a tiny fraction of all of the ads here.

You all are political candidates, you all know what the ads look like: They are thinly veiled, they do not say vote for or against, but they excoriate candidates in very strong terms, and the message is quite clear to the viewing public.

Now, there is also an argument that ending soft money will somehow destroy the political parties. But again, you have all been in the political system for quite some time. We saw \$469 million of soft money in the 2000 election cycle, but we do not have to think back very long to where soft money was just a blip in the political radar screen. Back in 1994, the figure was \$17 million.

Now, are political parties stronger today than they were during the Bush-Dukakis contest, for example? What is the measure to suggest that if soft money were eliminated, all of a sudden the political parties would disintegrate? When we look back at political parties, they become today giant advertising firms that run a lot of commercials, but have they increased their grass-roots activities? I suggest that they have not.

I would also like to discuss the argument that ending soft money will somehow eliminate grass-roots party activities. Currently, only 8 cents of every soft money dollar is spent on that type of voter mobilization get-out-the-vote activity. Mostly what is spent on, as I said, are political commercials. We have to end the conduit role of

political parties and restore parties to their normal role, which would be more grass-roots organizing and voter mobilization.

In sum, we find that ending soft money and adopting Snowe-Jeffords are constitutional, but let me say to the Committee that that is not just my view. We have put forward a letter that was signed by 88 constitutional scholars and academics supporting the proposition that ending soft money is consistent with the Constitution and that the expressed advocacy Snowe-Jeffords provisions were also constitutional.

There was also a letter circulated by former leaders of the ACLU. It represented at the time what were every past president, executive director, legal director and legislative director of the ACLU, and those people all endorsed the provisions in McCain-Feingold, the ending of the soft money and the Snowe-Jeffords provisions.

So these are difficult questions before this Committee, but I would suggest that you should let your policy choices determine this, because there are strong constitutional arguments to be made on both sides.

Thank you very much.

Mr. CHABOT. Thank you.

[The prepared statement of Mr. Moramarco follows:]

PREPARED STATEMENT OF GLENN J. MORAMARCO

Mr. Chairman, I am honored to have been invited to testify before the Subcommittee concerning some of the constitutional principles and problems involved in campaign finance reform legislation.

By way of introduction, the Brennan Center for Justice at New York University School of Law is a nonpartisan institution devoted to scholarship, discourse, and action on issues of justice that were central to the jurisprudential legacy of Justice William J. Brennan Jr. We are guided by principles that were important to Justice Brennan—a willingness to ask the hard questions and to reexamine old doctrine, an insistence on developing constitutional norms that make pragmatic sense, and an ardent insistence on protecting liberty. Justice Brennan did more than any Justice in the history of our nation to protect civil liberties—and particularly freedom of speech. Given our namesake, we would like to think that we approach all issues, and particularly issues relating to the financing of campaigns, with a special sensitivity to concerns about free speech.

The Senate recently passed, by a wide margin, the McCain-Feingold campaign finance reform bill. The House of Representatives is poised to consider either the Senate Bill or similar legislation sponsored by Congressmen Christopher Shays and Marty Meehan. Both of these bills are responding to the campaign finance excesses we have seen in the last few federal election cycles. The two most prominent problems, and the ones about which there are the most constitutional debate, are: (1) the large and unregulated soft money contributions to political parties, and (2) the rising use of sham “issue ads” that support or oppose specifically identified federal candidates without being subject to federal disclosure, source, and fundraising rules. I believe that the McCain-Feingold Bill, which passed the Senate, and the Shays-Meehan Bill, which has been introduced in the House, contain constitutionally-sound general approaches for dealing with these two vexing problems, and I will center my remarks today around those two issues.

I have appended to my testimony two documents which I believe the Committee will find useful in this inquiry. The first is a letter that was sent to Senators McCain and Feingold and signed by 88 legal and constitutional scholars. The letter, which was prepared by the Brennan Center, affirms the constitutional validity of the key provisions of the original McCain-Feingold Bill and states the reasoning in support of that position. I have taken the liberty of drawing substantially from that letter for my prepared statement before this Committee. The second document is a public statement, dated March 22, 2001, that was also introduced as part of the Senate debate on McCain-Feingold. The statement was signed by every living person to have served as ACLU President, ACLU Executive Director, ACLU Legal Director, or ACLU Legislative Director, with the exception of the then-current leadership. This statement from former ACLU leaders likewise affirms the constitutional

validity of the original McCain-Feingold Bill. These two documents, taken together, demonstrate some of the breadth of the academic and legal support for the general approaches taken in the campaign finance reform legislation that will be considered by the House of Representatives.

#### DISTINGUISHING ELECTIONEERING COMMUNICATIONS FROM TRUE ISSUE ADVOCACY

In the 2000 federal election cycle, corporations, labor unions, political parties, and advocacy groups spent hundreds of millions of dollars for advertisements that were wholly unregulated by the federal government because, the sponsors of the ads claimed, they were engaged in “issue advocacy” rather than electioneering. However, the vast majority of these so-called “issue ads” were a sham. Rather than educating the public broadly about issues, the typical sham “issue ad” mentioned a single candidate, targeted the segment of the public eligible to vote for that candidate, began to run when an election was imminent, and ended abruptly on Election Day.

The task that was taken up in both the McCain-Feingold and Shays-Meehan Bills was to attempt to draw a reasonable and constitutionally defensible line that distinguishes between regulable electioneering speech and protected “issue advocacy.” These bills recognize that we need to protect true “issue advocacy”—communications that address an issue of national or local political importance. Examples of true “issue advocacy” include the Harry and Louise ads run by the Health Insurance Association of America in opposition to the Clinton national health care reform proposal, or the anti-NAFTA ads run by labor unions in late 1993, while that legislation was pending. However, we cannot permit sham “issue ads,” which do nothing beyond advocating the election or defeat of a named candidate, to undermine the valid limitations placed by the law on electioneering activity.

Let me begin with some non-controversial legal principles. Under current law, there is no doubt that it is permissible for Congress to draw some line distinguishing electioneering speech from “issue advocacy.” If speech falls on the “electioneering” side of the line, three consequences follow:

1. *Disclosure:* Congress may require the speaker—whether a PAC or a corporation or a party or an individual or a candidate—to disclose the sources of the money and the nature of the expenditures in support of the speech.
2. *Source restrictions:* Congress may absolutely bar certain speakers from spending money on electioneering; Congress may preclude corporations and unions from spending general treasury funds on electioneering; Congress may limit participation to individuals and PACs; and Congress may prohibit foreigners from electioneering.
3. *Fundraising restrictions:* Congress may restrict the sources from which speakers can raise their money—to individuals, for example—and Congress can limit the size of the contributions to a collective fund.

Do these restrictions infringe on speech and privacy rights? Of course they do. Wherever one draws the electioneering line, there are certain words that corporations and unions are banned from uttering. There are certain messages that can be funded only by individuals or by groups that amass individual contributions in discrete amounts. These regulations necessarily reduce the sheer amount of money that can be spent on certain messages. And these regulations require speakers to reveal certain information such as how much they spent and who supported their message.

Even though these regulations infringe on speech, they are indisputably constitutional. Since 1907, corporations have been barred from electioneering, since 1947 those restrictions have been extended to labor unions, and since 1974, the law has restricted the size of contributions that can be made to speech funded by a group. The Supreme Court has upheld all of these restrictions on electioneering. Of course, a great deal rides on what qualifies as “electioneering.” If the government defines the concept too broadly, it could end up restricting speech on issues of public importance that happens to have an influence on elections—a result that is antithetical to the First Amendment. If the law defines it too narrowly, we may as well not bother having campaign finance laws, because all players could readily find a way to influence elections in a direct way, making a mockery of the law.

That is where we find ourselves today. We are now in a world where everyone has become accustomed to thinking that it is not electioneering unless the speaker utters a “magic word”—like “vote for,” “vote against,” “elect,” or “defeat.” All players—corporations, unions, foreigners, and parties—engage in an open strategy of trying to influence elections by running or paying for ads that look, smell, waddle, and quack like campaign ads, but are just missing the magic words. They use money from prohibited sources, they raise it in prohibited amounts, and they close

their books to public scrutiny. In many cases, their stated goal is to influence the election. They brag about their success in influencing the election, and yet they claim the First Amendment protects their right to engage in any speech, even with that clearly proscribable motive.

I do not believe that we are struck with a constitutional doctrine that nominally allows us to place restrictions on electioneering, but nevertheless allows individuals and groups to accomplish the same result through naked subterfuge. The federal courts are not so irrational that they will acknowledge the government's power to regulate in an area while simultaneously imposing rules that make all regulation unworkable.

When the Supreme Court first devised the "express advocacy" test in *Buckley*, it did so in the context of a poorly drafted statute (the Federal Election Campaign Act) whose definition of regulable electioneering contained problems both of vagueness and overbreadth. Under First Amendment "void for vagueness" jurisprudence, the government cannot punish someone without providing a sufficiently precise description of what conduct is legal and what is illegal. A vague or imprecise definition of electioneering might serve to "chill" some political speakers who, although they desire to engage in discussions of political issues, may be afraid that their speech could be construed as electioneering. The *Buckley* Court found that the regulated conduct, which included expenditures "relative to a clearly identified candidate" and "for the purpose of influencing an election" were not sufficiently precise to provide the certainty necessary for those wishing to engage in political speech.

Similarly, the overbreadth doctrine in First Amendment jurisprudence is concerned with a regulation that, however precise, sweeps too broadly and reaches constitutionally protected speech. The *Buckley* Court was concerned that the Federal Election Campaign Act's attempt to regulate any expenditure that is done "for the purpose of influencing" a federal election or that is "relative to a clearly identified candidate" could encompass not only direct electioneering, but also protected speech on issues of public importance.

The Court chose to save the Federal Election Campaign Act from invalidation by reading it very narrowly. However, the Court never said that no legislature could ever devise alternate language that would be both sufficiently narrow and sufficiently precise. The decision to narrowly construe a statute to save it from potential vagueness and overbreadth problems does not prevent further legislative refinements that eliminate those problems. The key for Congress is to draw a line that distinguishes between regulable electioneering and protected "issue advocacy" in a way that minimizes the vagueness and overbreadth concerns identified by the Court.

One way for Congress to do this is to follow the model presented in the Snowe-Jeffords Amendment to McCain-Feingold. The Snowe-Jeffords Amendment defines the term "electioneering communication" as radio or television ads that refer to clearly identified candidates and are broadcast within 60 days of a general election or 30 days of a primary and are targeted to the relevant electorate. A group that makes electioneering communications totaling \$10,000 or more in a calendar year must disclose its identity, the cost of the communication, and the names and addresses of all its donors of \$1,000 or more. If the group has a segregated fund that it uses to pay for electioneering communications, then only donors to that fund must be disclosed. Additionally, corporations and labor unions are barred from using their general treasury funds to pay for electioneering communications. Instead, they must fund electioneering communications through their political action committees.

Snowe-Jeffords presents a definition of electioneering carefully crafted to address the Supreme Court's dual concerns regarding vagueness and overbreadth. Because the test for prohibited electioneering is defined with great clarity, it satisfies the Supreme Court's vagueness concerns. Any sponsor of a broadcast will know, with absolute certainty, whether its ad depicts or names a candidate and how many days before an election it is being broadcast. There is little danger that a sponsor would mistakenly censor its own protected speech out of fear of prosecution under such a clear standard.

The prohibition is also narrow enough to satisfy the Supreme Court's overbreadth concerns. Advertisements that name a political candidate and are aired close to an election almost invariably are electioneering ads intended to encourage voters to support or oppose the named candidate. This conclusion is supported by a comprehensive academic review conducted of television advertisements in the 1998 federal election cycle. See *Buying Time: Television Advertising in the 1998 Congressional Elections* (Brennan Center for Justice, 2000). This study examined more than 300,000 airings of some 2,100 separate political commercials that appeared in the nation's 75 largest media markets in 1998. The study found that there were a total of 3,100 airings of only two separate commercials that met the Snowe-Jeffords cri-

teria of naming a specific candidate within 60 days of the general election and that were judged by academic researchers to be true issue advocacy. Thus, the Snowe-Jeffords general election criteria were shown to have inaccurately captured only on tiny fraction of the political commercials aired in the 1998 election cycle. A follow-up study of the ads run in the 2000 federal election cycle came up with comparable results. This empirical evidence demonstrates that the Snowe-Jeffords criteria are not “substantially overbroad,” which is the constitutional test. The careful crafting of Snowe-Jeffords stands in stark contrast to the clumsy and sweeping prohibition that Congress originally drafted in FECA.

In sum, it is constitutionally permissible for Congress to enact legislation that regulates ads that are intended to influence the electoral outcome of particular candidates, as long as the legislation does not unduly sweep within its reach ads that are intended to discuss issues only. The “magic words” test clearly does not accomplish this permissible objective in an acceptable manner. The Supreme Court does not purposely permit government to regulate in an area while imposing rules that make all attempts at regulation worthless. Congress has the power to pass legislation which remedies the vagueness and overbreadth problems that plagued the Federal Election Campaign Act by providing a better method for differentiating between electioneering and true “issue advocacy.”

#### CLOSING THE SOFT MONEY LOOPHOLE

The Federal Election Campaign Act (“FECA”) limits an individual’s contributions to (1) \$1,000 per election to a federal candidate; (2) \$20,000 per year to national political party committees; and (3) \$5,000 per year to any other political committee, such as a PAC or a state political party committee. *Id.* § 441a(a)(1). Individuals are also subject to a \$25,000 annual limit on the total of all such contributions. *Id.* § 441a(a)(3). The money raised under these strictures is commonly referred to as “hard money.” The McCain-Feingold Bill, as amended in the Senate, would raise these hard money limits substantially, in exchange for eliminating soft money entirely.

Regardless of whether Congress chooses to raise the hard money limits under FECA, it has the power to close the soft money loophole. Soft money, quite simply, is money that is raised by the political parties outside of the FECA requirements. With only certain very limited exceptions, Congress did not intend for political parties to raise money outside of the FECA limitations. The soft money loophole was created not by Congress, but by a Federal Election Commission (“FEC”) ruling in 1978 that permitted political parties to receive non-regulated contributions as long as the money was used for grassroots campaign activity, such as registering voters and get-out-the-vote efforts. In the years since the FEC’s ruling, this modest opening has turned into an enormous loophole that threatens the integrity of the entire regulatory system.

In the recent presidential election, soft money contributions soared to the unprecedented figure of \$487 million, which represented an 85 percent increase over the previous presidential election cycle (1995–96). It is not merely the total amount of soft money contributions that raises concerns, but the size of the contributions as well, with some donors contributing amounts of \$100,000, \$250,000, or more to gain preferred access to federal officials. This money is not being spent, for the most part, on the types of grassroots campaign activities that led to the original FEC advisory opinion. The largest single component of soft money spending, about 40 cents out of every soft money dollar, goes to media advertising that is intended to influence federal elections, although the ads refrain from using “express” words of advocacy. Only about 8 cents out of every soft money dollar is spent on grassroots activities like voter registration and voter mobilization. Soft money has become an end run around the campaign contribution limits, creating a corrupt system in which monied interests appear to buy access to, and inappropriate influence with, elected officials.

The McCain-Feingold Bill requires that all money spent on “federal election activities” by state or local parties be subject to the limitations, prohibitions, and reporting requirements of FECA. State parties are permitted to spend soft money on voter registration and get out the vote activity that does not mention a federal candidate as long as no single soft money donor gives more than \$10,000 per year to the state party for such purposes. The Bill also bars federal officeholders and candidates for such offices from soliciting, receiving, or spending soft money.

These provisions are constitutional. The soft money loophole has raised the specter of corruption stemming from large contributions (and those from prohibited sources) that led Congress to enact the federal contribution limits in the first place. In *Buckley v. Valeo*, the Supreme Court held that the government has a compelling interest in combating the appearance and reality of corruption, an interest that jus-

tifies restricting large campaign contributions in federal elections. See 424 U.S. 1, 23–29 (1976). Significantly, the Court upheld the \$25,000 annual limit on an individual’s total contributions in connection with federal elections. See *id.* at 26–29, 38. In later cases, the Court rejected the argument that corporations have a right to use their general treasury funds to influence elections. See, e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). Under *Buckley* and its progeny, Congress clearly possesses power to close the soft money loophole by restricting the source and size of contributions to political parties, just as it does for contributions to candidates, for use in connection with federal elections.

Any suggestion that the Supreme Court’s decision in *Colorado Republican Federal Campaign Committee v. FEC*, 1518 U.S. 604 (1996), casts doubt on the constitutionality of a soft money ban is flatly wrong. *Colorado Republican* did not address the constitutionality of banning soft money contributions, but rather the expenditures by political parties of hard money, that is, money raised in accordance with FECA’s limits. Indeed, the Court noted that it “could understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits was a serious matter, might decide to change the statute’s limitations on contributions to political parties.” *Id.* at 617.

In fact, the most relevant Supreme Court decision is not *Colorado Republican*, but *Austin v. Michigan Chamber of Commerce*, in which the Supreme Court held that corporations can be walled off from the electoral process by forbidding both contributions and independent expenditures from general corporate treasuries. 494 U.S. at 657–61. Surely, the law cannot be that Congress has the power to prevent corporations from giving money directly to a candidate, or from expending money on behalf of a candidate, but lacks the power to prevent them from pouring unlimited funds into a candidate’s political party in order to buy preferred access to him after the election. See also *Nixon v. Shrink Missouri Govt. PAC*, 120 S. Ct. 897 (2000) (reaffirming *Buckley*’s holding that legislatures may enact limits on large campaign contributions to prevent corruption and the appearance of corruption).

In sum, closing the loophole for soft money contributions is in line with the long-standing and constitutional ban on corporate and union contributions in federal elections and with limits on the size of individuals’ contributions to amounts that are not corrupting.

Mr. CHABOT. Mr. Troy.

**STATEMENT OF DANIEL TROY, PARTNER, WILEY, REIN & FIELDING**

Mr. TROY. Thank you, Mr. Chairman.

Mr. Chairman, this week marks my 10th wedding anniversary, but today I have an announcement to make. Although I love my family very much, and much as you may find this difficult to believe, I have not yet learned to love being criticized. As Members of Congress, you know how it is. At work people laugh at your jokes, they listen to you attentively, they carefully avoid any half-way critical comment. You go home, and right away your spouse, child or parents point out whenever you make some darn fool mistake, which, in my case, is quite often.

Well, Mr. Chairman, although I have not learned to love criticism, I have learned a few things about it. First I have learned that it comes with the territory. Second, people have a right to their opinions. And third, sometimes criticism is correct and even worth listening to.

Now, what, you may wonder, does any of this have to do with campaign finance legislation? Everything. Although robed in the sheep’s clothing of fighting corruption, bills like Shays-Meehan and the 86-page McCain-Feingold bill are really wolves of incumbency protection and suppression of criticism. How so?

Well, these measures, which are backed by the force of the criminal law, sharply reduce the flow of funds to parties which are frequently the sources of critical comment and which spend most of

their money financing challengers. They raise the amount of so-called hard money that can be contributed directly to candidates, and, in the case of McCain-Feingold, raise it even further if a millionaire has the temerity to challenge an incumbent. I suppose this means that incumbents who face millionaire challenges are somehow less vulnerable to corruption. They prohibit labor unions and corporations and, in the case of the McCain-Feingold bill, even non-profit ideological organizations such as the NRA, NARAL, the Chamber of Commerce from daring to breathe the name of a candidate 2 months before an election, and, in the event an independent entity is willing to reveal their contributors to the world and mentions an incumbent in a way that an incumbent thinks it is an attack, the Torricelli amendment gives candidates the right to buy television time to reply at bargain-basement prices. As one politician supporting campaign finance legislation remarked in a moment of candor, "If I could ban all negative attack ads, I would," and that sentiment is clearly what is at issue, what is at work here.

But, as in the case of marriage, criticism comes with the territory. As Judge Robert Bork wrote in rejecting a libel claim against Evans and Novak, "Those who step into areas of public dispute, who choose the pleasure and distractions of controversy, must be willing to bear criticism, disparagement and even wounding assessment." Truman's adage about warm kitchens also comes to mind.

Moreover, just as family members have a right to be heard, independent entities such as the AMA, NARAL, NRA, have a first amendment right addressed more eloquently here by others to address issues of public importance during times when people are paying attention to those issues and when they matter the most. And also, sometimes, the views of those independent entities are actually right.

Now, what of the claim that corruption in our system makes all this necessary? My partner Jan Baran has been in litigation with the FEC for more than 15 years over its claim that expenditures by parties corrupt candidates, but in all of this time, the FEC has failed to produce one example of such corruption in the record. Indeed, former Senators Tim Wirth and Paul Simon, who are both campaign finance reform supporters who testified under oath in the case, not only denied that they had ever been corrupted by their parties, they also couldn't name a single example of any such corruption relating to anyone else. There is, put simply, no evidence of corruption caused by independent speech, by independent speech before Congress or anywhere else to warrant these measures.

Now, is there big money in politics? Of course there is, and there will be as long as businesses, unions and interest groups either need to come here to Washington to play defense against government overregulation or have the ability to secure benefits that they desire through government action rather than in the marketplace. Until the stakes at the Federal level are reduced, attempts to reduce the influence of money merely squeezes the balloon at one end, forcing the pressure somewhere else. Past attempts have been ineffective and have had adverse, unintended consequences, but this measure has to be what seems to be the intended con-

sequences of protecting incumbents and suppressing political debate.

In closing, I just want you to consider the following quotes in light of the impassioned and eloquent statements of Congressmen Nadler, Conyers, and Meehan.

The first: The question is, quote, whether the people of the United States are to govern or whether the power or money of a great corporation are to be secretly exerted to influence their judgment and control their decisions, unquote.

The second: Money was used in this election with a profusion never before known on American soil, unquote.

And the third: Corruption dominates the ballot box, the legislatures, the Congress and touches even the ermine of the bench.

That first quote was from Andrew Jackson in 1832. The second was from a mugwump in 1888. And the third was from the authors of the Omaha Platform of the People's Party of America in 1892.

Mr. Chairman so it has always been, so it will always be. These measures are futile, unwise, and unconstitutional. Thank you.

[The prepared statement of Mr. Troy follows:]

#### PREPARED STATEMENT OF DANIEL E. TROY

My name is Daniel Troy. I am an associate scholar at the American Enterprise Institute in legal studies and a partner at Wiley, Rein & Fielding, where I specialize in constitutional and appellate litigation. I have argued cases on constitutional and administrative law before the United States Court of Appeals, as well as the United States Supreme Court. I have published and spoken on a variety of legal and policy issues including campaign finance legislation, the appropriate level of protection for commercial speech, the free speech rights of broadcasters, and other First Amendment issues. I am also currently the co-chair of the Committee on Separation of Powers and Constitutional Law of the American Bar Association's Section of Administrative Law and Regulatory Practice. I have served on that Section's Council as well. A copy of my c.v. is attached.

The views I present here are my own. I am not being compensated for this testimony, and I am not here on behalf of any person or entity. I should disclose, however, that I recently wrote an opinion for the Media Institute entitled "McCain-Feingold and the First Amendment" for which I was paid a \$1500 honoraria. I have also represented the National Association of Broadcasters in matters related to political communications, and was compensated for an opinion suggesting that the Toricelli amendment to McCain-Feingold raised substantial constitutional issues.

My testimony concerns the constitutionality of the Bipartisan Campaign Finance Reform Act of 2001, otherwise known separately as Shays-Meehan, H.R. 308, 107th Cong. (2001), and McCain-Feingold, S. 27, 107th Cong. (2001). Section I of this testimony discusses the constitutional framework of campaign finance law, specifically the Supreme Court's landmark decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), and its progeny. Section II examines a few major provisions of Shays-Meehan and McCain-Feingold and concludes that they violate this constitutional framework.

#### THE PROPOSED LEGISLATION

In their current forms, both Shays-Meehan and McCain-Feingold would substantially amend the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. § 431 et seq. (1994). Sponsors of these bills claim that their principal goal is to close the so-called soft money "loophole" by which donors support candidates through advertisements "disguised" as constitutionally protected independent speech. For example, there was much criticism over President Clinton's editing of Democratic National Committee ads during the 1996 campaign. Campaign finance reformers alleged that money raised by the Democratic party for issue advocacy was being put at the candidate's disposal, evading limits on the amount that could legally be contributed to the President's 1996 reelection campaign.

To close this "loophole," both bills seek to narrow the boundaries of constitutionally protected independent speech in two ways. First, they would restrict the ability of independent speakers to refer to candidates during the period preceding an election by prohibiting such communications altogether in some cases, and by

adding substantial disclosure requirements in other circumstances. Second, the bills would make it easier for the Federal Election Commission (FEC) to find that a group or individual and a candidate have worked together, and are thus subject to regulation or restriction.

In addition, a key amendment to McCain-Feingold requires broadcasters to sell candidates and political parties advertising slots at prices that would be considerably below the prices they charge to their other customers.

#### I. THE CONSTITUTIONAL FRAMEWORK OF CAMPAIGN FINANCE LAW

The purpose of this section is to develop a framework against which any proposed campaign finance law could be measured. The constitutional analysis of particular provisions of both bills will be left for discussion in Part II.

##### 1. *The Guiding Principles of Buckley v. Valeo.*

Congress amended FECA in 1974 in response to evidence of corruption during the 1972 Presidential campaign. These 1974 amendments limited the amounts that could be contributed to candidates for national elections, as well as to political parties. They also restricted the amount that could be expended “relative to a clearly identified candidate.” *Buckley*, 424 U.S. at 13. In addition, the 1974 amendments sought to curb the dollars spent on political campaigns by capping the amount of candidates’ self-financing, as well as their overall expenditures. *Id.* at 12–14. Finally, Congress imposed various reporting and disclosure requirements, and created the FEC to oversee the new regulatory scheme. *Id.*

The Supreme Court reviewed the 1974 amendments in *Buckley v. Valeo*, 424 U.S. 1 (1976). There, the Court found that FECA’s limits on contributions and expenditures directly restrained political speech, which was entitled to the “broadest protection” of the First Amendment. *Id.* at 14. As such, the Court applied the most exacting judicial scrutiny to all of the FECA amendments, requiring that they serve a compelling governmental interest and be narrowly tailored. *Id.* at 25; see also *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 347 (1995) (“When a law burdens core political speech, we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.”). This stringent test is rarely satisfied. *Bernal v. Fainter*, 467 U.S. 216, 219 n.6 (1986) (“strict scrutiny review is ‘strict’ in theory but usually ‘fatal’ in fact”) (citation omitted).

The *Buckley* Court found that reducing the “actuality and appearance of corruption” was, in fact, a compelling governmental interest. *Id.* at 25–26. In so doing, the Court relied on empirical data supporting Congress’s finding of a demonstrated problem of corruption, or at least the appearance of corruption, within certain realms of the political milieu. See *id.* at 32 nn. 34–37; see also *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 393 (2000) (“*Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible.”).

Relying on that anti-corruption rationale, the Court upheld limitations on contributions to candidates and political parties. The *Buckley* Court found contribution limits to be only a marginal restriction on an individual’s freedom to engage in political expression because, it said, the size of a contribution provides only a “rough index” of the intensity of the contributor’s support. *Buckley*, 424 U.S. at 21–22. The *Buckley* Court further stated that “the transformation of contributions into political debate involves speech by someone other than the contributor.” *Id.* at 21. The Court treated coordinated expenditures as contributions, both to close an easy end-run around contribution limits and because it believed that coordination dilutes, if not destroys, a contributor’s independent expression.

By contrast, the Court invalidated limits on political expenditures on the grounds that such limitations necessarily “reduce[d] the number of issues discussed, the depth of their exploration, and the size of the audience reached.” *Id.* at 19. Expenditure limitations were condemned for their “substantial rather than merely theoretical restraints on the quantity and diversity of political speech.” *Id.* at 19–20. The disclosure and reporting requirements were upheld where such expenditures pose the possibility of quid pro quo corruption. The Court deemed such concerns far less pressing, though, because independent expenditures are not filtered through a candidate or political party.

The Court forcefully rejected all other rationales for regulating campaigns. In particular, the Court rejected the idea that the government had a compelling interest in equalizing the power of “all citizens to affect the outcome of elections” or in curbing the ever-increasing costs of political campaigns. *Id.* at 25–26. The Court has since made clear that government must narrowly tailor any campaign finance laws that seek to limit the actuality or appearance of corruption. *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 384 (2000). Cases since *Buckley* have also reaffirmed

that the government bears a heavy burden of proving that the harms it seeks to combat are real and are based on solid evidence of a problem. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). Mere speculation and conjecture are not enough. *Shrink Missouri*, 528 U.S. at 392 (noting that the Court has “never accepted mere conjecture as adequate to carry a First Amendment burden. . .”).

Thus, in analyzing the 1974 amendments to FECA, *Buckley* essentially created three separate categories of analysis for regulating campaign expenditures: (1) contributions and coordinated expenditures, which are subject to prohibitions and limitations; (2) independent expenditures, which are subject only to disclosure and reporting requirements; and (3) independent issue advocacy. The latter category was treated as entirely off-limits to regulators.

### 2. The “Express Advocacy” Standard

To draw distinctions between coordinated expenditures and independent ones, *Buckley* established a bright-line rule limiting government regulation of political speech solely to “express advocacy” of “the election or defeat of a clearly identified candidate for federal office.” *Id.* at 44. Current law thus requires disclosure of independent expenditures which expressly advocate the election or defeat of a clearly identified candidate. Because disclosure and reporting requirements could threaten rights of privacy of association and belief, however, *id.* at 64, the Court held that such requirements must be subject to strict scrutiny. *NAACP v. Alabama*, 357 U.S. 449, 463 (1958). Although *Buckley* upheld various disclosure and reporting requirements to stem corruption or the appearance of corruption, as well as bookkeeping devices for preventing “end-runs” around contribution limits, this holding did not extend beyond communications which meet the current legal definition of “express advocacy.” 424 U.S. at 80.

In laying out this regime, the *Buckley* Court explicitly rejected the lower court’s interpretation of “express advocacy,” which would have condemned any communication merely “advocating the election or defeat of a candidate.” It found such an amorphous definition constitutionally deficient and unconstitutionally vague. *Id.* at 43. To avoid due process pitfalls, the *Buckley* Court instead defined “express advocacy” as reaching only those communications which explicitly advocate the election or defeat of a “clearly identified” candidate. As an example, use of words such as “elect” or “defeat” are “express advocacy,” while words that praise or criticize a candidate, but do not call for his election or defeat, are not. Currently, all federal courts of appeal except for the Ninth Circuit adhere to the “explicit words” standard. *But see FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987). Even the Ninth Circuit’s “express advocacy” test requires that the message be “reasonably” interpreted as persuading a reader or listener to vote for or against a candidate. *Id.*

In establishing this bright-line rule, the Court noted that “the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.” *Buckley*, 424 U.S. at 42. Nonetheless, the Court did not allow the government to regulate communications, even if they mentioned a candidate by name, so long as those communications did not directly advocate a candidate’s election or defeat. Any other result, the Court believed, would threaten core political speech by subjecting independent issue ads to government regulation.

Accordingly, today, an individual or organization running an advertisement near election time criticizing a senator for his voting record on environmental issues is not subject to reporting or disclosure requirements. In such a case, the Court has recognized that trying to distinguish whether the thrust of an ad is to advocate a cleaner environment or to defeat the named senator at the polls is too hard, too perilous an enterprise for the government, and too potentially injurious to First Amendment freedoms. Accordingly, under *Buckley*, persons and groups may spend as much as they wish to promote or criticize a candidate, as long as they do not advocate the candidate’s election or defeat in “express” terms. *Id.* at 45.

### 3. Expenditure Limitations Require Actual “Coordination”

Even if a political communication expressly advocates the election or defeat of a clearly identified candidate, it may not be constitutionally limited or prohibited unless it is made in “coordination” with a candidate’s campaign. Although FECA does not define “coordination,” current FEC regulations consider communications to be coordinated if, among other things, they are made “[a]t the request or suggestion of the candidate, the candidate’s authorized committee, [or] a party committee” or if “a party committee or its agent, has exercised control or decision-making authority over the content, timing, location, mode, intended audience, volume of distribution, or frequency of placement of that communication.” 11 CFR § 100.23 (2001).

Courts have been concerned that giving the FEC broad discretion to determine when in fact “coordination” has occurred raises the same problems of vagueness as the “express advocacy” standard could, had it not been further defined. Due process and fundamental fairness require that individuals be given notice of what is required of them before they are subject to criminal prosecution. Accordingly, in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 92 (D.D.C. 1999), a federal court held that a coordination occurs only where the candidate or his agents “can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over a communication’s: 1) Contents; 2) timing; 3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or 4) ‘volume’ (e.g., number of copies of printed materials or frequency of media spots). . . .” This definition provides clear notice as to when discussion turns into regulable “coordination.”

If the standard for “coordination” were too loose, fully protected independent advocacy could become subject to unconstitutional regulation. Accordingly, in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) (“*Colorado Republican I*”), the Supreme Court rejected the FEC’s position that party expenditures were presumed, as a matter of law, to be coordinated with their candidates. *Id.* at 622. Rather, the Court said, “[a]n agency’s simply calling an independent expenditure a ‘coordinated expenditure’ cannot for constitutional purposes make it one. . . .” *Id.* at 617.<sup>1</sup>

The *Colorado Republican I* Court reaffirmed the First Amendment right to make unlimited independent expenditures. The Court made clear that the absence of coordination between the candidate and the source of the expenditure was “constitutionally significant.” *Id.* at 615–18. The Court also reaffirmed that limits on independent expenditures are less directly related to preventing corruption than are coordinated expenditures because “the absence of prearrangement and coordination of an expenditure with the candidate . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.” *Id.* at 615 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)). Although the possibility of a quid pro quo arrangement may still exist even in the absence of prearrangement and coordination with the candidate, the possibilities are sufficiently reduced that the Court has chosen this point at which to draw the constitutional line. *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985). Notably, this line requires that actual coordination have taken place between the source of the expenditure and the candidate. It is not enough that coordination “appears” to or “might” have occurred.

#### 4. Upholding the Freedom to Make Unlimited Independent Expenditures

Both the “express advocacy” and “coordination” standards were designed to safeguard political speech, which gets the broadest possible First Amendment protection to “assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Buckley*, 424 U.S. at 14 (citation omitted). Accordingly, the government may not adopt regulations that have the effect of limiting or prohibiting independent expenditures. Such restrictions “impair the ability of individuals and groups to engage in direct political advocacy and ‘represent substantial . . . restraints on the quantity and diversity of political speech.’” *Colorado Republican I*, 518 U.S. 604, 615 (1996) (quoting *Buckley*, 424 U.S. at 19).

The independent speech of people who unite behind political causes is entitled to the highest measure of protection under our law. Such groups may not be blacklisted merely because some may categorize a particular group as “ideological” or as representing a “special interest.” Government may not regulate nonprofit, ideological corporations to the same extent it may regulate for-profit corporations, the Court has said, because the resources of such organizations are “not a function of [their] success in the economic marketplace, but [their] popularity in the political marketplace.” *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 259 (1986). Similarly, a political party’s “independent expression not only reflects its members’ views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible. . . .” *Colorado Republican I*, 518 U.S. at 615–16 (citation omitted). Indeed, even for-profit business corporations have First Amendment rights to engage in issue advocacy. *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 777 (1978).

<sup>1</sup>Although I have not myself been much involved in the *Colorado Republican I*, others in my firm have represented the Colorado Republican party in this litigation.

Moreover, no one has ever produced any evidence suggesting that uncoordinated independent expenditures pose a special danger of corrupting candidates. *Colorado Republican I*, 518 U.S. at 616. After the *Colorado Republican I* case was remanded by the Supreme Court, the FEC had more than a year and a half to show that politicians were corrupted by the prospect of receiving financial support from their political parties. Not only did the FEC fail to produce any evidence of such corruption, but the two politicians deposed in that case, former Senators Paul Simon and Tim Wirth, each denied under oath that they had ever been subjected to corruption or untoward influence by the party with which they chose to associate. In fact, neither senator could identify any member of either party who had been corrupted by his or her party. Brief for Respondent at 6, *Colorado Republican II*, (U.S. 2001) (No. 00–191). In the absence of legislative findings suggesting that uncoordinated expenditures by corporations or “special-interest” groups pose a problem of corruption, there is no basis for limiting the speech and association rights of these groups. *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985) (“[E]xchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more.”).

The Supreme Court’s most recent affirmation of *Buckley*’s central holding in *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377 (2000), provides further insight into the hurdle that the government must overcome before it can limit independent expenditures. Although that case dealt primarily with contribution limits for state office candidates, the opinion addressed the evidentiary showing required to establish more reaching campaign finance limitations beyond those upheld in *Buckley*. The Court stated that the “quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.” *Id.* at 391. Because neither *Buckley* nor subsequent decisions have found sufficient evidence to warrant limitations on independent expenditures to curb corruption or its appearance, the “quantum of empirical evidence” required to justify such sweeping limitations would surely be extensive.

In addition, *Shrink Missouri* noted that there was no finding that the state contribution limits at issue had resulted in “dramatically adverse effect[s] on the funding of campaigns and political associations.” *Id.* at 395–96 (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)). In contrast, constraining independent expenditures where direct contribution limitations exist must necessarily result in a smaller pool of funds available for political expression. And the Court has made clear that the government may not limit the total dollars available for political expression. *Id.* at 26–27 (rejecting a government interest in limiting the “skyrocketing cost of political campaigns”). In addition, independent expenditures remain vital not only for the support of individual issues, but also as a means of funding the less partisan aspects of the democratic process, such as voter registration.

Any proposed reform of FECA must be reconciled with the realization that the First Amendment is at its “zenith” when core political speech is involved. *Meyer v. Grant*, 486 U.S. 414 (1988). Since 1976, the Court has consistently refused to cut back on *Buckley* despite many invitations to do so. Instead, it has steadfastly clung to the idea that “the constitutional guarantee [of the freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.” *Buckley*, 424 U.S. at 15.

## II. SHAYS-MEEHAN AND MCCAIN-FEINGOLD OPERATE OUTSIDE OF THE CONSTITUTIONAL FRAMEWORK

Several of the recent proposals to amend FECA, many of which are cornerstones of Shays-Meehan and McCain-Feingold, violate the First Amendment. Although it is true that some, but not all, of the provisions may be prophylactic measures that arguably combat political corruption, they come at the price of constraining too much political speech to too great an extent.

A threshold problem with Shays-Meehan and McCain-Feingold is the sheer complexity of these bills, and of the regulatory schemes they would create. With the possibility of increased criminal sanctions awaiting violators, those engaging in political expression have a right to know what is and is not an illegal activity. A statute cannot be written so broadly so as to force possible violators to “guess” at its meaning. *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964).

Adding even more and more complex regulations to this already complicated area of the law would leave those participating in the political process to guess repeatedly whether seemingly innocuous and currently permissible activities are in fact lawful. And certainly the threat of criminal sanctions, when weighed against incre-

mental increases in political expression, could deter even the most seasoned political veteran from exercising his or her First Amendment freedoms.

Both bills presume that the most pressing source of political corruption stems from the soft money “loophole.” As noted above, this includes the process by which political parties, “special interest” groups, or individuals run ads designed to advocate the election or defeat of a candidate, but which are supposedly disguised as issue advocacy.<sup>2</sup> By avoiding use of the magic “express advocacy” words, the theory goes, contributors of advertisements can contribute indirectly to a candidate’s campaign even after they have met FECA contribution limits.

As noted above, drafters in both houses have sought to close the soft-money/issue ad” loophole in two ways, both of which raise constitutional issues. First, they have sought to rework the “express advocacy” test of *Buckley*, while simultaneously placing severe limitations on the use of advocacy ads. Second, the bills seek to broaden FECA’s definition of “coordinated activity.” In addition, there are proposals to significantly increase reporting and disclosure requirements for individuals and PACs, as well as to expand obligations upon broadcasters, cable, and satellite operators to give special benefits to candidates and political parties.

### 1. Circumventing the Supreme Court’s “Express Advocacy” Test

The *Buckley* Court construed FECA as reaching only those communications that in “express terms” advocate the election or defeat of a “clearly identified” candidate in order to prevent regulators from impinging on the constitutionally protected freedom of political issue discussion. *Buckley*, 424 U.S. at 44. Shays-Meehan and McCain-Feingold would create a new, broader category of communications called “federal election activity,” which would include all references to a “clearly identified” federal candidate regardless of whether the ad expressly advocates a vote for or against that candidate. S.27, 107th Cong. §101 (2001); H.R. 308, 107th Cong. §101 (2001). In addition, the bills would prohibit using the funds of corporations, labor unions—and in the case of McCain-Feingold, non-profit ideological corporations—for advertisements that “refer” to a clearly identified candidate 60 days before a general election or 30 days before a primary election.<sup>3</sup> All others wishing to run these types of ads would face stringent disclosure requirements.

The gutting of the “express advocacy” standard necessarily runs the risk that public issue discussion will be chilled and even unconstitutionally regulated. Except for the Ninth Circuit, all federal courts of appeal have interpreted *Buckley*’s command that “express advocacy” be “unambiguously related to the campaign of a particular federal candidate” as requiring that express words advocating the election or defeat of a particular candidate be communicated. *Id.* at 80. This interpretation has prevented regulators from constraining everyday political speech and issue advocacy. See, e.g., *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (discussing the need for an “express words” standard of “express advocacy” to satisfy constitutional concerns of vagueness). Even the Ninth Circuit’s more flexible “express advocacy” test requires that a message be unmistakable and unambiguous in advocating the election or defeat of a candidate before it crosses the constitutional line such that it can be regulated. *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1986). But Shays-Meehan and McCain-Feingold wander into uncharted waters in seeking to regulate communications that simply “refer” to a clearly identified candidate.

To prohibit or severely regulate all independent political communications that “refer” to a clearly identified candidate in proximity to election time would dramatically hamper the ability of the affected entities to communicate clearly about issues important to them and to the public. In American politics, candidates, campaigns, and issues are inextricably bound together. See *Buckley*, 424 U.S. at 42–43 (“[T]he distinction between discussion of issues and candidates and advocacy of the election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and government actions.”); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (noting that the “election campaign is a means of disseminating

<sup>2</sup>“Soft money” also refers to the money donated to parties by corporations, unions, and individuals, which use the proceeds to defray administrative and party-building activities (e.g., voter registration and “get out the vote” efforts, as well as issue ads.

<sup>3</sup>The bills accomplish this prohibition in separate ways. McCain-Feingold bans all “electioneering communications” by unions and corporations, including “special interest” groups and non-profits, with narrow exceptions. S. 27, 107th Cong. §§203, 204 (2001). Only individuals and PACs may speak, subject to disclosure requirements. Shays-Meehan contains no such explicit provision. Rather, it expands the “express advocacy” standard to include all references to candidates made within 60 days of an election. H.R. 308, 107th Cong. §201 (2001). Shays-Meehan then retains the current regulation that prohibits corporations and labor unions from engaging in “express advocacy.”

ideas as well as attaining political office”). Bills that come to identify issues are known by the names of politicians. This has always been the case. Our key labor laws are known as the Norris-LaGuardia Act, after Senators George Norris and Congressman Fiorello LaGuardia, and the Wagner Act, after Senator Robert Wagner. Our antitrust law is called the Sherman Act, after Senator John Sherman. The restriction on federal abortion funding is known as the Hyde Amendment, after Congressman Henry Hyde. And, of course, the synonym for campaign finance legislation has become McCain-Feingold.

Recognizing the constitutional difficulties with so broad a prohibition, McCain-Feingold contains a poison pill adopting the standard of *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987), itself in substantial conflict with *Buckley*, in the almost certain event that the Supreme Court were to find the expanded definition of “electioneering activity” unconstitutional. Members of Congress have an obligation to the Constitution, which they have sworn to respect. Senator Sam Ervin once observed that “every Congressman is bound by his oath to support the Constitution and to determine to the best of his ability whether proposed legislation is constitutional when he casts his vote in respect to it.” Peter Schuck, *The Judiciary Committee* 175 (1975). Congress should not adopt a bill about which it has such deep doubts that it finds it necessary to put in a backup clause in the expectation that the primary clause violates the Constitution.

As mentioned above, McCain-Feingold would ban political ads mentioning a candidate within 60 days of a campaign (and 30 days before a primary) if run by a wide range of groups, including nonprofit, ideological corporations such as the NRA or ACLU, trade associations such as the AMA, by chambers of commerce, by labor unions, or by for-profit corporations. Such a prohibition on political communication near the date of an election not only oversteps the “express advocacy” test established in *Buckley*, but would also violate Supreme Court precedent giving heightened protection to political speech made close to election day. In *Mills v. Alabama*, 384 U.S. 214 (1966), the Court invalidated a state ordinance that prohibited advocating the election or defeat of a candidate on one day, election day. The Court recognized that the statute “silences the press at a time when it can be most effective.” *Id.* at 219–20. In striking down FECA’s \$1,000 limitation on the amount of money any person or association can spend during an entire election year, *Buckley* relied upon *Mills*, noting that “the prohibition of election-day editorials invalidated in *Mills* is clearly a lesser intrusion on constitutional freedom than a \$1,000 limitation on the amount of money any person or association can spend during an entire election year. . . .” *See Buckley*, 424 U.S. at 50. If the one-day prohibition in *Mills* was unconstitutional, so too must be a prohibition on political communications within 60 or 30 days before an election. Indeed, states that have tried to enact similar provisions have all, without exception, seen the statutes struck down as unconstitutionally overbroad. *See, e.g., Vermont Right to Life Comm., Inc. v. Sorrell*, 216 F.3d 264 (2d Cir. 2000) (striking down Vt. Stat. Ann. tit. 17, § 2883 (1998) as unconstitutionally overbroad), *rev’g Vermont Right to Life Comm., Inc. v. Sorrell*, 19 F. Supp. 2d 204 (D. Vt. 1998); *Planned Parenthood Affiliates of Michigan, Inc. v. Miller*, 21 F. Supp. 2d 740 (E.D. Mich. 1998) (striking down Mich. Admin. Code r. 169.396 (1998)).

Nor is it an answer to assert that “special interest” groups are afforded less protection under the First Amendment, a misconception the Supreme Court rejected in *FEC v. Nat’l Conservative PAC Comm.*, 470 U.S. 480, 494 (1984) (rejecting the argument that the “form of organization” diminished the entitled of an ideological corporation to First Amendment protection). Even business corporations have a constitutional right to engage in issue advocacy, *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 777 (1978), a freedom directly impinged upon by the 60/30 day “electioneering communication” ban.

Perhaps in an attempt to woo the influential “fourth branch,” McCain-Feingold exempts the broadcast media from the 60/30 day prohibition—even though many such outlets are owned by corporations otherwise prohibited from making “electioneering communications.” S.27, 107th Cong. § 201 (2001). Affording the media greater rights of expression than citizens who join together to express their views favors one class of speakers over another, creating a First Amendment problem. Moreover, this regime creates an expansive loophole whereby a corporation incapable of engaging in “electioneering communications” can acquire the right to do so merely by purchasing a media outlet. Thus, AOL/Time Warner may use its media outlets to editorialize about the evils of censoring explicit song lyrics, complete with references to elected officials, while Ford Corporation could not refer to elected officials concerning environmental or labor issues, unless it were to first buy a media outlet.

In sum, the “express advocacy” test established in *Buckley* strikes a balance between those narrowly tailored regulations directly furthering an interest of limiting

corruption, on the one hand, and unconstitutionally overbroad regulations which impinge on “core” political speech, on the other. Reworking this well-established test in an attempt to close the soft money “loophole” runs afoul of constitutional requirements. Even worse is the prohibition of communications by certain advocacy groups near an election. The constitutional solution to the perceived evils of any “special interest” groups running ads during election season is “more speech, not enforced silence.” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

## 2. *The New Look of “Coordination”: A Phantom Definition*

As noted above, current law limits coordinated spending between unregulated independent entities and regulated entities such as political candidates. See Part I. § 3; *Buckley*, 424 U.S. at 46–47. Although FECA does not explicitly define “coordinated expenditure,” current FEC regulations consider communications to be coordinated if, among other things, they are made at the request or suggestion of a candidate or if the candidate had control or substantial decision-making authority in making the communication. 11 CFR § 100.23 (2001). A distinction between truly “coordinated” activity and independent expenditures is constitutionally significant because independent expenditures have been held not to pose a “substantial danger of corruption of the electoral system.” *Colorado Republican I*, 518 U.S. 604, 617–18 (1996).

Both Shays-Meehan and McCain-Feingold would expand the definition of what constitutes “coordination.” McCain-Feingold broadly defines a “coordinated expenditure” to mean “a payment made in concert or cooperation with, at the request or suggestion of, or pursuant to a general understanding with, such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.” S. 27, 107th Cong. § 214 (2001). It would direct the FEC to interpret this amorphous definition, with the caveat that “explicit” collaboration or agreement may not be required to establish “coordination.” *Id.* In considering whether “coordination” has in fact occurred, the FEC would be allowed to consider such supposedly suggestive criteria as whether the parties share the same vendor or whether payments for the communications are being directed by a former employee of the candidate. *Id.*

Similarly, Shays-Meehan presumes that a “coordinated activity” has taken place merely if the entity paying for the advertisement has consulted with the candidate in the past. H.R. 308, 107th Cong. § 206 (2001). As a questionable twist on the *Colorado Republican I* decision, Shays-Meehan further presumes that any party expenditure referring to a clearly identified candidate has been “coordinated,” unless the party certifies that the communication was made independent of the candidate. H.R. 308, 107th Cong. § 205 (2001). Shays-Meehan and McCain-Feingold would completely prohibit political parties from making both coordinated and independent expenditures in support of the same candidate.

This expansion of the “coordination” definition would trench on constitutionally protected independent expenditures. By directing the FEC to presume that coordination has taken place merely because of such far-reaching similarities as common vendors or former employees, both bills engage in the “guilt by association” labeling which *Colorado Republican I* rejected. Such a practice would also run counter to a central holding of *Buckley* that limits on independent expenditures “represent substantial . . . restraints on the quantity and diversity of political speech.” 424 U.S. at 19.

What is worse, both bills could impose criminal sanctions if the FEC were to find that a “coordinated activity” has occurred, but the candidate did not properly report the contribution. Due process and fundamental fairness require that candidates have notice as to the specific instances when they have engaged in “collaboration” with another entity. See *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 92 (D.D.C. 1999) (stating precise indications of when activity between two political entities becomes “coordinated” such that a mere “general understanding” is insufficient to make a presumption of “coordination”). McCain-Feingold’s directive that “coordination” may be found even without any “explicit collaboration or agreement” falls short of this requirement, as does Shays-Meehan’s presumption of “coordination” when the entity running the ad has merely consulted with the candidate on unrelated matters.

The Supreme Court has in other contexts invalidated statutory language aimed at restricting collaboration on the grounds that it unduly restrains First Amendment freedoms of speech. In the antitrust arena, for example, the Court found that the gathering and dissemination of general pricing information among competitors is not enough to presume collusion, absent agreement or evidence of concerted action. *Maple Flooring Manu. Ass’n v. United States*, 268 U.S. 563, 586 (1924). Cf. *United States v. Container Corp. of America*, 393 U.S. 333, 335 (1969) (finding collu-

sion where competitors exchanged pricing information concerning specific customers with the expectation that such information would be reciprocated). Any other interpretation, the Court said, would “suppress such influences as might affect the operations of interstate commerce . . . [including] the essential elements of the economics of a trade or business, however gathered or disseminated.” *Maple Flooring*, 268 U.S. at 583.

Similarly, an FEC finding of coordination between a candidate and an entity sponsoring a political advertisement in the absence of an express agreement or concerted action would implicate a candidate’s due process rights. Such a regime would also chill essential interaction between political players crucial to our democracy. Treating as a prohibited “coordinated expenditure” every amount spent pursuant to some “general understanding,” in the absence of collaboration or agreement, would unduly limit independent political activity.

### 3. *New Disclosure Requirements Imposed on Individuals and PACs*

Both bills would ban corporations and labor unions, and in the case of McCain-Feingold, ideological corporations, from making any communication referencing a candidate within 60 days of a general election and 30 days before a primary. Individuals and PACs would be permitted to make such communications, but would be subject to rigorous reporting and disclosure requirements. Specifically, McCain-Feingold requires those who spend in excess of \$10,000 per year on “electioneering activities” to disclose such spending within 24 hours of a decision to run an ad. S. 27, 107th Cong. § 201 (2001). Shays-Meehan has the effect of requiring those who run independent issue ads to make public disclosures by broadening the “express advocacy” standard.

These added disclosure requirements, which mandate that the affected individuals and PACs disclose the identity of all donors, as well as much about other business dealings, violate established free association rights. As the Supreme Court said in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995), “anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hands of an intolerant society.”

The tradition of anonymous political communication and activity stretches back even further than the use of the pseudonym “Publius” by James Madison, Alexander Hamilton, and John Jay to write the Federalist Papers. But that example should suffice to illustrate the value of anonymity in connection with political communications. To take more mundane, modern-day examples, one can well imagine Hollywood actors who prefer to keep private their donations to the NRA or the National Right to Life Committee, while employees of some corporations may want to keep private their donations to Public Citizen or NRDC. *Buckley v. Valeo*, 424 U.S. 1, 237 (1976) (Burger, C.J., concurring in part and dissenting in part) (noting that “rank-and-file union members or rising junior executives may now think twice before making even modest contributions to a candidate who is disfavored by the union or management hierarchy”).

The proposed disclosure requirements would establish that the “price” of meaningful and effective contributions to political debate—which often cost far more than \$10,000—is making public one’s list of donors.<sup>4</sup> A genuine fear of corruption may, as the Supreme Court suggested in *Buckley*, warrant requiring contributors to political campaigns to disclose their identities. Moreover, the need to guard against “end-runs” around contribution limits may warrant some disclosures even of independently generated ads expressly advocating the election or defeat of a particular candidate. But both bills would extend this disclosure regime far beyond contributors to campaigns, exposing to public scrutiny virtually anyone who wants his or her voice to be effectively heard.

The potential for mischief is compounded by the notion that an expenditure is considered made, and therefore must be disclosed, within 24 hours after a commitment has been made for that expenditure. Such a disclosure puts a candidate on notice (often months in advance) that an ad will be run mentioning him or her. As such, this regime would give powerful political figures the opportunity to use their power to try to suppress that communication, either by pressuring the media outlet or the independent entity itself. And, if that fails, the candidate has advance notice of any critical ad to which they can respond at bargain-basement prices available to candidates, but not to their critics.

<sup>4</sup>For comparison sake, a full page ad in the New York Times is over \$100,000, and a 30 second ad in a highly-rated prime-time show runs between \$158–\$170,000.

Individuals who want to express themselves on the issues of the day should not be forced to expose their every move to the public merely because they want to run an ad mentioning a candidate. Such a rule opens them to official retaliation and pressure, directly impeding their rights of speech and association.

#### 4. *Proposed Restrictions on the Editorializing Rights of Broadcasters Restrict Speech*

A key amendment to McCain-Feingold reworks section 315(b) of the 1934 Communications Act to require broadcasters to charge the “lowest unit rate” to candidates purchasing advertising time while simultaneously providing them with the most desirable class of time. S. 27, 107th Cong. § 305 (2001). Current law requires only that broadcasters charge political candidates the “lowest unit charge” for the particular class of time sought. In addition, the amendment would bar stations from preempting any political spot, and would extend the benefits of the “lowest unit charge” to political parties.

Current law favors political candidates by prohibiting broadcasters from charging them more than the lowest rate for a particular advertising slot, as well as from rejecting ads because of content or otherwise censoring them. 47 U.S.C. § 315(a) (1994). But the so-called “Toricelli Amendment,” in allowing candidates to purchase prime time slots potentially valued at amounts exponentially higher than the “lowest charge unit,” severely curtails the editorializing rights and potentially the economic well-being of broadcasters. Essentially, the amendment gives candidates and political parties a first-class seat for the price of a coach ticket.

Print publications are afforded unlimited discretion in both the selection and editorializing of their content. See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (finding that for newspapers a forced “right of reply” could increase costs, reduce editorial control, and encourage newspapers to avoid controversial issues). Although broadcasters have traditionally been afforded less First Amendment protection, *Red Lion Broad. Co. v. FEC*, 395 U.S. 367, 387 (1969) (“Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”) (citation omitted), there is no longer any justification for this regime. Indeed, the Supreme Court has come close to repudiating it. For example, in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650 (1984), the Court stated that “the FCC’s oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations;—which directly contravenes its *Red Lion* holding. Moreover, McCain-Feingold would extend the lowest unit charge regime to cable and satellite media as well, even though cablecasters are entitled to heightened First Amendment protection. *Turner Broad.*, 512 U.S. at 638.

The expansion of this regime unduly trenches on the editorial discretion of telecasters, and is little more than protectionist legislation for the favored few. If adopted, it would be subject to substantial challenge, and could well be—and should be—struck down as unconstitutional.

This is so even if the *Red Lion* scarcity rationale were applied. With limited exceptions, government may not favor one type of speech over another. Those exceptions all deal with speech that is deemed to be without communicative value, such as obscenity and fighting words. Other types of speech, whether political or not, must be treated equally. A central First Amendment principle is that there is an “equality of status in the field of ideas.” *Chicago Police Dep’t v. Mosley*, 408 U.S. 92, 96 (1972) (quoting Alexander Meiklejohn, *Political Freedom* 27 (1948)).

Similarly, government may not favor one type of speaker over another. *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951). In *Buckley*, the Court stated that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” 424 U.S. 1, 48–49 (1976). Open public debate requires that the government not pick favorites.

Yet the Toricelli Amendment prefers political speech, as well as a particular class of speaker—candidates and political parties, directly contravening the Supreme Court’s observation that it can “see no principled means under the First Amendment of favoring access by political parties over other groups and individuals.” *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 127 n.21 (1973). Moreover, at the same time that these bills are subsidizing political speech, they would have the almost certain effect of banning many political ads from the airwaves 60 days before a general election.

Even if the Court were not to invalidate the Toricelli Amendment on the grounds of favoritism, the government would still have to show that it was narrowly tailored to achieve a compelling government interest. *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984). But it is hard to see how the interest in reducing the actuality

or appearance of corruption is furthered by reserving a highly valued resource—low-cost advertising—for the representatives who enacted it. To the contrary, such a measure smacks of self-dealing.

The amendment is also not narrowly tailored. Subsidizing the costs of political campaigns could be achieved more directly through providing public funds directly to candidates. Broadcasters, let alone operators of media entitled to full constitutional protection, should not be forced to bear the brunt of public political campaigns alone.

In requiring broadcasters to charge candidates the “lowest charge unit” for the particular class of advertising time purchased, the objective of section 312(a)(7) was to assure candidates a right of access to broadcasting. But the Toricelli Amendment, rather than guaranteeing that political advertising be on par with commercial advertising, actually subsidizes political speech to the detriment of the editorial rights of broadcasters.

Beyond its constitutional shortcomings, the Toricelli Amendment will almost certainly have the perverse effect of increasing the number of attack ads during election season. The extension of favorable rates to political parties allows them to do the “dirty work” for candidates, who may be reluctant to have their names associated with negative ads. Although another amendment to McCain-Feingold requires federal candidate attack ads to include a photo and statement of approval, there is no such requirement if an attack ad comes from a political party. S.27, 107th Cong. §306 (2001). An increase in the number of attack ads will almost certainly harm broadcasters, who will be forced to reconcile their obligation to show more attack ads with a television audience disdainful of political mudslinging.

In all, the Toricelli amendment is unwise and unconstitutional, and contributes to the perception that the real motivation behind these measures is incumbency protection.

### III. Conclusion

These bills constitute a frontal assault on core First Amendment freedoms. Shays-Meehan and McCain-Feingold rework *Buckley* through a semantic sleight-of-hand, masking an abridgment of political communication through unprecedented complexity. *Buckley* drew a line protecting the rights of Americans to engage in political speech, upholding limits on this right only when a demonstrated problem of corruption or the appearance of corruption has been shown to exist. Congress has not demonstrated that such a threat exists simply because individuals and ideological associations make independent expenditures supporting or criticizing candidates and political issues. No one likes to be criticized—least of all powerful politicians—but the First Amendment guarantees the right to criticize those in the public arena with whom we disagree. Those who can’t withstand such attacks should withdraw from the arena, not abuse their position to hobble political opponents. For these reasons, the provisions outlined above are almost certain to be struck down by the Supreme Court as unconstitutional.

Mr. CHABOT. Thank you very much. The panel Members will now be entitled for 5 minutes to question the witnesses as they see fit. I recognize myself for 5 minutes for that purpose.

Ms. Strossen, I would like to start with you if I could, and then I would like the others to respond if they wish to do so. In your written statement you had written, “Neither the House nor the Senate version of the bipartisan Campaign Finance Reform Act of 2001 is real reform. They are both fatally flawed assaults on first amendment rights.” Then you went on to state that you think public financing is the answer, which I would vehemently disagree with, but I would like to have you expound on the first portion, which I think there is certainly some reason for many of us that are considering these to be concerned about the first amendment implications. I know you all addressed that to a certain degree in your opening statements, but I would like to hear each of you give us your best shot again about the first amendment specifically, and why you feel it has an impact on the first amendment.

Ms. STROSSEN. Yes, Mr. Chairman. Thank you for the opportunity to expound a little bit more. I think the written testimony singles out three fundamental flaws, the first of which has to do

with the issue advocacy concern that you also—that was one point of an agreement between your opening remarks and mine.

And if I may, I think one of the points I would like to make now on why those restrictions violate the first amendment is by responding to the attempted defense that Mr. Moramarco put forward. First he said that, well, it is not primarily a ban on speech, it simply requires disclosure. Well, first of all, that is not a factually accurate description. But even assuming for the sake of argument that all it required was disclosure, because of the privacy concerns that have been raised by Congressman Nadler, and perhaps more importantly in terms of constitutional adjudication, the concerns that the United States Supreme Court has consistently addressed whenever it has—and it has repeatedly struck down bans on anonymous expression, or struck down any requirement of disclosure in the context of making campaign statements, or making campaign contributions—that we cannot distinguish between the right to anonymously contribute, to speak anonymously and the right to speak freely. That if you are engaging in controversial expression or associated with a controversial organization, ranging from the NAACP to the NRA to the ACLU, depending on what part of the country you live in and who you are, the price that you will pay for being forced to have your name disclosed is that you simply will not speak at all. And the Court recently reaffirmed that principle in a case the ACLU won from Ohio just a few years ago. So, so-called “mere” disclosure is tantamount to banning—.

Mr. CHABOT. I don't want to cut you off, but I want to hear from the other witnesses. I only have 2 minutes left on my 5.

Ms. STROSSEN. Sorry.

Mr. CHABOT. Mr. Bopp, would you like to respond?

Mr. BOPP. Yes. With respect to political parties, over the last 10 years there has been one Supreme Court decision, the Colorado Republican case. There have been district court decisions striking down soft money bans in Alaska, striking down contribution limits from parties to political—to their candidates in the Eighth Circuit and in Vermont.

These are all cases that are based on first amendment grounds. Not only are contributions to and from entities such as political parties constitutionally protected, but that there is no justification for limiting them. There is not one single case that has upheld a restriction on political parties that are contained in McCain-Feingold and Shays-Meehan. There are these cases plus others striking down similar restrictions.

It is just fanciful. It is a hope, a hope that the Court will change the first amendment, leaving nude dancing pornography on the Internet and flag burning, while cutting out political speech.

Mr. CHABOT. Thank you, Mr. Bopp. Mr. Moramarco.

Mr. MORAMARCO. Yes, I would just like to address Ms. Strossen's concern in responding to the constitutional problem there. I think it is a presupposition, as I think everyone who is proposing this type of legislation does, that the Supreme Court's jurisprudence requiring anonymity in special cases is still valid. It doesn't mean you can't require disclosure generally; it means that if you have an organization like the NAACP that can show a legitimate threat to its members from having disclosure, then it might be entitled to an

“as applied” exemption from the law; not that the law is invalid, but that specific parties may be exempt from it. So with that understanding, I think the anonymity concerns can be dealt with.

Mr. CHABOT. Thank you. Mr. Troy.

Mr. TROY. Thank you. In *Buckley*, the Supreme Court stated that, quote, The concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the first amendment, unquote.

The reason why they said that is not because they don't think that everybody should have an equal right to speak, it is that the danger of having the government try and go through that equalizing process is too great a danger to warrant the enterprise.

Some people don't want to speak. Some people may unfortunately lack the resources. There are things that we can do to try and give them the resources. The age of the Internet, fortunately, makes speech a much easier thing to do. But for the government to get into the business of trying to enhance the relative voice of some in order to suppress the voice of others is a very dangerous enterprise, and the Supreme Court will not back down on that statement.

Mr. CHABOT. Thank you very much.

Mr. Nadler is recognized for 5 minutes.

Mr. NADLER. Thank you. Let me start off by commending Ms. Strauss and Mr. Bopp and Mr. Moramarco for seriously addressing the issues before us. Let me ask a question of Ms. Strossen. You said that the bill before us makes it a crime to criticize government. How, given the fact that, as I understand it, the issue limitation or the—says that you can criticize government all you want, you can say whatever you want, but you have to do it with hard money, you have to raise the money in increments of under whatever the contribution limit is; that that is the only limitation on it and disclosure.

Ms. STROSSEN. I was specifically referring to the issue advocacy restrictions that do make it a crime to engage in any criticism that simply refers to an individual—.

Mr. NADLER. No, excuse me. I thought the bill says that if within 60 days, et cetera, you deal with a candidate, you can do it. Not a crime to do it. It is a crime to do it with soft money. In other words, that that ad has to be paid for with under \$1,000 or with under—and with disclosed money.

Ms. STROSSEN. I am consulting my expert.

Mr. NADLER. Because if it—Mr. Moramarco, am I quoting the bill correctly?

Mr. MORAMARCO. If you are an individual, you can do it with unlimited.

Mr. NADLER. If the NRA or the Sierra Club wants to say Congressman Macgillicuddy's—.

Mr. MORAMARCO. They can't use corporate or union funds.

Mr. NADLER. They can't use corporate union funds, but they can use funds they raise in hard money. Ms. Strossen.

Ms. STROSSEN. I was thinking of an organization like the ACLU, for example, which would have to jump through hoops that we simply could not jump through. We would have to set up a separate organization, segregated funds. There would have to be disclosure,

even of very small contributions, and this simply would be intolerable for an organization—.

Mr. NADLER. Disclosure—wait a minute. Any organization like the ACLU, the NRA, the Right to Life, pro or con, Sierra Club, they could do any amount of criticism on soft money—not soft money, of issue or critical, as long as they used what we call—what we all understand to be hard money; is that not correct?

Ms. STROSSEN. I don't think that is correct. An organization like the ACLU by definition simply doesn't raise hard money.

Mr. NADLER. But you could choose to if you want to.

Ms. STROSSEN. But we couldn't choose to without going through all of the regulations that are intolerable to an organization that exists to advocate—.

Mr. NADLER. So what you are really saying is not that it makes it a crime to criticize the government, but it makes it a crime to criticize or to—it makes it a crime to put ads on television criticizing a candidate or, for that matter, praising a candidate, unless it is done with hard money and subject to the normal—to the campaign regulations.

Ms. STROSSEN. And that simply cannot be done by certain organizations. I mean—.

Mr. NADLER. That is a separate question. That is a separate question. And the disclosure—.

Ms. STROSSEN. But organizations that exist precisely to criticize government policy, and I like using the ACLU as an example because, as you may know, as a matter of organizational policy we are nonpartisan, and yet in our nonpartisan advocacy on issues it is essential for us to criticize candidates.

Mr. NADLER. No question. But this bill would prevent that. What it would mandate in effect is that if you wanted to do that, you have to—I don't know if have you to set up a—.

Mr. MORAMARCO. If the ACLU set up a separate bank account, it just had membership dues from individuals, they could fund all the advocacy they want. This would have to keep out the very, very large—but their membership dues are very small—that would satisfy this bill.

Ms. STROSSEN. Just as the Supreme Court has said, that even something that chills speech is as—.

Mr. NADLER. Whether it chills speech is another—excuse me. Whether it chills speech is another question.

I wanted to ask, Mr. Bopp, you said that people join groups to pool their resources, and under that legislation the wealthy would win, not the average citizens. The incumbents perhaps would win.

Isn't the whole point of this, though, that yes, people do join groups in order to pool their resources, and under this legislation it is precisely the groups that pool resources of people who contribute less than \$1,000 or, I suppose under the Senate bill, less than \$2,000, that would be fine for any ads. All that couldn't be done is to have all these grass-roots citizens contribute half a million dollars for the ad. They would have to be under \$1,000 or \$2000. Isn't that correct?

Mr. BOPP. Well, the average—it is essential for average citizens to join a group, because they have to—.

Mr. NADLER. I agree with you. And this wouldn't stop them from being able to do it.

Mr. BOPP. Yes, it would. It would mean that the group that they join is prohibited from audaciously mentioning the name of a candidate. Are you—may I finish the answer? It would prohibit the group from mentioning the name of a candidate within 60 days of an election. The rich people—.

Mr. NADLER. Excuse me, you are misstating the facts. It would prohibit the groups from within 60 days of election from mentioning the name of a candidate in an ad if that ad was paid for with large contributions that were not disclosed.

I ask for an extra minute.

Mr. BOPP. By the group. The average contribution, for instance, to one of my clients, the National Right to Life Committee, is \$29 a year per member. That is the average contribution. That group under McCain-Feingold is prohibited; it would be a crime to mention the name of a candidate within 60 days of an election.

A wealthy person, this \$500,000 person, spends his own money, he doesn't have to join the group.

Mr. NADLER. The NRA could fund those ads with less than \$1,000 or \$2000 if it wanted to.

Mr. BOPP. No. They have set up a different organization. The ACLU is prohibited, period.

Mr. NADLER. I hope—.

Mr. BOPP. You have to create a new organization called the ACLU PAC. Contributions to it are limited to \$5,000 a year. They cannot receive contributions from a corporation or labor union. And all to do what? For instance, to talk about McCain-Feingold legislation.

Mr. NADLER. Mr. Bopp, my time is limited. I think you made your point clear, and you have reaffirmed the fact that they could do it if they wanted to have subsidiaries and keep contributions—.

Mr. BOPP. They are prohibited.

Mr. CHABOT. The gentleman's time has expired. The gentleman is recognized for an additional minute to wrap up.

Mr. NADLER. Thank you. I did want to follow up on one thing you said in your opening statement. You said we need to level the playing field, to level the playing field and to—.

Ms. STROSSEN. Expand opportunities.

Mr. NADLER [continuing]. Expand opportunities. Could you expand on how you would expand opportunities and level the playing field?

Ms. STROSSEN. Yes. We believe that it is practically more effective as well as constitutionally more principled to increase the number of speakers and the amount of speech by providing an adequate floor for all qualified candidates for all Federal elections through the kind of public financing mechanisms that I mentioned in my opening remarks.

Mr. NADLER. So, in other words, people—.

Ms. STROSSEN. And that that is far more important than imposing a ceiling.

Mr. NADLER. So, in your opinion, people who are members who may have misgivings or qualms about this legislation would be well

advised to support a public financing bill. That is what you are saying.

Ms. STROSSEN. That is certainly our view. We realize that politically it is not likely to be too successful, and without casting any aspersions on anybody in this distinguished company I don't know which way that cuts. Why would incumbents be motivated to vote for something that would in fact empower challengers in a way that the current legislation does not, and in fact has exactly the opposite effect?

Mr. CHABOT. The gentleman's time has expired. The gentleman from Michigan is recognized for 5 minutes.

Mr. CONYERS. Ms. Strossen, as president—and me as a longtime member—are you elected by the board of ACLU—

Ms. STROSSEN. I certainly am.

Mr. CONYERS [continuing]. Or by the membership?

Ms. STROSSEN. The board. You as a member can vote for the board in your affiliate and at—

Mr. CONYERS. All right, stop. I got to control my time better than Mr. Nadler did. I understand. Okay.

Now, Mr. Daniel Troy, I am telling you, I was so pleased to hear the sense of humor in your remarks, coming from a scholar of the American Enterprise Institute, I could barely contain myself. I want to congratulate you and encourage that maybe to spread throughout the organization. But I really appreciated your approach.

Now, do you believe that Shays-Meehan soft money ban to be unconstitutional? Yes or no?

Mr. TROY. No.

Mr. CONYERS. Okay, that is fine. I know you can explain that for many minutes.

Could I ask the same question of Ms. Strossen?

Ms. STROSSEN. I believe it is unconstitutional, yes.

Mr. CONYERS. Okay. All right. Now, let me go back to Mr. Troy. Do you feel that—do you agree that free speech is absolute in terms of the constitutional provision thereto?

Mr. TROY. No, Mr. Conyers, nobody believes that the first amendment is absolute. But there are degrees of—

Mr. CONYERS. I understand. Now—

Mr. TROY [continuing]. Enforcing it.

Mr. CONYERS. So it is not absolute. Do you believe that the restriction on free speech is appropriate?

Mr. TROY. Not unless there was the most compelling governmental interest and it is narrowly tailored, which these bills are overall not. But the ban on soft money, I take it you meant—

Mr. CONYERS. Whoa. Whoa. Wait a minute.

Mr. TROY [continuing]. The ban on contribution to a party. That, I think, the Supreme Court would uphold.

Mr. CONYERS. Wait a minute, sir. I insist upon controlling my 5 minutes as I let you control yours.

And by the way, Mr. Chairman, is there going to be another round?

Mr. CHABOT. It has not been requested.

Mr. CONYERS. It has not been requested. Okay. All right.

Now, back to Ms. Strossen. Could you explain to me how the ACLU—this is member to president—how they happen to have changed their position on this subject matter in the course of the several years?

Ms. STROSSEN. We have not changed our position at all. The ACLU, I am sure you will be happy to know as a member, has in fact defended the prerogatives of dissent within our own organization much more than this legislation would do for dissenters in the broader political community. My predecessor as president—

Mr. CONYERS. Excuse me, ma'am. Forgive me. Four years ago, one of the leaders of ACLU testified before this Judiciary Committee in support of campaign finance reform.

Ms. STROSSEN. Not anything that—

Mr. CONYERS. Not true?

Ms. STROSSEN. Not true. The policy that supports our position here we have had from the get-go.

Mr. CONYERS. Okay.

Ms. STROSSEN. Those individuals that were cited were dissenters.

Mr. CONYERS. I understand. I get you.

Okay. This has been one of the more amazing hearings I have ever been in attendance, because I just found out that I, who support the people, justice, progress, have been on the wrong side of this issue all the time. Mr. Troy nods his head affirmatively and I am not even going to mention Mr. Bopp's name, because I know that he will seize—

Mr. BOPP. It is not a Federal crime, yet.

Mr. CONYERS. So—and I didn't even—okay. But I mean it is very interesting. I have got to go back and rethink so many other things that come before the Judiciary Committee as a result of me finding out that I am, instead of making American politics more democratic, I have inadvertently taken—I am going in exactly the wrong direction. And look who I have as my guides, my mentors here, to bring me into this new understanding of how we magnify the vote, take money out of the campaign process, which continues to increase every election nearly. And to think I owe it all to you. And I want to thank you for forcing me to go into many more hours of study on a subject that I thought I had some understanding of.

Mr. BOPP. Thank you, Congressman.

Mr. CONYERS. I accept your thanks, Mr. Bopp. Thank you, Mr. Chairman.

Mr. CHABOT. Thank you. The gentleman's time has expired. The gentleman from Virginia is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Moramarco, do I understand that this legislation would have no effect on legitimate issue ads?

Mr. MORAMARCO. That is certainly our belief. Well, there would be a tiny fraction of ads that would be—you know, less than 1 percent of ads that would be subject to regulation. The Supreme Court's test for constitutionality is whether there is substantial overbreadth. And we believe this will pass the test. We believe those relatively few ads could be easily redesigned to drop the name of the sponsors.

Mr. SCOTT. Let me ask it again. If it is a legitimate issue ad, the various bills would not affect the broadcast of legitimate issue ads.

Mr. MORAMARCO. What I am saying to the distinguished Representative is that the test that has been drafted is not substantially overbroad. It doesn't mean it is going to be 100 percent accurate. There may be 2 or 3 issue ads that are picked up. That doesn't make it unconstitutional.

Mr. SCOTT. Well, the bright line between legitimate issue ad and—the term of art is “sham” issue ad—is fairly easy to understand today. Who would get to decide whether something is a legitimate issue ad and when it is a sham issue ad if you don't have the bright line test that you have today?

Mr. MORAMARCO. Actually, the new proposed test is a better bright line than the old test. The new test, you know, if it names a candidate. There is no ambiguity. You know how many days it is broadcast before or after an election.

The old test, which is called the bright line test, still leaves it up to subjective judgment about whether or not a word of advocacy is a near-enough synonym to the words listed in the footnote 52—is an ad that says—you know, I saw one that says Dump Andreas C. Strand. That ad seemed to me to meet the test, but the group that sponsored it didn't think so because they used soft money to fund it. The MCFL case the Supreme Court had to decide was not a bright line because it was litigated all the way up there.

Mr. SCOTT. There would be no limitation on your ability to run a sham issue ad outside of the time period.

Mr. MORAMARCO. Absolutely.

Mr. SCOTT. So we are just talking about the period of time near an election.

Mr. MORAMARCO. Absolutely.

Mr. SCOTT. And the thing that makes it a sham issue ad is the mention of the candidate's name. Is that what I understand?

Mr. MORAMARCO. It is the mention of a candidate's name within 60 days of an election in certain specified media, yes.

Mr. SCOTT. How does this work if a bill only came up in September or October?

Mr. MORAMARCO. Well, most bills aren't known primarily or only by the name of the sponsor. I mean, you could say, call your Congressman and get him to vote against campaign financing reform.

Mr. SCOTT. Without mentioning a name, that would be okay.

Mr. MORAMARCO. Without mentioning the name of the candidate, yes.

Mr. SCOTT. But if you mentioned, call your Congressman Smith and tell him to vote no, then it would be a sham issue ad?

Mr. MORAMARCO. You could not mention that Mr. Smith was running—during 60 days, you could not mention his name.

Mr. SCOTT. Does this legislation limit in any way an individual's right to spend money on a sham issue ad 60 days before an election?

Mr. MORAMARCO. No, individuals are not limited. It is corporate and union money that is being limited. The rest is disclosure.

Mr. SCOTT. So if an individual wanted to run a million dollar sham issue ad against a named candidate within the 60 day period, that person individually would be free to do it.

Mr. MORAMARCO. Yes, and we would then know who that person is.

Mr. SCOTT. But an organization, group of people, two or more people getting together, could not run that same ad?

Mr. MORAMARCO. Well, if they formed a corporation, they couldn't. I believe an unincorporated association would be permitted.

Mr. SCOTT. Ms. Strossen, what did you mean by the safe harbor provision?

Ms. STROSSEN. That was the provision that allowed two forms of organizations, specifically 501(c)(4) organizations and I think 527 organizations, to engage in this kind of expression only under certain conditions which have been mentioned by Mr. Bopp. They would have to segregate the funds and they would have to disclose the names of all individuals who contributed to those funds, including in very small amounts. And that is why he kept saying that ACLU would be prohibited. But it is a small safe harbor not only because of the facts that I have just described, but also on the Senate side—and by the way, I think you would run afoul of this supposedly not overbroad legislation, simply by referring to McCain-Feingold when they were up for reelection. I can't think of anything that is more wildly overbroad.

In the Senate there was an amendment added by Senator Wellstone—again I am violating the law by mentioning his name and criticizing what his amendment did—but it makes some exception to the safe harbor for any expression that is targeted at the voters within that candidate's electorate—who are receiving the ad.

So the ACLU, for example—and this is a real case, not a hypothetical—which never advocates for or against candidates for election but on issues—was criticizing Rudolph Giuliani and his administration because of the terrible police brutality and racial profiling that were going on in the city. We would not be able to do that. Even if we did hypothetically jump through all of the hoops that the supposed safe harbor gave us, yes, we could broadcast those ads in California maybe, if he wasn't running for national office, but not where it counted.

Mr. CHABOT. The gentleman's time has expired. But would the gentleman like to yield to the gentleman from New York for a moment?

Mr. NADLER. Thank you. I don't understand that. Aside from the fact that Rudy Giuliani is not a Federal candidate and therefore isn't covered by this—let's assume he were.

Ms. STROSSEN. When he was running for Senate is what—.

Mr. NADLER. Let's assume he were a Federal candidate running in New York. Why wouldn't the ACLU be able to criticize him—assuming it uses the safe harbor provisions, it had a subsidiary or whatever, and it used hard money, why wouldn't it be able to criticize him?

Ms. STROSSEN. Because under the Wellstone amendment, you still could not broadcast any ad that was targeted at an electorate that would be voting on that candidate. You would have to run it in another geographic market.

Mr. NADLER. I thought that was the whole point of saying that that you could always broadcast an ad targeted at a candidate. We all saw those ads during every campaign. You know, Senator Macgillicuddy ate his brother for breakfast, he is going to attack

his mother for lunch. Call him up and tell him not do it. We have all seen those ads.

My understanding of McCain-Feingold and Shays-Meehan is as long as you do it with hard money, you can broadcast those ads. Am I wrong?

Ms. STROSSEN. I think you are wrong that the Wellstone amendment was an exception to that exception.

Mr. NADLER. I have to check that, because I thought the whole point was that—the point of the bill is that if you want in effect to play in the game in terms of trying to influence the election, you have to play by the rules, hard money and so forth.

Let me just say I will agree with you if there is a total ban under any circumstances that you can't broadcast an ad criticizing a candidate, even if you use hard money, I would think that would be (a) wrong and (b) unconstitutional.

Mr. CHABOT. The gentleman's time has expired. The gentleman from North Carolina is recognized.

Mr. WATT. Thank you, Mr. Chairman. I confess to being very conflicted by this whole area and would like to try to approach it from a different perspective maybe.

Mr. TROY, do you believe that spending money is free speech?

Mr. TROY. Yes, I believe that it is impossible to communicate a message without being able to spend money, and the Supreme Court has so held.

Mr. WATT. Do you agree with the Supreme Court?

Mr. TROY. Yes, I do.

Mr. WATT. Mr. Moramarco.

Mr. MORAMARCO. I don't believe that the Supreme Court has ever held that money is speech. Is certainly facilitates speech, and some is needed, but—

Mr. WATT. Was that what it held in *Buckley v. Valeo*?

Mr. MORAMARCO. No. I think that is a shorthand that people sometimes use. It did hold that money is a very important facilitator. And some of the restrictions that were contained in the original FECA provision were unduly low. I mean the \$1,000 limit on independent expenditures was indefensible.

Mr. WATT. Mr. Bopp, you believe money—do you believe *Buckley v. Valeo* was correctly decided?

Mr. BOPP. Yes, on this point. And to be precise, what the court said was a limitation on spending money for speech is a limitation on speech. And they dropped a footnote and said similarly, if you limited what you could spend on travel—in other words you could only use a tank of gas—you are limiting travel.

Mr. WATT. So if money and speech were not the same, would it be a violation of the first amendment to put campaign contribution limits on both soft and hard money?

Mr. BOPP. If you didn't have to spend money for speech, then a limit on spending money for speech would not be a violation of the first amendment. But that is not the case. Somebody had to buy the soapbox and the megaphone and the ad.

Mr. WATT. Somebody had to buy the voice, too.

Mr. BOPP. Well, we don't have to pay for that.

Mr. WATT. Okay. If the court were to hold that spending one's own money were not speech, would it be—would that be legal?

Mr. BOPP. If you are asking me, I don't understand the context of your question.

Mr. WATT. I am just saying if money were not speech, would the Court be able to tell a rich candidate you can't spend more than X dollars on a Federal election?

Mr. BOPP. Well, if we didn't have to spend money to speak, then limiting spending money would not be a violation of the first amendment. But we do need to spend money to speak. So I mean, we have to separate ourselves from reality to talk about a situation in which——.

Mr. WATT. You think the Founding Fathers were talking about spending money when they talked about free speech?

Mr. BOPP. Without a doubt.

Mr. WATT. What makes you think about—I am not arguing with you, I am just trying to figure out what is the historical context in which you believe the Founding Fathers were talking about speech and money being one and the same?

Mr. BOPP. At the time of the Revolution, Thomas Paine was publishing *Common Sense* to communicate his ideas about the American Revolution.

Mr. WATT. I understand that people have been spending money to speak for a long time, but what is it that makes you think that the Founding Fathers had in mind that speech and money are synonymous?

Ms. STROSSEN. Could I answer that possibly, Congressman? I have in front of me the Supreme Court's answer to that question referring back to——.

Mr. WATT. In *Buckley v. Valeo*?

Ms. STROSSEN. Yes.

Mr. WATT. I am talking about the Founding Fathers now. I assume——.

Ms. STROSSEN. I can't claim to have communed with the Founding Fathers, I will confess that. But I think the example of the hand bill that we associate with the founders was what the Supreme Court was referring to in *Buckley* when it said, "The distribution of the humblest hand bill or leaflet entails printing paper and circulation costs." Clearly, it would not have been within their contemplation that you can theoretically have a right to speak by handing out hand bills, but you may not spend any money or you may only spend a limited amount of money in order to distribute those handbills.

Mr. BOPP. The *Federalist*—of course, and anti-*Federalist*—published articles urging ratification and defeat of the Constitution of the United States. All of that communication required the expenditure of funds.

Mr. WATT. Okay. I mean, I hear you. I am not sure I agree with anything any of you have said on this issue but I am not sure where I stand on this issue either. I am in trouble.

Mr. TROY. May I add one historical fact?

Mr. WATT. Well, I need all the enlightenment I can get.

Mr. TROY. One of the precipitating events of the American Revolution was the stamp tax, of course. And the stamp tax was an tax on advertising. And one of the reasons why the newspaper publishers so rebelled against it was because it made it impossible for

them to earn enough revenues, earn their money, and have a business. And that was one of the key things that Arthur Schlesinger, Senior writes about in his book about printers in the American Revolution.

Mr. CHABOT. Thank you. The gentleman's time has expired. Pursuant to unanimous consent—.

Mr. CONYERS. I ask unanimous consent to discuss further matters with Ms. Strossen.

Mr. CHABOT. That would be fine, except Mr. Meehan is still going to be recognized.

Mr. CONYERS. I am sorry, I didn't recognize him come back into the room.

Mr. CHABOT. That is okay. I was just going to say that pursuant to unanimous consent agreement earlier on, and agreement between the parties, Mr. Meehan is recognized for 5 minutes to ask questions.

And just to inform the Committee, as part of that agreement it was also agreed that the Chairman would get an additional 5 minutes. I only have one question of follow-up after that, and the gentleman from Michigan has asked for a couple additional minutes, which we will also handle.

Mr. Meehan.

Mr. MEEHAN. Thank you, Mr. Chairman. Again, thank you for allowing me to participate. Mr. Bopp, you appear to deny that unlimited soft money contributions give rise to what the *Buckley* court said was even the appearance of corruption. It appears that in your view, that soft money somehow appears magically at the doorsteps of the parties and the parties simply spend it on the pursuit of issue advocacy or party building.

But I don't know that that is exactly how it works. Federal officeholders raise those six-figure soft money donations, and it is spent increasingly on campaign ads benefiting them. In fact, that money is funneled through the parties. In fact, in the past cycle, the Senate candidates established that joint fund-raising committee with the DSCC and the NRCC. And candidates themselves raised six-figure checks to the committees to the tune of \$17.8 million in total. The money was then channeled to the Senate party Committees, to State party committees. And the State party committees spent it on campaign ads promoting those same candidates or attacking their opponents.

Now, we can try to sort of whitewash the system, but I think the American people get this. I think the Supreme Court will get it ultimately when it goes to them. Just remember what Justice Souter wrote for himself and the five other justices in *Nixon v. Shrink* when he said, there is little reason to doubt that sometimes large contributions will work in actual corruption of our political system and there is no reason to question the existence of a corresponding suspicion among voters.

With all of this talk about what is a campaign ad and what is issue advocacy, I would like to read the text of an advertisement to you. This ad was funded by a nonprofit corporation named Citizens for Reform, funded by Republican activists, and the ad was aired in late October 1996. And it targeted Bill Yellowtail, a Demo-

crat, who was in a close race for Montana's at-large seat in the house.

Here's what it said. "Who is Bill Yellowtail? He preaches family values, but took a swing at his wife. And Yellowtail's response? He only slapped her, but her nose was not broken. He talks law and order, but he himself is a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments, then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values."

Now, do you think that is a campaign ad?

Mr. BOPP. Well, let me answer your first question first about soft money. Then I will get to that.

Mr. MEEHAN. I didn't ask a question, I just——.

Mr. BOPP. You started—at the beginning you said——.

Mr. MEEHAN. I wasn't asking a question there. I was simply telling you that the parties are funneling the money through the State parties, and the same candidates are raising the unlimited amounts because it is a loophole. They can raise a million dollars—I was just pointing out that 17.8 million. But is that a campaign ad?

Mr. BOPP. No.

Mr. MEEHAN. That isn't a campaign ad?

Mr. BOPP. No. It is talking about issues. To the extent that people are concerned about issues, then they can deal with it either—in various ways, including voting.

Mr. MEEHAN. Okay, I appreciate that. Here is another ad. This ad was funded by the Citizens for the Republic education fund, which is another tax-exempt organization. It ran in late October 1996 in Arkansas and targeted Senate candidate Winston Bryant. "Senate candidate Winston Bryant's budget as attorney general increased 71 percent. Bryant has taken taxpayer-funded junkets to the Virgin Islands, Alaska, and Arizona, and he spent about \$100,000 on new furniture. Unfortunately, as the State's top law enforcement official, he has never opposed the parole of any convicted criminal, even rapists and murderers, and almost 4,000 Arkansas prisoners have been sent back to prison for crimes committed while they were out on parole. Winston Bryant: Government waste, political junkets, soft on crime. Call Winston Bryant and tell him to give the money back."

Now, is that a campaign ad?

Mr. BOPP. No.

Mr. MEEHAN. You are kidding.

Mr. BOPP. Why is it that incumbent politicians don't want to be held accountable for what they do? Why is it that you want——.

Mr. MEEHAN. Listen, I am just asking whether it is an issue ad.

Mr. BOPP. And I am saying that it is not. It is an issue ad because it is talking about——.

Mr. MEEHAN. Okay. Political advertising—criticism is fine under the Constitution. I am asking if that is an issue ad or political ad. You believe that that is not a political ad, which is fine. It helps to buttress your side of the issue.

Finally, Mr. Bopp, do you have any sense as to what percentage of hard money ads funded by the candidates themselves actually use the so-called magic words that you talk about in your testi-

mony? Do you know how many political ads say, Vote for candidate X or vote for candidate Y?

Mr. BOPP. Really, Congressman, if you are going to let me answer, I will answer the question—.

Mr. MEEHAN. Do you know how much?

Mr. BOPP [continuing]. But I am not going to serve as some foil for your speeches.

Mr. MEEHAN. Four percent. I am glad you told the Committee—but it is 4 percent that actually use the words, magic words.

Mr. BOPP. You are entitled to use your time to make your speeches, but if you want to ask me a question—.

Mr. MEEHAN. You had plenty of time for your speeches.

Mr. BOPP. I will answer it.

Mr. MEEHAN. The question before the Congress, the question before the United States Supreme Court will be determined whether or not what I just read is a political ad subject to the regulations from the Federal Election Committee or whether it is really issue advocacy. That is what confronts the Court.

Mr. CHABOT. The gentleman's time has expired.

Mr. NADLER. I ask unanimous consent he get an additional minute. Mr. Bopp, the two issue ads that Mr. Meehan just referred to, would you tell us, other than the fitness for office of the candidates mentioned, what if any issue that they were advocating?

Mr. BOPP. They talked about a series of issues that involved actions by these public officials either in office or as to his own personal conduct.

Mr. NADLER. In other words, they were—.

Mr. BOPP. They were holding in account the actions of public officials.

Mr. NADLER. Precisely. In other words, they were advocating—the point of those ads was the fitness for whatever they were running for of those individuals, no?

Mr. BOPP. That is part of it.

Mr. NADLER. Thank you.

Ms. STROSSEN, would you comment to the same question?

Ms. STROSSEN. I find the whole exercise absolutely obnoxious, and this is why the ACLU argued that all prohibitions on all kinds of ads, whether you call them express advocacy or issue advocacy, are equally unconstitutional. The idea that we would have government officials sitting in review, parsing the language of this kind of expression, I think is completely antithetical to—.

Mr. MEEHAN. Mr. Chairman, just in closing, I don't think anyone would have to spend a whole lot of time figuring out whether what I just read was a political ad or issue ad. Thank you, Mr. Chairman.

Mr. CHABOT. The gentleman's time has expired.

The Chair recognizes himself for the purpose of questioning for 5 minutes. If you want to talk about ads, I will tell you one that appeared in my district, one in which they talked about this particular Chairman voting against being against the minimum wage, which was accurate, because I don't think the government ought to be in the business of setting wages. It ought to be done by the markets. But then it went on to say that at the same time, he voted for a pay hike for himself. And the irony is that the pay hike had

happened several years before I even got to Congress, so I clearly had not voted in that way.

They ultimately did pull the ad but they also mispronounced my name, didn't even know my name, which was pretty good because it showed the group that was running wasn't familiar with me or my district or anything else.

But I think we have had some very interesting give and take here this afternoon. Let me start by first of all letting Mr. Bopp respond on my time, relatively briefly, because I have one more question, to anything that you wanted to say in response to Mr. Meehan.

Mr. BOPP. Thank you, Mr. Chairman, for allowing me the courtesy to answer a question. The problem with the exercise that was going on by Congressman Meehan, there are two problems. First is, of course, incumbent politicians don't want to have their records revealed to the general public. So they are perfectly prepared—many, that is, are—many admirably are not—prepared to use government power to prohibit citizens who would have the audacity to talk about what they did in office. And many of the aspects of those ads contain just that sort of commentary, criticizing a governmental official for what they did in office.

Now, the second problem, which the Supreme Court considered to be of constitutional dimension is that there is no way to distinguish between those ads. For instance, an ad run on September 20th in 1996 by the National Right to Life Committee about the vote in the Senate on the override of the partial birth abortion bill. President Clinton had vetoed the bill and there was a veto override. So there were ads being run in certain States urging Senators, by name, to vote to override the veto. And mentioning as the predicate the fact that it had been vetoed by President Clinton. Two candidates are then mentioned in that ad.

This prohibition in McCain-Feingold would therefore prohibit lobbying that has nothing to do with elections. And that is overbroad.

Mr. CHABOT. Thank you.

And then, Ms. Strossen, you had mentioned earlier about the hoops that an organization would have to jump through in order to set up a PAC or whatever. Could you describe what those hoops are?

Ms. STROSSEN. Well, to set up the kind of PAC-like organization that Congressman Nadler is advocating the ACLU do, first of all it would be completely inconsistent with the nonpartisan nature of our organization. We can't do anything, and many of the other advocacy organizations are also scrupulously nonpartisan—we can't do anything to convey the impression that we are partisan. Setting up a PAC might jeopardize the charitable tax-exempt status that we have, which would obviously be devastating to an organization that depends, as all of these do, on tax-deductible donations.

The identity of people who give PACs as little as \$51 has to be maintained and publicly disclosed if they give anything more than \$200. That would be impossible. So I mean, it is not literally impossible, Congressman Nadler, but it would be impossible to maintain the function and purpose and role of a nonpartisan issue organization such as the ACLU. We would have to become something else that would be antithetical to our whole reason of existence.

Mr. CHABOT. I yield to the gentleman.

Mr. NADLER. Thank you. Mr. Bopp, I just want to explore something you said a moment ago when in referring back to the question—to the ads that Mr. Meehan had talked about, you said that of course incumbent politicians, many of them, some of them don't want to be criticized, so therefore there is an attempt to restrict the speech.

But isn't it the case that really this has nothing to do with criticism? This bill is not saying you can't criticize the Congressman, or whatever; the bill is saying if you want to criticize the Congressman, one, do it with hard money and subject to the other—basically with hard money disclosure; and two, by implication, be honest about it and call him up and tell him to stop beating his wife, say don't vote for him, although that is not the requirement. Isn't the issue really not that you can't criticize, but that if you want to criticize you can't do it with multimillion-dollar contributions?

Mr. BOPP. No, because certain organizations, such as the ACLU among others—for instance, the Southern Baptist Convention would be prohibited from doing lobbying within 60 days of an election about a pending bill if they mention the name of a candidate. The Southern Baptist Convention or the U.S. Catholic Conference or the United Methodist Church is not about to set up a PAC in order to lobby on legislation, which is what this bill requires.

Secondly, there are numerous burdens in setting up a separate—you would have to go set up a new organization. The National Right to Life, for instance, has \$14 million. They are prohibited from using that money. They already have a PAC; it raises about 2 million. They have to go through all sorts of limits.

Mr. NADLER. We have gone through this before. I suppose what I am really asking is the pros or cons of whether it is an advisable thing to do, and whether it imposes too strenuous a burden on organizations or whatever, put them aside for a moment; we have heard pros and cons on it. What I am saying is the issue before us is not whether people should criticize public officials, but whether under certain circumstances those criticisms should be subject to what we were just talking about, correct?

Mr. BOPP. Let me give you another example. It would be like, say, prohibiting Tina and I, my wife and I, from using my money to criticize a candidate; we could only use her money to criticize a candidate. Well, that is a prohibition on me.

Mr. CHABOT. Reclaiming my time, I recognize myself for an additional 30 seconds for Mr. Troy to respond. Then I will go to Mr. Conyers.

Mr. TROY. Thank you. Congressman Nadler, as a fellow New Yorker, I want to sincerely apologize if you think that I have not seriously addressed these issues, although Mr. Conyers at least appeared to appreciate my communicative efforts. And I direct you to my more than 30-plus pages of written testimony for a more comprehensive and serious discussion of my views. But I frankly think that humor is one of the most appropriate responses to what I view and obviously some other Members of the panel view is some obvious attempt by government officials to suppress speech, which is so clearly headed for the constitutional trash heap.

Mr. CHABOT. My time has expired. By unanimous consent, Mr. Conyers is recognized for 3 minutes to sum it up and ask any questions.

Mr. CONYERS. Thank you, Mr. Chairman. I hold in my hands a letter from past leaders in the American Civil Liberties Union—Norman Dorsen, Morton Halperin, Charles Morgan, Jr., Aryeh Neier, Burton Neuborne, Jack Pemberton, John Powell, John Shaddock, Melvin Wolf—all who strenuously take exception to the current President's position. And I also have in my other hand the Subcommittee hearing on free speech and campaign finance reform in which Burt Neuborne testified. And—

Ms. STROSSEN. He was not testifying on behalf of the ACLU. He was already a former ACLU employee. And if I might—

Mr. CONYERS. Just a moment. I haven't asked you anything else. Sorry to be technical like this but I only have a few minutes. I appreciate that. And your statement, unsolicited, was correct. But is there anything that you can do to enlighten me as a member, perhaps longer than you in the ACLU, as to what brings this great divide between all the other or this many other past leaders in ACLU and yourself and the current composition of the ACLU?

Ms. STROSSEN. Actually it is not a great divide, Congressman Conyers. As I was starting to say earlier, we have had the same policy ever since the issue came before us in the late 1960's and early 1970's. Recurrently my predecessor as president, Norman Dorsen—who is a very good friend of mine, as are most of the others that you named—would bring before the board the question of whether we should reconsider this policy. It was brought before the board most recently just a few years ago when Burt Neuborne came and presented his position before the board, and on each occasion the board has resoundingly, overwhelmingly, by a wide margin, reaffirmed the existing policy having heard all of the arguments urging us to adopt a different policy.

Mr. CONYERS. So you do not consider this to be as wide a breach as it kind of appears from the letter?

Ms. STROSSEN. No, I don't. And I think we share the very same commitments that I know you do, too, to both free speech and equality.

The same goals of enhancing both, and we just radically disagree as to what the effective solution is.

Mr. CONYERS. Yes, well, I was struck—there are very few organizations of which I am a member in which we get 1, 2, 3, 4, 5, 6, 7, 8, 9 past leaders who would all testify strongly in support of McCain-Feingold, and then it would be explained that, hey, they—just a moment, let me finish. And then it would be explained to me as, hey, not a big deal, they keep bringing this before us all the time, and they keep getting rejected all the time. So they have not got it right, according to you.

Ms. STROSSEN. According to the substantial majority of an 83-person board over a 30-year period of time after full and free debate.

Mr. CHABOT. The gentleman's time has expired.

Mr. CONYERS. Thank you very much.

Mr. CHABOT. The gentleman from Virginia, by unanimous consent, is recognized for an additional 2 minutes, and the gentleman

from North Carolina is also recognized for 2 minutes and has yielded his 2 minutes to the gentleman from Virginia, which means he has 4 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Ms. Strossen, if you funded—if you went through the loops to fund the broadcast, would that mean that everyone who had contributed more than \$200 would have to find their name on an FEC form the way candidates have to do now?

Ms. STROSSEN. I believe that that is correct. It is correct.

Mr. SCOTT. Mr. Bopp, we have talked about the lobbying, about the partial-birth abortion, veto override vote. You could do that 60 days before the election; is that right?

Mr. BOPP. With some limits. I mean, there is also a broad—in both Shays-Meehan and McCain-Feingold, there is also a broad definition of what express advocacy is, so that many forms of issue advocacy year-round will be prohibited because they are viewed to favor one candidate over another. But there is an absolute bar of mentioning the name of the candidate within 60 days of an election.

Mr. SCOTT. Sixty-one days before an election, if you are broadcasting a lobbying message to tell Congressman Jones to vote to override President Clinton's veto, would there be any limitation on an organization being able to broadcast that without having to go through all the loops and disclosures?

Mr. BOPP. Yes.

Mr. SCOTT. And what would those be?

Mr. BOPP. They have a broad definition of express advocacy which is prohibited by corporations, so they reject the express advocacy test in favor of broader language that is a year-round ban. And the other part, the other part is, the second part is if it is viewed as coordinated with a candidate, and there are very broad definitions of coordination, that is an unlawful contribution to the candidate.

So there is a series of trip wires that you would have to go through even 61 days prior to an election.

Mr. MORAMARCO. I believe that to be incorrect. In McCain-Feingold the definition is for electioneering communications, and the 60-day requirement is in the definition. And I am looking at Shays-Meehan as well, and that redefines the term "express advocacy," and the 60-day requirement is part of that definition as well.

Mr. SCOTT. So if it is outside of the 60 days, your view is that you could essentially lobby your representative by name to vote a certain way?

Mr. MORAMARCO. Yes.

Mr. SCOTT. Without limitation.

Mr. MORAMARCO. Yes.

Mr. SCOTT. And without going through all the loops?

Mr. MORAMARCO. Yes.

Mr. SCOTT. That you have that right to essentially lobby.

Mr. MORAMARCO. Of course there are lobbying disclosure requirements, too, but I know you don't mean it in the technical sense, but it is important to point out that we expect lobbying restrictions all the time.

Mr. SCOTT. But an organization would be able to broadcast its message 60 days before the election; however, if the bill does not come up until 59 days before the election, the veto occurs on the 59th day, you would not be able to broadcast your message.

Mr. MORAMARCO. You would be able to broadcast; you would have to say, you know, call your Congressman and tell him not to support the campaign finance reform bill rather than the McCain-Feingold bill. You would have to call it by something other than the name of the candidate in the candidate's own district. Yes. Only in the candidate's own district. Throughout the rest of the country you could call it whatever you want.

Mr. SCOTT. Mr. Chairman, rather than start of—I am sure I have run over my time.

Mr. CHABOT. I thank the gentleman. The gentleman's time has expired.

The gentleman from Michigan is recognized for purposes of making a unanimous consent request.

Mr. CONYERS. I ask unanimous consent to have the statement of persons who served the American Civil Liberties Union in leadership positions supporting the constitutionality of the McCain-Feingold bill, and I ask unanimous consent that the testimony of Burt Neuborne before the Subcommittee on the Constitution dated February 27, 1997, be made a part of this record.

Mr. CHABOT. Without objection.

Mr. NADLER. Mr. Chairman.

Mr. CHABOT. The gentleman from New York.

Mr. NADLER. Thank you, Mr. Chairman.

I ask unanimous consent that all Members be permitted to revise and extend their remarks and include additional materials in the record.

Mr. CHABOT. Without objection.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. CHABOT. Thank you.

We want to thank the panel for their testimony here this afternoon. I thought this was a very good exchange and does assist the Congress, at least in this Subcommittee, as we handle this important issue. With that, we are adjourned.

[Whereupon, at 4:06 p.m., the Subcommittee was adjourned.]



## A P P E N D I X

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### MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF BURT NEUBORNE

CAMPAIGN FINANCE REFORM AND THE CONSTITUTION: A CRITICAL LOOK AT  
*BUCKLEY V. VALEO*

#### *Introduction*

Discussion about reform of the campaign finance process begins, and often ends, with the Supreme Court's landmark decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). Since, reasoned the *Buckley* Court, most campaign speech requires the spending of money, any attempt to limit campaign spending must be analyzed, for constitutional purposes, as if it were an effort to limit political speech itself.

Applying the traditional First Amendment test for limiting political speech, the *Buckley* Court ruled that congressional efforts to regulate campaign spending must advance a "compelling" governmental interest. While the Court agreed that the government has a compelling interest in avoiding the reality or appearance of "corruption", the Justices rejected the argument that the government has an interest in fostering equal political participation by rich and poor alike.

The *Buckley* Court did two things: It upheld contribution restrictions, reasoning that limits help control corruption. And it struck campaign spending restrictions, reasoning that spending money does not involve a transaction between a donor and a candidate, thus there is no possibility of corruption.

*Buckley* has governed for over twenty years. Given Americans' virtual uniform abhorrence of the campaign finance system, and *Buckley's* role as its principal architect, it's no surprise *Buckley* remains an intensely controversial precedent.

#### *A. Buckley: Procedural History and Issues Examined*

In 1974, following President Nixon's resignation, public demand for campaign finance reform led Congress to enact the Federal Election Campaign Act of 1974 (FECA). This comprehensive set of campaign regulations built on reforms initially adopted in 1971. In an effort to assure that the constitutional issues raised by FECA would be settled before the 1976 presidential election, Congress created an expedited judicial review process that forced consideration of all of FECA in a single case, before it went into effect.

*Buckley* was heard at breakneck speed. The lower courts attempted to develop a detailed record, but there wasn't time for a careful fact-sifting process. Ordinarily, an important constitutional case involves adversarial factual hearings, whose products help guide the judicial decision making process. In place of such hearings, the district court encouraged the parties to submit so-called "offers of proof"—which consisted of assertions about the facts. The court then required the parties to negotiate over these offers-of-proof, and some were adopted as "findings." This process created a product that left the Supreme Court frustrated. Throughout the *Buckley* opinion the Court notes the insufficiency of the factual record, warning that its review was purely a "facial" testing of the statute as an abstract matter. Repeatedly, the *Buckley* Court reserves the possibility of a subsequent "as applied" review on a fuller factual record.

In an effort to meet the deadline of the impending presidential election, on November 10, 1975 the *Buckley* Court heard oral argument on all four of FECA's components: (1) contribution ceilings; (2) expenditure ceilings; (3) disclosure rules; and (4) public financing of presidential elections, as well as a challenge to the procedure for appointing the members of the Federal Election Commission (FEC), and an assault on the expedited judicial review procedures themselves.

### 1. Contribution Ceiling

FECA introduced four restrictions for campaign contributions—payments directly to a candidate's campaign—which *Buckley* ultimately upheld and which remain in place today.

First, FECA imposed a ceiling of \$1,000 on the amount that an individual could contribute to a candidate for federal office in connection with a given "election." Since primary elections and general elections were treated separately, the de facto contribution limit was \$2,000 per person for any candidate.

Second, while FECA continued the long-standing ban on corporations and labor unions directly contributing to candidates, Congress explicitly authorized the creation of political action committees (PACs). The creation of PACs allowed corporations, labor unions, and political organizations (e.g., the National Rifle Association, the Chamber of Commerce, and the Sierra Club) to collect voluntary contributions from interested individuals and pass them on to one or more candidates. PACs could give candidates \$5,000 per election, thus \$10,000 each political cycle.

Third, FECA imposed annual limits for contributions to the national committees of political parties. Each year individuals were limited to giving up to \$20,000, PACs could donate up to \$15,000.

Finally, Congress imposed an annual ceiling of \$25,000 on an individual's combined contributions to all federal candidates, PACs, and national parties. No aggregate contribution limit applied to PACs.

### 2. Expenditure Ceilings

In addition to its contribution limitations, FECA carefully regulated political expenditures with a series of caps, all of which the Court ultimately struck down.

Campaigns were subject to stringent expenditure limits. Presidential campaigns were capped at \$10 million for the primaries, and \$20 million for the general election. Senate campaigns were limited to 8 cents a voter for the primaries, and 12 cents a voter for the general election. House campaigns were limited to \$70,000 for the primaries and \$70,000 for the general elections. These spending limits were indexed annually for inflation.

Finally, the independent spending of individuals was limited to \$1,000 in support of a federal candidate. For example, Voter Jones could take out a newspaper ad supporting Candidate Smith, if Jones' costs were \$1000 or less. Candidates were permitted to spend up to \$50,000 of their own money on a presidential campaign; \$35,000 on a Senate campaign; and \$25,000 on a House campaign.

### 3. Disclosure Requirements

The limits on campaign contributions and expenditures were reinforced with stringent reporting and disclosure requirements. Congress required campaigns, PACs, and political parties to record all contributions of more than \$10, and to report to the FEC the name and business address of all persons contributing more than \$100. The FEC would make the latter category of information available for public scrutiny. In addition, independent expenditures of more than \$100 on behalf of any candidate were to be reported to the FEC which would make this information accessible to the public.

### 4. Public Financing of Presidential Elections

Finally, Congress provided for optional public funding of presidential elections, which was ultimately upheld and remains in force.

Candidates for party nomination (regardless of a party's size) received matching funds for contributions of \$250 and less, up to a candidate total of \$5 million. Two conditions applied: Candidates had to demonstrate widespread public support by gathering small checks from a substantial number of donors in at least 20 states; and candidates needed to abide by the \$10 million expenditure ceiling. No provision existed for subsidizing a presidential candidate not affiliated with a party.

The major political party nominating conventions (a major party was defined as a party that received 25% of the vote in the last election) received subsidies of \$2 million. Major party candidates also received a \$20 million campaign subsidy for the general election, if they promised to spend no more than this subsidy. In other words, a candidate who accepted public funding would use only public money in the general election campaign.

A minor party candidate (a minor party was defined as a party that received between 5%–25% of the vote in the last election) received a lower subsidy, keyed to the party's vote in the last election. A candidate from a new party (defined as any party that failed to gain 5% of the vote in the last election) received no pre-election subsidy, but was eligible for a post-election payment if she received more than 5% of the vote. No provision was made for funding independent candidates.

All subsidies were to be adjusted annually for inflation.

## B. *The Arguments on Both Sides*

### 1. The Challengers

The challengers in *Buckley* were an amalgam of political conservatives, civil libertarians, minor parties, and liberal reformers. Plaintiffs included James Buckley, then a Senator from New York who had been elected as a third-party candidate of the Conservative Party; Eugene McCarthy, a reformer who had run a spirited anti-Vietnam war campaign for the Presidency; the Socialist Labor and Socialist Workers Parties, the perennial standard-bearers of the radical left in national campaigns; the American Conservative Union; and the American Civil Liberties Union (ACLU).

What united the various challengers was a belief that Congress' comprehensive regulations would make it more difficult for challengers to defeat incumbents, and for minor parties and independents to challenge the hegemony of the two major parties. (The ACLU, the sole non-partisan challenger, shared this concern but was most interested in the First Amendment implications of disclosure rules, and contribution and spending limits.) In short, the challengers argued that the version of campaign reform before the *Buckley* Court would have had the effect of protecting the "ins" from serious challenge by the "outs."

For example, plaintiffs argued that individual contribution limits (\$1,000 per candidate election, and \$25,000 annually) unconstitutionally interfered with freedom of speech and association. This interference, they argued, would make it more difficult for a challenger to raise the money needed to wage a credible threat to an incumbent. These contribution limits particularly upset minor parties, which argued that since they were unlikely to win an election, their acceptance of large contributions posed no real threat of corruption. Finally, in a prescient criticism, reformers argued that severely limiting contributions from individuals would enhance the power of special interest groups organized as PACs.

The spending limits were challenged as direct restrictions on political speech. Also, limiting campaign expenditures, plaintiffs argued, gave incumbents an unfair advantage, since they entered most races with name recognition, a staff, and the advantage of the franking privilege. Moreover, the \$1,000 independent expenditure limit for individuals, was argued to be set so low that it prevented supporters from engaging in acts of political consequence, e.g., buying newspaper advertisements. The plaintiffs believed that the real problem with elections was too little political speech, not too much. Severe expenditure limits, they feared, would put an artificial cap on political discussion.

The reporting and disclosure requirements were challenged as undue intrusions into private political activity, especially in the context of contributions to minor parties, and independent expenditures on behalf of candidates. While no one challenged the concept of disclosing large contributions, plaintiffs argued that keeping records of \$10 contributions to a minor party unlikely to win an election seemed excessive, and public disclosure of contributions in excess of \$100 seemed an unnecessary interference with the right to political anonymity, especially for gifts to controversial minor parties.

Finally, the presidential election public funding provisions were challenged as fundamentally unfair to third parties and independent candidates. The bulk of the subsidy was reserved for the two major parties, critics noted. Minor parties were locked into a subordinate status, and new parties were denied subsidies until after the election, when it was too late for many. Independent candidates were completely cut out of the subsidy process, both during the general election and at the nomination stage. Critics charged that the subsidies merely took existing two-party orthodoxy and locked it into place for the foreseeable future.

### 2. The Government

The government defended FECA on three levels. First, the government argued that regulating the spending of money was not the same thing as directly regulating speech. While regulating the conduct of spending campaign money incidentally impacted on speech, the government claimed that because it was regulating conduct leading up to speech (e.g., the spending of money) and not speech itself (e.g., a candidate's statements) FECA deserved less demanding First Amendment scrutiny. The Court had accepted a similar speech/conduct argument in *O'Brien v. United States*, when it upheld the constitutionality of a ban on draft-card burning during the Vietnam War. The lower court in *O'Brien* upheld Congress' ban by distinguishing between regulating speech (e.g., verbal protests) and regulating conduct (e.g., burning draft cards).

Second, the government argued that since the campaign spending caps applied to everyone, the regulations should be tested by the permissive "time, place or man-

ner” constitutional standard, which is used for regulations which limit speech without regard to its content. Earlier Supreme Court cases had used the “time, place or manner” rationale to uphold regulations on sound trucks, and reasonable limits on the areas where parades and demonstrations could take place.

Finally, the government argued that the regulations were valid even under the most stringent standard of review—where for rules which censor political speech, the Court demands the showing of a compelling interest. To meet this review level, the government put forth two compelling interests: The interest in deterring the reality or appearance of corruption caused by suspicious campaign financing, and the interest in fostering equal political participation by assuring that financially weak voices are not drowned out by strong ones.

The government responded to the charges that the program unfairly benefited incumbents and the existing two-party structure by arguing that FECA leveled the playing field by removing money as a block to political discourse. In the long run, the government argued, a campaign process free from the distorting influence of unfair concentrations of wealth would prove more receptive to the arguments of reformers of every political stripe.

Finally, the severity of the restrictions and the low threshold for reporting and disclosure were defended as necessary to prevent the growth of loopholes and to provide the public with access to campaign finance data.

### C. *The Court’s Opinion*

#### 1. The Importance of the Court’s Per Curiam

The *Buckley* Court issued its opinion on January 30, 1976. Confronted with at least six major issues, and working under severe time constraints, the Court produced a 294 page opinion. The opinion is divided into a 143 page opinion for the Court, adorned with 178 footnotes (some of which are more important than the text), 92 pages of statutory appendices, and an additional 59 pages of separate opinions by individual justices concurring with, or dissenting from specific points.

The large number of legal issues and the short period of time available to the Court, forced the Justices to issue an unsigned per curiam opinion, widely believed to have been authored by Justice Brennan. The Court uses the per curiam device in settings, like the Pentagon Papers case, where time does not permit a single Justice to circulate a signed opinion for concurrence by colleagues, and where the issues are too complex to resolve by unanimous vote.

Justice Stevens did not participate in *Buckley*, thus eight, not nine, Justices reviewed FECA. Only three Justices agreed with the per curiam in its entirety, but clear majorities emerged on every issue.

Justice Brennan, Justice Stewart, and Justice Powell agreed with the per curiam. Justice White would have upheld all of FECA. Chief Justice Burger would have invalidated the entire plan, except for disclosure of large contributions. Justice Blackmun would have invalidated the limits on contributions and expenditures, but approved the disclosure and public financing provisions. Justice Marshall would have upheld the limits on contributions and a candidate’s personal expenditures, but invalidated spending caps for individuals and campaigns. Justice Rehnquist would have upheld contribution ceilings and invalidated expenditure ceilings, but struck the public financing rules as unfair to minor parties.

Contribution limits were approved by six Justices, with only Chief Justice Burger and Justice Blackmun dissenting. Expenditure ceilings were invalidated by seven Justices, with only Justice White dissenting, joined by Justice Marshall on the narrow issue of a candidate’s personal expenditures. Disclosure rules were upheld by seven Justices, with only Chief Justice Burger dissenting on the question of small contributions. And public funding rules were upheld by six Justices, with only Chief Justice Burger and Justice Rehnquist dissenting.

But the clear majorities obscure the opinion’s central analytical rift—the radically different First Amendment treatment of contributions and expenditures. On that critical issue, which has played an enormously important role in the evolution of modern election law, the Justices were closely divided. Justices Brennan, Stewart, Powell, and, Rehnquist argued that a bright-line First Amendment distinction could be drawn between contributions and expenditures. Justice White, Chief Justice Burger and Justice Blackmun rejected the effort to treat the contributions and expenditures differently. Justice Marshall accepted differential treatment, but disagreed with the majority’s treatment of a candidate’s personal expenditures, which he viewed as self-directed contributions.

Even though only a bare majority was comfortable with the contribution/expenditure distinction, its analytic framework continues to dominate constitutional analysis of campaign finance reform.

## 2. The Standard of Review: Speech Equals Money

The *Buckley* per curiam opinion opens by rejecting the government's effort to secure a more permissive standard of judicial review by characterizing the regulation of campaign finance as a regulation of conduct, not speech. Regulation of campaign spending exercises such an inevitable impact on political speech, noted the Court, that spending limitations should be analyzed as though they were limits on speech itself.

Over the years, no aspect of *Buckley* has been more criticized than its equation of money and speech. But the Court's rejection of the government's effort to characterize FECA's regulations as mere regulations of conduct, with only an incidental impact on speech, was based on more than a crude confusion between speech and money. It was based on an assumption that, in the campaign context, money is the fuel that powers the political speech process.

As the Court noted, severely limiting the amount of money a political campaign can raise or spend affects political speech in much the same way as limiting the amount of gas in an automobile affects mileage. Given the extremely low expenditure ceilings set by FECA, the *Buckley* Court seemed correct to insist that campaign finance regulation be treated, for analytical purposes, as a direct regulation of speech. All eight participating Justices accepted the need to apply classic free speech analysis, and no member of the Court has ever suggested applying a lesser standard of review.

Two possible responses exist to the Court's equation of political speech and money. First, the Court's assumption that expenditure limits bite deeply into the quantity of political speech may be a function of the severity of the ceiling. In *Buckley*, a very low ceiling may well have justified such an assumption. For example, FECA was passed in 1974, and limited House campaigns to \$70,000—but in 1972, 20 House candidates, 14 of whom were non-incumbents, spent more than \$70,000. It remains to be seen whether the same assumption—that all limits gravely injure the quantity of political speech—would be justified in the context of more generous spending ceilings.

The government's effort to invoke the "time, place or manner" standard was equally unavailing. The Court noted that FECA, unlike the regulations at issue in the "time, place or manner" cases had the effect of eliminating speech entirely, not merely shifting it to a different time or place. For example, courts have allowed protesters to be moved from the entrance of an event to an adjacent parking lot, reasoning that the protesters' speech opportunities remain. But capping campaign spending entirely removes speech from the political process.

Thus, the *Buckley* Court requires that campaign finance regulations satisfy the stringent constitutional test designed to govern efforts that censor political speech—a test that requires the government to prove that the regulation is the least drastic means of advancing a compelling governmental interest.

## 3. The Difference Between Contributions and Expenditures

With the question of the governing standard settled, the *Buckley* Court proceeded to canvass potential compelling interests that might justify regulation. Two interests were identified: Preventing the appearance or reality of "corruption" caused by suspicious forms of campaign financing, and promoting effective participation in the electoral process by all, regardless of wealth.

Next, the Court explored the First Amendment values at stake in campaign contributions and expenditures. Campaign contributions, it was decided, were important acts of political association, but not direct acts of expression. Campaign expenditures, on the other hand, were found to be pure acts of expression entitled to the highest level of protection.

The Court then proceeded to balance the potential compelling interests in regulation—preventing corruption and equal political participation—against the First Amendment values. Large campaign contributions, found the Court, risk the appearance or reality of corruption, which the Court equated with a quid pro quo arrangement between the contributor and the candidate. On the other hand, limiting large contributions would not materially diminish communication, the Court reasoned, since 94% of campaign contributions were lower than the \$1,000 ceiling, and the remaining 6% could simply be raised in smaller amounts. Balancing the compelling interest of preventing corruption against the Court's view of the mild interference with speech caused by limiting contributions, the per curiam opinion firmly upheld the \$1,000 limit on contributions to candidates.

The *Buckley* Court came out the other way on spending limits. For independent expenditures—Voter Jones' advertisement for Candidate Smith—there is little danger of quid pro quo corruption because the spender has no contact with the candidate. For a candidate's personal expenditures—Candidate Smith spends \$100,000

of his own money on his campaign—the Court found no danger of quid pro quo corruption because there is no one to make a deal with. Finally, for campaign expenditures—the Smith campaign’s advertising costs—the Court concluded that because no deals are made in the process of spending money, there is no risk of quid pro quo corruption.

On the other side of the balance, the Court noted the direct effect expenditure ceilings have on the ability to speak. The extremely low \$1,000 limit on individual independent expenditures would bar a supporter even from taking out an advertisement in a newspaper. And the candidate and campaign expenditure limits would directly impact on the quantity of political discourse. Balancing the lack of serious threat of corruption in the expenditure context, against the significant limit on political speech created by spending ceilings, the *Buckley* Court firmly invalidated all expenditure caps.

As to the government’s argument that spending caps were allowable because they advanced a compelling interest in fostering equal political participation, the Court acknowledged this interest as legitimate—relying on it later in the opinion to uphold public financing—but rejected using the equality rationale as a justification for preventing political speech, as opposed to subsidizing it. Strong voices, said the Court, may never be censored in an effort to aid weak voices. Thus, under *Buckley*, if a government wants to equalize political participation, its sole option is subsidizing, not limiting, candidates.

The *Buckley* Court’s separate treatment of expenditures and contributions has been criticized on at least three levels. First, critics have argued that the per curiam opinion erred in ascribing less First Amendment value to campaign contributions than to expenditures. When Voter Jones writes a check to Candidate Smith, one would think he has made the quintessential expression of political association. Moreover, if the Court was right in treating the spending of money as indispensable fuel for political speech, it should not matter whether the money is in the form of an expenditure, or in the form of a contribution that makes an expenditure possible. In both settings, the money is the sine qua non of political speech. As Justice Marshall noted in his separate opinion in *Buckley*, the distinction between expenditures and contributions becomes even more artificial when spending by candidates from their personal fortunes is considered. Conversely, if, as the per curiam argued, campaign contributions can be regulated because they are only indirectly linked to political speech, so are many campaign expenditures. Costs for polling, salaries and travel are all non-speech expenditures—each certainly seems less connected to speech than the campaign check Voter Jones writes to help Candidate Smith pay for his advertisements.

Second, critics have questioned the *Buckley* Court’s assumption that if Voter Jones made the relatively modest campaign contribution of \$1,001, it would risk the appearance or reality of corrupting Candidate Smith; while if Jones made a \$1 million on an independent expenditure in support of Smith, there would be no risk of corruption. In measuring the potential for corruption, critics ask, is there a real difference between contributing to a candidate, and spending on his behalf?

*Buckley*, of course, answers this question affirmatively. Independent expenditures, the Court noted, involve no communication between the independent spender and the campaign, thus there is no opportunity for corruption. Critics respond by pointing to communications not related to the expenditure. Congressman Smith has legislative business that will affect Voter Jones, who independently spends \$1 million on Smith’s behalf. The two individuals never expressly talk about this expenditure—but Smith surely knows Jones made it. After the election, Smith and Jones speak about the legislative matter affecting Jones. It’s this communication—the conversation after the independent expenditure—that critics assert the *Buckley* Court ignored.

This issue is where the *Buckley* Court suffers most from having been without a factual record. Enormous independent expenditures weren’t part of the fictional record the Court considered, mostly because they weren’t yet part of America’s political process. Several scholars, reflecting on the millions of dollars independently spent in the 1996 elections, have called for a factually based study of independent expenditures’ potential for corruption.

Finally, critics have attacked *Buckley*’s conclusion that spending can never be regulated in the name of equality. FECA’s spending limits were set at an unreasonably low level. The Court was correct to note that the \$1,000 ceiling on independent expenditures was a de facto ban on political participation, and FECA’s \$70,000 limit for House races was also unreasonably low. Thus, while the *Buckley* Court was correct in concluding that FECA’s extremely low expenditure limits significantly restrained political speech, it is not clear this reasoning should apply to higher spending caps.

At some point, critics argue, unlimited campaign spending reaches a point of diminishing returns. Instead of bringing new ideas to the political dialogue, run-away campaign expenditures simply distort the political process. The seemingly absolute language of *Buckley*, critics argue, should not apply to efforts to limit extremely high-end campaign spending in the name of equality.

#### 4. Reporting and Disclosure

After analyzing contributions and expenditures, the *Buckley* Court turned to the closely related reporting and disclosure requirements. No one challenged the concept of public disclosure of large contributions to major party candidates. The requirement of record-keeping for \$10 contributions was challenged, as was public disclosure of \$100 contributions. Moreover, the plaintiffs argued that disclosure was unnecessary for contributions to minor parties, especially if the minor parties were controversial. Finally, it was argued that once the expenditure ceilings were invalidated, no basis existed for forced disclosure of independent expenditures.

The *Buckley* Court had little difficulty upholding the disclosure and reporting requirements. First, the Court observed that no reason existed to disclose publicly contributions under \$100. Thus, the \$10 contributions were sealed off from public view. Second, the Court rejected the argument that contributions to minor parties should be exempt, noting that minor parties could affect the outcome of elections, even if they did not win. In an effort to protect the supporters of unpopular political parties, however, the Court provided a blanket exemption from the disclosure rules for any controversial third party able to demonstrate a genuine risk of reprisal.

Most importantly, the Court argued that prevention of corruption was not the only justification for disclosure and reporting. The source of a candidate's financial support, noted the Court, was important information about the candidate's political positions. The Court even found that the importance to voters of such information justified compelled disclosure of independent expenditures, even though earlier the Court had found that independent expenditures pose no threat of corruption.

#### 5. Public Financing of the Presidential Election

Finally, the *Buckley* per curiam upheld the public financing aspects of FECA, despite the argument that they discriminated in favor of the two major parties. Minor parties had no basis for complaint since they were no worse off than before the subsidies. In both settings, the Court held, minor parties were forced to rely on contributions from the public.

Of course, this analysis overlooked two important things. First, by limiting the size of contributions, and by requiring public disclosure in the absence of formal proof of a likelihood of reprisal, the Court actually made it harder for minor parties to raise money from the public. The demise of expenditure limits further burdened minor parties, as it was certain that they would be badly out spent in most settings.

Second, FECA altered the relative positions of minor and major parties by guaranteeing major parties a great deal of money, and permitting supporters to spend unlimited amounts, while minor parties were required to continue raising money from the general public in small doses.

In defense of the Court's result, any public funding plan must distinguish between serious candidates and those that do not deserve taxpayer support. While Congress' plan could have been more generous to serious independents and to minor parties generally, FECA's supporters have argued that it is a fundamentally fair way of subsidizing serious presidential candidates.

By far the most important aspect of the *Buckley* Court's public funding discussion was a casual footnote observing that Congress could condition optional public funding on a candidate's promise to respect campaign expenditure ceilings. The large remaining question is whether public funding can come with other strings, such as restrictions on the size and source of campaign contributions. For in recent years, in other contexts, the Court has been increasingly skeptical of conditioning government assistance behavior.

#### *D. The Unfortunate Practical Consequences of Buckley*

By upholding FECA's contribution limits, while striking down its expenditure ceilings, the *Buckley* Court created a campaign financing system very different from the one Congress intended. Congress had established an integrated series of regulations, with the contribution and expenditure limits reinforcing each other, and the entire package was designed to minimize the impact of money on elections. But without expenditure ceilings, FECA was radically altered. Further, contribution limits and disclosure requirements made raising money harder, but the lack of spending caps maintained the system's voracious need for money. In simple economic terms, the *Buckley* Court limited supply (contributions), while leaving demand (expenditures) free to grow without limit. The predictable effect has been to increase the pressures

on candidates to satisfy the ever-increasing demand for campaign cash. Inadvertently, the *Buckley* opinion took a congressional program designed to minimize the impact of wealth on campaigns and turned it into an engine for the glorification of money.

Specifically, *Buckley* dramatically increased the political power of rich candidates, who now could pour limitless wealth into their own campaigns, while opponents were left to raise contributions in small donations from the general public, or from special interest PACS. Before FECA, a candidate's personal wealth could be offset by large donations from wealthy supporters of an opponent. FECA, without the *Buckley* decision, provided a system that had contribution limits (which removed the potential corrupting impact of large donations), and spending limits (which removed the potential corrupting effect of wealthy candidates). But the post-*Buckley* scheme, where contribution ceilings remain in place, but the limits on candidate expenditures have been removed, makes it impossible to offset the power of individual candidate wealth. In a real sense, *Buckley* gave us Ross Perot, Steve Forbes, and Michael Huffington.

Similarly, *Buckley* increased the relative political power of special interests. Before FECA, a candidate was able to raise money from a large array of sources, including wealthy individuals. FECA cut off these sources by imposing contribution caps. Under the mutation produced by *Buckley*, however, candidates are under pressure to feed the money machine created by the removal of all expenditure ceilings. But raising money in \$1,000 increments from individuals is not efficient enough. Special interests, organized as PACS, help relieve this pressure by handing candidates \$5,000 contributions. Additionally, albeit without coordination with the campaign, PACs can support candidates through independent expenditures.

Thus, inadvertently, the Court inverted FECA's intent. Instead of freeing the political process from the effects of wealth disparities and the reality and appearance of corruption, *Buckley* places more pressure on public officials to raise money (having made the process more difficult), and increases the amount of special interest money in the system. This inversion created precisely what the *Buckley* Court identified as a threat to the Democratic process: a system corrupt in appearance and reality. In short, the *Buckley* Court inadvertently gave the nation a campaign funding system that, in the words of the principal challenger in *Buckley*—James Buckley—no Congress would ever have enacted.

The *Buckley* Court also upended Congress' intention with respect to the public funding of presidential elections. Instead of placing limits on the role of wealth in presidential elections, the public funding rules were subverted by the elimination of independent expenditure ceilings. Without these caps, candidates are permitted to accept public subsidies, while receiving the support of unlimited independent expenditures from wealthy supporters and organized special interests.

#### *E. The Evolution of the Law Since Buckley*

In the 20 years since it decided *Buckley*, the Supreme Court has rigorously maintained its distinction between contributions and expenditures. Restrictions on campaign expenditures have been universally invalidated, with the surprising exception, in 1990, of a Michigan ban on corporate expenditures in state and local elections, which the Court narrowly upheld. Restrictions on contributions have been sustained, unless the ceiling was unreasonably low.

##### 1. The Expenditure Cases

In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court invalidated a ban on independent corporate expenditures in connection with a referendum on taxes. Following the reasoning in *Buckley*, the *Bellotti* Court held that the corporate expenditure ban directly impacted on the flow of political information of potential interest to the electorate. In *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), the Court invalidated a federal ceiling on independent expenditures by PACS in support of federal candidates. It is the NCPAC decision that dealt the serious blow to public funding of presidential elections, since it destroyed the government's ability to place a real cap on candidate spending. After *NCPAC*, presidential candidates were free to accept the federal subsidy, knowing that they would also benefit from friendly PACs which would launch expensive independent expenditures to help their candidacies. The next year, in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), the Court expanded *NCPAC*, invalidating a ceiling on independent expenditures on behalf of federal candidates by non-profit corporations organized to advance a political position.

In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), however, the Court surprised observers by narrowly upholding a Michigan ban on independent corporate expenditures in connection with state and local elections. Surprisingly,

Justices Brennan and Marshall, both critical players in *Buckley's* invalidation of FECA, provided the crucial votes to sustain the Michigan ban. The Court reasoned that corporations accumulate great wealth in transactions having nothing to do with politics, and then are in a position to distort electoral outcomes by pouring wealth into a campaign with no guarantee that the wealth reflects the general views of the public.

Critics of *Austin* argued that the Court had ignored its precedents, and that if the corporate position truly lacked support in the community, the voters would reject it. Supporters of *Austin* saw it as a ray of hope that the Court was open to reconsidering a flat ban on all spending caps. Under existing precedent, therefore, corporations have a First Amendment right to spend money on referenda (*Belotti*), but may be forbidden from spending money in support of candidates (*Austin*). Supporters argue there's logic in this distinction—referenda can't be corrupted, unlike politicians, so they deserve less regulation.

Whether such a fine distinction can survive is debatable. Similarly, disputes have arisen over whether the Court's rationale in *Austin* can be limited to corporate expenditures. After all, virtually all concentrations of wealth come from economic transactions having nothing to do with politics. After *Austin*, can all "wealth" expenditures be regulated to prevent distortion of the political process?

*Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 116 S.Ct. 2309 (1996), is the most recent expenditure decision. In this case, the Court reasoned that a political party could engage in independent expenditures, as long as this activity was not coordinated with the candidate benefiting from the spending. Critics were astounded by this decision, arguing that the law always treated parties and campaigns as if they were inseparable. That is, it had always been thought that the spending of money by a political party would count against the amount of money a party could give its nominee. Critics fear that allowing parties to use independent expenditures will further escalate campaign spending, as candidates will be able to benefit from the limitless financial support, albeit "uncoordinated," of political parties.

## 2. The Contribution Cases

In *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981), the Court upheld the \$5,000 ceiling on contributions to PACs. The challenger, an unincorporated association, argued that since it had a First Amendment right to spend an unlimited amount in support of a candidate, it should have a similar right to contribute unlimited amounts to PACs, as PACs could not give more than \$5,000 to any given candidate. The funds were not being given directly to a candidate, the challenger argued, so a quid pro quo arrangement was not possible.

The Court rejected this argument, holding that the ceiling was necessary to prevent individuals from avoiding contribution limits by funneling large contributions through associations to numerous PACs for re-transmission to a candidate.

In *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), the Court upheld a ban on solicitation of the general public by corporate PACs. The Court reasoned that corporate PACs were not designed to be organs of general political influence, but rather to provide a convenient method for persons closely associated with the corporation to coordinate their individual political contributions.

Ironically, *National Right to Work* forces PACs to operate as narrow engines for the self-interest of corporate executives, rather than general vehicles for the expression of political ideals. On the other hand, since corporate executives generally determine which federal candidates receive PAC funding, the Court was obviously concerned about providing corporate executives with too much political influence by opening the PAC to the general public.

In *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981), however, the Court invalidated a \$250 ceiling on contributions to committees formed to support and oppose a ballot initiative. The Court stressed the extremely low ceiling, and the lack of a serious risk of quid pro quo corruption.

## 3. The Soft Money Amendments

Just as *Buckley* reviewed Congress' 1974 Amendments to FECA—the first generation of FECA was passed in 1971—our election laws have gone through several subsequent add-ons. While most of these amendments have had scant policy impact, a tiny item in Congress' 1979 FECA Amendments drastically altered money's role in politics.

According to 2 U.S.C. 431(8)(B)(viii)-(xii), funds which state and local parties use for "party building" activities can be raised without regard to FECA's contribution limits.

This exception for state and local party money, called the “soft money” loophole, allowed corporations, labor unions, and wealthy donors—each supposedly barred from contributing large sums to candidates for federal office—to make unlimited campaign contributions.

Not surprisingly, because soft money could only pay for “party building” activities, political professionals eventually began to push the envelope on what constituted “party building.” At first political parties only used this loophole for voter registration and get-out-the-vote drives. In 1988, however, the definition of “party building” went through a vast expansion, as “issue advertisements”—political commercials that promote a party’s message (often featuring the party’s nominee) without expressly advocating for a specific candidate—were paid for with soft money funds.

In 1996, corporations, labor unions, and wealthy individuals used soft money contributions to pump over \$250 million into the political process. Critics assert that soft money illustrates the phenomenon of an exception being allowed to swallow its rule.

#### *F. Some Lessons From the Buckley Experience*

*Buckley* is hardly a model for the formulation of public policy. The per curiam opinion resulted in the distortion of Congress’ intent, imposed a regime on the nation that no Congress would ever have enacted, and most importantly, has created a campaign finance system abhorred by virtually all political participants. Its many failings provide a cautionary road-map to future efforts of campaign finance.

First, do not look to courts as the primary forum to solve campaign financing. The limited fact-finding capability of courts, coupled with the inherent limitations on judicial power, make courts the wrong place to find a viable solution for campaign funding issues. If courts are to participate in the process, *Buckley* warns, judicial participation should be confined to the usual narrow “case or controversy” approach, which requires challengers to develop a factual record challenging a specific application of the law as it is applied to them, and counsels a court to decide only the actual case before it, unlike the Court’s breakneck, record-less review of FECA.

Second, facts matter. At no time in the process leading up to *Buckley* did any institution conduct a searching inquiry into how the proposed law would actually affect the campaign process. There were arguments and opinions about about the factual reality of the campaign process, and FECA’s impact on future campaigns. But no one—not Congress, not the parties, not the courts—conducted an in-depth study into the role of money in federal elections. This lack of a serious factual underpinning made it easier for the Court to brush aside Congress’ judgments. The success of any future effort to reform the campaign process is likely to turn on the persuasiveness of the factual record (not the factual assertions) developed to justify it.

Third, over-regulation is fatal. The 1974 Act’s effort to limit expenditures was doomed by its unreasonably low ceilings. Independent expenditures were capped at \$1,000, House campaigns at \$70,000. The Court was correct to decide that these limits bit deeply into the quality and quantity of political discussion. In a real sense, FECA’s unreasonably low expenditure ceilings precipitated the *Buckley* Court’s controversial link between speech and money. When the money ceiling is set so low that it constitutes a de facto prohibition on reasonable forms of political activity, it is natural for a reviewing court to equate expenditure ceilings with censorship.

Apart from strategic considerations, moreover, over-regulating the political process is a mistake. Unduly low expenditure ceilings dampen legitimate political discussion. Unduly low contribution ceilings harm third parties and independents, and unfairly enhance the relative power of rich candidates. Unduly burdensome reporting and disclosure requirements discourage perfectly legitimate political contributions, especially to controversial candidates.

Fourth, regulations may have unintended effects. Limiting spending may help incumbents. Limiting contributions may help rich candidates. Disclosure rules may hamstring controversial parties. Public financing may enshrine the two major parties. Any serious effort at reform must work through potential unintended effects, and should provide a mechanism for periodic reconsideration as experience reveals its practical impact.

Fifth, a reform effort need not be constitutional in every potential application to survive initial facial scrutiny. During the early years of any campaign reform program, the plan may operate unfairly in particular settings, justifying judicial intervention to protect First Amendment rights. But merely because a particular aspect of a law may be invalid, the entire legislative plan need not be struck down. Moreover, in the early years of any plan, there will undoubtedly be conflicting assertions about its practical effects. The fate of the entire program should not turn on such

conflicting predictions. Some mechanism allowing the plan to be tested against its predicted effects should be included.

#### *G. Reform Initiatives Consistent With Buckley*

The *Buckley* per curiam leaves open at least five important opportunities for campaign finance reform. First, and most importantly, the *Buckley* opinion explicitly permits expenditure ceilings to be introduced as the quid pro quo for public funding. Public funding, according to the *Buckley* Court, is appropriate, both to remove the risk of corruption created by private contributions, and to equalize access to the political process. As the price of a subsidy, the government can demand a pledge to limit campaign expenditures.

Several versions of this pledge are possible. Under one version, exemplified by the presidential funding plan, 100% of the campaign is funded, in return for a promise to cap spending at the subsidized ceiling. Under another version, a portion of the campaign is subsidized, and candidates are free to raise and spend a specified additional amount. A variant, exemplified by the presidential primary funding plan, or the recently enacted Kentucky and Maine plans, provides a subsidy in the form of matching funds keyed to private contributions. Under any of these versions, the effort to cap spending is complicated—and perhaps doomed—by the First Amendment right of supporters to make unlimited independent expenditures in support of a candidate. Whether public subsidies can be keyed to an effort to limit independent expenditures, or the geographical source of campaign contributions remain unanswered questions.

Finally, public subsidies need not be in the form of cash. For example, free or subsidized access to television has been urged as a means of lowering the demand for money. One form of subsidized access to television relies on vouchers. Another compels the networks to provide free, or under-market, access to candidates. The constitutionality of such compelled access remains an open question, as the networks will undoubtedly argue that the government's acquisition of network air time is an unconstitutional "taking."

Second, the meaning of the term corruption in the *Buckley* opinion can be expanded. The Court used the term to describe a quid pro quo arrangement under which a candidate's action was influenced by the receipt of money. But the corrosive impact of money is not confined to bribery, or some lesser form of financially induced behavior. The political process can be corrupted when a candidate loses (or appears to lose) the ability to think independently, and must constantly appeal for money from individuals and PACs. When voters watch this they increasingly believe that their interests can only be advanced by the payment of money. The deeply corrosive impact of such a cynical view of politics should qualify as a corruption of democracy. Nothing in *Buckley* forecloses a broad reading of the concept.

Third, the *Buckley* Court's refusal to uphold expenditure limits may well have been precipitated by the unreasonably low limits set in the 1974 statute. It is unclear whether the seemingly absolute refusal in *Buckley* to permit expenditure limits would apply if the spending caps were far greater than those permitted by FECA. At some point, the argument goes, unlimited expenditures stop acting as the source of new ideas, and become a form of repetitive propaganda, making it impossible for poorer candidates to get a fair hearing.

Fourth, existing loopholes can be plugged. The most glaring loophole, the soft money exception, involves no constitutional issues and can be closed by Congress tomorrow.

Finally, *Buckley* considered only two potential compelling interests—avoiding corruption, and equalizing political participation. Several other possible compelling interests exist, including, to name a few: Improving the quality of campaign discourse, preserving confidence in the democratic process, increasing voter turnout, and equalizing access to the ballot.

#### *H. The Possibility of Modifying the Buckley Ground Rules*

*Buckley* can be modified in two ways. First, the factual assumptions of the opinion can be shown to be inaccurate. For example, the assumption that unlimited personal campaign expenditures and independent expenditures would not create actual corruption, or its appearance, is ripe for attack 20 years after *Buckley*.

Second, the controversial distinction between contributions and expenditures can be attacked as arbitrary, especially in areas like a candidate's personal spending.

Attacking this distinction is risky, as two results are possible. Imagine *Buckley*'s contribution/expenditure distinction as a rotten tree. The Court could push the tree upon reformers by eviscerating the distinction between contributions and expenditures and then deciding that neither may be constitutionally regulated. Alter-

natively, the Court could push *Buckley*'s logic the other way by eliminating this same distinction and allowing the regulation of contributions and expenditures.

Colorado Republican can be read for clues as to where each Justice stands on challenges to this distinction. There appear to be three camps. Justice Thomas—who observers think will be joined by Chief Justice Rehnquist, and Justices Scalia and Kennedy—wants the tree to fall upon reformers. That is, in Colorado Republican Justice Thomas argued that it's time to erase the contribution/expenditure distinction and cease regulating campaign contributions. Justices Stevens and Ginsberg agree that *Buckley* rests upon a faulty fiction—but they welcome regulating both sides of the campaign ledger.

Justices O'Connor, Souter and Breyer are undecided. In Colorado Republican this camp argued that the case's facts did not make it necessary to decide the merits of *Buckley*'s contribution/expenditure distinction. In response to Justice Thomas' call for the Court to revisit this distinction, Justice Breyer wrote that the Court should proceed cautiously, noting that neither party briefed this issue.

Observers differ on which way, if any, these undecideds will drift. This environment has split reformers—some worry challenging *Buckley* is not worth its risks, and other think a gamble is justified, since, they argue, even a system with unregulated campaign contributions would be better than the *Buckley* status quo.

#### CONCLUSION

As originally written, the *Buckley* per curiam was probably intended to steer the nation to public financing of elections as the only constitutional way to control expenditures and enhance equality. And Justice Brennan's perception that weak voices should be protected by making them stronger, rather than by censoring strong voices, remains wise counsel. But the movement for public funding has stalled, at least at the federal level, forcing reformers to consider whether other avenues for reform survive *Buckley*.

Twenty years of experience with the campaign finance system that *Buckley* created reveals serious deficiencies in the per curiam opinion's factual assumptions, legal conclusions, and practical consequences. It is past time to revisit *Buckley*.




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## The Torricelli Amendment is Unconstitutional

The Senate passed version of McCain-Feingold-Cochran contains an amendment by Senator Toricelli that NAB opposes. The Torricelli Amendment would change the current law regarding the sale of broadcast time for political campaigns in four significant aspects. It would require television broadcasters to provide candidates with their most desirable class of time at the lowest price they charged during the previous year for the least desirable class, in effect requiring the sale of a first-class seat in high season at a deeply discounted off-season coach price. It would further bar television stations from preempting any political spot. It would require repeated and intrusive FCC audits of television stations during campaigns. Finally, while current law limits the benefits of political rates to appearances by candidates themselves that are aired on behalf of their authorized committees, the amendment would extend those benefits to ads run by a national committee of a political party, whether or not those ads even contained an appearance by the candidate.

Proponents of the amendment argue that it would effectuate Congress' intentions when it enacted the reasonable access and lowest unit charge provisions of the Federal Election Campaign Act of 1971. That claim is not supported by the record. After a searching examination, the D.C. Circuit concluded that "[e]ach reference to Section 312(a)(7) [the reasonable access provision] in the legislative history of the Campaign Communications Reform Act speaks of the sale of time." *Kennedy for President Committee v. FCC*, 636 F.2d 432, 445 (D.C. Cir. 1980). The court continued: "when the rejection of S.1's free-time provision is recalled, the possibility that Congress intended to demand more than that broadcasters sell reasonable amounts of time seems very remote." *Id.*

The court also understood that Congress intended to decrease the cost of campaigns through the lowest unit charge provision. *Id.* at 441. The problems that Congress saw in 1971 are fully addressed by the current provision and the amendment would strike an entirely different balance. Reviewing the legislative history of the lowest unit charge provision, the court commented:

"The debates contain a great deal of discussion over the rates charged candidates by broadcasters. In general, the problem arose from the short-term, cyclical nature of political broadcasting as well as the low volume of time purchased by any one candidate, making it impossible for candidates to take advantage of the many discounts available to users with whom broadcasters had long-term associations. Also cited, however, were instances of alleged abuse by broadcasters, such as imposition of excessive rates simply because of the candidate's political status." *Id.* n. 68.

Current law precisely and effectively deals with the problems Congress identified in 1971. Candidates who purchase one spot on a station get the lowest price the station has charged any commercial advertiser *for the same type of time*, even if that lowest rate was part of a volume discount or “package” buy. All uses by candidates during the two political “windows” receive these discounted rates; and the law bars stations from charging candidates higher rates than other advertisers at any time. Thus, the Torricelli amendment would not restore the resolution Congress reached in 1971; it would instead dramatically shift the cost of campaigns to broadcasters.

The Torricelli Amendment would indeed single out television for this treatment. No other supplier to campaigns would be required to provide any discounts to candidates, much less discounts far greater than would be available to any other purchaser. Telephone companies, cellular phone providers, airlines, landlords, commercial printers, newspapers, internet companies, and others supply goods and services to campaigns – many enjoying the benefits of federal licenses or other government-mandated privileges – but are not asked to subsidize the cost of campaigning. Even former FCC Chairman Reed Hundt concluded: “broadcasters should not be required to shoulder the financial burden of political time themselves.” *The Hard Road Ahead – An Agenda for the FCC in 1997*, <http://www.fcc.gov/Speeches/Hundt/97agenda.txt>.<sup>1</sup>

The Supreme Court has determined that “the mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending.” *Buckley v. Valeo*, 424 U.S. 1, 57 (1976). Simply controlling the cost of elections would not justify burdens placed on one small group of speakers. The amendment favors one group of speakers – candidates and parties – over all others. In *CBS v. DNC*, the Supreme Court commented that “[w]e see no principled means under the First Amendment of favoring access by political parties over other groups and individuals.” 412 U.S. 94, 127 n. 21 (1972). It may strike Congress that facilitating time for candidates and national parties on broadcast stations is good public policy. But, “[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.” *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 115 S. Ct. 2338, 2350 (1995).

<sup>1</sup> The Supreme Court has indeed suggested that the press cannot be compelled to participate in campaign finance reform. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Court upheld a Michigan statute that barred using corporate treasury funds for independent expenditures in connection with campaigns for state office, but exempted news media corporations from the prohibition. Rejecting an argument that the media exemption violated the equal protection guarantee, the Court emphasized that the “press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials,” and seemed to signal that the statute would not have been upheld if it had applied to the media. *Id.* at 667-68. See Smolla, *Free Air Time for Candidates and the First Amendment* (Paper Submitted to the Presidential Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, 1998).

The Supreme Court has long understood that the establishment of a government licensing scheme for broadcasters “called on both the regulators and the licensees to walk a ‘tightrope’ to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act.” *CBS v. DNC*, 412 U.S. at 117. While the Court upheld the requirement that broadcasters give “reasonable access” to federal candidates in *CBS v. FCC*, 453 U.S. 367 (1981), it emphasized that the right of access was “limited,” and that the 1971 Act “properly balances the First Amendment rights of federal candidates, the public, and broadcasters.” *Id.* at 397. The Torricelli Amendment would fundamentally alter that delicate balance. It would reduce the charges for political ads to a level far below Congress required and would extend the benefits of political discounts to party ads that might not include any appearance by a candidate. The amendment would therefore raise substantial questions about the constitutionality of political broadcasting regulation.

Government regulation of speech, including speech on broadcast stations, must both be the least restrictive means available and must directly advance a governmental interest. *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984). The amendment would not achieve the objectives of enhancing public respect for the political process or reducing the cost of campaigning.

The amendment would permit national party committees to air ads at steeply discounted rates without including any appearance by the candidate the party supports. This would permit parties to air ads attacking opposing candidates without having to acknowledge any connection between the attack and the candidate the party favors. Critics of current campaigns believe that attack ads reinforce “the very cynicism they exploit, and in the process drive citizens away from politics,” particularly when candidates avoid personal accountability for the attacks. Alliance for Better Campaigns, *Campaigns & Television*, <http://www.bettercampaigns.org/resources.htm>. Rather than enhancing public respect for the political process and encouraging greater voter participation, the Torricelli Amendment would have the opposite effect of facilitating non-accountable party ads and reducing public respect for elections.

Nor would the amendment achieve its other goal of reducing the cost of campaigns. While it would require broadcasters to give candidates and parties vastly greater discounts than the law now requires, it would not impose any limits on the number of spots that candidates and parties could purchase. Certainly, reducing the cost of individual ads would only lead to candidates and parties in tight races seeking to buy more of them. Campaign consultants and time buyers are not likely to want to explain to a losing candidate why, if funds were available, additional advertising time was not bought.

Finally, the amendment effectively imposes a flat rate for political time on broadcast stations. The reality, however, is that the value of time on broadcast stations varies over time and with demand. A spot on *Monday Night Football* the day before the election is worth more – to candidates – than a spot on a different program in early September weeks before the election. The amendment would provide no means by which stations could determine which campaign would receive the most valuable time slots. Under the amendment, a candidate in a relatively uncontested race for a local office could early in a campaign reserve the most desirable time periods just before the election. Since those spots would become non-preemptible, other

March 22, 2001

**Statement of Persons Who Have Served the  
American Civil Liberties Union in Leadership Positions  
Supporting the Constitutionality of the  
McCain-Feingold Bill**

We have served the American Civil Liberties Union in leadership positions over several decades. Norman Dorsen served as ACLU General Counsel from 1969-76 and as President of the ACLU from 1976-1991. Jack Pemberton and Aryeh Neier served as Executive Directors of the ACLU from 1962-1978. Melvin Wulf, Burt Neuborne, and John Powell served as National Legal Directors of the ACLU from 1962-1992. Charles Morgan, Jr., John Shattuck, and Morton Halperin served as National Legislative Directors of the ACLU from 1972-1992. Together we constitute every living person to have served as ACLU President, ACLU Executive Director, ACLU Legal Director, or ACLU Legislative Director, with the exception of the current leadership.

We have devoted much of our professional lives to the ACLU, and to the protection of free speech. We are proud of our ACLU service, and we continue to support the ACLU's matchless efforts to preserve the Bill of Rights. We have come to believe, however, that the ACLU's opposition to campaign finance reform in general, and the McCain-Feingold Bill in particular, is misplaced. In our opinion, the First Amendment does not forbid content-neutral efforts to place reasonable limits on campaign spending and establish reasonable disclosure rules, such as those contained in the McCain-Feingold Bill.

We believe that the First Amendment is designed to safeguard a functioning and fair democracy. The current system of campaign financing makes a mockery of that ideal by enabling the rich to set the national agenda, and to exercise disproportionate influence over the behavior of public officials.

We recognize that the Supreme Court's 1976 decision in *Buckley v. Valeo* makes it extremely difficult for Congress to reform the current, disastrous campaign finance system, and we believe that *Buckley* should be overruled. However, even within the limitations of the *Buckley* decision, we believe that the campaign finance reform measures contained in the McCain-Feingold Bill are constitutional.

We support McCain-Feingold's elimination of the "soft money" loophole, which allows unlimited campaign contributions to political parties and undermines Congress's effort to regulate the size and source of campaign contributions to candidates. There can be little doubt that large "soft money" contributions to the political parties can corrupt, and are perceived as corrupting, our government officials.

We also support regulation of the funding of political advertising that is clearly intended to affect the outcome of a specific federal election, but that omits the magic words "vote for" or "vote against." The McCain-Feingold Bill treats as electioneering any radio or television ad that names a federal candidate shortly before an election and is targeted to the relevant electorate. It would ban the use of corporate and labor general treasury funds for such ads, and it would require public disclosure of the sources of funding for such ads when purchased by other groups and individuals. We believe that these provisions are narrowly tailored to meet the vagueness and overbreadth concerns expressed by the Supreme Court in *Buckley*, and thus are constitutional.

Finally, we believe that the current debate over campaign finance reform in the Senate and House of Representatives should center on the important policy questions raised by various efforts at reform. Opponents of reform should not be permitted to hide behind an unjustified constitutional smokescreen.

Norman Dorsen  
Morton Halpern  
Charles Morgan, Jr.  
Aryeh Neier  
Burt Neuborne  
Jack Pemberton  
John Powell  
John Shattuck  
Melvin Wulf



March 12, 2001

Senator John McCain  
Senator Russell Feingold  
United States Senate  
Washington, DC 20510

Dear Senators McCain and Feingold:

We are scholars who have studied and written about the First Amendment to the United States Constitution. We submit this letter to respond to a series of public challenges to two components of S.27, the McCain-Feingold Bill. Critics have argued that it is unconstitutional to close the so-called "soft money loophole" by placing restrictions on the source and amount of campaign contributions to political parties. Critics have also argued that it is unconstitutional to require disclosure of campaign ads sponsored by advocacy groups unless the ads contain explicit words of advocacy, such as "vote for" or "vote against." We reject both of those suggestions.

As constitutional scholars, we are deeply committed to the principles underlying the First Amendment and believe strongly in preserving free speech and association in our society, especially in the realm of politics. We are not all of the same mind on how best to address the problems of money and politics. However, we all agree that the nation's current campaign finance laws are on the verge of being rendered irrelevant, and that the Constitution does not erect an insurmountable hurdle to Congressional efforts to adopt reasonable campaign finance laws aimed at increasing disclosure for electioneering ads, restoring the integrity of the long-standing ban on corporate and union political expenditures, and reducing the appearance of corruption that flows from "soft money" donations to political parties.

The problems of corruption and the appearance of corruption that the McCain-Feingold Bill attempts to address are ones that inhere in any system that permits large campaign contributions to flow to elected officials and the political parties. These problems have been brought to the public's attention in a rather stark manner through the recent presidential pardon issued to fugitive financier Marc Rich. Regardless of underlying merits of that presidential decision, the public perception that flows from the publicly-reported facts is that large political contributors receive both preferred access to and preferential treatment from our elected government officials. These perceptions, regardless of their truth or falsity in any individual case, are ultimately very corrosive to our democratic institutions.

**I. Limits on "Soft Money" Contributions to Political Parties from Corporations, Labor Unions, and Wealthy Contributors Are Constitutional.**

To prevent corruption and the appearance of corruption, federal law imposes limits on the source and amount of money that can be given to candidates and political parties "in connection with" federal elections. The money raised under these strictures is commonly referred to as "hard money." Since 1907, federal law has prohibited corporations from making hard money contributions to candidates or political parties. See 2 U.S.C. § 441b(a) (current codification). In 1947, that ban was extended to prohibit union contributions as well. *Id.* Individuals, too, are subject to restrictions in their giving of money to influence federal elections. The Federal Election Campaign Act ("FECA") limits an individual's contributions to (1) \$1,000 per election to a federal candidate; (2) \$20,000 per year to national political party committees; and (3) \$5,000 per year to any other political committee, such as a PAC or a state political party committee. *Id.* § 441a(a)(1). Individuals are also subject to a \$25,000 annual limit on the total of all such contributions. *Id.* § 441a(a)(3).

The soft money loophole was created not by Congress, but by a Federal Election Commission ("FEC") ruling in 1978 that opened a seemingly modest door to allow non-regulated contributions to political parties, so long as the money was used for grassroots campaign activity, such as registering voters and get-out-the-vote efforts. These unregulated contributions are known as "soft money" to distinguish them from the hard money raised under FECA's strict limits. In the years since the FEC's ruling, this modest opening has turned into an enormous loophole that threatens the integrity of the regulatory system. In the recent presidential election, soft money contributions soared to the unprecedented figure of \$487 million, which represented an 85 percent increase over the previous presidential election cycle (1995-96). It is not merely the total amount of soft money contributions that raises concerns, but the size of the contributions as well, with donors being asked to give amounts of \$100,000, \$250,000, or more to gain preferred access to federal officials. Moreover, the soft money raised is, for the most part, not being spent to bolster party grassroots organizing. Rather, the funds are often solicited by federal candidates and used for media advertising clearly intended to influence federal elections. In sum, soft money has become an end run around the campaign contribution limits, creating a corrupt system in which monied interests appear to buy access to, and inappropriate influence with, elected officials.

The McCain-Feingold bill would ban soft money contributions to national political parties by requiring that all contributions to national parties be subject to FECA's hard money restrictions. The bill also would bar federal officeholders and candidates for such offices from soliciting, receiving, or spending soft money. Additionally, state parties that are permitted under state law to accept unregulated contributions from corporations, labor unions, and

wealthy individuals would be prohibited from spending that money on activities relating to federal elections, including advertisements that support or oppose a federal candidate.

We believe that such restrictions are constitutional. The soft money loophole has raised the specter of corruption stemming from large contributions (and those from prohibited sources) that led Congress to enact the federal contribution limits in the first place. In *Buckley v. Valeo*, the Supreme Court held that the government has a compelling interest in combating the appearance and reality of corruption, an interest that justifies restricting large campaign contributions in federal elections. See 424 U.S. 1, 23-29 (1976). Significantly, the Court upheld the \$25,000 annual limit on an individual's total contributions in connection with federal elections. See *id.* at 26-29, 38. In later cases, the Court rejected the argument that corporations have a right to use their general treasury funds to influence elections. See, e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). Under *Buckley* and its progeny, Congress clearly possesses power to close the soft money loophole by restricting the source and size of contributions to political parties, just as it does for contributions to candidates, for use in connection with federal elections.

Moreover, Congress has the power to regulate the source of the money used for expenditures by state and local parties during federal election years when such expenditures are used to influence federal elections. The power of Congress to regulate federal elections to prevent fraud and corruption includes the power to regulate conduct which, although directed at state or local elections, also has an impact on federal races. During a federal election year, a state or local political party's voter registration or get-out-the-vote drive will have an effect on federal elections. Accordingly, Congress may require that during a federal election year, state and local parties' expenditures for such activities be made from funds raised in compliance with FECA so as not to undermine the limits therein.

Any suggestion that the Supreme Court's decision in *Colorado Republican Federal Campaign Committee v. FEC*, 1518 U.S. 604 (1996), casts doubt on the constitutionality of a soft money ban is flatly wrong. *Colorado Republican* did not address the constitutionality of banning soft money contributions, but rather the expenditures by political parties of hard money, that is, money raised in accordance with FECA's limits. Indeed, the Court noted that it "could understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits was a serious matter, might decide to change the statute's limitations on contributions to political parties." *Id.* at 617.

In fact, the most relevant Supreme Court decision is not *Colorado Republican*, but *Austin v. Michigan Chamber of Commerce*, in which the Supreme Court held that corporations can be walled off from the electoral process by forbidding both contributions and independent expenditures from general corporate treasuries. 494 U.S. at 657-61. Surely, the law cannot be that Congress has the power to prevent corporations from giving money directly to a

candidate, or from expending money on behalf of a candidate, but lacks the power to prevent them from pouring unlimited funds into a candidate's political party in order to buy preferred access to him after the election. *See also Nixon v. Shrink Missouri Govt. PAC*, 120 S. Ct. 897 (2000) (reaffirming *Buckley's* holding that legislatures may enact limits on large campaign contributions to prevent corruption and the appearance of corruption).

Accordingly, closing the loophole for soft money contributions is in line with the longstanding and constitutional ban on corporate and union contributions in federal elections and with limits on the size of individuals' contributions to amounts that are not corrupting.

**II. Congress May Require Disclosure of Electioneering Communications, and It May Require Corporations and Labor Unions to Fund Electioneering Communications With Money Raised Through Political Action Committees.**

The current version of the McCain-Feingold Bill adopts the Snowe-Jeffords Amendment, which addresses the problem of thinly-disguised electioneering ads that masquerade as "issue ads." Snowe-Jeffords defines the term "electioneering communications" to include radio or television ads that refer to clearly identified candidates and are broadcast within 60 days of a general election or 30 days of a primary. A group that makes electioneering communications totaling \$10,000 or more in a calendar year must disclose its identity, the cost of the communication, and the names and addresses of all its donors of \$1,000 or more. If the group has a segregated fund that it uses to pay for electioneering communications, then only donors to that fund must be disclosed. Additionally, corporations and labor unions are barred from using their general treasury funds to pay for electioneering communications. Instead, they must fund electioneering communications through their political action committees.

The Supreme Court has made clear that, for constitutional purposes, electioneering is different from other speech. *See FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) ("MCFL"). Congress has the power to enact campaign finance laws that constrain the spending of money on electioneering in a variety of ways, even though spending on other forms of political speech is entitled to absolute First Amendment protection. *See Buckley v. Valeo*, 424 U.S. 1 (1976). Congress is permitted to demand that the sponsor of a campaign ad disclose the amount spent on the message and the sources of the funds. And Congress may prohibit corporations and labor unions from spending money on campaign ads. This is black letter constitutional law about which there can be no serious dispute.

There are, of course, limits to Congress's power to regulate election-related spending. But there are two contexts in which the Supreme Court has granted Congress freer reign to regulate. First, Congress has broader latitude to require disclosure of election-related spending than it does to restrict such spending. *See id.* at 67-68. In *Buckley*, the Court declared that the

governmental interests that justify disclosure of election-related spending are considerably broader and more powerful than those justifying prohibitions or restrictions on election-related spending. Disclosure rules, the Court opined, in contrast to spending restrictions or contribution limits, enhance the information available to the voting public. Plus, the burdens on free speech rights are far less significant when Congress requires disclosure of a particular type of spending than when it prohibits the spending outright or limits the funds that support the speech. Disclosure rules, according to the Court, are "the least restrictive means of curbing the evils of campaign ignorance and corruption." *Id.* at 68. Thus, even if certain political advertisements cannot be prohibited or otherwise regulated, the speaker might still be required to disclose the funding sources for those ads if the governmental justification is sufficiently strong.

Second, Congress has a long record, which has been sustained by the Supreme Court, of imposing more onerous spending restrictions on corporations and labor unions than on individuals, political action committees, and associations. Congress banned corporate and union contributions in order "to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital." *United States v. UAW*, 352 U.S. 567, 585 (1957). As recently as 1990, the Court reaffirmed this rationale. See *Austin v. Michigan Chamber of Commerce*, 491 U.S. 652 (1990); *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982). The Court emphasized that it is constitutional for the state to limit the electoral participation of corporations because "[s]tate law grants [them] special advantages -- such as limited liability, perpetual life, and favorable treatment of the accumulation of and distribution of assets." *Austin*, 491 U.S. at 658-59. Having provided these advantages to corporations, particularly business corporations, the state has no obligation to "permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'" (quoting *MCFL*, 479 U.S. at 257). Snowe-Jeffords builds upon these bedrock principles, extending current regulation cautiously and only in the areas in which the First Amendment protection is at its lowest ebb.

Contrary to the suggestion of some of the critics of Snowe-Jeffords, the Supreme Court in *Buckley* did not promulgate a list of certain "magic words" that are regulable as "electioneering" and place all other communications beyond the reach of campaign finance law. In *Buckley*, the Supreme Court reviewed the constitutionality of a specific piece of legislation -- FECA. One section of FECA imposed a \$1,000 limit on expenditures "relative to a clearly identified candidate," and another section imposed reporting requirements for independent expenditures of over \$100 "for the purpose of influencing" a federal election. The Court concluded that these specific provisions ran afoul of two constitutional doctrines -- vagueness and overbreadth -- that pervade First Amendment jurisprudence.

The vagueness doctrine demands clear definitions. Before the government punishes someone -- especially for speech -- it must articulate with sufficient clarity what conduct is legal

and what is illegal. A vague definition of electioneering might "chill" some political speakers who, although they desire to engage in discussions of political issues, may fear that their speech could be punished.

Even if a regulation is articulated with great clarity, it may still be struck as overbroad. A restriction that covers regulable speech (and does so clearly) can be struck if it sweeps too broadly and covers a substantial amount of constitutionally protected speech as well. But under the overbreadth doctrine, the provision will be upheld unless its overbreadth is substantial. A challenger cannot topple a statute simply by conjuring up a handful of applications that would yield unconstitutional results.

Given these two doctrines, it is plain why FECA's clumsy provisions troubled the Court. Any communication that so much as mentions a candidate -- any time and in any context -- could be said to be "relative to" the candidate. And it is difficult to predict what might "influence" a federal election. The Supreme Court could have simply struck FECA, leaving it to Congress to develop a clearer and more precise definition of electioneering. Instead, the Court intervened by essentially rewriting Congress's handiwork itself. In order to avoid the vagueness and overbreadth problems, the Court interpreted FECA to reach only funds used for communications that "expressly advocate" the election or defeat of a clearly identified candidate. In an important footnote, the Court provided some guidance on how to decide whether a communication meets that description. The Court stated that its revision of FECA would limit the reach of the statute "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley*, 424 U.S. at 44 n.52.

But the Court did not declare that all legislatures were stuck with these magic words, or words like them, for all time. To the contrary, Congress has the power to enact a statute that defines electioneering in a more nuanced manner, as long as its definition adequately addresses the vagueness and overbreadth concerns expressed by the Court.

Any more restrictive reading of the Supreme Court's opinion would be fundamentally at odds with the rest of the Supreme Court's First Amendment jurisprudence. Countless other contexts -- including libel, obscenity, fighting words, and labor elections -- call for delicate line drawing between protected speech and speech that may be regulated. In none of these cases has the Court adopted a simplistic bright-line approach. For example, in libel cases, an area of core First Amendment concern, the Court has rejected the simple bright-line approach of imposing liability based on the truth or falsity of the statement published. Instead the Court has prescribed an analysis that examines, among other things, whether the speaker acted with reckless disregard for the truth or falsity of the statement and whether a reasonable reader would perceive the statement as stating actual facts or merely rhetorical hyperbole. Similarly, in the context of

union representation elections, employers are permitted to make "predictions" about the consequences of unionizing but they may not issue "threats." The courts have developed an extensive jurisprudence to distinguish between the two categories, yet the fact remains that an employer could harbor considerable uncertainty as to whether or not the words he is about to utter are sanctionable. The courts are comfortable with the uncertainty of these tests because they have provided certain concrete guidelines.

In no area of First Amendment jurisprudence has the Court mandated a mechanical test that ignores either the context of the speech at issue or the purpose underlying the regulatory scheme. In no area of First Amendment jurisprudence has the Court held that the only constitutionally permissible test is one that would render the underlying regulatory scheme unenforceable. It is doubtful, therefore, that the Supreme Court in *Buckley* intended to single out election regulations as requiring a mechanical, formulaic, and utterly unworkable test.

Snowe-Jeffords presents a definition of electioneering carefully crafted to address the Supreme Court's dual concerns regarding vagueness and overbreadth. Because the test for prohibited electioneering is defined with great clarity, it satisfies the Supreme Court's vagueness concerns. Any sponsor of a broadcast will know, with absolute certainty, whether the ad depicts or names a candidate and how many days before an election it is being broadcast. There is little danger that a sponsor would mistakenly censor its own protected speech out of fear of prosecution under such a clear standard.

The prohibition is also narrow enough to satisfy the Supreme Court's overbreadth concerns. Advertisements that name a political candidate and are aired close to an election almost invariably are electioneering ads intended to encourage voters to support or oppose the named candidate. This conclusion is supported by a comprehensive academic review conducted of television advertisements in the 1998 federal election cycle. See *Buying Time: Television Advertising in the 1998 Congressional Elections* (Brennan Center for Justice, 2000). This study examined more than 300,000 airings of some 2,100 separate political commercials that appeared in the nation's 75 largest media markets in 1998. The study found that there were a total of 3,100 airings of only two separate commercials that met the Snowe-Jeffords criteria of naming a specific candidate within 60 days of the general election and that were judged by academic researchers to be true issue advocacy. Thus, the Snowe-Jeffords general election criteria were shown to have inaccurately captured only 1 percent of the total political commercial airings, and represented an insignificant 0.1 percent of the separate political commercial airings in the 1998 election cycle. This empirical evidence demonstrates that the Snowe-Jeffords criteria are not "substantially overbroad." The careful crafting of Snowe-Jeffords stands in stark contrast to the clumsy and sweeping prohibition that Congress originally drafted in FECA.

### Conclusion

McCain-Feingold is a reasonable approach to restoring the integrity of our federal campaign finance laws. The elimination of soft money will close an unintended loophole that, over the last few election cycles, has rendered the pre-existing federal contribution limits largely irrelevant. Similarly, the incorporation of the Snowe-Jeffords Amendment into the McCain-Feingold Bill is a well-reasoned attempt to define electioneering in a more realistic manner while remaining faithful to First Amendment vagueness and overbreadth concerns. It seeks to provide the public with important information concerning which private groups and individuals are spending substantial sums on electioneering, and it prohibits corporations and labor unions from skirting the ban on using their general treasury funds for the purpose of influencing the outcome of federal elections. While no one can predict with certainty how the courts will finally rule if any of these provisions are challenged in court, we believe that the McCain-Feingold Bill, as currently drafted, is consistent with First Amendment jurisprudence.

Respectfully submitted,

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