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## Campaign Finance Legislation: McCain-Feingold/Shays-Meehan - The Political Equality Rationale and Beyond

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# CAMPAIGN FINANCE LEGISLATION: MCCAIN-FEINGOLD/SHAYS-MEEHAN— THE POLITICAL EQUALITY RATIONALE AND BEYOND

*Audra L. Wassom\**

## I. INTRODUCTION

**S**INCE the days before a group of revolutionaries declared this an independent country, no longer to be ruled by a monarchy from across the sea, how to finance campaigns for election to public office has been a thorn in the side of democracy.

In 1757, for example, George Washington was charged with a kind of campaign spending irregularity in his race for a seat in the Virginia House of Burgesses. With only 391 voters in his district, Washington is said to have purchased and distributed during his campaign more than a quart and a half of rum, wine, beer, and hard cider per person.<sup>1</sup>

How to finance campaigns, how to regulate campaigns, and how to monitor campaigns pose fundamental constitutional questions. These questions arise from Articles I and II of the Constitution, the First Amendment, the Fourteenth Amendment, and the Seventeenth Amendment. The problem is that none of the above provisions of the Constitution address directly how campaigns for election to federal office are to be financed. For many years, the United States had no campaign finance law, not many people could contribute or even vote, and campaigns did not cost much at all. In the present time, however, campaigns cost an almost-inconceivable sum, and the possibility of buying influence with elected officials is therefore great. So the remainder of this article will examine the new campaign finance legislation, its constitutionality under the “traditional” First Amendment approach, its constitutionality under a political equality and democracy rationale, and the possibility of public financing of federal elections. Section II will examine the origin of campaign finance laws, the Federal Election Campaign Act of 1971, the 1974

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1. Center for Responsive Politics, *A Brief History of Money in Politics*, at <http://www.opensecrets.org/pubs/history/historyindex.html> (last visited Oct. 21, 2001).

amendments, *Buckley v. Valeo* and the 1976 amendments, and subsequent legislation. Section III will, in turn, examine subsequent litigation arising after the decision in *Buckley v. Valeo* and how the standard has changed. The legislation before the 107th Congress, S. 27 as passed (the McCain-Feingold bill) and H.R. 2356 as passed (the Shays-Meehan bill), will be examined in Section IV. Section V will then assert a political equality and democracy rationale for campaign finance reform legislation and provide reasons for overturning *Buckley v. Valeo*. Finally, in a look to the future, Section VI will examine the ultimate goal, public financing of federal elections.

## II. A BRIEF HISTORY OF CAMPAIGN FINANCE LAWS

### A. ORIGINS OF CAMPAIGN FINANCE LAW

#### 1. *The Time Before Watergate*

Prior to the Watergate scandal, many efforts were made to regulate the financing of federal campaigns. All these efforts were small measures, at best, and none were effective; however, they provided the impetus for change and the idea that democracy demands regulation of campaign finance. The first such measure came in 1867 with passage of the Naval Appropriations Bill that “prohibited officers and employees of the government from soliciting money from naval yardworkers.”<sup>2</sup> Then in a 1905 message to Congress, President Theodore Roosevelt proposed that the law should forbid contributions to political committees by corporations. He “also called for public financing of federal candidates via their political parties.”<sup>3</sup> President Roosevelt can be credited for doing much to bring the problems of campaign finance to the forefront of political discussion. The Tillman Act of 1907 prohibited corporations and interstate banks from contributing directly to federal campaigns.<sup>4</sup> Disclosure of campaign finances was first required in the Federal Corrupt Practices Act of 1910. That legislation was revised in 1925, and, as revised, the Federal Corrupt Practices Act served as the campaign finance law until the Federal Election Campaign Act (“FECA”) was passed in 1971.<sup>5</sup>

Other legislation was also passed regulating campaign finance prior to 1971. For example, in 1943, the Smith-Connally Act prohibited unions from contributing to federal candidates. Then in 1947, the Taft-Hartley Act “made permanent the ban on contributions to federal candidates from unions, corporations, and interstate banks, and extended the prohibition to include primaries as well as general elections.”<sup>6</sup> Finally, in 1971 the FECA was passed, repealing the Federal Corrupt Practices Act. Furthermore, the Revenue Act of 1971 set up a public campaign fund for

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2. Hoover Institution, *Public Policy Inquiry: Campaign Finance History*, at <http://www.campaignfinancesite.org/history/financing1.html> (last visited Oct. 21, 2001).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

eligible presidential candidates (voluntary \$1 check-off on federal income tax returns).<sup>7</sup> It has been the law arising after Watergate and as interpreted by the Supreme Court that is currently at issue.

## 2. *Watergate and the Need for Campaign Finance Legislation*

The 1972 presidential election will long be considered a watershed year in American presidential politics. It transformed the presidency, the law, and the nation. Beyond the history and fascination with a man and corruption, Watergate forever changed the face of campaign finance law and the way in which the American public perceives the financing of political campaigns. It was in the shadow of Watergate that the 1974 amendments to the FECA were passed. That set the ball rolling for a Supreme Court review of campaign finance law in the case of *Buckley v. Valeo*. In turn, *Buckley* has been the standard by which all challenges to campaign finance laws have been brought since 1976, although the standard has morphed somewhat over the years.

Watergate was “by consensus, the impetus for passage of the 1974 amendments (to the FECA).”<sup>8</sup> According to Eric L. Richards, “[I]n seeking reelection as president in 1972, Richard Nixon and his fundraising organization, the Committee for the Reelection of the President (CREEP), had raised well in excess of \$50,000,000, often in illegal fashion or in ways otherwise meant to bypass the 1971 FECA disclosure requirements.”<sup>9</sup>

During the investigations that followed discovery of the Watergate break-in, it was discovered that the Milk Producers Association had pledged \$2 million to President Nixon’s reelection campaign—a contribution designed in part to secure an increase in milk support prices. It also was alleged that American Airlines had contributed funds in return for the government approval of more profitable routes for the airline. Finally, accusations were made that, during the Nixon administration, Justice Department officials settled anti-trust charges against International Telephone & Telegraph in return for the company’s promise to finance the GOP’s national convention through a subsidiary corporation.<sup>10</sup>

The abuses of the system in the 1972 election resulted in the 1974 amendments to the FECA, which, in addition to providing for contribution and expenditure limitations for federal campaigns, also “provided [the] option of full public financing for presidential general elections, matching funds for presidential primaries, and public funds for presidential nominating conventions.”<sup>11</sup> From the 1974 amendments, particularly the limits on

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7. *Id.*

8. Eric L. Richards, *The Emergence of Covert Speech and Its Implications for First Amendment Jurisprudence*, 38 AM. BUS. L.J. 559, 563 (2001).

9. *Id.*

10. *Id.*

11. Hoover Institution, *supra* note 2.

contributions and expenditures in federal campaigns, the challenge was made to the FECA as amended.

B. *BUCKLEY V. VALEO* AND THE RESULTING  
AMENDMENTS TO THE FECA

In *Buckley v. Valeo*,<sup>12</sup> various candidates for federal office and many organizations challenged the 1971 FECA and the 1974 amendments claiming the legislation was unconstitutional. The Supreme Court upheld parts of the statutes while striking down others, creating the current system we have today. At issue in *Buckley* were

the following provisions: (a) individual political contributions are limited to \$1,000 to any single candidate per election, with an overall annual limitation of \$25,000 by any contributor; independent expenditures by individuals and groups "relative to a clearly identified candidate" are limited to \$1,000 a year; campaign spending by candidates for various federal offices and spending for national conventions by political parties are subject to prescribed limits; (b) contributions and expenditures above certain threshold levels must be reported and publicly disclosed; (c) a system for public funding of Presidential campaign activities is established by Subtitle H of the Internal Revenue Code; and (d) a Federal Election Commission is established to administer and enforce the legislation.<sup>13</sup>

The Court determined that the contribution limitations were constitutional under the First Amendment, because the government had a compelling interest in preventing the appearance of corruption. "Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."<sup>14</sup> The Court struck down all expenditure limitations as an impermissible restriction on a candidate's First Amendment speech. The Court struck down the FEC, as constituted in the original Act, as a violation of the Appointment Clause of the Constitution, but Congress reworked the FEC in the subsequent 1976 amendments to comply with the Constitution. Furthermore, the Court upheld the Act's disclosure provisions and the public financing provision.<sup>15</sup> The framework for review of campaign finance laws in the modern era was set by the *Buckley* decision.

The FECA was amended in 1976 to comply with the Court's ruling in *Buckley*. Congress enacted the last major amendments to the FECA in 1979, and they primarily dealt with in-kind contributions by volunteers and state and local parties' ability to spend unlimited amounts in promotion of a federal candidate.<sup>16</sup> The Court has reviewed various campaign

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12. 424 U.S. 1 (1976).

13. *Id.* at 6.

14. *Id.* at 27.

15. *See generally* 424 U.S. 1 (1976).

16. Hoover Institution, *supra* note 2.

finance laws since 1976, and those decisions have further changed the face of campaign finance jurisprudence. Martin H. Redish provides an excellent summary of the current law:

Today, the regulatory framework is largely the product of a synthesis of the 1971 Act, the 1974 legislation, and Supreme Court-dictated constitutional restrictions. Under that crazy-quilt framework, individuals may not contribute in excess of \$1000 (in aggregate) to any candidate or her authorized political committees for each election. For purposes of contributions, primary elections for a party's nomination are distinguished from the general election for the office. Thus, an individual may contribute \$1000 to each. A person may not contribute more than \$20,000 in any calendar year to the political committees established and maintained by a national political party. Moreover, an individual may not contribute more than \$5000 to any other political committee in any calendar year. No individual may make campaign contributions aggregating more than \$25,000 in any calendar year. Any contribution made to a candidate in a year other than the calendar year in which the election is held is considered to have been made during the calendar year of the election.<sup>17</sup>

Different provisions apply to political action committees, commonly referred to as PACs. Redish summarizes those rules as follows:

Political action committees (PACs) may not make contributions in excess of \$5000 to any candidate or to her authorized political committee. PACs may not contribute more than \$15,000 to the national political committees in any calendar year, and may not contribute more than \$5000 to any other PAC in any calendar year. These limitations do not apply to transfers of money between national, state, district, or local political committees of the same political party.<sup>18</sup>

Many reform proposals have been through Congress since the 1979 amendments to the FECA, but the current state of the law remained unchanged until President George W. Bush signed the Bipartisan Campaign Reform Act of 2002 into law on March 27, 2002.

### III. SUBSEQUENT LITIGATION

There has been much litigation in this area since *Buckley*.<sup>19</sup> In recent years, the Court seems to be contemplating the idea of overturning *Buckley*; however, with no consensus on the Court as to what to replace *Buckley* with, the Court has thus far been unwilling to do so. The subsequent litigation is too numerous to cover each and every case; therefore this comment examines only five of the more important decisions of the Court. None of the decisions has overturned *Buckley*; however, many

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17. Martin H. Redish, *Free Speech and the Flawed Postulates of Campaign Finance Reform*, 3 U. PA. J. CONST. L. 783, 787 (2001).

18. *Id.*

19. On March 27, 2002, the day the Bipartisan Campaign Reform Act was signed into law, the National Rifle Association and a group led by Senator Mitch McConnell (R-Ky.) filed suit challenging the constitutionality of the law. Scott Lindlaw, *Bush Signs Campaign Bill, NRA Sues*, at <http://story.news.yahoo.com> (Mar. 27, 2002).

have pulled back from the rigid *Buckley* framework and interpreted it in a way to allow more campaign finance regulation.

A. *FEC v. MASSACHUSETTS CITIZENS FOR LIFE, INC.*<sup>20</sup>

*FEC v. Mass. Citizens for Life, Inc.* (the "MCFL" case) reiterated the importance of keeping corporate money from a corporation's general treasury fund out of federal elections, but it clarified to what type of corporation the relevant provision of the FECA applied. In this case, the FEC charged MCFL with violating the FECA by using corporate funds to publish and distribute a pamphlet expressly advocating the election of "pro-life" candidates and listing candidates for federal office and their stance on abortion.<sup>21</sup> The Court determined that

[T]he first question is whether appellee Massachusetts Citizens for Life, Inc. (MCFL), a nonprofit, nonstock corporation, by financing certain activity with its treasury funds, has violated the restriction on independent spending contained in § 441b [2 U.S.C. 441b]. That section prohibits corporations from using treasury funds to make an expenditure "in connection with" any federal election, and requires that any expenditure for such purpose be financed by voluntary contributions to a separate segregated fund. If appellee has violated §441b, the next question is whether application of that section to MCFL's conduct is constitutional.<sup>22</sup>

The Court held that § 441b did apply to MCFL,<sup>23</sup> but the Court determined that as applied the section was unconstitutional. The basic distinction here was that MCFL was not organized to be a money-making entity. MCFL was organized for the purpose of taking a position on a political issue and advocating that position.<sup>24</sup> As applied to MCFL, 2 U.S.C. § 441b was an infringement on the free speech rights of that organization.<sup>25</sup> That provision of the FECA, however, is constitutional on its face.

B. *AUSTIN v. MICHIGAN CHAMBER OF COMMERCE*<sup>26</sup>

This case upheld a Michigan state law that prohibited corporations from using general treasury funds for expenditures in connection with state elections. The importance of this case comes from its recognition that "preventing corruption or the appearance of corruption" is a compelling state interest, and, furthermore, the state has an interest in another type of corruption: "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for

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20. 479 U.S. 238 (1986).

21. *Id.* at 243.

22. *Id.* at 241.

23. *Id.* at 245.

24. *Id.* at 241-42.

25. *Id.* at 255, 263-64.

26. 494 U.S. 652 (1990).

the corporation's political ideas."<sup>27</sup> According to some scholars, this case indicates a willingness by the Court to look at justifications for campaign finance laws discarded by *Buckley*.<sup>28</sup> According to Raskin and Bonifaz, "[b]y expanding this definition of corruption, the Court may have opened the door for a possible reconsideration of *Buckley* in the future."<sup>29</sup> They continue to explain the importance of this step by saying "[t]his concern, now recognized by the Court, implicitly, if not explicitly, invokes the constitutional right to cast a meaningful vote and to run for office on an equal basis, rights which form the bedrock of democratic governance and which were largely ignored in the *Buckley* decision."<sup>30</sup>

C. COLORADO REPUBLICAN FEDERAL CAMPAIGN  
COMMITTEE V. FEC<sup>31</sup>

This case was a boomerang and landed at the Supreme Court twice. It is included because it is a precursor to the more important decision handed down the second time the Court hears the case. Therefore, this case will be called *Colorado I*. In *Colorado I*, the FEC charged the Colorado Republican Federal Campaign Committee (the Colorado party) with violating the Party Expenditure Provision of the FECA. The Colorado Party bought radio advertisements attacking the Democratic Party's potential candidate, before having selected its own candidate for Congress. According to the FEC, the purchase of the ad caused the Colorado Party to exceed its expenditure limit under the FECA, because it believed the purchase of the ad constituted an "expenditure in connection with the general election campaign of a candidate for Federal office."<sup>32</sup> The Court held that "the First Amendment prohibits the application of this provision [2 U.S.C. § 441a(d)(3)] to the kind of expenditure at issue here—an expenditure that the political party has made independently, without coordination with any candidate."<sup>33</sup> Therefore, the Court reinforced the *Buckley* determination that completely independent expenditures cannot be restricted. It is important, however, that the Court made such an emphatic point of defining a completely independent expenditure and did not hold the provision unconstitutional as applied to coordinated expenditures.

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27. *Id.* at 659-60.

28. Jamin B. Raskin & John Bonifaz, *The Wealth Primary: Campaign Fundraising and the Constitution*, at [http://www.opensecrets.org/pubs/law\\_wp/wealthindex.htm](http://www.opensecrets.org/pubs/law_wp/wealthindex.htm) (last visited Oct. 21, 2001).

29. *Id.*

30. *Id.*

31. 518 U.S. 604 (1996).

32. *Id.* at 612.

33. *Id.* at 608.



D. *NIXON v. SHRINK MISSOURI GOVERNMENT PAC*<sup>34</sup>

The respondents challenged a Missouri state law limiting contributions to candidates for state office. The Court determined that “the principal issues in this case are whether *Buckley v. Valeo* is authority for state limits on contributions to state political candidates and whether the federal limits approved in *Buckley*, with or without adjustment for inflation, define the scope of permissible state limitations today.”<sup>35</sup> The Court held that *Buckley* is authority for state regulation, but the state regulations do not have to be “pegged to *Buckley*’s dollars.”<sup>36</sup> “Yet, oddly, *Shrink Missouri* may also perhaps be seen as the beginning of the end of the *Buckley* era in campaign finance doctrine.”<sup>37</sup>

According to Richard Briffault, “*Shrink Missouri* challenges *Buckley* in three ways.”<sup>38</sup>

First, even in reaffirming *Buckley*’s holding that contributions can be subject to dollar limitations, *Shrink Missouri* subtly departed from *Buckley*’s emphasis on the speech-like nature of campaign contributions. *Shrink Missouri*’s easy validation of the Missouri contribution caps seems in tension with *Buckley*’s determination that contributions are a form of political speech. Indeed, in declining to impose a more rigorous standard of review, *Shrink Missouri* may have actually adopted a more liberal one. Second, although the *Shrink Missouri* holding commanded a six-justice majority, the concurring and dissenting opinions revealed that, for the first time, a clear majority of the justices now disagree with critical elements of the *Buckley* approach to campaign finance regulation. As a result, *Buckley*’s current role and continued survival seem to be more an artifact of a lack of agreement within the Court on how to replace *Buckley* than a reflection of continued support for *Buckley*’s approach. Third, for the first time, members of the Court acknowledged in their opinions the inability of the campaign finance laws produced and shaped by *Buckley* to effectively regulate campaign finance practices.<sup>39</sup>

Furthermore, the varying opinions in this case indicate a Court unsatisfied with the *Buckley* framework. Six justices indicated disagreement with *Buckley*, but there is no consensus as to how to change it. “If, as suggested by Justices Breyer, Ginsburg, and Kennedy, the Court were to begin to take into account ‘the post-*Buckley* experience,’ then surely *Buckley* would have to be substantially modified, if not replaced, since there can be little disagreement with Justice Kennedy’s conclusion that ‘*Buckley* has not worked’.”<sup>40</sup>

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34. 528 U.S. 377 (2000).

35. *Id.* at 381-82.

36. *Id.* at 382.

37. Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 MINN. L. REV. 1729-30 (2001).

38. *Id.*

39. *Id.*

40. *Id.*

E. *FEC v. COLORADO REPUBLICAN FEDERAL  
CAMPAIGN COMMITTEE*<sup>41</sup>

After the Court remanded *Colorado I* for a determination of whether the FECA provision regulating coordinated expenditures was unconstitutional, the case again worked its way up to the Supreme Court. This second case will be called *Colorado II*. At this hearing, the Court determined that the FECA provision regulating coordinated expenditures is constitutional.<sup>42</sup> Coordinated expenditures differ from independent expenditures in that they are expenditures made “in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents.”<sup>43</sup> The Court held that such coordinated expenditures could be treated as contributions under the FECA and be permissibly regulated within the constructs of *Buckley*.<sup>44</sup>

*Colorado II* allows coordinated expenditures to be treated as contributions and accordingly regulated; therein lies its importance. This was not addressed in *Buckley* and therefore adds to the framework of *Buckley*. This decision also creates a problem. The problem is where to draw the line between coordination and independent expenditures. Cases can be imagined where that line might be very blurry. For instance, does there have to be express communication, or can implicit or indirect communication be considered coordination? These are questions that will have to be answered by the Court in the future.

IV. LEGISLATION BEFORE THE 107TH CONGRESS: THE  
BIPARTISAN CAMPAIGN REFORM ACTS OF 2001/2002

This section will discuss the campaign finance legislation known as the Bipartisan Campaign Reform Act. Discussion of the Senate bill below refers to the McCain-Feingold bill, the Bipartisan Campaign Reform Act of 2001, as passed by the Senate in the spring of 2001. Following the discussion of S.27 is a discussion of H.R. 2356 as proposed in the summer of 2001.<sup>45</sup> Finally, there is an explanation of H.R. 2356, the Shays-Meehan substitute bill (with amendments), as passed by the House and Senate in the spring of 2002. This version of the legislation, the Bipartisan Campaign Reform Act of 2002, was signed into law on March 27, 2002.

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41. 121 S. Ct. 2351, 531 U.S. 923 (2001) [hereinafter *Colorado II*].

42. See generally *id.*

43. 2 U.S.C. § 441a(a)(7)(B)(i).

44. *Colorado II*, 121 S. Ct. at 2371.

45. The author has retained this portion of the article, written before final passage of the legislation, to provide the reader with a comparison of the legislation as originally proposed and as passed.

A. S. 27—THE MCCAIN-FEINGOLD BIPARTISAN CAMPAIGN REFORM ACT OF 2001

Officially the 107th Congress referred the Bipartisan Campaign Reform Act of 2001, more commonly known as the McCain-Feingold bill, S. 27 to the Committee on Rules and Administration on January 22, 2001.<sup>46</sup> The measure hit the floor of the Senate on March 19, 2001; after two weeks of debate, the Senate passed S. 27 by a vote of 59-41.<sup>47</sup> The Senate was the barrier to passage of campaign finance reform legislation in the past. The House version, the Shays-Meehan bill, had previously passed the House, but the Senate version was voted against.<sup>48</sup> Passage of S. 27, therefore, put the House in the interesting position of knowing, if they passed the Shays-Meehan bill, campaign finance reform legislation would likely become law. For that reason, Representatives Chris Shays and Martin Meehan wanted to introduce a bill as close to S. 27 as possible to avoid losing the legislation in the conference committee. The analysis of S. 27 and H.R. 2356 will therefore be very much the same.

Title I of S. 27 is entitled “Reduction of Special Interest Influence.” This provision is an effort to remove “soft money” (unregulated contributions to political parties or committees) from federal elections. The basis of the provision “with respect to soft money [is] to prohibit: (1) a national committee of a political party (including specified related entities) from soliciting or receiving contributions or making expenditures not subject to FECA.”<sup>49</sup> In addition, Title I allows for states to maintain their own campaign finance regulations, but if expenditures are being made for Federal election activities, they must be made from funds subject to the FECA as amended by this legislation.<sup>50</sup> If a State committee does contribute to federal election activities, however, this bill now restricts such contributions to \$10,000 per year.<sup>51</sup> It is important to note that there was much debate on the Hill as to whether that provision is merely another loophole. No definition as to what constitutes a State committee exists under this provision. For example, in a state such as Texas that has over 200 counties, if each county party committee is a “State committee” under this provision, it is easy to see how much money could flow into the system through this provision.

Title II of S. 27 covers non-candidate expenditures. Subtitle A, “Electioneering Communications,” requires filing with the FEC for any “electioneering communications exceeding \$10,000 in the aggregate during any

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46. *Bill Summary & Status for the 107th Congress*, available at <http://thomas.loc.gov> (last visited Nov. 25, 2001).

47. Common Cause, *CauseNet Action Center: Final Passage of McCain-Feingold Campaign Finance Reform Bill*, at <http://causenet.commoncause.org> (last visited Nov. 25, 2001).

48. Common Cause, *Chronology of Campaign Finance Reform—1979-1998*, at [http://www.commoncause.org/issue\\_agenda/chrono.htm](http://www.commoncause.org/issue_agenda/chrono.htm) (last visited Nov. 25, 2001).

49. *Bill Summary & Status for the 107th Congress*, 15, available at <http://thomas.loc.gov> (last visited Nov. 25, 2001).

50. *Id.*

51. *Id.*

calendar year.”<sup>52</sup> More importantly, this provision treats any electioneering communication that is made in coordination with a candidate or party as a contribution to that candidate or party and an expenditure by that candidate or party.<sup>53</sup> This is very important, especially in light of the Supreme Court’s ruling in June 2001, in the *Colorado II* case, that coordinated expenditures can be treated as contributions without a violation of the Constitution.<sup>54</sup> Therefore, it can be argued this provision has already been ruled constitutional by the Court.

Title II, Subtitle B, “Independent and Coordinated Expenditures,” amends the FECA to clarify the term “independent expenditure.” Under S. 27, the FECA would be amended so that “independent expenditure” means “an expenditure: (1) by a person expressly advocating the election or defeat of a clearly identified candidate; and (2) that is not a coordinated activity with the candidate or the candidate’s agent or a person who has engaged in coordinated activity with such candidate or such candidate’s agent.”<sup>55</sup> The importance of this provision is its attempt to redefine what has emerged as the “magic words” standard of *Buckley*.<sup>56</sup> The implication of this provision is that any communication falling under the provision must be paid for with money regulated under the FECA, as amended (so-called “hard money”). In other words, the communication would have to disclose who paid for the advertisement and be paid for with “hard dollars.” Under S. 27, “express advocacy” would no longer be limited to only those communications containing the words found in footnote 52 of the *Buckley* opinion. Instead, the test for “express advocacy” would be whether the communication clearly identified the candidate (as intended by the bill’s sponsors that could include the name of the candidate or a photo of the candidate) and expressly advocates the election or defeat of that candidate (in whatever form that takes).

Footnote 52 of *Buckley* does not require the use of “magic words” to require the use of “hard money” (money regulated under the FECA) for electioneering communications. This article contends the Supreme Court and lower courts have misapplied this footnote in the years since *Buckley*. The provision of the FECA, to which footnote 52 referred, was a provision limiting expenditures for communications advocating the election or defeat of a clearly identified candidate to \$1,000 annually. Since the Court found that provision unconstitutional, the “magic words” test has been used to determine when “hard money” must be used for an electioneering communication. Courts have used footnote 52 to require the use of “hard money” only for “those communications containing express words of advocacy of election or defeat, *such as* ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’

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52. *Id.* at 16.

53. *Id.*

54. *See generally Colorado II.*

55. *Bill Summary & Status for the 107th Congress*, 16, available at <http://thomas.loc.gov> (last visited Nov. 25, 2001).

56. *See Buckley*, 424 U.S. at 44 n.52.

'reject'."<sup>57</sup> First, it is important to note this is merely a footnote to the opinion. More importantly, the use of the words "such as" indicate a list of examples, not an exhaustive list of terms that must be used to require the communication be paid for with "hard money." Electioneering communications that are obviously meant to support or oppose an identified candidate for federal office (and obviously not "issue advocacy") can therefore be regulated and required to be paid for with regulated dollars within the constitutional boundaries as set forth in the *Buckley* opinion. However, outside that standard as applied by the courts, it seems strange to argue that certain ads, obviously advocating the election or defeat of a candidate, are not electioneering communications merely because they do not contain "magic words."

Title III, "Miscellaneous," contains some very important provisions. The National Association of Broadcasters (NAB) has vilified one of the most contentious provisions, known as the Torricelli Amendment. This provision, Section 305,

amends the Communications Act of 1934 with regard to television media rates, to provide that the charges made for the use of any television broadcast station, or by a provider of cable or satellite television service, to any person who is legally qualified candidate for any public office in connection with the campaign of such candidate for nomination for election, or election, to such office shall not exceed the lowest charge of the station for the same amount of time for the same period.<sup>58</sup>

This provision is also known as the "lowest unit rate" provision.<sup>59</sup> Another provision, that proved to be a contentious issue in the House debate, is Section 308, which increases contribution limits. Basically, this section increases individual contribution limits to candidates from \$1,000 to \$2,000. It also increases the aggregate, annual contribution limit to \$37,500 from \$30,000. Most importantly, this section allows for the indexing of contribution limits for inflation.<sup>60</sup> Contribution limits have remained the same since the FECA was passed in 1971, due to the fact the FECA did not allow indexing for inflation. Finally, Section 312 of Title III, "directs the Comptroller General to study and report to Congress on the clean money clean elections laws of Arizona and Maine to provide in whole or in part for the public financing of election campaigns."<sup>61</sup> This article will discuss state reform efforts later, but this provision is an important indication that the Senate is willing to look at the possibility of

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57. *Id.* (emphasis added).

58. *Bill Summary & Status for the 107th Congress*, 16-17, available at <http://thomas.loc.gov> (last visited Nov. 25, 2001).

59. This provision will likely be the springboard, if held constitutional, for future reforms providing for free air-time for candidates. That is a battle the National Association of Broadcasters is already gearing up for, and newscasters on CNN are already speaking out against any such measure when discussing campaign finance on talk shows. However, the airwaves are public, and the government has the constitutional right to regulate those airwaves to promote free speech.

60. *Id.* at 17.

61. *Id.*

publicly financing Congressional elections. It may be a political move only, but it identifies the possibility in a significant piece of federal legislation.

Title IV is the most important and necessary provision of the Act. Section 401 is the severability provision of S. 27. According to Section 401, [I]f 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.<sup>62</sup>

The importance of this provision is evident from the many challenges that will be brought against the Act. Candidates, political groups, non-profits, and others are divided into two diametrically opposed groups: either supporting the reform or opposing the reform. There will be, therefore, many challenges from those opposing the legislation. The severability amendment allows a provision of the Act to be held unconstitutional, without destroying the entire Act. The provision deemed unconstitutional could be extracted leaving the rest of the Act intact.

Title V of S. 27 contains additional disclosure provisions.<sup>63</sup> The main purpose of these provisions is to make more information more readily available to the public. This will be done primarily through use of the Internet.

#### B. H.R. 2356—THE SHAYS-MEEHAN BIPARTISAN CAMPAIGN REFORM ACT OF 2001, AS PROPOSED SUMMER, 2001

H.R. 2356 is substantially similar to S. 27 passed in the Senate. This article will, however, highlight a few additions that H.R. 2356 makes to the Senate version (S. 27). First, in Title I, H.R. 2356 adds a definition of “Federal election activity.” The definition states that “Federal election activity” includes:

- (1) voter registration activity in the last 120 days of a Federal Election;
- (2) voter identification, get-out-the-vote, or generic campaign activity conducted in connection with an election in which a Federal candidate is on the ballot;
- (3) public communications that refer to a clearly identified Federal candidate and promote, support, attack, or oppose a candidate for Federal office (regardless of whether they expressly advocate a vote for or against); or
- (4) services by a State, district, or local political party employee who spends at least 25 percent of paid time per month on activities in connection with a Federal election.<sup>64</sup>

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62. Bipartisan Reform Act of 2001, S. 27, 107th Cong. § 401 (2001).

63. *Bill Summary & Status for the 107th Congress*, 18, available at <http://thomas.loc.gov> (last visited Nov. 25, 2001).

64. *Bill Summary & Status for the 107th Congress*, 3, available at <http://thomas.loc.gov> (last visited Nov. 25, 2001).

The primary importance of this definition is the departure it takes from the "magic words" standard for express advocacy set forth in *Buckley*.<sup>65</sup>

Title II adds a definition of "electioneering communication" to the provision that requires disclosure of such communications by any entity spending more than \$10,000 annually per year for such communications. According to Sec. 201 of H.R. 2356, "electioneering communication" means

Any broadcast, cable, or satellite communication that refers to a clearly identified Federal candidate, made within 60 days of a general, special, or runoff election, or within 30 days of a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office the candidate seeks, and in the case of a communication that refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.<sup>66</sup>

The bill's sponsors believe this definition is sufficiently narrowly tailored to withstand constitutional scrutiny, but an alternative definition is provided should it be deemed "constitutionally insufficient."<sup>67</sup> Subtitle B of Title II also defines "coordinated expenditure" consistently with the Court's ruling in the Colorado II case.<sup>68</sup>

Title III includes a so-called "millionaire provision." This provision is an effort to diminish the advantage of independently wealthy candidates over challengers that do not have the benefit of large personal funds to use for their campaign. This provision "limits repayment of a candidate's personal loans incurred in connection with his or her campaign to \$250,000 from contributions made to the candidate or any authorized committee of the candidate after the election."<sup>69</sup> Noticeably absent from Title III of H.R. 2356 was an increase in limits on contributions to individual candidates, which is present in S. 27. This provision was much debated. Essentially three options were available to the House of Representatives: (1) increase individual contribution limits for both the House and Senate; (2) allow for the increase in individual contribution limits for Senate races but not for House races; or (3) require individual contribution limits for both the House and the Senate to remain as they are under the FECA.

Titles IV and V of H.R. 2356 contain no discernable differences from the Senate version. Title IV is the severability provision (previously discussed in relation to S. 27).

H.R. 2356 was reported out of the Committee on House Administration on July 10, 2001.<sup>70</sup> On July 12, 2001 the Rules Committee reported

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65. See *Buckley*, 424 U.S. at 44 n.52.

66. *Bill Summary & Status for the 107th Congress*, 4, available at <http://thomas.loc.gov> (last visited Nov. 25, 2001).

67. *Id.*

68. *Id.*

69. *Id.* at 5.

70. *Bill Summary & Status for the 107th Congress*, 1, available at <http://thomas.loc.gov> (last visited Nov. 25, 2001).

the rule for consideration of H.R. 2356 to the whole House.<sup>71</sup> The rule for consideration was not the rule the sponsors of the legislation believed they were going to get for consideration of the bill. As the rule was reported to the floor, the rule was designed to kill the legislation and make it almost impossible to pass. This was ugly political maneuvering by opponents of the legislation at its worst. As a result, "Rule H. Res. 188 failed passage of [the] House."<sup>72</sup> A rule for consideration of a piece of legislation rarely fails passage. A discharge petition was begun that would overrule the Rules Committee and bring the legislation to the floor of the House.<sup>73</sup> Two hundred-eighteen signatures, or a simple majority were needed to bring the legislation to the floor.<sup>74</sup> The requisite 218 signatures were obtained by January 24, 2002. At that point, the proponents of campaign finance reform were able to force a House vote on the Bipartisan Campaign Reform Act. The vote occurred on February 14, 2002, and the legislation passed with 240 votes.<sup>75</sup> The rare use of this parliamentary tactic to get consideration of a piece of legislation illustrates the contentiousness of campaign finance reform.

C. H.R. 2356—THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002,  
PASSED BY THE HOUSE ON FEBRUARY 14, 2002, PASSED BY  
THE SENATE ON MARCH 20, 2002, SIGNED INTO  
LAW ON MARCH 27, 2002

The Bipartisan Campaign Reform Act of 2002 will take effect on November 6, 2002, the day after the mid-term elections. The changes in contribution limits will take effect on January 1, 2003.<sup>76</sup> The summary of the legislation is as follows:

- NATIONAL PARTIES. Bans national parties from raising and spending soft money.
- PROHIBITION ON SOFT MONEY SOLICITATION. Prohibits Federal officeholders from soliciting or raising soft money for political parties at Federal, state, and local levels, and from soliciting or raising soft money in connection with Federal election.
- STATE PARTIES. Requires state parties and local party committees to spend hard money on activities that influence Federal elections. Allows state parties and local party committees to spend a mix of soft money (limited to \$10,000 per donor per year) and hard money on non-broadcast voter registration and get-out-the-vote activities that do not mention a federal candidate. State parties and local party committees cannot transfer funds for these activities, and

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71. *Id.* at 2.

72. *Id.*

73. For more information on the discharge petition, a parliamentary rule of Congress, see <http://www.commoncause.org/publications/july01/smfaq.htm>.

74. See <http://www.commoncause.org/publications/jan02/011502.htm> (last visited Jan. 19, 2002).

75. *Victory in the House*, available at <http://www.commoncause.org/mccainfeingold/> (last visited June 16, 2002).

76. Bipartisan Campaign Reform Act of 2002, H.R. 2356, 107th Cong. § 402(a)(1) (2002).



Federal officeholders and national parties may not solicit soft money for these activities.

- **REQUIRES SHAM "ISSUE ADS" TO BE TREATED AS CAMPAIGN ADS.** Prohibits the use of corporate and union treasury money for broadcast communications that mention a Federal candidate within 60 days of a general election or 30 days of a primary and are targeted at the candidate's electorate. (Unions and corporations can finance these ads through their PACs.) Requires individuals and groups of individuals to disclose contributions and expenditures for similar broadcast communications.
- **INCREASES INDIVIDUAL CONTRIBUTION LIMITS.** Raises limits on individual contributions to Senate and Presidential campaigns to \$2,000 and indexes for inflation.
- **PROVIDES FOR CANDIDATES AND POLITICAL PARTIES TO RECEIVE THE LOWEST UNIT RATE FOR BROADCAST ADVERTISEMENTS WITHIN 45 DAYS OF A PRIMARY OR 60 DAYS BEFORE A GENERAL ELECTION.** Requires broadcast, cable or satellite providers to charge candidates and national committees of political parties the lowest amount they have charged any other advertiser during the preceding 180 days.
- **SEVERABILITY PROVISION.** If a provision of the bill is held unconstitutional, the remainder of the bill is not affected.<sup>77</sup>

Three amendments were also passed. An amendment offered by Representative Wamp was passed increasing the limit on individual contributions to House candidates to \$2,000 indexed for inflation.<sup>78</sup> Another amendment, introduced by Representative Capito, "allows a candidate running against a wealthy opponent (who spends more than a threshold amount of his or her own money) to raise hard money contributions at triple the usual limit, and to receive additional coordinated party expenditures."<sup>79</sup> Finally, an amendment offered by Congressmen Armey and Ney "eliminates the transition rule that would allow leftover soft money to be spent for a building."<sup>80</sup> Proponents of reform were concerned this last amendment might push the legislation into conference committee, but luckily it did not. The two chambers were successful in their goal to avoid losing the legislation in conference committee, and the Bipartisan Campaign Reform Act became law on March 27, 2002.

## V. THE POLITICAL EQUALITY AND DEMOCRACY RATIONALES FOR CAMPAIGN FINANCE REFORM

Traditionally, the Supreme Court has viewed campaign finance law through the lens of strict First Amendment scrutiny. Since *Buckley*, the Court has held that limits on campaign expenditures are unconstitutional

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77. *Summary of the Shays-Meehan Substitute*, available at <http://www.commoncause.org/mccainfeingold/> (last visited June 16, 2002).

78. Bipartisan Campaign Reform Act of 2002, H.R. 2356, 107th Cong. § 307 (2002).

79. *Shays-Meehan Campaign Finance Reform Votes on Amendments, List of Proposed Amendments* (Prepared by the offices of Congressmen Shays and Meehan, Feb. 13, 2002), available at <http://www.commoncause.org/mccainfeingold/> (last visited June 16, 2002).

80. *Id.*

under the First Amendment, but they have also held that contribution limits survive strict scrutiny due to the government's compelling interest in preventing corruption or the appearance of corruption.<sup>81</sup> Unfortunately, preventing corruption or the appearance of corruption was the only rationale the Court provided to the proponents of campaign finance reform as a justification for passing any new measures to restrict the flow of private money into the political process. This article argues, however, that the Supreme Court is too narrow in its view of the First Amendment. There are two other bases, consistent with the First Amendment, for upholding many campaign finance reform measures: the protection of the democratic process and political equality.

This article further contends that, regardless of other rationales for upholding the legislation, the Bipartisan Campaign Reform Act of 2002 is constitutional under traditional campaign finance First Amendment scrutiny. Therefore, this article turns first to an examination of the proposed legislation under the *Buckley* framework.

#### A. THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002: CONSTITUTIONAL UNDER THE *BUCKLEY* FRAMEWORK

Many constitutional scholars have argued that the proposed legislation is constitutional, even under the standard set out by *Buckley*. This article agrees with those scholars. The provisions in the legislation are viewed as a necessary first step to closing the loopholes that have opened in the FECA.

While scholars have written prolifically on the constitutionality of McCain-Feingold/Shays-Meehan, many have also testified to the Congressional committees reviewing the legislation. The consensus appears to be that there are two provisions of the legislation most likely to be attacked on the battlefield of the First Amendment. Those two provisions are the soft money ban and the restrictions on electioneering communications.

The soft money ban is constitutional under *Buckley* due to the Court's recognition of a compelling governmental interest for contribution limits. According to Senator Kerry, "banning soft money contributions does not violate the Constitution. The Supreme Court in *Buckley* held that limits on individual campaign contributions do not violate the First Amendment. If a limit of \$1000 on contributions by individuals was upheld as constitutional, then a ban of contributions of \$10,000, \$100,000, or \$1 million is also going to be upheld."<sup>82</sup> Senator Kerry also noted the "risk of corruption or the appearance of corruption" rationale in *Buckley* that "warranted limits on individual campaign contributions."<sup>83</sup> The Senator reasoned, "soft money contributions to political parties can be limited for

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81. See generally *Buckley*, 424 U.S. 1 (1976).

82. *The Bipartisan Campaign Reform Act of 2001: Debate Before the Full Senate*, 107th Cong. (April 3, 2001) (statement of Sen. Kerry), available at <http://thomas.loc.gov> (last visited Oct. 28, 2001).

83. *Id.*

the same reason.”<sup>84</sup> The Senator was not the only supporter of the constitutionality of McCain-Feingold during the Senate debate and committee hearings. Deborah Goldberg, the Deputy Director of the Democracy Program at the Brennan Center for Justice at NYU School of Law, testified before the Committee on Rules and Administration that

[t]he Supreme Court’s decisions in *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) (upholding a ban on the solicitation of campaign contributions from the general public to corporate PACs), and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (upholding a ban on the use of corporate money for independent expenditures in state elections), offer clear constitutional support for the regulation of soft money from corporate and union sources.<sup>85</sup>

According to Donald J. Simon, general counsel for Common Cause, “the abuses that the Court sees as inherent in a system of unlimited financial contributions perfectly describes the soft money system.”<sup>86</sup> Mr. Simon professed, “the Court’s repeated recognition that Congress can legislate to address those abuses is a complete response to any claim that the soft money provisions of McCain-Feingold are unconstitutional.”<sup>87</sup> The soft money problem has arisen from the inaction of the FEC, or their toleration, regarding certain abuses. The soft money ban does no more than return to the state of the law intended in the FECA. The Court has never held such a ban unconstitutional, and it should not do so under the *Buckley* framework or any other framework.

The fight over the constitutionality of the electioneering communications provisions will be a tougher battle. The provisions are constitutional, however, even under *Buckley*. The “magic words” test set up by *Buckley* “has come to provide what is a wholly unworkable test that . . . was never the intention of the Court.”<sup>88</sup>

The Court chose to save FECA from invalidation by reading it very narrowly. However, the Court did not say that Congress could never devise alternate language that would be both sufficiently precise and sufficiently narrow. The decision to narrowly construe a statute to save it from potential vagueness and overbreadth problems do not prevent further legislative refinements that eliminate those problems. The key for Congress is to draw a line that distinguishes between regulable electioneering and protected ‘issue advocacy’ in a

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84. *Id.*

85. *The Constitution and Campaign Finance: Hearing Before the Committee on Rules and Administration*, 107th Cong. (March 22, 2000) (statement of Deborah Goldberg), available at <http://rules.senate.gov/hearings/2000/032200gold.htm> (last visited Oct. 20, 2001).

86. *Constitutional Perspective of Campaign Finance Reform: Hearing Before Committee on House Administration*, 107th Cong. (June 14, 2001) (statement of Donald J. Simon), available at [http://www.house.gov/cha/business/transcripts\\_14.htm](http://www.house.gov/cha/business/transcripts_14.htm) (last visited Oct. 20, 2001).

87. *Id.*

88. *The Bipartisan Campaign Reform Act of 2001: Debate Before the Full Senate*, 107th Cong. (Apr. 3, 2001) (statement of Sen. Kerry), available at <http://thomas.loc.gov> (last visited Oct. 28, 2001).

way that minimizes the vagueness and overbreadth concerns identified by the Court.<sup>89</sup>

The language in the legislation, defining regulable electioneering communications, is sufficiently narrow as to avoid any vagueness or overbreadth problems present in the original FECA. It is a bright line test for express advocacy that is easy to understand and will not regulate more than a very minimal number of advertisements that are truly issue advocacy. The Supreme Court has never held that to avoid overbreadth a statute must avoid all restrictions on legitimate activity, only that it must be sufficiently narrowly tailored.

Only two unique advertisements appeared in the 60-day period and one advertisement in the 30-day period before the election (2000 election cycle). The big difference, however, is the relative proportion of sham issue advocacy to total issue advocacy in the periods. Whereas the two genuine issue advertisements in the 60-day period before the 1998 elections made up 6.9% of the total number of unique issue advertisements, the two advertisements in the 60-day period before the 2000 period made up only 1.6% of the total number of unique advertisements.<sup>90</sup>

Richard L. Hasen further believes that “the data show that genuine issue advocacy featuring a candidate’s name or likeness is relatively rare in the period just before the election—when the public’s focus is generally on the election, not political issues generally.”<sup>91</sup> He concludes, therefore, that “with such narrow drafting, contribution limits applied through bright-line tests are more defensible as necessary to prevent the dangers of corruption and its appearance and therefore more likely to be upheld as constitutional.”<sup>92</sup> The test set out in H.R. 2356 is not a refutation of the *Buckley* standard and does not violate the First Amendment, but it is a constitutional evolution of a previously unworkable standard.

## B. THE POLITICAL EQUALITY RATIONALE

Shunned in the courts since *Buckley*, the idea that campaign finance reform can be justified as enhancing the political equality of candidates and the general public is growing among proponents of reform and academic scholars. Political equality should be one of the foremost concerns of the Supreme Court, and although past Courts have dismissed this idea, the current Court should not. “The (*Buckley*) Court rejected the asserted governmental interest in equalizing the ability of candidates to make their views known, observing that ‘the concept that the government may

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89. *The Constitution and Campaign Finance: Hearing Before the Committee on Rules and Administration*, 107th Cong. (Mar. 22, 2000) (statement of Deborah Goldberg), available at <http://rules.senate.gov/hearings/2000/032200gold.htm> (last visited Oct. 20, 2001).

90. Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 MINN. L. REV. 1773, 1796 (2001) (analysis of empirical evidence on electioneering communications in light of proposed legislation regulating such communications).

91. *Id.* at 1802-03.

92. *Id.* at 1803.

restrict the spending of some elements of our society in order to enhance the relative voices of others is wholly foreign to the First Amendment’.”<sup>93</sup> However, some new arguments for limiting spending might convince the Court. One such argument is that “at some level, spending money is no longer a communications function but rather a reflection of economic power that government may regulate.”<sup>94</sup> It is possible that such an argument could support an equal protection claim under Fourteenth Amendment jurisprudence.

If only the very wealthy, or those that can raise inordinate sums of money (usually well off themselves), can afford to run for office, then a lack of equality in representation results. The majority of the population, which is not wealthy, is inadequately represented in the federal government.

Long-time civil rights activist Dr. Gwendolyn Patton observed that the current electoral system is rigged for the benefit of wealthy candidates or those who can raise money from the wealthy, leaving us without candidates who really represent the working class and especially the poor. Calling the task of getting private money out of public elections ‘the unfinished business of the Voting Rights Movement,’ she identified the Achilles heel of American elections – the fundamental unfairness and inequality of the way we finance the system.<sup>95</sup>

The wealth primary, as Jamin B. Raskin and John Bonifaz have termed it, overwhelmingly decides congressional elections. For example, “the person who raises and spends the most money over the course of a campaign is overwhelmingly (consistently over 80%) likely to become the general election winner.”<sup>96</sup> The cost of running a campaign for Congress is phenomenal and has reached the point where “people of ordinary means can barely dream of holding congressional office.”<sup>97</sup> While some argue that the most popular candidate gets the most money, thereby legitimizing the current campaign finance system, the number of contributions is not the determining factor in success. “The *amount of money available to spend* is far more important than the *number of contributions collected*.”<sup>98</sup> It is not true, therefore, that the amount of money equals broad support from the voting and contributing public. Furthermore, a large number of congressional candidates, and winners, are independently wealthy and fund their own campaigns (obviously not revealing a measure of wide public support).

At least 71 of 435 United States Representatives and twenty-six out of 100 United States Senators are millionaires, compared to less than

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93. Alan B. Morrison, *Watch What You Wish For*, 9-36 THE AMERICAN PROSPECT (Jan. 1, 1998 – Feb. 1, 1998), at <http://www.prospect.org/print/V9/36/morrison-a.html> (citing *Buckley*).

94. *Id.*

95. Raskin & Bonifaz, *supra* note 28.

96. *Id.*

97. *Id.*

98. *Id.*

one-half of one percent of the American public. This means that millionaires are over-represented in the House by a factor of more than 3,000 percent and in the Senate by a factor of more than 5,000 percent.<sup>99</sup>

Such staggering statistics, combined with the fact that “numerous wealth primary winners who go on to capture congressional seats are relying primarily on just one donor—themselves,”<sup>100</sup> prove that equality is lacking in representation.

Economic disparities also create a lack of equality in who can contribute to congressional campaigns. While the law cannot solve the economic disparities that exist in society, it should prevent wealthy interests from exercising more than their fair share of influence over elected officials. “Out of a country of 250 million people, according to *Roll Call* newspaper, fewer than 900,000 gave direct individual contributions of \$200 or more in 1992. Yet these contributions, combined with PAC contributions, constitute the vast bulk of the money raised.”<sup>101</sup> Thus, well under 1% of the population, together with PACs, are providing the vast majority of donations to federal campaigns. Under the natural assumption that campaign contributors have more access to candidates and elected officials than a non-contributor, that means less than 1% of the population has a tremendous ability to influence elected officials, possibly and frequently to the detriment of much of the rest of the population.

How does the wealth primary offend the Constitution? The tyranny of private money in politics violates the principles of political equality and one-person-one-vote by making it exceedingly difficult for all but the wealthy (and those backed by the wealthy) to run for office, by leaving the non-affluent majority without meaningful electoral choices, and by assuring that wealthy interests will set the parameters of public debate and the content of the legislative agenda.<sup>102</sup>

“One important goal of campaign finance law ought to be to reduce the tension between the goal of equal voter influence over election outcomes and the unequal influence of wealthy individuals and interest groups currently.”<sup>103</sup> This goal is important, because “when extreme inequalities of wealth bear directly on campaign financing and spending, as they currently do, the norm of voter equality is undermined.”<sup>104</sup>

As previously noted, inequalities also result from the unequal access large contributors gain to candidates and elected officials. The savings and loan scandals and the figure of Charles Keating is a prime example. Charles Keating “raised over \$1.3 million for five senators in an effort to

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99. *Id.*

100. *Id.*

101. Raskin & Bonifax, *supra* note 28.

102. *Id.*

103. Briffault, *supra* note 37, at 1763-64.

104. *Id.*

thwart a federal investigation into his failing savings and loan.”<sup>105</sup> It is interesting to note that one of the five senators to whom Keating contributed was John McCain, now one of the leading proponents of campaign finance reform. Keating “explained, ‘One question . . . had to do with whether my financial support in any way influenced several political figures to take up my cause. I want to say in the most forceful way I can: I certainly hope so.’ And it did, jacking up the cost of a bailout that will ultimately exceed \$300 billion.”<sup>106</sup> As Rosenkranz wrote his article, he compiled statements of current and former members of Congress regarding campaign finance. Those statements are very illustrative of the problem, and they demonstrate the inequalities that result from the current campaign finance system.

Money buys access. Senator Robert Byrd (D-West Virginia) admitted, ‘We end up spending time with people only because they can give money to us.’ Former Representative Romano Mazzoli (D-Kentucky) put it this way: ‘People who contribute get the ear of the member and the ear of the staff. They have the access.’ Former Majority Leader George Mitchell (D-Maine) echoed this sentiment: ‘I think it gives them the opportunity to gain access and present their views in a way that might otherwise not be the case.’ Money buys results. As former Representative Vin Weber (R-Minnesota) stated, ‘If nobody cares about it very much, the special interest will get its way . . . . And all of us, me included, are guilty of this: If the company or interest group is (a) supportive of you, and (b) vitally concerned about an issue that (c) nobody else in your district knows about or ever will know about, then the political calculus is very simple.’ Former Representative Mel Levine (D-California) offered this observation: ‘On the tax side, the appropriations side, the subsidy side, and the expenditure side, decisions are clearly weighted and influenced . . . by who has contributed to the candidates.’ The need to chase after money influences votes. Former Representative Tim Penny (D-Minnesota) has observed, ‘Candidates know . . . they’re going to risk losing that money if certain groups are displeased with them . . . . I can tell you on the house floor, . . . the consideration of . . . whether the groups will withhold campaign funds is a consideration that does come into play.’ The need to chase after money influences official conduct other than voting. Former Representative Dennis Eckart (D-Ohio) put it this way: ‘There’s a lot of stuff in there we don’t know about. So . . . yes, a few folks can toss in some things, particularly in Appropriations and Ways and Means.’ Former Representative Hamilton Fish (R-New York) made a similar point: ‘Certainly (amendments are) influenced by campaign financing. You offer amendments that are brought to you by special interests.’ Campaign contributions can buy inaction. ‘It’s often not what you do, but what you don’t do,’ said former Representative Peter

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105. E. Joshua Rosenkranz, *Faulty Assumptions in “Faulty Assumptions”: A Response to Professor Smith’s Critiques of Campaign Finance Reform*, 30 CONN. L. REV. 867, 872 (1998).

106. *Id.*

Kostmayer (D-Pennsylvania). On some issues, ‘maybe you just keep quiet . . . . That way you don’t alienate anybody.’<sup>107</sup>

One way for the Court to recognize the equality rationale for campaign finance reform and uphold new restrictions on campaign finance is to depart from the false idea that money is speech. If political money is viewed as property, exclusively or merely in addition to its speech qualities, the Court can regulate it using a standard somewhere in between speech and property.<sup>108</sup> As Spencer Overton suggests, when Justice John Paul Stevens wrote “[m]oney is property; it is not speech,”<sup>109</sup> that “simple point, which attacks the theoretical underpinnings of the leading campaign finance case, *Buckley v. Valeo*, is more than a meaningless semantic ploy.”<sup>110</sup> The Court in *Buckley* never actually stated that money is speech, but opponents of campaign finance reform have been singing that tune since the case was decided. Overton “proposes that the Due Process and Takings Clauses (together the “Property Clauses”) of the Fifth and Fourteenth Amendments are at least as (if not more) applicable to political money as the First Amendment.”<sup>111</sup> He continues to say that by examining political money under the Property Clauses the authority of “Congress and state and local legislatures over political money” would be enhanced.<sup>112</sup>

Thinking of political money as property-like in some respects could allow for a legal system that maintains due respect for both the liberties of those with political money and other weighty societal interests, such as widespread participation and limiting the political influence of wealth. This approach resolves the inadequacies (whether through constitutional libertarian or egalitarian perspectives) of heavy-handed judicial constraints on the regulation of political money by moving the debate to the more suitable political arena. Rather than supporting or condemning any particular strategy of reform, judicial treatment that appreciates the property characteristics of political money would provide greater respect for democratic debate and decisions with regard to political money.<sup>113</sup>

If the current Court chooses to consider the property characteristics of money, it could decide, within constitutional bounds, that many reforms being sought are constitutional. The property characteristics of money also support a political equality view of campaign finance legislation.

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107. *Id.* at 875-77.

108. See generally, Spencer A. Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 VAND. L. REV. 1235 (2000).

109. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring).

110. Overton, *supra* note 108, at 1236.

111. *Id.* at 1239.

112. *Id.*

113. *Id.* at 1240.



C. PRINCIPLES OF DEMOCRACY REQUIRE CAMPAIGN  
FINANCE REFORM

The First Amendment guarantees the right to free speech not only for those who have money, but for *all* the people. And there cannot be a more important place to ensure that right to free speech is protected than in the democratic process. For the essence of our democracy is that the people are the ultimate rulers. This means *all* the people. And, it requires that *all* the people have the right to speak freely in the process of electing our representatives—our servants—in government.<sup>114</sup>

The foundation of our democracy and representative form of government is the idea that the people should choose their representatives to govern them. The founding fathers struggled with creating a form of government that gave power to the people but still had the ability to effectively govern a nation. Most importantly, the founding fathers rejected a monarchy form of government based on an aristocracy. While, our early leaders were without question aristocratic (at least from the standards of a new and fledgling nation), the ideal was that leadership should be based on ability. The United States is now the most powerful nation in the world, and, while ability crosses all economic classes, it is primarily the wealthy that continue to govern. It is also the wealthy that have the resources to influence those that govern. Democracy is harmed as a result. The voice of the people is not being heard; instead, the voice of money prevails. Campaign finance reform is desperately needed to allow the voice of the people to prevail.

The power of money also harms democracy by influencing who chooses to enter public service. According to Robert Kuttner, “you cannot have true representative government without free expression, and you cannot have it if money trumps votes.”<sup>115</sup> Kuttner asserts, “the money hurdle, by definition, deters the impecunious from entering electoral politics. It is depressing to spend half your time raising money. A lot of talented populists who might champion ordinary citizens and rouse the electorate from its torpor never get into the race.”<sup>116</sup> So perhaps it is the influence of money in politics that is actually suppressing the free speech rights of those who desire to enter the fray but don’t because of the rigors of fundraising and the dangers of being beholden to contributors.

Fair and vigorous competition among candidates and parties is critical for the legitimacy of our elections and of the government those elections produce. Campaign finance law, in turn, can have a direct effect on the competitiveness of elections. In constructing a new campaign finance doctrine—or in revamping current doctrine—the Court should give greater weight to the effect of campaign finance

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114. Raskin & Bonifaz, *supra* note 28.

115. Robert Kuttner, *Rescuing Democracy from “Speech”*, 9-36 THE AMERICAN PROSPECT (Jan. 1, 1998 – Feb. 1, 1998), at <http://www.prospect.org/print/V9/36/kuttner-r.html>.

116. *Id.*

rules on electoral competition.<sup>117</sup>

Competitive elections are central to democracy, and the statistics prove that elections are no longer competitive. When the candidate that either has the ability to finance his or her own campaign or the candidate that has the most money to spend wins well over the majority of the time, the competitiveness of elections is in serious doubt.<sup>118</sup>

Another concern is that the Court is supplanting the duties of the legislature by deciding issues in an area which the legislature has more expertise. Some justices on the Court have, however, indicated a willingness to return many campaign finance issues to the experience of Congress.

More generally, Justices Breyer and Ginsburg indicated (in *Nixon v. Shrink Mo. Gov'n PAC*) that given that 'constitutionally protected interests lie on both sides of the legal equation,' and given the legislature's 'significantly greater institutional expertise . . . in the field of election regulation,' they would be willing to give greater deference 'to empirical legislative judgments' as well as to the legislature's 'political judgment' including the constitutionally controversial judgment—rejected by *Buckley*—that 'unlimited spending threatens the integrity of the electoral process'.<sup>119</sup>

The Court has frequently refused to hear cases that they felt constituted a political judgment, and an argument can be made that campaign finance regulations are better left to the "political branch" of government, Congress. The First Amendment would obviously still apply, but the Court should be willing to consider other rationales (than just the appearance of corruption) as compelling government interests.

Voter apathy is another harm to democracy that results from too much money in the political process. Some people do not vote simply because they choose not to participate in the political process. Others do not vote, because, for whatever reason, they are unable to reach the polling place. Many, however, choose not to vote, because they feel the election is a predetermined outcome decided by those with money and influence.

It is no wonder that voting rates decline precipitously with income level, or that hugely disproportionate numbers of the poor regard electoral results as a *fait accompli* and then vote with their feet by never leaving home. Indeed, 'apathy' looks like a much more rational choice when participation means getting to cast a ballot for one of two candidates pre-selected by wealthy groups and individuals, many of whom do not even inhabit the district or state in which the election is taking place.<sup>120</sup>

As a result of voter apathy, "legislative initiatives arose from concern that existing finance laws jeopardize 'the democratic principle of 'one person, one vote' by allowing large contributors to have a disproportionate and therefore deleterious influence on the political process, and diminish[ ]

117. Briffault, *supra* note 37, at 1731-32.

118. See generally Raskin & Bonifaz, *supra* note 28.

119. Briffault, *supra* note 37, at 1755.

120. See generally, Raskin & Bonifaz, *supra* note 28.

the rights of citizens of all backgrounds to equal and meaningful participation in the democratic process’.”<sup>121</sup> The influence of money on politics must, therefore, be diminished to preserve the electoral process essential to democracy.

The democracy rationale for campaign finance reform does not have to be considered as separate from the First Amendment. Burt Neuborne puts forth a democracy-centered reading of the First Amendment that would allow the Court to prioritize the importance of both democratic processes and speech.

James Madison’s First Amendment is self-consciously structured and organized as the life-cycle of a democratic idea—an idea that begins in the recesses of individual belief, is communicated to others through speech and press, provokes collective action through assembly and association, and finally matures into public policy through formal interaction with the political branches. It is no coincidence that the textual rhythm of the First Amendment moves from protection of internal conscience in the religion clauses, to protection of individual expression in the speech clause, to broad community-wide discussion in the press clause, to concerted action in the assembly (and implied association) clause, and, finally, to formal political activity in the petition clause. Indeed, no rights-bearing document in the Western tradition approximates the precise organizational clarity of the First Amendment as a road map of democracy.<sup>122</sup>

This reading of the First Amendment allows the Court to view speech in light of democracy.

The deep structure of the First Amendment is the first complete, substantive blueprint of democracy; it tells us that you cannot succeed in getting to the end point of democratic politics unless you respect its beginnings in the core of the human spirit. But that deep structure also provides us with a tie-breaking principle that helps us to decide whose autonomy to privilege in a democracy case. Read as a bulwark of democracy (as well as a protection of individual autonomy), the First Amendment tells us that, when more than one candidate for First Amendment autonomy protection exists in a democracy case, the Court should privilege behavior that benefits democracy rather than behavior that saps its vitality.<sup>123</sup>

In conclusion, the First Amendment can support a political equality rationale and a democracy rationale for campaign finance reform. Congress simply must write a law that is not vague or overbroad and remains content-neutral. Then, the Court may decide that, in light of current times and ever more prolific spending in campaigns, those rationales are compelling governmental interests in First Amendment jurisprudence. In

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121. Rep. Harold E. Ford, Jr. & Jason M. Levien, *A New Horizon for Campaign Finance Reform*, 37 HARV. J. ON LEGIS. 307, 314 (2000).

122. Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW. U. L. REV. 1055, 1069 (1999).

123. *Id.* at 1070.

fact, that is exactly what the Court should hold in the first case, arising out of the legislation, to reach the Court.

## VI. THE CASE FOR PUBLIC FINANCING OF FEDERAL ELECTIONS

The Bipartisan Campaign Reform Act of 2002 is constitutional and a necessary first step in returning the electoral process to the people, all the people. Ultimately, however, this piece of legislation will not go far enough. It will still allow some loopholes to remain, and politics will still be too expensive a proposition for most of those interested. A system of full, voluntary public financing of Federal candidates should, therefore, be the ultimate goal of any system of reform.

Most public financing programs are termed "Clean Money" or "Clean Election" options. A typical program involves a candidate voluntarily accepting spending limits to receive public dollars to finance his or her campaign. In order to be eligible for the program, most options require the candidate to raise a certain amount of "seed" money in a specified number of small contributions. This requirement helps insure that public money is going to viable candidates. Also, most programs allow for further infusions of campaign money from the state, if the candidate is faced with an opponent not in the system that spends over a certain threshold. Such programs are widely considered to be constitutional, as they are voluntary. Some have argued that the programs are a form of coercion and, therefore, not constitutional. Since the Court upheld the voluntary public financing of Presidential elections in *Buckley*,<sup>124</sup> however, it seems unlikely the Court will hold an otherwise constitutional program unconstitutional on the coercion argument.

Several states have been experimenting with various public-financing programs. In 1996, voters in Maine endorsed a program of full public financing for candidates for state office.<sup>125</sup> Since then several other states have begun attempting to put in place similar programs, including: Vermont, Massachusetts, Arizona, Missouri, and Idaho.<sup>126</sup>

Under the Maine plan, approved by referendum last year, candidates who agree to voluntary limits get public funding. If an opposing candidate refuses to accept the limit, or if interest groups become his de facto contributors, then the other candidate receives compensatory public funds. A federal version of this approach has been sponsored by Senators Kerry, Glenn, Wellstone, Biden, and Leahy.<sup>127</sup>

Rep. Harold E. Ford, Jr. is one supporter of "clean elections" programs and states "the most comprehensive campaign finance reform efforts on the federal level ought to include the public financing of congressional

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124. See generally *Buckley*, 424 U.S. 1 (1976).

125. Kuttner, *supra* note 115.

126. *Id.*

127. *Id.*

elections.”<sup>128</sup> According to Rep. Ford,

The Maine Clean Election Act, a ballot initiative that was approved by a margin of more than ten percentage points and will affect the 2000 election season, is one of the more ambitious examples. The law, which has been challenged in federal court, offers full public financing to candidates who limit themselves to soliciting two sorts of funds—\$5 “qualifying contributions” from individuals in a candidate’s district, and \$100-maximum “seed contributions,” which may only be used to finance a candidate’s efforts to obtain qualifying contributions. Once a candidate obtains a certain number of qualifying contributions, he may seek ‘Clean Election Act’ status and become eligible for public campaign financing and must accept no further private contributions.<sup>129</sup>

The First Circuit has upheld the constitutionality of the program.<sup>130</sup> Vermont and Massachusetts have recently passed public financing programs as well in forms similar to that of Maine. The Vermont program will likely be struck down though, as it imposes spending limits on all candidates, whether they accept public financing.<sup>131</sup>

Public financing of Federal elections should be a goal of any reform proposal. McCain-Feingold and Shays-Meehan address this issue through their provision for a study of the Maine program and other state systems.

Public financing permits candidates to focus their own and voters’ attention on platforms and leadership rather than on money. As First Amendment scholar Cass Sunstein pointed out more than a decade ago, ‘what seems to be government regulation of speech actually might promote free speech, and should not be treated as an abridgment at all.’ Moreover, public financing can level the playing field for candidates and encourage new and talented people to participate more fully in our democracy.<sup>132</sup>

While, many contend the government cannot afford public financing of elections, or the taxpayers should not have to pay for public financing, such a program could actually save money.<sup>133</sup> The most compelling reasons, however, for a system of public financing of Federal elections are to promote equality among the electorate and to promote the best and most capable candidates, rather than just the most wealthy.

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128. Ford & Levien, *supra* note 121, at 317.

129. *Id.* at 314-15.

130. Theodore Lazarus, *The Main Clean Election Act: Cleansing Public Institutions of Private Money*, 34 COLUM. J.L. & SOC. PROBS. 79, 98 (2000).

131. For descriptions of the Massachusetts and Vermont programs, see generally Rep. Harold E. Ford, Jr. & Jason M. Levien, *A New Horizon for Campaign Finance Reform*, 37 HARV. J. ON LEGIS. 307 (2000).

132. *Id.* at 317-18.

133. For a discussion of instances where government bailouts of large campaign contributors might have cost the government less if Congress did not feel beholden to the contributors, see Lazarus, *supra* note 131, at 130-31.

## VII. CONCLUSION

U.S. Senator Mark Hanna was quoted in 1895 as saying, “[t]here are two things that are important in politics. The first is money and I can’t remember what the second one is.”<sup>134</sup> The problem is not new, but age does not make a wrong right. While the population grows, so do the economic disparities. On the other hand, voter turnout is declining. The public scorns all things political, and it is not a far leap to assume one reason is the perception of corruption. “Mark Twain once remarked, ‘I think I can say, and say with pride, that we have legislatures that bring higher prices than any in the world’.”<sup>135</sup> The problem has only become worse since the days of Mark Twain. Campaigns cost more and more every election cycle, the perception of corruption becomes worse every year, and with the recent scandals of the Clinton administration and the questions surrounding Enron in the Bush administration, something must be done to return the electoral process to the people. The Bipartisan Campaign Reform Act of 2002 is one step to remedying the problem of private money in the public process. It is however only the first step. “In the words of Thomas Paine, the famed agitator for the American Revolution and author of *Common Sense*: ‘A long habit of not thinking a thing wrong gives it a superficial appearance of being right, and raises at first a formidable cry in defence of custom’.”<sup>136</sup>

In conclusion, the current system of financing campaigns for elected office is perpetuating an apathetic public and a system of corruption, perceived or real. The framework of *Buckley v. Valeo* has become, perhaps always was, unworkable. *Buckley* should be overturned in light of the compelling governmental interest in political equality and the promotion of democracy. The Bipartisan Campaign Reform Act of 2002 should be upheld as constitutional in all respects. Beyond that, however, Congress should seek to write legislation providing for the full, voluntary public financing of all Federal candidates, after examining the State efforts. Short of full public financing, any future legislation should also include a provision prohibiting contributions from any individual or entity outside the candidate’s district or state, in the case of candidates for the House and Senate respectively. Campaign finance reform is not anathema to principles of free speech. Quite the contrary, campaign finance reform (in the form of the Bipartisan Campaign Reform Act of 2002 or similar measures and public financing) will increase the free speech rights of all citizens.

## VIII. AFTERWORD

The last major obstacle to meaningful implementation of the Bipartisan Campaign Reform Act is the Federal Election Commission. The FEC

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134. Center for Responsive Politics, *A Brief History of Money in Politics*, at <http://www.opensecrets.org/pubs/history/historyindex.html> (last visited Oct. 21, 2001).

135. *Id.*

136. *Id.*

has only succeeded in opening loopholes in the law since its inception in the FECA, not quite thirty years ago. Many believe the FEC must be completely overhauled, or eliminated and replaced with a new body, for any effective enforcement of campaign finance law to take place. This is a justifiable position given the agency's record.

The FEC must make rules implementing the legislation's provisions. "The four sponsors, and other advocates of a ban on soft money, say they fear that the commission will effectively eviscerate the new restrictions by permitting big donors to the national political parties to reroute their gifts through the state parties."<sup>137</sup> The FEC did vote on a rule that will include the precise language of the legislation regarding phony "issue" ads thereby maintaining the integrity of the legislation.<sup>138</sup> However, supporters of the legislation are still concerned the FEC will issue rules that will weaken the ban on soft money to be used in federal elections.<sup>139</sup> Congress must approve the rules after they are promulgated by the FEC. Congress is likely, however, to approve whatever rules the FEC presents to it. This article encourages the FEC to issue rules that effectively implement and support the language and intent of the Bipartisan Campaign Reform Act.

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137. Richard A. Oppel, Jr., *Sponsors Assert Soft Money Ban May Be Diluted*, N.Y. TIMES, June 14, 2002, at <http://www.nytimes.com/2002/06/14/politics/14DONA.html> (last visited June 14, 2002).

138. See Richard A. Oppel, Jr., *Election Panel Rebuffs an Effort to Weaken Curb on "Issue Ads"*, N.Y. TIMES, June 20, 2002, at <http://www.nytimes.com/2002/06/20/politics/20DONA.html> (last accessed June 20, 2002).

139. *Id.*

# **Casenotes**



