

“Separating Myth From Reality in *McConnell v. FEC*”

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For those of us who had the good fortune to view up close the entire seven-year odyssey of BCRA – from the initial formulation of a drastically-revised McCain-Feingold bill to the defense of the new law in the courts – it was especially heartening to see the Court recognize the care the bill’s authors took to craft constitutional means to achieve a limited set of policy ends. While many critics of the new law see an ambitious and threatening departure in campaign finance regulation and jurisprudence, we are comforted by the Court’s recognition that Congress took measured and considered steps to restore the FECA regime affirmed by *Buckley* that was undermined in recent years by the rise of party soft money and the explosion of electioneering in the guise of issue advocacy.

The majority opinion is notable for its reliance on the evidentiary record assembled by Congress and BCRA’s defendants and its refreshingly pragmatic view of money and politics. That record painted a vivid portrait of a campaign finance law gamed by political actors beyond recognition to the detriment of the integrity of the political process. The Thompson Committee report provided a particularly rich lode of evidence for the Court. Much of that record was not even challenged by the dissenting justices. For example, the Chief Justice acknowledged that party soft money was created by a series of administrative rulings by the Federal Election Commission. And all of the

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justices appeared to accept as obviously true a point sharply contested by the plaintiffs – that issue ads broadcast near an election are designed to elect or defeat candidates.

Given the willingness of the Court to strike down congressional enactments in recent years, the deference to Congress expressed throughout the majority opinion is striking. The Court acknowledged “that in its lengthy deliberations leading to the enactment of BCRA, Congress properly relied on the recognition of its authority contained in *Buckley* and its progeny.”¹ Critics see the Court as failing in its responsibility to hold Congress to a high constitutional standard, particularly insofar as BCRA might be construed to abridge First Amendment freedoms. We see a Court properly recognizing the limited and necessary steps taken by Congress to address a well-documented set of problems in campaign finance and intelligently clarifying the constitutional space within which it may do so.

As political scientists rather than lawyers, we may insufficiently appreciate the doctrinal challenges being raised against the Court’s decision. But in considering four crucial elements of the decision, we find the Court’s reasoning persuasive.

The first concerns the meaning of the governmental interest in preventing the actual or apparent corruption of federal candidates and officeholders. In his dissent Justice Kennedy argued forcefully that *Buckley* established that Congress’ regulatory interest was limited to quid pro quo corruption inherent in contributions made directly to or at the behest of federal officeholders or candidates.

The majority asserted that the Court in *Buckley* and its progeny had not limited that interest to the elimination of cash-for-votes exchanges (classic bribery already covered by criminal statutes) but instead recognized the broader threat of corruption from

¹ *McConnell v. Federal Election Commission*, 124 S.Ct. 619, 657 (2003).

undue influence on an officeholder's judgment. Justice Kennedy's interpretation, the Court argued, would render Congress powerless to address the evidence of "more subtle but equally disquieting forms of corruption" associated with party soft money exposed by the record in this litigation.² "And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation."³ The Court further allowed that Congress had the authority to legislate reasonable anti-circumvention provisions in order to prevent that broader form of corruption. This strikes us as constitutionally defensible as well as patently sensible.

A second key element was the Court's interpretation of the legal status of *Buckley*'s express advocacy standard. While virtually everyone conceded its practical irrelevance to modern campaigning, plaintiffs argued that it nonetheless had constitutional standing. Regulation of any political speech without express words of advocacy of election or defeat, they asserted, would violate First Amendment guarantees. The Court wisely rejected that argument by demonstrating how "a plain reading of *Buckley* makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command."⁴ And it affirmed that Congress had every right to construct an alternative standard that did not suffer from problems of vagueness and overbreadth.

In a third critical finding, the Court found that BCRA's definition of electioneering communications comfortably met that test. The majority saw no need to enter the methodological debate in the record over the proper way to measure the precise

² *Id.* at 666.

³ *Id.* at 666.

⁴ *Id.* at 688.

percentage of ads with no electioneering purpose and therefore inappropriately captured by the new bright-line test. They were content to observe that the record made clear that electioneering communications as defined in BCRA are “the functional equivalent of express advocacy.”⁵ It was sufficient to substantiate that “the vast majority of ads clearly had such a purpose.”⁶ “Far from establishing that BCRA’s application to pure issue ads is substantial, either in an absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion.”⁷ The Court was persuaded by the argument of the defendants that “in the future corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund.”⁸

This rather abrupt affirmation of Title II’s definition and regulation of electioneering communications – which most critics viewed as BCRA’s weakest constitutional link – represents in our view a triumph of experience and pragmatism over rigid ideology and doctrine.

Finally, the Court crucially upheld the longstanding prohibition against corporate and union contributions and expenditures in federal elections. The scant discussion of *Austin* is bracing, but it likely reflects the awkwardness of Justice O’Connor having opposed that decision but now coauthoring an opinion that clearly affirms it. The virtual silence on the constitutional rationale for regulating unions in the same fashion as corporations will no doubt raise some eyebrows. So too will the Court’s breezy

⁵ *Id.* at 696.

⁶ *Id.* at 696.

⁷ *Id.* at 697.

⁸ *Id.* at 696.

affirmation of the Wellstone amendment bringing nonprofit corporations unequivocally into the regulatory net, which required it to read the MCFL exemption into the act. But the bottom line is that the Court properly relied on considerations of *stare decisis*, the evidentiary record, and appropriate deference to Congress to uphold a central component of campaign finance law whose roots were planted almost a century ago.

One final point on the majority and dissenting opinions. We believe the only reasonable alternative to the majority opinion upholding BCRA's twin pillars would have been a complete repudiation of *Buckley* and a judicially-imposed march to a deregulated campaign finance system. Whatever its liabilities, this position has the virtues of simplicity and honesty. Justices Thomas and Scalia have been prepared to take just that step for some time. But Justice Kennedy and Chief Justice Rehnquist – their colleagues in the *McConnell* opposition – clearly are not. They would rely on a narrow reading of *Buckley* and a reversal of *Austin* to overturn all but three provisions of the soft money and electioneering communications parts of the act (those prohibiting solicitation of soft money by federal officeholders and candidates, requiring disclosure of electioneering communications, and treating such communications coordinated with candidates as contributions).

The position embraced by Justice Kennedy and Chief Justice Rehnquist is a recipe for regulatory disaster. It would extend and perpetuate a system that pretends to limit contributions in federal elections but in reality does no such thing. It would render utterly ineffective the effort by Congress to deal with the well-documented abuses of the FECA regime. By endorsing a regulatory approach that would be openly and routinely flouted

by political actors, the Kennedy-Rehnquist alternative would encourage public cynicism and risk a further loss of legitimacy for American democracy.

As welcome as the Court's decision is to us, we don't pretend to know precisely how BCRA will play out in the real world of elections. It will be fascinating to see how political actors adapt to the new rules. But we are struck by how quickly BCRA critics, having lost the argument in the Congress and the courts, are now heralding a parade of horrors that will inevitably follow.

Of course, there is some genuine unease about whether BCRA's balance between speech and political regulation is the appropriate one. But many critics, in our view, are escalating the rhetoric to discredit any future reforms -- from changes in the presidential financing system to reforms of broadcast availability and resources to a restructuring of the Federal Election Commission -- and to lay the groundwork for an eventual move to repeal BCRA.

Throughout the year-plus since BCRA has taken effect, and especially since the Supreme Court's decision, critics, allied with political reporters who are generally cynical about any institutional reform and with the political consultants who were the conduits for and recipients of much of the soft money in the pre-BCRA era, have pursued a series of themes perpetuating myths about the law and its impact.

Ironically, the two themes that have under girded much of the message are to some considerable degree contradictory. On the one hand, this law is "in its own way, as great an attack on American liberty as the terror attacks of September 11, 2001,"⁹ and

⁹ William Goldcamp, "Indifference to Liberty," *Washington Times*, 23 Dec. 2003, A19.

does the greatest damage to liberty in America since the Alien and Sedition Act.¹⁰ On the other hand, the law is so naively designed and filled with loopholes that it is toothless, filled with unintended consequences that undermine the law's intent. Whatever the themes, the attacks are built far more on myth than any reality about what is in the law or what we can detect thus far about its impact. The myths—and an initial assessment of the realities—include:

Myth #1: *BCRA was designed by naive reformers to reduce the amount of money in politics, especially from special interests, and it is doing no such thing.* Of course, the prime proponent of this view is Senator Mitch McConnell. In his response to the Court's eponymous decision, Senator McConnell said, "This law will not remove one dime from politics." The *Washington Times*, in an editorial, said the reforms "are based on a utopian dream that some system can be concocted to make money meaningless in politics."¹¹

Reality: The objective of the new law was not to reduce the amount of money in campaigns, which are of necessity expensive and growing more so, but to break up the nexus among large donors, political parties, and elected officials. What reform did do is to sharply raise hard money limits on donations to candidates and parties even as most soft money (with its unlimited donation base) was eliminated. Reformers doubled hard money limits for individual donations to candidates, sharply raised the annual overall limits on what individuals could give, and created a separate large hard money limit for donations to national party committees -- \$100,000 a cycle for a couple. The shakedown scheme and access peddling that parties and officeholders were using with

¹⁰ From the *McConnell* complaint; Julia Malone, "Bush Signs Campaign Finance Law, Goes Fundraising," Cox News Service, 27 Mar. 2002; and in the words of Wayne LaPierre of the National Rifle Association, as cited in David Von Drehle, "McCain-Feingold Ruling Angers Activists on Both Left and Right," *Washington Post*, 11 Dec. 2003, A1.

¹¹ 15 Dec. 2003, A22.

large donors who had no limits on what they could give appears to have largely disappeared. While the impact on the ground is real and pronounced, it has not been perfect; Rep. Tom DeLay, in particular, has made a move to use a charitable pretext to trade money for access, which is now under vigorous challenge from reform advocates.¹² But in general, money for parties and candidates is coming in a very healthy flow, in a way that has sharply cut the routes of real and perceived corruption.

Myth #2: *BCRA is simultaneously weakening political parties and strengthening interest groups.* Said Republican campaign finance lawyer Benjamin Ginsburg, “The parties are much weaker and the special interest groups are much stronger.” Added Jim Jordan, a former Democratic Senatorial Campaign Committee head, “Independent groups are now much more powerful than the parties.”¹³

Reality: The parties were actually weakened in the soft money era by becoming funding conduits for otherwise large illegal contributions; by concentrating resources in a handful of competitive races while shirking investments to broaden their competitive position in others; and by neglecting their small donors in favor of huge soft money contributors. The large amount of soft money going to the parties was illusory; it largely went right out the door into “issue ads” for and against federal candidates, except for the healthy cut taken by campaign lawyers and consultants, with relatively little going to party-building or grassroots activities.

¹² According to National Public Radio’s All Things Considered, “DeLay’s fund-raising staff has created a new entity called Celebrations For Children Incorporated. This new non-profit group, founded just this past September, drew criticism for its very first act, releasing a brochure on fund-raising events to be held in conjunction with the Republican National Convention this coming summer.” (NPR, January 6, 2004.) The brochure, reminiscent of past fundraising appeals from congressional campaign committees, offered different levels of access to DeLay and other prominent Republican officeholders for a sliding scale of large contributions to his charity. Democracy 21 and other reform organizations challenged this appeal as a violation of tax and campaign finance laws.

¹³ Quoted in Thomas B. Edsall, “Fundraising Specialists, Independent Groups Gain,” *Washington Post*, 11 Dec. 2003, A29.

BCRA has not starved the parties of resources. In fact, the parties are adapting very much in the fashion anticipated by BCRA's proponents. The parties have raised more hard money in the first year of this presidential cycle than hard and soft money combined during the comparable period in the last. Both parties are focusing heavily on small donors, with the Democrats making an unprecedented effort in this regard.

Republicans have a natural fundraising advantage--apart from BCRA--due to their core constituencies and their control of the White House and Congress. Their party committees continue to enjoy an advantage over the Democrats. But a deeper look at the numbers shows that Democrats are not only likely to have the resources they need to compete, but are doing quite well in the era of reform. After one year under BCRA, the DNC, for the first time in its history, closed the year with a major surplus, with over \$10 million cash in hand and no debt. The Party raised over \$12 million in the fourth quarter of 2003; in the fourth quarter of 1999, the last pre-presidential year and a year in which both hard and soft money existed at the national level, the Party collected \$5.5 million. The total hard money raised by the DNC in 2003, \$42 million, is more than fifty percent higher than the hard dollars raised in the comparable year 1999, and nearly as much as the total, hard and soft, raised that year—one in which the Democrats controlled the White House!

Moreover, the Democratic Party has created a sophisticated set of programs to expand its small donor base, and built a centralized voter-contact and fundraising system (called "Demzilla") to expand the donor base among those able to give the maximum. In the process, the DNC increased its direct mail donors from 400,000 to more than 1 million, and raised almost \$32 million in small donations, an 85 percent increase over the

comparable year 1999. Chairman Terry McAuliffe, the architect of this plan, noted, “The fundamental structure of our fundraising apparatus has changed. The average direct mail donation is only \$37.”

The robust financial activities within the Democratic Party are not limited to the DNC. The major Democratic candidates for president have raised nearly as much hard money combined as President George Bush, the most active and prodigious political fundraiser in history. And the path breaking fundraising efforts of Howard Dean over the Internet, bringing tens of thousands of new small donors into the process, shows considerable promise of having long-term benefits for the Democratic Party. Dean has already used this base to provide fundraising openings for competitive Democratic congressional candidates and is working cooperatively with Chairman McAuliffe.

On the surface, the Democrats' congressional campaign committees are being significantly out raised by their Republican counterparts. But a deeper look shows a much more competitive scene; Congressional Republicans rely much more heavily than their Democrats' counterparts on direct mail fundraising, which is extremely expensive. Take out the fundraising costs and look at cash on hand, and the numbers are very different. Because the Internet is nearly costless as a fundraising tool, it has the potential for Democrats to develop and exploit funding from a vast new base of donors.

In sum, both parties will be in a financial position to play on a larger field of House and Senate races and to increase their grass roots mobilization efforts. Indeed, 2004 is shaping up as an election in which a premium is put on voter identification and mobilization.

While independent groups, including the so-called "527s," are active and operating (as the name suggests and the law requires) independently of the parties, much of the effort on the part of liberal groups like Americans Coming Together and the Partnership for America's Families is also directed at voter mobilization and get-out-the vote efforts, which is less a challenge to the parties or a mechanism that will undermine them than a complementary set of activities to engage more Americans politically. Moreover, a clearheaded look shows that the amount these groups actually have raised is far behind what the parties have accomplished. Finally, serious legal questions exist about the ability of these groups – specifically political committees whose avowed purpose is to influence federal elections – to accept "soft-money" contributions.

As for corporations, anecdotal evidence suggests that much of their soft money appears destined to stay in corporate treasuries. Corporate officials we have talked to say that their soft money donations were often coerced or given as access insurance to counter their rivals. They show no signs of a burning desire to give the money to independent groups; most seem delighted to keep it in their corporate coffers. To be sure, many corporations are now turning their efforts to expanding their executives' involvement in political action committees—an expansion of individual participation in politics through a common interest, which we, along with most reformers, consider legitimate and in no way either an unintended consequence or pernicious effect of reform.

Myth #3: *The law is an incumbent-protection act that will further damage challengers.* Said James Bopp, general counsel at the James Madison Center for Free Speech, the law “is an orgy of incumbent protection.”¹⁴

Reality: In 1976 and 1978—the first two elections run under the post-*Buckley* hard money regime and the two just before party soft money was created by the Federal Election Commission—the reelection rate for House incumbents was 95.8 percent and 93.7 percent, respectively; for Senate incumbents, it was 64 percent and 60 percent. In 2000 and 2002, the most recent elections fought under the soft-money system championed by reform critics, the reelection rate for House incumbents was 97.8 percent and 95.9 percent; for Senate incumbents, it was 79.6 percent and 88.9 percent. So much for the salutary role soft money and so-called “issue ads” run by parties and groups played in helping challengers!

While BCRA was not explicitly designed to increase competition in congressional elections, several of its provisions may contribute modestly to that objective. Perhaps its most significant boost to challengers will be its doubling of hard-money individual contribution limits, which, according to the Campaign Finance Institute, will benefit challengers more than incumbents. In addition, with parties no longer able to concentrate resources in a handful of races with soft-money financed issue ads, it is likely that more challengers will receive party assistance. Moreover, it is clear that the explosion of soft money-financed television ads by parties and outside groups both crowded out

¹⁴ David Von Drehle, “McCain-Feingold Ruling Angers Activists on Both Left and Right,” *Washington Post*, 11 Dec. 2003, A1.

candidates' messages and sharply increased their broadcast costs. For challengers, getting over the threshold of recognition that all incumbents have is crucial, and higher television costs and greater cacophony make that threshold painfully higher. Reducing ad demand by parties will help challengers by lowering costs and freeing up more of the most potent time slots for candidate ads close to the election.

Myth #4: *Citizens and their surrogate groups will lose their ability to speak freely and critically about the government and their elected representatives close to an election.* Nat Hentoff, in a post-*McConnell* column, said that citizens who rely on groups like the National Rifle Association or the ACLU as surrogates to amplify their views through “issue ads,” would be stifled because “the new ‘reform’ law forbids such ‘electioneering communications’ on television or radio that refer to specific candidates for federal office within 30 days before a primary or 60 days before a general election.”¹⁵

Reality: Never mind that throughout its history before the passage of BCRA, the ACLU never had occasion to broadcast ads now caught in the net of electioneering communications. No speech is banned by the new law—not a single ad nor any word or combination of words would be or has been muzzled. The only new requirements relate to the disclosure and sources of funding for television and radio ads close to an election that feature federal candidates and that are targeted to the races in which these candidates are running. The Court accepted the voluminous research that showed the overwhelming majority of these ads were indeed aimed at electing or defeating candidates, and accepted

¹⁵ Nat Hentoff, “The Supreme Court's double standard; Justice Scalia's vote for the First Amendment,” THE WASHINGTON TIMES, Monday, December 22, 2003, p. A23.

the congressional provisions that treated the ads in a fashion parallel to campaign ads that are paid for with hard money.

As a January 7, 2004 AP story by Liz Sidota noted, ad spots by independent groups “still fill the airwaves” in both Iowa and New Hampshire before their presidential caucuses and primary. Some of the ads do not mention specific candidates, while others are financed through hard money.¹⁶ Kathleen Hall Jamieson of the Annenberg Public Policy Center noted of this phenomenon, “It shows that hard money lives.”¹⁷ As for the vitality of interest groups, consider the following comments by the National Rifle Association’s Wayne LaPierre. Noting the NRA would shift some energy to avenues other than television advertising and would expand efforts to raise hard money through its political action committee, LaPierre said, “We’re going to be heard, I promise that. We have new lines on the football field, but the game is still going to be played.”¹⁸

Conclusion. With a year’s experience under BCRA to draw on, there is no appreciable evidence that the political landscape is pocked with the debris of shattered parties, shackled and muted groups and individuals, or any other deleterious developments in the campaign funding system or the election process. Instead, there are multiple signs of revitalized parties, expanded grassroots activities, along with plenty of television and radio ads. The ads, to be sure, seem to be qualitatively different, possibly because of a little-noticed provision of BCRA originated by Rep. David Price (D-NC) called “Stand By Your Ad.” As candidates take more public responsibility for the ads

¹⁶ Liz Sidoti, “Issue Ads Continue Despite New Limits,” Associated Press, Wednesday, January 7, 2004

¹⁷ Ibid.

¹⁸ Quoted in Glenn Justice, “In New Landscape of Campaign Finance, Big Donations Flow to Groups, Not Parties,” The New York Times, Thursday, September 11, 2003, p. 41.

they run, we might see fewer petty personal attacks. Only time and systematic research will tell.

Money has neither dried up nor overwhelmed the process; new hard money, especially from a substantially expanded base of small donors, is coming in at a very healthy rate. There are few signs of the open bazaar selling officeholders' access in return for campaign cash. This is not a brand new world of campaign finance and political activity, but something reminiscent of the political world of the late 1970s and 1980s. Contrary to the judgment of some critics and in keeping with the view of the majority on the Court, we believe this is a world which reflects modest adjustments in the campaign finance regime under *Buckley*, not a world in which the *Buckley* structure will become irrelevant or unrecognizable. It also reflects the mature and sober view of reformers that no campaign finance regime will go long without the need for further incremental adjustments.

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