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The Constitutionality of Campaign Finance Regulation: *Buckley v. Valeo* and Its Supreme Court Progeny

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Committees of Congress

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The Constitutionality of Campaign Finance Regulation: *Buckley v. Valeo* and Its Supreme Court Progeny

Summary

Political expression is at the heart of First Amendment activity and the Supreme Court has granted it great deference and protection. However, according to the Court in its landmark 1976 decision, *Buckley v. Valeo*, an absolutely free political marketplace is not required by the First Amendment — nor is it desirable — because without reasonable regulation, corruption will result. Most notably, the *Buckley* Court ruled that the spending of money in campaigns, whether as a contribution or an expenditure, is a form of "speech" protected by the First Amendment. The Court upheld some infringements on free speech, however, in order to further the governmental interests of protecting the electoral process from corruption or the appearance of corruption.

In *Buckley*, the Supreme Court considered the constitutionality of the Federal Election Campaign Act of 1971 (FECA), requiring political committees to disclose campaign contributions and expenditures and limiting, to various degrees, the ability of persons and organizations to make contributions and expenditures. While First Amendment freedoms and campaign finance regulation present conflicting means of attempting to preserve the integrity of the political process, the Court resolved this conflict in favor of the First Amendment interests and subjected any regulation burdening free speech and free association to "exacting scrutiny." Under this standard of review, a court will evaluate whether the government's interests in regulating are compelling, examine whether the regulation burdens and outweighs First Amendment liberties, and inquire as to whether the regulation is narrowly tailored to serve the government's interests. If a regulation meets all three criteria, a court will uphold it.

This report first discusses the key holdings enunciated by the Supreme Court in *Buckley*, including those upholding reasonable contribution limits, striking down expenditure limits, upholding disclosure reporting requirements, and upholding the system of voluntary presidential election expenditure limitations linked with public financing. It then examines the Court's extension of *Buckley* in several subsequent cases, evaluating them in various regulatory contexts: contribution limits (*California Medical Association v. FEC; Citizens Against Rent Control v. Berkeley; Nixon v. Shrink Missouri Government PAC; FEC v. Beaumont)*; expenditure limits (*First National Bank of Boston v. Bellotti; FEC v. Massachusetts Citizens for Life; Austin v. Michigan Chamber of Commerce; FEC v. National Right to Work; Colorado Republican Federal Campaign Committee (Colorado I) v. FEC; FEC v. Colorado Republican Federal Campaign Committee (Colorado II); FEC v. Democratic Senatorial Campaign Committee; FEC v. National Conservative Political Action Committee; Randall v. Sorrell)*; disclosure requirements (*Buckley v. American Constitutional Law Foundation; Brown v. Socialist Workers '74 Campaign Committee; FEC v. Akins; McIntyre v. Ohio Elections Commission)*; and political party soft money and electioneering communication restrictions (*McConnell v. FEC*; *Wisconsin Right to Life, Inc. v. FEC (WRTL II)).*

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Introduction

Campaign finance regulation invokes two conflicting values implicit in the application of the First Amendment's guarantee of free political speech and association. On the one hand, political expression constitutes "core" First Amendment activity, which the Supreme Court grants the greatest deference and protection in order to "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[1] On the other hand, according to the Court in its landmark 1976 decision, *Buckley v. Valeo*,[2] an absolutely free "political marketplace" is neither mandated by the First Amendment, nor is it desirable, because when left uninhibited by reasonable regulation, corruptive pressures undermine the integrity of political institutions and undercut public confidence in republican governance. In other words, although the Court reveres the freedoms of speech and association, it has upheld infringements on these freedoms in order to further the governmental interests of protecting the electoral process from corruption or the appearance of corruption.

Case law subsequent to *Buckley* further illustrates that neither the freedom of speech and association nor the government's regulatory powers are absolute. Accordingly, Supreme Court campaign finance holdings embody the doctrinal tension between striking a reasonable balance between protecting the liberty interests in free speech and association, on the one hand, and upholding campaign finance regulation enacted with the intent to encourage political debate while protecting the election process from corruption, on the other. The Court appears to uphold First Amendment infringements by campaign finance regulation only insofar as the regulation is deemed necessary to preserve the very system of representative democracy that unregulated First Amendment freedoms purport to insure.[3]

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[1] Roth v. United States, 354 U.S. 476, 484 (1957).

[2] 424 U.S. 1 (1976).

[3] For example, in a line of cases involving the regulation of corporations, the Court endeavored to resolve whether the First Amendment's value for open debate by diverse participants permits the government to impose regulations designed to promote fairness and prevent corporate monopolization of the political marketplace; and whether the First Amendment's value for liberty proscribes the government from regulating the political speech and association rights of corporations. *Compare* Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) ("[T]he 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

(continued...)

In *Buckley*, the Court reviewed the constitutionality of the Federal Election Campaign Act of 1971 (FECA),[4] requiring political committees to disclose political contributions and expenditures, and limited to various degrees, the ability of natural persons and organizations to make political contributions and expenditures. While First Amendment freedoms and campaign finance regulation present conflicting means of preserving the integrity of the democratic political process, the Court resolved this conflict in favor of First Amendment interests and subjected any regulation burdening free speech and free association activities to "exacting scrutiny." Under this standard of review, the Court evaluates whether the state's interests in regulation are compelling, examines whether the regulation burdens and outweighs First Amendment liberties, and inquires whether the regulation is narrowly tailored to further its interest. If a regulation meets all three criteria, the Court will uphold it.

This report discusses the critical holdings and rationales enunciated by the *Buckley* Court and then examines the Court's extension of *Buckley* in subsequent cases. *Buckley*'s extensions are evaluated in various regulatory contexts: contribution limits, expenditure limits, disclosure requirements, and political party spending and electioneering communication restrictions. When discussing the Court's rationale in each case, facts relevant to a regulator are highlighted: the object of regulation (*e.g.*, a corporation, labor union, or natural person); the asserted liberty interest (*e.g.*, freedom of speech or association); the asserted regulatory interest (*e.g.*, deterring corruption); the triggers of the regulatory interests (*e.g.*, political advantages gained by assuming the corporate form); the means by which the regulator obtained those interests (*e.g.*, limiting campaign contributions); the extent to which the regulation burdened First Amendment liberties (*e.g.*, completely prohibiting expenditures above a certain dollar amount); and the scope of regulation (*e.g.*, whether the regulation was "narrowly tailored" to serve the compelling governmental interests).

Buckley v. Valeo

In *Buckley v. Valeo*, the Supreme Court considered the constitutionality of the Federal Election Campaign Act of 1971 (FECA), as amended in 1974,[5] and the

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[3] (...continued)
Amendment."), with Buckley, 424 U.S. at 49 ("[T]he First Amendment ... was designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources'" (quoting New York Times v. Sullivan, 376 U.S. 254, 266 (1964)).

[4] 2 U.S.C. § 431 *et seq.*

[5] In summary, the FECA provisions at issue contained: (A) spending limitations consisting of (1) a $1,000 contribution cap to any candidate by any individual, (2) a $25,000 limit on an individual's annual, aggregate contributions, (3) a $1,000 cap on a person's or group's independent expenditures "relative to a clearly identified candidate," (4) spending limits on various candidates for various federal offices, and (5) spending limits on political parties' national conventions; (B) reporting and disclosure requirements on contributions and expenditures above certain thresholds; and ©) a provision establishing the Federal Election Commission to administer and enforce the statute. The Court evaluated "spending" and
(continued...)

Presidential Election Campaign Fund Act.[6] The Court upheld the constitutionality of certain statutory provisions, including (1) contribution limitations to candidates for federal office,[7] (2) disclosure and record-keeping provisions,[8] and (3) the system of public financing of presidential elections.[9] The Court found other provisions unconstitutional, including (1) expenditures limitations on candidates and their political committees,[10] (2) the $1,000 limitation on independent expenditures,[11] (3) expenditure limitations by candidates from their personal funds,[12] and (4) the method of appointing members to the Federal Election Commission.[13] In general, the Court struck down expenditure limitations, but upheld reasonable contribution limitations, disclosure requirements,[14] and voluntary spending limits linked with public financing provisions.

In considering the constitutionality of these statutes, the *Buckley* Court applied the standard of review known as "exacting scrutiny," a standard applied by a court when presented with regulations that burden core First Amendment activity. Exacting scrutiny requires a regulation to be struck down unless it is narrowly tailored to serve a compelling governmental interest.

Contribution and Expenditure Limits. When analyzing First Amendment claims, a court will generally first determine whether the challenged government action implicates "speech" or "associational activity" guaranteed by the First

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[5] (...continued)
"disclosure" regulation under separate (though interrelated) lines of judicial principles. Evaluating a facial challenge to spending limitations, the Court construed the regulation as burdening two sorts of "speech acts": (1) "contributions," which express the level of a person or group's "support" of a candidate, and (2) "independent expenditures," which express the level of a person or group's "independent political point of view." In addition to evaluating "speech" activity, the Court analyzed "contributions" and "independent expenditures" in connection with their "associational" value.

[6] 26 U.S.C. § 9001 *et seq.*

[7] 2 U.S.C. § 441a.

[8] 2 U.S.C. § 434.

[9] *See* Subtitle H of the Internal Revenue Code of 1954, codified at 26 U.S.C. § 9001 *et seq.*

[10] Formerly 18 U.S.C. § 608(c)(1)(C-F). The Court made an exception for presidential candidates who accept public funding.

[11] Formerly 18 U.S.C. § 608e.

[12] Formerly 18 U.S.C. § 608a.

[13] Formerly 2 U.S.C. § 437c(a)(1)(A-C).

[14] There are two exceptions to this general rule: (1) disclosure requirements will probably not be upheld if disclosure of a contributor places him or her at risk for economic reprisal or physical threats for being "publicly" associated with the political group, *see* NAACP v. Alabama, 357 U.S. 449 (1958) discussed *infra*, and Brown v. Socialist Workers, 459 U.S. 87 (1982), discussed *infra*, and (2) disclosure requirements will probably not be upheld if they abridge the right of an individual to publish and distribute leaflets anonymously, expressing a political point of view, in a referenda or other issue-based election, *see* McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) discussed *infra*.

Amendment. Most notably, the *Buckley* Court held that the spending of money, whether in the form of contributions or expenditures, is a form of "speech" protected by the First Amendment. A number of principles contributed to the Court's analogy between money and speech. First, the Court found that candidates need to amass sufficient wealth to amplify and effectively disseminate their message to the electorate.[15] Second, restricting political contributions and expenditures, the Court held, "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of the exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money."[16] The Court then observed that a major purpose of the First Amendment was to increase the quantity of public expression of political ideas, as free and open debate is "integral to the operation of the system of government established by our Constitution."[17] From these general principles, the Court concluded that contributions and expenditures facilitated this interchange of ideas and could not be regulated as "mere" conduct unrelated to the underlying communicative act of making a contribution or expenditure.[18]

However, according to the Court, contributions and expenditures invoke different degrees of First Amendment protection.[19] Recognizing contribution limitations as one of FECA's "primary weapons against the reality or appearance of improper influence" on candidates by contributors, the Court found that these limits "serve the basic governmental interest in safeguarding the integrity of the electoral process."[20] Thus, the Court concluded that "the actuality and appearance of corruption resulting from large financial contributions" was a sufficient compelling interest to warrant infringements on First Amendment liberties "to the extent that large contributions are given to secure a *quid pro quo* from [a candidate.]"[21] Short of a showing of actual corruption, the Court found that the appearance of corruption from large campaign contributions also justified these limitations.[22]

Reasonable contribution limits, the Court noted, leave "people free to engage in independent political expression, to associate [by] volunteering their services, and to assist [candidates by making] limited, but nonetheless substantial [contributions]."[23] Further, a reasonable contribution limitation does "not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press,

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[15] *See* Buckley, 424 U.S. at 21.

[16] *Id.* at 19.

[17] *Id.* at 15.

[18] *Id.* at 17.

[19] *See id.* at 24.

[20] *Id.* at 59.

[21] *Id.* at 27.

[22] *See id.*

[23] *Id.* at 28.

candidates, and political parties."[24] Finally, the Court found that the contribution limits of FECA were narrowly tailored insofar as the act "focuses precisely on the problem of large campaign contributions."[25]

On the other hand, the Court determined that FECA's expenditure limits on individuals, political action committees (PACs), and candidates imposed "direct and substantial restraints on the quantity of political speech" and were not justified by an overriding governmental interest.[26] The Court rejected the government's asserted interest in equalizing the relative resources of candidates and in reducing the overall costs of campaigns. Restrictions on expenditures, the Court held, constitute a substantial restraint on the enjoyment of First Amendment freedoms. As opposed to reasonable limits on contributions, which merely limit the expression of a person's "support" of a candidate, the "primary effect of [limitations on expenditures] is to restrict the quantity of campaign speech by individuals, groups and candidates."[27] "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached," the Court noted.[28]

The Court also found that the government's interests in stemming corruption by limiting expenditures were not compelling enough to override the First Amendment's protection of free and open debate because unlike contributions, the risk of *quid pro quo* corruption was not present, as the flow of money does not directly benefit a candidate's campaign fund.[29] Upon a similar premise, the Court rejected the government's interest in limiting a wealthy candidate's ability to draw upon personal wealth to finance his or her campaign, and struck down the personal expenditure limitation.[30]

Reporting and Disclosure Requirements. In *Buckley*, the Supreme Court generally upheld FECA's disclosure and reporting requirements, but noted that they might be found unconstitutional as applied to certain groups. While compelled disclosure, in itself, raises substantial freedom of private association and belief issues, the Court held that these interests were adequately balanced by the state's regulatory interests. The state asserted three compelling interests in disclosure: (1) providing the electorate with information regarding the distribution of capital between candidates and issues in a campaign, thereby providing voters with

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[24] *Id.* at 29.

[25] *Id.*

[26] *Id.* at 39.

[27] *Id.*

[28] *Id.* at 19.

[29] *Id.* at 55.

[30] *Id*. at 51-54. The Court distinguished this holding from its validation of Subtitle H, which provides for the public financing of presidential elections. Limitations on expenditures by presidential candidates receiving public funds were distinguishable because the acceptance of public funds was voluntary.

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additional evidence upon which to base their vote; (2) deterring actual and perceived corruption by exposing the source of large expenditures; and (3) providing regulatory agencies with information essential to the election law enforcement. However, when disclosure requirements expose members or supporters of historically suspect political organizations to physical or economic reprisal,[31] then disclosure may fail constitutional scrutiny as applied to a particular organization.[32]

Voluntary Presidential Election Expenditure Limits Linked With Public Financing. The Supreme Court in *Buckley* upheld the constitutionality of the system of voluntary presidential election expenditure limitations linked with public financing, through a voluntary income tax checkoff.[33] The Court found no First Amendment violation in disallowing taxpayers to earmark their $1.00 "checkoff" for a candidate or party of the taxpayer's choice. As the checkoff constituted an appropriation by Congress, it did not require outright taxpayer approval, as "every appropriation made by Congress uses public money in a manner to which some taxpayers object."[34] The Court also rejected a number of Fifth Amendment due process challenges, including a challenge contending that the public financing provisions discriminated against minor and new party candidates by favoring major parties through the full public funding of their conventions and general election campaigns, and by discriminating against minor and new parties who received only partial public funding under the act.[35] The Court held that "[a]ny risk of harm to minority interests ... cannot overcome the force of the governmental

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[31] *See* National Association for the Advancement of Colored People (NAACP) v. Alabama, 357 U.S. 449 (1958). The reasoning in *Buckley* and *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982), discussed *infra*, has historical roots in *NAACP v. Alabama*. In *NAACP*, the Court addressed whether a non-profit organization's associational rights were abridged by a state statute compelling disclosure of its members and agents without regard to their position and responsibilities in the association. The organization did not comply with the disclosure requirement. Finding for the NAACP, the Court held that the freedom of association is an "inseparable aspect" of the freedoms guaranteed by the First and Fourteenth Amendments, *see id.* at 460-61; that compelled disclosure of the association's membership would effectively restrain that freedom, *see id.* at 461-463; and that, under strict scrutiny, the state's interests in disclosure were insufficient to overcome the association's deprivation of right, *see id.* at 463-366. The Court stressed that the "vital relationship between freedom to associate and privacy in one's associations" was unduly burdened by the disclosure requirement, as past revelation of membership identity resulted in economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. *Id.* at 462.

[32] *See also* McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) (further defining the scope of *Buckley*'s disclosure jurisprudence to proscribe disclosure requirements that infringe on the right of an individual to publish and distribute leaflets anonymously, expressing a political point of view, in a referenda or other issue-based election), discussed *infra*.

[33] 26 U.S.C. § 9001 *et seq.*

[34] *See* Buckley, 424 U.S. at 85.

[35] *See id.* at 86.

interests against the use of public money to foster frivolous candidacies, create a system of splintered parties, and encourage unrestrained factionalism."[36]

Issue and Express Advocacy Communications. In *Buckley*, the Supreme Court provided the genesis for the concept of issue and express advocacy communications. In order to pass constitutional muster and not be struck down as unconstitutionally vague, the Court ruled that FECA can only apply to non-candidate "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office," *i.e.*, expenditures for express advocacy communications.[37] In a footnote to the *Buckley* opinion, the Court further defines "express words of advocacy of election or defeat" as, "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject."[38] Communications not meeting the express advocacy definition are commonly referred to as issue advocacy communications.

In its rationale for establishing such a bright line distinction between issue and express advocacy, the Court noted that the discussion of issues and candidates as well as the advocacy of election or defeat of candidates "may often dissolve in practical application." That is, candidates — especially incumbents — are intimately tied to public issues involving legislative proposals and governmental actions, according to the Court.[39]

Contribution Limits

This section analyzes several Supreme Court opinions decided subsequent to *Buckley* in which the Court evaluated the constitutionality of contribution limitations. Specifically, in *California Medical Association v. Federal Election Commission (FEC)*,[40] the Court upheld limits on contributions from an unincorporated association to its affiliated, non-party, multicandidate political action committee (PAC). In *Citizens Against Rent Control v. Berkeley*,[41] the Court reviewed a statute severely limiting the ability of an unincorporated association to raise funds through contributions in connection with its activities in a ballot initiative, holding that the limit unduly burdened the association's free speech and association rights. In *Nixon v. Shrink Missouri Government PAC*,[42] the Court evaluated campaign contribution limit amounts and considered, among other things, whether *Buckley*'s approved contribution limits established a minimum for state limits, with or without

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[36] *Id.* at 101.

[37] *Id.* at 44.

[38] *Id.*, n. 52.

[39] Buckley, 424 U.S. at 42. *See also* FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986), discussed *infra*.

[40] 453 U.S. 182 (1981).

[41] 454 U.S. 290 (1981).

[42] 528 U.S. 377 (2000).

adjustment for inflation, and concluded that *Buckley* did not. Finally, in *FEC v. Beaumont*, the Court reaffirmed the prohibition on all corporations — including tax-exempt corporations — making direct treasury contributions in connection with federal elections.

Limiting Individual Contributions to Political Action Committees (*California Medical Association v. FEC*). *California Medical Association (CMA) v. Federal Election Commission (FEC)*[43] considered whether the rationale behind the *Buckley* Court affording such high protection to campaign contributions extended to political action committee (PAC) contributions as well. This case involved 2 U.S.C. § 441a(a)(1)(C) of FECA, which limits individual contributions to PACs to $5,000 per year.[44] An unincorporated association of medical professionals, ("the doctors") and the association's affiliated political action committee ("the PAC") challenged FECA's contribution limits, alleging, *inter alia*, violation of their free speech and association rights. The doctors argued that § 441a(a)(1)(C) was unconstitutional because it inhibited their use of the PAC as a proxy for their political expression.[45] Moreover, the doctors contended that the contribution limit did not serve a compelling state interest because the risk of corruption is not present where money does not flow directly into a candidate's coffers.[46]

Unpersuaded, the Supreme Court upheld FECA's contribution limits. In evaluating the doctor's free speech interest, the Court held that the doctors' "speech by proxy" theory was not entitled to full First Amendment protection because *Buckley* reserved this protection for independent and "direct" political speech.[47] The Court found that the PAC was not simply the doctors' "political mouthpiece," but was a separate legal entity that received funding "from multiple sources" and engaged in its own, independent political advocacy.[48] In rejecting the doctors' "speech by proxy" theory, the Court construed the doctors' relationship with the PAC as providing "support" through campaign contributions, which does not warrant the same level of First Amendment protection as independent political speech.[49]

In evaluating the state's interests, the *CMA* Court rejected the PAC and the doctors' argument that the risk of corruption is not present when contributions are made to a PAC. The Court interpreted this argument as implying that Congress cannot limit individuals and unincorporated associations from making contributions to multicandidate political committees. This rationale, the Court held, undercuts FECA's statutory scheme by allowing individuals to circumvent FECA's limits on

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[43] 453 U.S. 182 (1981).

[44] *See id.* at 184. A related provision, 2 U.S.C. § 441a(f), makes it unlawful for a political committee to knowingly accept contributions exceeding this limit.

[45] *See id.* at 195.

[46] *See id.*

[47] *See id.* at 196.

[48] *Id.*

[49] *See id.* at 197.

individual contributions[50] and aggregate contributions[51] by making contributions to a PAC. Hence, the doctor's rationale would erode Congress' legitimate interest in protecting the integrity of the political process.[52] Under *Buckley*, the Court held that the state's regulatory interests outweighed the doctors' relatively weak free speech interest.

Limiting Contributions in Connection With Ballot Initiatives (*Citizens Against Rent Control v. Berkeley*). In *Citizens Against Rent Control v. Berkeley*,[53] the Supreme Court addressed whether a city ordinance, imposing a $250 limit on contributions made to committees formed to support or oppose ballot measures, violated a PAC's liberty interest in free speech and free association under the Fourteenth Amendment.[54] Citizens Against Rent Control ("the group"), an unincorporated association formed to oppose a Berkeley ballot initiative imposing rent control on various properties, challenged the ordinance's constitutionality. The Court found for the group, on freedom of association and freedom of speech grounds.

The Court held that while the limit placed no restraint on an individual acting alone, it clearly restrained the right of association, as the ordinance burdened individuals who wished to band together to voice their collective viewpoint on ballot measures.[55] The Court applied "exacting scrutiny" to the ordinance, weighing the city's regulatory interests against the group's associational rights.[56] While the Court

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[50] *CMA*, 453 U.S. 198 ("Since multicandidate political committees may contribute up to $5,000 per year to any candidate, 2 U.S.C. § 441a(a)(2)(A), an individual or association seeking to evade the $1,000 limit on individual contributions could [channel] funds through a multicandidate political committee").

[51] *Id.* at 198-199 ("Individuals could evade the $25,000 limit on aggregate annual contributions to candidates if they were allowed to give unlimited sums to multicandidate political committees, since such committees are not limited in the aggregate amount they may contribute in any given year").

[52] *See id.* at 199.

[53] 454 U.S. 290 (1981).

[54] The Fourteenth Amendment prohibits state governments from depriving "any person of life, liberty, or property, without due process of law." U.S. CONST., Amdt. 14 § 1. By virtue of the inclusion of the term "liberty," the First Amendment has become applicable to the states. *See* Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, concurring) ("[A]ll fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. The right of free speech [and assembly] ... are fundamental rights.") Although the plain language of the First Amendment proscribes the Congress from abridging the freedom of speech and association, Justice Brandeis' reading of the Fourteenth Amendment has become a part of the Supreme Court's incorporation jurisprudence. *See also* First National Bank of Boston v. Bellotti, 435 U.S. 765, 779-780 (1978), discussed *infra*.

[55] *See id.* at 296. "The freedom of association 'is diluted if it does not include the right to pool money through contributions, for funds are often essential if advocacy is to be truly or optimally effective.'" *Id.* (quoting Buckley, 424 U.S. at 65-66).

[56] *See id.* at 298-199 (finding that "[r]egulation of First Amendment Rights is always subject (continued...)

noted that *Buckley* permitted contribution limits to candidates in order to prevent corruption, contributions tied to ballot measures pose "no risk of corruption."[57] Moreover, as the ordinance required contributors to disclose their identity, the regulation posed "no risk" that voters would be confused by who supported the speech of the association.[58] Under "exacting scrutiny," therefore, the $250 contribution limitation was held unconstitutional.

Extending its holding, the Court found that the contribution limitations unduly burdened the free speech rights of the group and of individuals who wish to express themselves through the group.[59] Applying "exacting scrutiny," the Court found no significant public interest in restricting debate and discussion of ballot measures, and held that the ordinance's disclosure requirement adequately protected the sanctity of the political system.[60]

Establishing Contribution Limit Amounts (*Nixon v. Shrink Missouri Government PAC*). In *Nixon v. Shrink Missouri Government PAC,*[61] the Supreme Court considered, among other things, whether *Buckley's* approved limitations on campaign contributions established a minimum for state contribution limits today, with or without adjustment for inflation. Asserting free speech and association rights, a political action committee and a candidate challenged the facial validity of a Missouri regulation limiting contributions to amounts ranging from $275 to $1,075.[62] Missouri asserted interests similar to those articulated in *Buckley*, namely, that contribution limits serve the governmental interest in avoiding the real and perceived corruption of the electoral process.[63] The Eighth Circuit found these interests unpersuasive and required Missouri to show that "there were genuine problems that resulted from the contributions in amounts greater than the limits in

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[56] (...continued)
to exacting scrutiny").

[57] *Id.* at 298 (noting that "[r]eferenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue" (quoting First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)).

[58] *See id.*

[59] *Id.* at 298 (finding that "[c]ontributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression").

[60] *See id.* at 299-300.

[61] 528 U.S. 377 (2000).

[62] *Id.* at 901. The amounts were statutory base lines to be adjusted each year in light of the cumulative consumer price index. *See id.*

[63] *Id.* at 902.

place . . .”[64] The Court granted *certiorari* to review the agreement between the Eighth Circuit’s evidentiary requirement and *Buckley*.[65]

Reversing, the Court found Missouri’s regulatory interests compelling and negated the proposition that the $1,000 limit upheld by *Buckley* is a constitutional floor to state contribution limitations.[66] Though the Court reviewed the case under an exacting scrutiny standard,[67] it upheld the regulation since it “was ‘closely drawn’ to match a ‘sufficiently important interest.’”[68] Notwithstanding the “narrow tailoring” requirement, the Court held that the limitation’s dollar amount “need not be ‘fine tuned.’”[69] As the risk of corruption is greater when money flows directly into a campaign’s coffers, the Court found that contribution limits are more likely to withstand constitutional scrutiny. In these cases, a contributor’s free speech interest is less compelling since “contributions” merely index for candidate “support,” not the contributor’s “independent” political point of view.[70] Addressing the lower court’s evidentiary requirement, the Court noted that “[t]he 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 justifications raised.”[71] However, it found that Missouri cleared the standard implied by *Buckley* and its progeny.[72] Given the relative weakness of the asserted free speech and associational interests, as compared to the state’s weighty regulatory interest, the Court upheld the Missouri state campaign contribution limits.

Prohibiting Contributions by Tax-Exempt Corporations (*FEC v. Beaumont*). The Supreme Court in *Federal Election Commission (FEC) v. Beaumont*,[73] evaluated the constitutional application of 2 U.S.C. § 441b of the Federal Election Campaign Act (FECA) to North Carolina Right to Life (NCRL), a tax-exempt advocacy corporation. Section 441b prohibits corporations, including tax-exempt advocacy corporations, from using treasury funds to make direct contributions and expenditures in connection with federal elections. Corporations seeking to make such contributions and expenditures may legally do so only through a political action committee or PAC.

As it notes in *Beaumont*, the Supreme Court has long upheld the ban on corporate contributions, including those made by corporations that are tax-exempt

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[64] *Id.*, *quoting* 161 F.3d 520, 521-522.

[65] *See id.* at 903 (announcing that [t]he [First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office.” *Id.*

[66] *Id*. at 909.

[67] *Id.* at 903.

[68] *Id*. at 904, *quoting* Buckley, 424 U.S. at 25.

[69] *Id*. at 904, *quoting* Buckley, 424 U.S. at 30, n. 3.

[70] *Id.* at 904-905.

[71] *Id.* at 906.

[72] *See id.* at 906-908.

[73] 539 U.S. 146 (2003).

under the Internal Revenue Code. However, in *FEC v. Massachusetts Citizens for Life, Inc. (MCFL),*[74] the Court created an exception for independent expenditures made by such entities that do not accept significant corporate or labor union money finding that restrictions on contributions require less compelling justification under the First Amendment than restrictions on independent expenditures. In *FEC v. Beaumont*, NCRL unsuccessfully attempted to extend the *MCFL* exception to contributions by tax-exempt corporations.

Finding that limits on contributions are more clearly justified under the First Amendment than limits on expenditures, the Court reaffirmed the prohibition on *all* corporations making direct treasury contributions in connection with federal elections and upheld the ban on corporate contributions as applied to NCRL. According to the Court, quoting from some of its earlier decisions, it has upheld the "well established constitutional validity of ... regulat[ing] corporate contributions," including contributions by membership corporations that "might not exhibit all the evil that contributions by traditional economically organized corporations exhibit."[75] Stating its refusal to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared," the Court rejected the argument that deference to congressional judgments is determined by whether the corporations affected by a regulation are for-profit or non-profit.[76]

Beaumont also clarified the standard for review applicable to campaign finance regulation under the First Amendment. In the view of the Court, determining the appropriate standard of review depends on the nature of the activity being regulated. Commencing with its 1976 ruling in *Buckley*, the Court said that it has treated the regulation of contributions as only a "marginal" speech restriction, subject to "relatively complaisant review under the First Amendment," since contributions are a less direct form of speech than expenditures.[77] Hence, the Court concluded that instead of requiring a contribution regulation to pass strict scrutiny by meeting the requirement that it be narrowly tailored to serve a compelling governmental interest, a contribution regulation involving "significant interference with associational rights" passes constitutional muster by merely satisfying the lesser requirement of "being 'closely drawn' to match a 'sufficiently important interest.'"[78] The Court held that the Section 441b prohibition passed this lower level of scrutiny because it does not render a complete ban on corporate contributions, *i.e.*, corporations are still permitted to use treasury funds to establish, solicit funds for, and pay the administrative expenses of a political action committee or PAC, which can then in turn make

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[74] 479 U.S. 238 (1986), discussed *infra.*

[75] Beaumont, 539 U.S. at 157 (quoting National Conservative Political Action Comm., 470 U.S. at 500-01).

[76] *Id.* (quoting National Right to Work Comm., 459 U.S. at 210).

[77] The Court explained that "[w]hile contributions may result in political expression if spent by a candidate or an association ... the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 161 (quoting Buckley, 424 U.S. at 20-21).

[78] *Id.* (quoting Buckley, 424 U.S. at 25).

contributions.[79] Invoking its unanimous holding in *FEC v. National Right to Work,* the Court rejected the argument that the regulatory burdens on PACs, including restrictions on their ability to solicit funds, renders a PAC unconstitutional as the only way that a corporation can make political contributions.[80]

In summary, the Supreme Court in *FEC v. Beaumont* upheld the ban on corporate contributions as applied to NCRL because corporate campaign contributions — including contributions by tax-exempt advocacy corporations — pose a risk of harm to the political system. Consequently, the Court found, courts owe deference to legislative judgments on how best to address their risk of harm. In addition, the Court announced that limits on contributions are merely "marginal" speech restrictions subject to a "relatively complaisant" or lesser review under the First Amendment than the strict scrutiny standard of review.

Expenditure Limits

This section analyzes several Supreme Court opinions decided subsequent to *Buckley* in which the Court evaluated the constitutionality of expenditure limitations. The first area of case law involves the regulation of corporations. In *First National Bank v. Bellotti,*[81] the Court held that corporate speech in the form of expenditures, in a state referendum, could not be suppressed under the First Amendment. In two other corporate speech cases, the Court generally upheld a requirement that corporate political expenditures be made from a special segregated fund or political action committee (PAC), but subjected this requirement to an exception for "purely" political organizations: *Federal Election Commission (FEC) v. Massachusetts Citizens for Life (MCFL)*[82] and *Austin v. Michigan Chamber of Commerce.*[83]

The second area of case law involves the regulation of labor unions. In *FEC v. National Right to Work Committee*[84] the Court upheld a regulation restricting from whom labor unions can solicit funds for their separate segregated funds or PACs. The third area of case law addresses the regulation of political party expenditures. In *Colorado Republican Federal Campaign Committee v. FEC,*[85] the Court upheld a political party's purchase and broadcasting of radio "attack ads," finding it was an "uncoordinated independent expenditure." The fourth area of case law examines the

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[79] *See id.* at 162-63. ("The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, and it lets the government regulate campaign activity through registration and disclosure, *see* §§ 432-434, without jeopardizing the associational rights of advocacy organizations' members").

[80] *Id.* (citing National Right to Work, 459 U.S. at 201).

[81] 435 U.S. 765 (1978).

[82] 479 U.S. 238 (1986).

[83] 494 U.S. 652 (1990).

[84] 459 U.S. 197 (1982).

[85] 518 U.S. 604 (1996).

regulation of PACs. In *FEC v. National Conservative Political Action Committee (NCPAC),*[86] the Court struck down a prohibition on independent expenditures above $1,000 in support of a "publicly funded" candidate.

Finally, the issue of a state statute limiting state office candidate expenditures is examined. In *Randall v. Sorrell,*[87] the Court struck down a Vermont statute imposing expenditure limits finding that the state's primary justification for the limits was not significantly different from Congress's rationale for the expenditure limits that the Court struck down in *Buckley*.

Prohibiting or Limiting Corporate Expenditures (*First National Bank of Boston v. Bellotti; FEC v. Massachusetts Citizens for Life, Inc.; Austin v. Michigan Chamber of Commerce*). Representing an important new emphasis on First Amendment protection of corporate free speech, in *First National Bank of Boston v. Bellotti*, the Supreme Court held that the fact that the corporation is the speaker does not limit the scope of its interests in free expression, as the scope of First Amendment protection turns on the nature of the speech, not the identity of the speaker. However, as demonstrated in *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)* and *Austin v. Michigan Chamber of Commerce*, the fact that the speaker is a corporation may elevate the state's interests in regulating a corporation's expressive activity, on equitable grounds. *MCFL* and *Austin* appear to expand the Court's "governmental interest" jurisprudence from the interest identified in *Buckley, i.e.*, avoiding candidate corruption, to a broader interest of avoiding corruption in the entire electoral process. Although the Court emphasized that equalizing the relative voices of persons and entities in the political process is not a valid regulatory end, *MCFL* and *Austin* appear to hold that the government has equitable interests in ensuring fair and open debate in the political marketplace by preventing corporate monopolization. However, in both cases, the Court stressed that corporate wealth, in itself, is not a valid object of speech suppression.

In *First National Bank of Boston v. Bellotti*,[88] the Supreme Court evaluated the constitutional basis of a Massachusetts criminal statute, which in pertinent part, prohibited corporate expenditures made to influence the outcome of a referendum. The statute did not completely ban corporate expenditures: it permitted expenditures when a referendum's outcome could materially affect a corporation's business, property, or assets.[89] *Bellotti* arose in connection with a proposed state constitutional amendment permitting the state to impose a graduated tax on an individual's income.[90] When the proposal was presented to the voters, a group of corporations wanted to expend money to publicize their point of view;[91] however, their desire was burdened by the statutory provision stating that issues concerning the taxation of

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[86] 470 U.S. 1 (1985).

[87] 548 U.S. 230 (2006).

[88] 435 U.S. 765 (1978).

[89] *Id.* at 768.

[90] *Id*. at 769.

[91] *Id.*

individuals do not "materially affect" a corporate interest.[92] The corporations sought to prevent enforcement of the statute, arguing that it was facially invalid under the First and Fourteenth Amendments.[93] In agreement with the corporations, the Supreme Court struck down the statute.

First, the *Bellotti* Court considered whether a speaker's "corporate" identity substantively affects the extension of First Amendment liberties. On the state's contention that the scope of the First Amendment narrows when the speaker is a corporation, the Court found no constitutional support.[94] This conclusion followed from the Court's framing of the issues. The Court did not address the question of whether corporate interests in free speech are coextensive with those of natural persons, finding the issue peripheral to the case's efficient resolution.[95] Instead, the threshold issue was whether the statute proscribed speech that "the First Amendment was meant to protect."[96] In other words, the Court focused on the nature of the speech, not the identity of the speaker. As the Massachusetts statute burdened expressive activity addressing a proposed amendment to the state constitution, the nature of the speech fell squarely within the historic and doctrinal mandate of the First Amendment — protecting the free discussion of governmental affairs.[97] As the corporations asserted 'core' First Amendment interests, the statute was subject to "exacting scrutiny," triggering the remaining issues, where the Court considered whether the government's regulatory interests were compelling and obtained by narrowly tailored means.[98]

Massachusetts advanced two rationales for the prohibition of corporate speech: (1) elevating and "sustaining" the individual's role in electoral politics, and (2) ensuring that corporate political expenditures are funded by shareholders who agree with their corporation's political views.[99] In the context of candidate elections, the Court found these rationales "weighty," but in a "direct democracy" context, they were simply not advanced in a material way.[100]

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[92] *Id*. at 768.

[93] *Id.* at 769.

[94] *See id.* at 784-786.

[95] *See id.* at 776.

[96] *Id*.

[97] *See id.* at 776-777 (citing Mills v. Alabama, 384 U.S. 214, 218 (1966) (noting that the nature of the corporation's speech "is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual").

[98] *Id.* at 787.

[99] *Id.*

[100] *Id.* at 788.

While ensuring that individuals sustain confidence in government and maintain an active role in elections is "of the highest importance,"[101] the *Bellotti* Court did not find that regulating corporate speech would necessarily enhance the role of the individual in this context. The Court reasoned that the inclusion of corporate political perspectives does not demonstrate that they will unduly "influence the outcome of a referendum vote"[102] and stressed that restricting the speech of some to amplify the voice of others is not a valid object suppression.[103] As such, the Court held that permitting corporate speech in a referendum does not exert coercive pressures (real or perceived) on the "direct democracy" process.[104]

Likewise, the *Bellotti* Court rejected the state's purported interest in protecting minority shareholders who object to their corporation's majority political philosophy. With respect to this interest, the Court found the statute was both over and under-inclusive. The statute was over-inclusive insofar as it proscribed corporate speech, where the corporate political policy and speech enjoyed unanimous assent by its members.[105] The Court emphasized that corporate democracy informs the decision to engage in public debate, that shareholders are presumed to protect their own interests, and that they are not compelled to contribute additional funds to their corporation's political activities.[106] The statute was under-inclusive insofar as corporations may exert political influence by lobbying for the passage and defeat of legislation and may express its political views on an issue when it does arise in connection to a ballot measure.[107] As a result, the Court held that the statute unduly infringed on the corporations' protected free speech interest in expressing its political point of view.[108]

The Supreme Court in *Federal Election Commission (FEC) v. Massachusetts Citizens for Life (MCFL)*[109] evaluated the constitutional application of 2 U.S.C. § 441b of the Federal Election Campaign Act (FECA), prescribing a separate segregated fund or PAC for corporate political expenditures. In this case, the requirement was applied to a non-profit corporation founded for purely political purposes. The founding charter of MCFL was to "foster respect for life," a purpose motivating various educational and public policy activities.[110] Drawing from its general treasury, the corporation funded a pre-election publication entitled "Everything You Need to Know to Vote Pro-life," which triggered litigation under

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[101] *Id*. at 789 (citing Buckley, 352 U.S. at 2).

[102] *Id.*

[103] *Id.*

[104] *Id*. at 790. Moreover, the Court asserted that the people, not the government, are the final arbiter and evaluator of the "relative and conflicting arguments" on referendum issues.

[105] *See id.* at 794.

[106] *See id.* at 794-795.

[107] *See id.* at 793.

[108] *See id.* at 795.

[109] 479 U.S. 238 (1986).

[110] *See id.* at 241-242.

§ 441b.[111] As the publication was tantamount to an "explicit directive [to] vote for [named] candidates," MCFL's speech constituted "express advocacy of the election of particular candidates," subjecting the expenditure to regulation[112] under the express advocacy standard first articulated by the Court in *Buckley*.[113] However, as applied to MCFL, § 441b was held unconstitutional because it infringed on protected speech without a compelling justification.[114]

Noting that § 441b burdened expressive activity,[115] the Court examined the government's regulatory interests in alleviating corruptive influences in elections by requiring the use of corporate PACs and the Court held that concentration of wealth, in itself, is not a valid object of regulation.[116] The Court noted that a corporation's ability to amass large treasuries confers upon it an unfair advantage in the political marketplace, as general treasury funds derive from investors' economic evaluation of the corporation, not their support of the corporation's politics.[117] By requiring the use of a PAC, § 441b ensures that a corporation's independent expenditure fund indexes for the "popular support" of its political ideas.[118] The Court held that by prohibiting general treasury fund expenditures to advance a political point of view, the regulation "ensured that competition among actors in the political arena is truly competition among ideas."[119]

While the Court found these interests compelling as applied to most corporations, it held the restriction unconstitutional as applied to MCFL. Specifically, the *MCFL* Court found the following characteristics exempt a corporation from the regulation: (1) its organizational purpose is purely political; (2) its shareholders have no economic incentive in the organization's political activities; and, (3) it was not founded by nor accepts contributions from business organizations or labor unions.[120]

Carving out an exception for corporations with these characteristics, the Court raised equitable grounds for the regulation, stressing that "[r]egulation of corporate

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[111] *See id.* at 242.

[112] *Id.* at 249. The Court found that the publication not only urged voters to vote for "pro-life" candidates, but also identified and provided photographs of specific candidates. As a result, the Court determined that the publication could not be considered a "mere discussion" of public issues. *Id.*

[113] *See* Buckley v. Valeo, 424 U.S. 1, 44 (1976), *supra*.

[114] *See* FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. at 263.

[115] *See id.* at 252.

[116] *Id*. at 257 ("political 'free-trade' does not necessarily require [that participants] in the political marketplace [compete with equal resources]").

[117] *See id.* at 258 (cited by Austin, 494 U.S. at 659).

[118] *Id.* 258, *see also* Austin, 494 U.S. at 660 (holding that the separate segregated fund requirement "ensures that expenditures reflect actual public support").

[119] *Id.* at 259.

[120] *See id.* at 259, 264.

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political activity . . . has reflected concern not about the use of the corporate form *per se*, but about the potential for the *unfair* deployment of [general treasury funds] for political purposes."[121] The Court held that MCFL's general treasury is not a function of its economic success, but is an index for membership support of its political ideas.[122] Thus, according to the Court, purely political organizations such as MCFL cannot constitutionally be regulated by § 441b because their treasuries already embody what the regulation purports to achieve: an index of the corporation's political support. In other words, MCFL is an example of a corporation that is not at risk for gaining an "unfair" advantage in the electoral process.[123]

In *Austin v. Michigan State Chamber of Commerce*,[124] the Supreme Court affirmed and clarified its *MCFL* holding when it considered whether a non-profit corporation's free speech rights were unconstitutionally burdened by a state prohibition on using general treasury funds to finance a corporation's independent expenditures in state elections. While prohibiting expenditures from general treasury funds,[125] the statute permitted independent contributions as long as they were made from a separate segregated fund or PAC.[126] Plaintiff-corporation, a non-profit founded for political and non-political purposes, asserted that the regulation burdened its First Amendment interest in political speech by limiting its spending.[127] Further, the plaintiff contended that the regulation was not narrowly tailored to obtain the state's interests in avoiding the appearance of corruption by limiting a corporate entity's inherent ability to concentrate economic resources.[128] Although economic power, in itself, does not necessarily index the persuasive value of a corporation's political ideas, the state argued, a corporation's structural ability to amass wealth

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[121] *Id.* (emphasis added). *See also*, *id*. at 263 ("voluntary political organizations do not suddenly present the specter of corruption merely by assuming the corporate form."), *but see* Austin, 494 U.S. 659, 660 (suggesting that the selection of the corporate form in itself triggers the state's regulatory interests; "[t]he unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures").

[122] *See MCFL*, 479 U.S. at 259.

[123] *See id.* at 260.

[124] 494 U.S. 652 (1990).

[125] The statute defined "expenditure" as "a payment, donation, loan, pledge, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate." *Id*. at 655 (quoting Mich. Comp. Laws § 169.206(1) (1979)).

[126] The Michigan Statute was modeled on a provision of the Federal Election Campaign Act (FECA) requiring corporations and labor unions to use a separate segregated fund or PAC when making independent expenditures in connection with federal elections. *See* Austin, 494 U.S. at 656, n. 1.

[127] *See id.* at 658.

[128] *See id.* at 659.

makes it "a formidable political presence" — a presence which triggers its regulatory interest.[129]

Unpersuaded by the corporation's assertion of right, the Court upheld the regulation. Under *Buckley*[130] and *MCFL*,[131] the Court addressed whether the plaintiff's free speech interests were burdened by the regulation; evaluated the state's regulatory interests; and asked whether the regulation was narrowly tailored to achieve those interests.[132] The Court found that the plaintiff's freedom of expression was burdened by the regulation, but held that the state achieved its compelling interests by narrowly tailored means.

By limiting the source of a corporation's independent expenditures to a special segregated fund or PAC, the *Austin* Court held that the regulation burdened the plaintiff's freedom of expression.[133] The regulation placed various organizational and financial burdens on a corporation's management of its PAC,[134] limited PAC solicitations to "corporate members" only;[135] and prohibited independent expenditures from corporate treasury funds.[136] Similar to its finding in *MCFL*, the Court found that the statute's requirements burdened, but did not stifle, the corporation's exercise of free expression to a point sufficient to raise a genuine First Amendment claim.[137] Thus, to overcome the claim, the regulation had to be motivated by compelling governmental interests and be narrowly tailored to serve those interests.

First, the *Austin* Court evaluated the state's regulatory interests. The state argued that a corporation's "unique legal and economic characteristics"[138] renders it

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[129] *Id*. (quoting Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238, 258 (1986) (MCFL)).

[130] 424 U.S. 1 (1976) (per curiam).

[131] 479 U.S. 238 (1986).

[132] *See* Austin, 494 U.S. at 657. Antecedent to these inquiries, the Court affirmed that the plaintiff's interest in using general funds for independent expenditures is "political expression at the core of our electoral process and of the First Amendment freedoms." *Id.* at 657, (quoting Buckley, 424 U.S. at 39). Moreover, the Court noted that the plaintiff's status as a corporation did not completely erode its free speech interest under the First Amendment. *See* Austin, 494 U.S. at 657 (citing Bellotti, 435 U.S. at 777).

[133] *See* Austin, 494 U.S. at 657.

[134] For example, the Court noted that the regulation required a corporation to appoint a treasurer to administer the fund, keep records of the funds' transactional history, and create and periodically update an informational statement about the fund for the state. *Id.* at 658.

[135] *Id.*

[136] *Id.*

[137] *Id.* (citing MCFL, 479 U.S. at 252 (plurality opinion)).

[138] As examples, the Court cited attributes that enhanced a corporation's ability to manage and attract capital assets favorable to its shareholder's proprietary interests, such as perpetual life, limited liability, and favorable treatment with respect to the accumulation and

(continued...)

a "formidable political presence" in the market place of ideas, which necessitates regulation of its political expenditures to "avoid corruption or the appearance of corruption."[139] The Court stressed that the regulation's purpose was not to equalize the political influence of corporate and non-corporate speakers, but to ensure that expenditures "reflect actual public support for political ideas espoused by corporations."[140] Moreover, the Court was careful to emphasize that the mere fact that corporations can amass large treasuries was not its justification for upholding the statute. Rather, the Court identified the compelling state interest as "the unique state-conferred corporate structure," which facilitates the amassing of large amounts of wealth.[141] On these grounds, the Court appeared to recognize a valid regulatory interest in assuring that the conversion of economic capital to political capital is done in an equitable way. In other words, the Court held that corruption of the electoral process itself, rather than just the corruption of candidates, is a compelling regulatory interest.

After finding a compelling state interest, the *Austin* Court determined that the regulation was neither over-inclusive nor under- inclusive with respect to its burden on expressive activity. Responding to the plaintiff's argument that the regulation was over-inclusive insofar as it included closely held corporations, which do not enjoy the same capital resources as larger or publicly-held corporations, the Court ruled that the special benefits conferred to corporations and their *potential* for amassing large treasuries justified the restriction.[142] Plaintiff's under-inclusiveness argument, alleging that the regulatory scheme failed to include unincorporated labor unions with large capital assets, fared no better. The Court distinguished labor unions from corporations on the ground that unions "amass large treasuries ... without the significant state-conferred advantages of the corporate structure."[143] Here again, the Court remarked that the corporate structure, not corporate wealth, triggers the state's interest in regulating a corporation's independent expenditures.[144] Hence, despite the burden on political speech, the Court upheld the regulation because it was narrowly tailored to reach the state's compelling interests.[145]

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[138] (...continued)
distribution of capital. *Austin*, 494 U.S. at 658-659.

[139] *Id.* at 658, 659 (citing Federal Election Comm'n v. National Conservative Political Action Committee, 470 U.S. 480, 496-497 (1985), and MCFL, 479 U.S. at 258)).

[140] *Id*. at 660.

[141] *Id.*

[142] *See id.* at 663.

[143] *Id.* at 665.

[144] *Id.* ("The desire to counter-balance those advantages unique to the corporate form is the State's compelling interest in this case.") *But see* MCFL, 479 U.S. at 259 ("[r]egulation of the corporate political activity thus has reflected concern not about the corporate form per se, but about the potential for unfair deployment of wealth for political purposes").

[145] The Court also considered whether the corporation's "ideological" purposes, rather than purely "economic" purposes, provided a constitutional warrant for "excepting" it from the "segregation" requirement.

In sum, the *Austin* Court clarified *MCFL* and upheld the three-part test for when a corporation is exempt from the state's general interest in requiring a corporation to use a separate segregated fund or PAC for its "independent expenditures."[146] Under *Austin*, a corporation is exempt from the PAC requirement when (1) the "organization was formed for the express purpose of promoting political ideas;"[147] (2) no entity or person has a claim on the organization's assets or earnings, such that "persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity;"[148] and (3) the organization is independent from "the influence of business corporations."[149]

Restricting From Whom Labor Unions Can Solicit PAC Funds (*FEC v. National Right to Work*).[150] In *Federal Election Commission (FEC) v. National Right to Work Committee* (NRWC),[151] the Supreme Court evaluated 2 U.S.C. § 441b(b)(4)(C) of FECA, which requires labor unions to solicit only "members" when amassing funds for its separate segregated fund or PAC. In particular, the Court considered, *inter alia*, whether the Federal Election Commission's (FEC) interpretation of "member" abridged NRWC's associational rights and held that it did not. The NRWC, a non-profit corporation, essentially considered anyone who gave a contribution a "member."[152] On the other hand, the FEC advanced a narrower definition of "member," under which a participant would

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[146] *See* Austin, 494 U.S. 662-664.

[147] *Id.* at 662 (quoting MCFL, 479 U.S. at 264).

[148] *Id.* at 663 (quoting MCFL, 479 U.S. at 264).

[149] *Id.* at 664 (citing MCFL, 479 U.S. at 264).

[150] Outside the First Amendment and *Buckley* contexts, but relevant to the regulation of political activities by labor unions, in *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), the Supreme Court considered whether the National Labor Relations Act, 29 U.S.C. § 158(a)(3), permits a labor union to expend funds collected from dues paying, non-union member employees for activities unrelated to collective bargaining, contract administration, and grievance adjustment. The plain language of the act permits an employer and an exclusive bargaining representative to enter into an agreement requiring all employees in the bargaining unit to pay periodic union dues and initiation fees as a condition of continued employment, whether or not the employees otherwise wish to be a member of the union. *See* Beck, 487 U.S. at 736. The Court found that Congress intended to correct abuses associated with "closed shop" agreements by limiting compulsory unionism to regimes that require non-member contributions only insofar as they are necessary to defray the costs of collective-bargaining efforts made on behalf of union and non-union employees. *See id.* at 745. Accordingly, the Court held that the act does not permit a union, over the objections of dues paying nonmember employees, to expend funds collected from them on activities unrelated to collective bargaining, including funds expended for political activities. *See id.* at 744-62. For further discussion of Communication Workers of America v. Beck, *see* CRS Report 97-618, *The Use of Labor Union Dues For Political Purposes: A Legal Analysis*, by L. Paige Whitaker.

[151] 459 U.S. 197 (1982).

[152] *See id.* at 202 ("A person who, through his response [to the organization's publications or material], evidences an intention to support NRWC in promoting [the organization's purposes] qualifies as a member"). *Id.* Under this definition, contributors to the NRWC's segregated fund were construed as members.

have to display various levels of involvement with the soliciting-organization, beyond providing a contribution,[153] or the participant would have to enjoy responsibilities, rather than mere privileges, in connection to the soliciting organization.[154]

Persuaded by the FEC's interpretation, the Court held that NRWC's asserted associational liberties were burdened by the FEC's definition, but were overborne by the state's regulatory interests.[155] While associational rights are "basic constitutional" freedoms deserving of the "closest scrutiny," they are not absolute.[156] While § 441b restricts the solicitations of corporations and labor unions, thereby restricting their freedom of association, the state had an interest in hedging corporations and labor organizations' particular legal and economic attributes, since they may be converted into a political advantage.[157] For example, corporations and labor unions can amass large, financial "war chests," which could be leveraged to incur political debts from candidates.[158] Indeed, citing *Bellotti*, the Court affirmed the fundamental importance of curbing the potential, corruptive influence represented by political debts.[159] The Court was further persuaded by the state's additional interest in protecting investors and members who provide financial support to their organization over their objection to or distaste for the corporation's majority-political philosophy.[160] "In order to prevent both actual and apparent corruption," the Court concluded, "Congress aimed a part of its regulatory scheme at corporations, [reflecting a constitutionally warranted] judgment that the special characteristics of the corporate structure require particularly careful regulation."[161]

Limiting Political Party Expenditures (*Colorado Republican Federal Campaign Committee v. FEC (Colorado I); FEC v. Colorado Republican Federal Campaign Committee (Colorado II); FEC v. Democratic Senatorial Campaign Committee*). In *Colorado Republican Federal Campaign Committee v. Federal Election Commission (Colorado I)*,[162] the Supreme Court examined whether the FECA "Party Expenditure Provision,"[163] which imposed dollar limits on political party expenditures "in connection with the general election

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[153] *See id.* at 203 ("A person is not considered a member ... if the only requirement for membership is a contribution to a separate segregated fund"). 11 CFR § 114.1(e) (1982).

[154] *See NRWC*, 459 U.S. at 203.

[155] *See id*. at 207.

[156] *See id.* at 206-207.

[157] *See id.* at 207.

[158] *See id.* at 207-208.

[159] *See id.* at 209 (citing Bellotti, 435 U.S. at 788, n. 26.).

[160] *See id.* at 208.

[161] *Id.* at 209-210. For reasons similar to those in *Austin* and *MCFL*, the Court held that the regulation was narrowly tailored to attain its regulatory interests. *See id.* at 210.

[162] 518 U.S. 604 (1996).

[163] 2 U.S.C. § 441a(d)(3).

campaign of a [congressional] candidate," was unconstitutionally enforced against a party's funding of radio "attack ads" directed against its likely opponent in a federal senatorial election. This case concerned expenditures for radio ads by the Colorado Republican Party (CRP), which attacked the likely Democratic Party candidate in the 1986 senatorial election.[164] At the time the ads were purchased and aired, the CRP already transferred to the National Republican Party the full amount of the funds it was permitted to expend "in connection with" senatorial elections under FECA.[165] Finding that the CRP exceeded its election spending limits, the FEC noted that the ads were purchased after the fund transfer and found that the expenditure was "in connection with the campaign of a candidate for federal office."[166] The CRP challenged the constitutionality of the Party Expenditure Provision's "in connection with" language as unconstitutionally vague[167] and objected to how the provision was applied in this instance.[168] Rendering a narrow holding, the Court found for the CRP on a portion of its "as applied" challenge.

The Court's ruling turned on whether CRP's ad purchase was an "independent expenditure," a "campaign contribution" or a "coordinated expenditure."[169] "Independent expenditures," the Court noted, do not raise heightened governmental interests in regulation because the money is deployed to advance a political point of view "independent" of a candidate's viewpoint.[170] Indeed, the Court found that when independent expenditures display little coordination and prearrangement between the payor and a candidate, they alleviate the expenditure's corruptive influence on the polity.[171] Moreover, the Court stressed that restrictions on independent expenditures "represent substantial . . . restraints on the quantity and diversity of political speech,"[172] and constrict "core First Amendment activity."[173] However, restrictions on "contributions," which only marginally impair a "contributor's ability to engage

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[164] *See* 518 U.S. at 612.

[165] At the time of this decision, FECA exempted political parties from its general contribution and expenditure limits, which limits "multi-candidate" political committees to making no more than $5,000 in direct and indirect contributions to candidates. *See* 2 U.S.C. §§ 441a(a)(2),(7)(B)(i). Instead, FECA allowed political parties to make greater contributions and expenditures. *See* §§ 441a(d)(1),(3)(A). In this case the CRP qualified to spend about $103,000 in connection with the senatorial campaign, but transferred that amount to their national party. *See* 518 U.S. at 611.

[166] *See id*. at 612. However, at the time of the expenditure, the Republicans had not selected their senatorial candidate. *See id.* at 614.

[167] *See id*. at 618.

[168] *See id*. at 613.

[169] *See id* at 614, 615, 618, 622-623.

[170] *See id.* at 614-615 (citing Federal Election Comm'n v. National Conservative Political Action Committee (NCPAC), 479 U.S. 238 (1985)).

[171] *See id.* at 615 (citing Buckley, 424 U.S. at 47).

[172] Id. (quoting Buckley, 424 U.S. at 19).

[173] *Id.* at 616.

in free communication,"[174] do not burden free speech interests to the same degree and decrease the risk that corruptive influences will taint the political process.[175] Similarly, "coordinated expenditures" are not as inviolable as "independent expenditures" because they are the functional equivalent of a "contribution" and accordingly, they trigger regulatory interests in staving off real and perceived corruption.[176] Given the heightened First Amendment protection of independent expenditures, the Court did "not see how a provision that limits a political party's independent expenditures" could withstand constitutional scrutiny.[177]

The Court held that the CRP's ad purchase was an independent expenditure deserving constitutional protection. In categorizing the expenditure, the Court emphasized that at the time of the purchase the Republicans had not nominated a candidate and that the CRP's chairman independently developed the script, offering it for review only to the Party's staff and the Party's executive director.[178] Moreover, the Court held that the CRP asserted significant free speech interests because "independent expression of a political party's philosophy is 'core' First Amendment activity."[179]

According to the Court, the CRP's First Amendment interests were not counterbalanced by the state's interest in protecting the sanctity of the political process, as restraints on "party" expenditures neither eliminate nor alleviate corruptive pressures on the candidate through an expectation of a *quid pro quo*.[180] The greatest risk for corruption, the Court recognized, resided in the ability of an individual to circumvent the $1,000 restraint on "individual contributions" by making a $20,000 party contribution with the expectation that it will benefit a particular candidate; however, the Court did not believe "that the risk of corruption here could justify the 'markedly greater burden on basic freedoms caused by' . . . limitations on expenditures."[181] If anything, the Court remarked, an independent expenditure originating from a $20,000 donation that is controlled by a political party rather than an individual donor would seem less likely to corrupt than a similar independent expenditure made directly by a donor.[182] Additionally, the Court held that the statute was not overly broad and was narrowly tailored to obtain its compelling interests.

In *FEC v. Colorado Republican Federal Campaign Committee (Colorado II)*,[183] the Supreme Court ruled 5 to 4 that a political party's coordinated expenditures,

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[174] *Id.* at 614 (quoting Buckley, 424 U.S. at 20-21).

[175] *Id.* at 615.

[176] *See id.* at 610, 611, 613, 619.

[177] *See id.* at 615.

[178] *See id*. at 614-615.

[179] *Id.* at 616.

[180] *See id*. at 617.

[181] *See id*. (quoting Buckley, 424 U.S. at 44).

[182] *See id.*

[183] 533 U.S. 431 (2001).

unlike genuine independent expenditures, may be limited in order to minimize circumvention of FECA contribution limits. While the Court's opinion in *Colorado I* was limited to the constitutionality of the application of FECA's "Party Expenditure Provision,"[184] to an *independent* expenditure by the Colorado Republican Party (CRP), in *Colorado II* the Court considered a facial challenge to the constitutionality of the limit on *coordinated* party spending.

Persuaded by evidence supporting the FEC's argument, the Court found that coordinated party expenditures are indeed the "functional equivalent" of contributions.[185] Therefore, in its evaluation, the Court applied the same scrutiny to the coordinated "Party Expenditure Provision" that it has applied to other contribution limits, *i.e.,* whether the restriction is "closely drawn" to the "sufficiently important" governmental interest of stemming political corruption.[186] The Court further determined that circumvention of the law through "prearranged or coordinated expenditures amounting to disguised contributions" is a "valid theory of corruption."[187] In upholding the limit, the Court noted that "substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law," which, the Court concluded, "shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open."[188]

Although *Federal Election Commission (FEC) v. Democratic Senatorial Campaign Committee (DSCC)*[189] dealt primarily with issues of statutory construction and application, the Supreme Court's rationale is relevant to the extension of *Buckley* and the First Amendment generally. Specifically, the Court addressed whether 2 U.S.C. § 441a(d) of FECA, which prohibits party committees from making expenditures on behalf of candidates, extends to party expenditures paid on behalf of other state and national party committees. This case arose in connection with the National Republican Senatorial Campaign Committee's (NRSC) agency relationship with its state and national party committees, under which the NRSC made various expenditures on behalf of its state and national affiliates.[190] The DSCC challenged an FEC interpretation of §441a(d) permitting the NRSC to make such expenditures.[191] The Court affirmed the FEC's interpretation.

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[184] 2 U.S.C. § 441a(d)(3).

[185] *Id* at 447.

[186] *Id.* at 456.

[187] *Id.* at 446, 456.

[188] *Id.* at 457.

[189] 454 U.S. 27 (1981).

[190] *See id*. at 29, 30.

[191] *See id*. at 31.

Under *Buckley*, the Court held, *inter alia*, the FEC's interpretation was not inconsistent with the purpose of FECA.[192] Agency agreements do not raise the risk of corruption nor the appearance of corruption, spawned by the real or perceived coercive effect of large candidate contributions, so long as the candidate is not a party to the agency relationship.[193] Under an agency agreement, contribution limits to candidates apply with equal force when a committee transfers its spending authority to one of its affiliate committees — the agreement does not increase the expenditure of a single additional dollar under FECA.[194] Thus, the Court held, non-candidate agency agreements are consistent with *Buckley* and the purposes of FECA.

Limiting Political Action Committee Independent Expenditures (*FEC v. National Conservative Political Action Committee*). In *Federal Election Commission (FEC) v. National Conservative Political Action Committee (NCPAC)*,[195] the Supreme Court held that the First Amendment prohibits enforcement of 26 U.S.C. § 9012(f) of FECA, which proscribed any "committee, association, or organization" from making expenditures over $1,000 in furtherance of electing a "publicly financed" presidential candidate. *NCPAC* arose in connection with President Reagan's 1984 bid for reelection, where the Democratic National Committee sought an injunction under § 9012(f) against NCPAC from expending "large sums of money" to support President Reagan's publicly funded campaign.[196] NCPAC, an ideological multicandidate political committee, argued that § 9012(f) unduly burdened its First Amendment interests in free expression and free association, as its expenditures were protected as "independent expenditures."[197] NCPAC intended to raise and expend money for the purposes of running radio and television ads to encourage voters to elect Reagan.

Holding § 9012(f) unconstitutional, the Court found that the expenditure limitation burdened NCPAC's "core" First Amendment speech, that it was supported by a comparatively weak state interest, and that it was fatally over-inclusive. The Court noted that in *Buckley* it had upheld expenditure restrictions on individual and political advocacy associations; however, in this case, the fact that NCPAC's expenditures were not made in coordination with the candidate supplied the distinguishing key opening the door to First Amendment protection. In sum, a regulation may not burden a non-candidate's First Amendment rights based on whether a candidate accepts or does not accept public funds.

The Court first determined whether NCPAC was entitled to First Amendment protection. After interpreting the statute as proscribing NCPAC's expenditures, the Court concluded that the proscription burdened speech "of the most fundamental First Amendment activities, [as the discussion of] public issues and debate on the

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[192] *See id.* at 41.

[193] *See id.*

[194] *See id.*

[195] 470 U.S. 480 (1985).

[196] *See id*. at 483.

[197] *See id*. at 490.

qualification of candidates [is] integral to [a democratic form of governance.]"[198] While the statute did not exact a prior restraint on NCPAC's political speech, the Court held that limiting their expenditures to no more than $1,000 in today's sophisticated (and expensive) media market was akin to "allowing a speaker in a public hall to express his views while denying him the use of an amplifying system."[199]

The Court then rejected the argument that NCPAC's organizational structure eroded its First Amendment liberty interests. Associational values and class consciousness pervaded the Court's reasoning. For example, the Court stressed that political committees are "mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to 'amplify the voice of [the committee's] adherents.'"[200] Moreover, the Court did not find that individuals were speaking through a political committee constitutionally significant: "to say that . . . collective action in pooling ... resources to amplify [a political perspective] is not entitled to full First Amendment would [unduly disadvantage those of modest means]."[201] The Court distinguished its holding in *National Right to Work Committee,*[202] which upheld a FECA regulation of corporations and unions by virtue of their unique organizational structure, and noted that "organizational structure" is irrelevant to its facial analysis of § 9012(f) because the statute equally burdens informal groups who raise and expend money in support of federally funded presidential candidates.[203]

After concluding that NCPAC's First Amendment liberties were burdened by § 9012(f), the Court evaluated the state's regulatory interests and asked whether the section was narrowly tailored to reach those interests. The state's interests in alleviating the specter of corruption through a regulation which proscribes uncoordinated, independent expenditures by informal and formal organizations were not compelling to the Court as "independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counter productive." As such, the Court held that low probability of truly independent expenditures materializing into a political debt owed by the candidate to an independent speaker significantly undermined the state's asserted interest in deterring actual and perceived corruption. Entertaining the state's contention that the ability of political committees to amass large pools of funds increase the risk of corruption tainting the political

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[198] *See id.* at 493 (quoting Buckley, 424 U.S. at 14).

[199] *Id. See also* Buckley, 424 U.S. at 19("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.")

[200] NCPAC, 470 U.S. at 494 (quoting Buckley, 424 U.S. at 22).

[201] *Id.* at 495 (distinguishing California Medical Assoc. 453 U.S. at 196 (Marshal, J.) (plurality opinion)).

[202] Discussed *supra.*

[203] *See* NCPAC, 470 U.S. at 496.

process, the Court held that § 9012(f) was fatally over-inclusive, as it included within its scope informal groups that barely clear the $1,000 limitation.[204]

Limiting Expenditures by Candidates (*Randall v. Sorrell*). In *Randall v. Sorrell*,[205] the Supreme Court struck down as unconstitutional a Vermont statute imposing expenditure limits on state office candidates. The expenditure limits imposed were approximately $300,000 for governor, $100,000 for lieutenant governor, $45,000 for other statewide offices, $4,000 for state senate, and $3,000 for state representative, all of which were adjusted for inflation in odd-numbered years.[206]

In support of such statutory expenditure limits, the State of Vermont proffered that they were justified by the state interest in reducing the amount of time that candidates spend raising money. That is, according to a brief filed by Vermont Attorney General Sorrell, absent expenditure limits, increased campaign costs — coupled with the fear of running against an opponent having more funds — means that candidates need to spend more time fundraising instead of engaging in public debate and meeting with voters. Supporters of the law further argued that, in *Buckley*, the Court did not consider this time-saving rationale and had it done so, it would have upheld FECA's expenditure limitations back in 1976.[207]

While unable to reach consensus on a single opinion, six justices of the Supreme Court agreed that First Amendment free speech guarantees were violated by the Vermont expenditure limits. Announcing the Court's judgment and delivering an opinion, which was joined by Chief Justice Roberts and Justice Alito, Justice Breyer found that there was not a significant basis upon which to distinguish the expenditure limits struck down in *Buckley* from the expenditure limits at issue in *Randall*. According to Justice Breyer, it was "highly unlikely that fuller consideration of ... [the] time protection rationale would have changed *Buckley's* result."[208] In *Buckley*, the Court recognized the link between expenditure limits and a reduction in the time needed by a candidate for fundraising, but nonetheless struck down spending limits as unconstitutional.[209] Therefore, Justice Breyer's opinion concluded, given *Buckley's* continued authority, the Court must likewise strike down Vermont's expenditure limits as violating the First Amendment.[210]

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[204] *See id.* at 498.

[205] 548 U.S. 230 (2006).

[206] *See id.* at 237-38.

[207] *See id.* at 245.

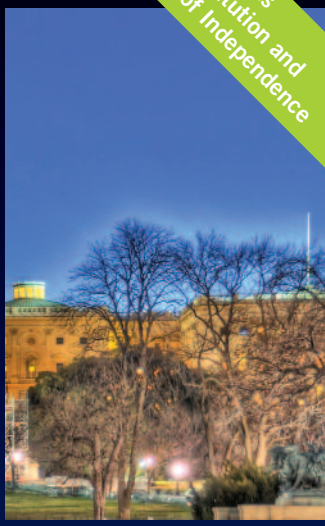
[208] *Id.*

[209] *See id.* The Breyer opinion notes that in *Buckley*, the Court observed that "Congress was trying to 'free candidates from the rigors of fundraising.'" *Id.* (citing Buckley v. Valeo, 424 U.S. 1, 91 (1976)).

[210] *See id.* at 246.

By Bradford Fitch

Includes U.S. Constitution and Declaration of Independence



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Disclosure Requirements

This section analyzes Supreme Court opinions decided subsequent to *Buckley* in which the Court evaluated the constitutionality of disclosure requirements. The first line of cases clarifies the scope of *Buckley*'s general rule, upholding liberal disclosure requirements. In *Buckley v. American Constitutional Law Foundation (ACLF),*[211] the Court struck down a regulation prescribing, among other things, "payee" disclosure in connection with a ballot initiative. Moreover, in *Brown v. Socialist Workers '74 Campaign Committee,*[212] the Court struck down a state disclosure requirement as applied to a minority party that had historically been the object of harassment and discrimination in the public and private sectors. In the second regulatory context, the Court in *Federal Election Commission v. Akins*[213] was presented with the question of whether certain "political committees," without the primary purpose of electing candidates, must nonetheless disclose under FECA. The Court, however, did not issue a holding on this issue.

Requiring Reporting and Disclosure (*Buckley v. American Constitutional Law Foundation; Brown v. Socialist Workers '74 Campaign Committee; FEC v. Akins*)

Reviewing a First Amendment privacy of association and belief claim, the Supreme Court in *Buckley v. American Constitutional Law Foundation (ACLF)*[214] examined the facial validity of a Colorado ballot-initiative statute requiring initiative-sponsors to provide "detailed, monthly disclosures" of the name, address, and amount paid and owed to their petition-circulators.[215] Colorado affords its citizens many "law-making" opportunities by placing initiatives on election ballots for public ratification.[216] A non-profit organization founded to promote the tradition of "direct democracy" challenged the facial validity of the state's statute regulating the initiative-petition process, alleging, *inter alia*, that the regulation's disclosure requirement burdened citizens' associational and speech interests.[217] Colorado did

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[211] 525 U.S. 182 (1999).

[212] 459 U.S. 87 (1982).

[213] 524 U.S. 11 (1998).

[214] 525 U.S. 182 (1999).

[215] *See id.* at 201.

[216] *See id.* at 186. In addition to "disclosure," the statute limited petition circulation to six months and required that petition-circulators be at least eighteen years old, be registered to vote, wear identification badges indicating their status as "volunteer" or "paid," and attach a signed affidavit to each petition stating that they have read and understood the laws governing petition-circulation. *See id.* at 188-189. The Court, however, only reviewed the constitutionality of the voting registration, badge, and disclosure requirements. *See id.* at 186.

[217] *See id*. at 201-202.

not dispute that the regulation burdened expressive activity,[218] but asserted regulatory interests in disseminating information concerning the distribution of capital tied to initiative campaigns.[219] Colorado asserted that the regulation promotes "informed public decision-making," and deters actual and perceived corruption.[220]

Unimpressed with Colorado's interests, the *ACLF* Court upheld the lower court's decision,[221] finding the disclosure requirement unconstitutional. Under *Buckley*, the Court determined that "exacting scrutiny" is necessary where, as here, a regulation compels the disclosure of campaign related payments.[222] After noting the state's interest in regulation, the Court examined the fit between the proposed statutory remedy and its requirements.[223] As the lower court did not strike down the regulation in toto, but upheld the state's requirements for payor disclosure, the electorate had access to information about who proposed an initiative and who funded the circulation of the initiative.[224] The added "informational" benefit of requiring payee disclosure was not supported by the record and would be *de minimis* at best, held the Court.[225] The Court further noted that, as *Meyer v. Grant*[226] demonstrates, the risk of *quid pro quo* corruption, while common in candidate elections, is not as great in ballot initiatives because there is no corrupting object present, especially at the time of petition.[227] Ergo, the Court held that while compelling state interests motivated Colorado's regulatory régime, the link between "payee" disclosures and the state's interests was too tenuous to warrant First Amendment infringement.[228]

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[218] *See id.*

[219] *See id.* at 202.

[220] *See id.*

[221] The lower court invalidated the disclosure requirement "only insofar as it compels disclosure of information specific to each paid contributor, in particular, the circulators' names and addresses and the total amount paid to each circulator." *Id.* at 201 (citing American Constitutional Law Foundation v. Meyer, 120 F.3d 1092, 1104-1105 (1997)).

[222] *See id.* (citing Buckley, 424 U.S. at 64-65). By requiring proponents to identify paid circulators by name, it would decrease the supply of those willing to be circulators, thereby "chilling" core political speech. *See* ACLF, 525 U.S. at 212 (Thomas, J. concurring).

[223] *See ACLF*, 525 U.S. 202.

[224] *See id.* at 203.

[225] *See id.*

[226] 486 U.S. 414 (1988) (holding a Colorado statute making it a felony to pay for circulation of initiative petitions to abridge political speech in violation of the First and Fourteenth Amendments.)

[227] *See* ACLF, 525 U.S. at 203 (quoting Meyer, 486 U.S. at 427) ("The risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting.")

[228] *See* ACLF, 525 U.S. at 204.

In *Brown v. Socialist Workers '74 Campaign Committee*,[229] the Supreme Court considered whether a state disclosure requirement was constitutionally applied, under the Fourteenth Amendment's liberty interest in free speech and association, to a minority political party that historically had been the object of harassment and discrimination in the public and private sectors. The Court reviewed a state disclosure law requiring candidates to report the names and addresses of contributors and recipients of campaign funds.[230] The principal plaintiff, a small political party operating in the socialist tradition, sought and obtained a restraining order against enforcement of the requirement and challenged the constitutionality of the statute as applied to its fundraising and expenditure activities.[231] Agreeing with the plaintiff, the Court upheld the constitutional challenge.

This was a fact intensive holding. The *Brown* Court affirmed *Buckley*'s prohibition on compelled disclosures where contributors would be subject to a reasonable probability of threats, harassment, or reprisals by virtue of their support of a currently and historically suspect political organization.[232] The Court extended *Buckley* to protect recipients of campaign contributions.[233] Affording the plaintiff "sufficient flexibility" in the proof of injury, the Court found "substantial evidence" to support the contention that compliance with the disclosure requirement would subject both contributors and recipients of campaign funds to the risk of threats, harassment, or reprisals.[234] Plaintiff's showing of current hostility by government and private parties included threatening phone calls, hate mail, burning of party literature, dismissal from employment due to member's political affiliation, destruction of the membership's property, harassment of the party's candidate, and the firing of gunshots at the party's offices.[235] Plaintiff also developed a factual record of historic discrimination and hostility against the party and its membership.[236] From this expansive record, the Court found that the plaintiffs established a "reasonable probability" that acts of discrimination, threats, reprisals, and hostility would continue in the future.[237] Therefore, the Court held that the disclosure requirement was unconstitutional as applied to the plaintiffs' political committees.[238]

In *Federal Election Commission (FEC) v. Akins*,[239] the Supreme Court did not issue a holding on whether "an organization that otherwise satisfies the [FECA's]

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[229] 479 U.S. 87 (1982).

[230] *See id. at 89.*

[231] *See id.* at 88.

[232] *See id.* at 93 (citing Buckley, 424 U.S. at 74).

[233] *See id.* at 97, 98.

[234] *See id.* at 101-102.

[235] *See id.* at 99.

[236] *See id.*

[237] *See id.* at 100.

[238] *See id.* at 102.

[239] 524 U.S. 11 (1998).

definition of 'political committee,' and thus is subject to its disclosure requirements, nonetheless falls outside that definition because 'its major purpose' is not 'the nomination or election of candidates.'"[240] However, the Court reiterated that "political committees," for the purposes of FECA, refer to organizations under the "control of a candidate" or with the major purpose of nominating or electing a candidate to political office.

Requiring Attribution Disclosure by Individuals Distributing Leaflets in Issue-Based Elections (*McIntyre v. Ohio Elections Commission*)

In *McIntyre v. Ohio Elections Commission*,[241] the Supreme Court further defined the universe of permissible disclosure requirements when it struck down an Ohio election law, which prohibited the distribution of anonymous campaign literature and required attribution disclosure of the name of the literature's author on all distributed campaign material. *McIntyre* arose in relation to a school tax levy, where a parent published and distributed anonymous campaign leaflets opposing the tax measure.[242] The Court held that the statute violated the parent's liberty interest in free speech under the First Amendment as incorporated by the Fourteenth Amendment.[243]

As the statute burdened the parent's First Amendment interest in anonymous pamphleteering — "an honorable tradition of advocacy and dissent" in U.S. political history — the Court applied exacting scrutiny to the regulation.[244] The Court construed the First Amendment interest in anonymity as "a shield from the tyranny of the majority. . . . [exemplifying] the purpose behind the Bill of Rights and of the First Amendment in particular, [which protects] unpopular individuals from retaliation and their ideas from suppression at the hand of an intolerant society."[245] The Court recalled, for example, that the Federalist Papers were published under fictitious names.[246] Balanced against the parent's interests in anonymous publishing, the Court acknowledged Ohio's interest in preventing the dissemination of fraudulent and libelous statements and in providing voters with information on which to evaluate the message's worth. However, the Court found that the state's interests were not served by a ban on anonymous publishing because it had a number of regulations designed to prevent fraud and libel and because a person's name has little significance to evaluating the normative weight of a speaker's message.[247] Thus, the Court held that the statute was not narrowly tailored to serve its regulatory interests and therefore, struck it down.

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[240] *See id.* at 14.

[241] 514 U.S. 334 (1995).

[242] *See id.* at 336.

[243] *See id.* at 357.

[244] *Id.*

[245] *Id.* at 347.

[246] *See id.*

[247] *See id.* at 348, 349.

The *McIntyre* Court specifically found that neither *Bellotti* nor *Buckley* were controlling in the *McIntyre* case: *Bellotti* concerned the scope of First Amendment protection afforded to corporations and the relevant portion of the *Buckley* opinion concerned mandatory disclosure of campaign expenditures.[248] Neither case involved a prohibition of anonymous campaign literature. In *Buckley*, the Court noted, it had stressed the importance of providing the electorate with information regarding the origin of campaign funds and how candidates spend those funds, but that such information had no relevance to the kind of "independent activity" in the case of *McIntyre*. "Required disclosures about the level of financial support a candidate has received from various sources are supported by an interest in avoiding the appearance of corruption that has no application in this case," the Court stated.[249] Moreover, the Court found that independent expenditure disclosure above a certain threshold, which the Court upheld in *Buckley*,[250] although clearly impeding First Amendment activity, is a "far cry from compelled self-identification on all election-related writings." An election related document, particularly a leaflet, is often a personally crafted statement of a political viewpoint and as such, compelled identification is particularly intrusive, according to the Court. In contrast, the Court found, expenditure disclosure, reveals far less information; that is, "even though money may 'talk,' its speech is less specific, less personal, and less provocative than a handbill — and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation."[251]

Further distinguishing *Buckley*, the *McIntyre* Court found that not only is a prohibition on anonymous campaign literature more intrusive than the disclosure requirements upheld in *Buckley*, but it rests on "different and less powerful state interests."[252] The Federal Election Campaign Act (FECA), at issue in *Buckley*, regulates only candidate elections, not referenda or other issue-based elections, and the *Buckley* Court had construed "independent expenditures" to only encompass those expenditures that "expressly advocate the election or defeat of a clearly identified candidate."[253] Unlike candidate elections, where the government can identify a compelling governmental interest of avoiding *quid pro quo* candidate corruption, issue based elections do not present such a risk and hence, the Court ruled, the government cannot justify such an intrusion on free speech.[254]

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[248] *Id.* at 353.

[249] *Id.* at 354.

[250] *Id.* at 355 (citing Buckley, 424 U.S. at 75-76). In *Buckley*, the Supreme Court had upheld a requirement that independent expenditures above a certain threshold be reported to the FEC.

[251] *Id.*

[252] *Id.* at 356.

[253] *Id.* (quoting Buckley, 424 U.S. at 80.

[254] *See id.*

Political Party Soft Money and Electioneering Communication Restrictions

McConnell v. FEC

In its most comprehensive campaign finance ruling since *Buckley v. Valeo*, the Supreme Court in its 2003 decision, *McConnell v. FEC*,[255] upheld against facial constitutional challenges key portions of the Bipartisan Campaign Reform Act of 2002 (BCRA),[256] also known as the McCain-Feingold or Shays-Meehan campaign finance reform law. In *McConnell*, a 5-to-4 majority of the Court upheld restrictions on the raising and spending of previously unregulated political party soft money and a prohibition on corporations and labor unions using treasury funds to finance "electioneering communications," requiring that such ads may only be paid for with corporate and labor union political action committee (PAC) funds. The Court invalidated BCRA's requirement that parties choose between making independent expenditures or coordinated expenditures on behalf of a candidate and its prohibition on minors age 17 and under making campaign contributions.

By a 5-to-4 vote, the *McConnell* Court upheld two critical BCRA provisions, Titles I and II, against facial constitutional challenges. In the majority opinion, coauthored by Justices Stevens and O'Connor and joined by Justices Souter, Ginsburg, and Breyer, the Court upheld the limits on raising and spending previously unregulated political party soft money (Title I), and the prohibition on corporations and labor unions using treasury funds — which is unregulated soft money — to finance directly electioneering communications (Title II).

In upholding BCRA's "two principal, complementary features," the Court readily acknowledged that it is under "no illusion that BCRA will be the last congressional statement on the matter" of money in politics. The Court observed, "money, like water, will always find an outlet." Hence, campaign finance issues that will inevitably arise and the corresponding legislative responses from Congress "are concerns for another day."[257]

Restricting Political Party Soft Money. Title I of BCRA prohibits national party committees and their agents from soliciting, receiving, directing, or spending any soft money.[258] As the Court noted, Title I takes the national parties "out

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[255] 540 U.S. 93 (2003). For further discussion of this decision, *see* CRS Report RL32245, *Campaign Finance Law: A Legal Analysis of the Supreme Court Ruling in McConnell v. FEC*, by L. Paige Whitaker.

[256] P.L. 107-155. The Bipartisan Campaign Reform Act of 2002 (BCRA) was the first major overhaul of federal campaign finance laws since the enactment of the Federal Election Campaign Act of 1971.

[257] *Id.* at 706.

[258] 2 U.S.C. § 441i(a).

of the soft-money business."[259] In addition, Title I prohibits state and local party committees from using soft money for activities that affect federal elections; prohibits parties from soliciting for and donating funds to tax-exempt organizations that spend money in connection with federal elections; prohibits federal candidates and officeholders from receiving, spending, or soliciting soft money in connection with federal elections and restricts their ability to do so in connection with state and local elections; and prevents circumvention of the restrictions on national, state, and local party committees by prohibiting state and local candidates from raising and spending soft money to fund advertisements and other public communications that promote or attack federal candidates.[260] Plaintiffs challenged Title I based on the First Amendment as well as Art. I, § 4 of the U.S. Constitution, principles of federalism, and the equal protection component of the Due Process Clause of the 14th Amendment. The Court upheld the constitutionality of all provisions in Title I, finding that its provisions satisfy the First Amendment test applicable to limits on campaign contributions: they are "closely drawn" to effect the "sufficiently important interest" of preventing corruption and the appearance of corruption.

Rejecting plaintiff's contention that the BCRA restrictions on campaign contributions must be subject to strict scrutiny in evaluating the constitutionality of Title I, the Court applied the less rigorous standard of review — "closely drawn" scrutiny. Citing its landmark 1976 decision *Buckley v. Valeo* and its progeny, the Court noted that it has long subjected restrictions on campaign expenditures to closer scrutiny than limits on contributions in view of the comparatively "marginal restriction upon the contributor's ability to engage in free communication" that contribution limits entail.[261] The Court observed that its treatment of contribution limits is also warranted by the important interests that underlie such restrictions, *i.e.* preventing both actual corruption threatened by large dollar contributions as well as the erosion of public confidence in the electoral process resulting from the appearance of corruption.[262] The Court determined that the lesser standard shows "proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise."[263] Finally, the Court recognized that during its lengthy consideration of BCRA, Congress properly relied on its authority to regulate in this area, and hence, considerations of *stare decisis* as well as respect for the legislative branch of government provided additional "powerful reasons" for adhering to the treatment of contribution limits that the Court has consistently followed since 1976.[264]

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[259] McConnell, 124 S. Ct. at 654.

[260] 2 U.S.C. §§ 441i(b), 441i(d), 441i(e), 441i(f).

[261] McConnell, 124 S. Ct. at 647 (quoting FEC v. Beaumont, 123 S. Ct. 2200 (2003)).

[262] *Id.* at 656 (quoting FEC v. National Right to Work, 459 U.S. 197, 208 (1982)).

[263] *Id.* at 656-57. The Court further noted that "closely drawn" scrutiny provides Congress with sufficient room to anticipate and respond to circumvention of the federal election regulatory regime, which is designed to protect the integrity of the political process. *Id.*

[264] *Id.*

Responding to plaintiffs' argument that many of the provisions in Title I restrict not only contributions but also the spending and solicitation of funds that were raised outside of FECA's contribution limits, the Court determined that it is "irrelevant" that Congress chose to regulate contributions "on the demand rather than the supply side." Indeed, the relevant inquiry is whether its mechanism to implement a contribution limit or to prevent circumvention of that limit burdens speech in a way that a direct restriction on a contribution would not. The Court concluded that Title I only burdens speech to the extent of a contribution limit: it merely limits the source and individual amount of donations. Simply because Title I accomplishes its goals by prohibiting the spending of soft money does not render it tantamount to an expenditure limitation.[265]

In his dissent, Justice Kennedy criticized the majority opinion for ignoring established constitutional bounds and upholding a campaign finance statute that does not regulate actual or apparent *quid pro quo* arrangements.[266] According to Justice Kennedy, *Buckley* clearly established that campaign finance regulation that restricts speech, without requiring proof of specific corrupt activity, can only withstand constitutional challenge if it regulates conduct that presents a "demonstrable *quid pro quo* danger." The *McConnell* Court, however, interpreted the anti-corruption rationale to allow regulation of not only "actual or apparent *quid pro quo* arrangements," but also of "any conduct that wins goodwill from or influences a Member of Congress." Justice Kennedy further maintained that the standard established in *Buckley* defined undue influence to include the existence of a *quid pro quo* involving an officeholder, while the *McConnell* Court, in contrast, extended the *Buckley* standard of undue influence to encompass mere access to an officeholder. Justice Kennedy maintained that the Court, by legally equating mere access to officeholders to actual or apparent corruption of officeholders, "sweeps away all protections for speech that lie in its path."[267]

Unpersuaded by Justice Kennedy's dissenting position that Congress's regulatory interest is limited to the prevention of actual or apparent *quid pro quo* corruption "inherent in" contributions made to a candidate, the Court found that such a "crabbed view of corruption" and specifically the *appearance* of corruption "ignores precedent, common sense, and the realities of political fundraising exposed by the record in this litigation."[268] According to the Court, equally problematic as classic *quid pro quo* corruption, is the danger that officeholders running for re-election will make legislative decisions in accordance with the wishes of large financial contributors, instead of deciding issues based on the merits or constituent interests. Since such corruption is neither easily detected nor practical to criminalize,

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[265] *Id.* at 657-58.

[266] *Id.* at 742-59 (Kennedy, J., concurring, in part, dissenting, in part) (joined by Chief Justice Rehnquist, Justices Scalia (except to the extent it upholds FECA § 323(e) and BCRA § 202) and Thomas (only with respect to BCRA § 213).

[267] *Id.* at 746.

[268] *Id.* at 665.

the Court reasoned, Title I offers the best means of prevention, *i.e.*, identifying and eliminating the temptation.[269]

Prohibiting Corporate and Labor Union Treasury Fund Financing of Electioneering Communications. Title II of BCRA created a new term in FECA, "electioneering communication," which is defined as any broadcast, cable, or satellite communication that "refers" to a clearly identified federal candidate, is made within 60 days of a general election or 30 days of a primary, and if it is a House or Senate election, is targeted to the relevant electorate.[270] Title II prohibits corporations and labor unions from using their general treasury funds (and any persons using funds donated by a corporation or labor union) to finance electioneering communications. Instead, the statute requires that such ads may only be paid for with corporate and labor union political action committee (PAC) regulated hard money.[271] The Court upheld the constitutionality of this provision.

In *Buckley v. Valeo*, the Court construed FECA's disclosure and reporting requirements, as well as its expenditure limitations, to apply only to funds used for communications that contain express advocacy of the election or defeat of a clearly identified candidate.[272] After *Buckley*, many lower courts had interpreted the decision to stand for the proposition that communications must contain express terms of advocacy, such as "vote for" or "vote against," in order for regulation of such communications to pass constitutional muster under the First Amendment. Absent express advocacy, lower courts had held, a communication is considered issue advocacy, which is protected by the First Amendment and therefore may not be regulated.

Effectively overturning such lower court rulings, the Supreme Court in *McConnell* held that neither the First Amendment nor *Buckley* prohibits BCRA's regulation of "electioneering communications," even though electioneering communications, by definition, do not necessarily contain express advocacy. The Court determined that when the *Buckley* Court distinguished between express and issue advocacy it did so as a matter of statutory interpretation, not constitutional command. Moreover, the Court announced that by narrowly reading FECA provisions in *Buckley* to avoid problems of vagueness and overbreadth, it "did not suggest that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line."[273] "[T]he presence or absence of magic words

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[269] *Id.* at 666.

[270] 2 U.S.C. § 434(f)(3)(A)(i). BCRA defines "[t]argeted to the relevant electorate" as a communication that can be received by 50,000 or more persons in a state or congressional district where the Senate or House election, respectively, is occurring. 2 U.S.C. § 434(f)(3)(C).

[271] 2 U.S.C. § 441b(b).

[272] Buckley, 424 U.S. at 80.

[273] McConnell, 124 S. Ct. at 688.

cannot meaningfully distinguish electioneering speech from a true issue ad," the Court observed.[274]

In response to plaintiffs maintaining that the justifications supporting the regulation of express advocacy do not apply to communications covered by the definition of "electioneering communication," the Court found that the argument failed to the extent that issue ads broadcast during the 30- and 60-day periods prior to primary and general elections are the "functional equivalent" of express advocacy.[275] The Court reasoned that the justifications for the regulation of express advocacy "apply equally" to ads broadcast during those periods if the ads have the intent and effect of influencing elections. Based on the evidentiary record, the Court determined that the vast majority of such ads "clearly had such a purpose."[276]

While Title II prohibits corporations and labor unions from using their general treasury funds for electioneering communications, the Court observed that they are still free to use separate segregated funds (PACs) to run such ads. Therefore, the Court concluded that it is erroneous to view this provision of BCRA as a "complete ban" on expression rather than simply a regulation.[277] Further, the Court found that the regulation is not overbroad because the "vast majority" of ads that are broadcast within the electioneering communication time period (60 days before a general election and 30 days before a primary) have an electioneering purpose.[278] The Court also rejected plaintiffs' assertion that the segregated fund requirement for electioneering communications is under-inclusive because it only applies to broadcast advertisements and not print or internet communications. Congress is permitted, the Court determined, to take one step at a time to address the problems it identifies as acute. With Title II of BCRA, the Court observed, Congress chose to address the problem of corporations and unions using soft money to finance a "virtual torrent of televised election-related ads" in recent campaigns.[279]

In his dissent, Justice Kennedy criticized the majority for permitting "a new and serious intrusion on speech" by upholding the prohibition on corporations and unions using general treasury funds to finance electioneering communications. Finding that this BCRA provision "silences political speech central to the civic discourse that sustains and informs our democratic processes," the dissent further noted that unions and corporations "now face severe criminal penalties for broadcasting advocacy messages that 'refer to a clearly identified candidate' in an election season."[280]

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[274] *Id.* at 689.

[275] *Id.* at 696.

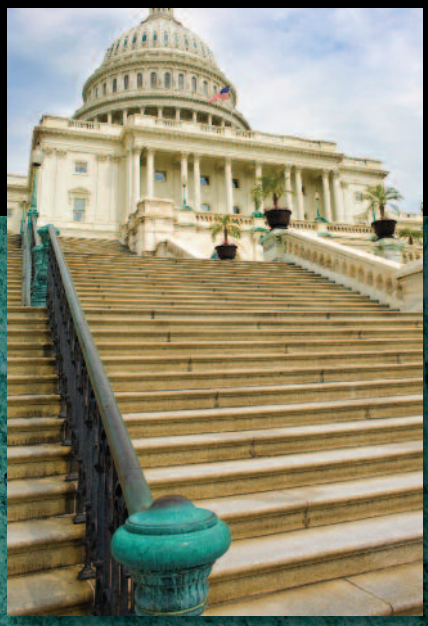
[276] *Id.* (citing 251 F. Supp. 2d 176, 573-578 (D.D.C.) (Kollar-Kotelly, J.), 826-827 (Leon, J.)).

[277] *Id.* at 695.

[278] *Id.* at 696.

[279] *Id.* at 697.

[280] *Id.* at 762 (Kennedy, J., concurring, in part, dissenting, in part) (joined by Chief Justice Rehnquist and Justices Scalia (except to the extent it upholds FECA § 323(e) and BCRA § (continued...)



A Practical Guide to Preparing and Delivering Testimony Before Congress and Congressional Hearings for Agencies, Associations, Corporations, Military, NGOs, and State and Local Officials

By William N. LaForge

Testifying Before Congress

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In upholding BCRA's extension of the prohibition on using treasury funds for financing electioneering communications to non-profit corporations, the *McConnell* Court found that even though the statute does not expressly exempt organizations meeting the criteria established in its 1986 decision in *FEC v. Massachusetts Citizens for Life (MCFL),*[281] it is an insufficient reason to invalidate the entire section. Since *MCFL* had been established Supreme Court precedent for many years prior to enactment of BCRA, the Court assumed that when Congress drafted this section of BCRA, it was well aware that this provision could not validly apply to MCFL-type entities.[282]

Requiring Sponsors of Election-Related Advertisements to Self-Identify ("Stand-By-Your-Ad Provision"). By an 8-to-1 vote, the Court upheld Section 311 of BCRA, which requires that general public political ads that are "authorized" by a candidate clearly indicate that the candidate or the candidate's committee approved the communication.[283] Rejecting plaintiffs' assertion that this provision is unconstitutional, the Court found that this provision "bears a sufficient relationship to the important governmental interest of 'shedding the light of publicity' on campaign financing."[284]

Requiring Political Parties to Choose Between Coordinated and Independent Expenditures After Nominating a Candidate. By a 5-to-4 vote, the Court invalidated BCRA's requirement that political parties choose between coordinated and independent expenditures after nominating a candidate,[285] finding that it burdens the right of parties to make unlimited independent expenditures.[286] Specifically, Section 213 of BCRA[287] provides that, after a party nominates a candidate for federal office, it must choose between two spending options. Under the first option, a party that makes any independent expenditure is prohibited from making any coordinated expenditure under this section of law; under the second option, a party that makes any coordinated expenditure under this section of law —

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[280] (...continued)
202) and Thomas (only with respect to BCRA § 213)). While Justice Kennedy's opinion served as the primary dissent for the minority, in a separate dissent, Justice Scalia wrote, "[t]his is a sad day for the freedom of speech," further commenting that "[i]f the Bill of Rights had intended an exception to the freedom of speech in order to combat this malign proclivity of the officeholder to agree with those who agree with him, and to speak more with his supporters than his opponents, it would surely have said so." *Id.* at 720, 726.

[281] 479 U.S. 238 (1986) (holding that the following characteristics exempt a corporation from regulation: (1) its organizational purpose is purely political; (2) its shareholders have no economic incentive in the organization's political activities; and, (3) it was neither founded by nor accepts contributions from business organizations or labor unions).

[282] McConnell, 124 S. Ct. at 699.

[283] 2 U.S.C. § 441d.

[284] McConnell, 124 S. Ct. at 710.

[285] 2 U.S.C. § 315(d)(4).

[286] McConnell, 124 S. Ct. at 703.

[287] 2 U.S.C. § 315(d)(4).

one that exceeds the ordinary $5,000 limit — cannot make any independent expenditure with respect to the candidate. FECA, as amended by BCRA, defines "independent expenditure" to mean an expenditure by a person "expressly advocating the election or defeat of a clearly identified candidate" and that is not made in cooperation with such candidate.[288]

According to the *McConnell* Court, the regulation presented by Section 213 of BCRA "is much more limited than it initially appears." A party that wants to spend more than $5,000 in coordination with its nominee is limited to making only independent expenditures that contain the magic words of express advocacy. Although the Court acknowledges that "while the category of burdened speech is relatively small," it is nonetheless entitled to protection under the First Amendment. Furthermore, the Court determined that under Section 213, a party's exercise of its constitutionally protected right to engage in free speech results in the loss of a longstanding valuable statutory benefit. Hence, to pass muster under the First Amendment, the provision "must be supported by a meaningful governmental interest" and, the Court announced, the interest in requiring parties to avoid the use of magic words does not suffice.[289]

Prohibiting Campaign Contributions by Minors Age 17 and Under. By a unanimous vote, the Court invalidated Section 318 of BCRA, which prohibited individuals age 17 or younger from making contributions to candidates and political parties.[290] Determining that minors enjoy First Amendment protection and that contribution limits impinge on such rights, the Court determined that the prohibition is not "closely drawn" to serve a "sufficiently important interest."[291]

In response to the government's assertion that the prohibition protects against corruption by conduit — that is, parents donating through their minor children to circumvent contribution limits — the Court found "scant evidence" to support the existence of this type of evasion. Furthermore, the Court postulated that such circumvention of contribution limits may be deterred by the FECA provision prohibiting contributions in the name of another person and the knowing acceptance of contributions made in the name of another person.[292] Even assuming, *arguendo,* that a sufficiently important interest could be provided in support of the prohibition, the Court determined that it is over-inclusive. According to the Court, various states have found more-tailored approaches to address this issue, for example, counting contributions by minors toward the total permitted for a parent or family unit, imposing a lower cap on contributions by minors, and prohibiting contributions by

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[288] 2 U.S.C. § 301(17).

[289] McConnell, 124 S. Ct. at 702.

[290] 2 U.S.C. § 441k.

[291] McConnell, 124 S. Ct. at 711.

[292] *See* 2 U.S.C. § 441f.

very young children. The Court, however, expressly declined to decide whether any alternatives would pass muster.[293]

Establishing Staggered Increases in Contribution Limits if Opponent Spends Certain Amount in Personal Funds ("Millionaire Provisions"): Challengers Held to Lack Standing. By a unanimous vote, the Court determined that the challenges to Sections 304, 316, and 319 of BCRA, also known as the "millionaire provisions," were properly dismissed by the district court due to lack of standing.[294] The millionaire provisions, which therefore remain in effect, provide for a series of staggered increases in otherwise applicable limits on contributions to candidates if a candidate's opponent spends a certain amount in personal funds on his or her own campaign.[295]

Supreme Court Deference to Congressional Findings. A notable aspect of the Supreme Court's ruling in *McConnell v. FEC* is the extent to which the majority of the Court deferred to Congressional findings and used a pragmatic rationale in upholding BCRA. According to the Court, the record before it was replete with perceived problems in the campaign finance system, circumstances creating the appearance of corruption, and Congress's proposal to address these issues. As the Court remarked at one point, its decision showed "proper deference" to Congress's determinations "in an area in which it enjoys particular expertise."[296] Furthermore, "Congress is fully entitled," the Court observed, "to consider the real-world" as it determines how best to regulate in the political sphere.[297]

Wisconsin Right to Life, Inc. v. FEC (WRTL II)

Ruling 5 to 4, the Supreme Court in its 2007 decision *Wisconsin Right to Life, Inc. v. FEC (WRTL II)*[298] found that a provision of the Bipartisan Campaign Reform Act of 2002 (BCRA), prohibiting corporate or labor union treasury funds from being spent on advertisements broadcast within 30 days of a primary or 60 days of a general election, was unconstitutional as applied to ads that Wisconsin Right to Life, Inc. sought to run. While not expressly overruling its 2003 ruling in *McConnell v. FEC*, which upheld the BCRA provision against a First Amendment facial challenge, the Court limited the law's application. Specifically, it ruled that advertisements that may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate are not the functional equivalent of express advocacy, and therefore, cannot be regulated.

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[293] McConnell, 124 S. Ct. at 711.

[294] *Id.*

[295] 2 U.S.C. § 315(a).

[296] McConnell, 124 S. Ct. at 656-57.

[297] *Id.* at 686.

[298] 127 S.Ct. 2652 (2007). For further discussion of this decision, *see* CRS Report RS22687, *The Constitutionality of Regulating Political Advertisements: An Analysis of Federal Election Commission v. Wisconsin Right to Life, Inc.*, by L. Paige Whitaker.

Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA)[299] prohibits corporate or labor union treasury funds from being spent for "electioneering communications." BCRA defines "electioneering communication" as any broadcast, cable, or satellite transmission made within 30 days of a primary or 60 days of a general election (sometimes referred to as the "blackout periods") that refers to a candidate for federal office and is targeted to the relevant electorate.[300] In *McConnell v. Federal Election Commission (FEC),*[301] the Supreme Court had upheld Section 203 of BCRA against a First Amendment facial challenge even though the provision regulates not only campaign speech or "express advocacy," (speech that expressly advocates the election or defeat of a clearly identified candidate), but also "issue advocacy," (speech that discusses public policy issues, while also mentioning a candidate). Specifically, the Court determined that the speech regulated by Section 203 was the "functional equivalent" of express advocacy.[302]

In July 2004, Wisconsin Right to Life (WRTL), a corporation that accepts contributions from other corporations, began broadcasting advertisements exhorting viewers to contact Senators Feingold and Kohl to urge them to oppose a Senate filibuster to delay and block consideration of federal judicial nominations. WRTL planned to run the ads throughout August 2004 and to finance them with its general treasury funds, thereby running afoul of Section 203, as such ads would have been broadcast within the 30 day period prior to the September 14, 2004, primary. Anticipating that the ads would be illegal "electioneering communications," but believing that they nevertheless had a First Amendment right to broadcast them, WRTL filed suit against the FEC, seeking declaratory and injunctive relief and alleging that Section 203's prohibition was unconstitutional as applied to the ads and any future ads that they might plan to run.

Just prior to the BCRA 30-day blackout period, a three-judge district court denied a preliminary injunction, finding that *McConnell v. FEC* left no room for such an "as-applied" challenge. Accordingly, WRTL did not broadcast its ads during the blackout period, and the district court subsequently dismissed the complaint in an unpublished opinion. On appeal, in *Wisconsin Right to Life, Inc. v. FEC (WRTL I),*[303] the Supreme Court vacated the lower court judgment, finding that by upholding Section 203 against a facial challenge in *McConnell,* "we did not purport to resolve future as-applied challenges."[304] On remand, after permitting four Members of Congress to intervene as defendants, the three-judge district court granted WRTL summary judgment, determining that Section 203 was unconstitutional as applied to

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[299] P.L. 107-155. This law is also known as "McCain-Feingold," referring to the principal Senate sponsors of the legislation.

[300] *See* 2 U.S.C. § 441b(b)(2).

[301] 540 U.S. 93 (2003), discussed *supra*.

[302] *Id.* at 204-205, 206.

[303] 546 U.S. 410 (2006).

[304] *Id.* at 412.

WRTL's ads.[305] It concluded that the ads were genuine issue ads, not express advocacy or its "functional equivalent" under *McConnell*, and held that no compelling interest justified their regulation.[306] The FEC appealed.

Prohibiting Corporate and Labor Union Treasury Fund Financing of Electioneering Communications. Affirming the lower court ruling, the Supreme Court in *Wisconsin Right to Life, Inc. v. FEC (WRTL II)*[307] determined that Section 203 of BCRA was unconstitutional as applied to the WRTL ads, and that they should have been permissible to broadcast. In a plurality opinion, written by Chief Justice Roberts, joined by Justice Alito — Justice Scalia wrote a separate concurrence, joined by Justices Kennedy and Thomas[308] — the Court announced that "[b]ecause WRTL's ads may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, we hold they are not the functional equivalent of express advocacy, and therefore, fall outside the scope of *McConnell's* holding."[309] In determining the threshold question, as the Court found was required by *McConnell*, of whether the ads were the "functional equivalent" of speech expressly advocating the election or defeat of a candidate for federal office or genuine issue advocacy, the Court observed that it had long recognized that the practical distinction between campaign advocacy and issue advocacy can often dissolve because candidates, particularly incumbents, "are intimately tied to public issues involving legislative proposals and governmental actions."[310] Nonetheless, the Court stated, its jurisprudence in this area requires it to make such a distinction, and "[i]n drawing that line, the First Amendment requires ... err[ing] on the side of protecting political speech rather than suppressing it."[311]

The FEC argued that in view of the fact that *McConnell* had already held that Section 203 was facially valid, WRTL — and not the government — should bear the burden of demonstrating that BCRA is unconstitutional as applied to its ads.[312] Rejecting the FEC's contention, the Court pointed out that Section 203 burdens political speech and is therefore subject to strict scrutiny.[313] Under strict scrutiny, the

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[305] Wisconsin Right to Life, Inc. v. Federal Election Commission, 466 F. Supp. 2d 195 (D.D.C. 2006).

[306] *Id.* at 210.

[307] 127 S.Ct. 2652 (2007).

[308] In a concurrence, Justice Scalia found that the attempt in the Court's ruling to distinguish *McConnell* is "unpersuasive enough, and the change in the law it works is substantial enough, that seven Justices ... having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so." *Id.* at 2684, n. 7 (Scalia, J. concurring in part and concurring in the judgment).

[309] *Id.* at 2670.

[310] *Id.* at 2659 (quoting Buckley v. Valeo, 424 U.S. 1, 42 (1976)).

[311] *Id.*

[312] *See id.* at 2663-64.

[313] *See id.* at 2664 (citing McConnell v. FEC, 540 U.S. 93, 205 (2003); Austin v. Michigan (continued...)

Court determined that the FEC — not the regulated community — had the burden of proving that the application of Section 203 to WRTL's ads furthered a compelling interest, and was narrowly tailored to achieve that interest.[314] As it had already ruled in *McConnell* that Section 203 "survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent," the Court found that in order to prevail, the FEC needed to show that the WRTL ads it sought to regulate fell within that category.[315] On the other hand, if the speech that the FEC sought to regulate is not express advocacy or its functional equivalent, the Court cautioned that the FEC's task is "more formidable" because it must demonstrate that banning such ads during the blackout periods is narrowly tailored to serve a compelling governmental interest, a conclusion that no precedent has reached.[316]

In response to the FEC's and the dissent's[317] argument that *McConnell* had established a test for determining whether an ad is the functional equivalent of express advocacy, that is, "whether the ad is intended to influence elections or has that effect," the Court disagreed, finding that it had not adopted any type of test as the standard for future as-applied challenges.[318] Instead, the Court found that its analysis in *McConnell* was grounded in the evidentiary record, particularly studies showing that the BCRA definition of "Electioneering Communications accurately captures ads having the purpose or effect of supporting candidates for election to office."[319] Hence, when the *McConnell* Court made its assessment that the plaintiffs in that case had not sufficiently proven that Section 203 was overbroad and could not be enforced in any circumstance, it did not adopt a particular test for determining what constituted the "functional equivalent" of express advocacy. Indeed, the Court held, the fact that in *McConnell* it looked to such intent and effect "neither compels nor warrants

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[313] (...continued)
Chamber of Commerce, 494 U.S. 652, 658 (1990); FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 252 (1986); First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978); Buckley v. Valeo, 424 U.S. 1, 44-45 (1976)).

[314] *Id.* (finding "[e]specially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing ... 'the burden is on the government to show the existence of [a compelling] interest.'"(quoting First Nat. Bank of Boston v. Bellotti, 435 U.S. at 786)).

[315] *Id.* (quoting McConnell v. FEC, 540 U.S. at 206).

[316] *Id.*

[317] The dissenting opinion maintained that the principal opinion establishes a "new test to identify a severely limited class of ads that may constitutionally be regulated as electioneering communications, a test that is flatly contrary to ... [and] simply inverts" the Court's holding in *McConnell*. *Id.* at 2669 (Souter, J., dissenting) (quoting McConnell v. FEC, 540 U.S. at 206-207, n. 88). While the Court in *McConnell* had "left open the possibility" of a "'genuine' or 'pure' issue ad that might not be open to regulation under §203," the dissent argued that the Court meant that an issue ad that did not contain campaign advocacy could escape the regulation, not that "if an ad is susceptible to any 'reasonable interpretation other than as an appeal to vote for or against a specific candidate,' then it must be a 'pure' or 'genuine' issue ad." *Id.* (Souter, J., dissenting)

[318] *Id.* at 2664.

[319] *Id.* at 2665.

accepting that same standard as the constitutional test for separating, in an as-applied challenge, political speech protected under the First Amendment from that which may be banned."[320]

Accordingly, the Court turned to establishing the proper standard for an as-applied challenge to Section 203 of BCRA, finding that such a standard "must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect," involving "minimal if any discovery" so that parties can resolve disputes "quickly without chilling speech through the threat of burdensome litigation," and eschewing "'the open-ended rough-and-tumble of factors,' which 'invit[es] complex argument in a trial court and a virtually inevitable appeal.'"[321] In summation, the Court announced that the standard "must give the benefit of any doubt to protecting rather than stifling speech."[322] Taking such considerations into account, the Court held that

> [A] Court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. Under this test, WRTL's three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.[323]

Moreover, the Court cautioned, contextual factors "should seldom play a significant role in the inquiry." Although courts are not required to ignore basic background information that provides relevant contextual information about an advertisement — such as whether the ad describes a legislative issue that is under legislative consideration — the Court found that such background information "should not become an excuse for discovery."[324]

In applying the standard it developed for as-applied challenges to the ads that WRTL sought to broadcast, the Court determined that the FEC had failed to demonstrate that such ads constituted the functional equivalent of express advocacy because they could reasonably be interpreted as something other than a vote for or against a candidate. The Court's established jurisprudence has recognized the

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[320] *Id.* The Court further noted that in its seminal 1976 campaign finance decision, *Buckley*, it had expressly "rejected an intent-and-effect test for distinguishing between discussions of issues and candidates," finding that such an analysis would afford "'no security for free discussion.'" *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 43-44 (1976), quoting Thomas v. Collins, 323 U.S. 516 (1945)).

[321] *Id.* at 2666 (quoting Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 547 (1995)).

[322] *Id.* at 2667 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[323] *Id.*

[324] *Id.* at 2669.

governmental interest in preventing corruption and the appearance of corruption in elections, which has been invoked in order to justify contribution limits and, in certain circumstances, spending limits on electioneering expenditures that pose the risk of *quid pro quo* corruption. In *McConnell,* the Court noted, it had applied this interest in justifying the regulation of express advocacy and its functional equivalent, but in order to justify regulating WRTL's ads, "this interest must be stretched yet another step to ads that are *not* the functional equivalent of express advocacy."[325] In strongly worded opposition to extending the application of this governmental interested yet again, the Court announced, "Enough is enough." The WRTL ads are not equivalent to contributions — they are political speech — and the governmental interest in avoiding *quid pro quo* corruption cannot be used to justify their regulation.[326] The Court also announced that the discussion of issues cannot be suppressed simply because the issues may also be relevant to an election: "Where the First Amendment is implicated, the tie goes to the speaker, not the censor."[327]

While the ultimate impact and aftermath of the Supreme Court's decision in *WRTL II* remains to be seen, application of the federal law prohibiting corporate and labor union treasury funds from being spent on ads that are broadcast 30 days before a primary and 60 days before a general election has been limited. As a result of this ruling, only ads that are susceptible of no reasonable interpretation other than an exhortation to vote for or against a candidate can be regulated. While the Court's ruling was careful not to overrule explicitly its earlier upholding of this portion of the Bipartisan Campaign Reform Act (BCRA) in its 2003 decision, *McConnell v. FEC, WRTL II* seems to indicate that the FEC's ability to regulate the electioneering communication ban has nonetheless been circumscribed.

Conclusion

In the landmark 1976 decision, *Buckley v. Valeo*, the Supreme Court established the constitutional framework for campaign finance regulation and in numerous subsequent decisions, extended its holding. Although it has provided much guidance with regard to the constitutionality of various aspects of campaign finance regulation, the Court's jurisprudence in this area continues to evolve and many questions remain unanswered. While awaiting further guidance from the Court, those proposing or evaluating campaign finance legislation rely on *Buckley* and its progeny for constitutional direction.

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[325] *Id.* at 2672 (emphasis included).

[326] *Id.* at 2673.

[327] *Id.* at 2669.

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