October 2003

The Bipartisan Campaign Reform Act: Constitutional Implications for the Future

Carolyn Caccese

Follow this and additional works at: https://scholarship.law.stjohns.edu/jcred

Recommended Citation
Caccese, Carolyn (2003) "The Bipartisan Campaign Reform Act: Constitutional Implications for the Future," Journal of Civil Rights and Economic Development: Vol. 18 : Iss. 1 , Article 10. Available at: https://scholarship.law.stjohns.edu/jcred/vol18/iss1/10

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.
THE BIPARTISAN CAMPAIGN REFORM ACT: CONSTITUTIONAL IMPLICATIONS FOR THE FUTURE

CAROLYN CACCESE*

The call for reform of campaign finance law has resonated in politics from both candidates and the general public alike.1 Recent electoral spending has reached shocking proportions and fueled a movement for change.2 After heated debates in both Houses of Congress,3 the Bipartisan Campaign Reform Act (The Act)4 was passed, amending the Federal Election Campaign Act,5

*J.D. Candidate, June 2004, St. John's University School of Law.


and in March of 2002 President Bush signed the bill into law.\(^6\) A challenge to the constitutionality of the Act was quickly mounted.\(^7\) In assessing this claim, the historical background of campaign finance legislation and judicial decisions on the topic must be fully understood.

In 1971, Congress passed the Federal Election Campaign Act in order to effectively deal with increasing election costs and provide for more effective disclosure of funds.\(^8\) At the time it was hailed as a major reform to the electoral process, but soon thereafter, the Watergate scandal was exposed and numerous problematic campaign practices were uncovered.\(^9\) In response to

\(^6\) See Russell L. Smith & Barbara A. Block, New Campaign Finance Law Bans "Soft Money" but Increases Individual Federal Contribution Limits, METROPOLITAN CORP. COUNS., INC., June 2002, at 19 (explaining that President Bush signed the Bipartisan Campaign Reform Act on March 27, 2002 without show or ceremony); see also Legislation Improves Campaign Finance System, Bush Says; Senate approves House-passed Reform Bill FED. INFO. AND NEWS DISPATCH, INC., Mar. 21, 2002 (noting the President who has expressed his concern over the constitutionality of the Act and proposed that the most effective method of campaign regulation is disclosure). See generally David S. Karp, Taxing Issues: Reexamining the Regulation of Issue Advocacy by Tax-exempt Organizations Through the Internal Revenue Code, 77 N.Y.U. L. REV. 1805, 1839 (2002) (indicating that President Bush signed the Act into law shortly after passed).


\(^9\) See Bauer, supra note 3, at 745 (noting corruption associated with Watergate fueled Congressional action on campaign finance); see also Todd Paulson & David Schultz, Bucking Buckley: Voter Attitudes, Tobacco Money, and Campaign Contribution Corruption in Minnesota Politics, 19 HAMLINE J. PUB. L. & POL'Y 449, 452 (1998) (arguing there is universal agreement that 1974 amendments were passed because of Watergate). See generally Frank J. Sorauf, Politics, Experience and the First Amendment, 94 COLUM. L. REV. 1348, 1348 (1994) (discussing
this corruption, Congress amended the Federal Election Campaign Act in 1974, extending its application to contributions and expenditures in connection with campaigns as well as tougher disclosure laws and a provision providing public funding for presidential campaigns. The amendments also created the Federal Election Commission, an agency charged with the duty of promulgating regulations as well as interpreting and implementing federal campaign finance law. The amendments drew much criticism and a challenge to the requirements soon followed.

This note will examine the history of campaign finance jurisprudence. Part one will describe the principles the Court has developed in dealing with campaign finance legislation in conjunction with First Amendment principles. It will analyze the effects of the judicial doctrine and the problems that have arisen. Part two will discuss the provisions of the Bipartisan Reform Act of 2002. It will discuss in detail the controversial

---


ban on soft money as well as the limits placed on campaign advertisements and issue advocacy. Part three will assess the constitutionality of the Act. It will argue that soft money regulation is within the established judicial principles. The issue advocacy limitations, although not firmly entrenched in court decisions, should also be found constitutional. Finally, part four will evaluate the likelihood of a new judicial doctrine on campaign finance legislation and argue that rejection of the Buckley doctrine is necessary in light of contemporary political realities.

I. THE REALM OF CAMPAIGN FINANCE JURISPRUDENCE

A. Origin of Campaign Finance Principles

The First Amendment to the Constitution guarantees the rights of free speech and association without interference from the government.\(^\text{13}\) The Amendment’s guarantee has been deemed especially important in the area of political expression and debate.\(^\text{14}\) Such rights have even been considered at the heart of the amendment’s protection.\(^\text{15}\) Because of the need for an educated electorate in our system of government, political discussions have received great protection in order to ensure

\(^{13}\) See U.S. CONST. amend. I (1791) (forbidding Congress from passing legislation “abridging the freedom of speech” or “the right of the people to peacefully assemble”); see also Kevin E. Broyles, NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan, 46 ALA. L. REV. 487, 542 (1995) (noting the Supreme Court has held that freedom of association exists within the Amendment’s guarantees of speech, press, assembly, and petition). See generally Steven Chaffee & Stacey Frank, How Americans Get Political Information: Print Versus Broadcast News, 546 ANNALS 48, 49 (1996) (explaining that First Amendment guarantees were formed out of faith in the people).


\(^{15}\) See Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) (stressing "constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office"); see also Nicholson v. Judicial Comm’n, 50 N.Y.2d 597, 607 (1980) (stating "the rights of political expression and association are at the heart of the First Amendment.") See generally W. Bradley Wendel, Free Speech for Lawyers, 28 HASTINGS CONST. L.Q. 305, 365 (2001) (arguing the ability to comment on matters of public concern is important to the First Amendment).
that elections take place free from governmental intervention.\textsuperscript{16} Associational rights insure that groups may congregate to discuss their views in a meaningful discussion.\textsuperscript{17} This constitutional right to associate protects the activities of political parties and other political organizations.\textsuperscript{18} The Supreme Court has interpreted campaign donations and candidate spending to be within this protection.\textsuperscript{19} These rights of freedom of speech and association, however, are not absolute and government restrictions can be upheld in certain situations.\textsuperscript{20}


\textsuperscript{17} See Roberts v. United States Jaycees, 468 U.S. 609, 617-618 (1984) (noting associational rights protect against encroachments on individual liberties and on fundamental rights); see also Kusper v. Pontikes, 414 U.S. 51, 57 (1973) (emphasizing "[t]he right to associate with the political party of one's choice is an integral part of this basic constitutional freedom"). See generally NAACP v. Ala., 357 U.S. 449, 460 (1958) (holding the right to associate protects exchange of ideas and fundamental concepts of liberty).


\textsuperscript{20} See United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973) (arguing "[n]either the right to associate nor the right to participate in political activities is absolute in any event."); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (emphasizing the need for the government to prove a compelling state interest in order to regulate within the First Amendment sphere of protection); Shelton v. Tucker, 364 U.S. 479, 488 (1960) (noting even though governmental purpose may be legitimate it "cannot be pursued by means that broadly stifle fundamental personal liberties").
Campaign finance legislation infringes upon the rights of freedom of association and speech, but not all legislation on the matter has been invalidated. In determining whether campaign finance legislation unduly infringes upon First Amendment rights, the courts have applied "exacting scrutiny." This scrutiny level has been applied to speech issues in order to give the government the necessary freedom to regulate fields of speech or expression that would otherwise be protected. But the Court has repeatedly viewed governmental interference in this area as a threat to constitutional guarantees. Using this level of scrutiny, a law will be upheld "only if it is narrowly tailored to serve an overriding state interest."

In the landmark case Buckley v. Valeo, the Supreme Court applied exacting scrutiny to amendments of the Federal Election Campaign Act of 1971 (FECA), upholding contribution limitation

See Buckley v. Valeo, 424 U.S. 1, 58 (1976) (upholding $1,000 contribution limits for individuals); see also Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 385 (2000) (noting contribution limits are constitutionally permissible). See generally Blasi, supra note 19, at 1325 (arguing that spending limits may advance First Amendment rights).

See Buckley, 424 U.S. at 16 (stating exacting scrutiny is required for First Amendment analysis); see also Citizens for Responsible Gov't State PAC v. Davidson, 236 F.3d 1174, 1197 (2001) (noting that exacting scrutiny applies to campaign finance legislation). See generally Buckley v. Amn. Constitutional Law Found., 525 U.S. 182, 204 (1999) (applying exacting scrutiny to ballot initiatives approved by voters on the election process); Potter, supra note 10, at 160 (arguing that exacting scrutiny is essentially strict scrutiny).

See Denver Area Educ. Telecommission Consortium v. FCC, 518 U.S. 727, 741 (asserting scrutiny level leaves government possibility of essential regulation); see also Potter, supra note 8, at 78 (noting that test requires the state to have a substantial state interest). See generally Eric L. Richards, Federal Election Commission v. Colorado Republican Federal Campaign Committee: Implications for Parties, Corporate Political Dialogue, and Campaign Finance Reform, 40 AM. BUS. L.J. 83, 92-93 (2002) (explaining the connection between money and expression does not introduce a nonspeech element).


See McIntyre, 514 U.S. at 347 (announcing the appropriate test for evaluating legislation); see also Burson v. Freeman, 504 U.S. 191, 198 (1992) (describing standard government must meet is the showing of a compelling interest narrowly tailored to achieve the purpose); United States v. Grace, 461 U.S. 171, 177 (1983) (stating restrictions will be upheld "only if narrowly drawn to accomplish a compelling governmental interest").

provisions while invalidating expenditure limitations. The challengers of the amendments argued that the amendment provisions unconstitutionally restricted the rights of freedom of speech and association. In examining the law, the Court found the restrictions it imposed inhibited the voice of the people and decreased the reach of political campaigns. Therefore, it determined that the act hampered political speech and associational rights.

In its analysis, the Court distinguished between contribution limits and expenditure limits. Contribution limits capped the amount a person may donate to a candidate to $1,000 in an election year. Expenditure limits restricted the amount a person may spend on communications encouraging the election or defeat of a particular candidate to $1,000 in an election year.

---

27 See Buckley, 424 U.S. at 58-59 (holding that "limitations on contributions" are "constitutionally valid" but the First Amendment requires the invalidation of the Act's expenditure limitations); see also Jason P. Conti, Book Review, The Money Chase: How Proposed Changes to Campaign Finance Laws Could Impact Female Candidates, 21 B.C. THIRD WORLD L.J. 105, 108-09 (2001) (reviewing ELEANOR CLIFT AND TOM BRAZAITIS, MADAM PRESIDENT: SHATTERING THE LAST GLASS CEILING) (stating Buckley held that contribution limits were permissible but expenditure limits violated constitutional principles). See generally Gora, supra note 24, at 15 (setting forth the FECA including provisions limiting candidate contribution and expenditure limitations).

28 See Buckley, 424 U.S. at 15 (summarizing challenger's argument as "contributions and expenditures are at the very core of political speech and that the Act's limitations thus constitute restraints on First Amendment liberty that are both gross and direct"); see also Gora, supra note 24, at 18 (noting opposers like the ACLU argued reforms would suppress political advocacy). See generally Richards, supra note 1, at 565 (citing argument that First Amendment freedoms have been directly challenged).

29 See Buckley, 424 U.S. at 17 (stating the Act controls "the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns"). See generally Gora, supra note 24, at 18 (describing the Buckley decision as "a landmark of political freedom"); Richards, supra note 1, at 559 (calling the Buckley decision a "watershed" decision).

30 See Buckley, 424 U.S. at 18 (concluding both contribution and expenditure limitations are greater than traditional elections clause limitations); see also Gora, supra note 24, at 18-19 (tracing Court's rationale that limits on political speech threatened First Amendment freedoms); Richards, supra note 1, at 565-66 (clarifying the Court's position that in part the FECA intended to restrict expression).

31 See 2 U.S.C. § 441a (stating contribution limitation); Buckley, 424 U.S. at 7 (summarizing statutory provisions); see also Gora, supra note 24, at 24 (stating the FECA contribution limit of $1000).

32 See 2 U.S.C. § 608 (e) (1) (repealed) (noting contribution limit); Buckley, 424 U.S. at 39 (quoting statutory limitation); Richards, supra note 1, at 560 (stating the FECA individual expenditure limit of $1000).
The Court found the expenditure limits to infringe on freedom of speech and association rights in a more substantial manner than the contribution limitations.\(^{33}\) It reasoned that the contribution limitation only forced candidates to raise money from an extended constituency and did not constrain the total amount a candidate could raise.\(^{34}\) The expenditure limitation, however, was held to be a much more substantial burden on First Amendment Rights, because it limited the opportunity of people and political associations to express their views on a particular candidate.\(^{35}\)

After noting that these provisions of the act interfered with constitutional rights, the court analyzed each provision separately.\(^{36}\) The applicable standard announced stated, "[e]ven a ‘significant interference’ with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms."\(^{37}\)

With regard to the contribution limits, the Court found the government interest in avoiding corruption or the appearance of corruption sufficiently important to warrant such legislation because of the need for public confidence in the governmental

---

\(^{33}\) See *Buckley*, 424 U.S. at 23 (holding "[a]lthough the Act’s contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected political freedoms"); see also Gora, *supra* note 24, at 23 (noting the Court’s relative favor of contribution limits and disfavor of expenditure limits); Richards, *supra* note 1, at 560 (declaring that the Court drew a clear distinction between expenditure and contribution limits).

\(^{34}\) See *Buckley*, 424 U.S. at 21-22 (finding candidates would have to raise money from more sources, but there was no limitation on the amount of money they could raise); see also Gora, *supra* note 24, at 23 (detailing the Court’s rationale in allowing contribution limits to stand); Richards, *supra* note 1, at 566 (interpreting the Court’s holding with respect to its allowance of contribution limitations).

\(^{35}\) See *Buckley*, 424 U.S. at 22 (declaring the expenditure limitation “precludes most associations from effectively amplifying the voice of their adherents”); see also Gora, *supra* note 24, at 20 (relaying the Court’s rationale that government cannot exercise power over the quantity and range of political debate); Richards, *supra* note 1, at 571 (stating that expenditure limits were found unconstitutional).


\(^{37}\) *Buckley*, 424 U.S. at 25-30.
system and the amount limitation did not have to perfectly advance this important goal. However, with respect to the expenditure limits the Court found the same justification of corruption or appearance of corruption inadequate and that the means of the Act were not narrowly tailored to prevent such corruption. In rejecting the corruption purpose, the Court determined that the possibility of corruption was not as strong concerning this type of expenditure and other provisions of the act more effectively dealt with such concerns. The Court also rejected the government's argument that the expenditure distinction was necessary in order to level the playing field for candidates, finding that restrictions on speech of some cannot be implemented in order to increase the level of speech of others.

While examining the expenditure limitation, the Court confronted the challenger's argument that this provision was

38 See Buckley, 424 U.S. at 27 (noting Watergate scandal and possibility of quid pro quo corruption); see also Richards, supra note 1, at 567 (explaining that necessary to any government success was a showing of sufficient governmental importance, among those named is prevention of corruption); Sheils, supra note 36, at 479 (reporting the Court's decision to accept the government's corruption argument with respect to contributions).

39 See Buckley, 424 U.S. at 45 (rejecting assertion that expenditure limits are subject to same evil as contribution limits); see also Richards, supra note 1, at 570 (underscoring Court's decision that expenditure limits did not lessen corruption); Sheils, supra note 36, at 479 (recounting Court's decision not to accept corruption argument with respect to expenditures).

40 See Buckley, 424 U.S. at 46-47 (arguing other provisions of the Act effectively deal with possible corruption in this area). See generally Bauer, supra note 3, at 757 (discussing strengths and weaknesses of the Court's corruption holding); Gora, supra note 24, at 23-25 (contrasting the Court's decision and the opposing position with respect to the corruption issue).

41 See Buckley, 424 U.S. at 56 (arguing support for a particular candidate will vary, thus contributions will also vary); see also Gora, supra note 24, at 21 (maintaining that the Court focused on securing the widest dissemination of ideas, rather than equal dissemination among different candidates). See generally Richards, supra note 1, at 567 (noting the government's goal to achieve a level playing field for all candidates).

42 See Buckley, 424 U.S. at 57 (noting "[i]n the free society ordained by our Constitution is it not the government but the people-individually as citizens and candidates and collectively as associations and political committees-who must retain control over the quantity and range of debate on public issues in a political campaign"); see also Richards, supra note 1, at 569 (pointing out the portion of this argument concerning incumbent advantage was rejected by the Court). But see Martin H. Redish, Free Speech and the Flawed Postulates of Campaign Finance Reform, 3 U. PA. J. CONST. L. 783, 785-86 (2001) (arguing five reasons for the constitutionality of campaign finance reform, including an equality among individuals rationale).
unconstitutionally vague. The Court rejected this argument, stating that the provision referred to expenditures “advocating the election or defeat of a candidate.” In reaching this decision, the Court distinguished between issue advocacy, which encourages activism and support on a particular issue, and express advocacy, which encourages voters to choose or reject specific candidates on Election Day. It recognized that in certain instances, the difference between both types of advocacy may be slight:

For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

These categories of advocacy have remained a strong force in politics today. Buckley made it abundantly clear that restrictions on express advocacy are permissible, while restrictions on communications that do not promote the election or defeat of a candidate may not be regulated. The courts still

---

43 See Buckley, 424 U.S. at 40 (describing challenger's vagueness argument); see also Richards, supra note 1, at 569-70 (providing insight into Court's narrowing interpretation so as to avoid a finding of vagueness). See generally Jan Witold Baran, National Symposium on Judicial Campaign Conduct and the First Amendment: Compelled Disclosure of Independent Political Speech and Constitutional Limitations, 35 IND. L. REV. 769, 772-73 (2001/2002) (examining Court's understanding of term expenditures).

44 Buckley, 424 U.S. at 42.

45 See id. at 42 (noting that discussion of issues and candidates are not identical); see also Gora, supra note 24, at 29 (explaining that the Court's express advocacy doctrine worked to protect issue advocacy from controls). See generally, Bauer, supra note 3, at 751-52 (discussing Court's reaction that there exists speech alternatives by which to demonstrate candidate support).

46 Buckley, 424 U.S. at 42.

47 See Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387 (2000) (confirming contribution and expenditure distinction as set out in Buckley); see also FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985) (reaffirming Buckley holding). See generally Karp, supra note 6, at 1805 (stating that since Buckley, political candidates have identified themselves with particular issues).

48 See Buckley, 424 U.S. at 45 (stating that the government's interest in preventing corruption or the appearance of corruption, was not a sufficient justification for 2 U.S.C. § 608(e) (1)'s cap on independent expenditures); see also
distinguishes today between express advocacy and impermissible restrictions on issue advocacy.\textsuperscript{49}

The dissenting opinions seem to have anticipated many of the problems that have arisen since the Court decided \textit{Buckley}. Chief Justice Burger questioned the viability and effectiveness of the remaining sections of the statute, since the majority opinion invalidated expenditure limitations while upholding contribution limitations.\textsuperscript{50} Justice White viewed both limitations as constitutional and argued that it was necessary to uphold expenditure limitations in order to prevent circumvention of the act.\textsuperscript{51} He also argued that without expenditure limits the cost of campaigns would continue to increase.\textsuperscript{52} Justice Marshall viewed


\textsuperscript{50}See \textit{Buckley}, 424 U.S. at 235-36 (Burger, J., dissenting) (noting that remaining sections of the statute may prove ineffective because of Court's holding); see also Ronald A. Cass, \textit{Money, Power, and Politics: Governance Models and Campaign Finance Regulation}, 6 SUP. CT. ECON. REV. 1, 9 (1998) (noting that Justice Thomas subsequently criticized the divergent treatment that expenditures and contributions receive and declared it goes against Supreme Court precedent); Richard Hasen, Shrink Missouri, \textit{Campaign Finance, and and "The Thing That Wouldn't Leave"}, 17 CONST. COMMENT 483, 483 (2000) (observing that since \textit{Buckley}, members of the Supreme Court have criticized its decision to hold campaign contribution limits and campaign expenditure limits to different standards).

\textsuperscript{51}See \textit{Buckley}, 424 U.S. at 261-62 (White, J., dissenting) (arguing Congress is in a better position to judge campaign necessities and the Court should accept its wisdom); see also Stephanie Pesta, When \textit{Buckley}, The First Amendment, 58 WASH. & LEE L. REV. 1109, 1125 (2001) (stating that in cases subsequent to \textit{Buckley}, Justice White consistently disagreed with the Court's First Amendment jurisprudence regarding campaign finance laws). See generally Sheils, supra note 36, at 501-02 (examining Justice White's opinion).

\textsuperscript{52}See \textit{Buckley}, 424 U.S. at 264 (White, J., dissenting) (noting campaign spending will continually increase and candidates will feel pressured to raise more and more money); Debra Burke, \textit{Twenty Years After the Federal Election Campaign Act Amendments of 1974: Look Who's Running Now}, 99 DICK. L. REV. 357, 375-76 (1995) (observing that since \textit{Buckley} congressional campaign expenses have increased at a much faster rate than inflation); Marty Jezer et al., \textit{A Proposal for
a limitation on the contributions of candidates to their own campaigns as necessary to achieve a level playing field among the candidates. His concern was that wealthy candidates would face significantly decreased barriers in the election process because they would not be reliant on private contributions and also focused on negative public reaction to such candidates. Many of these concerns and arguments have become a reality in today’s political process.

B. Effects of Buckley and the Rise of Modern Problems

Since the court’s holding in Buckley, the contribution/expenditure distinction has proliferated. Courts have consistently invalidated expenditure limitations while

Democratically Financed Congressional Elections, 11 YALE L. & POL'Y REV. 333, 336 (1993) (observing that in 1974 the combined cost of all House and Senate campaign was $77 million and rose to $678 million in 1992).


54 See Buckley, 424 U.S. at 288 (Marshall, J., dissenting) (remarking the honor of the election process may be undermined by wealthy candidates spending their own fortune to essential buy an election); see also William P. Marshall, The Last Best Chance for Campaign Finance Reform, 94 NW. U. L. REV. 335, 349 (2000) (observing that Buckley has received harsh criticism for underestimating the influence wealth has in election campaigns and rejecting interests of equality in campaigning as a sufficient justification expenditure limitations). See generally James G. Wilson, Noam Chomsky and Judicial Review 44 CLEV. ST. L. REV. 439, 465 (1996) (stating that the decision in Buckley gave wealthy political candidates a "perpetual advantage" because they can spend as much of their money as they want while less wealthy candidates are forbidden from obtaining a comparable amount from a single source).

55 See Douglas J. Feichtner, Campaign Finance Reform—Whether Money Talks Depends on Who is Talking: FEC v. Colorado Republican Federal Campaign Committee, 70 U. CIN. L. REV. 789, 795 (2002) (mentioning since Buckley courts have consistently classified regulation as either contribution or expenditure limitation); see also Sharon Wheeler, Money in Politics: Reforming Alabama's Campaign Finance and Ethics Laws, 45 ALA. L. REV. 675, 683 (1994) (noting contribution limits have been regularly upheld while expenditure limits are questionable); David C. Clifton, Note, FEC v. Colorado Republican Federal Campaign Committee: A Vote for Campaign Finance Reform?, 53 MERCER L. REV. 911, 917 (2002) (observing that the contribution/expenditure differentiation is maintained today).
upholding contribution limits. In *Colorado Republican Federal Campaign Committee v. FEC*, the Court held the FECA Party Expenditure Limitation was unconstitutional and could not be applied to political party expenditures that were not coordinated with a specific candidate. Relying on the *Buckley* classification, the Court found this type of provision was intended to regulate what *Buckley* had labeled an independent expenditure, which cannot be constitutionally regulated. Similarly, in *FEC v. National Conservative Political Action Committee*, the Court struck down a limit on independent expenditures made by political committees because it attempted to impose limits on expenditures that *Buckley* had deemed impermissible.

In contrast, provisions that limit contributions to political candidates have been steadily upheld. The Court upheld

56 See Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387 (2000) (confirming contribution and expenditure distinction as set out in *Buckley*); see also Todd R. Overman, Note, *Shame on You: Campaign Finance Reform Through Social Norms*, 55 VAND. L. REV. 1243, 1272 (2002) (stating that the contribution/expenditure difference is still relied upon today). But see Richards, supra note 23, at 91 (noticing that some courts have not accepted a "rigid application" of the distinction between contribution and expenditure delineated in *Buckley*).


59 See Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. at 614-15 (finding the expenditure was not an indirect contribution but an independent expenditure); see also Richard Briffault, Nixon v. Shrink Missouri Government PAC: *The Beginning of the End of the Buckley Era?*, 85 MINN. L. REV. 1729, 1745 (2001) (stating that Colorado Republican upheld the central holding of *Buckley* by rejecting limits on political party expenditures). See generally Simmons, supra note 53, at 8 (declaring that *Buckley* has shaped the contemporary development of organizing campaigns).


61 See *Nat'l Conservative Political Action Comm.*, 470 U.S. at 497 (reaffirming *Buckley* holding); see also Richards supra note 23, at 118 (2002) (stating the decision allowed corporations, by acting through their political action committees, to funnel an unlimited amount of money to their candidates). See generally Briffault, supra note 59, at 1741 (stating that *Nat'l Conservative Political Action Comm.* followed *Buckley* in focusing on the quid pro quo: dollars for political favors).

62 See Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley,
limitations on contributions made to multi-candidate political action committees by individuals in *California Medical Association v. FEC*. There the court determined that the *Buckley* analysis applied, and if an individual could be constitutionally limited to the amount of money he or she could give to a candidate, they could be constitutionally limited in the amount given to a political action committee. Likewise, in *FEC v. Colorado Republican Federal Campaign Committee*, the Court upheld a limitation on political parties’ coordinate expenditures, those spent in conjunction with a candidate, because of the potential to effectively destroy the constitutionally permissible contribution limitations in place. The Court analyzed the provision under the contribution limits scrutiny set out in *Buckley*, because such a provision was easily likened to a contribution directly to a candidate.

454 U.S. 290, 301 (1981) (J. Marshall concurring) (noting that distinction between contributions and expenditures is longstanding); see also Wheeler, supra note 55, at 683 (declaring that contribution limits have been upheld); Clifton, supra note 55, at 917 (stating contribution and expenditure differences are still upheld today).

63 See *Cal. Medical Ass'n v. FEC*, 453 U.S. 182, 197 (1981) (emphasizing contributions limits are constitutionally permissible under the *Buckley* framework); see also Clifton, supra note 55, at 918 (stating that the contribution given to the multi-candidate political committees in *Cal. Medical Ass'n* could permissibly be limited without violating the First Amendment); Scott Shuchart, *Seeking Coherence in Doctrines of Part Election Expenditures*, 19 YALE L. & POL'Y REV. 515, 518-19 (2001) (stating *Cal. Medical Ass'n* held that Congress can permissibly place restrictions on contributions to these associations).

64 See *Cal. Medical Ass'n*, 453 U.S. at 198 (stating the contribution limitations can be applied to multicandidate political committees in order to prevent circumvention of the policies of the Act); see also Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 CAP. U. L. REV. 381, 385 (1992) (stating that *Cal. Medical Ass'n* reaffirmed *Buckley* in distinguishing between regulations of expenditures and contributions); Clifton, supra note 55, at 918 (stating that the court reiterated *Buckley*’s holding).


66 See *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 464 (analogizing political party coordinate expenditures to contribution limits); see also Richards, supra note 23, at 83-84 (stating that *Colorado II* upheld legislation that limits how much political parties can spend in conjunction with a candidate for federal office). See generally Monteiro, supra note 3, at 107 (observing that in this decision, the Court recognized the political realities and took an incremental step in recognizing that contribution and expenditure of money is conduct, rather than speech).

67 See *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 456 (applying test "whether the restriction is 'closely drawn' to match what we have recognized as the 'sufficiently important' government interest in combating political corruption"); see also Monteiro, supra note 3, at 116-17 (stating that *Colorado II* put to rest some speculation that the *Buckley* framework was unstable). See generally Altman, supra
This judicial doctrine has created the framework within which campaign finance legislation may be passed.\textsuperscript{68} The \textit{Buckley} doctrine limited the type of regulation Congress may pass in order to deal with the growing problem of the ever-increasing cost of conducting a campaign.\textsuperscript{69} Such constraints upon Congress have often been blamed for the lack of effective campaign finance changes since the 1974 amendments.\textsuperscript{70}

The decision has not gone without criticism. Many have argued that its framework impermissibly restrains free speech and the Court's analysis damaged firmly established First Amendment principles.\textsuperscript{71} Some have labeled it one of the worst decisions of this century.\textsuperscript{72} Others have argued that money

\textsuperscript{68} See Potter, supra note 10, at 167-68 (arguing \textit{Buckley} and \textit{Nixon} affirm First Amendment principles that limit Congressional action); see also Richards, supra note 23, at 90-91 (stating that proponents of campaign finance reform eagerly awaited the \textit{Colorado II} decision); Monteiro, supra note 3, at 107 (observing that those in favor of campaign finance reform were relieved after the Court's decision in \textit{Colorado II}).

\textsuperscript{69} See David Schultz, \textit{Revisiting Buckley v. Valeo: Eviscerating the Line between Candidate Contributions and Independent Expenditures}, 14 J.L. & POLITICS 33, 35 (1998) (arguing that \textit{Buckley} distinction hampers legislative efforts even though the general public desires meaningful reform legislation); see also Briffault, supra note 59, at 1759 (positing that \textit{Buckley} has allowed politicians and organizations to disturb legislative efforts to restrict campaign funding); Richard Briffault, \textit{Symposium: Law and Political Parties: The Political Parties and Campaign Finance Reform}, 100 COLUM. L. REV. 620, 634 (2000) ("The \textit{Buckley} doctrine appears to raise serious constitutional objections to any legislative efforts to curtail party independent spending or party issue advocacy.").

\textsuperscript{70} See Deborah E. Schneider, \textit{As Goes Maine? The 1996 Maine Clean Election Act: Innovations and Implications for Future Campaign Finance Reforms at the State and Federal Level}, 2 WASH. U. J.L. & POL'Y 627, 631 (2000) (noting that although public support of campaign finance reform is at an all-time high, Congress has not passed meaningful legislation in over twenty years). See generally Geddis, supra note 49, at 29-30 (outlining the reforms invoked by the 1974 amendments to the Federal Elections Campaign Act); Paulson & Schultz, supra note 9, at 451 (offering evidence of corrupt campaign financing practices which satisfy \textit{Buckley}).

\textsuperscript{71} See Banks & Green, supra note 10, at 1 (noting some have stated that \textit{Buckley} protected neither First Amendment principles nor campaign laws); see also Richards, supra note 1, at 585 (reasoning that non-recognition of political equality as a sufficient governmental interest to overcome burdens on free speech was a specific error in \textit{Buckley}). But see Gora, supra note 24, at 30 (1999) (arguing that \textit{Buckley} reaffirmed the bedrock First Amendment freedom of public discussion of public issues).

\textsuperscript{72} See Gora, supra note 24, at 7 (stating academics have rated \textit{Buckley} in the top ten worst decisions of the century); see also John C. Bonifaz et al., \textit{Challenging Buckley v. Valeo: A Legal Strategy}, 33 AKRON L. REV. 39, 58 (1999) (noting that scholars have criticized the Supreme Court's decision in \textit{Buckley}). But see Colloquia, \textit{Campaign Finance Reform: Law and Politics: Constitutional
should not be considered within the realm of speech and that even more restrictions on campaigns should be implemented. Still others have approved of the decision, stating that it has effectively intermingled First Amendment principles and the need for campaign finance regulation.

The most problematic outcome of the distinction between contributions and expenditures has been the ability to sidestep the regulations. In a fairly recent decision, *Nixon v. Shrink Missouri Government PAC,* Justice Kennedy's dissent coined the term "covert speech." Justice Kennedy argued that the *Buckley* distinction created an even greater vice than the one it intended to correct and severely damaged First Amendment principles previously established by the Court.

*Implications of Campaign Finance Reform,* 8 ADMIN. L.J. AM. U. 161, 167 (1994) [hereinafter *Constitutional Implications*] (suggesting that the possibility of overturning *Buckley* is unreal).

73 See *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 398 (2000) (Stevens, J., concurring) (arguing "[m]oney is property; it is not speech"); see also *Monteiro,* supra note 3, at 110 (discussing common criticism of the *Buckley* decision is classification of political money as speech). But see *Constitutional Implications,* supra note 72, at 167-68 (suggesting "it is impossible to allow political speech to be unrestrained if the purse strings that allow it to reach its audience are severed.").

74 See *Gora,* supra note 24, at 7 (hailing *Buckley* decision as protective of First Amendment Rights and gives power to influence elections to the people); see also *Blasi,* supra note 19, at 1288 n.24 ("Buckley's conclusion that certain campaign finance reforms that cannot be instituted directly by means of prohibitions can be achieved indirectly by means of financial incentives."). But see Richard L. Hansen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers,* 84 CALIF. L. REV. 1, 44 n.202 (1996) (arguing that *Buckley* must be overruled).

75 See *Richards,* supra note 1, at 561 (discussing the ability of parties, candidates, and interest groups to avoid contribution limitation); see also Bradley A. Smith, *Campaign Finance Reform: The General Landscape: The Siren's Song: Campaign Finance Regulation and the First Amendment,* 6 J.L. & POLY 1, 2-3 (1997) (positing that campaign finance reforms may never be effectuated with each major party having sufficient Senate votes). See generally *Lowenstein,* supra note 64, at 302 (suggesting that there are unforeseeable ways that corruption may occur in campaign financing).


77 See *Nixon,* 528 U.S. at 406 (Kennedy, J., dissenting) (arguing that *Buckley* created another category of speech which protects efforts to avoid contribution limits); see also *Richards,* supra note 1, at 586 (2001) (claiming that *Buckley* and its progeny have given rise to an increase in use of soft money in campaign elections); Justin A. Nelson, Note, *The Supply And Demand Of Campaign Finance Reform,* 100 COLUM. L.REV. 524, 542 (2000) (explaining Justice Kennedy's feeling that *Buckley* pushed spending into issue advocacy which is covert speech).

78 See *Nixon,* 528 U.S. at 406-08 (Kennedy, J., dissenting) (arguing the Court's analysis created protections for concealed speech while limiting more legitimate
argued that while restrictions are placed on the contributions that can be given to a candidate, damaging issue advocacy advertisements and soft money go completely unregulated.\textsuperscript{79} He places the blame for such an effect squarely on the Court and argued if Congress created the problematic campaign finance legislation, the Court could more effectively deal with it; however, "its unhappy origins are in our earlier decree in \textit{Buckley}, which by accepting half of what Congress did (limiting contributions) but rejecting the other (limiting expenditures) created a misshapen system, one which distorts the meaning of speech."\textsuperscript{80} The final effect of this distinction is avoidance of the actual law and deceitful campaign practices that further corrupt in the electoral system,\textsuperscript{81} whereas \textit{Buckley} believed such spending was not subject to that evil.\textsuperscript{82}

\textsuperscript{79} See Nixon, 528 U.S. at 406 (Kennedy, J., dissenting) (arguing soft money and issue advocacy remain unregulated because of the \textit{Buckley} decision); see also Kara Baker, Comment, \textit{Is Justice for Sale in Ohio? An Examination of Ohio Judicial Elections and Suggestions for Reform Focusing on the 2000 Race for the Ohio Supreme Court}, 35 AKRON L. REV. 159, 172 n.102 (2001) ("Because donors can contribute to issue advocacy groups in unregulated amounts, the possibility for corruption may be greater than for express advocacy."). \textit{But see} Lillian R. BeVier, \textit{The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis}, 85 VA. L. REV. 1761, 1781 (1999) (suggesting that an anti-corruption motivation is unavailable to endorse limitations on issue advocacy).

\textsuperscript{80} Nixon, 528 U.S. at 407 (Kennedy, J., dissenting). See Gail Kijak Martens, Nixon v. Shrink Missouri Government PAC: \textit{Further Dissension Over The Federal Election Campaign Act}, 50 CATH. U.L. REV. 819, 822 (2001) (arguing that \textit{Buckley} rewrote the campaign finance laws); Simon, \textit{supra} note 2, at 170 (blaming the court for ineffective campaign finance laws that existed after \textit{Buckley}).

\textsuperscript{81} See 148 CONG. REC. H270,270 (daily ed. Feb. 12, 2002) (statement of Rep. Boyd) (arguing that diminished participation in elections occurred because of the corruption of money in politics); see also Ronald M. Levin, \textit{Dedication: Fighting the Appearance of Corruption}, 6 WASH. U. J. L. & POL'Y 171, 178 (2001) (suggesting that the Court's reliance on public perception is misplaced); Baker, \textit{supra} note 79, at 177 (discussing limitations on government regulations on issue advocacy subsequent to \textit{Buckley}).

\textsuperscript{82} See Buckley v. Valeo, 424 U.S. 1, 47-48 (1976) (holding that expenditures independent from candidates were not subject to quid pro quo corruption because they are unaffiliated with the candidate). See \textit{generally} FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 456 (2001) (applying the standard set forth in
The evil of covert speech as discussed by Justice Kennedy refers to the proliferation of the distinction between express advocacy and issue advocacy. Since issue advocacy is not considered part of the federal election process, it is not subject to the limitations imposed by FECA. Individuals and groups are free to run ads that will affect federal elections as long as they steer clear of the “magic words” announced in Buckley. These ads usually take the form of attacks on current politicians in an attempt to influence the electorate’s decision making. As long as the ad does not specifically declare, “vote for” or “defeat,” groups are free to spend unregulated money to manipulate the outcome of federal elections.


See Chamber of Commerce of the U.S. v. Moore, 288 F.3d 187, 193 (5th Cir. 2002) (stressing Buckley’s holding that the government cannot regulate issue advocacy); see also Virginia Soc’y for Human Life, Inc. v. FEC, 362 F.3d 379, 391 (4th Cir. 2001) (noting that there is a sharp distinction between express advocacy and issue advocacy); Clifton v. FEC, 114 F.3d 1309, 1312 (1st Cir. 1997) (explaining that the FECA “stops short of prohibiting issue advocacy”).

See Kirk L. Jowers, Issue Advocacy: If It Cannot Be Regulated When It Is Least Valuable, It Cannot Be Regulated When it is Most Valuable, 50 CATH. U.L. REV. 65, 72-73 (2000) (noting courts require magic words in order to fund an ad is express advocacy and can therefore be subject to regulation); Potter & Jowers, supra note 7, at 845 (arguing that absence of magic words in advertisement leaves courts wary of regulation because of fears of limiting speech). But see Glenn J. Moramarco, Beyond “Magic Words”: Using Self Disclosure to Regulate Electioneering, 49 CATH. U.L. REV. 107, 118 (1999) (arguing that Buckley did not limit the finding of express advocacy to the magic words but that the court looked to the message itself in order to determine its character and purpose).

See Baker, supra note 79, at 180 (suggesting that groups may publish derogatory advertisements under the pretext of issue advocacy); see also Potter, supra note 8, at 83 (discussing examples of derogatory advertisements used without magic words). But see Bradley A. Smith, A Most Uncommon Cause: Some Thoughts on Campaign Reform and a Response to Professor Paul, 30 CONN. L. REV. 831, 838 (1998) (arguing that issue advocacy in its present form only exists because of the current campaign finance laws).


See Monteiro, supra note 3, at 90 (arguing there is very little regulation on issue advocacy); see also Bopp & Colson, supra note 49, at 786 (2002) (maintaining that advertisements aimed at issue advocacy need strict regulation); Gora, supra note 24, at 28 (claiming that regulations on issue advocacy are unprecedented and
Given the Court's strict restrictions on Congress passing effective campaign finance reform, the legislation currently in place has not effectively dealt with campaign costs and spending. Parties and candidates have been able to circumvent current law and take advantage of unintended loopholes in the law.\footnote{88} Corporations and labor unions have been pouring money into political parties to influence elections, since they are barred from directly contributing to a candidate's campaign.\footnote{89} Wealthy individuals have followed this path by donating unlimited and unrestricted amounts of money into the political parties.\footnote{90} These practices have effectively circumvented the intended aims of the Federal Election Campaign Act.\footnote{91}

C. Soft Money

Soft money refers to the contributions made by unions, corporations, and wealthy individuals to political parties, which are unregulated by the FECA.\footnote{92} These contributions allow unconstitutional).

\footnote{88} See Conti, supra note 27, at 112 (reviewing ELEANOR CLIFT AND TOM BRAZAITIS, MADAM PRESIDENT: SHATTERING THE LAST GLASS CEILING) (noting both parties use soft money to run issue advocacy ads that affect federal elections). See generally Geddis, supra note 49, at 147-48 (discussing various loopholes that arise under analogous campaign finance legislation in the United Kingdom). But see Eisenberg, supra note 16, at 154 (proposing that loopholes will always remain as long as financial interests are at stake).

\footnote{89} See Richards, supra note 1, at 561 (mentioning that third parties have avoided limitations on contributions). See generally La Forge, supra note 11 (reviewing the Tillman Act as the predecessor of the FECA). But see Paulson & Schultz, supra note 9, at 488-89 (noting that Minnesota law prohibits corporations from providing political candidates with contributions).

\footnote{90} See Richards, supra note 1, at 561 (arguing that unregulated money reaches the candidates); see also Conti, supra note 88, at 127-28 (arguing that unregulated contributions by wealthy individuals provides the basis for corrupt activities); Simmons, supra note 53, at 88 (reviewing the concept of "party building" and its relation to the FECA).


\footnote{92} See Conti, supra note 27, at 127 (describing soft money as unregulated money that individuals and groups donate to political parties); Kolb & Dreibelbis,
parties to spend excessive amounts of money, draped in the name of party building, to indirectly advocate the election or defeat of political candidates. This money enables parties to run issue advocacy ads, which have a great impact on political elections. These ads often have the effect of confusing the voters and it is usually impossible to determine who is actually sponsoring such communications.

The origin of soft money in politics did not occur because of the Buckley decision. The 1979 Congressional amendments to FECA in conjunction with FEC regulations have permitted the explosion of soft money. An FEC advisory opinion in 1978 permitted parties to use funds previously banned from federal elections for activities that benefited both state and federal

supra note 91, at 109 n.13 (defining soft money as unregulated money that individuals, groups, and private corporations can donate to political parties); Mark Fineman, Political Financing's New State, L.A. Times, Sept. 9, 2002, at 1 (defining soft money as unregulated money unions and companies contribute to political parties that will affect elections).

See Mariani v. United States, 212 F.3d 761, 767 (2000) (defining soft money and its effects on political debate); see also Simon, supra note 2, at 176-77 (arguing that soft law contributions have a negative affect on political discourse). See generally Briffault, supra note 69, at 628 (defining soft money as falling outside boundaries under federal regulation but affecting elections).

See Briffault, supra note 69, at 631 (arguing that parties have found soft money beneficial to run issue advocacy ads that affect elections); see also Gora supra note 24, at 25 (arguing that soft money donations and issue advocacy have been foremost in reform discussions). See generally Richards, supra note 23, 123 n.27 (explaining that soft money used to pay for issue advertisements may have both direct and indirect effects on elections).

See 148 CONG. REC. H270,270 (daily ed. Feb. 12, 2002) (statement of Rep. Lucas) (remarking that issue ads inundate voters days before the election and no one is held accountable for these deceptive and sometimes blatantly false advertisements); see also Richard Briffault, Issue Advocacy: Redrawing the Elections/Politics Line, 77 Tex. L. Rev. 1751, 1760-61 (1999) (noting that issue ads often confuse voters in figuring out whether politicians or interest groups sponsor such ads). See generally Jowers, supra note 84, at 66 (explaining that issue ads are viewed by critics as meant to influence elections and not to discuss issues).

candidates for office. The money spent by the parties was to be allocated between hard money spent on federal elections and soft money, which could be permissibly spent on state candidates. After intense pressure from lobbyists, Congress amended FECA to allow the state and local parties to spend infinite resources on certain specified activities. These activities consisted of voter registration drives, get out the vote drives, and the creation of campaign materials such as bumper stickers, handbills, and yard signs. Although all money spent in conjunction with a federal election was supposed to be regulated by the FECA, soft money does in fact manipulate electoral outcomes.

The amount of soft money spent in federal elections has grown dramatically in recent years. In the 1995-1996 election


98 See 147 CONG. REC. S3233,3250-51 (daily ed. Apr. 2, 2001) (statement of Sen. Thompson) (noting that portion of soft money was permissibly spent on federal elections); see also Conti, supra note 27, at 128 (noting that soft money can be spent in conjunction with hard money on issue advocacy). See generally Monteiro, supra note 3, at 91-92 (discussing how soft money can be used for “voter mobilization and registration activities”).


100 See Briffault, supra note 69, at 626 (noting activities on which state parties may spend soft money); Anthony Corrado, Campaign Finance Reform: The General Landscape: Giving, Spending, and “Soft Money,” 6 J. L. & POLY 45, 46-47 (1997) (outlining activities soft money may used for); Monteiro, supra note 3, at 92 (listing specific activities paid for by soft money by parties and committees).

101 See Ansolabehere & Snyder, Jr., supra note 96, at 598 (arguing the channeling of soft money through parties allows soft money to influence federal elections); see also Briffault, supra note 69, at 628 (stating that soft money funding affects federal elections); Simon, supra note 97, at 75 (arguing soft money is meant to affect political campaigns).

102 See Conti, supra note 27, at 111 (reviewing ELEANOR CLIFT AND TOM BRAZAITIS, MADAM PRESIDENT: SHATTERING THE LAST GLASS CEILING) (noting the large increase and affect soft money has had in recent elections); see also Paul Frymer & Albert Yoon, Political Parties, Representation, and Federal Safeguards, 96 NW. U.L. REV. 977, 1009 (2002) (discussing increase in soft money raised and spent since 1992); John Lewis, Editorial, Don’t Let Money Rule, WASH. POST, July 10, 2001, at A21 (noting 50 percent increase in soft money spent since 1996).
cycle, Democrats doubled the amount of soft money spent to $121 million while Republicans tripled the amount to $149 million from the previous election cycle.\textsuperscript{103} The presidential election of 1996 is often cited as the advent of the substantially large soft money infusion into politics.\textsuperscript{104} However, in the 2000 federal election, a staggering $495.1 million in soft money was spent by the parties, with the Democrats spending $245.2 million and the Republicans spending $249.9 million.\textsuperscript{105}

The amount of soft money spent in federal elections shows the current law has not worked. The general public has become very disillusioned by a political process they view as catering to the rich, while ignoring the poor.\textsuperscript{106} Electoral participation has reached an alarming low, where half of the American people do not even bother to make it to the polls on Election Day.\textsuperscript{107} The

\begin{footnotesize}
\begin{enumerate}
\item[104] See Bradley Smith, The Current Debate over Soft Money: Soft Money, Hard Realities: The Constitutional Prohibitions on a Soft Money Ban, 24 J. LEGIS. 179, 182 (1998) (noting “widespread use of soft money” was used for the first time by political parties to finance issue advertisements during 1996 presidential campaign); see also Corrado, supra note 100, at 51 (noting soft money raised in the 1996 election was “three times that raised in 1992”); Soft Money, supra note 97, at 1332-33 (explaining how the 1996 campaign “witnessed the unprecedented use of soft money”).
\item[106] See 148 CONG. REC. S2096,2099 (daily ed. Mar. 20, 2002) (statement of Sen. Dodd) (arguing “[i]n the minds of Americans, our public citizens at large, in whom we must maintain the confidence of an electoral democratic process, our campaign financing system is so corrupted by large contributions, that is a stark reality with which we have to contend.”); Bonifaz et al., supra note 72, at 48 (quoting poll figures that show Americans believe campaign contributions sway the decision making process of elected officials); see e.g., Sean T. McLaughlin, Pledge Our Grievance to the Flag: Could McCain-Feingold Also Help Bring Young People Back to Politics?, 27 J. LEGIS. 493, 496-97 (2001) (noting young voters do not vote because they lack resources for their viewpoints to be considered as opposed to other constituencies with funds).
\end{enumerate}
\end{footnotesize}
disturbingly low participation in our electoral process signifies extreme dissatisfaction with the current political arena.\textsuperscript{108}

Attempts to deal with the soft money problem began in the late 90's with numerous bills being presented in the House and the Senate for vote.\textsuperscript{109} Senator John McCain became associated with campaign reform in his unsuccessful presidential bid in 2000.\textsuperscript{110} On April 2, 2001 the Senate passed the McCain-Feingold Bipartisan Campaign Reform Act.\textsuperscript{111} On February 15, 2002, the House of Representatives passed the Shays-Meehan Bipartisan
Reform Act, an almost identical bill.112 Finally, on March 27, 2002, President Bush signed the law into effect.113

II. BIPARTISAN REFORM ACT OF 2002

The Bipartisan Reform Act of 2002,114 is a major change to the current scheme of campaign finance laws.115 It can be regarded as the most meaningful campaign finance reform since the 1974 amendments were enacted.116 However, it has been already challenged by numerous groups, much like the 1974 amendments, as an unconstitutional restriction on associational rights and political speech.117

The purpose of the Act has been interpreted as intending to


113 See Elisabeth Bulimer with Philip Enson, President Signs Bill on Campaign Gifts; Begins Money Tour, N.Y. TIMES, Mar. 28, 2002 (noting quick signing of bill by President Bush); Mary McGrory, McCain-Feingold Follies, WASH. POST, Mar. 28, 2002, at A29 (mentioning President Bush signed bill quietly); Smith & Block, supra note 6 (noting President Bush signed the bill into law without ceremony).


115 See Mark Hansen, Costly Speech: Failure to Follow Legal Requirements for Political Contributions Can Mean Serious Trouble, 88 A.B.A.J. 36 (2002) (stating campaign finance laws will be drastically changed with onset of Bipartisan Campaign Reform Act). But see, E.J. Dionne Jr., Fear of McCain –Feingold, WASH. POST, Dec. 3, 2002, at A25 (arguing that law simply builds on past campaign laws); John Samples & Patrick Basham, Meet the New Loopholes, N.Y. TIMES, Nov. 5, 2002, at A27 (arguing that new law will have loopholes and people will find them, therefore the new law does nothing but maintain the status quo, if not make the system worse).

116 See Monteiro, supra note 3, at 123 (noting this is most important legislative change in thirty years); Seth P. Waxman, Free Speech and Campaign Finance Reform Don't Conflict, N.Y. TIMES, July 10, 2002, at A21 (remarking that the Bipartisan Campaign Reform Act is attempting to re-establish honesty in political system). But see Samples & Basham, supra, note 115 (arguing that while it is a major change, it may not be for the better).

117 See Kort, supra note 7, at 4 (discussing that lawsuit filed by both the National Rifle Association and Senator Mitch McConnell the day President Bush signed the bill); A Newsletter on American Politics, supra note 7 (noting discontent with Bipartisan Campaign Reform act of a few Senators, led by Mitch McConnell); Charles Fried, A Campaign Law that Curbs More Than Contributions, N.Y. TIMES, Dec. 30, 2002, at A17 (noting that the law was challenged as unconstitutional).
reinstate honesty and respectability in the political process.\textsuperscript{118} Congressman Meehan, a sponsor of the Act in the House of Representatives, argued the soft money influx in politics has kept Congress from passing effective legislation to protect American working families.\textsuperscript{119} As noted in legislative debates, recent corporate scandals, including Enron, acted as a motivating force behind the passage of the Act.\textsuperscript{120}

The major provisions of the Act increased the amount an individual may contribute to a candidate for federal office to $2,000 per election\textsuperscript{121} and increased the amount individuals may donate to national political parties from $20,000 to $25,000 per

\begin{itemize}
  \item \textsuperscript{118} See Dionne, supra note 115, at A25 (quoting form Republican whip Alan Simpson as saying “Too often, member’s first thought is not what is right or what they believe, but how it will affect their fundraising”); Neely Tucker, Campaign Law Case Brings Debate, Crowds; McCain-Feingold Bill Called Threat to Free Speech – and Key to Honest Elections, N.Y. TIMES, Dec. 5, 2002, at A04 (quoting Roger M. Witten, lawyer for bill sponsor Senator John McCain, as saying “This law is designed to repair a thoroughly broken campaign finance system...”); Waxman, supra note 116, at A21 (arguing the purpose of the Bipartisan Campaign Reform Act “seeks to restore integrity to this system” of politics).
  \item \textsuperscript{119} See 148 CONG. REC. H369,439 (daily ed. Feb. 13, 2002) (statement of Rep. Meehan) (discussing influence from soft money has not permitted passage of bills concerning prescription drugs, worker’s rights, and other such concerns). See also Dionee, supra note 115, at A25 (quoting former Republican Senator Warren Rudman as saying, “I know firsthand and from working with colleagues just how beholden elected officials and their parties can become to those who contribute to their campaigns and their parties coffers” this, he added, “distorts the legislative process”); Neely Tucker, States Back Campaign Finance Law, Court Motion Supports McCain-Feingold Act, WASH. POST, Nov. 7, 2002, at A23 (quoting Iowa Attorney General Thomas J. Miller as saying “the accumulated experience of members of Congress, reinforced by empirical evidence, is that the dominance of money in politics seriously threatens the public’s faith in the legitimacy of government and in the elections that choose whom shall govern”).
  \item \textsuperscript{120} See 148 CONG. REC. H369,439 (daily ed. Feb. 13, 2002) (statement of Rep. Engel) (remarking that general public is annoyed with corporate scandal and that incident caused many to support campaign reform legislation); 148 CONG. REC. H270,270 (daily ed. Feb. 13, 2002) (statement of Rep. Lucas) (observing Enron scandal should be used as a lesson for Congress to “avoid even the appearance of impropriety” and support reform); see also Waxman, supra note 116, at A21 (stating that the uncovering of Enron scandal displays corruption and the idea that money buys access to elected officials).
  \item \textsuperscript{121} See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 307 (a)(1), 116 Stat. 81 (2002) (noting individual donations to candidate has increased); 148 CONG. REC. S2096,2142 (daily ed. March 20, 2002) (statement of Sen. McCain) (noting increase from $1,000 to $2,000 showed Congress’ view that any contribution exceeding that amount may have corruptive influence); Matthew Hidman, How Web Will Change Campaigns, N.Y. TIMES, Dec. 25, 2002, at A23 (noting that the Act doubles the amount individuals may give to $2000).
\end{itemize}
year.122 The limit on overall donations to federal candidates, political action committees, and parties was raised to $37,500.123 Additionally, these limits have also been indexed to increase with inflation.124

A further major provision of the Act is its ban on unlimited and unrestricted use of soft money. The Act provides “[a] national committee of a political party may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any thing of value, or spend funds that are not subject to the limitations, prohibitions, and reporting requirements of this Act.”125 This restriction is an attempt to close the present loophole that allows soft money to be spent in federal elections.126

The Act also limits the definition of independent expenditure in order to include more activity within this provision. The revised definition classifies an independent expenditure as a communication “expressly advocating the election or defeat of a clearly identified candidate that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.”127 The difference in the definition is that it now includes suggestions or requests by political party committees and their agents. The effect is that not only can the candidates not solicit

122 Bipartisan Campaign Reform Act of 2002, § 307 (a) (2) (increasing personal donations to national political parties); see also Richards, supra note 23, at 92 (noting prior limits on federal campaign spending).

123 Bipartisan Campaign Reform Act of 2002 § 307 (b) (A) (amending 2 U.S.C. § 441(a)) (describing “individual aggregate limit”); see Audra L. Wassom, Campaign Finance Legislation: McCain-Feingold/Shays Meehan – The Political Equality Rationale and Beyond, 55 SMU L. REV. 1781, 1792 (Fall 2002) (noting the increase in aggregate annual contribution to $37,000).


125 Bipartisan Campaign Reform Act of 2002, § 323 (a) (1) (disallowing money to be spent in federal elections).

126 See Hansen, supra note 115 (mentioning outcry that soft money “violates the spirit if not the letter” of the Act); Fried, supra note 117, at A17 (noting that the Act attempts to close present loopholes in the campaign financing system); Tucker, supra, note 118, at A04 (noting the Justice Department’s argument that the law was designed to plug the loopholes of the current system that have been thoroughly exploited by current politicians).

127 2 U.S.C. § 431 (17) (a) and (b) (limiting the definition of independent expenditure).
or suggest that independent expenditures be made on their behalf, but party committees may not seek out potential supporters of a political candidate to suggest they run an advertisement to back a particular candidate.\textsuperscript{128}

The most controversial part of the Bipartisan Campaign Reform Act that deals with issue advocacy forbids unions and labor organizations from running "electioneering communications."\textsuperscript{129} Electioneering communications are defined as communications that refer to a specific candidate within sixty days of a general election or thirty days before a primary election.\textsuperscript{130} Under this definition, the attack ads that are usually seen frequently as the election approaches cannot be funded by soft money groups but must be paid for with limited hard money from the political parties.\textsuperscript{131}

III. CONSTITUTIONALITY OF THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002

A. Soft Money Ban

There are many arguments against the constitutionality of the Bipartisan Campaign Reform Act. Challengers claim that an all-encompassing ban on soft money is not narrowly tailored to serve a compelling governmental interest.\textsuperscript{132} Additionally it is

\textsuperscript{128} See Richards, supra, note 23 (noting that Bipartisan Campaign Reform Act prohibits party soft money fundraisers); Monteiro, supra note 3, at 121 (arguing the Act increases regulation of advertisements).

\textsuperscript{129} Bipartisan Reform Act of 2002, § 203 (amends 2 U.S.C. § 441b (2)). See generally Fried, supra note 117 (noting that groups like the Sierra Club and the National Rifle Association are hurt by Act's prohibitions against running ads within specified times of the election). But see Samples & Basham, supra note 115 (arguing that new law may help these groups raise money).

\textsuperscript{130} Bipartisan Reform Act of 2002, § 201 (3)(A) (amends 2 U.S.C. § 434) (defining electioneering communication as "any broadcast, cable, or satellite communication which refers to a clearly identifiable candidate for Federal office made within 30 days of a general election or 30 days before a primary").

\textsuperscript{131} See Samples & Basham, supra note 115, at A27 (noting the rules for running advertisements near election day for non-party groups); Tucker, supra note 118 (noting that law limits issue adds that non party groups may run close to election day); George F. Will, Sham Concern for Corruption, WASH. POST, May 16, 2002, at A25 (noting provision that prevents non-party groups from running any advertisement that refers to an actual candidate within 30 days of a primary and 60 days of a general election).

\textsuperscript{132} See Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 641 (1996) (Thomas, J., dissenting in part) (stating "broad prophylactic caps on both spending and giving in the political process...are unconstitutional"); Yarmish, supra
argued that this provision is direct regulation of core political speech, which is unconstitutional. Challengers have also claimed that such regulation is an intolerable burden on the ability of political parties to promote political ideas, within their freedom of political speech. However, using the framework established in *Buckley*, a ban on soft money clearly is constitutional and does not unduly burden First Amendment Rights.

The starting point of the constitutional analysis is considering the treatment of soft money under the *Buckley* framework. The soft money ban in the Act deals with the supply of money, and not the spending of money. Since the ban deals with limiting the amount an individual or corporation can contribute to political parties, it is not as restrictive of First Amendment rights as an expenditure limitation.

---

133 See Kort, *supra* note 7, at 4 (describing arguments that have been mounted against the Act); *see also* Dionne *supra* note 115, at A25 (noting opponents argument that preventing groups from running advertisements is a violation of the First Amendment's protection of political speech); Tucker, *supra* note 118 (stating argument that law amounts to an abridgement of First Amendment rights).

134 See Kort, *supra* note 7, at 4 (describing arguments that have been mounted against the Act); Tucker, *supra* note 118 (noting that Kenneth Starr argued that the law "tramples First Amendment rights"); *see also* Hansen, *supra* note 115 (suggesting arguments challengers to Act will make).

135 See Monteiro, *supra* note 3, at 122 (remarking that soft money ban fits within Buckley framework); Tucker, *supra*, note 118 (stating that Former Solicitor General Seth P. Waxman argued before the District Court that no part of the Act violated the provisions of the First Amendment); *see also* Tucker, *supra* note 119, at A23 (noting that nineteen states joined in arguing that Bipartisan Campaign Reform Act was constitutional because the current system posed a large threat to our democratic system).

136 See Yarmish, *supra* note 8, at 1275 (arguing that it is well settled that Congress may regulate sources of funding); *see also* Dionne, *supra* note 115, at A25 (noting that the Supreme Court has held that regulation of sources of money is constitutional). *But see* Smith, *supra* note 104, at 180 (intimating that most bans on soft money are unconstitutional).

limitations, in contrast, only place a "marginal restriction" upon the contributor. Therefore, the soft money ban is subject to somewhat less scrutiny according to the Buckley analysis.\(^{138}\)

Although the First Amendment is meant to protect legitimate discussion of political ideas, this right has never been recognized as absolute.\(^{139}\) Money is donated by individuals and corporations in avoidance of other statutory provisions and then is funneled through the parties and eventually spent in a manner that affects an electoral outcome.\(^{140}\) Banning such diluted speech has very little imposition on the rights of any. Such watered down speech does not contribute any meaningful public debate on the issues.\(^{141}\) By the time the money is spent in a method that affects public debate, it is unclear who has donated to support the issue advanced.\(^{142}\)

---

\(^{138}\) See Buckley v. Valeo, 424 U.S. 1, 20-21 (1976) (noting how contribution limitations are only a "marginal restriction"); Jane Conrad, Note, Nixon v. Shrink Missouri Government PAC: Campaign Contributions, Symbolic Speech and the Appearance of Corruption, 33 Akron L. Rev. 551, 564-65 (2000) (discussing when the intermediate level of scrutiny may be appropriate); see also Monteiro, supra note 3, at 122 (arguing Buckley stands for the proposition that contribution limitations require a less compelling government interest than expenditure limitations).

\(^{139}\) See United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973) (arguing "[n]either the right to associate nor the right to participate in political activities is absolute in any event"); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (emphasizing the need for the government to prove a compelling state interest in order to regulate within the First Amendment sphere of protection); see also Shelton v. Tucker, 364 U.S. 479, 488 (1960) (noting even though governmental purpose may be legitimate it "cannot be pursued by means that broadly stifle fundamental personal liberties").

\(^{140}\) See Feichtner, supra note 55, at 794 (noting current FEC policy allows unlimited donations of soft money from unions and corporations); Richards, supra note 23, at 88 (noting soft money comes from corporate donations and labors unions); Richards, supra note 1, at 586 (noting unions and corporations donate large amounts of soft money to the parties).

\(^{141}\) See Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 647 (1996) (Thomas, J., concurring) (noting influence of one person is "diffused" in a political party); Eisenberg, supra note 16, at 144 (arguing citizens are disenchanted with political discourse that depends on attack ads and does not effectively discuss important issues). But see Jeremy Marsh, Missouri's Sacrificial Lamb: Political Party Contributions and Campaign Finance Reform in Missouri Republican Party v. Lamb, 45 St. Louis L. J. 925, 954 (2001) (noting a political party's contribution is viewed as an expression).

\(^{142}\) See Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 408 (2000) (Kennedy, J., dissenting) (arguing issue advocacy has led to an "indirect system of accountability that is confusing, if not dispiriting, to the voter"); Colo. Republican Fed. Campaign Comm., 518 U.S. at 647 (noting there is no danger that one individual would be able
the ad is to influence voters, and there is usually no opportunity to disclose the source of the funds used to produce the advertisement.\textsuperscript{143} The ad will often distort a candidate's position in order to inflame the voting public.\textsuperscript{144} Soft Money has simply developed as way to contravene other restrictive statutory provisions in an underhanded manner.\textsuperscript{145}

Associational rights are also not unduly restricted by the Act's contribution limits. \textit{Buckley} held that associational rights "enable like-minded persons to pool their resources in furtherance of common political goals."\textsuperscript{146} The soft money ban does nothing to prevent people from donating to political parties or participating in other activities that show their support and dedication to the ideals advanced.\textsuperscript{147} The ban also only places a slight burden on the associational rights of parties. They are free to associate with candidates and partisan supporters—but they now must do it within the framework of the Federal Election Campaign Act.\textsuperscript{148}

to bribe a candidate); see also Martens, \textit{supra} note 80, at 853 n.241 (2001) (quoting Justice Kennedy's dissent in \textit{Nixon}).

\textsuperscript{143} See Becky Cain, \textit{Sham Issues Ads: Solutions to a Clear Record of Abuse}, 10 \textit{STAN. L. & POLY REV.} 71, 72 (1998) (arguing "[s]ham issue advocacy provides a useful conduit for those who want influence without leaving any fingerprints"). See generally \textit{FEC v. Furgatch}, 807 F.2d 857, 864 (9th Cir. 1987) (declaring a newspaper article to be express advocacy of a candidate by a private citizen); \textit{FEC v. Mass. Citizens for Life Inc.}, 769 F.2d 13, 20 (1st Cir. 1985) (noting how group was involved with expressly advocating).

\textsuperscript{144} See \textit{Mass. Citizens for Life}, 769 F.2d at 20 (noting display of candidates pictures is advocating); Blasi, \textit{supra} note 19, at 1299; Cain, \textit{supra} note 143, at 72 (remarking a study performed showed that marginal number of the issue advocacy ads actually represented candidate's positions).

\textsuperscript{145} See Briffault, \textit{supra} note 95, at 1752 (noting that soft money is not covered by federal regulation); Richards, \textit{supra} note 1, at 561 (discussing the ability of parties, candidates, and interest groups to avoid contribution limitation); see also \textit{Nixon}, 528 U.S. at 406 (Kennedy, J., dissenting) (noting how candidates have developed ways to get around contribution limits).

\textsuperscript{146} Buckley v. \textit{Valeo}, 424 U.S. 1, 22 (1976); see Kusper v. \textit{Pontikes}, 414 U.S. 51, 57 (1973) (noting "[t]he right to associate with the political party of one's choice is an integral part of this basic constitutional freedom).

\textsuperscript{147} See \textit{Buckley}, 424 U.S. at 22 (arguing that even though contribution limit is in place, people are still at liberty to join associations or the campaign activities of a candidate in order to support and exercise their constitutional rights of freedom of association); see also Richards, \textit{supra} note 1, at 585-86 (noting the problems associated with unregulated soft money). \textit{But see Gora, \textit{supra} note 24, at 22-23} (noting campaign finance proposals cut at the very heart of the First Amendment).

Keeping in mind the restrictions imposed, it must be determined whether the "interference with protected rights of political association may be sustained" by a government demonstration of "a sufficiently important interest" developed in a manner "closely drawn to avoid unnecessary abridgement of associational freedoms." In Buckley, the Court held the avoidance of corruption or appearance of corruption is a significantly compelling governmental interest to justify regulation on contributions. The existence or possibility of quid pro quo arrangements was found to validate the government's interest.

The Bipartisan Campaign Reform Act attempts to deal with the fact that soft money is used for a corruptive purpose. Scholars have noted "soft money corrupts for a simple and obvious reason. Soft money donations are given in such huge amounts - $50,000, $100,000, or more - that the donors typically expect to receive something in return for any investment of this magnitude." Wealthy individuals and corporations donate arguing a soft money ban will strengthen the parties). But see Bopp & Coleson, supra note 49, at 815 (arguing that the ban of soft money is a direct attack on the right of association); Wertheimer & Manes, supra note 91, at 1155 (hypothesizing that a ban on soft money will violate the right of association).

149 Buckley, 424 U.S. at 25; see Nixon, 528 U.S. at 387-88 (quoting Buckley standard); Shelton v. Tucker, 364 U.S. 479, 488 (1960) (repeating firmly established principle that "even though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved"); Citizens for Responsible Gov't v. Davidson, 236 F.3d 1174, 1199 (10th Cir. 2000) (noting appropriate standard to judge campaign finance legislation).

150 See Buckley, 424 U.S. at 27 (noting that Congress has an interest in avoiding appearance of corruption); Bonifaz et al., supra note 72, at 45 (noting the governmental interest of preventing corruption in federal elections). But see Sorauf, supra note 9, at 1350 (arguing the Court never clearly defined that corruption justified restrictions).

151 Buckley, 424 U.S. at 26-27 (discussing how some contributions may be "quid pro quo" agreements; see Briffault, supra note 69, at 622 (observing that Buckley held the only legitimate interest in campaign laws must be corruption and quid pro quo arrangements); Potter, supra note 8, at 89 (noting the quid pro quo agreements are a concern in elections).

152 See Ansolabehere & Snyder, supra note 96, at 601 (noting source of soft money is frequently "corporations, associations, and individuals with strong interests in legislative and executive decisions facing the government"); Bonifaz et al., supra note 72, at 39 (discussing the possibility of corruption when large contributors are financing campaigns); Paulson & Schultz, supra note 9, at 492 (noting relationship of voting habits and contributions from tobacco companies).

excessive amounts of money in order to obtain access to political officials.\textsuperscript{154} A prominent lobbyist noted that donations of soft money are made in order to prevent legislative retaliation on his interests.\textsuperscript{155} Such massive donations cannot be viewed as anything except an attempt to sway public policy.\textsuperscript{156}

Although no direct correlation can be proven between donations to political parties and favorable policy treatment, the inference is compelling.\textsuperscript{157} This actual corruption, or at the very least the appearance of corruption, in our political process justifies the imposition of a soft money ban.\textsuperscript{158}

Challengers to the legislation have argued that not all soft money donations are large donations that seek to influence the

\textsuperscript{154} See 147 CONG. REC. S3233,3248 (daily ed. Apr. 2, 2001) (statement of Sen. Levin) (arguing "[p]eople who are in power are asking for large sums of money for access to them"); Eisenberg, supra note 16, at 144 (arguing dependence on fundraising provides an opportunity for "moneymed interests to buy access to officeholders that others do not fairly enjoy"); Richards, supra note 1, at 88 (noting that soft money comes from wealthy individuals and corporations).

\textsuperscript{155} See Burt Solomon, Forever Unclean, 32 NAT'L J. 858, 863 (2000) (interviewing a lobbyist who candidly admitted that donations are made to protect their interests from being damaged); see also Kolb & Dreibelbis, supra note 91, at 108 (quoting National Journal article). See generally John Warren Kindt, Gambling: Socioeconomic Impacts and Public Policy: Follow the Money: Gambling, Ethics, and Subpoenas, 556 ANNALS 85, 93 (1998) (noting how lobbyists have donated large amounts of money to protect their interests).

\textsuperscript{156} See CONG. REC. H369,443 (daily ed. Feb. 14, 2002) (statement of Rep. Lee) (noting the influence of money in the political process from companies such as Enron and Arthur Anderson); Ansolabehere & Snyder, supra note 96, at 603-04 (noting that contributors can control public policy); Ron Smith, Compelled Cost Disclosure of Grass Roots Lobbying Expenses: Necessary Government Voyeurism or Chilled Political Speech?, 6 KAN. J.\& PUB. POL'Y 115, 131 (1996) (noting that new rules are needed when lobbyists are trying to change public policy).

\textsuperscript{157} See Ansolabehere & Snyder, supra note 96, at 603-04 (noting how contributions can change public policy); Kindt, supra note 155, at 93 (discussing how increase in contributions led to more protective legislation for gambling interests), See generally Kolb & Dreibelbis, supra note 91, at 87 (arguing that even though no direct link between voter participation and loathing of campaign funding it can be inferred from recent data).

\textsuperscript{158} See 148 CONG. REC. H270,272 (daily ed. Feb. 12, 2002) (statement of Rep. Moore) (arguing American people believe that special interest money corrupts and imposition of the soft money ban will correct this). But see Gora, supra note 24, at 36 (suggesting that public disclosure of contributions is needed, not a ban on soft money); Smith, supra note 104, at 200 (opining that a soft money ban would be unconstitutional).
political process. They maintain that donations to political parties are for party building purposes and such a far-reaching ban is not narrowly tailored to serve the compelling government interest of avoiding corruption or the appearance of corruption. However, this argument seems weak in light of firmly established campaign finance principles.

The Court has previously noted that if a compelling justification exists for governmental regulation in the campaign finance area, the fact that the remedy has not been perfected will not destroy the legislation. While discussing the contribution limit in *Buckley*, the Court stated “Congress's failure to engage in such fine tuning does not invalidate the legislation.” Congress must be afforded some deference in its legislative policy-making and choice behind such policy. In the case of the soft money ban, Congress has noted the compelling governmental interest in a political system free from corruptive forces and decided that a blanket prohibition on soft money is the only effective means of correcting the problem.

---

159 See Gora, *supra* note 24, at 36 (noting ban of soft money is not appropriate); Smith, *supra* note 104, at 200 (suggesting ban on soft money would be struck down by the Supreme Court as too broad); Yarmish, *supra* note 8, at 1279 (noting that a complete ban on all soft money may be too broad because small donations of soft money do not present the possibility of quid pro quo corruption).

160 See Yarmish, *supra* note 8, at 1279 (noting that a complete ban on all soft money may be too broad because small donations of soft money do not present the possibility of quid pro quo corruption); see also William W. Eldridge IV, *Campaign Finance Reform Silences Protected Free Speech*, WASH. LEGAL FOUND. LEGAL OPINION LETTER, June 21, 2002 (arguing that the BCRA's soft money contribution restrictions are not narrowly tailored to serve a compelling government interest and that the BCRA may be in contention with First Amendment Rights). See generally David M. Mason, *Why Congress Can't Ban Soft Money*, HERITAGE FOUND. REP., July 21, 1997 (positing that Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996), indicates a showing of corruption would be difficult to satisfy).

161 See *Buckley v. Valeo*, 424 U.S. 1, 30 (1976) (noting that Congressional failure to achieve an ideal balance between the harm and the remedy is not necessary).

162 See *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001) (stating “[c]ongress is entitled to its choice” when formulating campaign finance legislation). See generally Office of Cmty. of United Church of Christ v. FCC, 707 F.2d 1413, 1422 (D.C. Cir. 1983) (explaining that courts give deference to legislative bodies who have the authority to make laws because the courts are only to interpret legislation, although the issue here deals with the deference given to the FCC); Burkhart Advertising, Inc. v. Auburn, 786 F. Supp. 721, 727-28 (N.D. Ind. 1991) (stating that the court usually gives deference to lawmakers, although here it was in reference to traffic safety and aesthetic concerns).

Opponents of the legislation argue that even if the ban is analyzed under the less rigorous contribution limit approach, it is still unconstitutional because in *Buckley* the legislation at issue "focused precisely on the problem of large campaign contributions" as opposed to the soft money ban, which is an all-encompassing approach. However, this argument ignores the fact that there are plenty of avenues still open to those who want to donate to political campaigns. Although the mere existence of other methods of association and speech does not alleviate a First Amendment problem, in this instance the burden on the First Amendment is slight and there are numerous opportunities for participation and association in the electoral process. The comprehensive ban is merely closing a loophole that has been thoroughly abused by parties, candidates, and individuals alike.

---

164 See *Buckley*, 424 U.S. at 28.
165 See *Yarmish*, supra note 8, at 1279 (noting that a complete ban on all soft money may be too broad because small donations of soft money do not present the possibility of quid pro quo corruption); Guy Gugliotta, *Campaign Reform: Death by Debate?*, WASH. POST, July 13, 1998, at A19 (describing the House version of the BCRA as "all encompassing"); The Center for Responsive Politics/FEC Watch, *Forum Can't 'Undo' Past Financing*, ROLL CALL, Jan. 27, 2003, Letters Section (positing that "[t]he statute... covers all soft-money solicitations").
167 See *Buckley*, 424 U.S. at 21 (memorializing that *Buckley* stands for the principle that a contribution is a political gesture and the greater the contribution does not increase the political activism); *Walsh*, supra note 107, at A1 (explaining that under the Act, people may still contribute money, but it must be hard money within the confines of the previously established contribution limits); Jonathan Rauch, *Blow It Up*, NAT'L J., Mar. 29, 1997, at 604, (noting that "contributions to candidates are capped but spending by candidates is not ([since]... large donations to candidates pose a clear risk of corruption, whereas candidates' own spending does not").
168 See *Richards*, supra note 1, at 561 (discussing the ability of parties,
In light of the Court's decision in *Colorado Republican Federal Campaign Comm. v. FEC*,¹⁶⁹ challengers may argue that since there can be no limitations on the party's independent expenditures, there can be no limitations on the source of funds for those expenditures.¹⁷⁰ In *Colorado Republican*, the Court invalidated a provision that limited the expenditures of political parties, which were uncoordinated with a candidate as a violation of First Amendment rights.¹⁷¹ However, this argument ignores the fact that the ban on soft money does not limit the amount of money a party can spend independent of its candidates and only regulates the source of contributions.¹⁷² The Court in *Colorado Republican* noted the Buckley distinction between contribution limits and expenditure limits.¹⁷³ Since the


¹⁷⁰ See Yarmish, *supra* note 8, at 1287 (noting possible argument by challengers based on Colorado Republican decision); Deirdre Davidson, *McConnell Case: Lawyers Jockey for Edge*, LEGAL TIMES, Nov. 11, 2002, at 09 (stating that “[o]pponents of the law mounted a twofold attack in their 353-page brief—a legal argument about why the law violates the Constitution, existing laws, and Supreme Court precedent, and a practical argument about the detrimental impact of the law on the practice of politics”); Eldridge, *supra* note 160 (inferring that “since the money is donated to a group instead of directly to a candidate, the idea that the money is given as a quid pro quo is weakened”).

¹⁷¹ Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. at 608 (holding “the First Amendment prohibits the application of this provision to the kind of expenditure at issue here”); see Mason, *supra* note 160, (explaining that “hard money” are “contributions made directly to candidates by individuals and political action committees”); Edward Zuckerman, *To Regulate ‘Leadership PACs’*, POL. FIN. NEWSL., Feb. 2003 (“treating the leadership PACs of federal candidates as separate from and unrelated to the candidate's authorized committees has ignored reality”).

¹⁷² See Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155 § 323 (a)(1), 116 Stat. 81 (2002) (prohibiting contributions and similar donations that are not regulated by FECA); Nancy Ives, *McCain, Feingold, Cochran Introduce Bipartisan Campaign Reform Act of 2001*, PRESIDENTIAL CAMPAIGN PRESS MATERIALS, Jan. 22, 2001, Press Release (noting that soft money contributions will be prohibited and that there is no limit on contributions to political parties from corporations, unions, and wealthy individuals); Mason, *supra* note 160 (detailing how soft money contributions may be regulated by Congress under free speech parameters, and that contributions to a political party, pursuant to *Colo. Republican*, cannot be regulated by Congress).

¹⁷³ *Colo. Republican*, 518 U.S. at 610 (mentioning the past decisions which
soft money ban should be classified as a contribution limitation, it will not be analyzed under the same principles used by the Court in *Colorado Republican*.174 Therefore any reliance on this decision is misplaced.175

The soft money ban is clearly consistent with the principles enunciated in *Buckley*.176 Although it does place limitations on First Amendment rights, those limitations are minor and not unduly restrictive.177 The governmental interest of the avoidance of corruption is clear, and the ban on soft money is narrowly tailored to prevent the continuance of corruption in our political process.178

---

174 See Yarmish, supra note 8, at 1287 (arguing that *Colorado Republican* only applies to expenditure analysis and the rationale is inapplicable to the soft money ban); see also House Freshmen Introduce Campaign Finance Reform Bill, WHITE HOUSE BULL., July 17, 1997 (quoting Senator Mitchell’s concern that the soft money ban would greatly restrict a candidate’s ability to raise money); Craig Gilbert, Campaign Reform Takes a Pounding; Lawyers Toss Book at McCain-Feingold, MILWAUKEE J. SENTINEL, Dec. 8, 2002, at 01A (categorizing soft money as those contributions by unions, corporation, and individuals to political parties).

175 See *Colo. Republican*, 518 U.S. at 610 (mentioning the past decisions which found contribution limits acceptable, while expenditure limitations have been often invalidated); Yarmish, supra note 8, at 1287 (stating that *Colorado Republican* rationale is irrelevant); Eldridge, supra note 160 (contending that the *Colorado Republican* Case dealt with expenditure limitations, and the case only mentioned the soft money issue in dicta).

176 See *Buckley*, 424 U.S. at 6 (addressing issues of contributions by individuals, the soft money issue); Waxman, supra note 116 (remarking that soft money ban is consistent with current case law). See generally Hasen, supra note 168 (stating that the *Buckley* decision is contended by the same dissenting minority in the Supreme Court).

177 See Monteiro, supra note 3, at 122 (mentioning law does not prohibit expenditures but only contributions leaving other avenues of participation open). See generally Neil Weinstock Netanel, Locating Copyright within the First Amendment Skein, 54 STANFORD L. REV. 1,1 (2001) (explaining that some restriction on speech does not necessarily result in the unconstitutionality of a statute); Richards, supra note 1, at 559-60 (2001) (noting that *Buckley* upheld contribution limits on the grounds that they imposed only marginal restriction on speech).

178 See Ansolabehere & Snyder, supra note 96, at 601 (noting that soft money is often donated by large corporations and associations that have interests in legislative changes). See generally FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 457 (2001) (positing then that if Congress has discerned that a complete ban is appropriate, than the decision should be given deference); Yarmish,
B. Advocacy Limitations Issue

The new definition of independent expenditure, which proposed a limitation on those expenditures that are truly independent of a candidate, faces a much greater constitutional challenge.\textsuperscript{179} Since this provision deals with the way groups spend their money, it must be evaluated under the expenditure limitation analysis.\textsuperscript{180} Although the same compelling interest test applies, the expenditure limitations are subject to a higher level of scrutiny due to the allegedly "more severe restrictions on protected freedoms of political expression and association."\textsuperscript{181} In assessing the constitutionality of expenditure provisions, \textit{Buckley} proceeded to define express advocacy as an advertisement "that in express terms advocate the election or defeat of a clearly identifiable candidate for federal office" which included the words "vote for" or "defeat," or other words of such nature.\textsuperscript{182} The definition in the Act expands express advocacy to include previously unregulated communications.\textsuperscript{183} Despite the expansion however, the Act can still be found constitutional within the \textit{Buckley} framework.\textsuperscript{184}

\textsuperscript{179} See Monteiro, \textit{supra} note 3, at 121 (observing that both supporters and challengers of the Act recognize the susceptibility of this provision); Editorial, \textit{McCain-Feingold Goes to Court}, \textit{N.Y. TIMES}, Apr. 1, 2002, at A18 (mentioning the arguments against limitations on issue advocacy).

\textsuperscript{180} See \textit{Buckley} 424 U.S. at 23 (finding that expenditure limitations infringed upon core First Amendment Rights and analyzing that provision separately from contribution limitations); see also Feichtner, \textit{supra} note 55, at 795 (mentioning since \textit{Buckley} decision courts have consistently classified regulation as either contribution or expenditure limitation); Wheeler, \textit{supra} note 55, at 683 (noting contribution limits have been regularly upheld while expenditure limits are questionable).

\textsuperscript{181} See \textit{Buckley}, 424 U.S. at 23 (holding expenditure limitations pose much greater burden on First Amendment rights).


\textsuperscript{183} See Monteiro, \textit{supra} note 3, at 121-22 (mentioning definition of issue advocacy has been expanded); see also Bopp & Coleson, \textit{supra} note 49, at 798-99 (clarifying the means by which the provisions narrow of traditional notions of issue advocacy); Richards, \textit{supra} note 23, at 119-20 (indicating that the term 'electioneering communications' in BCRA is an expansion on the express advocacy standard elucidated by the Court).

\textsuperscript{184} See Monteiro, \textit{supra} note 183, at 121–22 (arguing that under the recently enunciated principles new issue advocacy definition can be found constitutional); see
Challengers have argued that the provision violates the right to freedom of expression.\textsuperscript{185} This argument is misplaced, however, and the provision in question does not violate expressive rights.\textsuperscript{186} The provision instead refuses to allow advertisements, cloaked in the label of an issue ad, to influence federal elections.\textsuperscript{187} Congress has the authority to regulate campaign advertisements in order to prevent corruption in federal elections.\textsuperscript{188} Although under the Act advertisements can still be bought in abundance, those advertisements must now be

\begin{footnotesize}
\textsuperscript{185} See 148 CONG. REC. S2096,2096 (daily ed. Mar. 20, 2002) (statement of Sen. Hutchinson) (arguing 'The bill tramples the principle of freedom of speech by restricting broadcast advertising for 60 days before an election'); see also Walsh, supra note 107, at A01 (indicating the plaintiff's attack was founded upon a violation of First Amendment rights); Jeff Zeleny & Jill Zuckman, Campaign Law Heads To Next Battlefield; Bush Signs Bill, Goes Fundraising, CHI. TRIB., Mar. 28, 2002, at 1 (noting NRA will challenge the limitation on advertisements).

\textsuperscript{186} See 148 CONG. REC. H369,438 (daily ed. Feb. 14, 2002) (statement of Rep. Shays) (stating that Act does nothing to limit political participation but is aimed at giving all a more equal chance in participation); see also Kaldahl, supra note 184, at 298 (elucidating the rebuttal to the constitutional arguments against the provisions purported limiting the freedom of expression); Wassom, supra note 123, at 1798-99 (explaining the rationale for the constitutionality of the provisions open to the freedom of expression attack).

\textsuperscript{187} See 148 CONG. REC. H270,270 (daily ed. Feb. 12, 2002) (statement of Rep. Lucas) (mentioning that campaign finance reform will eliminate the problematic political advertisements present in the political arena); see also Kaldahl, supra note 184, at 298 (providing this rationale to support the constitutionality of the provision); Wassom, supra note 123, at 1800 (indicating that the provision should be upheld as constitutional because the limitation on the freedom of expression are subordinated to legitimate concerns for the protection of the political process).

\textsuperscript{188} See Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 388-94 & 400-01 (2000) (indicating the majority's and concurrences' acceptance of this as a legitimate governmental interest against which freedom of expression must be weighed); see also Richards, supra note 23, at 102-03 (asserting the protection of the political process as a legitimate interest); McCain-Feingold Goes to Court, supra note 179 (arguing that there is a difference between issue advocacy and sham campaign ads which sanctions Congressional regulation of the latter).
\end{footnotesize}
paid for with hard money subject to FECA limitations.189

Many of the same arguments that opponents will propose against the soft money ban will seemingly be utilized in the challenge to the independent expenditure definition. Challengers argue that because issue advocacy advertisements allow groups to enhance public discussion on topics of concern to the American people, any restriction on the ads violates the First Amendment's free speech guarantee.190 The independent expenditure definition, however, does not limit the free speech of groups because it only encompasses diluted speech that serves no purpose in enhancing the political debate.191 The sham ads are political attacks on candidates meant to incite the voters and do not advocate any actual issue.192 Such ads are not actually used to improve political discourse on any issue.193 The law does not intrude upon the rights of anyone to run a legitimate advertisement on an important issue.194 Associational rights are

189 See 148 CONG. REC. H369,374 (daily ed. Feb. 14, 2002) (statement of Rep. Keller) (stating that all ads 60 days before an election must be paid for with hard money); see also Richards, supra note 23, at 116–17 (indicating that there is no limit on speech per se, just a limitation on its funding to protect the political process); McCain-Feingold Goes to Court, supra note 179 (mentioning the new limits will subject advertisements to more extensive regulation).

190 See Bopp & Coleson, supra note 49, at 787–88 (articulating the arguments that unfettered expression is an integral component of the political process); Jowers, supra note 84, at 86 (arguing that issue advocacy ads contribute to official's accountability, thereby enhancing public debate and any restrictions violate free speech); Peter J. Cammarano, III, Note, Colorado Cases and Costly Campaigns: An Invitation to Reform, 26 SETON HALL LEGIS. J. 499, 500 n.9 (providing a historical account of this contention).

191 See Buckley v. Valeo, 424 U.S. 1, 22 (1976) (indicating that the restrictions may actually improve political debate); see also Richard L. Hasen, The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy, 48 UCLA L. REV. 265, 265 (2000) (indicating the ease of cloaking its political convictions in terms of a political issue); Kolb & Dreibelbis, supra note 91, at 95 (arguing the "magic words test" allows candidates to run ads promoting themselves shrouded in an issue ad).

192 See Hasen, supra note 191, at 265 (characterizing a sham advertisement as cloaking its political convictions in terms of a political issue); see also Potter & Jowers, supra note 7, at 857 (remarking that President Clinton in 1995 directed the DNC to run issue ads about his achievements in office to bolster his approval before the election of 1996); Montiero, supra note 3, at 122 (indicating that the issue ads were essential shams to avoid the constraints of FECA).

193 See FEC v. Furgatch, 807 F.2d 857, 862 (9th Cir. 1987) (noting that ads which do not disclose the source of the ad can harm political institutions); see also Cain, supra note 143, at 71 (indicating according to one study that only one in five advocated the sponsor's position); Hasen, supra note 78, at 1776 (indicating that issue ads rarely incite political debate but usually support a candidate).

not infringed upon because these issue advocacy ads often do not disclose the true source of funding and support, or they name a general, non-identifiable group.195

The constitutionality of the provision depends on the Court's acceptance of the rationale placed forth in *FEC v. Colorado Republican Federal Campaign Committee*.196 In upholding limitations on party coordinate expenditures, the Court reasoned this restriction was necessary in order to prevent circumvention of the established campaign finance laws.197 The same logic should be applied in this situation: in order to prevent evasive advertisements, the Court should uphold the definition of independent expenditures.198 Corporations and labor unions are prohibited from making a contribution or expenditure to influence federal elections.199 The Court should recognize these

---

195 See 148 CONG. REC. H270,270 (daily ed. Feb. 12, 2002) (statement of Rep. Lucas) (noting that the source of advertisements is often indiscernible and no one can be held accountable for such advertisements); see also Richard Briffault, *supra* note 95, at 1751–52 (providing that because the advertisements are classified as issue advertisements they do not require the disclosure of the source of funding); Hasen, *supra* note 78, at 1776–77 (indicating that disclosure of the source of funding is not required in sham advertising).

196 533 U.S. 431 (2001) (holding that a limit on party coordinate expenditures is constitutional in order to avoid evading campaign finance laws).

197 Id. (remarking that to permit unlimited party coordinate expenditures would undermined the current campaign finance laws); see also Kyla D. Cummings, *Election Law*, 24 U. ARK. LITTLE ROCK L. REV. 967, 967 (2002) (explaining the Court as attempting to minimize the circumvention of contribution limitations); Richards, *supra* note 23, at 122–23 (quoting the courts concerns about the circumvention of campaign limitations).

198 See Monteiro, *supra* note 3, at 122 (arguing the Court should adopt same line of reasoning as applied to *Colorado*); see also Robert M. Knop, Note, *The Party Expenditure Provision's Near Death Experience: Colorado Republican Federal Campaign Committee v. FEC*, 47 AM. U.L. REV 963, 988 (1998) (indicating the analogous treatment that should be given to both categories). But see Richards, *supra* note 23, at 92-94 (indicating that the court did not use an analogous analysis for restraints on expenditures in *Buckley*).

199 See 2 U.S.C. § 441(b) (prohibiting union or corporate donations); see also Overman, *supra* note 56, at 1268 (providing this prohibitions as one of the keys to the legislation); *Leading Cases: I. Constitutional Law*, 116 HARV. L. REV. 272, 281 n.90 (2002) (indicating the prohibition of corporate and labor union funding of issue ads).
ads for what they really accomplish, avoiding longstanding federal law, and impose the limitations of the Act.

Although the arguments in support of the independent expenditure definition are not as strong as the soft money arguments, it can still pass constitutional muster if the Court considers the true nature and effect of the ads instead of the façade of issue advocacy. This limitation is necessary in order to protect the electoral system and renew the faith of American citizens in political campaigns.

IV. CONTINUING VIABILITY OF BUCKLEY V. VALEO

Recently, established campaign finance jurisprudence has been questioned. In Nixon v. Shrink Missouri Government PAC, the Supreme Court hinted towards a doctrinal shift. Although the majority upheld the Buckley principles, the case generated five opinions. Four Justices stated their outright disapproval of the doctrine. Justices Breyer and Ginsburg

200 See Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 610 (1996) (stating that the Court has generally found limitations on contributions and expenditures constitutional); FEC v. Mass. Citizens for Life, 479 U.S. 238, 259-60 (1986) (stating "It has, in any event, been plain ever since Buckley that contribution limits would more readily clear hurdles before them."); see also Monteiro, supra note 3, at 122 (arguing the Court should adopt same line of reasoning as applied to Colorado).

201 See Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000) (stating that the renewal of the faith in the political process is important given its significance in the democratic system); see also Bonifaz et al., supra note 72, at 48 (quoting poll figures that show Americans believe campaign contributions sway the decision making process of elected officials); Kolb & Dreibelbis, supra note 91, at 92 (noting American discontent with the current political system).


203 See Nixon, 528 U.S. at 397 (arguing that although the dissent would like to see Buckley overruled, the majority responded "[t]he answer is that we are supposed to decide this case. Shrink and Fredman did not request that Buckley be overruled"); see also Bauer, supra note 3, at 759 (arguing the Supreme Court is conscious of problems with the campaign finance doctrine and suggestions have been put forth to change that doctrine); Ethan Fenn, An Economic View of Campaign Finance Spending Under the First Amendment, 8 U. CHI. L. SCH. ROUNDTABLE 173, 174 (2001) (arguing a majority of Justices showed a tendency to overrule Buckley in the Nixon case).

204 See Nixon, 528 U.S. 377 (2000) (displaying the split in opinion between the court on the issue of campaign finance reform); see also Martens, supra note 80, at 824 n.38 (noting that five separate opinions were issued from the Court in this case); Richards, supra note 1, at 586 (indicating the heavy diversity within the Court's decision).

205 Justice Stevens argued that money is not speech and therefore is not entitled to as much protection as integral First Amendment Rights. Nixon, 528 U.S.
joined in the decision upholding *Buckley*, but under the rationale that *Buckley* would allow the government to pass regulations that curb the spending soft money. The decision has been hailed as a possible precursor to a doctrinal shift in campaign finance legislation.

The *Buckley* distinction has not effectively protected First Amendment rights and should be reviewed by the Court. The argument that expenditures are not subject to quid pro quo arrangements is no longer true in today's system of politics. The Buckley decision was announced in a different political

at 398-99. Justice Thomas's opinion, in which Justice Scalia concurred, argued that *Buckley* does not work and ignores core First Amendment principles. *Id.* at 411-18. They both argue that strict scrutiny should be used in order to give speech the protection it deserves. *Id.* at 410. Finally, Justice Kennedy argued that *Buckley* should be overruled and allow Congress to attempt new regulations that coincide with First Amendment Principles. *Id.* at 410-11.

206 See *Nixon*, 528 U.S. at 404 (Kennedy, J., dissenting) (arguing the need for flexibility in this area is great and that Congress should be given much deference in this area); Richards, *supra* note 1, at 589-90 (positing Breyer and Ginsburg "suggested *Buckley* either was flexible enough to permit needed reforms, or in the alternative, could be reinterpreted . . ."); see also Overman, *supra* note 56, at 1245 (suggesting efforts to curb the corruptive influence of soft money was behind the Bipartisan Campaign Reform Act of 2002).

207 See *Levin*, *supra* note 81, at 176 (explaining many mistakenly believed the Court would use *Nixon* to limit *Buckley* and strike down Missouri's contribution limit); Richards, *supra* note 1, at 587 (noting that if the Court had been asked to overrule *Buckley*, there may have been a different result); Richards, *supra* note 23, at 116 (suggesting "*Colorado II* reduced the First Amendment obstacles faced by the soft money restrictions in the recently enacted Bipartisan Campaign Reform Act of 2002").

208 See *Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976) (finding reduced possibility of corruption in expenditures as compared to large campaign contributions); Jodi Miller, *Affirmative Action: "Democracy in Free Fall" The Use of Callov Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 ANN. SURV. AM. L. 1, 28 (1999) (suggesting corporate contributions to campaigns creates a greater possibility of corruption due to the potential quid pro quo influence on the candidate); see also Conrad, *supra* note 138, at 569 (discussing the government interest in preventing actual quid pro quo corruption and potential influence of elected officials).

209 See *Martens*, *supra* note 80, at 843-44 (stating that campaign finance laws have not adequately protected from corruption in the electoral system); Richards, *supra* note 1, at 596 (positing "now may be the time for the Court to return to the drawing board and rethink its approach to the role of money in politics"). See generally Peter J. Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 ARIZ. J. INT'L & COMP. LAW 793, 808 (2001) (explaining "[t]he classic example of corruption is a payment involving a quid pro quo between the offeror and public official in which each party acts with the intent that the transfer influence the exercise of governmental authority").
Today political parties and other organizations such as PACs, citizens groups and political associations play a role unimaginable by the Buckley Court. Buckley established that the only government interest compelling enough to impinge on First Amendment rights was the corruption or appearance of corruption. Quid pro quo arrangements seem to be the only adequate justification for campaign finance legislation. This limited view has hampered the passage and validity of campaign finance reform. In reality, there are many other grave problems that are in need of correction in our current campaign system. The Court should consider the many purposes advanced in the aggregate and uphold campaign finance legislation.

In addition to concerns over corruption or the appearance of corruption, the amount of money necessary to mount a

---

210 See Sorauf, supra note 9, at 1366 (arguing the system the FECA intended to regulate has changed dramatically); Richards, supra note 23, at 88 (stating "[t]he amount of soft money contributed in each federal election has grown at an alarming rate, from $19 million in 1980 to at least $410 million during the 2000 presidential elections"); see also Brent A. Fewell, Comment, Awash in Soft Money and Political Corruption: The Need for Campaign Finance Reform, 36 DUQ. L. REV. 107, 134 (1997) (suggesting "campaign finance reform must focus on preventing and exposing the most egregious and blatant forms of corruption by making quid pro quo risky and difficult for both candidate and donor").

211 See Briffault, supra note 69, at 627 (arguing that issue advocacy, party expenditures and soft money are recent developments not considered in Buckley); see also Timothy Stoltzfus Jost & Sandra J. Tanenbaum, Selling Cost Containment, 19 AM. J. L. AND MED. 95, 104 (1993) (noting PAC contributions increased ninety percent between 1980 and the first half of 1991). But see Nelson, supra note 77, at 524 (suggesting "[s]ince Buckley v. Valeo permits . . . demand-side reforms, a continuation of the Buckley regime still allows enough flexibility to implement a comprehensive reform strategy").

212 See FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496-97 (1984) (stating "[w]e held in Buckley and reaffirmed in Citizens Against Rent Control that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances"); Bauer, supra note 3, at 745 (arguing that most accept the premises that corruption or the appearance of corruption is necessary for governmental restrictions on campaign finances); Potter, supra note 10, at 151 (remarking that corruption or appearance thereof satisfied the Court's analysis).

213 See Buckley, 424 U.S. at 29 (accepting rationale that corruption is a sufficient justification for regulation); Kruse v. City of Cincinnati, 142 F.3d 907, 914 (6th Cir. 1998) (finding "[t]he Buckley court rejected two other governmental interests advanced by Congress as justification for spending caps"); see also John C. Eastman, Strictly Scrutinizing Campaign Finance Restrictions (and the Courts that Judge Them), 50 CATH. U.L. REV. 13, 14 (2000) (noting "the Supreme Court applies a slightly lower level of scrutiny when assessing restrictions on contributions to candidates than it applies when assessing restrictions on expenditures").
formidable challenge for political office has been steadily increasing. In 1976, the year Buckley was decided, the average cost of a successful House race was at $87,200, and by 1996 it had increased to $661,000. The amount of money spent in Senate elections is even more absurd. In 1976 the average Senate candidate spent $609,100, which increased to $3.6 million by 1996. According to a Federal Election Commission Report, the aggregate spent by Congressional candidates in the 2000 elections reached $1.006 billion, the highest figure ever recorded. Along with discouraging potentially qualified citizens from running, this also keeps candidates constantly focused on fundraising for the next election. For a member of


215 See Nawaz, supra note 214, at 168 (explaining "spending in House races has increased from $60.9 million in 1976, to $326.9 million in 1992); Schneider, supra note 70, at 629 n.8 (noting the large increase for campaign spending in the last twenty years); see also Wertheimer & Manes, supra note 91, at 1132 (stressing large increase in candidate spending in the House from 1976 to 1992).

216 See Schneider, supra note 70, at 629 n.8; see also Blasi, supra note 19, at 1282 (explaining as of 1992, Senators must raise nearly $13,000 each week in office to generate enough funds to cover average winning campaign costs); Joseph E. Finley, Comment, The Pitfalls of Contingent Public Financing in Congressional Campaign Spending Reform, 44 EMORY L.J. 735, 735-36 (1995) (noting "[s]kyrocketing campaign costs have fueled the need for congressional campaign finance reform. By 1992, spending in congressional elections had reached $678 million, an increase of more than 300% since 1978").

217 Federal Election Committee, supra note 2; see also John Bonifaz et al., supra note 72, at 39 (stating the 1996 presidential and congressional candidates spent over two billion dollars); Owen M. Fiss, Money and Politics, 97 COLUM. L. REV. 2470, 2470 (1997) (noting $866 million was spent in 1996 by candidates for staffing, polls, advertisements and travel).

218 See Eisenberg, supra note 16, at 144 (arguing candidates devote an increasing amount of time to fundraising because of increasing costs); David A. Strauss, What is the Goal of Campaign Finance Reform?, 1995 U. CHI. LEGAL F. 141, 155-56 (1995) (observing "demands of fund-raising are also said to hurt the public by diverting the time and energy officials need to do their jobs well and, partly as a result, by driving many able people from public service"); see also Banks & Green, supra note 10, at 3 (suggesting the view that unlimited spending is a serious problem is widely held).
the House of Representatives, especially, the pressure to amass an effective war chest never ends.  

This reality keeps our elected officials from properly serving the needs of their constituents. In devoting a substantial amount of time towards amassing re-election funds, officials are distracted from the needs of their constituents and cannot effectively formulate policies, sponsor legislation, or even discuss issues.  

This political truth serves to further alienate the average American from the political process. Not only do they lack the money to buy influence, but also their elected official does not have time to hear their concerns because of the preoccupation with fundraising.  

The need for effective political representation should also be a compelling governmental justification for regulation of campaign finance.  

---

219 See Blasi, supra note 19, at 1282 (noting that the two year term for representatives keeps them in constant pursuit of campaign funds); Grant Davis-Denny, Comment, Coercion in Campaign Finance Reform: A Closer Look at Footnote 65 of Buckley v. Valeo, 50 UCLA L. REV. 205, 209 (2002) (recognizing "[b]ecause they must run for reelection every two years, members of the U.S. House of Representatives must engage in constant fundraising to keep their campaign war chests full"). See generally Jezer et al., supra note 52, at 339 (discussing the large amounts of money spent by incumbents in elections).

220 See Blasi, supra note 19, at 1282 (stating that constant fund raising prevents politicians from effectively performing their job functions); Peterson, supra note 53, at 434 (1998) (noting the issue of preserving representatives' time for representing, not fund raising has been argued before a state court); see also Douglas C. Melcher, Note, Free Air Time for Political Advertising: An Invasion of the Protected First Amendment Freedoms of Broadcasters, 67 GEO. WASH. L. REV. 100, 120 (1998) (suggesting the government could establish a national campaign fund for congressional elections similar to reduce fund raising pressures).

221 See Kolb & Dreibelbis, supra note 91, at 92 (arguing "[f]ully two-thirds of the public think that their own representatives in Congress would listen to the views of outsiders who made large political contributions before a constituent's view"); Andrea D. Williams, Comment, The Lowest Unit Charge Provision of the Federal Communications Act of 1934, as Amended, and its Role in Maintaining a Democratic Electoral Process, 45 FED. COMM. L.J. 265, 300 (1993) (suggesting discussion of political issues has become secondary to fundraising); see also David L. Boren, A Recipe for the Reform of Congress, 21 OKLA. CITY U.L. REV. 1, 7 (1996) (arguing "current campaign law encourages practices that actually squelch political discourse").

222 See Potter, supra note 10, at 172 (explaining "[c]ampaign limits are not intended to infringe on political speech but rather intend to give control back to the common voter and allow democracy to function as originally intended."); see also Leslie Gielow Jacobs, The Link Between Student Activity Fees and Campaign Finance Regulations, 33 IND. L. REV. 435, 471 (2000) (suggesting “promoting diversity particularly supports campaign finance regulation because of the self-government rationale that underpins the free speech clause”); Rebecca Tushnet, Copyright as a Model for Free Speech Law: What Copyright Has in Common With
When the Bipartisan Campaign Reform Act is considered by the Supreme Court, the Court should abandon the strict *Buckley* framework and consider the legislation in light of current societal needs.\(^{223}\) The alternative government interest of effective representation should be considered along with corruption or appearance of corruption.\(^{224}\) Although the First Amendment remains a dominating factor to consider, the changes made will only increase the exchange of valuable and constructive ideas in our political campaigns.\(^{225}\)

**V. CONCLUSION**

Recently in *McConnell v. FEC*,\(^ {226} \) a lengthy decision which produced three separate opinions, a three-judge panel upheld portions of the Act, but invalidated other provisions.\(^ {227} \) The

\(^{223}\) See Kolb & Dreibelbis, *supra* note 91, at 93 (arguing increasing campaign costs have left American people with fewer candidates to choose from); see also Potter & Jowers, *supra* note 7, at 839 (observing "the Supreme Court is not likely to invalidate key provisions of the Bipartisan Campaign Reform Act of 2002"). *See generally* Richards, *supra* note 23, at 116 (explaining "the legislation prevents federal candidates and the national parties from raising and spending soft money").

\(^{224}\) See Schneider, *supra* note 70, at 661 (proposing other compelling interests that should be considered in addition to corruption or the appearance thereof); Jon L. Mills, *The Future of Governmental Ethics: Law and Morality*, 17 DICK. J. INT'L L. 405, 414 (1999) (recognizing "[o]thers contend that the goal of campaign finance reform is to insure that every candidate has the same opportunity to participate in the electoral process"). *But see* Potter & Jowers, *supra* note 223, at 874 (arguing the Act should be upheld based on present compelling government interests of prevent the appearance of, as well as actual, corruption).

\(^{225}\) See Simon, *supra* note 2, at 174 (arguing campaign finance laws are constitutional and the current scheme hampers political participation). *See generally* Samuel M. Walker, Note, *Campaign Finance Reform in the 105th Congress: The Failure to Address Self-Financed Candidates*, 27 HOFSTRA L. REV. 181, 213 (1998) (discussing the struggle between the First Amendment and efforts to regulate soft money contributions). *But see* Gora, *supra* note 24, at 26 (1999) (positing "[i]f there is any lesson we should have learned from 25 years of campaign finance controls, it is that limits on campaign funding, apart from constitutional questions, have an equally critical flaw: they just do not work").


\(^{227}\) *McConnell v. FEC*, 2003 U.S. Dist. LEXIS 7816, *20* (D.C. Cir 2003) (providing a chart of the court's ruling); *see* Editorial, *An Urgent Task for the Court*, N.Y. TIMES, May 6, 2003, at A30 (noting the court's decision invalidated portions of the law); *see also* Adam Clymer, *Campaign Finance Muddle Recalls Election of '76*, N.Y. TIMES, May 6, 2003, at A28 (arguing that the decision has caused confusion
decision upheld the ban on federal candidates and officeholders from raising soft money, and the provision which prohibits national and state parties from using soft money to affect electoral outcomes. However, it invalidated the provision which banned national and state parties from raising and spending soft money for non-federal activities or for activities that do not directly influence federal elections. The decision left many in a state of confusion, wondering what fund raising activities are acceptable. A stay was therefore issued, allowing the law to stand. The Supreme Court is expected to hear the case this fall, and should recognize that banning all soft money

228 See McConnell, 2003 U.S. Dist. LEXIS 7816 at *20 (noting the court's holding); see also Jim VandeHei, Democrats Initiate New 'Soft Money' Campaign, WASH. POST, May 7, 2003, at A01 (remarking federal officeholders may not raise soft money under the recent decision); Jules Witcover, Sorting Through Campaign Finance Confusion, BALT. SUN, May 9, 2003, at 25A (reiterating the holding of the panel).

229 See McConnell, 2003 U.S. Dist. LEXIS 7816 at *20 (describing holding of the court); Neely Tucker and Edward Walsh, Panel Stays Campaign Finance Ruling, WASH. POST, May 20, 2003, at A1 (stating certain provisions were upheld by the panel's decision); see also Editorial, Soft Money Ban Survives, Barely, S. F. CHRON., May 7, 2003, at A22 (repeating the holding of the court).

230 See McConnell, 2003 U.S. Dist. LEXIS 7816 at *20 (noting the panel's decision); see also James Polti, Senators Try to Stay 'Soft Money' Ruling, FIN. TIMES, May 9, 2003, at 7 (pronouncing McCain's unhappiness with the ruling, as an upheaval of the law could come during the presidential campaign); Lawmakers Plan Push for Suspension of Campaign Fund Ruling, CHI. TRIB., May 9, 2003, at C24 (mentioning Senator McCain's discontent over the district court ruling).

231 See Clymer, supra note 227 (noting questions have arisen as to who is permitted to raise soft money); Richard Oppel, Court Stays Its Ruling on Financing Campaigns, N.Y. TIMES, May 20, 2003, at A21 (stating politicians were left confused over what constituted permissible fund-raising activity); Witcover, supra note 228 (remarking the law was "clouded by a ruling that figuratively gives to the reformers with one hand and takes away with the other").

232 See Nick Anderson, Ban on 'Soft Money' Stands, L. A. TIMES, May 20, 2003, at 14 (describing the federal court decision which mandates compliance with the soft money ban); Linda Greenhouse, Justices to Rule on Schedule of Campaign Finance Case, N.Y. TIMES, June 5, 2003 (noting "[t]he district court issued a stay of the decision, so the law remains in effect until the Supreme Court rules"); Deborah McGregor, Supreme Court to Decide on 'Soft Money' Donations, FIN. TIMES, May 20, 2003, at 2 (asserting federal court order suspended its previous decision).

233 See Lyle Denniston, Supreme Court Backs Campaign Gift Limits Ruling Also Affects Non-Profits' Donations, BOSTON GLOBE, June 17, 2003, at A3 (remarking the Supreme Court is to hear the case in the fall); Thomas Edsall, Nonprofits Bound By Donation Rules; McCain-Feingold Case Impact Seen, WASH. POST, June 17, 2003, at A6 (noting the court will hear campaign finance case this fall); see also Oppel, supra note 231 (commenting the Court is expected before the 2004 presidential election).
is the only effective solution to insure compliance with campaign finance laws.

The Bipartisan Reform Act of 2002 attempts to make meaningful changes to the current system of campaign finance. By banning the use of soft money and limiting the airing of issue advocacy advertisements close to Election Day, Congress is attempting to give meaning to the existing provisions of the Federal Election Campaign Act.\(^{234}\) Administrative and judicial loopholes have created a system that is spinning out of control.\(^{235}\) The Supreme Court should recognize the current state of political campaigns and uphold the legislation. Although it does not require an abandonment of *Buckley* principles, the Court should seriously consider abandoning the old doctrine and formulating a new, more workable doctrine that considers both the commands of the First Amendment and the needs of the American citizens at large.

---

\(^{234}\) See 148 CONG. REC. S2096,2098 (daily ed. Mar. 20, 2002) (statement of Sen. Wellstone) (stating the soft money ban is a step in the right direction towards meaningful reform); see also Briffault, *supra* note 69, at 620 (noting "[t]hrough the development of soft money, the parties have enabled donors to avoid FECA's contribution caps, its ban on the use of corporate and union treasury funds in federal elections, and its limitation on spending by presidential candidates who choose to accept public funding"); Scott D. Slater, Comment, *Where the Bucks Stop: An Analysis of Presidential Telephone Solicitations Under 18 U.S.C. § 607*, 59 U. PITT. L. REV. 851, 878 (1998) (explaining one limitation of FECA was the existence of a soft money loophole which enabled politicians to circumvent the Act).

\(^{235}\) See 148 CONG. REC. H270,272 (daily ed. Feb. 14, 2002) (statement of Rep. Turner) (stating large donations of soft money have undermined the confidence of American people); see also Henning, *supra* note 209, at 843 (recognizing "[t]he system of campaign contribution regulation in the United States is complex . . . and riddled with loopholes"). *But see* Bonifaz et al., *supra* note 72, at 51 (arguing "the courts cannot in good faith conclude that the corrupting failures of the present system are attributable to soft money alone and thereby ignore the corrosive effects of bundled contributions").