steady diet of buncombe, the people may come to expect and to respond with highest predictability to buncombe. And those leaders most skilled in the propagation of buncombe may gain lasting advantage in the recurring struggles for popular favor.

[My] perverse and unorthodox argument . . . is that voters are not fools. To be sure, many individual voters act in odd ways indeed; yet in the large the electorate behaves about as rationally and responsibly as we should expect, given the clarity of the alternatives presented to it and the character of the information available to it. In American presidential campaigns of recent decades the portrait of the American electorate that develops from the data is not one of an electorate straitjacketed by social determinants or moved by subconscious urges triggered by devilishly skillful propagandists. It is rather one of an electorate moved by concern about central and relevant questions of public policy, of governmental performance, and of executive personality. Propositions so uncompromisingly stated inevitably represent overstatements. Yet to the extent that they can be shown to resemble the reality, they are propositions of basic importance for both the theory and the practice of democracy. . . .

Political Parties and Campaign Finance: Constitutional Issues Regulating Political Campaigns

First Amendment Barriers to the Regulation of Interest Groups and Political Parties

James Madison pointed out in *Federalist 10* that in a free society faction, "evil" cannot be eliminated without destroying liberty at the same time. He wrote, "Liberty is to faction what air is to fire, an ailment, without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency."

The liberty Madison referred to in *Federalist 10* was an eighteenth-century natural right, which became explicit in the First Amendment's list of freedoms of expression. The First Amendment's freedoms of speech, press, assembly, and its right to petition government for a redress of grievances protect political parties and interest groups from governmental intrusion. Neither these nor other freedoms and rights listed in the Bill of Rights are, however, absolute.

Congress as well as state legislatures have perennially attempted to regulate interest groups and, especially in the 1970s, political parties in various ways. Proponents of interest group regulation accept one prong of Madison's *Federalist 10* argument but ignore his caveat. They view interest groups as "evil" factions, but then propose a cure that invariably treads upon the liberty of groups under the First Amendment.

The following case involves a constitutional challenge on First Amendment grounds to a major congressional attempt to regulate interest groups and parties in the campaign finance legislation of the 1970s. The Federal Election Campaign Act of 1971, amended in 1974, limited individual and political action committee (PAC) contributions to political candidates and parties, and also imposed limits upon spending in behalf of and by political candidates. The law created the Federal Election Commission (FEC), a regulatory body to oversee the complex provisions of the laws. Political candidates and PACs had to register with the Commission and file a detailed report on their contributions and spending.

In the following opinion the Supreme Court held that political spending is protected speech under the First Amendment that Congress cannot burden. However, there is sufficient public interest in establishing a level political playing field to justify limits upon political contributions and their disclosure.

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Buckley v. Valeo

424 U.S. 1 (1976)

Per Curiam

I. Contribution and Expenditure Limitations

The intricate statutory scheme adopted by Congress to regulate federal election campaigns includes restrictions on political contributions and expenditures that apply broadly to all phases of and all participants in the election process. The major contribution and expenditure limitations in the Act prohibit individuals from contributing more than $25,000 in a single year or more than $1,000 to any single candidate for an election campaign and from spending more than $1,000 a year "relative to a clearly identified candidate." Other provisions restrict a candidate's use of personal and family resources in his campaign and limit the overall amount that can be spent by a candidate in campaigning for federal office.

. . .

A. General Principles

The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on

the qualifications of candidates are integral to the operation of the system of government established by our Constitution. . . .

The First Amendment protects political association as well as political expression. . . .

It is with these principles in mind that we consider the primary contentions of the parties with respect to the Act's limitations upon the giving and spending of money in political campaigns. Those conflicting contentions could not more sharply define the basic issues before us. Appellees contend that what the Act regulates is conduct, and that its effect on speech and association is incidental at most. Appellants respond that 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. . . .

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. . . .

The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. The $1,000 ceiling on spending "relative to a clearly identified candidate," 18 U.S.C. § 608(e)(1) . . . would appear to exclude all citizens and groups except candidates, political parties and the institutional press from any significant use of the most effective modes of communication. Although the Act's limitations on expenditures by campaign organizations and political parties provide substantially greater room for discussion and debate, they would have required restrictions in the scope of a number of past congressional and Presidential campaigns and would operate to constrain campaigning by candidates who raise sums in excess of the spending ceiling.

By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. . . . While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy. There is no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations. The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

The Act's contribution and expenditure limitations also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. The Act's contribution ceilings thus limit one important means of associating with a candidate or committee, but leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates. And the Act's contribution limitations permit associations and candidates to aggregate large sums of money to promote effective advocacy. By contrast, the Act's $1,000 limitation on independent expenditures "relative to a clearly identified candidate" precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association. . . .

In sum, although the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.

B. Contribution Limitations

. . . We find that, under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling.

. . .

C. Expenditure Limitations

The Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech. . . . It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. The restrictions, while neutral as to the ideas expressed, limit political expression "at the core of our electoral process and of the First Amendment freedoms." . . .

1. The $1,000 Limitation on Expenditures "Relative to a Clearly Identified Candidate"

. . .

. . . [T]he constitutionality of § 608(e)(1) turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.

We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify § 608(e)(1)'s ceiling on independent expenditures. . . .

. . .

It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by § 608(e)(1)'s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion. . . .

. . .

For the reasons stated, we conclude that § 608(e)(1)'s independent expenditure limitation is unconstitutional under the First Amendment.

2. Limitation on Expenditures by Candidates from Personal or Family Resources

. . .

The ceiling on personal expenditures by candidates on their own behalf, like the limitations on independent expenditures contained in § 608(e)(1), imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression. . . .

The ancillary interest in equalizing the relative financial resources of candidates competing for elective office, therefore, provides the sole relevant rationale for § 608(a)'s expenditure ceiling. That interest is clearly not sufficient to justify the provision's infringement of fundamental First Amendment rights. . . .

3. Limitations on Campaign Expenditures

Section 608(c) places limitations on overall campaign expenditures by candidates seeking nomination for election and election to federal office. . . .

No governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by § 608(c)'s campaign expenditure limitations. The major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions. The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by § 608(c)'s campaign expenditure ceilings. . . .

The interest in equalizing the financial resources of candidates competing for federal office is no more convincing a justification for restricting the scope of federal election campaigns. . . .

The campaign expenditure ceilings appear to be designed primarily to serve the governmental interests in reducing the allegedly skyrocketing costs of political campaigns. . . . The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is 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.

For these reasons we hold that § 608(c) is constitutionally invalid. . . .

II. Reporting and Disclosure Requirements

. . . Each political committee is required to register with the Commission, § 433, and to keep detailed records of both contributions and expenditures, §§ 432(c), (d). . . . Each committee and each candidate also is required to file quarterly reports. . . . The reports are to contain detailed financial information. . . .

Every individual or group, other than a political committee or candidate, who makes "contributions" or "expenditures" of over $100 in a calendar year "other than by contribution to a political committee or a candidate" is required to file a statement with the Commission. . . .

A. General Principles

Unlike the overall limitations on contributions and expenditures, the disclosure requirements impose no ceiling on campaign-related activities. But we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment. . . .

We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP v. Alabama* [1958] we have required that the subordinating interests of the State must survive exacting scrutiny. . . .

The strict test established by *NAACP v. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights. But we have acknowledged that there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the "free functioning of our national institutions" is involved. . . .

The governmental interests sought to be vindicated by the disclosure requirements are of this magnitude. They fall into three categories. First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. . . .

. . .

Third, and not least significant, record keeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

The disclosure requirements, as a general matter, directly serve substantial governmental interests. In determining whether these interests are sufficient to justify

the requirements we must look to the extent of the burden that they place on individual rights.

Limiting Political Party Expenditures

In our system of politics virtually no political process or policy is immune from challenges through litigation. In *Buckley v. Valeo* (1976), Chapter 4, *selection no.* 36, the Supreme Court held that the First Amendment forbids limits on political candidates' expenditures of their own money to get elected. The decision also held unconstitutional limits on "indirect" expenditures in behalf of issues or candidates. But the Court held that Congress could regulate both PAC and party contributions to candidates. The *Buckley* opinion did not spell out in detail how far Congress could go in regulating campaign finance without breaching the First Amendment. The decision left the Federal Election Commission with the responsibility of deciding in concrete cases how the Campaign Finance laws would apply to both interest groups and political parties.

The Supreme Court revisited the *Buckley* opinion and First Amendment protections of party fund-raising in the following case.

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Colorado Republican Federal Campaign Committee v. Federal Election Commission

518 U.S. 604 (1996)

Justice Breyer announced the judgment of the Court and delivered an opinion, in which Justice O'Connor and Justice Souter join.

In April 1986, before the Colorado Republican Party had selected its senatorial candidate for the fall's election, that Party's Federal Campaign Committee bought radio advertisements attacking Timothy Wirth, the Democratic Party's likely candi-

point to any congressional findings suggesting that the Party Expenditure Provision is necessary, or even helpful, in reducing corruption or the perception of corruption. In fact, this Court has recognized that Congress wrote the Party Expenditure Provision not so much because of a special concern about the potentially corrupting effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending. . . .

Even if the Government had presented evidence that the Party Expenditure Provision affects corruption, the statute still would be unconstitutional, because there are better-tailored alternatives for addressing the corruption [including bribery and disclosure laws]. . . .

In my view, it makes no sense to contravene a political party's core First Amendment rights because of what a third party might unlawfully try to do. Instead of broadly restricting political parties speech, the Government should have pursued better-tailored alternatives for combating the alleged corruption.

The Bipartisan Campaign Reform Act of 2002 The Constitutional Challenge

The preceding cases address major constitutional issues government regulation of political campaigns poses. Congress continued attempts to regulate parties and political campaigns in the Bipartisan Campaign Reform Act of 2002 (BCRA). While signing the legislation President Bush raised doubts about its constitutionality. Congress itself seemed to doubt the constitutionality of many of the provisions of BCRA and provided for expedited judicial review in the bill itself. The legislation also provided:

> If any provision of this Act or amendment made by this Act, or the application of a provision or amendment to any person or circumstance, is held to be unconstitutional, the remainder of this Act and amendments made by this Act, and the application of the provisions and amendment to any person or circumstance, shall not be affected by the holding. (Sec. 401)

The law also provided:

> Any Member of Congress may bring an action, . . . for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act.

Immediately Senator Mitch Mcconnell challenged the constitutionality of the law. He used the provision of the bill allowing members of Congress to sue. A wide range of groups and individuals joined in the suit, including the ACLU, the Christian Coalition, the Attorney General of Alabama, and many others. The complaint focused on First Amendment limits on Congress. Another suggested constitutional challenge was that Congress under Article I did not have the authority to regulate *campaigns*, only elections as explicitly stated.

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Senator Mitch McConnell, et al. v. Federal Election Commission

Amended Complaint for Declaratory and Injunctive Relief (Filed in the United States District Court for the District of Columbia April 12, 2002)

1. This is an action challenging numerous provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) as violating the United States Constitution. The BCRA limits and criminalizes speech and related activities touching on the widest range of public issues. . . .

2. Central to the BCRA is its effort to regulate core political speech. When such speech, long and correctly viewed as entitled to the highest degree of First Amendment protection, is broadcast in the form of an issue advertisement on television or radio and merely mentions a federal officeholder or candidate in the months leading up to an election, it can be a crime, with penalties of up to five years in prison. If the BCRA had been in effect in 2000, criminal punishments could have been meted out simply for the sponsorship of ads urging a Member of Congress to vote yes or no on pending proposals to expand the federal hate crimes law, to preempt Oregon's law permitting physician-assisted suicide, to regulate speech on the Internet, or to abolish the Electoral College and provide for direct popular election of the President. Not since the Alien and Sedition Acts, enacted in the earliest days of our Republic, could criminal sanctions be so easily incurred simply by engaging in such core political speech. . . .

3. By creating a new crime of incitement to political action, the BCRA flagrantly contravenes more than a quarter century of unbroken Supreme Court and lower court precedent [*Buckley v. Valeo* (a976)]. . . .

4. Nor does it stop there. The BCRA attempts to re-engineer the way our democratic process works, and in doing so pervasively violates the Constitution. To take but a few examples:

The BCRA unconstitutionally favors some speakers over others.

The BCRA unconstitutionally constrains the rights of officeholders and candidates to raise money for tax-exempt organizations, political parties, and other candidates.

The BCRA treads on First Amendment-protected associational rights by compelling organizations to disclose the identity of their supporters to a far greater, and more dangerous, extent than ever before contemplated, and imposes expensive and burdensome reporting requirements.

The BCRA places unprecedented limits on political parties' ability to make expenditures for core political speech. . . .

All this is accomplished by the use of language that is itself unconstitutionally vague and overbroad and, in some instances, violative of the constitutional guarantee of equal protection under the laws.

5. The far-reaching provisions of the BCRA, particularly those seeking to regulate and control issue advocacy by groups independent of any candidate or campaign, do not improve democracy. The impact of the law is not merely to suppress speech, but to insulate incumbent officeholders from effective criticism. The BCRA permits candidates for federal office to specify what topics are to be discussed during their campaigns and with what intensity. The First Amendment does not permit the government to impose any such regime. . . .

6. Many of the BCRA's supporters have acknowledged that the BCRA raises serious constitutional questions, but these questions did not prevent the BCRA's enactment by the Congress and signature by the President, who likewise has noted the BCRA's grave constitutional implications. The federal courts therefore stand, as so often before in our history, as the ultimate guardians of the Constitution and the Bill of Rights. Plaintiffs urge that this Court take up that solemn responsibility and invalidate the many constitutionally problematic provisions of the BCRA. . . .

A Perspective on the Act

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Myths and Realities about The Bipartisan Campaign Reform Act of 2002

Thomas E. Mann and Norman J. Ornstein

In an outpouring of newspaper columns and motions filed with a three-judge panel of the D.C. district court, critics of the new campaign finance law enacted by Con-

gress and signed by President Bush would have us believe that the law is an egregious affront to our constitutional rights and that all or major parts of it will be thrown out by the Supreme Court. This presumption of unconstitutionality has carried well beyond the usual ideological suspects.

Even such astute observers of American politics as David Broder assume that the major provisions of the law defining and regulating electioneering communications will almost certainly be ruled unconstitutional. And that in turn, according to Broder, will render other parts of the act, especially a soft money ban on political parties, damaging to American democracy.

Before this bandwagon of conventional wisdom gathers further momentum, we believe it is crucial to identify and explode the myths underlying this view, thereby making clear why the new law has an excellent chance of being upheld by the Supreme Court and of achieving its major objectives in the real world of politics.

Myth No. 1: The new law is an unprecedented assault on the rights to free speech and association.

Reality: The law poses no threat to these fundamental rights. It is actually quite modest in its ambitions. The new campaign finance law reinstates the *status quo ante* of barely a decade ago, before soft money began to be a major component of national party fundraising and before candidate-specific sham "issue ads" were used to undermine the disclosure and contribution limitation provisions of federal election law.

Rather than restricting the rights of citizens, it seeks to regain legitimacy for the rule of law, by removing incentives for political actors to shamelessly and disingenuously evade the clear intentions of the law. The new law accomplishes this objective not by removing speech rights but by updating existing, constitutionally-upheld provisions that limit contributions to political parties and that prohibit corporate and union treasury spending in federal elections to take into account contemporary realities of campaigning.

Myth No. 2: Citizens will lose their ability to speak freely and critically about the government and their elected representatives close to an election.

Reality: Nothing could be further from the truth. No speech is banned by the new law—not a single ad nor any word or combination of words would be muzzled. Individuals and groups retain their full First Amendment rights. The only new requirements relate to the disclosure and sources of funding for television and radio ads close to an election that feature federal candidates. Individuals can spend unlimited funds but must disclose spending on electioneering communications (broadcast ads clearly identifying a federal candidate within 30 days of a primary or 60 days of a general election and targeted to his or her constituency above a threshold amount of $10,000.)

Corporations and unions may not use their treasury funds, directly or indirectly, to finance electioneering communications, just as they are currently prohibited from financing campaign communications, but they can use their PACs to finance this narrow class of broadcast ads. Similarly, advocacy groups receiving corporate or union funds can use PACs to finance such communications. No form of political speech, only the source of funding, is touched by the new law.

Myth No. 3: The new law places restrictions on ideological groups that the Supreme Court has explicitly exempted from regulation.

Reality: The Supreme Court has held that certain small, ideologically based nonprofit corporations that do not accept corporate or union funds (known as MCFL groups) are exempt from the prohibition on independent expenditures by corporations in connection with a federal election. That same MCFL exemption applies to the electioneering communications provisions of the new law.

Myth No. 4: Advocacy groups will be prohibited from using their most potent tools for promoting issues in the heat of election campaigns.

Reality: This charge sounds like a serious constraint but it evaporates under scrutiny. Careful and comprehensive research on television advertising during the 1998 and 2000 election cycles reveals that genuine issue ads designed to shape the policy debate or influence decisions in Congress almost never fall within the law's narrowly-tailored definition of electioneering communication.

Genuine issue advocacy campaigns are not constrained by the new law. Perhaps that is why the American Civil Liberties Union, a critic of the act, in recent weeks scrambled to craft and air an ad that both has a legislative reference and trips the wire of electioneering communication. But the artificiality of that exercise combined with the simple adjustments that could be made in the ad to remove it from the law's coverage underscore the reality that no genuine issue advocacy is limited or harmed by the new law. If a non-MCFL advocacy group chooses to promote an issue through a targeted ad close to an election featuring a federal candidate, it can do so. It just has to finance that ad with hard money.

Myth No. 5: The act unconstitutionally flies in the face of the express advocacy or "magic words" standard set by the Supreme Court in *Buckley v. Valeo*.

Reality: The Court in *Buckley* established an express advocacy standard required to be met in order for communications by individuals and outside groups to be subject to campaign finance laws. The standard was defined by the Court as communications that "in express terms advocate the election or defeat of a clearly identified candidate for federal office." It elaborated, in a footnote, examples of express advocacy, including the use of such words as "vote for," "vote against," "support" or "oppose."

The Court conceived the express advocacy test as a way of salvaging disclosure requirements and contribution limitations from the unconstitutionally vague and overbroad language crafted by Congress in the 1974 amendments to the FECA. But the Court did not declare that its standard for express advocacy was rigid and immutable. Indeed the Court has indicated that Congress could take another crack at defining what form of electioneering is properly subject to campaign finance regulation. Chief Justice William Rehnquist said in *Massachusetts Citizens For Life*, a decision in which the Court expanded express advocacy beyond the specific magic words in its *Buckley* footnote, "We are obliged to leave the drawing of lines such as this to Congress if those lines are within constitutional bounds."

Now that we know the *Buckley* test does not square with the reality of election campaigns—no one (not even candidates) uses express words of advocacy of election or defeat in their communications and the test is brazenly exploited by groups with "sham" issue ads—Congress has both the right and the responsibility to fashion an alternative bright line test that passes constitutional muster. That is precisely what it has done. The act's definition of electioneering communication is carefully crafted to be neither vague nor overbroad. And its requirement of disclosure for individuals and hard money for corporations and unions is firmly rooted in existing law and Supreme Court rulings.

Myth No. 6: The law requires the FEC to impose onerous new coordination restrictions on groups interacting with parties or candidates; even routine or innocent conversations between group representatives and lawmakers or staff will unconstitutionally subject their issue advocacy spending to contribution limits and a ban on corporate and labor union contributions.

Reality: The act reinstates the coordination theory initially formulated in *Buckley* as part of its definition of independent expenditures. Under this approach, a campaign expenditure by a person coordinated with a candidate constitutes a contribution to the candidate and is subject to federal contribution limits. The FEC recently adopted a much narrower definition of coordination that in practice excludes most coordinated spending and, therefore, opens the door to widespread evasion of the law. *Buckley* allows a more encompassing definition, one that prevents contribution limits from being rendered utterly meaningless without in any way constraining routine conversations. Congress has merely instructed the FEC to try again. Nothing unconstitutional about that. If the FEC uses the Supreme Court's own "prearrangement or coordination" language in *Buckley*, it will meet Congress's objective as well as the Court's constitutional standards.

Myth No. 7: The ban on soft money damages the constitutionally protected right of association of political parties by restricting the sources of its funding for issue advocacy, legislative, and organizational activities and by putting it at a disadvantage relative to other groups.

Reality: Parties are different from interest groups. They exist to win elections and steer policymaking within government. Their most prominent members and actual or *de facto* leaders are incumbent politicians seeking reelection. Federal law and court rulings have long sanctioned limits on the size and source of contributions to political parties in the interest of preventing corruption or the appearance of corruption.

In *Colorado Republican II*, the Court upheld limits on party expenditures coordinated with candidates, recognizing that "political parties act as agents for spending on behalf of those who seek to produce obligated officeholders." And *Buckley* stated that spending by candidates and political committees (including parties) is "by definition, campaign-related." This means express advocacy is not required in candidate and political party ads for the financing of such ads to be subject to federal campaign finance laws.

All of these authorities support the new law's requirement that in order to prevent the circumvention of existing contribution limits to candidates and party committees, national parties raise and spend only federal (hard money) funds.

Myth No. 8: The act's regulation of state and local parties violates basic principles of federalism.

Reality: The Constitution grants Congress broad authority to regulate the time, place, and manner of federal elections. Numerous court rulings have upheld regulations of federal elections that incidentally effect state and local elections. The evidence is overwhelming that state and local parties are now routinely used to circumvent federal contribution limits. The act is carefully written to regulate state and local money only when it is used for federal election activity. States are free to raise and spend money consistent with state, not federal, law when it is used exclusively in nonfederal election activity.

Myth No. 9: The ban on soft money will weaken political parties and, thereby, American democracy.

Reality: The real myth is that soft money has strengthened parties at all. Instead, it has been used largely to finance thinly disguised television attack ads that rarely even mention a political party. In fact, before the FEC invented soft money in 1978 and well before it became a major source of party funding, the national parties were gaining strength. There is no reason they cannot adapt well to a return to a hard-money world. The national parties raised more than $700 million in hard money in the 2000 cycle, far more than both hard- and soft-money totals in any cycle before 1996.

And the new law does more than just abolish national party soft money. It raises considerably the overall limits on what individuals can give in hard money to parties and separates these limits from those for contributions to candidates. Parties will quickly discover how best to raise and invest those added hard dollars within the new legal framework to advance their electoral interests. This will almost certainly entail some shift in emphasis from television attack ads to grassroots activities, which would actually strengthen parties.

Another provision of the new law allows state and local party organizations to raise contributions in amounts of up to $10,000 under rules set by state law to support certain grassroots political activities that affect both state and federal elections. Together these provisions auger well for political parties—by removing the incentive to lie about the nature of their fundraising and campaigning, reducing their utility to incumbent politicians as money launders, and investing in broader and longer-term strategies to build electoral strength.

Myth No. 10: Under this law, not one penny of the soft money going to parties will go unspent. It will simply be redirected to more narrow, less responsible groups.

Reality: Much of the soft money now contributed to parties is not given eagerly by corporations, unions and individuals because of their zeal to elect particular

candidates, or to get what they want out of Congress or the White House. Many that contribute soft money to parties do so only reluctantly, as "access insurance"—out of fear that if they don't, their more obliging competitors will get privileged access—or to avoid retribution by officeholders. Take away the soft money and much spending on politics from corporate treasuries will end.

Moreover, in an era of close partisan majorities and high-stakes elections, campaign fundraising has been transformed into a giant protection racket, where individual and corporate donors, without the safety afforded by contribution restrictions, are pressured by powerful government officials for more and more money. Elimination of soft money sharply reduces the protection game. While some of these dollars will flow instead to advocacy groups, lawmakers and White House nabobs will be prohibited from shaking down donors on behalf of outside groups, crimping the flow of big money. And most importantly, the nexus between mega-contributors and policymakers will be weakened, thereby reducing the blatant conflicts of interest.

Myth No. 11: The law is an incumbent-protection act that will further damage challengers.

Reality: In 1976 and 1978—the first two elections run under the current hard-money rules and the two just before party soft money was created by the Federal Election Commission—the reelection rate for House incumbents was 95.8 percent and 93.7 percent, respectively; for Senate incumbents, it was 64 percent and 60 percent. In 1998 and 2000, the most recent elections fought under the soft-money system championed by reform critics, the reelection rate for House incumbents was 98.3 percent and 97.8 percent; for Senate incumbents, it was 89.7 percent and 78.6 percent. So much for the salutary role soft money and sham issue advocacy has played in helping challengers!

In fact, the explosion of television ads by parties and outside groups has both crowded out candidates' messages and sharply increased their broadcast costs. For challengers, getting over the threshold of recognition that all incumbents have is crucial, and higher television costs and greater cacophony make that threshold painfully higher. Reducing ad demand by parties and groups will help challengers by lowering costs and freeing up more of the most potent time slots for candidate ads close to the election. The reform helps challengers as well by doubling the hard-money individual contribution limits—something the Campaign Finance Institute has demonstrated in a recent study will benefit challengers more than incumbents.

Myth No. 12: This most recent effort to regulate the flow of money in politics, like all that have preceded it, will fall prey to the infamous Law of Unintended Consequences, in which the intended purposes of campaign finance reform are inevitably overwhelmed by effects not desired or anticipated.

Reality: Critics of campaign finance reform have misread the historical record and underestimated the care recent reformers have taken to gauge the constitutionality of their proposals as well as to anticipate their consequences. Yes, it is difficult to formulate policies regulating money and politics that are workable

and sustainable. First Amendment guarantees properly limit the reach of regulators. Political money is fungible, and legal constraints on its flow will divert some of it to less accountable passageways. Politicians and groups will exploit the weaknesses of the regulatory fabric to advance their interests.

But that doesn't mean that all efforts to regulate campaign financing are counterproductive. Some well-conceived reforms have achieved their stated objectives for a period of time, but they need ongoing maintenance and repair. That is the fundamental purpose of the new law—to repair egregious tears in the regulatory fabric in order to lift the corrosive cynicism that surrounds the system and to lay the groundwork for additional improvements in the campaign finance system.

January 21, 2010

Justices, 5-4, Reject Corporate Spending Limit

By ADAM LIPTAK

WASHINGTON — Overruling two important precedents about the First Amendment rights of corporations, a bitterly divided Supreme Court on Thursday ruled that the government may not ban political spending by corporations in candidate elections.

The 5-to-4 decision was a vindication, the majority said, of the First Amendment's most basic free speech principle — that the government has no business regulating political speech. The dissenters said that allowing corporate money to flood the political marketplace would corrupt democracy.

The ruling represented a sharp doctrinal shift, and it will have major political and practical consequences. Specialists in campaign finance law said they expected the decision to reshape the way elections were conducted. Though the decision does not directly address them, its logic also applies to the labor unions that are often at political odds with big business.

The decision will be felt most immediately in the coming midterm elections, given that it comes just two days after Democrats lost a filibuster-proof majority in the Senate and as popular discontent over government bailouts and corporate bonuses continues to boil.

President Obama called it "a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans."

The justices in the majority brushed aside warnings about what might follow from their ruling in favor of a formal but fervent embrace of a broad interpretation of free speech rights.

"If the First Amendment has any force," Justice Anthony M. Kennedy wrote for the

majority, which included the four members of the court's conservative wing, "it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."

The ruling, Citizens United v. Federal Election Commission, No. 08-205, overruled two precedents: Austin v. Michigan Chamber of Commerce, a 1990 decision that upheld restrictions on corporate spending to support or oppose political candidates, and McConnell v. Federal Election Commission, a 2003 decision that upheld the part of the Bipartisan Campaign Reform Act of 2002 that restricted campaign spending by corporations and unions.

The 2002 law, usually called McCain-Feingold, banned the broadcast, cable or satellite transmission of "electioneering communications" paid for by corporations or labor unions from their general funds in the 30 days before a presidential primary and in the 60 days before the general elections.

The law, as narrowed by a 2007 Supreme Court decision, applied to communications "susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

The five opinions in Thursday's decision ran to more than 180 pages, with Justice John Paul Stevens contributing a passionate 90-page dissent. In sometimes halting fashion, he summarized it for some 20 minutes from the bench on Thursday morning.

Joined by the other three members of the court's liberal wing, Justice Stevens said the majority had committed a grave error in treating corporate speech the same as that of human beings.

Eight of the justices did agree that Congress can require corporations to disclose their spending and to run disclaimers with their advertisements, at least in the absence of proof of threats or reprisals. "Disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way," Justice Kennedy wrote. Justice Clarence Thomas dissented on this point.

The majority opinion did not disturb bans on direct contributions to candidates, but the two sides disagreed about whether independent expenditures came close to amounting to the same thing.

"The difference between selling a vote and selling access is a matter of degree, not kind,"

Justice Stevens wrote. "And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf."

Justice Kennedy responded that "by definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate."

The case had unlikely origins. It involved a documentary called "Hillary: The Movie," a 90-minute stew of caustic political commentary and advocacy journalism. It was produced by Citizens United, a conservative nonprofit corporation, and was released during the Democratic presidential primaries in 2008.

Citizens United lost a suit that year against the Federal Election Commission, and scuttled plans to show the film on a cable video-on-demand service and to broadcast television advertisements for it. But the film was shown in theaters in six cities, and it remains available on DVD and the Internet.

The majority cited a score of decisions recognizing the First Amendment rights of corporations, and Justice Stevens acknowledged that "we have long since held that corporations are covered by the First Amendment."

But Justice Stevens defended the restrictions struck down on Thursday as modest and sensible. Even before the decision, he said, corporations could act through their political action committees or outside the specified time windows.

The McCain-Feingold law contains an exception for broadcast news reports, commentaries and editorials. But that is, Chief Justice John G. Roberts Jr. wrote in a concurrence joined by Justice Samuel A. Alito Jr., "simply a matter of legislative grace."

Justice Kennedy's majority opinion said that there was no principled way to distinguish between media corporations and other corporations and that the dissent's theory would allow Congress to suppress political speech in newspapers, on television news programs, in books and on blogs.

Justice Stevens responded that people who invest in media corporations know "that media outlets may seek to influence elections." He added in a footnote that lawmakers might now want to consider requiring corporations to disclose how they intended to spend shareholders' money or to put such spending to a shareholder vote.

On its central point, Justice Kennedy's majority opinion was joined by Chief Justice Roberts

and Justices Alito, Thomas and Antonin Scalia. Justice Stevens's dissent was joined by Justices Stephen G. Breyer, Ruth Bader Ginsburg and Sonia Sotomayor.

When the case was first argued last March, it seemed a curiosity likely to be decided on narrow grounds. The court could have ruled that Citizens United was not the sort of group to which the McCain-Feingold law was meant to apply, or that the law did not mean to address 90-minute documentaries, or that video-on-demand technologies were not regulated by the law. Thursday's decision rejected those alternatives.

Instead, it addressed the questions it proposed to the parties in June when it set down the case for an unusual second argument in September, those of whether Austin and McConnell should be overruled. The answer, the court ruled Thursday, was yes.

"When government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought," Justice Kennedy wrote. "This is unlawful. The First Amendment confirms the freedom to think for ourselves."

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Column: Campaign-finance case tests Supreme Court again

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---- — Those concerned about all the money sloshing around in American politics will want to pay attention Tuesday, when the Supreme Court is scheduled to hear arguments in a case that could open the campaign-financing spigot even wider.

The court has been asked to strike down restrictions on how much a person can contribute in each two-year election cycle (now limited to $48,600 to candidates and $74,600 to political parties and political action committees, for a $123,200 total). Supporters of the limits -- enacted in the mid-1970s after Watergate -- contend these prevent partisan politics from being dependent on high-dollar donors. They say Congress has had the authority to regulate contributions at least since the court's 1976 Buckley v. Valeo decision, which said the public has a compelling interest in limiting the corrupting influence of money.

However the court rules, this will be the biggest campaign-finance case since its 2010 Citizens United v. Federal Election Commission decision, which led to massive spending by outside groups. Some are calling it a second Citizens United.

Alabama businessman Shaun McCutcheon and the Republican National Committee have challenged the aggregate limits, or caps, that citizens can contribute -- not the $2,600 limit donors can make to individual candidates in primary and general elections.

McCutcheon agrees that large contributions from one source could be a corrupting influence. But the caps limit freedom of expression, he says, contending it doesn't make sense that wealthy donors like him can give the maximum legal contribution only to a certain number of federal candidates.

Friend-of-the-court briefs have been filed on behalf of McCutcheon by Senate Minority Leader Mitch McConnell, the National Republican Senatorial and Congressional Committees and the Tea Party Leadership Fund, which calls the caps "arbitrary."

Those supporting the caps include Americans for Campaign Reform, which argues that the limits encourage "ordinary citizens" to get involved in the political process.

"Anti-corruption principles are a core element of the Constitution's text, history and structure, with overlapping constitutional provisions designed to serve as a bulwark against insidious corruption," Harvard law professor Lawrence Lessig wrote in his friend-of-the-court brief. The author of "Republic Lost: How Money Corrupts Congress -- and a Plan to Stop It," he urged the court to uphold the federal government's power to establish aggregate limits on campaign contributions.

If the high court follows the same reasoning it did in Citizens United and strikes down the caps, the result inevitably will be more cash in the system. We'll want to watch this closely.

This commentary was written by the Scripps Howard News Service.