

McConnell v. FEC: Rationing Speech to Prevent “Undue” Influence

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I. Overview

In upholding one of the most sweeping expansions of campaign finance restrictions in decades, *McConnell v. FEC*,¹ the Supreme Court continued in a direction that strikes at the heart of First Amendment protection for freedom of speech, and in particular the jealous protection for core political speech. The decision sanctioned expansive restrictions on political speech by engineering two substantial shifts in its approach to such issues.

First, the Court took pains to dissociate political speech from the money used to generate the speech. Focusing on the money itself, rather than the speech that resulted from spending the money, the Court devalued the First Amendment interests at stake and strengthened a rhetorical similarity between campaign spending and bribery. Based on the operative notion that money influences politics—rather than that speech influences politics—the Court applied a diluted standard of First Amendment scrutiny that allowed it to uphold restrictions that would never pass strict scrutiny.

Second, the Court expanded upon its notion of what constitutes corruption of government officials, sweeping in candidate gratitude, responsiveness, and accessibility to those who provide political support through contributions or expenditures for speech. The Court also expanded on the notion that influence gained through substantial spending on political speech could be “undue,” and hence corrupt. That suggests an appropriate baseline amount of political speech—and hence gratitude and influence—that echoes the one-person-one-vote principle in the voting context. But the notion that persons and groups have some hypothetically “due” amount of

¹124 S. Ct. 619 (2003).

speech and influence smacks of a false egalitarianism, which has no place in a system predicated upon *freedom* of speech. The end-point of substituting equality for freedom is the rationing of speech so that each person and group has no more than their “due” share. That is the direction in which our campaign finance laws are moving, and it is the direction that the *McConnell* opinion sadly endorses. The Supreme Court has thus handed Congress a significant weapon against speech, and both freedom and the First Amendment will be the victims.

Section I of this Article provides some background to the *McConnell* opinion, summarizing the statutory provisions at issue in the case and briefly commenting on the lower court’s decision. Section II then examines the key opinions that the Supreme Court released on December 10, 2003. That’s followed by an extended Section III, which discusses two of the fundamental issues raised by the *McConnell* decision and their profound implications. Readers who are broadly familiar with the statute and the Court’s opinions may wish to proceed directly to the discussion section.

II. Background

The Bipartisan Campaign Finance Reform Act of 2002 (BCRA)² is the most significant overhaul of campaign finance legislation in a generation. In it, Congress significantly curbs the use of so-called “soft money”—i.e., money not previously subject to federal regulation—for expressive activities that might influence federal elections, and regulates spending on supposedly “sham” issue ads that are intended to influence federal elections.

The BCRA amended the Federal Election Campaign Act of 1971 (FECA), the Communications Act of 1934, and other portions of the United States Code. The *McConnell* opinions address various portions of BCRA Titles I, II, III, and V. Title I regulates the use of soft money by political parties, officeholders, and candidates. Title II generally prohibits corporations and labor unions from using their own funds for certain communications that could influence federal elections. Title III contains miscellaneous provisions modifying contribution limits, imposing burdens on attack ads, and prohibiting

²116 Stat. 81.

contributions by minors. Title V imposes various recordkeeping requirements on broadcasters regarding requests to broadcast political messages. The sections of the BCRA most relevant to the *McConnell* decision and this article are described below.

A. BCRA Title I

The central element of BCRA Title I is the creation of new FECA § 323(a), which makes it illegal for national party committees and their agents to “solicit, receive, . . . direct . . . , or spend any funds . . . that are not subject to [FECA’s] limitations, prohibitions, and reporting requirements.”³ In short, § 323(a) means that *all* funds used by national parties must now be heavily regulated “hard money.” The remainder of new FECA § 323 shuts down a variety of other avenues for soft money that might see increased use once the funds available to national parties are reduced and regulated.

New FECA § 323(b) prohibits state and local parties from using soft money for activities affecting federal elections.⁴ Such “federal election activit[ies],” defined in new FECA § 301(20)(A), include (1) voter registration activity during the 120 days before a federal election; (2) voter identification, get-out-the-vote and generic campaign activity in connection with elections where federal offices are at stake; (3) any “public communication” promoting, supporting, attacking, or opposing a “clearly identified [federal] candidate”; and (4) the services of any state-party employee dedicating a portion of his paid time to “activities in connection with a Federal election.”⁵ A limited exception created by the so-called Levin Amendment allows state and local parties to use some less regulated funds for certain activities targeted at state and local candidates running in the same election cycle as federal candidates.⁶

New FECA § 323(d) makes it illegal for national, state, and local party committees and their agents to “solicit any funds for, or make or direct any donations” to § 501(c) tax exempt organizations that make expenditures in connection with a federal election, and to certain § 527 political organizations.⁷

³2 U.S.C. §§ 441i(a)(1)–(2).

⁴2 U.S.C.A. § 442i(b).

⁵2 U.S.C. §§ 431(20)(A)(i)–(iv).

⁶2 U.S.C. §§ 441i(b)(2)(B)(i)–(ii).

⁷2 U.S.C. § 441i(d)

New FECA § 323(e) restricts federal candidates and officeholders from receiving, spending, or soliciting soft money in connection with federal elections and limits their ability to do so in connection with state and local elections.⁸

Finally, new FECA § 323(f) prohibits state and local candidates from raising and spending soft money to fund advertisements and other public communications that promote or attack federal candidates.⁹

B. BCRA Title II

BCRA Title II generally targets non-party expenditures for election-related communications. It expands upon various reporting requirements and restrictions by increasing the range of persons and communications subject to such restrictions.

BCRA § 201 amends FECA § 304, which requires political committees to file detailed periodic financial reports with the FEC. The BCRA expands the FECA's reporting requirements to the broader category of "electioneering communication[s]," which includes any broadcast, cable, or satellite communication that clearly identifies a candidate for federal office, airs within thirty days of a primary or sixty days of a general election, and is targeted to the relevant electorate.¹⁰ The definition expressly excludes news items and editorial commentary.

BCRA § 202 expands the scope of so-called "coordinated" expenditures that will be considered "contributions" to candidates or parties.¹¹

BCRA § 203 extends to all electioneering communications FECA § 316(b)(2)'s restrictions on corporations and unions using their own funds for political speech, previously restricted only in the case of "express advocacy" of the election or defeat of federal candidates.¹² Those entities may still organize and administer segregated funds, or Political Action Committees (PACs) for election-related speech.

⁸2 U.S.C. § 441i(e).

⁹2 U.S.C.A. § 441i(f).

¹⁰2 U.S.C. § 434(f)(3)(A)(i).

¹¹2 U.S.C. § 441a(a)(7)(C).

¹²2 U.S.C. § 441b(b)(2).

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BCRA § 204, extends to nonprofit corporations the prohibition on the use of their own general funds to pay for electioneering communications.

BCRA § 213 requires political parties to choose between coordinated and independent expenditures during the postnomination, preelection period.¹³

And finally, BCRA § 214 reinforces the rule of BCRA § 202 restricting coordinated expenditures by directing the FEC to promulgate new regulations that do not “require agreement or formal collaboration to establish coordination.”¹⁴

C. BCRA Title III

BCRA Title III contains miscellaneous provisions adjusting various campaign-related speech and contribution restrictions.

BCRA § 305 amends the Communications Act of 1934,¹⁵ which requires broadcast stations to give favorable pricing—the so-called lowest-unit-charge rule—for candidate ads in the lead-up periods to primary or general elections, by denying such benefit to ads that “make any direct reference to another candidate for the same office,” without the candidate clearly identifying himself at the end of the broadcast and stating that he approves of the broadcast.¹⁶

BCRA § 307 amends FECA § 315(a)(1) to increase and index for inflation certain FECA contribution limits.

BCRA §§ 304, 316, and 319, known as the “millionaire provisions,” increase or eliminate certain contribution and coordinated expenditure limits if a candidate’s (wealthy) opponent spends more than certain triggering amounts of his personal funds.

BCRA § 311 extends to electioneering communications FECA § 318’s requirement that certain communications clearly identify whether they were “authorized” by a candidate or his political committee or, if not so authorized, identify the payor and announce the lack of authorization.¹⁷

¹³2 U.S.C. § 441a(d)(4).

¹⁴2 U.S.C. § 441a(a) note.

¹⁵§ 315(b), 48 Stat. 1088, as amended, 86 Stat. 4.

¹⁶47 U.S.C. §§ 315(b)(2)(A), (C).

¹⁷2 U.S.C. § 441d.

Finally, BCRA § 318 adds FECA § 324, which prohibits individuals “17 years old or younger” from making contributions to candidates or political parties.¹⁸

D. BCRA Title V

BCRA Title V adds various recordkeeping requirements for broadcaster stations, including the obligations to keep public records of requests for broadcast time by candidates for public office (“candidate requests”), requests by any person seeking to broadcast messages that refer either to a candidate or to any election to federal office (“election message requests”), and requests by any person seeking to broadcast messages related to a “national legislative issue of public importance” or otherwise relating to a “political matter of national importance” (“issue requests”).¹⁹

E. The Lower Court Opinion

The initial challenges to the BCRA were consolidated and heard before a three-judge panel of the U.S. District Court for the District of Columbia. The panel was composed of District Judges Koleen Kollar-Kotelly and Richard Leon and Circuit Judge Karen Henderson. The three-judge panel produced four different decisions totaling over 1,500 pages.²⁰ The various configurations of judges produced a mixture of results; upholding some provisions, striking down others, and declining to reach a variety of challenges based on the lack of ripeness or standing. In general, however, the BCRA’s supporters seemed to get the better of the mix.

III. The Supreme Court’s Opinions

On December 10, 2003, following expedited briefing and a special four-hour argument held before the start of the Supreme Court’s October 2003 term, the Supreme Court issued its decision in *McConnell*. Through various combinations of justices across three different majority opinions, the Court upheld the BCRA against substantially all of the significant challenges and declined to reach a number of other challenges.

¹⁸2 U.S.C. § 441k.

¹⁹47 U.S.C. §§ 315(e)(1)(A)–(B).

²⁰251 F. Supp. 2d 176 (D.D.C. 2003).

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The principal opinion in the case was jointly written by Justices Stevens and O’Connor, joined by Justices Souter, Ginsburg, and Breyer, and upheld virtually all of the challenged provisions of BCRA Titles I and II.

During a brief introductory history of Congress’s ever-expanding regulation of campaign speech and financing,²¹ the Court identified the central target of such regulation as “the political potentialities of wealth and their untoward consequences for the democratic process.”²² Turning to the more recent phenomenon of soft-money contributions, and observing that the largest corporate donors of soft money often gave to both major political parties, the Court drew the inference that such contributions “were motivated by a desire for access to candidates and a fear of being placed at a disadvantage in the legislative process relative to other contributors, rather than by ideological support for the candidates and parties.”²³ Adopting a theme that would repeatedly echo throughout the opinion, the Court concluded that soft money contributions “enabled parties and candidates to circumvent [existing] limitations on the source and amount of contributions in connection with federal elections.”²⁴

The Court likewise described “issue” ads—those not using words of express advocacy, and hence not previously treated as contributions—as yet another means of circumventing contribution limits. Discussing the distinction drawn in *Buckley v. Valeo*²⁵ between “issue ads” and “express advocacy,” the Court observed that the two were “functionally identical in important respects” in that they were both used to advocate election or defeat of specifically identified candidates, regardless of whether they used any “magic words” of express advocacy like “vote for” or “defeat.” Both issue ads and express advocacy, insisted the Court, are specifically intended to influence election results given the timing of almost all of the ads in the sixty days preceding an election.²⁶

²¹McConnell v. FEC, 124 S. Ct. 619, 644–648 (2003).

²²*Id.* at 644.

²³*Id.* at 649 (footnote omitted).

²⁴*Id.* at 650.

²⁵424 U.S. 1 (1976).

²⁶McConnell, 124 S. Ct. at 650–651.

Following that ominous introduction, the primary opinion proceeded to uphold virtually all of the challenged provisions of BCRA Title I.

A. *Level of Scrutiny*

The Court began its analysis by endorsing its prior cases reviewing contribution limits using something less than the strict scrutiny ordinarily applied to restrictions on political speech. The Court embraced the frequently criticized reasoning from *Buckley* that the First Amendment value of contributions involves only the “undifferentiated, symbolic act of contributing,” that “the transformation of contributions into political debate involves speech by someone other than the contributor,” and that limitations on contributions “thus involves little direct restraint on [the contributor’s] political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor’s freedom to discuss candidates and issues.”²⁷

Although recognizing that contribution limits “may bear ‘more heavily on the associational right than on freedom to speak,’” by limiting like-minded persons from affiliating with a candidate and from pooling their resources, the Court claimed that unlike expenditure limits, which “preclud[e] most associations from effectively amplifying the voice of their adherents,’ contribution limits both ‘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 allow associations ‘to aggregate large sums of money to promote effective advocacy.’”²⁸ According to the Court, contribution limits “merely . . . require candidates and political committees to raise funds from a greater number of persons.”²⁹

The Court also justified the lower level of scrutiny for contribution limits as reflecting the importance of the “interests in preventing ‘both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process

²⁷*Id.* at 655 (quoting *Buckley*, 424 U.S. at 21).

²⁸*McCConnell*, 124 S. Ct. at 656 (citations omitted).

²⁹*Id.* (citation omitted).

through the appearance of corruption.”³⁰ It concluded with an invitation for yet more regulation by Congress: “The less rigorous standard of review we have applied to contribution limits . . . provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process.”³¹

B. Application to Title I

Applying that more lenient standard of review to the restrictions of Title I, the Court proceeded to uphold the challenged new provisions of FECA § 323.

1. The First Amendment and Governmental Interests Implicated by New FECA § 323

Addressing new § 323 in general, the Court held that, like prior contribution limits, it had “only a marginal impact on the ability of contributors, candidates, officeholders, and parties to engage in effective political speech,” finding that it “does little more than regulate the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders.”³² The Court held that the restrictions on *soliciting* large contributions “in no way alters or impairs the political message ‘intertwined’ with the solicitation” and would tend “to increase the dissemination of information by forcing parties, candidates, and officeholders to solicit from a wider array of potential donors.”³³

The Court also found that new FECA § 323 had only a “modest impact” on the ability of party committees to associate with each other and that such burden as it created would be accounted for “in the application, rather than the choice, of the appropriate level of scrutiny.”³⁴

Turning to the government interests justifying the new restrictions, the Court reiterated its prior conceptions of a government interest in preventing corruption and the appearance of corruption.

³⁰*Id.* (citation omitted).

³¹*Id.* at 656–657.

³²*Id.* at 657 (citation omitted).

³³*Id.* at 658 (citations omitted).

³⁴*Id.* at 659.

Its concern, it said, was “not confined to bribery of public officials, but extend[ed] to the broader threat from politicians too compliant with the wishes of large contributors.”³⁵ The government could properly direct its attention “to curbing ‘undue influence on an officeholder’s judgment’” and the acquisition of preferential “access to high-level government officials” regardless of whether such access resulted in any “actual influence.”³⁶

And it reiterated an “almost equal” interest “in combating the appearance or perception of corruption engendered by large campaign contributions,” finding that “the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.”³⁷ Such interests were deemed “sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits.”³⁸

Extending the notion of candidate and officeholder gratitude to contributors as the crux of corruption, the Court held that “contributions to a federal candidate’s party in aid of that candidate’s campaign threaten to create—no less than would a direct contribution to the candidate—a sense of obligation.”³⁹ Given the supposedly “special relationship and unity of interest” between politicians and national parties, such parties were deemed to be “in a unique position, ‘whether they like it or not,’ to serve as ‘agents for spending on behalf of those who seek to produce obligated officeholders.’”⁴⁰ Observing that national parties often facilitate contacts between politicians and party contributors, the Court viewed the parties as “necessarily the instruments of some contributors whose object is . . . to support a specific candidate for the sake of a position on one narrow issue, or even to support any candidate who will be obliged to the contributors.”⁴¹

³⁵*Id.* at 660 (citation omitted).

³⁶*Id.* at 664 (citations omitted).

³⁷*Id.* at 660–61 (citations and internal quotations omitted).

³⁸*Id.* at 661.

³⁹*Id.*

⁴⁰*Id.* (quoting *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001)[hereinafter “Colorado II”]).

⁴¹*McCConnell*, 124 S. Ct. at 664 (quoting *Colorado II*, 533 U.S. at 451–452).

Turning to the specifics of BCRA Title I, the Court rejected a variety of challenges to the manner in which the BCRA sought to suppress soft-money.

2. *New FECA § 323(a)’s Restriction on Spending and Receiving Soft Money*

Regarding the restriction on national party receipt or use of *any* soft money, regardless of what speech such money funded, the Court rejected an overbreadth challenge by reasoning that “it is the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, that have made *all* large soft-money contributions to national parties suspect.”⁴² Such contributions, said the Court, “are likely to buy donors preferential access to federal officeholders no matter the ends to which their contributions are eventually put.”⁴³

Having upheld the central elements of new FECA § 323(a), the Court readily upheld its further restrictions on national parties’ solicitation or direction of soft money to others. Once again extending the causal chain—linking candidate gratitude with *party* gratitude—the Court viewed such restrictions as basic anti-circumvention measures because a “national committee is likely to respond favorably to a donation made at its request regardless of whether the recipient is the committee itself or another entity.”⁴⁴

The Court also rejected the claim that § 323(a)’s prohibition on spending or directing the use of soft money by others imposed an undue associational burden by limiting national and state/local party interaction. It instead found that “[n]othing on the face of § 323(a) prohibits national party officers, whether acting in their official or individual capacities, from sitting down with state and local party committees or candidates to plan and advise how to raise and spend soft money,” and that § 323(a) permits a wide range of

⁴²McConnell, 124 S. Ct. at 667 (emphasis added).

⁴³*Id.* at 668.

⁴⁴*Id.* The Court also upheld the facial application of new § 323(a) to minor parties, observing, first, that regardless of the number of legislators a party managed to elect, the interest in avoiding corruption or its appearance is the same and, second, that any national party with official status gains “significant benefits” for its members. 124 S. Ct. at 669. The Court left open the possibility that a struggling minor party could “bring an as-applied challenge if § 323(a) prevents it from ‘amassing the resources necessary for effective advocacy.’” *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)).

joint planning and electioneering activity.”⁴⁵ The seemingly subtle distinction between “planning” or “advising” and “directing” the use of soft money—and the likelihood that such supposedly available activities would be deemed “circumvention” of § 323(a)—was left unexplored.

3. *New FECA § 323(b)’s Restrictions on State and Local Party Committees*

The BCRA’s various restrictions on state and local party activity that could affect federal elections were also upheld as anti-circumvention measures based on the purportedly “close ties between federal candidates and state party committees.”⁴⁶ Endorsing Congress’s conclusion that soft-money contributions to state and local parties had been and would be used to try to influence federal candidates, the Court concluded that such candidates and officials would feel or appear to feel a corrupting gratitude for contributions to state and local parties used for even basic political activities—voter registration, get-out-the-vote efforts, and generic campaigning—that could influence federal races held simultaneously with state races.⁴⁷

Again emphasizing the broad sweep of its gratitude-is-corrupting rationale, the Court gave “substantial deference” to Congress’s views that “federal candidates would be just as indebted to” contributors who shifted their giving to state and local parties “as they had been to those who had formerly contributed to the national parties.”⁴⁸ The restrictions of § 323(b), said the Court, were narrowly tailored to Congress’s interests because they targeted only “those contributions to state and local parties that can be used to benefit federal candidates directly.”⁴⁹

⁴⁵McConnell, 124 S. Ct. at 670.

⁴⁶*Id.*

⁴⁷*Id.* at 671–73.

⁴⁸*Id.* at 673.

⁴⁹*Id.* at 674. The Court similarly upheld the Levin Amendment’s convoluted rules regarding funding of certain state-party activities with at best a tenuous connection to federal candidates—noting that “not every minor restriction on parties’ otherwise unrestrained ability to associate is of constitutional dimension,” and that given “the delicate and interconnected regulatory scheme at issue here, any associational burdens imposed by the Levin Amendment restrictions are far outweighed by the need to prevent circumvention of the entire scheme.” *Id.* at 676–77

Finally, the Court dismissed as “speculative” the claim that § 323(b) would prevent state and local parties from engaging in effective advocacy. With seemingly unintended irony, the Court observed that “[i]f the history of campaign finance regulation discussed above proves anything, it is that political parties are extraordinarily flexible in adapting to new restrictions on their fundraising abilities.”⁵⁰ (Such flexibility, of course, is consistently abhorred in the remainder of the opinion as “circumvention” of existing restrictions and as a justification for still further restrictions.) More troubling, however, was the Court’s disparagement of the First Amendment significance of any speech-reducing consequences of § 323(b): “[T]he mere fact that § 323(b) may reduce the relative amount of money available to state and local parties to fund federal election activities is largely inconsequential. The question is not whether § 323(b) reduces the amount of funds available over previous election cycles, but whether it is ‘so radical in effect as to . . . drive the sound of [the recipient’s] voice below the level of notice.’”⁵¹ Apparently the First Amendment now only protects speech up to some *de minimis* level needed to get noticed, but little more.

4. *New FECA § 323(d)’s Restrictions on Parties’ Solicitations for, and Donations to, Tax-Exempt Organizations*

The prohibition in new FECA § 323(d) barring all political party committees from soliciting, directing, or donating funds to certain tax exempt organizations that engage in speech related to federal elections was likewise upheld as a valid anti-circumvention measure.⁵² The Court found that “[d]onations made at the behest of party committees would almost certainly be regarded by party officials, donors, and federal officeholders alike as benefiting the party as well as its candidates”; thus, those donations pose the same threat of corruption and the appearance of corruption as national-party soft-money contributions.

In one of the few nods to the First Amendment, however, the Court narrowed the application of § 323(d) to permit party donations of hard money, holding that a “complete ban on donations prevents

⁵⁰*Id.* at 677.

⁵¹*Id.* (citation omitted).

⁵²*Id.* at 678.

parties from making even the ‘general expression of support’ that a contribution represents,’’ and that banning hard-money donations “does little to further Congress’ goal of preventing corruption or the appearance of corruption of federal candidates and officeholders.”⁵³

5. *New FECA § 323(e)’s Restrictions on Federal Candidates and Officeholders*

The Court also upheld new FECA § 323(e)’s general prohibition on federal candidates and officeholders “solicit[ing], receiv[ing], direct[ing], transfer[ring], or spend[ing]” any soft money in connection with federal, state, and local elections.⁵⁴

The Court held that the restrictions were “valid anticircumvention measures” because the value of—and hence the candidate’s gratitude for—such donations to nonprofits “is evident from the fact of the solicitation itself,” and because the various exceptions adequately accommodated “the individual speech and associational rights of federal candidates and officeholders.”⁵⁵

6. *New FECA § 323(f)’s Restrictions on State Candidates and Officeholders*

Finally, the Court upheld new FECA § 323(f)’s prohibition on state and local candidates and officeholders spending soft money to fund “public communications” that “refer[] to a clearly identified candidate for Federal office . . . and that promote[] or support[] a candidate for that office, or attack[] or oppose[] a candidate for that office” except where the communication refers only to the candidate himself or his opponents for the same office.⁵⁶ The Court found it “eminently reasonable” that Congress expected that “state and local candidates

⁵³*Id.* at 681 (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)).

⁵⁴2 U.S.C. § 441i(e). Various exceptions to the prohibition allow federal candidates and officeholders to speak or be guests at state or local party fundraising events, to solicit contributions to certain non-profits that do not engage in federal election activities, and to solicit limited amounts from individuals to non-profits that do engage in such activities. 2 U.S.C. §§ 441i(e)(3) & (4).

⁵⁵*McCConnell*, 124 S. Ct. at 683.

⁵⁶2 U.S.C. § 441i(f), § 431(20)(A)(iii).

and officeholders will become the next conduits for the soft-money funding of sham issue advertising.’’⁵⁷

C. BCRA Title II

Turning to BCRA Title II, involving expenditures for speech by groups and individuals other than candidates, the Court once again rejected virtually all of the constitutional challenges to the law.

1. BCRA § 201’s Definition of “Electioneering Communication”

The most significant element of Title II is its definition of a new category of regulated speech—electioneering communications—that had previously been immune from regulation under *Buckley*. BCRA § 201 modified FECA § 304 and expanded the category of regulated expenditures to include outlays for any “broadcast, cable, or satellite communication” that refers to a clearly identified candidate for federal office, is made within thirty days of a primary, convention, or caucus or within sixty days of a general election, and is targeted to the relevant electorate.⁵⁸

In upholding Congress’s authority to regulate that broader category of speech, the Court rejected the argument that the First Amendment required it to maintain *Buckley*’s distinction between express advocacy (treated like a contribution) on the one hand and other forms of political speech (protected from regulation) on the other. Instead, the Court held that *Buckley*’s express advocacy line was merely one possible solution to a vagueness problem in the language of the prior statute, and that other definitions of speech to be regulated could satisfy the First Amendment.⁵⁹

Addressing the deficiencies of the express-advocacy line, the Court held that “the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad,” and

⁵⁷McConnell, 124 S. Ct. at 684. The Court quickly disposed of claims that Title I exceeded Congress’s Election Clause authority, U.S. Const. art. I, § 4, and violated the Tenth Amendment by impairing the authority of the states to regulate their own elections. 124 S. Ct. at 685. The Court also rejected an equal protection argument premised on the supposed discrimination against political parties and in favor of special interest groups. *Id.* at 685–86.

⁵⁸2 U.S.C. § 434(f)(3)(A)(i).

⁵⁹McConnell, 124 S. Ct. at 687.

that “*Buckley’s* magic-words requirement is functionally meaningless.”⁶⁰ Finding that the new definition of electioneering communications “raises none of the vagueness concerns that drove [the Court’s] analysis in *Buckley*,” the Court rejected the general challenge to the definition.⁶¹

2. BCRA § 201’s Disclosure Requirements

Turning to the application of various disclosure provisions to the broader category of electioneering communications, the Court readily upheld FECA § 304’s requirement that if “any person makes disbursements totaling more than \$10,000 during any calendar year for the direct costs of producing and airing electioneering communications, he must file a statement with the FEC identifying the pertinent elections and all persons sharing the costs of the disbursements,” including, in some instances, all persons who contributed \$1,000 or more to the account or the person or fund paying for the communication.⁶²

According to the Court, such requirements furthered the important interests of “providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions.”⁶³ Elevating the public’s interest in information above the First Amendment interest in speaker anonymity, the Court held that the evidence did not establish that forced disclosure would cause “the requisite ‘reasonable probability’ of harm to any plaintiff group or its members” that might serve to chill such speech.⁶⁴ The Court left open, however, possible future as-applied challenges where a particular threat from disclosure could be demonstrated.⁶⁵

⁶⁰*Id.* at 689.

⁶¹*Id.*

⁶² 2 U.S.C.A. §§ 434(f)(2)(A)–(B), (D)–(F).

⁶³ *McConnell*, 124 S. Ct. at 690.

⁶⁴ *Id.* at 691–92. The Court likewise upheld new FECA § 304(f)(5)’s application of the disclosure requirement to *executory* contracts for electioneering communications, finding that “the interest in assuring that disclosures are made promptly and in time to provide relevant information to voters is unquestionably significant.” *McConnell*, 124 S. Ct. at 693.

⁶⁵ *McConnell*, 124 S. Ct. at 693.

3. BCRA § 202’s Treatment of “Coordinated Communications” as Contributions

BCRA § 202’s treatment of coordinated electioneering communications as contributions was readily upheld by the Court with the brief observation that there “is no reason why Congress may not treat coordinated disbursements for electioneering communications in the same way it treats all other coordinated expenditures.”⁶⁶

4. BCRA § 203’s Prohibition of Corporate and Labor Expenditures on Electioneering Communications

The Court also upheld BCRA § 203’s ban on corporations or unions using their own funds for electioneering communications and the requirement that any such speech be funded through separate segregated funds—i.e., PACs—that can be raised only through limited contributions from narrow categories of persons directly affiliated with the corporations or unions. The Court reasoned—and claimed that the challengers had conceded—that the “PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, and it lets the government regulate campaign activity through registration and disclosure without jeopardizing the associational rights of advocacy organizations’ members.”⁶⁷

Such restrictions, the Court held, furthered the compelling interest in controlling 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 the corporation’s political ideas,” and hedged “against ‘circumvention of [valid] contribution limits.’”⁶⁸

Reiterating its view that express advocacy and electioneering communications were functionally equivalent, and accepting that both were core political speech entitled to the “fullest and most urgent” protection of the First Amendment, the Court held that the justifications for regulating express advocacy apply equally to electioneering

⁶⁶*Id.* at 694.

⁶⁷*Id.* at 694–95 (citation omitted).

⁶⁸*Id.* at 695–96 (citations omitted).

communications.⁶⁹ What once had been a narrow exception allowing regulation of express advocacy having a supposedly greater potential for corruption thus is now a general rule that any speech with the possibility of influencing an election can be regulated.

Rejecting the claimed overbreadth of the restrictions, the Court held that they had ample legitimate applications given that most issue ads were merely sham attempts to influence elections and given that any supposedly “genuine” issue ads—which the Court *assumed* might be constitutionally protected—could still be run by corporations or unions by avoiding any reference to a specific federal candidate.⁷⁰

The Court likewise rejected the claim that the restriction was under-inclusive—and hence not properly tailored—in that it does not apply to print or internet advertising or to news stories, commentary, and editorials aired by certain broadcasters.⁷¹ In a disturbing echo of rational basis scrutiny, the Court held that “‘reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,’” and that there was a “‘valid distinction’” between “‘the media industry and other corporations that are not involved in the regular business of imparting news to the public.’”⁷²

5. BCRA § 204’s Application to Nonprofit Corporations

Regarding BCRA § 204’s application of the corporate speech restrictions to non-profit corporations, the Court reaffirmed the line drawn in its previous cases between so-called *MCFL* corporations—those that are formed for the express purpose of promoting political ideas, do not engage in business activities, have no shareholders or affiliated persons with claims on their assets, and were neither established by nor accept contributions from business corporations

⁶⁹*Id.* at 696 (citation omitted).

⁷⁰*Id.* at 696–97.

⁷¹2 U.S.C § 434(f)(3).

⁷²*McConnell*, 127 S. Ct. at 697 (quoting *Buckley v. Valeo*, 424 U.S. 1, 105 (1976) (internal quotation marks and citations omitted by the Court) and *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 668 (1990)).

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or labor unions—and all other non-profits.⁷³ The defining characteristics of MCFL corporations were claimed, first, to ensure that “political resources reflect political support”; second, that “persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity”; and, third, to prevent “such corporations from serving as conduits” for otherwise restricted expenditures by business corporations and unions.⁷⁴

Because the new FECA § 316(c)(6) did not contain any exception for MCFL corporations, however, the Court upheld the provision only by imposing a limiting construction that “presume[d],” despite plain language to the contrary, “that the legislators who drafted § 316(c)(6) were fully aware that the provision could not validly apply to MCFL-type entities.”⁷⁵

6. BCRA § 212’s Reporting Requirement for \$1,000 Expenditures

The Court next upheld BCRA § 212, which requires persons making independent expenditures (defined to include executory contracts) of \$1,000 or more during the twenty-day period before an election to report such expenditures.⁷⁶ Only the timing of such disclosures—in some cases before the actual speech occurred—was challenged, and the Court rejected the challenge for the same reason it upheld similar pre-speech disclosures under new FECA § 304(f).⁷⁷

7. BCRA § 213’s Requirement that Political Parties Choose Between Coordinated and Independent Expenditures After Nominating a Candidate

One of the few provisions of the BCRA invalidated by the Court was the requirement imposed by BCRA § 213 that appeared to “require political parties to make a straightforward choice between using limited coordinated expenditures or unlimited independent

⁷³McConnell, 124 S. Ct. at 699 (citing *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252–53, 256–60 (1986) [hereinafter “MCFL”]).

⁷⁴McConnell, 124 S. Ct. at 699 (quoting MCFL, 479 U.S. at 264).

⁷⁵McConnell, 124 S. Ct. at 699.

⁷⁶*Id.*

⁷⁷See *supra* note 64.

expenditures to support their nominees” during the post-nomination, pre-election, period.⁷⁸ The Court read the section more narrowly, however, as imposing a choice only between coordinated expenditures and independent *express advocacy*—but not limiting independent expenditures for the broader category of electioneering communications that did not use the magic words urging a particular vote. As thus narrowed, however, the Court held that even express advocacy was entitled to protection and that the government’s interest was illusory given that limiting the restriction to express advocacy was “functionally meaningless” and hence “woefully inadequate” to serve the alleged purpose.⁷⁹

8. *BCRA § 214’s Changes in FECA’s Provisions Covering Coordinated Expenditures*

Finally, the Court upheld BCRA § 214’s modification of FECA § 315’s definition of “coordinated” expenditures that are treated as contributions, allowing expenditures to be deemed coordinated even without any formal agreement or collaboration.⁸⁰ The Court held that while “wholly independent” expenditures “are poor sources of leverage for a spender, . . . expenditures made after a ‘wink or nod’ often will be ‘as useful to the candidate as cash.’”⁸¹ Rejecting the argument that the broader definition of coordination was vague, the Court noted that the FEC’s existing regulatory definition of coordination did not require an agreement and that the long application of that definition “delineates its reach in words of common understanding.”⁸²

D. *BCRA Title III*

A second opinion for the Court, holding that various plaintiffs lacked standing to challenge miscellaneous provisions in BCRA Title III, was written by Chief Justice Rehnquist, joined in full by Justices O’Connor, Scalia, Kennedy, and Souter. Justices Stevens, Ginsberg,

⁷⁸McConnell, 124 S. Ct. at 700.

⁷⁹*Id.* at 703.

⁸⁰*Id.* at 704–05.

⁸¹*Id.* at 705 (citations omitted).

⁸²*Id.* at 706 (citations omitted). The Court declined to reach certain challenges to the regulations that would implement the expanded definition, holding that such challenges were not ripe. *Id.*

and Breyer joined most of the opinion, except with regard to BCRA § 305. Justice Thomas also joined most of the opinion.

1. BCRA § 305

Regarding Senator McConnell’s challenge to BCRA § 305, which, in order to discourage attack ads, denies candidates the benefit of receiving the “lowest unit charge” for broadcast time prior to an election or primary if the ads fail various content requirements, the Court held that Senator McConnell lacked standing to bring the challenge. Because he could not be affected by the provision until 2008, the Court found that his “alleged injury in fact is too remote temporally to satisfy Article III standing.”⁸³

2. BCRA § 307

A variety of plaintiffs, including voters, voter organizations, and candidates challenged BCRA § 307, which increases and indexes for inflation certain FECA contribution limits. The Court again concluded that the challengers lacked standing, finding that their claimed injury of a loss “of an equal ability to participate in the election process based on their economic status”—i.e., they could not afford to contribute up to the higher limits—did not constitute “an invasion of a concrete and particularized legally protected interest.”⁸⁴ The Court noted that “[p]olitical ‘free trade’ does not necessarily require that all who participate in the political marketplace do so with exactly equal resources.”⁸⁵ The Court also found that the candidate-plaintiffs lacked standing to challenge the higher limits because their alleged competitive injury—based on their concern over appearing corrupt and their unwillingness to solicit or accept contributions up to the BCRA’s higher limits—was not “‘fairly traceable’ to BCRA § 307.”⁸⁶ Such injury, said the court, “stems not from the operation of § 307, but from [the candidates’] own personal ‘wish’ not to solicit or accept large contributions, i.e., their personal choice.”⁸⁷

⁸³*Id.* at 708.

⁸⁴*Id.*

⁸⁵*Id.* (citation omitted).

⁸⁶*Id.* at 709 (citation omitted).

⁸⁷*Id.*

Finally, the Court found that certain plaintiffs lacked standing to bring a Free Press challenge based on alleged discrimination in the law favoring the “institutional media” given that “if the Court were to strike down the increases and indexes established by BCRA § 307, it would not remedy the . . . plaintiffs’ alleged injury because both the limitations imposed by FECA and the exemption for news media would remain unchanged.”⁸⁸

3. BCRA §§ 304, 316, and 319

The Court also found that certain plaintiffs lacked standing to challenge the so-called “millionaire provisions,” BCRA §§ 304, 315, and 316, which partially exempt candidates from certain contribution and coordinated expenditure restrictions if the candidate’s opponent spends certain triggering amounts of his personal funds. The Court held that the alleged injuries were the same as with BCRA § 307 and were not “fairly traceable” to BCRA.⁸⁹ Furthermore, because none of the plaintiffs was “a candidate in an election affected by the millionaire provisions,” the Court agreed with the district court that “it would be purely “conjectural” for the court to assume that any plaintiff ever will be.”⁹⁰

4. BCRA § 311

The Court next upheld the disclosure requirements of BCRA § 311, which extended to “electioneering communications” the existing FECA § 318 requirement that certain communications “authorized” by a candidate or his political committee clearly identify the candidate or committee or, if not so authorized, identify the payor and announce the lack of authorization.⁹¹ The Court found that the required disclosure “bears a sufficient relationship to the important governmental interest of ‘shed[ding] the light of publicity’ on campaign financing,” assuming, as the Court thought it must, that the FECA’s existing disclosure provisions were otherwise valid.⁹²

⁸⁸ *Id.*

⁸⁹ *Id.* at 710.

⁹⁰ *Id.* (citation omitted).

⁹¹ 2 U.S.C. § 441d.

⁹² *McCConnell*, 124 S. Ct. at 710.

5. BCRA § 318

Finally, in the last of the few defeats dealt the government, the Court struck down BCRA § 318, which forbids individuals “17 years old or younger” to make contributions to candidates and political parties.⁹³ Rejecting the government’s claim that the provision “protects against corruption by conduit”—*i.e.*, parents circumventing contribution limits by giving through their children—the Court found “scant evidence of this form of evasion.”⁹⁴ Noting that FECA § 320 already prohibited such circumventing contributions made in the name of another person and that the states had adopted narrower means of addressing any problems regarding minors, the Court held that “[a]bsent a more convincing case of the claimed evil, this interest is simply too attenuated” and “the provision here sweeps too broadly.”⁹⁵

E. BCRA Title V

A final opinion for the Court, upholding BCRA § 504, was written by Justice Breyer and joined by Justices Stevens, O’Connor, Souter, and Ginsburg.

BCRA § 504 requires broadcasters to keep publicly available records of broadcasting requests (1) by or on behalf of a candidate; (2) by any person where the message will refer to a candidate or a federal election; and (3) by any person where the message is related to a “national legislative issue of public importance” or to a “political matter of national importance.”⁹⁶

The Court found that the “candidate request” requirement was similar to an existing FCC regulation, would impose on each broadcaster only six to seven hours of work per year, and thus constituted a “microscopic” burden on broadcasters relative to their revenues from candidates and relative to existing recordkeeping requirements.⁹⁷ The Court also found that the requirements served important government interests in aiding verification of broadcasters’

⁹³2 U.S.C. § 441k.

⁹⁴McConnell, 124 S. Ct. at 711.

⁹⁵*Id.*

⁹⁶47 U.S.C. §§ 315(e)(1)(A)–(B).

⁹⁷McConnell, 124 S. Ct. at 712–14.

“equal time” and “lowest unit charge” obligations toward candidates, in helping the government and the public evaluate whether broadcasters were being even-handed toward candidate requests for time, and in providing an independent set of data for verifying compliance with the various disclosure and funding limitations of the BCRA and the FECA.⁹⁸ The Court also found a curious further interest in making “the public aware of how much money candidates *may be prepared to spend* on broadcast messages.”⁹⁹ Regarding “election message requests” by any person, the Court again found “only a small incremental burden” and important interests in helping, first, “both the regulatory agencies and the public evaluate broadcasting fairness, and determine the amount of money that individuals or groups, supporters or opponents, intend to spend to help elect a particular candidate”; and, second, the FCC determine “whether a broadcasting station is fulfilling its licensing obligation to broadcast material important to the community and the public.”¹⁰⁰

Finally, regarding the “issue request” requirements, the court found important interests in helping “the FCC determine whether broadcasters are carrying out their ‘obligations to afford reasonable opportunity for the discussion of conflicting views on issues of public importance,’ and whether broadcasters are too heavily favoring entertainment, and discriminating against broadcasts devoted to public affairs.”¹⁰¹

The Court rejected the claim that the definition of issue requests was unconstitutionally vague and overbroad, finding instead that the “language is no more general than the language that Congress has used to impose other obligations upon broadcasters.” Further, declared the Court, the FCC could interpret the provision in a way that “may limit, and make more specific, the provision’s potential linguistic reach.”¹⁰² The Court left open the possibility of a future as-applied challenge or a challenge to any subsequent FCC regulations.¹⁰³

⁹⁸*Id.* at 714.

⁹⁹*Id.* (emphasis added).

¹⁰⁰*Id.* at 715.

¹⁰¹*Id.* at 716.

¹⁰²*Id.* at 716–17.

¹⁰³*Id.* at 717.

The Court also rejected the claim that the “issue request” requirement will force speakers to reveal their political strategies to opponents, sometimes prior to any broadcast. Assuming, “purely for argument’s sake,” that the Constitution offered some protection against forcing premature disclosure of campaign strategies, the Court argued that the statute did not require disclosure of the substantive content of the message to be broadcast, that the FCC could issue regulations avoiding any premature disclosures that might be forbidden by the Constitution, and that it saw no evidence of any “strategy-disclosure” problem under the FCC’s previously existing candidate request requirement.¹⁰⁴

F. The Concurring and Dissenting Opinions

In addition to the three majority opinions, there were five separate decisions concurring in part and dissenting in part. Four of those decisions would have struck down the bulk of the BCRA’s new restrictions, and concurred, to varying degrees, only with regard to certain disclosure requirements or with the decision not to resolve various of the challenges to Title III. One of the opinions, however, would have gone further and upheld BCRA § 305’s content-based restrictions on the lowest-unit-charge rule for candidate ads, the challenge to which the majority avoided by finding that Senator McConnell lacked standing to raise the issue.

1. Justice Scalia’s Opinion

Justice Scalia’s concurring and dissenting opinion¹⁰⁵ in general sided with the challengers and would have struck down much of the BCRA.

Justice Scalia began by reiterating his view that *Buckley* “was wrongly decided.”¹⁰⁶ He then expressed dismay that the same Court that “has sternly disapproved of restrictions upon such inconsequential forms of expression as” virtual child pornography, tobacco advertising, dissemination of illegally intercepted communications, and sexually explicit cable programming, “would smile with favor upon a law that cuts to the heart of what the First Amendment is

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 720–30 (Scalia, J., dissenting).

¹⁰⁶ *Id.* at 720.

meant to protect: the right to criticize the government."¹⁰⁷ The BCRA, he said, "prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice: national political parties and corporations, both of the commercial and the not-for-profit sort."¹⁰⁸

The nominal evenhandedness of the restrictions on all candidates was illusory, he maintained, because "any restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents."¹⁰⁹ And, Justice Scalia observed, many of the restrictions contained in the BCRA were especially favorable to incumbents, who generally have an easier time raising the types of funds least restricted by the law.¹¹⁰ He found it difficult to believe that such imbalance was "mere happenstance."¹¹¹

Addressing three propositions that he believed underlay the BCRA's restrictions and the Court's decision, Justice Scalia rejected each in turn.

As to the proposition that money is not speech, he condemned the Court's "cavalier attitude toward regulating the financing of speech" because in "any economy operated on even the most rudimentary principles of division of labor, effective public communication requires the speaker to make use of the services of others."¹¹² While general commercial regulations that impact funds for speech are acceptable if the government "applies them evenhandedly to those who use money for other purposes," where "the government singles out money used to fund speech as its legislative object, it is acting against speech as such, no less than if it had targeted the paper on which a book was printed or the trucks that deliver it to the bookstore."¹¹³

Rather than mere indirect burdens on speech, therefore, Justice Scalia found it "obvious, then, that a law limiting the amount a

¹⁰⁷*Id.*

¹⁰⁸*Id.*

¹⁰⁹*Id.* at 721.

¹¹⁰*Id.*

¹¹¹*Id.*

¹¹²*Id.* at 722.

¹¹³*Id.*

person can spend to broadcast his political views is a direct restriction on speech.”¹¹⁴ And he found it “equally clear that a limit on the amount a candidate can *raise* from any one individual for the purpose of speaking is also a direct limitation on speech,” no different from “a law limiting the amount a publisher can accept from any one shareholder or lender, or the amount a newspaper can charge any one advertiser or customer.”¹¹⁵

Justice Scalia next rejected the proposition that “the First Amendment right to spend money for speech does not include the right to combine with others in spending money for speech.”¹¹⁶ Just as it would be an “obvious violation of the First Amendment” for Congress to require “newspapers to be sole proprietorships, banning their use of partnership or corporate form,” he found it “incomprehensible why the conclusion should change when what is at issue is the pooling of funds for the most important (and most perennially threatened) category of speech: electoral speech.”¹¹⁷

Finally, Justice Scalia challenged the notion that “the particular form of association known as a corporation does not enjoy full First Amendment protection,” and repeated his view that the decision in *Austin v. Michigan Chamber of Commerce*¹¹⁸ was in error.¹¹⁹ Because corporations are the most common means for people to “associate,” i.e., pool their financial resources, “for economic enterprise” and, increasingly, “to defend and promote particular ideas” as in the cases of the NRA and the ACLU, Justice Scalia rejected the prospect that a candidate could be “insulated from the most effective speech” by such major economic participants and interest groups.¹²⁰

Justice Scalia found inadequate the Court’s reliance on the supposed “danger to the political system posed by ‘amassed wealth,’” noting that bribery is already criminalized and finding the use of wealth to speak “unlikely to ‘distort’ elections—*especially* if disclosure requirements *tell* the people where the speech is coming

¹¹⁴*Id.* at 724.

¹¹⁵*Id.*

¹¹⁶*Id.*

¹¹⁷*Id.* at 725.

¹¹⁸494 U.S. 652 (1990).

¹¹⁹McConnell, 124 S. Ct. at 725.

¹²⁰*Id.* at 726.

from."¹²¹ Given that the "premise of the First Amendment is that the American people are neither sheep nor fools," said Justice Scalia, "there is no such thing as *too much* speech."¹²²

As for candidate gratitude toward contributors or supportive speakers, Justice Scalia noted that any "*quid-pro-quo* agreement for votes" again would already be a crime and that enhanced access for, or a general tendency to favor, supporters is simply "the nature of politics," equally non-corrupt as to corporate and non-corporate allies alike.¹²³ He found that so long as disclosure rules exist, undue influence would be sufficiently checked "by the politician's fear of being portrayed as 'in the pocket' of so-called moneyed interests," and that the First Amendment assumes that any supposed benefits from restricting speech are "more than offset by loss of the information and persuasion that corporate speech can contain."¹²⁴

Justice Scalia also ridiculed the "notion that there is too much money spent on elections," noting that such spending—mostly on brief television ads—are apparently effective at persuading voters and that it is not the proper role of government to judge what campaign speech is valuable "and to abridge the rest."¹²⁵ And he deemed the total amount spent on campaign speech minor as compared to total spending on other items such as movies, cosmetics, and "pork (the nongovernmental sort)."¹²⁶

Justice Scalia concluded that BCRA was about "preventing criticism of the government," and that the Court had abandoned the First Amendment's "fundamental approach" of rejecting the regulation of political speech "for fairness' sake."¹²⁷ He deemed the *McConnell* decision "merely the second scene of Act I of what promises to be a lengthy tragedy. In scene 3 the Court, having abandoned most of the First Amendment weaponry that *Buckley* left intact, will be even less equipped to resist the incumbents' writing of the rules of political debate."¹²⁸

¹²¹ *Id.* (emphasis in original).

¹²² *Id.* (emphasis in original).

¹²³ *Id.*

¹²⁴ *Id.* at 726–27.

¹²⁵ *Id.* at 727–28.

¹²⁶ *Id.* at 728.

¹²⁷ *Id.* (citation and quotation marks omitted).

¹²⁸ *Id.* at 729.

2. Justice Thomas’s Opinion

Justice Thomas, joined in part by Justice Scalia, also filed a concurring and dissenting opinion that generally would have struck down much of the BCRA.¹²⁹

Describing the BCRA as “the most significant abridgment of the freedoms of speech and association since the Civil War,” Justice Thomas mourns the casting aside of fundamental First Amendment principles “in the purported service of preventing ‘corruption,’ or the mere ‘appearance of corruption.’”¹³⁰ Arguing that the BCRA should be reviewed under strict scrutiny, he viewed bribery laws and disclosure laws as “less restrictive means of addressing [the Government’s] interest in curtailing corruption.”¹³¹

Justice Thomas then charged the majority with continuing and building upon the errors of *Buckley* “by expanding the anticircumvention rationale beyond reason.”¹³² Noting that each new restriction on speech has been justified as a means of preventing circumvention of the previous restriction, Justice Thomas thought it “not difficult to see where this leads. Every law has limits, and there will always be behavior not covered by the law but at its edges; behavior easily characterized as ‘circumventing’ the law’s prohibition. Hence, speech regulation will again expand to cover new forms of ‘circumvention,’ only to spur supposed circumvention of the new regulations, and so forth” in a “never-ending and self-justifying process.”¹³³

Justice Thomas then offered an extended critique of the supposed evidence of improper influence, concluding that it consisted of “nothing more than vague allegations of wrongdoing” and “at best, [the Members of Congress’s] personal conjecture regarding the impact of soft money donations on the voting practices of their present and former colleagues.”¹³⁴

Justice Thomas next rejected the majority’s continuation of the “disturbing trend” of decreasing “the level of scrutiny applied to restrictions on core political speech” as in the case of broadly defined

¹²⁹*Id.* at 729–42 (Thomas, J., dissenting).

¹³⁰*Id.* at 729–30.

¹³¹*Id.* at 730 (citation omitted).

¹³²*Id.*

¹³³*Id.* at 732.

¹³⁴*Id.* at 732, 733 (quoting Judge Leon’s opinion from the district court).

coordinated expenditures and corporate or union speech.¹³⁵ As to the latter, Justice Thomas disputed the claim that aggregations of wealth spent on speech that might actually convince voters were corrosive or distorting, and wryly noted that “[a]pparently, winning in the marketplace of ideas” is “now evidence of corruption,” a conclusion that “is antithetical to everything for which the First Amendment stands.”¹³⁶

Contrary to all of his colleagues, Justice Thomas also took issue with the BCRA’s various disclosure requirements, defending the right to anonymous speech and rejecting the sufficiency of an “interest in providing ‘information’ about the speaker to the public.”¹³⁷ He also disputed the majority’s abandonment of *Buckley*’s “express advocacy” line to allow disclosures and restrictions related to a broader category of speech, noting that the line was drawn “to ensure the protection of the ‘discussion of issues and candidates,’ not out of some strange obsession of the Court to create meaningless lines.”¹³⁸ Because any distinction between the two “‘may often dissolve in practical application,’” only an unambiguous line would provide adequate protection for the discussion of issues that might overlap with the discussion of candidates.¹³⁹

Justice Thomas concluded with the dire assessment that the “chilling endpoint of the Court’s reasoning is not difficult to foresee: outright regulation of the press.”¹⁴⁰ Pro-candidate editorials and commentary, no less than political advertising, could engender candidate gratitude; media-corporation wealth are just as unrelated to the public’s political views; and media corporations just as desirous of access and influence as any other corporation or union.¹⁴¹ He found nothing in the majority’s reasoning that would “stop a future Congress from determining that the press is ‘too influential,’ and that the ‘appearance of corruption’ is significant when media organizations endorse candidates or run ‘slanted’ or ‘biased’ news stories”

¹³⁵*Id.* at 734.

¹³⁶*Id.* at 735.

¹³⁷*Id.* at 736.

¹³⁸*Id.* at 739.

¹³⁹*Id.* at 740 (quoting *Buckley v. Valeo*, 424 U.S. 1, 42 (1976)).

¹⁴⁰*McCConnell*, 124 S. Ct. at 740.

¹⁴¹*Id.* at 740–41.

or from “concluding that the availability of unregulated media corporations creates a loophole that allows for easy ‘circumvention’ of” existing restrictions.¹⁴² “Although today’s opinion does not expressly strip the press of First Amendment protection, there is no principle of law or logic that would prevent the application of the Court’s reasoning in that setting.”¹⁴³

3. Justice Kennedy’s Opinion

A third, and lengthy, concurring opinion was written by Justice Kennedy, joined in whole or in part by Chief Justice Rehnquist and Justices Scalia and Thomas, again substantially siding with the BCRA’s opponents though supporting a variety of the BCRA’s restrictions as well.¹⁴⁴

Arguing that the “First Amendment guarantees our citizens the right . . . to decide for themselves which entities to trust as reliable speakers,” he viewed the BCRA as forcing “speakers to abandon their own preference for speaking through parties and organizations,” and codifying “the Government’s own preferences for certain speakers.”¹⁴⁵ Those governmental preferences, said Justice Kennedy, worked to the detriment of new political parties and discriminated “in favor of the speech rights of giant media corporations and against the speech rights of other corporations, both profit and nonprofit.”¹⁴⁶

Justice Kennedy also accused the majority of conflating the anti-corruption rationale with the corporate speech rationale, with the purpose “to cast the speech regulated here as unseemly corporate speech,” even where the law failed to draw such distinctions and regulated far broader swaths of speech.¹⁴⁷ Distinguishing *Buckley*’s aim as “to define undue influence by reference to the presence of *quid pro quo* involving the officeholder,” Justice Kennedy then rejects the Court’s conclusion that “access, without more, proves influence is undue,” finding that such “new definition of corruption sweeps away all protections for speech that lie in its path.”¹⁴⁸

¹⁴²*Id.* at 741.

¹⁴³*Id.* at 742.

¹⁴⁴*Id.* at 742–77 (Kennedy, J., dissenting).

¹⁴⁵*Id.* at 742.

¹⁴⁶*Id.*

¹⁴⁷*Id.* at 744.

¹⁴⁸*Id.* at 746.

Rather than access or influence being corrupt, said Justice Kennedy, “[i]t is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.”¹⁴⁹ Justice Kennedy thus would limit the government’s compelling interest in “corruption” to quid pro quo arrangements.¹⁵⁰ And he similarly would evaluate any claimed interest in preventing the “appearance of corruption” based not “on whether some persons *assert* that an appearance of corruption exists,” but “on whether the Legislature has established that the regulated conduct has *inherent* corruption potential, thus justifying the inference that regulating the conduct will stem the appearance of real corruption.”¹⁵¹ Justice Kennedy next took issue with the application of lesser scrutiny to various forms of expenditures that the Court treated as if they were contributions.¹⁵² Under *Buckley*’s own terms, he concluded that the BCRA creates “markedly greater associational burdens than the significant burden created by contribution limitations and, unlike contribution limitations, also creates significant burdens on speech itself.”¹⁵³ He thus argued that strict scrutiny should apply, and found most of Title I lacking.¹⁵⁴

Finally, Justice Kennedy rejected the restrictions on corporate and union speech in BCRA § 203, explaining at length why he would overrule *Austin v. Michigan Chamber of Commerce*.¹⁵⁵ Rejecting the majority’s “endear[ment]” or gratitude theory of corruption, Justice Kennedy found that such a rationale would have “no limiting principle,” would give Congress “the authority to outlaw even pure issue ads,” and “would eviscerate the line between expenditures and contributions.”¹⁵⁶

¹⁴⁹*Id.* at 748.

¹⁵⁰*Id.*

¹⁵¹*Id.* (emphasis added).

¹⁵²*Id.* at 755–57.

¹⁵³*Id.* at 756.

¹⁵⁴*Id.* at 757.

¹⁵⁵*Id.* at 762.

¹⁵⁶*Id.* at 766.

4. Chief Justice Rehnquist’s Opinion

Chief Justice Rehnquist, joined by Justices Scalia and Kennedy, wrote separately to express his dissenting views regarding Titles I and V.¹⁵⁷

Chief Justice Rehnquist deemed the BCRA overinclusive in its restrictions on national and state political parties, particularly with regard to the prohibition of national party use of soft money for “pure political speech” that was either unrelated to elections or had “little or no potential to corrupt their federal candidates and officeholders.” The chief justice would also have invalidated BCRA restrictions on state-party conduct such as “voter identification, and get-out-the-vote for state candidates even if federal candidates are not mentioned”; “soliciting and donating ‘any funds’ to nonprofit organizations” like the NRA and the NAACP; and state-candidate television ads that stake out positions opposing presidential policies.¹⁵⁸

Regardless whether such activities “may affect federal elections,” said the chief justice, “there is scant evidence in the record to indicate that federal candidates or officeholders are corrupted or would appear corrupted by donations for these activities.”¹⁵⁹ And he rejected the Court’s conclusion that deference to Congress is justified simply because such “activities benefit federal candidates and officeholders, or prevent the circumvention of” other restrictions, observing that newspaper editorials and political talk shows likewise “benefit federal candidates and officeholders” and generate gratitude, yet could not be restricted consistent with the First Amendment.¹⁶⁰

The chief justice tellingly noted the irony in the Court’s view that “Congress cannot be trusted to exercise judgment independent of its parties’ large donors in its usual voting decisions because donations may be used to further its members’ reelection campaigns, but yet must be deferred to when it passes a comprehensive regulatory regime that restricts election-related speech.”¹⁶¹ He found it “no less

¹⁵⁷*Id.* at 777–84 (Rehnquist, C.J., dissenting).

¹⁵⁸*Id.* at 779.

¹⁵⁹*Id.* at 780 (emphasis in original).

¹⁶⁰*Id.*

¹⁶¹*Id.* at 780 n.2.

likely that Congress would create rules that favor its Members' reelection chances, than be corrupted by the influx of money to its political parties, which may in turn be used to fund a portion of the Members' reelection campaigns."¹⁶²

The chief justice criticized the Court's broad application of the circumvention rationale by noting that it "ultimately must rest on the circumvention itself leading to the corruption of federal candidates and officeholders."¹⁶³ "All political speech that is not sifted through federal regulation circumvents the regulatory scheme to some degree or another," said the chief justice, "and thus by the Court's standard would be a 'loophole' in the current system."¹⁶⁴ He concluded that the Court's "untethering" of its inquiry from "corruption or the appearance of corruption" has "removed the touchstone of our campaign finance precedent and has failed to replace it with any logical limiting principle."¹⁶⁵ The Court's approach, in his estimation, "all but eliminates the 'closely drawn' tailoring requirement and meaningful judicial review."¹⁶⁶

Finally, the chief justice would have invalidated BCRA § 502 insofar as it required disclosure of mere broadcast "requests," as opposed to disbursements, finding that the provision had no connection to any corruption interests and threatened to burden the First Amendment freedoms of purchasers.¹⁶⁷

5. Justice Stevens' Opinion

In the final separate opinion, Justice Stevens, joined by Justices Ginsburg and Breyer, wrote a brief dissent to the Court's refusal to reach Senator McConnell's challenge to BCRA § 305's new restrictions on the lowest-unit charge rule for candidate advertising.¹⁶⁸ Justice Stevens would have found that Senator McConnell had standing and then upheld the challenged provision as serving an informational interest in shedding light on campaign financing.¹⁶⁹ He rejected

¹⁶²*Id.* at 780.

¹⁶³*Id.*

¹⁶⁴*Id.* at 780–81.

¹⁶⁵*Id.* at 781.

¹⁶⁶*Id.*

¹⁶⁷*Id.* at 782–84.

¹⁶⁸*Id.* at 785–86 (Stevens, J., dissenting).

¹⁶⁹*Id.* at 785.

any characterization of the provisions’ focus on attack ads as being “viewpoint-based” by noting that while it targets attacks on one’s opponent, it applies equally to the opponent’s response.¹⁷⁰

IV. Discussion

While reams of paper could be devoted to identifying the numerous problems, large and small, with the *McConnell* decision, this article is limited to two conceptual problems that taint virtually all aspects of the decision.

First, even more than it has in the past, the Court dissociates the money that the BCRA regulates from the speech and expressive activity on which that money is spent. Indeed, the Court barely acknowledges that speech and expressive activity are the grounds on which the money is regulated in the first place. The Court thus undervalues the First Amendment interests at stake and overstates the government’s interests by its almost casual treatment of key protected activities from which “influence” is supposedly gained through money.

Second, the Court continues and expands upon a theory of “corruption” that lacks a rational foundation in the core principles of our constitutional democracy. By characterizing as corrupt a candidate’s “gratitude” for supportive political speech, and responsiveness to those who support or generate such speech, the Court indicts the fundamental political mechanism—free speech—enshrined in the Constitution. Furthermore, by having the hubris to condemn certain degrees of speech-mediated political influence as “undue,” and hence corrupt, the Court implicitly endorses an influence-rationing, and hence speech-rationing, theory of politics that collapses in the end to a revolutionary one-person-one-voice principle alien to our Constitution. Such a principle substitutes the misguided requirement for some rough *equality* of speech—cast in terms of equal opportunity for influence and access to those who benefit from political speech—in place of the constitutionally guaranteed *freedom* of speech.

¹⁷⁰*Id.* at 785–86.

A. *McConnell Erroneously Dissociates Speech from the Money Used Exclusively to Pay for Such Speech*

A major theme of the *McConnell* decision—carried forward and expanded from the Court’s previous decisions starting with *Buckley*—is the denigration of political contributions and expenditures as being primarily about the use of money in politics. That characterization dissociates contributions and expenditures from the political speech they necessarily fund and from the First Amendment value of protecting such essential prerequisites of political speech. The consequence of such dissociation was a consistently trivial degree of scrutiny that seemed barely more rigorous than rational basis scrutiny.

Starting with contributions, the Court endorsed its views from *Buckley* that the First Amendment value of contributions involves only the “undifferentiated, symbolic act of contributing,” that the “the transformation of contributions into political debate involves speech by someone other than the contributor,” and that limitations on contributions “thus involves little direct restraint on [the contributor’s] political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor’s freedom to discuss candidates and issues.”¹⁷¹ Those dubious propositions had been used in *Buckley* to establish a false dichotomy between contributions and expenditures, with contributions receiving ever more feeble protection under the First Amendment.

In a pyrrhic victory for consistency, however, the *McConnell* decision eroded that false dichotomy by extending its cavalier attitude towards contributions to a broad variety of expenditures for political speech. To be sure, *Buckley* had drawn a distinction between “express advocacy” and other forms of political speech—yet another false dichotomy. But at least the *Buckley* Court had acknowledged that expenditures for speech were part and parcel of the resulting speech itself and accordingly were to receive full First Amendment protection.¹⁷²

¹⁷¹*Id.* at 655 (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)).

¹⁷²See, e.g., *Buckley*, 424 U.S. at 43–44 & n.52 (express advocacy treated as a contribution).

McConnell v. FEC: Rationing Speech to Prevent “Undue” Influence

Significantly abandoning *Buckley’s* willingness to grant greater protection to most expenditures than to contributions, *McConnell* treats both political acts more consistently. Regrettably, the treatment is consistently wrong, with both contributions and expenditures afforded diminished protection, as they are divorced from the speech they necessarily produced. For example, in upholding BCRA Title I’s prohibition on national parties receiving or using soft money, even where such money would neither be transferred nor coordinated with particular candidates, the Court treated larger categories of speech as equivalent to contributions, not expenditures.¹⁷³ It also treated limits on solicitation—a direct speech activity—as a contribution restriction, even where the solicitation was for money to third parties, such as nonprofit corporations, entitled to receive such money.¹⁷⁴

Similarly, in upholding BCRA Title II’s restrictions on “electioneering communications,” the Court again painted with the same dismissive brush by treating such speech as the equivalent of express advocacy, which had in turn been treated as the equivalent of contributions in *Buckley*.¹⁷⁵ While the Court correctly recognized that many issue ads were functionally indistinguishable from express advocacy and that a magic-words requirements had no substance,¹⁷⁶ it failed to recognize that such equivalence demonstrated the *error* in equating express advocacy to contributions in the first place. Instead, it held that both categories of indisputable core political speech could be regulated, eliminating one of *Buckley’s* false dichotomies by eliminating the protection *Buckley* had maintained for expenditures on non-express advocacy. By turning *Buckley’s* irrational, though mercifully narrow, exception allowing regulation of express advocacy into the general rule for any speech that could influence an election, *McConnell* exacerbated the First Amendment devaluation of political speech begun with *Buckley’s* assault on contributions.

¹⁷³McConnell, 124 S. Ct. at 660.

¹⁷⁴*Id.* at 680. Coordinated expenditures are another example of direct speech and direct association being grouped with and scrutinized as contributions despite the complete absence of the distinguishing features of contributions. *Id.* at 704.

¹⁷⁵*Buckley*, 424 U.S. at 43–45 & n.52.

¹⁷⁶McConnell, 124 S. Ct. at 689.

The expansion of the Court's dissociation of money from the speech it produces is most noticeable, however, in the Court's broad-brush descriptions of the BCRA as a whole, where it implies an equivalence between campaign spending and genuine bribery or vote-buying. "Congress's most recent effort to confine the ill effects of aggregated wealth on our political system," said the Court, is part of its power to "'safeguard . . . an election from the improper use of money to influence the result.'"¹⁷⁷ "[M]oney is the mother's milk of politics," the Court quotes a former Senator as saying, and then itself later concludes that "[m]oney, like water, will always find an outlet."¹⁷⁸

What is so deeply troubling about the Court's expanded willingness to treat both contributions and expenditures as involving only money, rather than speech, to influence politics is that it builds upon an illogical foundation used for regulating contributions and then renders the premises *wholly* indefensible as expanded to expenditures. Embracing *Buckley's* justifications for diluted scrutiny of contribution restrictions, *McConnell* repeated the claims that contributions involve only symbolic speech by the contributor, that any further expression is contingent on "speech by someone other than the contributor,"¹⁷⁹ and that the burden imposed by contribution restrictions are marginal.¹⁸⁰ Those assertions, however, are wrong.

First, contributions involve far more than undifferentiated symbolic speech. As even *Buckley* itself acknowledged that "[m]aking a contribution . . . enables like-minded persons to pool their resources in furtherance of common political goals."¹⁸¹ Just as with contributors to other advocacy groups, campaign contributors form part of an expressive association organized around a favored candidate who is both an object of the collective speech as well as a unifying spokesperson or coordinator for such speech.

Contributors thus "speak" not only through the symbolic act of contributing, but also through the speech funded by the contribution.¹⁸² Such speech will indeed vary in both scope and reach according to the amount of contributions. And it will effectively vary in

¹⁷⁷ *Id.* at 706 (citation omitted).

¹⁷⁸ *Id.* at 663, 706 (citation and quotation marks omitted).

¹⁷⁹ *Buckley*, 424 U.S. at 21.

¹⁸⁰ *McConnell*, 124 S. Ct. at 655.

¹⁸¹ 424 U.S. at 22.

¹⁸² *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (the NAACP "is but the medium through which its individual members seek to make more effective the expression

content according to the distribution of a contributor’s total contributions across multiple candidates and groups.¹⁸³

Furthermore, while dismissing the speech value of contributions as merely symbolic is wrong from the outset, it is entirely nonsensical when expanded to expenditures for express advocacy, electioneering communications, and coordinated speech. Regardless of whether expenditures for such direct speech have a similar potential for obtaining favor from a candidate—an issue related to the government interest involved, not the speech interests at stake—such expenditures are plainly neither symbolic nor undifferentiated.

Second, denigrating contributions as producing only contingent and once-removed speech-by-proxy ignores both the nature of contributions and the nature of virtually all effective speech directed at a large audience. Unlike gifts or bribes, campaign contributions can be spent *only* to support campaign-related expression,¹⁸⁴ and hence implicate purported government interests only when they *are* spent to support such expression. Because contributions, as thus defined, only have value to a candidate when used to support political speech, both sides of the First Amendment balance—government interests and speech interests—turn on the same contingency, whether political speech in fact flows from the contribution. For that reason, the contingency is irrelevant.

And while the candidate may do the literal speaking that results from contributions, it is emphatically *not* true that such speech is *only* that of the candidate, rather than the speech of both the candidate and the contributors combined. That someone other than the

of their own views”); see also *Buckley*, 424 U.S. at 22 (role of associations is to “effectively amplify[] the voice of their adherents”); *Nixon v. Shrink Missouri*, 528 U.S. 377, 415 (2000) (Thomas, J., dissenting) (“a contribution, by amplifying the voice of the candidate, helps to ensure the dissemination of the messages that the contributor wishes to convey”).

¹⁸³ Giving \$2,000 to candidate Smith, \$1,000 dollars to candidate Jones, and \$10,000 to the Cato Institute allocates the content of the giver’s total speech no less than if he spent one day giving speeches praising Smith and his ideas, two days praising Jones and his ideas, and ten days praising the Cato Institute and its ideas. Such decisions regarding both the recipient and the amount given are content-based decisions in precisely the same way that a magazine’s editorial decisions about authors and the amount of space devoted to particular articles are the speech and expression of the editors, not merely symbolic acts of association.

¹⁸⁴ BCRA § 313.

multiple contributors utters the final words neither diminishes the expressive interest of the contributors nor distinguishes contributions from other expenditures for speech. Indeed, given the size and geographic dispersion of the voting population—the key listeners for core political speech—and the need to employ costly mass media to have any hope of effective communication, effective political speech almost necessarily requires collective efforts by speakers and hence some use of proxies. The days of a lone orator on a soapbox are long gone, and only the wealthiest among us can afford to purchase mass media time for their own individual speech. Political association and the pooling of resources for speech are the only realistic means of effective advocacy to the electorate.

As extended to contributions, therefore, while the speech-by-proxy rationale is not as literally incoherent as the symbolic speech claim, it instead proves far too much. If speech-by-proxy is indeed a valid basis for diluted First Amendment scrutiny, then *all* expenditures by expressive associations (large or small) are subject to regulations that limit the “contributions” to such associations and hence the resources available for such groups to speak. Indeed, that is precisely what the BCRA has done, and the Court has upheld, in the case of political parties, corporations, and unions, with the only limiting principle seeming to be that Congress cannot constrain their resources to such a degree as to drive their voices *completely* “below the level of notice.”¹⁸⁵ But freedom of speech would become a truly pitiful right if all it protected was the minimal ability to get noticed.

¹⁸⁵See *McConnell*, 124 S. Ct. at 677 (citation omitted). While the Court has given somewhat greater protection to *MCFL* non-profit corporations, given its repeated criticism of the aggregated wealth of both individuals and corporations alike, there is little reason to be sanguine that such protection is secure against the boundless logic of the remainder of the *McConnell* opinion. Like *Buckley*'s express-advocacy line, the *MCFL* line may likewise end up in the dustbin. And given the popular outcry against wealthy individuals financing so-called section 527 entities to engage in political speech, the *MCFL* line may meet its demise sooner rather than later. After all, in terms of their ability to influence federal elections, *MCFL* corporations with wealthy patrons are little different than other large aggregations of wealth. Should Mr. Kerry win the upcoming election and/or the Democrats take back the Senate, both he and the DNC will undoubtedly be quite grateful to Mr. Soros and others, who have done yeoman's work in compensating for the hard-money gap between Kerry and Bush.

Third, claiming that the First Amendment burden of contribution limits is minimal is appalling with regard to the character of the burden and simply wrong with regard to the magnitude of the burden.

As for the character of the First Amendment burden, the restrictions are imposed precisely because contributions will (and can only) be used for core political speech—supporting or opposing candidates or otherwise discussing elections and voting. That makes the restrictions content-based and hence among the most offensive types of speech restrictions. And, as Justice Scalia persuasively argues, there is every reason to consider the BCRA’s restrictions as viewpoint-discriminatory as well, because even though they are facially viewpoint neutral, they have the predictable—and very likely intended—effect of favoring incumbents and disproportionately burdening those who would challenge existing elected officials.¹⁸⁶ Such content and viewpoint discrimination is more than sufficient to characterize the First Amendment burden here as significant. Even a trifling speech tax discriminatorily imposed on messages critical of the government would be subject to the strictest scrutiny regardless of the quantity of speech, if any, likely to be suppressed.

That the restrictions apply to the raising, rather than the spending, of money for speech does not diminish their offensive nature. In *Buckley* the Court suggested that a contribution limit is merely an “indirect[]” burden on campaign speech, “making it relatively more difficult for candidates to raise large amounts of money.”¹⁸⁷ *McConnell* echoed that sentiment, arguing that contribution limits “merely . . . require candidates and political committees to raise funds from a greater number of persons.”¹⁸⁸ But there is nothing *indirect* in conditioning the amount of a candidate’s (or political party’s) expression on his ability to raise funds from a greater number of persons, and there is nothing *indirect* in forcing people who would otherwise contribute larger amounts to expend such funds themselves rather than in association with their preferred messenger. Rather, allowing

¹⁸⁶See *id.* at 720–21 (Scalia, J., concurring and dissenting); see also *id.* at 780 n.2 (Rehnquist, C.J., concurring and dissenting) (claimed threat of corruption to gain contributions to fund reelection campaign no more likely than Congress creating campaign finance restrictions that “favor its Members’ reelection chances”).

¹⁸⁷*Buckley v. Valeo*, 424 U.S. 1, 26 n.27 (1976).

¹⁸⁸*McConnell*, 124 S. Ct. at 656 (citation omitted).

speakers to raise and pool money only by bits and pieces, and doing so precisely *because* such money will be used for political speech, directly offends the First Amendment and burdens speech and association.¹⁸⁹

Whether direct or indirect, however, the burden also is substantial, particularly where the aggregation of large amounts of money is essential for access to “expensive modes of communication” such as television, radio, and other mass media, which are “indispensable instruments of effective political speech.”¹⁹⁰ Requiring a gardener to water a garden with a thimble rather than a pitcher plainly would burden the production of flowers, and so too with contribution limits and the production of speech. Contribution limits necessarily increase the time and expense a candidate must devote to raising money to support speech and divert such time and expense from the campaign speech itself. And they also increase the burden on contributors, who must search for less effective means of combining in support of a shared message. Those contributors are likely to find numerous alternative avenues of expressive association foreclosed in the name of preventing “circumvention.”

As the “minimal burden” rationale is extended to expenditure limits, the above errors are compounded. The content-based nature of the expenditure limits is even more apparent in the various limits on electioneering communications and express advocacy, and the prohibition on corporate and union speech is as direct as can be.¹⁹¹ Furthermore, the justifications for restricting corporate and union

¹⁸⁹That the burden is imposed *because* the money is targeted for speech is what distinguishes contribution restrictions from general income taxes or similar financial burdens that have only an incidental effect on speech and thus fall within the analysis of *United States v. O'Brien*, 391 U.S. 367, 377 (1968). But a restriction specifically on raising money for speech and imposed precisely because such money will be spent on speech—*i.e.*, because of its communicative impact—fails the *O'Brien* test. *Id.* at 382.

¹⁹⁰Buckley, 424 U.S. at 19.

¹⁹¹Corporations and unions have the option of forming PACs for such political speech, but that does not alter the character of the burden, which remains substantial in magnitude as well. First, raising funds for a PAC is no minor matter compared with spending a corporation’s or union’s own funds. Second, the amount that individuals can contribute to PACs is tightly regulated. Third, unlike with national parties and elected officials, the pool from which a corporation or union can solicit PAC funds is extremely limited, thus significantly constraining the total funds a corporation has available for the core political speech restricted by the BCRA.

speech do nothing to mitigate the First Amendment burden, and in some instances actually compound the burden.

Corporations and unions are vital associations based on the shared interests of their members—assuming voluntary purchase of stock by shareholders or payment of membership dues by workers.¹⁹² That their interests are largely economic does nothing to diminish their constitutional status, and given the federal government’s pervasive manipulation of the economy, speech from such interests would seem especially important. Political advocacy and speech driven by economic perspectives are likely universal and, in any event, are no different than speech motivated by less worldly concerns.¹⁹³

Claiming that corporations possess an “unfair” advantage because they have characteristics that allow them to accumulate significant capital is no more and no less than a complaint that they are wealthy and that it is somehow wrong to use wealth to support political speech. Furthermore, the very characteristics that help corporations raise money—the liquidity of stock markets and the limited financial risks of stock ownership—also facilitate widespread and voluntary association of all types of citizens through the medium of a corporation.

Insofar as the perceived unfairness of corporate wealth being used for contributions or expenditures is premised on the notion that corporations can generate speech and influence out of proportion to the strength or support behind their ideas and hence beyond the amount of speech and influence they *ought* to have, that is the same criticism leveled against all large contributions, regardless of source,

¹⁹²The claim that corporate and union speech is somehow not a valid reflection of the interests of the shareholders or members, *FEC v. MCFL*, 479 U.S. 236, 258, 260 (1986), simply ignores that such agency issues are inherent to all associations and do not diminish the speech interests involved so long as association is voluntary. All shareholders and members are free to remain affiliated or not, and do so knowing that the entities are authorized to speak in furtherance of the collective economic interests that they represent. That individuals may have other interests that conflict with their economic interests in a corporation or union—and hence conflict with a corporation’s or union’s speech—simply puts them to the choice of which interests are more important and whether to continue or terminate their association. That same choice is presented by all forms of association.

¹⁹³Cf. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (“it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters”).

and begs the same question of what is the “proper” amount of speech and influence. Once again, the notion that the wealthy have too great a voice is not only inadequate as a justification for lesser scrutiny of corporate speech restrictions, it is also a reason itself to invalidate such restrictions. Though failing in its application, *Buckley* at least correctly recognized that government may not “restrict the speech of some elements of our society in order to enhance the relative voice of others.”¹⁹⁴ That, said *Buckley*, is “wholly foreign to the First Amendment,” the protections of which “cannot properly be made to depend on a person’s financial ability to engage in public discussion.”¹⁹⁵ Manipulating different groups’ relative ability to speak “is a decidedly fatal objective.”¹⁹⁶

McConnell’s application of lenient judicial scrutiny, initially reserved for contribution restrictions but now extended to many expenditure restrictions, is a particularly treacherous example of the slippery slope at work. The desire to uphold contribution restrictions was so powerful in *Buckley* that it caused the Court to create false dichotomies between contributions and expenditures and between different types of expenditures in order to reach that result. Given the absence of sustainable logic supporting those dichotomies, they were bound to break down.

Instead of finding the common feature of contributions and expenditures to be the resulting speech to which each was integrally and necessarily tied, and hence abandoning *Buckley*’s holding as to contributions, the Court went the other way and extended lower scrutiny to more expenditures as well, all in the name of preventing circumvention of the *result* it sought to sustain. Given that *Buckley*’s already dubious reasoning regarding contributions is incoherent as applied to expenditures, the Court was forced to take the further step of ignoring the speech that comes from both contributions and expenditures and instead focusing on the facts that money is the common resource that creates such speech and that gratitude and political influence are what can result. It is the connection between money and influence, and a disregard for the core political speech

¹⁹⁴424 U.S. at 48–49.

¹⁹⁵*Id.*

¹⁹⁶*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995).

involved, that the Court then uses to characterize even expenditures as a mere means to circumvent contribution limits.¹⁹⁷

But while it is correct that both contributions and expenditures can influence elections (though the direction of such influence is often unclear), and can ultimately lead to candidate gratitude if the influence is favorable, ignoring the speech component hides the reason for such influence and potential gratitude. A candidate’s appreciation for contributions or expenditures stems not from their monetary value as such, but from their speech value—from the favorable political speech that results and that might persuade voters to elect or reelect the candidate. Money thus serves to amplify and expand the reach of the candidate’s and his supporters’ message, either as directly expressed by the candidate using contributions or as expressed by his supporters through their expenditures on speech that conveys the same message, praises the candidate’s virtues, or criticizes the contrary views of his opponents. It is not money that buys influence, it is effective speech. Money only buys speech, which will be effective or not depending on whether voters are persuaded by the message.¹⁹⁸

As with many rights, exercising the right to speak almost always costs money, especially if the speaker intends to reach a large audience. The right to speak thus necessarily encompasses the right to pay for speech or the distribution of speech, just as the right to counsel encompasses the right to hire a lawyer, and the right to free exercise of religion includes the right to contribute to a church. In each of those cases the expenditure or contribution is protected not because “money is speech,” or “money is a lawyer,” or “money is

¹⁹⁷It is precisely the distorted view of expenditures for political speech as a means of circumventing contribution limits that has driven the BCRA’s further restrictions on electioneering communications. Using contribution limits to bootstrap still further restrictions on speech that might influence candidates caused the unprincipled exception to swallow the First Amendment rule. Even assuming that contributions to candidates are themselves suspect means of gaining influence, effective political speech and association used to influence government are not means of *circumventing* restrictions on supposedly improper influence. Rather, they are the constitutionally favored alternatives for achieving desired ends *without* force, bribery, or other improper means.

¹⁹⁸In the Court’s terms, it is speech, not money, that is the “mother’s milk” of politics. Money is merely the milkman (or the breast pump, if one wants to keep the metaphor precise.)

religion,” but rather because such targeted use of money is part of the *exercise* of the right to speak, to counsel, or to free exercise of religion. But in no case is such targeted money simply “money” in the generic sense. It is necessarily an integral component of the protected activity and should be analyzed as such. The *McConnell* decision not only ignores that fact, it also goes out of its way to mask it, to devastating effect on the First Amendment.

B. McConnell Both Misconceives and Vastly Expands the Interests in Preventing Corruption

A second major theme of the *McConnell* opinion is its characterization of the government’s interest in preventing corruption and the appearance of corruption. By characterizing as corrupt not merely such classic wrongdoing as bribery but also virtually any use of concentrated wealth—including its use for *speech*—to influence the political process, the Court deems “corrupt” several fundamental aspects of our constitutional democracy.

The underlying principle inherent in the Court’s view of corruption as “undue” influence is an implied baseline of rough equality of political influence that echoes the one-man-one-vote concept but that is totally alien to the First Amendment’s protection of the *freedom* of speech. Such forced equality can only be reached by replacing freedom of speech with the rationing of political speech, which is precisely what the BCRA has begun to do and precisely what the Court endorses. Individuals and groups may generate or support only as much speech—and thus gain only as much gratitude, influence, and access—as they are respectively “due.” And while the rationing of political speech is not yet complete—Congress has yet to turn its full attention toward the speech and association of wealthy individuals or toward speech seeking to influence the legislative process apart from elections—the opportunities for “undue” influence from concentrated wealth used for speech exist in those contexts as well. The logic of *McConnell* gives Congress all the encouragement it needs to go further.

Following on the path marked by *Buckley* and its progeny, the *McConnell* decision defines corruption as the supposedly undue influence and access gained through the employment of large personal and aggregated wealth in the political process.¹⁹⁹ But whereas

¹⁹⁹124 S. Ct. 619, 660 (2004).

Buckley had focused on a government interest in preventing “the real or imagined *coercive* influence of large financial contributions on candidates’ positions and on their actions if elected to office,”²⁰⁰ *McConnell* seems to extend that notion to even non-coercive candidate “gratitude” that might create, or be imagined to create, undue influence with or access to elected officials.²⁰¹ The asserted interest in preventing “corruption,” however, fails to differentiate between acceptable and unacceptable causes of officeholder gratitude and between proper and improper influence on government officials. Without a principled basis for drawing such a distinction, the label “corruption” simply devolves into a generic epithet addressed at any political influence that is contrary to the often unspoken preferences of the person applying the label. There are two essential problems with the Court’s conception of corruption.

First, given that the contributions and expenditures said to foster gratitude—and hence influence and access—all achieve that effect only through the mechanism of speech seeking to persuade the public to vote for a candidate, they are intrinsic elements of our constitutional democracy. The resulting tendency of elected officials to be grateful, responsive and accessible to those who aided them in persuading voters is nothing more sinister than democratic responsiveness.

The basis for a distinction between proper and improper influence over elected officials necessarily starts with the recognition that democracy in general, and elections in particular, are, by definition, an exchange between candidates and the citizens that elect them. Every candidate for office necessarily says to voters: “Give me your vote, give me a job as your representative, and I will give you something in return.” Different candidates offer different things in exchange for being given their jobs. Some promise to lower taxes, some to provide more social services; some promise to fight for abortion rights, others to fight against abortion; some promise to bring more public works to their jurisdiction, others to reduce “pork” in politics. And every voter says to the candidates in turn: “Give me the policies and laws that I desire and I will give you my vote for a job as my elected representative. Deny me the official actions

²⁰⁰ 424 U.S. at 1, 25 (1998) (emphasis added).

²⁰¹ 124 S. Ct. at 666.

I desire and I will vote you out on your ear.” The exchange of elective office for desired official conduct, and the influence over government officials that such an exchange necessarily creates, are the essence of representative democracy and neither the exchange nor the influence can be characterized as improper without indicting our democratic system as a whole.²⁰²

Our constitutional democracy also relies on the core premise, endorsed through the First Amendment, that politicians and the public will be influenced not merely by voting in a vacuum, but also by the political speech of competing interest groups and individuals. The influence exerted through the exchange of supportive political speech for desired official action is an inherent and desirable element of a democracy that relies upon speech and elections, rather than force, to change its laws and leaders.²⁰³ To indict the exchange of political support for official action would brand virtually *all* behavior by elected officials as corrupt and would condemn the Constitution itself.²⁰⁴

²⁰²Even where the exchange of elective office support for desired public policy is expressed in terms of an explicit *quid pro quo*—vote for me and I promise to do X; we will vote for you if you promise to do X—there still is nothing *improper* about that exchange. In fact, the exchange is precisely what we want and expect it to be. Voters are entitled to vote for candidates responsive to their desires, and candidates are entitled to respond to those desires through lawful official action.

²⁰³Just as with votes, speech is routinely exchanged for the promise and performance of official conduct. A newspaper that says it will only endorse a candidate who pledges to vote for/against abortion rights, a citizens’ group that says it will endorse a candidate that pledges not to raise taxes, and a candidate that promises to increase law enforcement in exchange for the endorsement of a respected anti-crime advocate. All are engaged in the same exchange embodied in the election process itself.

²⁰⁴The suggestion that soft-money contributions do not involve *genuine* political support because the largest soft-money donors gave to both major parties makes an unwarranted logical leap and is a far cry from demonstrating corruption. Large donors may still show a slight preference in the relative amounts they give to the two parties—does a particular donor prefer free-market Republicans or protectionist Democrats?—and may believe that giving both parties sufficient political support is an important means to allow them to keep each other in check. Avoiding dominance by either party could serve to minimize the ability of extremists in the dominant party to further their agenda. Such a checks-and-balances approach to political donations is a perfectly sensible, and genuine, basis for political support. Furthermore, the largest donors may well have a strong preference for the established two-party system, find much in common between the major parties, and prefer *either* of the traditional alternatives to the third-party prospects that have cropped up in recent years. Donations to both major parties thus may be equally or better explained by an ideological preference for American centrism (in either current flavor) to the occasional varieties of populism.

If the most blatant description of the democratic political exchange—votes and support for official action—is necessarily embodied in the very notion of democracy, then so too is the Court’s fuzzier version. Focusing on a politician’s vague gratitude for political support mediated by contributions and expenditures for speech changes nothing. Politicians *should* be grateful for the political support that helps them get their message to the public and thus potentially helps them get elected if the message is appealing. They *should* be grateful not only to the large groups of constituents who voted for them but also to the individuals and groups that helped persuade those constituents to vote. That, once again, is merely democratic responsiveness.

The fact that the political support comes in the form of money either contributed for campaign speech or expended directly on political speech does not change the equation in the slightest. The *only* use of campaign contributions or expenditures is to generate political speech and the *only* value to a candidate stems from the prospect that the resulting speech will persuade voters and help the candidate get elected. Contributions that assist the candidate in getting elected through the entirely proper mechanism of generating political speech are no different than endorsements or votes. Because the assistance is ultimately channeled through the protected medium of political speech, it cannot be deemed corrupt.

In contrast to the fundamental democratic exchange of electoral support for desired official conduct, genuine corruption is limited to the exchange of official action for some private advantage. Bribery is the archetype of such corruption: “I’ll give you cash for your *personal* benefit if you vote for an upcoming bill.” But the element of private gain inherent in the concept of corruption does not and cannot include whatever personal satisfaction and benefit come from being elected to public office. And if the benefit of actually being elected cannot be deemed corrupting, neither can the potential electoral benefit from speech or association in support of a candidate be deemed corrupting. While such speech, like votes themselves, may well be exchanged for official action, such exchanges are the essence of representative democracy and may not be redefined, *ipse dixit*, as “corrupt.”

Given the Court’s historic difficulty in identifying any actual or genuine corruption, it continued to rely heavily on the further interest in avoiding a public perception of unproven corruption—the

mere “appearance” of corruption—that might shake public confidence in our democratic institutions.²⁰⁵ But mere public suspicions or misperceptions that the operation of free speech is somehow corrupt are no bases for ignoring the constitutional scheme. Rather, the proper answer to such misperceptions is either more speech, the election of candidates voluntarily practicing the public’s notion of virtue, or, ultimately, a constitutional amendment if the existing system cannot hold the public’s confidence. In no event are public misperceptions a justification for distorting constitutional provisions set out precisely to resist even the strongly held desires of a temporal majority.

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.²⁰⁶

Maintaining the public’s esteem may be desirable for a government deserving of such esteem, but it is not a sufficient basis for avoiding constitutional requirements.²⁰⁷ If the danger from exposing or imagining a corrupt government is so great, then there should be ample incentive for more speech to counter such danger. And if more speech is insufficient to mitigate the public’s contempt and distrust for the government, and to restore its confidence in our constitutional system, then presumably there will be sufficient support and motivation for a constitutional amendment.

The second problem with the approach in *McConnell* is its notion that while some unspecified degree of influence may be appropriate, influence gained through the application of concentrated wealth for political speech is improper or “undue.” But simply characterizing

²⁰⁵ *McConnell*, 124 S. Ct. at 660.

²⁰⁶ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

²⁰⁷ The government surely could not forbid speech accusing elected officials of corruption because they kowtow to political polls or favor the interests of their home states, regardless whether such criticism caused the public to *believe*—rightly or wrongly—that elected officials were corrupt.

the influence of expressive activities as “undue” is merely an epithet, not an explanation. Many things have an influence—indeed, even a coercive influence—on candidates’ positions and actions, yet few would be considered improper.²⁰⁸ The mere size or force of influence thus is not the measure of whether such influence is corrupt.

What ultimately seems to be the crux of the Court’s notion of “undue” influence is influence substantially out of proportion to the somehow valid characteristics of the person or group wielding it. Any indictment of disproportional influence, however, begs the question of how much influence any given person or group *should* have in some idealized construction of the world. While each person has only one *vote*, and hence has limited influence in that sense, we have never imagined that the *speech* of each person or group should be equally influential or that the views of politicians should be based solely on broad opinion polls.

Speech having unequal influence on the public, and hence unequal value to candidates, comes in many shapes—speech by the media, speech by celebrities, speech by religious leaders, and speech by the economically successful. Whether through differences in access, quantity, or credibility, the impact of speech necessarily will vary.²⁰⁹ But the falsely egalitarian notion that the speech of persons and groups *ought* to have influence in proportion to the voting strength of the speakers, and the assumption that speech in fact will have influence solely in relation to its quantity, represent fundamental misunderstandings of the principles and predicates of the First Amendment.

The *freedom* of speech means that the quantity and substance of speech *ought* to be determined by private choices, not government

²⁰⁸Public opinion is an obvious example of something that might “coercively” influence a candidate—at least any candidate that takes seriously his or her role as a representative of constituents and who has any interest in being elected or re-elected. Vehement public opposition to a particular policy would exert a tremendously coercive influence on candidates considering such a policy. Yet that influence could not be deemed corrupt.

²⁰⁹And if an elected official is more responsive to those constituents that have a greater impact in persuading the public to vote for him or her, that is not corruption—that is simply politics. Disparities in influence are the inevitable consequence of differences in wealth, intelligence, popularity, motivation, and a hundred other factors. Such disparities might be addressed through means such as education, economic opportunity, and the like, but they can never be eliminated in a free society.

control. And the First Amendment assumes that, so long as government stays out of the way, the eventual influence of speech will turn on its substance, not its quantity or initial popularity, and that more speech is superior to restricted speech. Through such assumptions the First Amendment places its trust in the public, not government, to sort it all out in the end. Judge Learned Hand reminds us that the First Amendment “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.”²¹⁰

Even if disparities in actual or apparent influence are troubling, the government may not attempt to equalize the political strength of different elements in society by restricting the voice of some to enhance the voice of others.²¹¹ The First Amendment uniquely and especially condones political influence mediated through speech and forbids government manipulation of that aspect of the political process. However imperfect or worrisome a system built on such influence may be, it is the system the Constitution established, it is better than the alternatives, and it may not simply be redefined as “corrupt” in order to avoid the First Amendment.

The exchange of political speech and association for desired official action embodies representative government. To have a coherent definition of corruption, the concept must be limited to official action exchanged for some *private* advantage, not simply for the very public advantage of getting elected. Any alleged interest based on contrary assumptions is not compelling, is not substantial, and is not even valid.

V. Conclusion

The two major themes of the *McConnell* decision discussed in this article—the dissociation of political speech from the money that funds it and the characterization of disproportionate influence and access as corrupt even when such influence is mediated through speech—look to be grim harbingers for First Amendment protection of political speech. Gone is the quaint notion of a “free” marketplace

²¹⁰United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff’d*, 326 U.S. 1 (1945).

²¹¹Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).