

BIPARTISAN CAMPAIGN REFORM ACT

On March 27, 2002, President George W. Bush signed into law¹ the most sweeping reform of the federal campaign finance system in twenty-five years. The Bipartisan Campaign Reform Act of 2002 (“BCRA”),² sponsored by Representatives Martin Meehan (D-Mass.) and Christopher Shays (R-Conn.),³ has at its core two prohibitions. First, the BCRA bans the solicitation, receipt, transfer, donation and spending of soft money by political parties for federal elections.⁴ Second, the BCRA prohibits corporations and unions from using treasury money to pay for “electioneering communications,” which are candidate advertisements within sixty days of a general election and thirty days of a primary election.⁵

The BCRA also includes several other provisions that modify the structure of the campaign finance system. The Act increases hard money limits on permissible contributions by individual donors from \$1,000 to \$2,000 per candidate per election,⁶ from \$20,000 to \$25,000 per national

¹ See Press Release, White House Office of the Press Secretary, President Signs Campaign Finance Reform Act (Mar. 27, 2002), available at <http://www.whitehouse.gov/news/releases/2002/03/20020327.html>.

² Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (to be codified in scattered sections of 2 U.S.C.).

³ Representatives Meehan and Shays introduced the bill as H.R. 2356, 107th Cong. (2001). The Senate version of the bill was introduced by Senators John McCain (R-Ariz.), Russell Feingold (D-Wis.), and seventeen other Senators as S. 27, 107th Cong. (2001). See 147 CONG. REC. S298 (daily ed. Jan. 22, 2001) (statement of Sen. McCain). Senators McCain and Feingold had introduced a bipartisan campaign reform bill in every congressional session since 1995. See 148 CONG. REC. S2104 (daily ed. Mar. 22, 2002) (statement of Sen. Feingold). Not until 1997, however, did soft money and issue advertisements become the focus of the legislation. See 144 CONG. REC. S10,067 (daily ed. Sept. 9, 1998) (statement of Sen. Feingold) (stating that in 1996, parties stopped using soft money exclusively to get out the vote, and began running issue ads designed to support particular candidates, leading to changes in the legislation’s focus).

⁴ Bipartisan Campaign Reform Act of 2002 § 101. Soft money is defined as “funds raised and/or spent outside the limitations and prohibitions” of the Federal Election Campaign Act, 2 U.S.C. §§ 431–455 (2000). See FED. ELECTION COMM’N, TWENTY YEAR REPORT, ch. 3 (1995), available at <http://fecweb1.fec.gov/pages/20year.htm>. Hard money is contributions received in accordance with FECA guidelines. See generally *id.* For a more thorough explanation of soft money, see *infra* text accompanying notes 56–65.

⁵ Bipartisan Campaign Reform Act of 2002 § 203. See *infra* notes 76–90 for a more detailed analysis of this provision.

⁶ Bipartisan Campaign Reform Act of 2002 § 307(a)(1). Senator Dianne Feinstein (D-Cal.) argued that this increase “will reinvigorate individual giving . . . reduce the incessant need for fund-raising . . . give candidates and parties the resources they need to respond to independent campaigns . . . [and] reduce the relative influence of PACs.” 148 CONG. REC. S2154 (daily ed. Mar. 20, 2002) (statement of Sen. Feinstein). While \$1,000 per donor may seem insignificant, when added up over thousands of donors, the effect becomes more dramatic. See generally *id.* Some proponents of campaign finance reform have criticized this provision for that very reason, claiming that the increase in hard money will only increase the disparity between the donations of the rich and the poor. See Press Release, National Association of State Public Interest Research Groups, Lawsuit Challenges McCain-Feingold’s Hard Money Increases (May 7, 2002), available at <http://www.pirg.org/democracy/democracy.asp?id2=6885>.

party committee per year,⁷ and from \$5,000 to \$10,000 per state or local party committee per year.⁸ In addition, the Act increases aggregate limits on hard money contributions by individuals from \$25,000 per year to \$95,000 per every two years, of which only \$37,500 may be contributed to candidates or candidates' committees.⁹ The BCRA also clarifies and amends federal election law by prohibiting any government employee or official from fundraising on federal property,¹⁰ fraudulently soliciting funds,¹¹ or receiving contributions from minors.¹² Finally, the Act contains further provisions that strengthen the ban on foreign contributions,¹³

⁷ Bipartisan Campaign Reform Act of 2002 § 307(a)(2). Senator Mitch McConnell (R-Ky.) noted that, without soft money in 2001, "the total cash on hand for the six national party committees would have dropped from \$66 million down to \$6 million: For the three national Republican committees it would drop from \$56 million down to \$19 million; and for the three national Democratic Party committees, from \$10 million down to a debt of \$13 million." 148 CONG. REC. S2121 (daily ed. Mar. 20, 2002) (statement of Sen. McConnell). The increase in limits on hard money contributions to national party committees provides a small pathway through which the committees can regain funds. *See* 148 CONG. REC. S2153-54 (daily ed. Mar. 20, 2002) (statement of Sen. Feinstein).

⁸ Bipartisan Campaign Reform Act of 2002 § 102. Since national party committees will lose a significant portion of their funds, they will be less able to contribute to state and local party operations. *See* 148 CONG. REC. S2121 (daily ed. Mar. 20, 2002) (statement of Sen. McConnell). This provision will increase the sum of direct, hard money contributions to state and local parties. *See* 148 CONG. REC. S2153-54 (daily ed. Mar. 20, 2002) (statement of Sen. Feinstein).

⁹ Bipartisan Campaign Reform Act of 2002 § 307. Senator Fred Thompson (R-Tenn.) introduced a version of this provision as an amendment to the Senate's bill. *See* 147 CONG. REC. S3005-06 (daily ed. Mar. 28, 2001). Senator Feinstein argued, as she did with the increased individual contribution limit, *see supra* note 6, that this change will reduce the influence of political action committees ("PACs") by permitting individuals and national party committees to contribute more money to individual candidates. *See* 148 CONG. REC. S2154 (daily ed. Mar. 20, 2002) (statement of Sen. Feinstein).

¹⁰ Bipartisan Campaign Reform Act of 2002 § 302. While current law prohibits solicitation and receipt of contributions in one's federal office or on a navy yard, fort, or arsenal, 18 U.S.C. § 607 (2000), the BCRA amends federal law to clarify that the President and Vice President are subject to this ban as well. Bipartisan Campaign Reform Act of 2002 § 302.

¹¹ Bipartisan Campaign Reform Act of 2002 § 309. Senator Bill Nelson (D-Fla.) proposed this amendment in order to give the Federal Election Commission the power to prosecute individuals who misrepresent themselves as agents of a candidate. *See* 147 CONG. REC. S3122 (daily ed. Mar. 29, 2001) (statement of Sen. Nelson).

¹² Bipartisan Campaign Reform Act of 2002 § 318. Senator McCain argued for inclusion of this provision, citing studies that indicated

individuals are evading contribution limits by directing their children to make contributions. [For example,] [a]ccording to a Los Angeles Times study, individuals who listed their occupation as student contributed \$7.5 million to candidates and parties between 1991 and 1998. Upon further investigation, some of these contributions were made by infants and toddlers. In another instance, the paper found that two high school sisters contributed \$40,000 to the Democratic Party in 1998. When asked about the contribution, the high school sophomore answered that it was a "family decision."

148 CONG. REC. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

¹³ Bipartisan Campaign Reform Act of 2002 § 303. According to Senator Christopher Bond (R-Mo.), this provision is a reaction against attempts to circumvent the old ban

augment disclosure requirements,¹⁴ mandate studies of state “Clean Elections” policies,¹⁵ and increase contribution limits for those donating to candidates whose opponents spend large sums of their own money.¹⁶

While all of the BCRA’s provisions are important, this Recent Development will focus on the two most influential and controversial sections of the BCRA: the soft money ban and the limits on electioneering communications. It is no coincidence that these two sections are the primary focus of pending litigation challenging the constitutionality of the BCRA.¹⁷ Over the past seven years, the use of the campaign practices that these two provisions address has grown dramatically, and the primary purpose of the BCRA is to eliminate these practices.¹⁸

against foreign contributions by channeling them through United States citizens, including religious figures such as nuns. *See* 147 CONG. REC. S3187 (daily ed. Mar. 30, 2001) (statement of Sen. Bond).

¹⁴ Bipartisan Campaign Reform Act of 2002 §§ 306, 501–504. This portion of the legislation calls for the Federal Election Commission to promulgate standards for software to post receipts and disbursements on the Internet, and to maintain a particular Internet site for this purpose. *Id.*

¹⁵ *Id.* § 310. The U.S. Comptroller General must study and report within one year on the Clean Elections policies of Arizona and Maine. *Id.* More specifically, he must study the number of individuals who accepted Clean Elections funds, the number of incumbents compared to the number of challengers who took the funds, the rate of success of those who took funds, and the total number of races that included a Clean Elections candidate. *Id.*

¹⁶ *Id.* §§ 304, 316, 319. Since the Supreme Court has found unconstitutional congressional limits on a candidate’s spending from his own personal funds, *see Buckley v. Valeo*, 424 U.S. 1, 143 (1976), this “millionaire provision” permits increased contribution limits for candidates facing wealthy opponents. *See* Bipartisan Campaign Reform Act of 2002 §§ 304, 316, 319. Senator Richard Lugar (R–Ind.) justified this provision by arguing that

parties now spend a great deal of energy recruiting millionaires to run for office, because it is the simplest way to apply millions of dollars—sometimes tens of millions—to a political race virtually free of regulation. As more restraints on fundraising are added, the incentive to recruit millionaire candidates increases. . . . The millionaires amendment in this bill will not eliminate the advantage of wealthy candidates, but it will substantially reduce the current incentives that place personal wealth near the top of qualifications for candidacy.

148 CONG. REC. S2148 (daily ed. Mar. 20, 2002) (statement of Sen. Lugar).

¹⁷ Senator McConnell, the National Rifle Association, and the American Federation of Labor, among others, have filed complaints alleging that the BCRA is unconstitutional. *See* *McConnell v. Fed. Election Comm’n*, No. 02-582 (D.D.C. filed Mar. 27, 2002). Senator McConnell’s complaint charges, *inter alia*, that the BCRA’s restrictions on soft money and electioneering communications violate First Amendment rights to free speech and free association and the Equal Protection component of the Due Process Clause of the Fifth Amendment. *See generally* Second Amended Complaint for Declaratory and Injunctive Relief, *McConnell v. Fed. Election Comm’n*, No. 02-0582 (D.D.C. filed May 7, 2002), available at <http://www.law.stanford.edu/library/campaignfinance/mcconnell-v-feccomplaint50702.pdf>. The complaint seeks injunctive relief to prevent the enforcement of the BCRA’s major provisions. *See id.* at 50. For a discussion of whether the Supreme Court will hold that the BCRA violates the First Amendment, see *infra* text accompanying notes 103–195.

¹⁸ *See* 148 CONG. REC. S2104 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold).

The Supreme Court has recognized the reduction of corruption and the appearance of corruption as compelling governmental interests.¹⁹ Congress is charged with legislating in the best interests of the American public, but when the interests of the public conflict with the interests of a large donor, legislators face a conflict of interest.²⁰ Campaign finance legislation has tried to eliminate the possibility of campaign contributions leading to a *quid pro quo* for more than a century.²¹ Despite these attempts, new means for money to influence campaigns like soft money and sham issue advocacy²² have continued to arise.²³ Without any limits on these activities, corruption or the appearance of corruption could taint congressional action.²⁴ The BCRA's bans on soft money and corporate and union electioneering communications are designed to reduce these potentially corrupting influences.²⁵ Since donations of soft money both express support for a party and express an interest in associating with other members of that party, the First Amendment rights to free speech and association are triggered. The provisions limiting corporate and union electioneering communications also trigger First Amendment concerns. The BCRA, however, successfully walks the fine line between effective regulation and protected expression because the Act allows for expressions of loyalty to a party through other means, and because, in the electioneering context, the Act focuses on reducing corporate and union influence on federal elections. For these reasons, the BCRA's core provisions banning soft money and electioneering communications are both constitutional and strong policy.

The legal framework for regulating campaign finance has long been a divisive issue in the United States.²⁶ The first major pieces of campaign

¹⁹ See *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (holding that corruption and the appearance of corruption are "constitutionally sufficient justification[s]" for FECA's contribution limits).

²⁰ See 148 CONG. REC. H352 (daily ed. Feb. 13, 2002) (statement of Rep. Shays) ("The candidates know who makes these huge contributions and what these contributors expect. Candidates not only solicit these funds themselves, they meet with big donors who have important issues pending before the government; and sometimes, the candidates' or the party's position appear to change after such meetings.").

²¹ See *infra* text accompanying notes 27–63.

²² The term "sham issue advocacy" is commonly used to refer to advertisements that purport solely to advocate a particular issue, but in the process endorse a candidate for office. See, e.g., 148 CONG. REC. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

²³ See 148 CONG. REC. H349 (daily ed. Feb. 13, 2002) (statement of Rep. Robert Borski (D-Pa.)).

²⁴ See 148 CONG. REC. H351–53 (daily ed. Feb. 13, 2002) (statement of Rep. Shays) (citing several examples where large soft money contributions posed potential conflicts of interest for members of Congress).

²⁵ See 148 CONG. REC. H349 (daily ed. Feb. 13, 2002) (statement of Rep. Borski).

²⁶ See generally Anthony Corrado, *History of Federal Campaign Finance Regulation*, in NEW CAMPAIGN FINANCE SOURCEBOOK 1, 1–25 (forthcoming 2002), (explaining in detail the statutory history of campaign finance regulation), available at <http://www.brook.edu/dybdocroot/gs/cf/sourcebk01/HistoryChap.pdf>.

finance legislation responded to the “spoils system,” in which workers received jobs from political parties and in return paid a percentage of their salary to the party.²⁷ Without employees to fund them, political parties looked to corporations to increase their contributions.²⁸ The Tillman Act of 1907 subsequently prohibited national banks or federal corporations from donating to political candidates and also prohibited any state bank or corporation from donating to federal candidates.²⁹ In 1943, Congress expanded the Tillman Act to prohibit contributions from labor unions.³⁰ Unions responded by creating political action committees (“PACs”), groups that collected money apart from union dues and used those funds to finance political activity, raising over \$1.4 million for use in federal elections in their first year.³¹ After that point, Congress passed little legislation relevant to campaign finance until 1971.

In 1971, Congress passed the Federal Election Campaign Act (“FECA”),³² primarily to account for the rising costs of campaign advertisements by limiting the amount of money federal candidates could spend on advertising as a whole, and on radio and television advertising specifically.³³ FECA also designated officials to collect quarterly reports from candidates of their contributions and expenditures.³⁴ While these reforms were substantial, in the wake of Watergate, Congress further expanded the regulations.³⁵ The 1974 amendments to FECA³⁶ set specific

²⁷ See *id.* at 1–2. The first major piece of campaign finance legislation prohibited government employees from requesting these payments, called assessments, from naval employees. See Naval Appropriations Act of 1867, ch. 172, 14 Stat. 489, 492. The Pendleton Act of 1883 further limited the spoils system by requiring government employees to pass a competitive exam and prohibiting solicitation of donations from these employees. See Pendleton Act of 1883, ch. 27, 22 Stat. 403. In 1939, the Hatch Act expanded the scope of the Pendleton Act to prohibit solicitation of funds from government workers in New Deal created programs. See Hatch Political Activities Act, ch. 410, 53 Stat. 1147 (1939). See also Corrado, *supra* note 26, at 6–7.

²⁸ See Corrado, *supra* note 26, at 2 (stating that corporations increased their contributions to \$50,000 or more after the Naval Appropriations Act).

²⁹ See Tillman Act of 1907, ch. 420, 34 Stat. 864.

³⁰ See War Labor Disputes Act, ch. 144, §§ 9–10, 57 Stat. 163, 167–68 (1943) (prohibiting union contributions until six months after World War II ended); Labor Management Relations Act of 1947, ch. 120, § 304, 61 Stat. 136, 159–60 (codified at 2 U.S.C. § 441(b)) (establishing ban without sunset provision).

³¹ See Corrado, *supra* note 26, at 8.

³² Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431–455).

³³ See Corrado, *supra* note 26, at 10. FECA limited a candidate’s overall media spending to the greater sum of \$50,000 or \$.10 times the voting-age population. Federal Election Campaign Act of 1971 § 104(a)(1)(A). The law also limited a candidate’s radio and television advertising to no more than sixty percent of his overall media spending. *Id.* at § 104(a)(1)(B).

³⁴ See Federal Election Campaign Act of 1971 § 304.

³⁵ See Corrado, *supra* note 26, at 11 (listing some of the campaign finance abuses by the Nixon campaign). Nixon’s abuses included maintaining at least three undisclosed slush funds that contained millions of dollars and receiving corporate contributions. See *id.* (citing HERBERT E. ALEXANDER, FINANCING THE 1972 ELECTION 39–76 (1976)).

³⁶ Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat.

limits on contributions: the legislation limited contributions by individual donors to \$1,000 per candidate and \$25,000 total; contributions by PACs to \$5,000 per candidate; and expenditures by individuals or groups on behalf of a candidate to \$1,000 per year per candidate.³⁷ The amendments also replaced limits on advertising in specific media with a general limitation on a campaign's total expenditures.³⁸ Finally, the amendments required disclosure statements from both candidates and individuals detailing contributions and expenditures.³⁹ To enforce this new regulatory framework, the FECA amendments created the Federal Election Commission ("FEC"), a six-person panel charged with reviewing disclosure documents, promulgating rules and regulations concerning campaign practices, and seeking civil injunctions to ensure compliance with the limits.⁴⁰ Finally, the amendments provided funding for presidential candidates through an optional tax distribution that had been established in the Internal Revenue Code.⁴¹

In 1976, the Supreme Court considered the constitutionality of FECA and its amendments in *Buckley v. Valeo*.⁴² After a thorough analysis of FECA's provisions, the Court upheld most of the law, but ruled that its limits on candidates' expenditures and on "independent" expenditures by individuals or groups impermissibly infringed First Amendment rights.⁴³ To arrive at this holding, the Court distinguished between "contributions," "coordinated expenditures," and "independent expenditures."⁴⁴ Under the *Buckley* holding, Congress (or states) may limit the amount of contributions and coordinated expenditures, since such limits further a compelling governmental interest in reducing corruption.⁴⁵ Congress may

1263 (codified as amended in scattered sections of 2 U.S.C.).

³⁷ See *id.* § 101. These limits were much more comprehensive than those of the original FECA, which merely prohibited corporate and union contributions and limited the amount a candidate or his family could spend on his own campaign. See Federal Election Campaign Act of 1971 § 608. The 1974 Amendments preserved both of these provisions. See Federal Election Campaign Act Amendments of 1974 §§ 101(b)(1)(a), 103.

³⁸ Compare Federal Election Campaign Act of 1971 § 104(a) (limiting the amount a candidate may spend on communications media), with Federal Election Campaign Act Amendments of 1974 § 101(c)(1) (limiting a candidate's expenditures).

³⁹ See Federal Election Campaign Act Amendments of 1974 § 201.

⁴⁰ See *id.* § 208.

⁴¹ See *id.* § 403 (appropriating to the Presidential Election Campaign Fund an amount equal to that designated for the fund by individual taxpayers both before and after the Amendments took effect).

⁴² 424 U.S. 1 (1976).

⁴³ *Id.* at 143.

⁴⁴ *Id.* at 47. The Court defines a contribution as a "general expression of [financial] support of a candidate and his views . . ." *Id.* at 21. Independent expenditures are expenditures made by individuals or groups that were not "authorized or requested" by the candidate or an authorized agent. *Id.* at 37. Coordinated expenditures are "expenditures controlled by or coordinated with the candidate and his campaign . . . [that] are treated as contributions rather than expenditures under the Act." *Id.* at 46.

⁴⁵ *Id.* at 58–59.

not, however, limit the amount of independent expenditures without unduly treading on First Amendment rights.⁴⁶

In the process of striking down FECA's restrictions on independent expenditures, the Supreme Court in *Buckley* also announced a general principle that election laws that restrict speech must be construed narrowly to avoid unconstitutional vagueness.⁴⁷ The Court found that unless it were "to clearly mark the boundary between permissible and impermissible speech,"⁴⁸ vaguely worded statutes could result in the regulation of "public discussion of public issues that are also campaign issues"⁴⁹ According to the Court, the only way to prevent all political speech from potential restriction by FECA was to read FECA's scope "as limited to communications that include explicit words of advocacy of election or defeat of a candidate."⁵⁰ If FECA were not so construed, it could be read to cover all forms of issue advocacy, making it facially invalid on vagueness grounds.⁵¹ Applying this construction to FECA's disclosure requirements, the Court found the requirements constitutional, but only for those contributions and expenditures involving express advocacy.⁵²

Congress amended FECA in 1976 to accommodate the framework established in *Buckley*, reinstating spending limits only for those presidential candidates who opted to take public funds for their campaigns,⁵³ and limiting the amount an individual could contribute to a PAC to \$5,000 per year and to a national party committee to \$20,000 per year.⁵⁴

⁴⁶ *Buckley*, 424 U.S. at 58–59.

⁴⁷ *See id.* at 40–44.

⁴⁸ *Id.* at 41.

⁴⁹ *Id.* at 43 (quoting *Buckley v. Valeo*, 519 F.2d 821, 875 (D.C. Cir. 1975)).

⁵⁰ *Id.* at 43.

⁵¹ *Id.* at 44. While the Court does not use the term "issue advocacy," it gives a rough definition of the kind of speech that is not express advocacy, and thus is beyond congressional regulation: "[f]unds spent to propagate one's views on issues without expressly calling for a candidate's election or defeat are thus not covered." *Id.*

⁵² *See id.* at 60–84. The *Buckley* Court found that FECA's disclosure requirements furthered compelling governmental interests in informing the electorate and preventing corruption in the political process. *See id.*

⁵³ *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, sec. 112, § 320, 90 Stat. 475, 488 (1976) (codified at 2 U.S.C. 441a(b)) (establishing presidential campaign expenditure limits for publicly funded candidates). The Supreme Court had indicated in *Buckley* that it would treat such an opt-in program as a voluntary limitation on a candidate's speech. *See Buckley*, 424 U.S. at 57. The *Buckley* Court reasoned that

Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.

Id.

⁵⁴ Federal Election Campaign Act Amendments of 1976, sec. 112.

The amendments also increased disclosure requirements to ensure greater accuracy in the reporting of independent expenditures.⁵⁵

In 1979, Congress further amended FECA⁵⁶ to permit political parties to spend unlimited amounts on grass-roots activities, expanding the role of unregulated “soft money” contributions, which are contributions made by individuals to political parties that are outside the scope of FECA.⁵⁷ The 1979 Amendments changed the legal definition of “contribution” so that it would not include amounts that parties could spend on certain grass-roots political activities.⁵⁸ This change in definition responded to financial concerns expressed by state and local party leaders by greatly expanding a party’s ability to make use of unregulated contributions.⁵⁹

While this provision largely lay dormant for more than a decade, relegated to its initial purpose of facilitating local get-out-the-vote activities, both parties began large soft money drives in the mid-1990s.⁶⁰ Soft money spent by parties grew from \$86 million in 1992, to \$262 million in 1996, to \$495 million in 2000.⁶¹ This unlimited party spending permitted corporations, unions, individuals, and other interested entities to evade contribution limits by channeling money through political parties, potentially leading to a *quid pro quo*.⁶² Concern over this growth in campaign spending outside the limits established by FECA was a major impetus for the passage of the BCRA.⁶³

The BCRA bans the use of soft money by political parties in federal elections, providing that “[a] national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution,

⁵⁵ *Id.* sec. 104.

⁵⁶ See Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, sec. 101, § 301, 93 Stat. 1339, 1342–44 (codified at 2 U.S.C. § 431 (2000)).

⁵⁷ See generally FED. ELECTION COMM’N, *supra* note 4, at ch. 3.

⁵⁸ Federal Election Campaign Act Amendments of 1979 § 101(8)(B). Following the 1979 FECA Amendments, state and local parties were permitted to use soft money to engage in a variety of grass-roots activities, including mailing out sample ballots to supporters, printing campaign materials (such as signs and buttons) for use “in connection with volunteer activities” on behalf of party candidates, and sponsoring get-out-the-vote and voter registration efforts on behalf of presidential candidates. Federal Election Campaign Act of 1971, 2 U.S.C. 441a(b)(8)(B) (2000). See also FED. ELECTION COMM’N, *supra* note 4, at ch. 3.

⁵⁹ See Corrado, *supra* note 26, at 17. Soft money may be used for get-out-the-vote drives, voter registration, bumper stickers, buttons, stickers, brochures, and practically every mechanism for increasing name recognition except for print or broadcast advertising. See *id.*

⁶⁰ See 148 CONG. REC. S2104 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold).

⁶¹ *Id.*

⁶² See *id.*

⁶³ See *id.* (stating that in 1997, after the explosion of soft money use in the 1996 elections, banning soft money became the primary focus of congressional efforts to reform the campaign finance system); 148 CONG. REC. H351–52 (daily ed. Feb. 13, 2002) (statement of Rep. Shays).

donation, or transfer” of funds outside of the hard money limits set by FECA.⁶⁴ The BCRA also prohibits state and local party committees from using soft money for supporting get-out-the-vote campaigns, for purchasing voter identification lists, and for conducting other local activities for federal candidates.⁶⁵ Sponsors of the Act argued that this extra limitation is necessary because federal candidates could otherwise avoid the effects of federal contribution limits by benefiting from large soft money expenditures by state and local parties.⁶⁶ The BCRA’s soft money provisions are thus designed to ensure that federal candidates are unable to use unregulated soft money contributions in their campaigns.

Another area of campaign finance law that became more frequently exploited in the 1990s was the unregulated broadcasting of issue advertisements that were designed to favor but not explicitly endorse a particular candidate.⁶⁷ These advertisements may be sponsored by political parties using soft money, or by private individuals or groups making independent expenditures.⁶⁸ In *Buckley*, the Supreme Court held that issue advertisements made as independent expenditures constitute highly expressive messages, triggering First Amendment strict scrutiny.⁶⁹ In distinguishing between issue advocacy and express advocacy,⁷⁰ the Court suggested that express advocacy can be identified by the language it contains: express advocacy includes “explicit words of advocacy of election or defeat of a candidate” such as “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” or “reject.”⁷¹ Some pundits consider even the following advertisement issue advocacy under the *Buckley* test because it lacks any “magic words”: “Senate candidate Winston Bryant’s budget as attorney general increased 71 percent. Bryant has taken taxpayer-funded junkets to the Virgin Islands, Alaska and Arizona. And spent about \$100,000 on new furniture Winston Bryant: government waste, political junkets, soft on crime.”⁷² The Court, by interpreting FECA to require disclosure of only express advocacy and not issue advocacy,⁷³ has permitted corporations to use money to fund

⁶⁴ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 101, 116 Stat. 81, 82 (to be codified at 2 U.S.C. § 323).

⁶⁵ *Id.* § 101(b).

⁶⁶ See 148 CONG. REC. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (“We have authority to extend the soft money reforms to the State and local level where it is necessary, as it is here, to protect the integrity of Federal elections.”).

⁶⁷ See 148 CONG. REC. S2101 (daily ed. Mar. 20, 2002) (statement of Sen. Barbara Boxer (D-Cal.)).

⁶⁸ See generally 148 CONG. REC. S2098 (daily ed. Mar. 20, 2002) (statement of Sen. Paul Wellstone (D-Minn.)).

⁶⁹ *Buckley v. Valeo*, 424 U.S. 1, 43–44 (1976).

⁷⁰ See *supra* text accompanying notes 50–51.

⁷¹ *Buckley*, 424 U.S. at 44 n.52.

⁷² Seth P. Waxman, Editorial, *Free Speech and Campaign Reform Don’t Conflict*, N.Y. TIMES, July 10, 2002, at A21.

⁷³ See *supra* text accompanying note 52.

commercials that undermine legal restrictions on corporate campaign expenditures.⁷⁴ Corporations, along with unions, political parties, and other groups, have been able to take advantage of this ambiguity in the law to spend unlimited amounts of money on advertisements in support of a candidate as long as they avoided the magic words of express advocacy.⁷⁵

The BCRA responds to the problem of unregulated issue advocacy by prohibiting corporations and unions from sponsoring “electioneering communications” and placing disclosure requirements on individuals who sponsor “electioneering communications.”⁷⁶ The BCRA prohibits the funding of “electioneering communications” by corporations, trade associations, and labor organizations from the group’s treasury money within sixty days of a general election and thirty days of a primary.⁷⁷ Meanwhile, nonprofit corporations that organize under Internal Revenue Code Section 527 to promote a particular issue are exempt from the electioneering communications provisions.⁷⁸

The effect of these provisions hinges on the Act’s definition of “electioneering communication” as

any broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office; is made within 60 days before a general, special, or runoff election for the office sought by the candidate; or 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and . . . is targeted to the relevant electorate.⁷⁹

⁷⁴ See 148 CONG. REC. S2098 (daily ed. Mar. 20, 2002) (statement of Sen. Wellstone). See also *supra* text accompanying notes 29–30.

⁷⁵ See 148 CONG. REC. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (arguing that “the sham issue ad subterfuge . . . will continue unless Congress draws a more accurate line between campaign ads and issue ads”). While these specific examples indicate that “magic words” usually must be present for an advertisement to constitute express advocacy, one subsequent Supreme Court decision found a pamphlet with pictures of pro-life candidates to be express advocacy despite the pamphlet’s lack of magic words. See *Fed. Election Comm’n v. Mass. Citizens for Life*, 479 U.S. 238, 249–50 (1986) (holding that a pamphlet with pictures of pro-life candidates and statements urging citizens to vote for pro-life candidates was functionally express advocacy).

⁷⁶ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201, 116 Stat. 81, 88 (to be codified at 2 U.S.C. § 434).

⁷⁷ See *id.* § 203.

⁷⁸ See *id.* But see *id.* § 101 (prohibiting national, state, district, or local political parties from soliciting money or from sending donations to Section 527 organizations). Combined, these provisions suggest that parties cannot use Section 527 organizations as a front for collecting unlimited funds, but such organizations are still free to make independent expenditures advocating their positions.

⁷⁹ *Id.* § 201(3)(A)(i).

This definition potentially strays into areas of speech that the *Buckley* Court was concerned with protecting when it held issue advocacy to be off-limits from congressional regulation.⁸⁰ Addressing some of these concerns, the BCRA also makes exceptions from this definition for news stories, editorials, and candidate debates or forums, and it leaves the FEC some discretion to determine other exceptions consistent with the bill.⁸¹ Nevertheless, if a contested primary election is sixty days or less before the general election, as is common in some states for congressional races,⁸² the scope of this provision could comprise the entire time the two major party's candidates know their opponents.

If the Supreme Court finds the BCRA's original language defining "electioneering communications" to be "constitutionally insufficient," the Act also contains an alternate definition that would then take effect.⁸³ This alternate definition regulates advertisements that promote or attack a candidate: an "electioneering communication" is defined as

any broadcast, cable, or satellite communication which promotes or supports a candidate for [federal] office, or attacks or opposes a candidate for [federal] office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.⁸⁴

The main difference between the two definitions is that the primary definition encompasses ads that only *refer* to a particular candidate, while the alternate definition requires that ads *promote* or *support* a particular candidate.⁸⁵ Though narrower in scope than the primary definition, the alternate definition still likely goes beyond the *Buckley* "magic words" test for express advocacy.⁸⁶

⁸⁰ See *Buckley v. Valeo*, 424 U.S. 1, 41–43 (1976) (stating that overbroad regulation of campaign speech could chill discussion of public issues).

⁸¹ Bipartisan Campaign Reform Act of 2002 § 201(3)(B)(i), (iii), (iv).

⁸² General elections for 2002 were held on November 5. The primaries for several states, including New York (September 10), Wisconsin (September 10), Massachusetts (September 17), and Washington (September 17), fell within the sixty-day period.

⁸³ Bipartisan Campaign Reform Act of 2002 § 201(3)(A)(ii).

⁸⁴ *Id.*

⁸⁵ Compare *id.* § 201(3)(A)(i), with *id.* § 201(3)(A)(ii). For an analysis of the constitutionality of these provisions, see *infra* text accompanying notes 151–189.

⁸⁶ See *Buckley v. Valeo*, 424 U.S. 1, 42–44 (1976). The *Buckley* Court rejected lower court reasoning that defining express advocacy as "advocating the election or defeat of a candidate" was sufficient to avoid unconstitutional vagueness problems. *Id.* at 42 (internal quotation marks omitted). Rather, the Court found that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id.*

The BCRA regulates electioneering communications in two ways. First, the Act requires disclosure by “every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of \$10,000 during any calendar year.”⁸⁷ This disclosure must identify the person making the disbursement, anyone directing or controlling that person, the custodian of the books and accounts of that person, and the principal place of business of that person making the disbursement, if not an individual.⁸⁸ The disclosure also must include the amount of any disbursement over two hundred dollars, along with the relevant elections and the names of the identified candidates.⁸⁹ The disclosure requirement permits individuals to create unlimited issue advertisements but requires publication of a list of the contributors to that advertisement on the Federal Communication Commission’s Web site.⁹⁰

Many policy arguments in support of the BCRA are motivated by an underlying egalitarian concern that a small set of interests will exert disproportionate influence on legislators at the expense of the nation as a whole. Some supporters of campaign finance reform, such as Ronald Dworkin, argue that constitutional norms of equality require not only a system of one-person, one-vote, but also a system that provides equal ability to command the attention of others to one’s own views; to make this possible, strong restrictions should limit spending on candidates.⁹¹ Some liberal members of Congress share this position, and advocate “get[ting] money out of politics” entirely.⁹²

Critics of the BCRA and campaign finance reform legislation generally tend to oppose this egalitarian perspective on ideological grounds. Libertarianism is one strand of political thinking that is particularly at odds with the egalitarian view.⁹³ Opponents of the BCRA who take a lib-

⁸⁷ Bipartisan Campaign Reform Act of 2002 § 201.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* § 201(b).

⁹¹ See Ronald Dworkin, *Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 19–24.

⁹² See, e.g., 148 CONG. REC. S2098 (daily ed. Mar. 20, 2002) (statement of Sen. Wellstone). Senator Wellstone argued that

no one in the United States of America should believe we have now created a level playing field, where you do not have to be a millionaire to run, where you do not have to depend upon big money to win, where you get a lot of the big money out of politics and you get more ordinary citizens back into politics.

Id. Despite his belief that the BCRA does not do enough to regulate campaign finance, Senator Wellstone described it as “a step forward” and “a victory for the citizens [of this] country.” *Id.*

⁹³ Indeed, the Libertarian National Committee is one of the plaintiffs in litigation challenging the constitutionality of the BCRA. See Second Amended Complaint for Declaratory and Injunctive Relief, *McConnell v. Fed. Election Comm’n*, No. 02-0582 (D.D.C. filed May 7, 2002), at 1, available at <http://www.law.stanford.edu/library/campaignfinance/>

ertarian line tend to object to the Act's limit on the amount that individuals can spend on the causes and candidates they support.⁹⁴ As one author described it, the "First Amendment is not a loophole": the political speech that campaign finance legislation often hinders has a constitutionally protected status in the United States, putting it outside of Congress's authority to regulate.⁹⁵ The BCRA's limitations on corporate and union electioneering communications directly proscribe certain kinds of political speech.⁹⁶ The Act's ban on soft money limits the free speech of political parties.⁹⁷ The soft money ban also restricts the ability of individuals who may not know how to arrange their campaign contributions in a way that would maximize their political effect from associating with those who do.⁹⁸ Moreover, requiring individuals to publicize their names with their ideas under the BCRA's electioneering communication requirements would chill the expression of unpopular ideas.⁹⁹

Opponents of the BCRA also argue that the best way to increase competition in races for Congress is to strengthen political parties, not to weaken their financial base.¹⁰⁰ Political scientists have suggested that strengthening political parties provides better funding for lesser-known candidates who have party support.¹⁰¹ In response, supporters of the Act

mcconnell-v-feccomplaint50702.pdf. Of course, members of the Libertarian Party are not the only political group in America who share this view; libertarianism is an offshoot of the philosophical tradition of liberalism that dates back to Enlightenment thinkers such as John Locke. *See generally* JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* (C. B. Macpherson ed., Hackett Publ'g Co. 1980) (1690) (arguing that a limited, minimal state is the best form of government, because it safeguards individual liberty).

⁹⁴ *See* James Bopp, Jr. & Richard E. Coleson, *Fatal Flaws in the Bipartisan Campaign Reform Act of 2002*, BNA'S DAILY REP. FOR EXEC., Apr. 22, 2002, at 2–4, available at <http://www.brook.edu/dybdocroot/gs/cf/debate/Bopp.pdf>.

⁹⁵ *See* James Bopp, Jr. & Richard E. Coleson, *First Amendment is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 UWLA L. REV. 1, 1 (1997).

⁹⁶ 148 CONG. REC. S2124 (daily ed. Mar. 20, 2002) (statement of Sen. McConnell). Senator McConnell also points out that left-wing political organizations such as the American Civil Liberties Union also oppose the BCRA because of the Act's restrictions on political speech. *See id.*

⁹⁷ *See* 148 CONG. REC. S2106 (daily ed. Mar. 20, 2002) (statement of Sen. Ted Stevens (R-Alaska)) (arguing that the BCRA "tilts the balance of power away from accountable political parties towards non-profit interest groups whose donors are often shielded from disclosure").

⁹⁸ *See generally* Second Amended Complaint for Declaratory and Injunctive Relief, *McConnell v. Fed. Election Comm'n*, No. 02-0582 (D.D.C. filed May 7, 2002), at 44–45 (arguing that the ban on soft money results in the inability of individuals to pool resources, thereby violating the First Amendment right to free association), available at <http://www.law.stanford.edu/library/campaignfinance/mcconnell-v-feccomplaint50702.pdf>.

⁹⁹ *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201, 116 Stat. 81, 88 (to be codified at 2 U.S.C. § 434). This possibility has been a traditional concern of Anglo-American political philosophy. *See, e.g.*, JOHN STUART MILL, *ON LIBERTY* 8 (Stefan Collini ed., Cambridge Univ. Press 1998) (1859).

¹⁰⁰ *See, e.g.*, Bopp & Coleson, *supra* note 94, at 14.

¹⁰¹ *See, e.g., id.* (citing Anthony Gierzynski & David A. Breaux, *Role of Parties in Legislative Campaign Financing*, 15 AM. REV. OF POL. 171–89 (1994)) (arguing that increasing the strength of political parties would increase competition in races for Congress).

argue that the BCRA reduces cynicism about parties, and encourages citizens to become more active because of the cleaner process.¹⁰² This potential for a revitalization of democracy, when combined with the importance of having a political system that is free from corruption, is a strong policy argument outweighing the concerns of BCRA opponents that the Act will produce weaker parties and restrictions on core political speech.

If the Supreme Court chooses to consider a case challenging the BCRA on First Amendment grounds, these policy concerns will play an important role in the Court's decision. The Court will also be forced to revisit its reasoning in *Buckley*, in which it considered the constitutionality of FECA.¹⁰³ Fundamental to the *Buckley* Court's reasoning was a finding that FECA's "contribution and expenditure limitations impose direct quantity restrictions on political communication and association"¹⁰⁴ By limiting the amount of money a person can spend on a candidate, Congress directly limits the amount of speech he can make, since in the modern world of mass media, effective political speech costs money.¹⁰⁵

The *Buckley* Court's rough equation of speech and money in this context has severe consequences for the constitutionality of campaign finance legislation. Because FECA limits on contributions and expenditures were treated as direct restrictions on political speech, they were required to withstand strict scrutiny¹⁰⁶ by demonstrating "a sufficiently important interest and employ[ing] means closely drawn to avoid unnecessary abridgment of associational freedoms."¹⁰⁷ The Court found that the government's stated interests in preventing corruption and the appearance of corruption in election campaigns were compelling.¹⁰⁸ In light of these compelling state interests, FECA's contribution limits were no more restrictive than necessary to effect the government's purpose.¹⁰⁹ In contrast,

¹⁰² See 148 CONG. REC. S2159 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). Senator McCain argues that the BCRA might lead Americans "to see that their elected representatives value their reputations more than their incumbency." *Id.* With this renewed trust in the political system, citizens would be able "to exercise their franchise more faithfully, to identify more closely with political parties, [and] to raise their expectations for the work [elected officials] do." *Id.*

¹⁰³ See *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹⁰⁴ *Buckley*, 424 U.S. at 18.

¹⁰⁵ *Id.* at 19 ("[V]irtually every means of communicating ideas in today's society requires the expenditure of money.").

¹⁰⁶ *Id.* at 25 (quoting *N.A.A.C.P. v. Ala.*, 357 U.S. 449, 460-61 (1958)) (finding that "governmental action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny").

¹⁰⁷ *Id.* (citing *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975)).

¹⁰⁸ *Id.* at 27. See also *Fed. Election Comm'n v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 496-97 (1985) (holding that a statute limiting independent expenditures by PACs violated the First Amendment, in part because the statute did little to further the compelling governmental interest in preventing corruption).

¹⁰⁹ *Id.* at 28-29.

the Court found less of a governmental interest in regulating independent expenditures, since the possibility of a *quid pro quo* is reduced when coordination between candidates and donors is lacking.¹¹⁰ Because there was a clear possibility of corruption if contributions went unregulated, *Buckley* concluded that, as long as individuals could make independent expenditures, FECA was narrowly tailored.¹¹¹ Moreover, a donor's First Amendment right was found to be stronger in making independent expenditures because donors choose the use to which their money is put, increasing its expressive quality.¹¹² Thus, the Court struck down the limits on expenditures but upheld the limits on contributions and coordinated expenditures.¹¹³

The Supreme Court has never ruled directly on the constitutionality of banning soft money donations. Nonetheless, the Court has consistently upheld the *Buckley* framework, finding limits on independent expenditures unconstitutional and limits on contributions constitutional.¹¹⁴ In *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, the Colorado Republican Federal Campaign Committee purchased advertisements attacking the Democratic candidate before the Republican Party had selected its nominee.¹¹⁵ Interpreting a provision of FECA regulating political party committee expenditures on federal campaigns,¹¹⁶ the FEC argued that the purchase was a coordinated expenditure that violated statutory limits.¹¹⁷ Because there was no evidence in the record that the Republican Campaign Committee coordinated the purchase of the advertisement with any candidate, the Court found the purchase to be an independent expenditure that was beyond congressional authority to regulate.¹¹⁸

In a subsequent opinion in the same litigation,¹¹⁹ the Supreme Court considered the Colorado Republican Party's claim that even limits on

¹¹⁰ *Id.* at 45.

¹¹¹ *Buckley*, 424 U.S. at 28–29. The Court also noted that individuals were still permitted to engage in political expression by volunteering for campaigns. *See id.* at 28.

¹¹² *Id.* at 47–48.

¹¹³ *Id.* at 143.

¹¹⁴ *See, e.g.*, *Colo. Repub. Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 610 (1996) [hereinafter *Colorado I*] (stating that “the provisions that the Court found constitutional mostly imposed *contribution* limits”).

¹¹⁵ *Colorado I*, 518 U.S. at 608.

¹¹⁶ *See* Federal Election Campaign Act of 1971, 2 U.S.C. § 441a(d)(1) (2000) (imposing special limits on expenditures of national and state party committees made “in connection with the general election campaign of candidates for Federal office”).

¹¹⁷ *Colorado I*, 518 U.S. at 619. FEC regulations interpreted this FECA provision to cover all party expenditures “in connection with a general election campaign.” *See id.* (quoting 11 C.F.R. § 110.7(b)(4) (1995) (internal quotation marks omitted)). The Supreme Court had previously expressed support for this position in dicta, stating that “party committees are considered incapable of making ‘independent’ expenditures” *Fed. Election Comm'n v. Dem. Sen. Campaign Comm.*, 454 U.S. 27, 28–29 n.1 (1981).

¹¹⁸ *Colorado I*, 518 U.S. at 613–16.

¹¹⁹ *Fed. Election Comm'n v. Colo. Repub. Fed. Campaign Comm.*, 533 U.S. 431 (2001) [hereinafter *Colorado II*].

coordinated expenditures by party committees in connection with congressional campaigns were facially unconstitutional.¹²⁰ The Republican Party argued that the expressive quality of its activities towards electing a particular candidate who represented its set of views was so strong that any limit on the party's coordinated expenditures in this context imposed a unique First Amendment burden.¹²¹ Because financial support of candidates is essential to the nature of a political party, the Republican Party claimed that any regulation of its expenditures in connection with an election campaign was akin to regulation of an individual's independent expenditures.¹²² The Court rejected that argument, holding that the limits on coordinated expenditures met strict scrutiny because they prevented the corruption that might result from donors circumventing statutory hard money limits by contributing soft money to the party.¹²³

Nixon v. Shrink Missouri Government PAC also upheld the Buckley framework.¹²⁴ In *Nixon*, the Court considered whether a Missouri statute that imposed contribution limits as low as \$275 violated the Fourteenth Amendment rights of PACs and candidates.¹²⁵ The Court held that testimony concerning the potential for corruption satisfied the state's evidentiary burden, and that the contribution limits approved in *Buckley* did not set a constitutionally mandated minimum.¹²⁶

In the one case where the Supreme Court upheld statutory limits on independent expenditures, the scope of the statute was limited to regulating expenditures from corporate treasury funds. In *Austin v. Michigan State Chamber of Commerce*,¹²⁷ the Supreme Court upheld the Michigan Campaign Finance Act,¹²⁸ which prohibited corporations from using treasury funds to make independent expenditures.¹²⁹ The Court held that "the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form."¹³⁰ The State of Michigan persuaded the Court that unique economic and legal advantages that the state grants to corporations¹³¹ created a compelling state interest in addition to the prevention of "financial *quid pro quo*" corruption: namely, the possibility that the corporation will use the aggregated wealth of its shareholders to

¹²⁰ *Id.* at 437.

¹²¹ *Id.* at 445.

¹²² *Id.* at 445–46.

¹²³ *Id.* at 460.

¹²⁴ 528 U.S. 377 (2000).

¹²⁵ *Id.* at 382–83.

¹²⁶ *Id.* at 393–97.

¹²⁷ 494 U.S. 652 (1990).

¹²⁸ MICH. COMP. LAWS § 169.254(1) (1979).

¹²⁹ *Austin*, 494 U.S. at 654.

¹³⁰ *Id.* at 659 (quoting *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500–01 (1985) (internal quotation marks omitted)).

¹³¹ *See id.* at 658–59. These advantages include "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets." *Id.*

pursue a political agenda that has “little or no correlation to the public’s support for the corporation’s political ideas.”¹³² The Court found that the Michigan statute was narrowly tailored to prevent this kind of corruption, since it permitted corporations to make unlimited independent expenditures from a separate, segregated fund established with shareholder contributions specifically earmarked for political purposes.¹³³

Opponents of the BCRA argue that a complete ban on soft money does not withstand strict scrutiny, but rather that the Act bans an entire form of federal fundraising to eliminate a practice that creates only a minimal appearance of corruption.¹³⁴ *Buckley* recognized that the less a donation involves coordination between the candidate and the donor, the less danger there is of corruption.¹³⁵ In the context of soft money, the presence of the party as an intermediary through which the donation passes reduces the amount of coordination, thereby reducing the potential for corruption.¹³⁶ The Supreme Court has recognized that interests of candidates are not identical to those of party committees.¹³⁷ No party by itself votes for any piece of legislation—individual members of Congress do—so contributors to parties have no guarantee that their money will translate into their desired policies. Furthermore, a party, through its whip, would continue to exert pressure on its members to vote in accordance with the party position even if the party did not receive contributions.¹³⁸ According to this argument, the BCRA does not further the government’s interest in reducing corruption.

Opponents of the BCRA also argue that its soft money ban does not satisfy the other prong of the strict scrutiny test because the Act is not narrowly tailored to impede only minimally the constitutional rights of contributors. *Buckley* noted that the First Amendment protects the freedom to associate with a political party of one’s choice.¹³⁹ This right to associate provides a mechanism for a group to express its political views: as the Supreme Court has stated, “[i]t is the accepted understanding that a party combines its members’ power to speak by aggregating contributions and broadcasting messages more widely than individual contribu-

¹³² *Id.* at 659–60.

¹³³ *Id.* at 660–61.

¹³⁴ See Second Amended Complaint for Declaratory and Injunctive Relief, *McConnell v. Fed. Election Comm’n*, No. 02-0582 (D.D.C. filed May 7, 2002), at 44–45, available at <http://www.law.stanford.edu/library/campaignfinance/mcconnell-v-feccomplaint50702.pdf>.

¹³⁵ See *Buckley v. Valeo*, 424 U.S. 1, 46–47 (1976) (finding that independent expenditures have less potential for corruption than coordinated expenditures).

¹³⁶ See *id.*

¹³⁷ See *Colorado I*, 518 U.S. 604, 622–23 (1996) (stating that parties are “coalitions of differing interests”).

¹³⁸ See generally ROGER H. DAVIDSON & WALTER J. OLESZEK, *CONGRESS AND ITS MEMBERS* 176 (7th ed. 2000) (explaining that the party whip’s role is “to encourage party discipline, count votes, and in general, mobilize winning coalitions on behalf of partisan priorities”).

¹³⁹ *Buckley*, 424 U.S. at 15 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 56–57 (1973)).

tors generally could afford to do, and the party marshals this power with greater sophistication than individuals generally could.”¹⁴⁰ The BCRA prevents individuals from pooling their money together in a political party that advocates a slate of candidates that support their causes; this restriction, opponents argue, is unnecessarily heavy, and effectively undermines the First Amendment freedom of association.¹⁴¹

Assuming the Court preserves the *Buckley* framework,¹⁴² the constitutionality of the BCRA’s soft money ban will hinge on whether the Court views it as more like a regulation of contributions, which is permissible under *Buckley*, or more like a regulation of independent expenditures, which is not. Some analysts argue that the BCRA’s soft money provisions further the compelling governmental interest in reducing the potential for corruption and only minimally impede free speech and association.¹⁴³ The soft money provisions could stem corruption resulting from “*quid pro quo* relationships between large-dollar soft money contributors and federal office candidates who benefit from political party soft money expenditures.”¹⁴⁴ For example, donors who gave \$250,000 to the Republican National Committee in 1996 received access to expensive parties and photo-ops with high-level politicians.¹⁴⁵ In the 1999-2000 election cycle, Enron donated more than \$2 million in soft money to candidates from both parties, and when congressional hearings on Enron began, the contributions had cast “a pall of doubt” over federal activity on the matter.¹⁴⁶ These examples, and many more cited by Representative Shays,¹⁴⁷ indicate that soft money’s potential to create corruption, or at least its appearance, is high.

¹⁴⁰ *Colorado II*, 533 U.S. 431, 453 (2001).

¹⁴¹ See Second Amended Complaint for Declaratory and Injunctive Relief, *McConnell v. Fed. Election Comm’n*, No. 02-0582 (D.D.C. filed May 7, 2002), at 44–45, available at <http://www.law.stanford.edu/library/campaignfinance/mcconnell-v-feccomplaint50702.pdf>.

¹⁴² While the above paragraphs suggest that the Supreme Court would uphold the *Buckley* framework, Justice Thomas has argued that the Court should break with *Buckley* by abolishing the distinction between contributions and expenditures. See *Colorado I*, 518 U.S. at 636 (Thomas, J., dissenting) (arguing that “[c]ontributions and expenditures both involve core First Amendment expression because they further the ‘discussion of public issues and debate on the qualifications of candidates.’”). Thomas’s position would make any campaign finance legislation that regulates contributions and expenditures unconstitutional. See *id.*

¹⁴³ See, e.g., L. PAIGE WHITAKER, *CAMPAIGN FINANCE: CONSTITUTIONAL AND LEGAL ISSUES OF SOFT MONEY* (Cong. Res. Serv., Report No. 98-025, 2001), available at <http://www.cnle.org/nle/crsreports/risk/rsk-35.cfm>.

¹⁴⁴ *Id.*

¹⁴⁵ See Peter H. Stone, *Green Wave*, 28 NAT’L J. 2410, 2411 (1996).

¹⁴⁶ 148 CONG. REC. H352 (daily ed. Feb. 13, 2002) (statement of Rep. Shays). Enron contributed \$1.4 million to the Republican Party and \$600,000 to the Democratic Party. *Id.*

¹⁴⁷ See *id.* For example, Shays also cites the case of three Wisconsin tribes who wanted to open a casino in Wisconsin. *Id.* Their application was ultimately rejected by the Clinton Administration Department of the Interior after Minnesota tribes fearing competition contributed “large sums of soft money” to the Democratic Party. *Id.* The incident triggered “an independent counsel investigation and two debilitating congressional investigations into whether the government was for sale.” *Id.*

Supporters of the BCRA argue that it also satisfies the second prong of the strict scrutiny test because it is narrowly tailored to reduce corruption and impedes minimally on free speech and association. Even under the Act's soft money ban, there are many alternatives available to those who want to express their political views: they may

contribute directly to a candidate, to a PAC that would support a certain candidate, to the political party of such a candidate in accordance with FECA-regulated contribution limits (also known as "hard money" contributions), to state parties for state activities, or make independent expenditures on behalf of the candidate.¹⁴⁸

Since the BCRA does nothing to restrict unlimited independent expenditures, the Act does not severely impair the total quantity of speech available to individuals.

For these reasons, the Supreme Court will likely find the BCRA's soft money provisions constitutional. The potential conflicts of interest cited by Representative Shays¹⁴⁹ justify the Act, and the concurrent opportunity to make individual expenditures and pool money through state parties or national parties, subject to FECA limits, adequately addresses First Amendment concerns. Furthermore, viewing *Buckley* and its progeny as a whole, the Supreme Court generally gives deference to the FEC and Congress on campaign finance issues.¹⁵⁰ Given this trend and the strength of constitutional arguments in favor of the BCRA, the Court will likely uphold the soft money ban.

The constitutionality of the BCRA's electioneering communications clause is also contested in pending litigation.¹⁵¹ Under the Supreme Court's holding in *Buckley*, Congress may only regulate communications that expressly advocate the election of a candidate; any statute that strays beyond these limits into the regulation of issue advocacy is unconstitutionally vague.¹⁵² The BCRA, however, regulates advertisements beyond those that contain the magic words that *Buckley* suggests are necessary to

¹⁴⁸ See WHITAKER, *supra* note 143.

¹⁴⁹ See *supra* notes 146–147.

¹⁵⁰ See Trevor Potter & Kirk L. Jowers, *The Frequently Mischaracterized Impact of the Courts on the FEC and Campaign Finance Law*, 51 CATH. U. L. REV. 839, 840–44 (2002) (arguing that "in the six most relevant Supreme Court battles since [FECA] . . . was passed, the Court has upheld most, if not all, of the challenged law"). The six cases examined were *Buckley*, *Massachusetts Citizens for Life*, *Austin*, *Colorado I*, *Colorado II*, and *Nixon*. See *id.*

¹⁵¹ See Second Amended Complaint for Declaratory and Injunctive Relief, *McConnell v. Fed. Election Comm'n*, No. 02-0582 (D.D.C. filed May 7, 2002), at 34–36, available at <http://www.law.stanford.edu/library/campaignfinance/mcconnell-v-feccomplaint50702.pdf>.

¹⁵² See *Buckley v. Valeo*, 424 U.S. 1, 43–44. See also *supra* text accompanying notes 50–51.

trigger express advocacy,¹⁵³ both in the Act's primary definition of electioneering communication¹⁵⁴ and in its alternate definition.¹⁵⁵ This legislation forces the Court to decide whether Congress may prohibit corporations and unions from engaging in what, under *Buckley*, might be considered issue advocacy during the most important ninety days of an election cycle.

The supporters of the BCRA argue that its ban on electioneering communications passes the strict scrutiny test since it only impedes corporations and unions from using their treasury funds to engage in speech.¹⁵⁶ This ban on the use of money by corporations and labor unions to influence elections is consistent with the historical bans on contributions from corporations and unions in the Tillman Act of 1907 and Labor Management Relations Act of 1947.¹⁵⁷ The ban is also consistent with the Supreme Court's holding in *Austin*.¹⁵⁸

The BCRA's provisions concerning electioneering communications promote the reduction of corruption in a narrowly tailored manner that focuses on the treasury funds of corporations and unions.¹⁵⁹ The BCRA furthers the interest in reducing corruption for the same reasons as the statute in *Austin* did: corporate agents who control corporate treasuries (and, along parallel lines, union agents who control union dues) are not generally thought to be authorized to express the political views of the corporation's shareholders (or the union's workers) through the business decisions they make on how to spend those funds; meanwhile, the ability of those agents to use this large mass of funds to influence campaigns to advance corporate (or union) interests may lead to corruption.¹⁶⁰ The *Austin* Court found that the aggregation of wealth of a large number of shareholders in the corporate form made corporate political advocacy inherently suspect, because the political acts of the corporation were un-

¹⁵³ See *Buckley*, 424 U.S. at 44 n.52. See also *supra* text accompanying notes 71–72.

¹⁵⁴ See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201(3)(A)(i), 116 Stat. 81, 89 (to be codified at 2 U.S.C. § 434(f)(3)) (regulating advertisements that “refer to a federal candidate”). See also *supra* text accompanying note 79.

¹⁵⁵ See Bipartisan Campaign Reform Act of 2002 § 201(a)(3)(A)(ii) (regulating advertisements that oppose or attack a candidate “regardless of whether the communication expressly advocates a vote for or against a candidate”). See also *supra* text accompanying notes 83–84.

¹⁵⁶ See Trevor Potter, *New Law Follows Supreme Court Rulings*, BNA'S DAILY REP. FOR EXEC., Apr. 22, 2002, at 2, available at <http://www.brook.edu/dybdocroot/gs/cf/debate/Potter.pdf>.

¹⁵⁷ Tillman Act of 1907, ch. 420, 34 Stat. 864 (repealed); Labor Management Relations Act of 1947, ch. 120, § 304, 61 Stat. 136, 159–60. See also Federal Election Campaign Act of 1971, 2 U.S.C. § 441(b) (2000) (re-codifying the ban on corporate and union contributions); *supra* text accompanying notes 28–31.

¹⁵⁸ *Austin v. Mich. St. Chamber of Commerce*, 494 U.S. 652 (1990). See also *supra* text accompanying notes 127–133.

¹⁵⁹ See Bipartisan Campaign Reform Act of 2002 § 203(a).

¹⁶⁰ See *Austin*, 494 U.S. at 660–61.

likely to be correlated with the views of individual shareholders.¹⁶¹ Similarly, in *Federal Election Commission v. Massachusetts Citizens for Life*,¹⁶² the Supreme Court stated that “direct corporate spending on political activity” could result in corruption, as corporations used their vast resources in the economic market to gain an “unfair advantage” in the political marketplace.¹⁶³ The BCRA’s electioneering communications provisions are designed to reduce this potential for undue influence from corporate entities.

In adding a provision to FECA that regulates electioneering communications, the BCRA is no less narrowly tailored to effect its purpose than the Michigan statute that the Supreme Court upheld in *Austin*. Like the statute at issue in *Austin*, FECA includes an exemption from the longstanding ban on corporate and union contributions¹⁶⁴ for a “segregated funds” account.¹⁶⁵ Corporations and unions may create an account solely for political spending, as long as they do not transfer money from their dues into this account, and as long as they only accept money from shareholders, executive and administrative personnel, and their families.¹⁶⁶ Since the BCRA’s electioneering communications provision will be inserted into the same section of FECA as this exemption,¹⁶⁷ it will thus become a part of the same kind of regulatory framework that the Court approved in *Austin*.¹⁶⁸ Seen in this light, the BCRA is not an outright ban on corporate or union free speech because corporations and unions may still use the segregated funds allowed to them by FECA to make independent expenditures.¹⁶⁹

Individuals may also continue to express themselves by forming nonprofit groups for purposes of political expression, entities that the BCRA has exempted from its ban on electioneering communications.¹⁷⁰ In *Massachusetts Citizens for Life*, the Supreme Court held that congressional restrictions on independent corporate expenditures are unconstitutional as applied to a nonprofit corporation formed for “the express pur-

¹⁶¹ See, e.g., 148 CONG. REC. S2114 (daily ed. Mar. 20, 2002) (statement of Sen. Carl Levin (D-Mich.)).

¹⁶² 479 U.S. 238 (1986).

¹⁶³ See *id.* at 257–58 (“The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.”).

¹⁶⁴ See *supra* note 157.

¹⁶⁵ Federal Election Campaign Act of 1971, 2 U.S.C. § 441b(b)(C) (2000) (stating that the ban “shall not include . . . the establishment, administration, and solicitation of contributions to a segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock”).

¹⁶⁶ *Id.* § 441b(b)(C)(3).

¹⁶⁷ See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155 § 203, 116 Stat. 81, 91 (to be codified at 2 U.S.C. § 441b).

¹⁶⁸ See Potter, *supra* note 156, at 2.

¹⁶⁹ See *id.* at 7–8.

¹⁷⁰ See *supra* note 78 and accompanying text.

pose of promoting political ideas” that “has no shareholders or other persons with a claim on its assets or earnings,” and that was not established or funded by a business corporation or union.¹⁷¹ Under this holding, non-profit corporations are independent political funds that are outside the scope of the BCRA’s ban on the use of corporate or union treasury funds for electioneering communications.

The BCRA’s supporters suggest that the BCRA may not even regulate issue advocacy at all, arguing that the magic words test in *Buckley* is not exhaustive in determining what constitutes express advocacy.¹⁷² The magic words given as examples in *Buckley* originally appear in a footnote, preceded by the words “such as.”¹⁷³ Subsequently, in *Massachusetts Citizens for Life*, the Court held that “the fact that [a] message is marginally less direct than ‘Vote for Smith’ does not change its essential nature” as express advocacy.¹⁷⁴ Nonetheless, regulating any reference to a political candidate during the designated period¹⁷⁵ will, by definition, include advertisements focused solely on an issue and the stances of different candidates on that issue.

The BCRA’s opponents build on this point, charging that the BCRA is overbroad, and not narrowly tailored to further a compelling interest.¹⁷⁶ *Buckley* reasons that discussion of issues affecting the public inevitably leads to discussion of political candidates and officeholders, and it would be unconstitutional to regulate all such discussions.¹⁷⁷ Regulations that encroach upon public discussion of issues limit the quantity of core political speech in which an individual is able to engage.¹⁷⁸ The BCRA is the exact type of regulation that the *Buckley* Court denounced: if interpreted according to the plain meaning of its terms, the Act would regulate over ninety-seven percent of political television ads.¹⁷⁹

Furthermore, critics of the BCRA charge that it fails to promote either of its primary governmental interests because there is no evidence of corruption, and it would not reduce the appearance of corruption.¹⁸⁰ One

¹⁷¹ See *Fed. Election Comm’n v. Mass. Citizens for Life*, 479 U.S. 238, 264 (1986) (finding that defendant pro-life advocacy group was such a group).

¹⁷² See Potter, *supra* note 156, at 9.

¹⁷³ *Buckley v. Valeo*, 424 U.S. 1, 44 (1976).

¹⁷⁴ *Mass. Citizens for Life*, 479 U.S. at 249.

¹⁷⁵ See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201, 116 Stat. 81, 89 (to be codified at 2 U.S.C. 434).

¹⁷⁶ See Second Amended Complaint for Declaratory and Injunctive Relief, *McConnell v. Fed. Election Comm’n*, No. 02-0582 (D.D.C. filed May 7, 2002), at 35, available at <http://www.law.stanford.edu/library/campaignfinance/mcconnell-v-feccomplaint50702.pdf>.

¹⁷⁷ See *Buckley*, 424 U.S. at 42.

¹⁷⁸ See *id.* at 18.

¹⁷⁹ Expert Report of Kenneth M. Goldstein on Behalf of Intervenor Defendants, *McConnell v. Fed. Election Comm’n*, No. 02-0582 (D.D.C. filed Mar. 27, 2002), at 3, available at <http://www.camlc.org/attachment.html/Goldsteinpart1.pdf?id=258>. Eighty-five percent of interest group advertisements mentioning a candidate were broadcast within sixty days of a general election. *Id.* at 17.

¹⁸⁰ See *supra* text accompanying notes 159–163.

opponent of the BCRA cited a 1997 Princeton study in which less than one percent of respondents correctly answered five questions on federal campaign finance regulation to claim that “public opinion about campaign finance regulations is shallow and poorly informed.”¹⁸¹ If Americans know little about campaign finance regulations, changing those regulations will not influence public opinion regarding corruption.¹⁸² *Buckley* also already rejected potential corruption and its appearance as sufficient justification for regulating issue advocacy.¹⁸³ The lack of coordination between candidate and contributor reduces the possibility of corruption.¹⁸⁴ While the statute that the Supreme Court upheld in *Austin* did limit independent expenditures, it did not involve direct regulation of issue advocacy.¹⁸⁵ Because the BCRA fails to further a compelling governmental interest and is not narrowly tailored, the BCRA’s ban on electioneering communications, according to this argument, is unconstitutional.

If the Supreme Court finds that the BCRA’s primary definition of electioneering communications is unconstitutional under *Buckley*, it may do the same with the alternate definition.¹⁸⁶ The alternate definition changes the scope of the regulation from an advertisement that “refers to a clearly identified candidate” to one that “promotes or supports,” or “attacks or opposes” a candidate for federal office.¹⁸⁷ This definition is more limited than the original definition since some ads that refer to a candidate but do not support or attack him would not be regulated.¹⁸⁸ The alternate definition, however, is also broader than the original definition because it regulates corporate and union advertisements year-round instead of the thirty days before the primary election and sixty days before the general election.¹⁸⁹ Critics have suggested that this year-round definition could include any broadcasting advertisement by a corporation referring to a candidate’s record.¹⁹⁰ If so, a corporation may be prohibited from making any political communications within a year of an election, significantly impairing its First Amendment right to free expression.¹⁹¹

¹⁸¹ Declaration of Q. Whitfield Ayres, *McConnell v. Fed. Election Comm’n*, No. 02-0582 (D.D.C. filed Mar. 27, 2002), at 3–4, available at <http://www.camlc.org/attachment.html/Ayres,+Whitfield+-+Declaration.pdf?id=101>. Only four percent of respondents knew that corporations were prohibited from directly contributing to federal candidates. *Id.*

¹⁸² *Id.* at 4.

¹⁸³ *Buckley*, 424 U.S. at 45.

¹⁸⁴ *See id.*

¹⁸⁵ *See Austin v. Mich. St. Chamber of Commerce*, 494 U.S. 652, 656 (1990) (finding that the advertisement at issue was “an advertisement supporting a specific candidate”).

¹⁸⁶ *See supra* text accompanying notes 83–86.

¹⁸⁷ *Compare* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201(3)(A)(i), 116 Stat. 81, 89 (to be codified at 2 U.S.C. 434), *with id.* § 201(3)(A)(ii).

¹⁸⁸ *See id.* § 201(3)(A)(ii).

¹⁸⁹ *Compare id.* § 201(3)(A)(ii), *with id.* § 201(3)(A)(i).

¹⁹⁰ *See Bopp & Coleson, supra* note 94, at 9.

¹⁹¹ *See id.*

Supporters of the BCRA, however, can stress the narrow scope of regulating direct advocacy to suggest that the alternate definition is narrowly tailored. In *Massachusetts Citizens for Life*, the Supreme Court suggested that advertisements that clearly promote or support a candidate are functionally express advocacy, even though they do not contain explicit words endorsing a candidate.¹⁹² Moreover, while the alternate definition would apply year-round to advertisements purchased by corporations and unions out of their treasury funds, these entities still have the opportunity to engage in political expenditures out of a segregated fund.¹⁹³ The BCRA's alternate definition would thus likely withstand strict scrutiny even if the primary definition does not.

The Supreme Court will likely uphold the BCRA's electioneering communication provisions because of the strong arguments in favor of their constitutionality. History and precedent reveal that reducing corporate and union influence on elections furthers the compelling governmental interest in reducing corruption and its appearance.¹⁹⁴ The toughest issue before the Court is whether the statute is narrowly tailored to further its goal since it would regulate almost all political messages sponsored by corporations and unions.¹⁹⁵ The Court, however, will likely rule that the provisions are narrowly tailored because the BCRA limits its ban on electioneering communications to corporations and unions, while continuing to allow the use of segregated funds and nonprofit advocacy to further a group's political interests.

Regardless of how the Supreme Court rules on the BCRA's constitutionality, the current FEC interpretation of the Act's soft money provisions will have a significant impact on their effectiveness. The FEC is the federal agency responsible for developing regulations governing how the Act will be enforced, and for monitoring its enforcement.¹⁹⁶ Supporters of the BCRA have strongly criticized the regulations that the FEC has promulgated to interpret the Act as failing to uphold both the letter and the spirit of its ban on soft money.¹⁹⁷

Supporters of the BCRA have challenged the FEC's interpretations of the Act's soft money ban in four respects. First, the FEC interprets the ban on political parties' soliciting, receiving, or directing another party to

¹⁹² See *supra* text accompanying note 174.

¹⁹³ See *supra* text accompanying notes 164–169.

¹⁹⁴ See *supra* text accompanying notes 156–163.

¹⁹⁵ See *supra* text accompanying notes 176–179.

¹⁹⁶ See Federal Election Campaign Act of 1971, 2 U.S.C. § 437c (2000) (establishing the FEC).

¹⁹⁷ See Press Release, Senator John McCain, FEC Undermines the New Campaign Finance Law in Direct Contravention of the Statute's Language, Purpose, and Legislative History (June 26, 2002) [hereinafter *FEC Undermines New Law*], available at <http://www.camlc.org/attachment.html/MCAIN-FEINGOLD+REGS+RESPONSE+6+26+02+latest+version.pdf?id=54>.

contribute soft money¹⁹⁸ to require one to explicitly “ask” another to donate or transfer something of value, rather than the definition recommended by the BCRA’s sponsors that included “request[ing], suggest[ing] or recommend[ing]” that one contribute soft money.¹⁹⁹ This permissive interpretation opens the possibility for political parties to gain soft money funds through suggestion, allowing potential donors to read between the lines what is asked of them.²⁰⁰ The Commission justified its interpretation on the grounds that the recommended phrase was too vague, giving rise to a concern that such an interpretation would lead to convictions of innocent people whose actions unintentionally suggested a contribution.²⁰¹ This would result in meritless suits that would only waste judicial resources.²⁰²

Second, the FEC regulations permit federal candidates and officeholders to engage in solicitation of large donations as featured guests at state, district, or local fundraising events, as long as they do not serve on the event’s host committee.²⁰³ While the FEC recognized that at least one of the BCRA’s sponsors, Senator McCain, wanted to ban this solicitation entirely and only permit federal candidates or officeholders to speak if they do not solicit money,²⁰⁴ the FEC did not want to be a “speech police,” monitoring federal candidates’ statements at events to determine if they constituted solicitations.²⁰⁵ Whatever the merits of the FEC’s concern, this interpretation has little support in the text of the BCRA itself.²⁰⁶ If wealthy donors may attend local fundraisers in which they can gain the good graces of a federal officeholder who is a featured guest, the same potential *quid pro quo* could occur as that which the BCRA seeks to prevent.²⁰⁷

Third, the Commission allows national parties to set up affiliated organizations²⁰⁸ before the law takes effect, which would later be deemed

¹⁹⁸ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 101, 116 Stat. 81, 82 (to be codified at 2 U.S.C. § 441).

¹⁹⁹ Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,086–87 (July 29, 2002) (to be codified at 11 C.F.R. pt. 300).

²⁰⁰ See FEC Undermines New Law, *supra* note 197 (arguing that the FEC’s interpretation of “soliciting or directing” undermines the BCRA’s prohibition against federal candidates and national parties soliciting, directing, receiving or spending soft money).

²⁰¹ See Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,086–87 (July 29, 2002) (to be codified at 11 C.F.R. pt. 300).

²⁰² See *id.*

²⁰³ See *id.* at 49,107–08. This rule interprets Section 101 of the BCRA, which permits federal candidates and officeholders to be featured guests at state and local party fundraisers “notwithstanding” the ban on solicitation of non-federal funds. See *id.*

²⁰⁴ See 148 CONG. REC. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

²⁰⁵ See Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,107–08 (July 29, 2002) (to be codified at 11 C.F.R. pt. 300).

²⁰⁶ See FEC Undermines New Law, *supra* note 197.

²⁰⁷ See *id.*

²⁰⁸ The Commission defines an “affiliated committee” vaguely, as a committee that is authorized or controlled by a common entity. 11 C.F.R. § 100.5(g) (2001).

independent and available to solicit unlimited donations.²⁰⁹ This interpretation opens a gaping hole in the BCRA's soft money ban. As long as the political parties have gone through the appropriate formalities in setting up affiliated organizations, the FEC will allow them to continue accepting soft money donations through these organizations, as if the Act had never been passed at all.²¹⁰

Fourth, the FEC allows local parties to use soft money for get-out-the-vote activities and acquiring voter lists,²¹¹ despite indications in the BCRA that such activities constituted federal election activity.²¹² As with all of the controversial FEC interpretations, this regulation undermines the intended purpose of the BCRA.²¹³ Each of these FEC regulations expands the ability of political parties to solicit contributions, and ultimately fails to uphold the letter and spirit of the Act.²¹⁴

While the FEC justified its interpretations with constitutional and policy arguments, unless some change occurs, the BCRA, as interpreted, does not close the soft money loophole. To challenge these FEC regulations, BCRA sponsors Representatives Shays and Meehan have taken legal action by filing suit against the FEC, arguing under the Administrative Procedure Act²¹⁵ that the FEC regulations are arbitrary and capricious, contrary to the plain meaning and text of the BCRA, and lacking a rational basis.²¹⁶

²⁰⁹ See Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,083–84 (July 29, 2002) (to be codified at 11 C.F.R. pt. 300). The FEC argued that since the BCRA does not take effect until November 6, 2002, organizations created prior to that date are beyond the scope of the statute, and are presumptively not subject to regulation. *See id.*

²¹⁰ See FEC Undermines New Law, *supra* note 197.

²¹¹ See Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,083–84 (July 29, 2002) (to be codified at 11 C.F.R. pt. 300).

²¹² See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 101(b), 116 Stat. 81, 85–86 (to be codified at 2 U.S.C. § 431). (defining “federal election activity” to include get-out-the-vote activities associated with federal campaigns).

²¹³ See FEC Undermines New Law, *supra* note 197. Senator McCain argued that “the FEC, without any basis in law, defined get-out-the-vote activities as not including encouraging voters to vote, and voter identification activities as not including the acquisition of voter lists.” *Id.*

²¹⁴ See *id.* FEC Commissioner Scott Thomas charged that a block of four other Commissioners “have so tortured this law, it’s beyond silly.” Thomas B. Edsall, *FEC Reopens Soft Money Spigot*, PITT. POST-GAZETTE, June 23, 2002, at A18. As a result, at least two critics have called for a change in the process for nominating FEC Commissioners. See Bruce Ackerman & Ian Ayres, *Campaign Reform’s Worst Enemy*, N.Y. TIMES, July 6, 2002, at A13 (arguing that a panel of five retired federal judges over the age of sixty-five could be the most impartial group to decide important questions of election law, since partisan Commissioners can impede enforcement of reform). Currently, the six-person Commission may not have four members of the same party serving at the same time. See Federal Election Campaign Act of 1971, 2 U.S.C. § 437(c) (2000) (establishing the FEC).

²¹⁵ Administrative Procedure Act, 5 U.S.C. § 706 (1946) (establishing standards for judicial review of an agency’s rulemaking and adjudication).

²¹⁶ See Complaint for Declaratory and Injunctive Relief, *Shays v. Fed. Election Comm’n* (D.D.C. filed Oct. 8, 2002), available at <http://www.camlc.org/attachment.html/SHAYS+V.+MEEHAN+COMPLAINT+FINAL+10+8+0211.pdf?id=88>.

The BCRA may also produce new and unintended effects that run counter to the goals of its drafters. A common critique of the BCRA charges that it will unduly protect incumbents.²¹⁷ According to this argument, parties currently help unknown candidates gain exposure through soft money.²¹⁸ Perhaps without soft money and without issue advertisements from corporations or unions, people will only vote for the name they recognize, the incumbent. New candidates may not be able to garner recognition through increased hard money contributions under the BCRA alone.²¹⁹ A tradeoff generally exists between eliminating potential corruption and protecting incumbents.

Even with the passage of the BCRA, individuals and interest groups will still be able to find ways to use money to increase their level of influence on the political system. For example, donations to Section 527 nonprofit corporations, and spending by these corporations, will likely increase as a result of the BCRA.²²⁰ These corporations already play a significant role in financing campaigns: Planned Parenthood, for example, spent \$12 million on politically relevant activity in the 2000 presidential election campaign.²²¹ Groups seeking influence could also exploit the exclusion of news coverage and editorials from the definition of electioneering communications.²²² This exemption may lead corporations to publish advertisements in corporate-owned newspapers.²²³

²¹⁷ See Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COL. L. REV. 1390, 1390–414 (1994) (suggesting that reforming the campaign finance system could entrench incumbents); Bopp & Coleson, *supra* note 190, at 2.

²¹⁸ See Bopp & Coleson, *supra* note 190, at 14 (citing MICHAEL J. MALBIN & THOMAS L. GAIS, *DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES* 145–58 (1998) (arguing that in close elections, parties fund challengers and candidates in open-seat elections, thereby making the parties an important vehicle in electoral competition)). Senator McConnell entered into the Congressional Record several articles that argued that the increasingly complex rules of campaign finance favor incumbents who know the rules. See 148 CONG. REC. S2121–29 (daily ed. Mar. 20, 2002) (statement of Sen. McConnell). Moreover, the BCRA's electioneering communications provisions benefit incumbents because voters will hear fewer commercials supporting opponents, and the BCRA's millionaire provision benefits incumbents facing wealthy challengers. See *id.* at S2125.

²¹⁹ See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 307, 116 Stat. 81, 102–03 (to be codified at 2 U.S.C. § 441a) (increasing individual contribution limits from \$1,000 to \$2,000 per candidate).

²²⁰ See Frances R. Hill, *Softer Money: Exempt Organizations and Campaign Finance*, 91 TAX NOTES 477, 478 (2001). These kinds of donations to nonprofit corporations are sometimes referred to as “softer money.” See, e.g., *id.* According to some commentators, placing a ban on soft money without also addressing softer money donations will only shift more donations to nonprofit organizations, preventing the reform from realizing its desired effect. See *id.*

²²¹ MICHAEL J. MALBIN ET AL., *CAMPAIGN FINANCE INSTITUTE INTEREST GROUP PROJECT, NEW INTEREST GROUP STRATEGIES—A PREVIEW OF POST MCCAIN-FEINGOLD POLITICS?* 24 (2002), available at http://www.cfinst.org/int_groups_CFIpaper.pdf.

²²² See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201, 116 Stat. 81, 89–90 (to be codified at 2 U.S.C. 434(f)(3)). See also *supra* text accompanying note 81.

²²³ 148 CONG. REC. S2097 (daily ed. Mar. 20, 2002) (statement of Sen. McConnell)

The BCRA produces a substantial change in the legal structure that governs campaign financing. By banning soft money and curbing sham issue ads, the legislation eliminates some means by which corporations, unions, and individual donors used money to gain disproportionate access to the political system. This disproportionate level of influence by campaign contributors and sponsors of sham issue ads produced corruption, or at least the appearance of corruption. Even after the BCRA, monetary interests may still exert a disproportionate level of influence through uncoordinated independent expenditures and advocacy by non-profit organizations. Because regulating these forms of political speech may be unconstitutional under the Supreme Court's First Amendment jurisprudence, the BCRA regulates as much as it can without infringing on protected speech. The Act should be found constitutional by the Supreme Court because it is narrowly tailored to further a compelling governmental interest in reducing the corruption created by soft money and sham issue ads. For the BCRA's potential to institute these meaningful reforms of the campaign finance system to be realized, however, the Act's FEC interpretations must be changed, and the Supreme Court must find the Act constitutional. If both of these conditions are satisfied, the BCRA will change the way campaigns are run, and 2004 will provide a glimpse at how effectively the new regime can help secure cleaner elections in the twenty-first century.

—*Gregory Comeau*

(suggesting that corporations that own newspapers are exempt from all regulation under the BCRA).