

POLITICS AND THE ONLINE MARKETPLACE:  
A FIRST AMENDMENT ANALYSIS OF CAMPAIGN FINANCE LAWS TO  
INTERNET COMMUNICATIONS

By

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To my husband and my mother for their love and support.

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Abstract of Dissertation Presented to the Graduate School  
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COMMUNICATIONS**

By

Courtney Anne Barclay

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Given the increasing importance of the Internet in political communication, it is imperative to determine whether the current legal structure intended to protect the integrity of the electoral system also adequately protects free speech. The Federal Election Commission adopted rules to regulate paid online, mediated political activities under the campaign finance laws. Although these have not been litigated, previous case law analyzing other campaign finance laws and regulations under First Amendment challenges will provide a guide for evaluating the current regulations.

Because campaign finance laws act as a restriction on speech, these laws must be analyzed under a First Amendment framework. To begin this analysis, it is necessary to engage in a historical overview of the evolution of campaign finance laws, which has largely followed a self-governance theory of the First Amendment. Analyzing the existing U.S. Supreme Court jurisprudence that has resolved First Amendment free speech challenges to the campaign finance laws provides insight into how the Internet may be factored into the current paradigm for campaign finance reform—or whether the Internet may contribute to a shift in controlling paradigms.

Additionally, the Federal Election Commission's approach to regulating online campaign communications must be explicated through its advisory opinions and rulemakings. This analysis is the foundation for determining whether the current Federal Election Commission regulations adequately protect First Amendment values. My study focused on the First Amendment impacts of campaign finance laws and whether the current constitutional framework should be used for campaign speech on the Internet in the same that it is used for the traditional mass media. My dissertation did not focus on the effectiveness of the laws in preventing corruption except as it relates to the discussion of the balance between that interest and the First Amendment.

## CHAPTER 1

### CAMPAIGN FINANCE REFORM AND THE FIRST AMENDMENT

#### **Introduction**

It's logically impossible both to honor the First Amendment and to regulate campaign finance effectively. We can do one or the other—but not both.<sup>1</sup>

The First Amendment to the United States Constitution protects against government infringement of freedom of speech and of the press.<sup>2</sup> This protection is not absolute. The government and the Supreme Court have carved out the ability to regulate speech when there is either a compelling reason to curtail it or a need for reasonable restriction for public safety and order. In this process of defining the right of freedom of speech, the Court has identified a hierarchy of protected speech, at the top of which lies political speech. This is the “core” of the First Amendment because free exchange of political information and opinions is necessary for effective self-government.

However, Congress and the U.S. Supreme Court have identified the protection of the integrity of the American political system as a countervailing interest to a free exchange of information under the First Amendment. Gallup polls have shown that the American people support campaign finance reform. In 2007, “fixing the government” was one of the top ten priorities of the American public. More than half of respondents supported campaign finance reform as a tool to effect that “fix.”<sup>3</sup> In 2002, 72 percent of respondents favored new campaign finance laws.<sup>4</sup> In 2000 61 percent of respondents thought it was more important to “protect

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<sup>1</sup> Robert J. Samuelson, *The Washington Post*.

<sup>2</sup> U.S. Const., amend. 1. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

<sup>3</sup> Gallup Poll, *The People’s Priorities: Gallup’s Top 10* (Nov. 2, 2007).

<sup>4</sup> Jeffrey M. Jones, *Seven in 10 Support New Campaign Finance Legislation*, *Gallup News Service*, Feb. 13, 2002.

government from excessive influence by campaign contributors” than to protect “the freedom of individuals to support political candidates and parties financially.”<sup>5</sup>

Campaign finance laws regulate the flow of money in federal campaigns with the aim to protect against corruption by excessive contributions. The formula of campaign finance laws has changed over the years when new challenges arose. Federal campaign finance laws originated in the early twentieth century when corporate donations to presidential campaigns were a transparent method of “curry[ing] influence” with the administration.<sup>6</sup> In response, Congress prohibited corporations from donating to federal political campaigns.<sup>7</sup> In the following half century, Congress created disclosure requirements, spending limits, and contribution limits to ward off further threats of corruption.<sup>8</sup> With the advent of television and the Watergate era, Congress embarked on its first attempt at a comprehensive reform, resulting in the Federal Election Campaign Act of 1971.<sup>9</sup> Since then, the major amendments have been aimed at closing loopholes left open by this law. The most substantial of these was the Bipartisan Campaign Reform Act of 2002 (BCRA).

Current campaign finance law consists of four basic provisions: 1) limitations on contributions to candidates by individuals and political committees; 2) requirements that candidate committees, party committees and political action committees disclose money raised and spent; 3) requirements that individuals disclose any independent expenditures; and 4)

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<sup>5</sup> Gallup Poll, Campaign Financing (Oct. 18, 2000).

<sup>6</sup> See, e.g., Justin A. Nelson, *The Supply and Demand of Campaign Finance Reform*, 100 Colum. L. Rev. 524, 533 (2000). For a brief summary of major campaign finance reform efforts, see *infra* p. 21. For a more in depth history of campaign finance law in the United States, see *infra* Chapter 3.

<sup>7</sup> Tillman Act, ch. 420, 34 Stat. 864 (1907).

<sup>8</sup> Nelson, *supra* note X at 535-537.

<sup>9</sup> Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431–455).

prohibitions against contributions and expenditures by corporations, labor organizations, federal government contractors, and foreign nationals. The law defines contribution as “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.”<sup>10</sup> Independent expenditures are “an expenditure by a person—(A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.”<sup>11</sup> Despite these regulations, campaign spending has continued to rise at considerable rates.

The Federal Election Commission reported that campaign spending by candidates for the U.S. House of Representatives before the 2006 general election totaled more than \$540 million, an increase of 30 percent from spending in 2004.<sup>12</sup> The spending in 2004 was 11 percent higher than in 2002.<sup>13</sup> The Center for Public Integrity reported that the average campaign spending for a House race in 2004 was eleven times more than the average spending in 1976—the first election cycle operated under the Federal Election Campaign Act amendments.<sup>14</sup>

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<sup>10</sup> 2 U.S. CODE § 431(8) 2006.

<sup>11</sup> 2 U.S. CODE §431(17) 2006.

<sup>12</sup> FEC, Congressional Campaigns Spend \$966 Million Through Mid October, Press Release (Nov. 2, 2006).

<sup>13</sup> FEC, Congressional Campaigns Spend \$711 Million Through Pre-Election Period, Press Release (Oct. 28, 2004).

<sup>14</sup> Sandy Bergo, Center for Public Integrity, A Wealth of Advice: Nearly \$2 billion flowed through consultants in 2003-2004 federal elections, <http://www.publicintegrity.org/consultants/report.aspx?aid=533> (last visited Sept. 27, 2007).

As Congress has attempted to equalize the public debate during elections, it seems to apply the First Amendment as articulated by Alexander Meiklejohn.<sup>15</sup> Meiklejohn stressed that the free speech imagined by the First Amendment was necessary for an informed electorate. But as an informed electorate was the goal, Meiklejohn suggested that it was the different viewpoints that must all be heard, not necessarily all of the speakers supporting each viewpoint. By placing limits on individuals' ability to give money and gifts to candidates and other restrictions on election speech, Congress has attempted to lower the magnitude of a few voices so that others may be heard. These efforts are aimed at keeping corruption and undue influence out of the electoral process. This has served as a constant value as Congress has repeatedly expanded the reach of campaign finance laws to address new circumventions of the limits and restrictions.<sup>16</sup>

Most recently, the Internet has prompted a reevaluation of the current campaign finance laws and how they are interpreted and applied by the Federal Elections Commission (FEC). The Internet provides a unique medium for campaign communications, allowing instantaneous, global communications. This new tool magnifies the reach and impact of campaign communications.

### **Campaign Communications Online**

Since the Internet emerged, its use by candidates and voters has increased and diversified.<sup>17</sup> The Internet was first used as a campaign tool during the 1996 elections, but it was Jesse Ventura's 1998 bid for Michigan governor that first demonstrated the "power of the

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<sup>15</sup> See ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (Harper & Brothers 1960) (1948).

<sup>16</sup> See *infra* Chapter 3 discussing the development of television and radio as new methods of communication in campaigns and the resulting increase in campaign expenditures.

<sup>17</sup> See, e.g., Election 2006 Online, The Pew Research Center, January 17, 2007; Ira Teinowitz, *Note to Politicians: It's Not the Spending, Stupid*, ADVERTISING AGE, vol. 79, p. 17 (Mar. 17, 2008).

Internet.”<sup>18</sup> In federal elections, the 2004 election cycle was the first evidence of effective use of the Internet.<sup>19</sup> Candidates continued to evolve campaign styles in the 2006 mid-term election and the 2008 election cycles to further incorporate the Internet.<sup>20</sup> A study by the Pew Internet & American Life Project examined the use of the Internet in the 2008 presidential election found that Internet has both increased and diversified since the 2004 election cycle.<sup>21</sup> Citizens also have used the Internet for everything from newsgathering to participating in the political debate. This participation has increased dramatically since the 2002 federal mid-term elections.<sup>22</sup> This section will further explicate the expanding application of the Internet to political campaigns.

In 2008, 40 percent of all adults surveyed by the Pew Foundation look to the Internet for political news. This is a 9 percent increase from 2004, and an 18 percent increase from 2000.<sup>23</sup> The public also has looked to the Internet for more in-depth information about a candidate or an issue. This has included watching political videos online (e.g., campaign commercials, online candidate speeches, online interviews), reading position papers, and reading transcripts of candidate speeches.<sup>24</sup>

The public is not using the Internet merely as a source of information, but also as a tool to engage in the political conversation. More than 60 percent of Internet users use email or text

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<sup>18</sup> Alexis Wright, The Power of the Internet, Center for the Study of American Government, John Hopkins University (Nov. 2004), available at <http://www.campaignsonline.org/reports/1104.html>.

<sup>19</sup> *Id.* Although John McCain initiated an online following during the 2000 primary elections, the general election candidates largely ignored the medium. *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> The internet and the 2008 election, Pew Internet & American Life Project, June 15, 2008.

<sup>22</sup> Deborah Fallows, *Election Newsounds Speak Up: Newspaper, TV and Internet Fans Tell How and Why They Differ*, PEW INTERNET & AMERICAN LIFE PROJECT (Feb. 6, 2007); see also BurstMedia, Likely Presidential Voters Already Using the Internet, Online Insights (March 2007).

<sup>23</sup> The Internet and the 2008 Election, *supra* note 20.

<sup>24</sup> *Id.*

messaging to take part in the political process. Users subscribe to email listservs to receive political information related to a campaign. Users also use email to urge family and friends to support a candidate or to provide information on the campaigns. Text messaging is a growing factor in political communication.<sup>25</sup>

Social networking sites also are increasing in popularity for engaging in the political conversation. Sites such as Facebook and MySpace have allowed users to find out information about their friends political interests, get campaign information, join political groups, and track the activities of a candidate. Social networking sites have so far appealed more to adults 18 to 29 years old. More than 30 percent of those adults had used a social networking site for political reasons.<sup>26</sup>

Despite the growing online usage for political activities, the public is wary of the impact of the Internet. A majority believed that the Internet is “full of misinformation and propaganda that too many voters believe is accurate.”<sup>27</sup> Less than 30 percent believed that the Internet helped them “feel more personally connected to [their] candidate or campaign of choice.”<sup>28</sup> A minority of Internet users believed that the Internet had any impact on their level of involvement in the 2008 campaign.<sup>29</sup> However, the positive perception of the Internet’s impact on political involvement increased when younger users were segmented out of the total survey respondents.<sup>30</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* 60 percent of respondents agreed with this statement.

<sup>28</sup> *Id.* 67 percent of respondents disagreed with this statement.

<sup>29</sup> *Id.* 74 percent of respondents disagreed with the statement: I would not be as involved in this campaign as much if it weren’t for the internet.

<sup>30</sup> *Id.*

Comments to the FEC in 2005 reported that Internet users took “active roles in supporting policies and candidates.”<sup>31</sup> According to the FEC report, the Internet activities included posting commentary about federal candidates, creating and distributing advertisements on the Internet, fundraising, and providing hyperlinks to campaign Web sites.<sup>32</sup>

In addition to being a forum for discussion, the Internet has evolved into a primary source of information. In 2004, 63 million people used the Internet as a source of campaign news, and 18 percent of Americans reported that the Internet was their leading source of information during the campaign.<sup>33</sup> Nearly 25 percent of all online political news consumers said their use of the Internet for political news and activities encouraged them to vote.<sup>34</sup> Nearly 30 percent of online political news consumers said the online information helped them decide to vote for or against a particular candidate.<sup>35</sup> A majority of online political news consumers said the Internet was important in providing information that helped them decide how to vote.<sup>36</sup>

Moreover, the Internet was perceived as improving not only the quantity of information available, but also the quality of the information.<sup>37</sup> People used the Internet to gather campaign information for a variety of reasons. Nearly 60 percent used online sources because it was

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<sup>31</sup> Proposed Rulemaking: Internet Communications, 70 Fed. Reg. 16967 (Apr. 4, 2005) (to amend 11 CFR Parts 100, 110, 114).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* This number was more than twice than what it was in the 2000 election when 30 million people reported using the Internet as a primary source of campaign news. *Id.*

<sup>34</sup> Lee Rainie, Micheal Cornfield, and John Horrigan, THE INTERNET AND CAMPAIGN 2004, The Pew Research Center (March 6, 2005), available at <http://www.pewinternet.org>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* Forty-nine percent of all Internet users and 56 percent of all online political news consumers said that the Internet had raised the overall quality of “public debate” during an election. However, 5 percent said the Internet lowered the quality of debate during elections; 36 percent said the Internet made no difference to the quality of debate. *Id.*

convenient. Seven percent believed that the Internet provided more targeted news sources—those that reflected their specific interests and values. But nearly 45 percent used the Internet to gather election information because the Internet offered better or different information. Thirty-three percent believed that traditional news sources, such as daily newspapers and network news, did not provide the information they wanted. Eleven percent believed that the information on the Internet was information not available from other sources.<sup>38</sup> A major source of information on the Internet was political blogs. Eleven million people relied on blogs as their primary source of information during the 2004 presidential race.<sup>39</sup> Six million people joined in online political discussions and chat groups.

The activities that Internet users engage in include researching the candidates, using emails to send and receive political jokes, discuss the election, find voting location and time information, and donating money. In 2004, 34 million people used the internet to research political candidates' positions on certain issues, and 20 million Internet users researched voting records online.<sup>40</sup> Nearly 20 million Internet users took online polls to indicate their voting preferences.<sup>41</sup> Sixteen million Internet users used online sources to find out about the endorsements and ratings of candidates by particular organizations.<sup>42</sup>

Fundraising was also heavily affected by the Internet; four million users used the Internet to donate money to a candidate. The Howard Dean campaign raised more than \$20 million through the Internet, which totaled 40 percent of the campaign's total funds. The Kerry campaign

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

raised more than \$80 million dollars online. The Bush campaign, although not targeting Internet donors as heavily as the Democrat candidates, managed to raise \$14 million. More importantly than the totals amassed is that most of the donations were less than \$200 each. This indicates that the Internet is the medium that can vitiate the influence of ‘big money’ donors in political campaigns.<sup>43</sup>

The public does not have a monopoly on increased Internet usage. In a 2006 survey of U.S. Senatorial candidates, the Bivings Group found that the use of the Internet had “grown dramatically.”<sup>44</sup> However, the study found that candidates were not utilizing all the multimedia tools that the Internet supports.<sup>45</sup> For example, only 23 percent of the candidates used blogging during the campaign. More candidates included audio and video on their websites.<sup>46</sup> These were mostly repurposed television and radio ads rather than materials created for the Internet.<sup>47</sup>

In the 2008 presidential race, the campaigns are using the Internet to create local events, to push for grassroots campaigns, to deliver key messages, and to fundraise. Senator Barack Obama raised “tens of millions of dollars from 1.7 million donors.”<sup>48</sup> Obama also reported that he has “more than 5 million campaign e-mail contacts and nearly 2 million online friends on social networks like Facebook and Twitter.” Senator John McCain, the Republican nominee for president, has not adopted technology as quickly or completely as his opponent. “McCain is

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<sup>43</sup> *Id.*

<sup>44</sup> The Bivings Group, The Internet’s Role in Political Campaigns: Utilization by 2006 United States Senatorial Candidates (May 23, 2006).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Chuck Raasch, In 2008 election, the Internet goes local, local, local, USAToday.com (June 27, 2008).

‘aware’ of the Internet, but ‘just because he doesn’t have as many Facebook supporters doesn’t mean he doesn’t have as many active supporters.’<sup>49</sup>

The Internet has played an increasingly important role in federal elections. As candidates, political organizations, and citizens began using the Internet to advocate for the election of a candidate, the FEC began considering the regulation of this medium under the Federal Election Campaign Act. The approach that the FEC adopted to applying the FECA to the Internet went through several permutations, but made gained national attention after Congress passed the Bipartisan Campaign Reform Act of 2002, which failed to mention the Internet anywhere in the legislation.

The Federal Election Commission (FEC) specifically exempted Internet communications from campaign finance regulation when it first adopted rules for the Bipartisan Campaign Reform Act (BCRA). In the face of such an influential medium, two congressmen who had sponsored the BCRA filed for a declaratory judgment that the FEC’s exclusion of the Internet was unlawful.<sup>50</sup> The U.S. District Court for the District of Columbia agreed with the congressmen, finding that the FEC could not exempt *all* Internet communications.<sup>51</sup> In response to the district court’s ruling the FEC undertook a new rulemaking in 2005 that would create a regulatory scheme for Internet communications consistent with the functionality of current campaign finance laws. In 2006, the FEC adopted regulations that brought Internet speech paid

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<sup>49</sup> *Id.*

<sup>50</sup> Complaint for Declaratory and Injunctive Relief, Shays v. Federal Election Commission, 337 F. Supp. 2d 28 (D.D.C. 2004) (No. 1:02-cv-01984-CKK).

<sup>51</sup> Shays, 337 F. Supp. 2d 28.

to appear on a third party's website under the purview of the FEC, but explicitly left the majority of Internet speech unregulated.<sup>52</sup>

### Purpose

Given the increasing importance of the Internet in political communication, it is imperative to determine whether the current legal structure intended to protect the integrity of the electoral system also adequately protects free speech. The FEC adopted rules to regulate paid online, mediated political activities under the campaign finance laws. Although these have not yet been litigated, previous case law analyzing other campaign finance laws and regulations under First Amendment challenges will provide a guide for evaluating the current regulations.

This dissertation will analyze the FEC rulemaking that defined the Internet as a medium regulated under campaign finance laws and regulations under a First Amendment analysis. This study will include a history of campaign finance laws, which has largely followed a self-governance theory of the First Amendment. Analyzing the existing U.S. Supreme Court jurisprudence that has resolved First Amendment free speech challenges to these laws will provide insight into how the Internet may be factored into the current paradigm for campaign finance—or whether the Internet may contribute to a shift in controlling paradigms. Using this case analysis, this dissertation seeks to determine whether the current FEC regulations adequately protect First Amendment values. Additionally, this dissertation will consider proposals for change to these rules and to the underlying principles of campaign finance laws. This study focuses on the First Amendment impacts of campaign finance laws and whether the current constitutional framework should be used for campaign speech on the Internet. This

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<sup>52</sup> Internet Communications, 71 Fed. Reg. 18589 (Apr. 12, 2006) (codified at 11 CFR Parts 100, 110, 114).

dissertation will not focus on the effectiveness of the laws in preventing corruption except as it relates to the discussion of the balance between that interest and the First Amendment.

## Background

At this point, this study requires a brief history and explanation of campaign finance laws. In the formative years of the U.S. political system, party supporters were placed in government jobs with the expectation that they would contribute to party activities, including campaigns.<sup>53</sup> Congress first began legislating campaign funding banning naval yard employees from contributing to campaigns.<sup>54</sup> As Congress continued to regulate federal employment, corporate contributions became a larger part of the political process.<sup>55</sup> In the beginning of the 20th century, Congress continued to expand regulations of campaign finance. With the Tillman Act of 1907, Congress banned all corporate donations and gifts to federal candidates.

Although these first efforts regulated pieces of campaign financing, the first comprehensive campaign finance reform was not passed until 1971.<sup>56</sup> Until the Federal Election Campaign Act of 1971, the campaign finance laws consisted of piecemeal legislation regulating disclosure and contributions—direct payments or gifts of money. Since 1971, Congress has continued to amend the statute to address new concerns and close loopholes in the law as they appeared.

One of the most significant campaign finance cases followed amendments to the law in 1974. The U.S. Supreme Court, in *Buckley v. Valeo*, determined the constitutionality of limiting

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<sup>53</sup> THE CAMPAIGN LEGAL CENTER, CAMPAIGN FINANCE GUIDE 5 (2004). This guide was written by Trevor Potter, Daniel R. Ortiz, and Anthony Corrado.

<sup>54</sup> *Id.* See also 1868 Naval Appropriations Act.

<sup>55</sup> *Id.*

<sup>56</sup> Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431–455 (hereinafter FECA).

campaign spending by candidates, parties and individuals.<sup>57</sup> The most recent overhaul was the Bipartisan Campaign Reform Act of 2002, which was aimed at closing loopholes that left elections vulnerable to unintended influence.<sup>58</sup> This section will provide a brief overview of each of these major developments in the law.

### **Federal Election Campaign Act**

In 1971, Congress passed the Federal Election Campaign Act of 1971 (FECA) in order “to promote fair practices in the conduct of election campaigns for Federal political offices.”<sup>59</sup> FECA placed limits on contributions and expenditures—indirect gifts of value—by corporations and candidates in connection with federal election.<sup>60</sup> However, FECA did not establish an independent overseeing agency, and the 1972 elections led to more than 7,000 reports to the Department of Justice of campaign finance abuse, contributing to significant amendments in the FECA in 1974.

The 1974 amendments established the Federal Election Commission (FEC) as the sole agency responsible for overseeing the administrative functions of the campaign finance system.<sup>61</sup> Congress also enacted limits on both contributions and expenditures that applied to federal candidates and political committees. The constitutionality of the 1974 amendments was challenged by Senators James L. Buckley and Eugene McCarthy.

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<sup>57</sup> 424 U.S. 1 (1976).

<sup>58</sup> Pub. L. No. 107-155 (2002) (codified at 2 U.S.C. § 431, et seq.).

<sup>59</sup> See FECA.

<sup>60</sup> *Id.* The definitions of contributions and expenditures will be further explicated in Chapter 3.

<sup>61</sup> Federal Election Campaign Act Amendments of 1974, 2 U.S.C. §§ 431 et seq. Individuals’ contributions were limited to \$1,000 per candidate and \$25,000 in total contributions; expenditures were limited to \$1,000 per candidate per year. *Id.*

## **Determining Constitutionality: *Buckley v. Valeo***

In response to challenges to the constitutionality of the 1974 amendments of FECA, the Supreme Court of the United States issued a per curiam opinion in *Buckley v. Valeo*<sup>62</sup> that has shaped all subsequent campaign finance reform. The constitutionality of FECA was challenged by individuals and groups that included federal officeholders, candidates and political organizations.<sup>63</sup> Among other issues, the petitioners challenged the limits on campaign spending, contributions, and expenditures, as well as disclosure requirements.

In its opinion, the Court attempted to fence in campaign finance reform, in efforts to protect First Amendment rights. The Buckley Court held that limits on candidates' expenditures and "independent" expenditures by individuals and groups were unconstitutional and infringed on First Amendment rights.<sup>64</sup> However, limiting contributions and "coordinated expenditures," the Court found, satisfied the compelling government interest in reducing corruption of the election system.<sup>65</sup>

## **Bipartisan Campaign Finance Reform Act**

Nearly thirty years passed before Congress again significantly amended the Federal Election Campaign Act (FECA). In 2002, Congress passed the Bipartisan Campaign Reform Act (BCRA), which was aimed to "close" some of the loopholes that the FECA left open.<sup>66</sup>

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<sup>62</sup> 424 U.S. 1 (1976).

<sup>63</sup> 424 U.S. 7-8. "Plaintiffs included a candidate for the Presidency of the United States, a United States Senator who is a candidate for re-election, a potential contributor, the Committee for a Constitutional Presidency – McCarthy '76, the Conservative Party of the State of New York, the Mississippi Republican Party, the Libertarian Party, New York Civil Liberties Union, Inc., the American Conservative Union, the Conservative Victory Fund, and Human Events, Inc." *Id.*

<sup>64</sup> *Id.* 43.

<sup>65</sup> *Id.* at 58-59.

<sup>66</sup> BCRA, *supra* note 37. On February 13, 2002, the House of Representatives passed H.R. 2356. The bill was then adopted by the Senate on March 18 and 20, 2002. President George W. Bush signed H.R. 2356 into law on March

Specifically, the sponsors of the bill, Senators John McCain and Russell Feingold, expressed concern with the unregulated soft money donations—money raised outside the scope of FECA.<sup>67</sup> These type of donations had allowed contributors to bypass the FECA’s contribution and expenditure limits for years.<sup>68</sup>

In an effort to close these loopholes, BCRA prohibited national parties, federal candidates, and federal officeholders from raising or spending soft money.<sup>69</sup> BCRA also prohibited corporations and labor unions from using soft money to fund broadcasts that mention a federal candidate or officeholder within 30 days of a primary and 60 days of a general election. Further, BCRA required state and local parties to pay for federal election activities with hard money. Disclosure of electioneering communications that exceed \$10,000 a year must be disclosed to the FEC under the new BCRA requirements. BCRA also increased the dollar limit on contributions from individuals to candidate and political parties.<sup>70</sup>

In the BCRA, Congress defined two terms key to this discussion. “Public communication” was defined as “any communication by means of broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.”<sup>71</sup> And “general campaign activity” was defined as “a campaign activity that promotes a political party and does

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27, 2002. BCRA is also known as the McCain-Feingold Act, after its Senate co-sponsors, Senators John McCain and Russell Feingold.

<sup>67</sup> These funds were generally raised for grass-roots campaigns and party-specific activities (i.e., bumper stickers, get-out-the-vote drives, and committee publications with three or more candidates listed). For a further discussion of soft money, see *infra* Ch. 3.

<sup>68</sup> BCRA, *supra* note 8. See also ANTHONY CORRADO, MONEY AND POLITICS: A HISTORY OF FEDERAL CAMPAIGN FINANCE LAW CAMPAIGN FINANCE REFORM: A SOURCEBOOK (Washington, DC: Brookings Institution Press 1997).

<sup>69</sup> See Corrado, *supra* note 67.

<sup>70</sup> BCRA, *supra* note .

<sup>71</sup> *Id.*

not promote a candidate or non-Federal candidate.”<sup>72</sup> These definitions are important because they are used to determine the scope of all regulations mandated by the BCRA.<sup>73</sup>

## Literature Review

Scholars have since the inception of the Federal Election Campaign Act more than thirty years ago have been intrigued by the complexities of campaign finance laws. Many scholars have focused on the explicating the definitions and specific applications. Others have concentrated on the relationship between campaign finance laws and the First Amendment. Most recently, scholars have addressed how campaign finance laws can, and should, be applied to the Internet.

### Campaign Finance Laws and History

Scholars have attempted to explain the complex paradigm of current campaign finance laws. This includes explicating the concepts central to campaign finance, examining the history of campaign finance laws, and exploring the future of campaign finance reforms.<sup>74</sup> Scholars have used a range of perspectives in considering these issues, including historical, normative, and critical. The focus of these articles range from a broad, comprehensive description of the current state of campaign finance law to a directed analysis of a particular court opinion or a particular statutory provision. The result is a fairly well-established area of study that offers a general understanding of the relative laws and issues.

Some scholars have focused on illustrating the key elements of campaign finance law, clarifying a sometimes convoluted legal concept. For example, Burt Neuborne offered a “Guide

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<sup>72</sup> *Id.*

<sup>73</sup> BCRA was challenged and upheld in *McConnell v. Federal Elections Committee*, 540 U.S. 93 (2003).

<sup>74</sup> See, e.g., COMMISSION ON CAMPAIGN FINANCE REFORM, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, DOLLARS AND DEMOCRACY: A BLUEPRINT FOR CAMPAIGN FINACE REFORM (2000); Burt Neuborne, *One Dollar-One Vote: A Preface to Debating Campaign Finance Reform*, 37 WASHBURN L.J. 1 (1997).

for the Busy Reader” that listed the principles and corollaries inherent in the campaign finance debates.<sup>75</sup> This guide reviewed the values at issue in campaign finance debates: political autonomy, preventing corruption, and enhancing political equality.<sup>76</sup> Neuborne continued his guide with a critical analysis of the 1976 Supreme Court decision that determined the constitutionality of the first comprehensive campaign finance reform law and its progeny.<sup>77</sup>

Other scholars exploring the area of campaign finance also have focused on the pivotal 1976 Supreme Court decision in *Buckley v. Valeo*, which determined the constitutionality of the Federal Election Campaign Act of 1971.<sup>78</sup> Robert Bauer offered an overview of the status of campaign finance reform, focusing on the weaknesses of the *Buckley v. Valeo* opinion.<sup>79</sup> Bauer argued that *Buckley’s* rationale that focused on corruption as the overriding government interest has become the “principle obstruction” for FEC actions because courts have strengthened the requirement of showing corruption so that the FEC seemingly must prove actual corruption—an almost impossible task—before being able to enforce the laws.<sup>80</sup> Bauer further noted that the courts have become unwilling to accept the FEC’s judgment as to the existence or appearance of corruption,<sup>81</sup> thereby preventing effective enforcement.

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<sup>75</sup> Neuborne, *supra* note 73.

<sup>76</sup> *Id.* at 1-8. Neuborne also identified ancillary values: efficiency, flexibility, spontaneity, increasing voter knowledge, enhancing quality of representation, restoring confidence in democracy, and improving the quality of democratic disclosure. *Id.* at 8-11.

<sup>77</sup> *Id.* at 12-26 (discussing *Buckley v. Valeo*, 424 U.S. 1 (1976) and subsequent cases).

<sup>78</sup> Robert F. Bauer, *The Demise of Reform: Buckley v. Valeo, the Courts, and the “Corruption Rationale*, 10 STAN. L. & POL’Y REV. 11 (1998); Bradley A. Smith, *Campaign Finance Reform: Searching for Corruption in all the Wrong Places*, 2003 CATO SUP. CT. REV. 187 (2003).

<sup>79</sup> Robert F. Bauer, *The Demise of Reform: Buckley v. Valeo, the Courts, and the “Corruption Rationale*, 10 STAN. L. & POL’Y REV. 11 (1998).

<sup>80</sup> *Id.* at 13.

<sup>81</sup> *Id.* at 14.

Bradley Smith also offered commentary on the required “corruption” standard that issued from *Buckley*.<sup>82</sup> Smith offered a brief history of campaign finance laws leading to the *Buckley* decision. Smith argued that the Court, in its treatment of the corruption requirement, created three important impacts on the enforcement of campaign finance laws. First, *Buckley*, by rejecting the argument that political equality was a sufficiently compelling interest to limit the First Amendment via contribution and expenditure limits, requires all reform advocates to “shoehorn their arguments into the guise of anti-corruption arguments.”<sup>83</sup> Second, by creating a legal standard that contributions may be banned, the Court “opened the door” for regulations that ban or limit activity that does not have the potential for corruption, merely because it comes in the form of a contribution ban.<sup>84</sup> “Finally, by failing to more precisely define the evil to be prevented, it opened up the system to manipulation.”<sup>85</sup>

Smith further argued that these flaws resulting from the reasoning in *Buckley* have promoted the trend toward regulating political speech more than the Court intended, no longer limiting regulation to monetary contributions.<sup>86</sup> For example, Smith pointed out that BCRA placed more extensive limits on the amount that groups like the Sierra Club could spend on broadcast advertisements than on print and billboard advertisements.<sup>87</sup>

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<sup>82</sup> Smith, *supra* note 77.

<sup>83</sup> *Id.* at 201.

<sup>84</sup> *Id.* at 209.

<sup>85</sup> *Id.* at 201.

<sup>86</sup> *Id.* at 222.

<sup>87</sup> *Id.* at 221.

While recognizing the flaws in the *Buckley* decision—such as the corruption justification effects—Eugene Volokh argued that the Supreme Court got it “basically right.”<sup>88</sup> Volokh argued that in striking down expenditure limits, the Court protected the freedom of *effective* speech. These limits would have prohibited an individual from using any number of media to speak out on political issues; Volokh mentions advertisements in major newspapers and message T-shirts as two examples of speech that would be curtailed under the FECA expenditure limits.<sup>89</sup> Volokh supported the Court’s finding that contribution limits are constitutional.<sup>90</sup> Volokh argued that 1) contributions are analogous to content-neutral speech limitations because the limits are not relative to the content of communication purchased with contribution funds; 2) the limits serve an important government interest in preventing corruption; 3) the restrictions are not overbroad because any money given to a candidate could be a bribe; and 4) the restrictions on contributions leaves other avenues of communication.<sup>91</sup> Further, Volokh reasons that whereas many scholars criticize the *Buckley* Court for focusing on corruption rather than political equality as the prevailing governmental interest, the Court’s decision to ignore the equality rationale was consistent with First Amendment jurisprudence. Volokh cites the ever-present classroom analogy. Advocates of basing campaign finance reform on equalizing the debate, compare it to a classroom, in which government constantly controls speech.<sup>92</sup> Volokh notes that this is acceptable in the forum of a classroom or a courtroom, but not when the government is acting as the sovereign.<sup>93</sup> Each individual is supposed to be autonomous and free to decide how to express

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<sup>88</sup> Eugene Volokh, *Why Buckley v. Valeo is Basically Right*, 34 ARIZ. ST. L.J. 1095 (2002).

<sup>89</sup> *Id.* at 1095-96.

<sup>90</sup> *Id.* at 1102.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1097.

him or herself. Allowing the government to restrict speech in favor of equality of speech would “dramatically restrict First Amendment protection across the board.”<sup>94</sup>

The *Harvard Law Review* published an unauthored analysis of the current Supreme Court’s review of the *Buckley* opinion in its 2006 *Randall v. Sorrell* decision.<sup>95</sup> The analysis noted the negative response that *Buckley* received since it was issued.<sup>96</sup> Although the Court’s decisions between *Buckley* and *Randall* had indicated a potential for overturning the long-standing decision, the majority in *Randall* affirmed *Buckley*. Yet the *Harvard Law Review* noted that in discussing the First Amendment challenges to campaign finance laws, the *Randall* decision focused more on protecting the integrity of the electoral process than protecting the individual’s right of free speech, which was more prevalent in *Buckley*. This signaled a shift in the Court’s rhetoric that the law review found “more sensible.”<sup>97</sup>

The law review article argued that this shift to “an institutional or structural approach”—focusing on the integrity of the political system—would protect the courts from “undermin[ing] the very interests they believe themselves to be securing.”<sup>98</sup> This structural approach would favor judicial deference to the legislature when there is no risk of “such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge.”<sup>99</sup> However, the Court—despite its eloquent phrasing—was unwilling to exercise broad legislative deference in

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<sup>93</sup> *Id.* at 1097.

<sup>94</sup> *Id.* at 1098.

<sup>95</sup> *Leading Cases, Constitutional Law, Freedom of Speech and Expression, Campaign Finance Regulation*, 120 HARV. L. REV. 283 (2006).

<sup>96</sup> *Id.* at 283.

<sup>97</sup> *Id.* at 284.

<sup>98</sup> *Id.* at 289 (quoting Richard H. Pildes, *The Supreme Court, 2003 Term --Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 54 (2004)).

<sup>99</sup> *Id.* at 290 (quoting Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)).

*Randall*.<sup>100</sup> And thus, while the Court purported to support a structural standard, it continued to utilize the individual right's standard applied in *Buckley*. The Court held that the limits in the challenged law “constrained the ability of ‘challengers to run competitive campaigns,’ threatened individual voters' right to association, and imprecisely determined the impact of volunteer activity.”<sup>101</sup> The law review concluded that although the Court’s rhetoric indicated a positive change to a structural approach, the Court did not follow through in its decision; the approach in *Buckley* was affirmed.<sup>102</sup>

Some scholars, instead of focusing on particular aspects of the *Buckley* decision, used the pivotal decision and a historical approach toward campaign finance reform to explore the evolution of campaign finance laws.<sup>103</sup> For example, Justin Nelson explored the trends that have emerged through the years since the inception of campaign finance reform.<sup>104</sup> Nelson argued that previous reform attempts have failed because they have focused too heavily on limiting the amount of money being infused into the political system, and that efforts should instead focus on decreasing politicians’ need for private money.<sup>105</sup> Farrah Nawaz also used the history of

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<sup>100</sup> *Id.* at 292.

<sup>101</sup> *Id.* at 285-86.

<sup>102</sup> *Id.* at 287.

<sup>103</sup> See, e.g., Justin A. Nelson, *The Supply and Demand of Campaign Finance Reform*, 100 COLUM. L. REV. 524 (2000); Farah Nawaz, *Campaign Finance Reform “Dollar for Votes” – The American Democracy*, 14 ST. JOHN’S J. LEGAL COMMENT. 155 (1999).

<sup>104</sup> Nelson, *supra* note 102.

<sup>105</sup> *Id.* at 524.

campaign finance reform laws to illustrate the need for change.<sup>106</sup> Nawaz analyzed various

reform proposals that were being considered at the time of the article in 1999.<sup>107</sup>

In addition to using the history of campaign finance laws to evaluate the current system and proposals for change, scholars have examined the possible future configurations of campaign finance laws.<sup>108</sup> For example, Richard Briffault identified concerns that he believed needed to be addressed in future amendments to the campaign finance laws.<sup>109</sup> Briffault contended that the FEC should be restructured or replaced to ensure effective enactment and enforcement of campaign finance provisions.<sup>110</sup> Briffault further called for the increase in available public funding for campaigns. “[T]he next goal for campaign finance reform must be not simply the prevention of corruption but the promotion of competition. That will require a new commitment of public resources to the funding of federal election campaigns.”<sup>111</sup>

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<sup>106</sup> See Nawaz, *supra* note 102.

<sup>107</sup> Nawaz at 175. For other examples of using a historical approach to analyze proposed reforms, see Kenneth J. Levit, *Campaign Finance Reform and the Return of Buckley v. Valeo*, 103 YALE L.J. 469 (1993); and Kevin P. Sullivan, *But These Times Were Supposed to be a Changing . . . How Congress Should Regulate 527 Groups in Light of the Bipartisan Campaign Reform Act, the Vote for Change Tour, and the 2004 Presidential Election*, 16 SETON HALL J. SPORTS & ENT. L. 130 (2006).

<sup>108</sup> See, e.g., Richard Briffault, *The Future of Reform: Campaign Finance After the Bipartisan Campaign Reform Act of 2002*, 34 ARIZ. ST. L.J. 1179 (2002); Rep. Harold E. Ford, Jr. & Jason M. Levien, *A New Horizon for Campaign Finance Reform*, 37 HARV. J. ON LEGIS. 307 (2000); Cecil C. Kuhne, III, *Rethinking Campaign-Finance Reform: The Pressing Need for Deregulation and Disclosure*, 38 J. MARSHALL L. REV. 633 (2004); William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U. L. REV. 335 (2000); Audra L. Wassom, *Campaign Finance Legislation: McCain-Feingold/Shay-Meehan—The Political Equality Rationale and Beyond*, 55 SMU L. REV. 1781 (2002).

<sup>109</sup> Richard Briffault, *The Future of Reform: Campaign Finance After the Bipartisan Campaign Reform Act of 2002*, 34 ARIZ. ST. L.J. 1179 (2002). This article was written prior to the Supreme Court decision in *McConnell v. FEC*, which upheld the Bipartisan Campaign Reform Act of 2002. See 540 U.S. 93 (2003).

<sup>110</sup> Briffault, *supra* note 108, at 1211.

<sup>111</sup> *Id.* at 1216. See also, Wassom, *supra* note 107 at 1782 (heralding public financing as the “ultimate goal” of campaign finance legislation).

## Campaign Finance and the First Amendment

Scholars studying campaign finance laws have expended great effort devoted to the relationship between these laws and the First Amendment. Some argue that the current paradigm of First Amendment analysis in campaign finance cases needs to be adjusted or abandoned for a more flexible one; others argue that the paradigm shift is already occurring.

One theme commonly found in First Amendment analysis of campaign finance laws is that the Court needs to deviate from its current approach because First Amendment rights are being denied.<sup>112</sup> Scholars have suggested various new methods for analysis, but most suggest a focus on the process of campaigns and elections—as suggested by the rhetoric in the *Randall* opinion—rather than on individuals. Others suggest that the current approach of focusing First Amendment challenges on the interests of individuals implicitly supports disparate treatment of minority voters and candidates, allowing wealth to overshadow the viewpoint of the poor.<sup>113</sup>

Owen Fiss advocated a change in jurisprudence from the traditional approach that placed autonomy as the ultimate value in First Amendment scrutiny, to a structural model that would place as the ultimate principle enhancing the public debate.<sup>114</sup> Fiss argued that “[w]hen the state acts to enhance the quality of public debate, we should recognize its actions as consistent with the first amendment.”<sup>115</sup> Fiss noted that although expanding the debate might be the intent of

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<sup>112</sup> See Richard A. Davey, Jr., “Buckleying” the System: Is Meaningful Campaign Finance Reform Possible Under Reigning First Amendment Jurisprudence?, 34 GONZ. L. REV. 509 (1999); Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Bradley A. Smith, *The Sirens’ Song: Campaign Finance Regulation and the First Amendment*, 6 J.L. & POL’Y 1 (1997); Stephanie A. Sprague, *The Restriction of Political Associational Rights Under Current Campaign Finance Reform First Amendment Jurisprudence*, 40 NEW ENG. L. REV. 947 (2006).

<sup>113</sup> See, e.g., Sprague, *supra* note 111; Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73 (2004) (contending that the disparities in wealth cause disparity in citizen participation).

<sup>114</sup> Fiss, *supra* note 111 at 1415.

<sup>115</sup> *Id.* at 1416.

campaign finance laws, sometimes laws may have contrary results, restricting the debate by “narrow[ing] the choices and information available to the public.”<sup>116</sup> However, he maintained that by adhering to the traditional approach of the First Amendment, the Court “ignores the manifold ways that the state participates in the construction of all things social and how contemporary social structure will, if left to itself, skew public debate.” The structural approach would, on the whole, allow for the necessity of restricting some speech “in order to enhance the relative voice of others.”<sup>117</sup>

Another scholar, Stephanie Sprague, argued that the current campaign finance laws disparately deny First Amendment association rights to the poor.<sup>118</sup> Sprague contended that unlimited spending promotes wealthy candidates, and deemphasizes the efforts of poor citizens to support a candidate that would represent their interests.<sup>119</sup> Further, Sprague argued that unlimited spending “has worked against the goals of the First Amendment” because candidates without the ability to raise the large sums of money now necessary for a successful campaign are left out—those voices and views are not included in the public debate.<sup>120</sup> Sprague recognized that the right of free speech supported by unlimited spending is important. However, she noted that this right must be balanced against the rights of political association and that the courts must not “simply ignore one in favor of another.”<sup>121</sup> Other aspects of First Amendment protections also may be threatened because further amendments to the campaign finance regime will

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<sup>116</sup> *Id.* at 1418.

<sup>117</sup> *Id.* at 1425.

<sup>118</sup> Sprague, *supra* note 111 at 973. See also Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73 (2004) (contending that the disparities in wealth cause disparity in citizen participation).

<sup>119</sup> Sprague, *supra* note 111 at 973

<sup>120</sup> *Id.* at 976.

<sup>121</sup> *Id.* at 981.

constantly require more amendments to close the loopholes, thus ever endangering the First Amendment rights.<sup>122</sup>

It has been suggested that the approach the Supreme Court used to examine the First Amendment obstacles to campaign finance laws began to change with the 2006 decision in *Randall v. Sorrell*.<sup>123</sup> Robert Bauer explored Justice Stephen Breyer's theory of active liberty, which focuses on participatory self-government.<sup>124</sup> Bauer noted that this theory, focusing on the effectiveness of government, calls for significant deference to the legislature—even where the First Amendment is triggered. He paraphrased Justice Breyer as having said that “the First Amendment should not bar legislation that regulates speech for sound reasons based on the evaluation of facts.”<sup>125</sup> Bauer analyzed Breyer’s theory as the Justice had applied it to campaign finance cases, finding that Breyer would defer to the legislature in determining the balance between electoral integrity and free speech. Breyer believed that in election law, the “legislators possess an experience and understanding not available to judges” and so are the expert and should not “be denied the tools for finding a solution.”<sup>126</sup>

In 2007, Rachel Gage identified Breyer’s theory of active liberty as an emerging trend in jurisprudence when she analyzed all of the Supreme Court’s campaign finance decisions to discern the Court’s approaches in balancing the need for campaign finance reform and the First

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<sup>122</sup> See Smith, *supra* note 111 at 34-42.

<sup>123</sup> See Robert F. Bauer, *Democracy as Problem Solving: Campaign Finance and Justice Breyer’s Theory of “Active Liberty,”* 60 U. MIAMI L. REV. 237 (2006); Lillian R. Bevier, *Full of Surprises—And More to Come: Randall v. Sorrell, the First Amendment, and Campaign Finance Regulation,* 2006 SUP. CT. REV. 173; Rachel Gage, *Randall v. Sorrell: Campaign-Finance Regulation and the First Amendment as a Facilitator of Democracy*, 5 FIRST AMEND. L. REV. 341 (2007).

<sup>124</sup> See Bauer, *supra* note 122.

<sup>125</sup> *Id.* at 246.

<sup>126</sup> *Id.* at 244.

Amendment.<sup>127</sup> Gage argued that the decision in *Randall v. Sorrell*<sup>128</sup> indicated a paradigm shift in campaign finance jurisprudence.<sup>129</sup> Gage concluded that the paradigm shift, illustrated in Justice Breyer's concurrence, could create problems because Breyer suggested that individual speech could be curtailed to further the institutional goals of the electoral system; that is, the individual free speech rights of campaign contributions are "subordinate to the larger First Amendment interest of protecting the integrity of the political process in order to achieve more perfect self-government."<sup>130</sup> Gage argued that this two-sided First Amendment results in courts deciding—with little or no guidance—"the point at which the restriction on the individual fails to serve society's interests, and also to determine when an individual deserves protection despite the fact that such protection may be at odds with democratic self-governance.". <sup>131</sup>

Some scholars, rather than suggest a new paradigm for campaign finance reform, have focused on revitalizing the use of strict scrutiny in determining the constitutionality of campaign finance laws.<sup>132</sup> In 2000, Michael Marcucci justified the use of strict scrutiny<sup>133</sup> through analogies to the Supreme Court's election law jurisprudence.<sup>134</sup> Because *any* campaign finance law structure will impact the candidates that run and thereby voter choices, these laws may be

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<sup>127</sup> See Gage, *supra* note 111.

<sup>128</sup> 126 S. Ct. 2479 (2006).

<sup>129</sup> Gage, *supra* note 111, at 358-61.

<sup>130</sup> *Id.* at 361-364.

<sup>131</sup> *Id.* at 364.

<sup>132</sup> See Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045 (1985); Michael Marcucci, *Speech or Not: Applying Election Law Strict Scrutiny to Campaign Finance Regulations*, 42 B.C.L. REV. 173 (2000).

<sup>133</sup> "The standard applied to suspect classifications (such as race) in equal-protection analysis and to fundamental rights (such as voting rights) in due-process analysis. Under strict scrutiny, the state must establish that it has a compelling interest that justifies and necessitates the law in question." BLACK'S LAW DICTIONARY.

<sup>134</sup> Marcucci, *supra* note 131 at 176.

analyzed similarly to ballot access laws—to which the Supreme Court has always applied strict scrutiny.<sup>135</sup> The Court applies a balancing test when examining ballot access laws, inquiring into the alleged injury to constitutional rights and the competing governmental interests.<sup>136</sup> Marcucci concludes that applying this same type of balancing test to campaign finance laws would not render all such laws unconstitutional, but would require the courts to find a compelling governmental interest to justify the laws.<sup>137</sup>

In 1985, Lillian BeVier defended strict scrutiny when she refuted common arguments put forth by reformers who demanded a relaxed standard of review for First Amendment challenges to campaign finance laws. Bevier argued that: 1) that the First Amendment requires the restriction of political speech inherent in campaign finance laws and 2) that the courts should defer to the Congress in the decisions that may subordinate free speech rights to the interest in equality in the electoral process. BeVier argued that the First Amendment does not guarantee outputs—equality of views—but rather it prohibits government intrusion of inputs—expression entering the marketplace.<sup>138</sup> BeVier further argued that even if the output view was accepted, that does not preclude a strict scrutiny standard in the courts. This is particularly true in cases involving campaign finance legislation because the legislators have incentives to craft legislation to favor incumbents.<sup>139</sup>

Other scholars have argued that when courts engage in a balancing test—strict scrutiny or not—to determine the constitutionality of campaign finance laws, they should not limit their

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<sup>135</sup> *Id.* at 190.

<sup>136</sup> *Id.* at 191.

<sup>137</sup> *Id.* at 197.

<sup>138</sup> BeVier, *supra* note 131 at 1071.

<sup>139</sup> *Id.* at 1075-1081.

inquiry for a compelling government interest to corruption.<sup>140</sup> Vincent Blasi contended that campaign finance laws that limit spending should not be presumed unconstitutional when they are justified with the objective of protecting candidates' time.<sup>141</sup> Time protection is aimed at encouraging candidates who are already elected officials<sup>142</sup> to spend more of their time governing, and less time fundraising.<sup>143</sup> Blasi contended that in so far as the limits on contributions and expenditures promote time-protection, they are content-neutral.<sup>144</sup> He advanced this rationale as a protection of the electoral system by redirecting how candidates spend their time. He posited that such changes may increase voter confidence and encourage citizen engagement in the public debate—thereby enhancing public discourse through a limitation on certain speech.<sup>145</sup>

Eric Freedman contended that a political system that relies on the use of money risks exaggerating the voice of wealthy citizens and candidates while excluding those without sufficient funds.<sup>146</sup> Freedman argues that it should be the equality of political influence that is the foundation of campaign finance law. He stated that because political systems are most generally justified by a social contract theory, private financing should be examined from the perspective of John Rawls' *A Theory of Justice*.<sup>147</sup> Rawls' theory proposed that all laws should be created

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<sup>140</sup> Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994).

<sup>141</sup> *Id.* at 1324.

<sup>142</sup> These could be incumbents or officials seeking a different office.

<sup>143</sup> Blasi, *supra* note 139 at 1282-83.

<sup>144</sup> *Id.* at 1292.

<sup>145</sup> *Id.* at 1324.

<sup>146</sup> Eric Freedman, *Campaign Finance and the First Amendment: A Rawlsian Analysis*, 85 IOWA L. REV. 1065 (2000).

<sup>147</sup> *Id.* at 1070.

from the “original position”—when decisions are made no one knows “his class position or social status, nor … his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like.”<sup>148</sup> Rawls’ contended that through this device, society would arrive at laws that were fair and just.<sup>149</sup> Freedman, through this analysis, concluded that the current contribution limits are too high and that a voucher system for public financing would be more effective at furthering the interest in political equality of speech.<sup>150</sup>

Scholars also have argued that the collective interests and the individual interests must both be considered—a careful balancing test is the key to the coexistence of First Amendment principles and effective campaign finance laws.<sup>151</sup> Gary Stein, in arguing that campaign finance reforms can be effective without fatally infringing on First Amendment values asked, “of what enduring constitutional value is unlimited political speech if its practical effect in contemporary society is to corrupt the elective process it was intended to enhance?”<sup>152</sup> Stein concluded that absolute First Amendment principles cannot be used to determine campaign finance reforms. There must be a balance between the individual interest in unlimited speech and the collective interest in maintaining integrity of the electoral system.<sup>153</sup>

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<sup>148</sup> See JOHN RAWLS, THEORY OF JUSTICE (Belknap Press 2005) (1971).

<sup>149</sup> *Id.*

<sup>150</sup> Freedman, *supra* note 145 at 1087-94.

<sup>151</sup> See Gary S. Stein, *The First Amendment and Campaign Finance Reform: A Timely Reconciliation*, 44 RUTGERS L. REV. 743 (1992).

<sup>152</sup> *Id.* at 795.

<sup>153</sup> *Id.* at 795.

## Campaign Finance and the Internet

As the debates surrounding campaign finance laws continued, the Internet emerged as a new medium for political campaigns in the 2000 election cycle.<sup>154</sup> As the Internet has increased in perceived importance to campaigns, scholars have increasingly explored how campaign finance laws could, and should, be applied to the Internet. Scholars have recognized that the Internet creates unique problems for the enforcement of current campaign finance laws. For example, one scholar questioned how the Internet would affect the campaign finance media exemption—if an individual creates a website, does that individual become a media entity?<sup>155</sup> Additionally, the Internet can intensify the disparity of participation among the poor and minority citizens, as Internet users generally “control more financial resources than other Americans” and nearly 25 percent of all Americans are “offline.”<sup>156</sup> Scholars have examined the challenges that the Internet poses to application and enforcement of campaign finance laws, and proposed some solutions and amendments.

Michael Kang studied the evolution in political communications from “broadcasting to narrowcasting,” taking note of the unique challenges this shift poses to campaign finance laws.<sup>157</sup> Kang noted that television was, in recent years, the prominent feature in any campaign or political communication strategy; in parallel, broadcast was the prominent feature in campaign finance laws.<sup>158</sup> Beginning in the 2004 election cycle though, candidates recognized that

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<sup>154</sup> Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 110 (2004).

<sup>155</sup> Volokh, *supra* note 87 at 1097.

<sup>156</sup> Overton, *supra* note 153 at 110.

<sup>157</sup> Michael S. Kang, *From Broadcasting to Narrowcasting: The Emerging Challenge for Campaign Finance Law*, 73 GEO. WASH. L. REV. 1070 (2005).

<sup>158</sup> *Id.* at 1073.

broadcasting was not as effective as it once was. Kang observed that campaigns began to turn to narrowcasting—“movement toward individualized, face-to-face campaigning.”<sup>159</sup> Campaigns began using web-based databanks to target specific messages to specific audiences, and they increased face-to-face time with voters—often working in cooperation with organizations not legally affiliated with the campaign.<sup>160</sup> Kang contended that many of these activities escaped the construction of current campaign finance legislation.<sup>161</sup> Although he did not dwell on Internet activities, the concerns Kang raised in relation to these narrowcasting activities translate to online campaign activities. Kang concluded that narrowcasting is a “strategic modernization of old-fashioned politics that not only is difficult to regulate legally, but also makes the case for reform less compelling.”<sup>162</sup>

In 2006, shortly before the FEC adopted regulations governing Internet campaign communications, Lindsey Powell proposed strategies for applying the federal campaign finance laws online.<sup>163</sup> Powell outlined which provisions of the laws and existing regulations should be applied to the Internet and which exemptions also should apply.<sup>164</sup> She created a cost-analysis structure to determine the value of Internet communications, disputing the idea that most online activities would fall outside of the scope of FECA due to the low-cost nature.<sup>165</sup>

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<sup>159</sup> *Id.* at 1075. Kang explained this shift as a result of cable fragmenting the television audience. *Id.* at 1074.

<sup>160</sup> *Id.* at 1075-84, 1087.

<sup>161</sup> *Id.* at 1084.

<sup>162</sup> *Id.* at 1095.

<sup>163</sup> Lindey Powell, *Getting Around Circumvention: A Propoosal for Taking FECA Online*, 58 STAN. L. REV. 1499 (2006).

<sup>164</sup> *Id.* at 1513-1524.

<sup>165</sup> *Id.* at 1513-1515.

Specifically, Powell determined that paid online advertisements should be regulated in the same manner as paid advertisements in other media.<sup>166</sup> Further, Powell identified two exemptions to campaign finance laws that also should be carried to the online forum: individual volunteers and the media.<sup>167</sup> Powell ultimately focused on the issue of disclaimers online; she raised a concern that is unique to the Internet—or at least exacerbated by the Internet—hidden associations between online actors and candidates or political parties. Powell contended that traditional media forestalls much of this concern by the existence of codes of ethics and professional standards.<sup>168</sup> In order to dispel concern over this issue, Powell proposed a mandatory disclosure provision that would require “an online actor receiving money from a political source to state conspicuously on her website that she has a paid relationship with that source. Reference to the fact of payment would have to be explicit.”<sup>169</sup>

Powell did contemplate the impact this requirement would have on online speech. She recognized a risk of decreased speech due to the fact that many online actors, bloggers specifically, are unpaid.<sup>170</sup> This mandatory disclosure could be a deterrent for online actors to accept payment—leaving the online speech up to mostly “hobby” bloggers.<sup>171</sup> However, Powell doubted that the disclosure requirement would in fact deter bloggers from accepting payment as most bloggers do not pretend to be nonpartisan. In fact, Powell ponders whether a disclosure requirement would actually lend more credibility to blogs and thus increase the demand for

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<sup>166</sup> *Id.* at 1515-1518.

<sup>167</sup> *Id.* at 1518.

<sup>168</sup> *Id.* at 1524-1526.

<sup>169</sup> *Id.* at 1534.

<sup>170</sup> *Id.* at 1536.

<sup>171</sup> *Id.* at 1536.

online speech.<sup>172</sup> Powell concluded that this disclosure requirement would be a mere first step at regulating the Internet, but that until more is learned about the potential of the medium it is best to “permit some amount of undesirable activity than unjustifiably to stifle core political speech and in turn damage the democratic process in its own name.”<sup>173</sup>

In 2007, David Stevenson called for a disclaimer requirement similar to Powell’s and argued for blogger exemption from FECA.<sup>174</sup> Stevenson called for an expansion of the media exemption to FECA to online communications beyond that which the FEC adopted in its 2006 rules. Specifically, Stevenson proposed that online entities should not need to meet the definition of a “press entity” to qualify for the exemption; also, he advocated a shift in presumption when the FEC decides press exemption claims—he stated that the commission should presume the exemption applies unless “(1) the entity's ownership or control by a political party, committee, or candidate compromised its ability to be a bona fide member of the media, or (2) the entity was created for the primary purpose of advocating the election or defeat of clearly identified federal candidates.”<sup>175</sup> Stevenson concluded that a disclaimer requirement would alleviate any additional circumvention that this shift in presumption would create.<sup>176</sup>

Applying campaign finance laws to the Internet is a relatively new and complicated issue. Scholars have begun to tackle the unique problems presented, but further discussion and analysis is warranted.

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<sup>172</sup> *Id.* at 1535-1538.

<sup>173</sup> *Id.* at 1538.

<sup>174</sup> David Stevenson, *A Presumption Against Regulation: Why Political Blogs Should be (Mostly) Left Alone*, 13 B.U. J. SCI. & TECH. L. 74 (2007).

<sup>175</sup> *Id.* at 105.

<sup>176</sup> *Id.* at 105.

## **Research Questions**

The current literature provides a fairly complete discussion of the current laws and history of campaign finance reform. Additionally, the discussion of the interaction between the First Amendment and campaign finance reform is diverse and abundant. However, the current literature addressing the Internet and campaign finance reform lacks a comprehensive review of the FEC's 2006 rulemaking. Rather, the extant literature focuses on particular aspects of Internet political activity—most notably bloggers. While bloggers are a significant audience to consider, it is important to discuss the full ambit of effects of regulating online political activity. This study will provide that discussion and further analyze the First Amendment compliance of these regulations.

The research questions that are answered by this dissertation are:

- 1. What are the First Amendment concerns associated with applying campaign finance laws to Internet communications?**
- 2. What is the current framework for campaign finance reform?**
- 3. How are the different communication media treated by current campaign finance laws, including FEC regulations?**
- 4. What are the current campaign finance laws and regulations that govern Internet campaign communications?**
- 5. Do the campaign finance regulations defining paid Internet communications transmitted via third party as regulated under campaign finance laws adequately protect First Amendment interests?**
- 6. What is the optimum model for regulating campaign finance on the Internet to protect First Amendment interests?**

## **Methodology**

The questions posed by this study are best answered using legal research methods. As the focus of this dissertation is at the federal level, the primary sources include the U.S. Constitution, federal campaign finance reform acts, Federal Elections Commission regulations and

rulemakings, and federal court decisions. Additionally, the author analyzed legislative history and regulatory rulemaking documents to understand the intent of Congress and the FEC.

To gather the primary legal resources, the author used both Lexis-Nexis Legal and Westlaw legal databases. The author used both known citations as well as string searches to the required materials. The researcher was aware of the federal statutes from reviewing secondary literature, including journals and treatises. These were retrieved from the Westlaw database using a citation search. The relevant administrative law materials were located by searching the Westlaw database as well as the FEC government website. Additionally, the researcher completed a legislative history search for both identified legislation; this was completed using the Lexis-Nexis legal database. U.S. Supreme Court cases were identified by Shepardizing major decisions in campaign finance law including *Buckley v. Valeo* and *McConnell v. FEC*. To perform the literature review, the author reviewed the Lexis-Nexis and Westlaw databases.

Research Question 1 was answered by reviewing relevant First Amendment theories and Supreme Court cases addressing First Amendment challenges to campaign finance laws. The researcher then applied the same challenges to the Internet environment. Research Questions 2 and 3 were answered by analyzing the Federal Election Campaign Act, including codified amendments, along with relevant U.S. Supreme Court cases. Additionally, FEC advisory opinions to determine the application of the statute to the different media. Research Question 4 was answered by analyzing the FECA and the corresponding sections of the Code of Federal Regulations. Additionally, the researcher discussed the FEC advisory opinions that addressed application of the FECA to the Internet. Research Question 5 was answered by using First Amendment analyses generated by review of First Amendment legal scholars and Supreme Court campaign finance opinions to evaluate the constitutionality of the regulations adopted by

the FEC. Research Question 6 was answered by extracting the potential problems in the FEC regulations as addressed by Questions 4 and 5.

### **Dissertation Outline**

This dissertation asked whether the current laws regulating campaign speech on the Internet comports to First Amendment protections for free speech. Chapter 2 of this dissertation will discuss the interests served by the freedom of speech and the values of regulating campaign financing. The values that will be the focus of this study are self-governance as proposed by Alexander Meiklejohn and the marketplace of ideas as conceived of by John Stuart Mill because these are the theories most utilized by the Supreme Court in campaign finance cases. Finally, this chapter will offer a brief discussion of how the Court has approached the balance between the First Amendment interests in free speech and the government interest in moderating the political process.

Chapter 3 will discuss the history of campaign finance laws that have culminated in new FEC regulations for online activities. This will include an overview of FECA and the major amendments, and administrative rules and process.

Chapter 4 will provide an analysis of the relevant U.S Supreme Court case law in the area of campaign finance. This analysis will identify trends that may impact online campaign communications in the future.

Chapter 5 will discuss the legal developments in regulating campaign communications on the Internet. This will include a discussion of the 2004 district court opinion in *Shays v. FEC* and the rules adopted by the FEC in 2006 to regulate certain online activities.

Chapter 6, the conclusion will summarize the findings in the preceding chapters. This chapter will discuss the role of the Internet in elections. The chapter will suggest the proper balance between regulation and free speech on the Internet in terms of campaign finance laws.

## CHAPTER 2

### CAMPAIGN FINANCE AND FIRST AMENDMENT THEORY

#### **Interpreting the First Amendment**

Congress shall make no law ... abridging the freedom of speech, or of the press.<sup>177</sup>

The seemingly clear words of the First Amendment are “deceptively simple.”<sup>178</sup> The meaning and scope of protection for expression has been continually tested and debated. The U.S. Supreme Court and scholars have developed theories to fill the gaps left by the Framers.<sup>179</sup> These theories embody justifications for the First Amendment protections, namely freedom of speech and freedom of the press. The Supreme Court has leaned on many of these theories in analyzing alleged infringements of free speech, including campaign finance laws. The Court, in its evaluation of the interaction of the First Amendment and campaign finance laws has focused on free speech as fundamental to self-government and the search for truth. In fact, these theories of the First Amendment often have been pitted against one another in the academic debates over campaign finance reform.

#### **Search for Truth**

The search for truth has been touted as a rationale for First Amendment protection of free and uninhibited speech. This theory of free speech also has been claimed by both sides of the campaign finance reform debate. This rationale most often takes the form of the marketplace of

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<sup>177</sup> U.S. Const., amend. 1.

<sup>178</sup> DANIEL A. FARBER, FIRST AMENDMENT 1 (2003).

<sup>179</sup> The major theories most consistently cited by courts and legal scholars are the search for truth, espoused most notably by John Milton, John Stuart Mill, and Justice Holmes; self-governance, espoused most notably by Alexander Meiklejohn; the checking value, espoused most notably by Vincent Blasi; self-fulfillment, espoused by Thomas Emerson who envisioned a cooperation between several justifications. This study focuses on the search for truth and self-governance as the two theories most heavily relied on in the debate over campaign finance reform. For a full discussion of the checking value, see Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RES. J. 521; for a full discussion of Emerson’s theory, see THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1971).

ideas, a term coined in U.S. jurisprudence by Justice William Brennan. Although most closely tied to John Stuart Mill's famous essay *On Liberty*,<sup>180</sup> the concept dates to the 17th century.

John Milton in *Areopagitica* set out the attainment of truth as justification for a free press as he argued against a renewal of a licensing system for the press.<sup>181</sup> Milton emphasized that truth would be discovered through a free exchange of ideas. Milton argued that restricting the free flow and debate of ideas would limit the ability for truth to emerge; values and knowledge would stagnate.<sup>182</sup>

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; Who ever knew Truth put to the worse in a free and open encounter?<sup>183</sup>

More than 200 years after Milton delivered his speech to Parliament, John Stuart Mill, an English philosopher, expanded Milton's theory of truth attainment. In *On Liberty*, Mill advocated the open exchange of ideas as a necessity for a democratic society.<sup>184</sup> He believed freedom to participate in this exchange was part of a citizen's right.<sup>185</sup> A truly free society would allow for all ideas to be expressed, even those at the height of dissent.

When there are persons to be found, who form an exception to the apparent unanimity of the world on any subject, even if the world is in the right, it is always probable that dissentients have something worth hearing to say for themselves, and that truth would lose something by their silence.

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<sup>180</sup> JOHN STUART MILL, ON LIBERTY (D. Spitz ed., 1975) (1859).

<sup>181</sup> John Milton, *Areopagitica, A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (Nov. 23, 1644).

<sup>182</sup> John Milton, *Areopagitica, A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (Nov. 23, 1644).

<sup>183</sup> *Id.*

<sup>184</sup> Mill, *supra* note 4.

<sup>185</sup> *Id.*

Indeed, Mill thought that by nature of the comparison and necessity of evaluation of different ideas, the “truth” would be that much stronger for having survived the process.

[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.<sup>186</sup>

Mill did express concern that minority views might be silenced by the sheer power of a majority. He feared that a government by majority may lead to laws directed at limiting the expression of the minority; but also that the majority would also oppress minority expression through social controls. Mill argued that individuals must fight to protect the limits of collective opinion over individual opinion.<sup>187</sup>

This concept that a free exchange of ideas is necessary to arrive at the “truth” and a prerequisite for self-government was introduced into U.S. jurisprudence in a dissent by Justice Oliver Wendell Holmes in *Abrams v. United States*.<sup>188</sup> The *Abrams* Court found that the publication of dissident publications during time of war was not protected expression under the First Amendment.<sup>189</sup> Holmes dissented from the majority, arguing that such restriction would hamper the debate on public policy, thereby undercutting the search for truths.

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.* There is a limit to the legitimate interference of collective opinion with individual independence; and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism.

<sup>188</sup> See *Abrams v. U.S.*, 250 U.S. 616 (1919) (Holmes, J., dissenting).

<sup>189</sup> *Id.* at 619.

is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>190</sup>

This marketplace analogy languished in the background of U.S. jurisprudence until Justice William J. Brennan revived it in 1965.<sup>191</sup> In *Lamont v. Postmaster General*, the Court determined that a statute mandating the detention of unsealed mail determined to be “communist political propaganda” to be inconsistent with the First Amendment. Brennan, in a concurring opinion, emphasized that the implementation of this law would be to restrict people’s ability to receive information, a fundamental right.<sup>192</sup> Brennan argued that without protecting the recipient’s rights to receive and consider ideas, the First Amendment protections for dissemination would be meaningless. “It would be a barren marketplace of ideas that had only sellers and no buyers.”<sup>193</sup>

Only two years after Brennan’s initial revival of the marketplace metaphor, it found general acceptance in the Court.<sup>194</sup> Since then, the theory has been a fixture in free speech cases for more than forty years.<sup>195</sup>

However, critics of the marketplace theory have contended that it does not adequately protect free speech or promote the desired search for truth. In 1967, the same year that the marketplace metaphor gained majority approval in the Court, Jerome A. Barron criticized the theory in a *Harvard Law Review* article.<sup>196</sup> Barron criticized the Court for its blanket protection of “free speech” through a prevention of government intervention. Barron averred that by

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<sup>190</sup> *Id.* at 630.

<sup>191</sup> *Lamont v. Postmaster General of the United States*, 381 U.S. 301 (1965)(Brennan, J., concurring).

<sup>192</sup> *Id.* at 308.

<sup>193</sup> *Id.*

<sup>194</sup> *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967).

<sup>195</sup> See, e.g., *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 512 (1969); *Healy v. James*, 408 U.S. 169 (1972).

<sup>196</sup> Jerome A. Barron, Access to the Press – A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967).

focusing on the free flow of information, the Court has been indifferent to the fact that communication channels had changed and that access to those channels was limited to certain interest groups; this imbalance of access allowed powerful speakers to overshadow those with fewer resources.<sup>197</sup> “The ‘marketplace of ideas’ view has rested on the assumption that protecting the right of expression is equivalent to providing for it.”<sup>198</sup> It is not the government who may “most effectively abridge free expression” but the media.<sup>199</sup> The marketplace of ideas model, according to Barron, no longer protected robust debate in the age of media control because it restricts the government from ensuring equal access to the debate.

Barron argued that restraining the government would not ensure free speech. Rather, he required a restraint on “private groups” that controlled the mass media. He advocated a balance of the interests of the owners of media outlets and members of the public seeking a “forum in which to express their point of view.”<sup>200</sup> To ensure equal access to the mass media, Barron suggested that there existed a constitutional right of access to the media.<sup>201</sup> This right of access calls for “burial” of the classic marketplace of ideas. With the development of private restraints on free expression, the idea of a free marketplace where ideas can compete on their merits has become . . . unrealistic.<sup>202</sup>

C. Edwin Baker, echoing concerns of critics like Barron that the monopolization of media channels led to a failure of the marketplace, also argued that the classic marketplace of ideas

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<sup>197</sup> *Id.* at 1642-43.

<sup>198</sup> *Id.* at 1648.

<sup>199</sup> *Id.* at 1655-56.

<sup>200</sup> *Id.* at 1656.

<sup>201</sup> *Id.* at 1666-1668.

<sup>202</sup> *Id.* at 1678.

model rests on certain faulty assumptions: 1) truth is objective and 2) that people are rational and able to perceive the truth.<sup>203</sup> Baker said that truth is constantly shaded by experience and, therefore, is not—cannot be—objective. Having proven the faulty nature of the first assumption, Baker argued, also discredits the second. If there is no objective truth, people cannot discern it. Further, Baker argued that even if there is a discernible truth, people cannot look past the packaging of the message. Emotions greatly impact people’s decisions and perceptions; they will not be able to see past form and frequency to the “real” information. Thus, Baker concluded that the classic marketplace of ideas fails to produce the value intended by the metaphor.<sup>204</sup>

Baker reviewed several proposals for a revised marketplace model.<sup>205</sup> These models ranged from advocacy subsidies to expenditure limitations to creating free media for speech. However, in his evaluation of these proposals, Baker found them all unacceptable for First Amendment doctrine.<sup>206</sup> Rather he proposed the Liberty Model, which would expand First Amendment doctrine beyond the Marketplace model to include a focus on autonomy and self-fulfillment.<sup>207</sup>

These critiques, particularly limited access, have been considered, but not adopted widely by the Court. In *Red Lion Broadcasting Company v. Federal Communications Commission*, the Court relied on the marketplace of ideas model to support public access to broadcast outlets.<sup>208</sup>

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<sup>203</sup> C. Edwin Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. Rev. 964, 974 (1978).

<sup>204</sup> *Id.* at 974-81.

<sup>205</sup> *Id.* at 981-90.

<sup>206</sup> *Id.* at 989-90.

<sup>207</sup> *Id.* at 1009.

<sup>208</sup> See 395 U.S. 367 (1969).

However, for most of the Court’s marketplace jurisprudence, the focus has been on the right of the recipient to receive information.<sup>209</sup>

### **Democratic Self-Governance**

Stemming from the concept of a marketplace of ideas, democratic self-governance theory supports the free flow of information and the search for truth as necessary to support an informed electorate. Alexander Meiklejohn, the scholar most closely associated with self-governance theory, posited that the First Amendment protects free speech to the extent that it promotes an effective self-governing process.<sup>210</sup> Under Meiklejohn’s formula, the core of the First Amendment, which he termed “public speech,” is valid “only in and for a society which is self-governing. It has no political justification where men are governed without their consent.”<sup>211</sup>

Alexander Meiklejohn, in *Political Freedom*, identified the ultimate goal of the democratic process, including free discussion of issues, as the “voting of wise decisions.”<sup>212</sup> Meiklejohn offered the town hall meeting as a “model by which free political procedures may be measured.” In this model, individuals allow free speech to be abridged in exchange for order and “to get business done”<sup>213</sup> – a chairperson calls the meeting to order, causing all speech to be waived until orderly process recognizes it. In the town hall meeting, the point is not that each individual

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<sup>209</sup> See, e.g., *Kleinlein v. Mandel*, 408 U.S. 753 (1972); *Miami Herald Publish’g Co. v. Tornillo*, 418 U.S. 241 (1974); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 728 (1976).

<sup>210</sup> ALEXANDER, MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 84 (HARPER & BROS. 1960).

<sup>211</sup> *Id.* at 7.

<sup>212</sup> *Id.* at 26.

<sup>213</sup> *Id.* at 24.

speak freely, but that “everything worth saying shall be said” to make the voters “as wise as possible.”<sup>214</sup>

Meiklejohn applied this analogy to the First Amendment. It is not, he argues, “the guardian of unregulated talkativeness.” Rather, the First Amendment guarantees that speakers shall not be denied the opportunity to speak based on viewpoint or content. The First Amendment guarantees that the people shall hear and have the opportunity to evaluate every idea as a necessity of self-government.<sup>215</sup> To suppress ideas out of fear, Meiklejohn said, is “to be unfit for self-government.”<sup>216</sup>

However, Meiklejohn limited this absolute protection of freedom for the exchange of ideas “only to speech which bears, directly or indirectly, up on issues with which voters have to deal—only, therefore, to the consideration of matters of public interest.” Other types of speech, which he termed “private speech”, received protection only from due process, not from the First Amendment. Meiklejohn distinguished the two types of speech as identified by each citizens dual roles in government: sovereign and governed. As voters, citizens are “We the People”—quite simply, the government. However, as individuals, citizens are the governed, subject to regulations that may infringe on private rights for the enhancement of the government.<sup>217</sup> These two different roles and sets of values, Meiklejohn argued, “must be given fundamentally different status” under the law.<sup>218</sup> Within private speech, Meiklejohn has included “a merchant advertising his wares” and a “paid lobbyist fighting for the advantage of his client” as juxtaposed

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<sup>214</sup> *Id.* at 26.

<sup>215</sup> *Id.* at 27.

<sup>216</sup> *Id.* at 28.

<sup>217</sup> *Id.* at 80.

<sup>218</sup> *Id.*

against the “citizen who is planning for the general welfare.” Meiklejohn argued that private speech may be regulated, but that public speech—as the true meaning of the First Amendment—must not be abridged in any way. Meiklejohn argued that speech protected under the First Amendment was so vital to the education and decision making of voters that a balancing test would be meaningless—freedom of speech is absolute.<sup>219</sup>

The U.S. Supreme Court has to some extent adopted Meiklejohn’s theory of self-government as the “central meaning” of the First Amendment. Meiklejohn’s influence on the Court is evident in its 1964 *New York Times v. Sullivan* decision.<sup>220</sup> In *Sullivan*, a case addressing a defamation claim by public officials in Montgomery Alabama, the Court ruled that there must be protection for public criticism of the actions of government officials.<sup>221</sup> Justice William Brennan emphasized the need for open discussion on government issues, which dated back to the writings of James Madison and Thomas Jefferson.<sup>222</sup> Discussing the *Sullivan* case, Brennan said that at the core of the First Amendment is speech which must carry the highest protection because “without [it] democracy cannot function … the ‘censorial power’ would be in the Government over the people and not ‘in the people over the Government.’”<sup>223</sup> Since *Sullivan*, the Court has supported this approach in various areas of the law.

In the same year as *Sullivan*, the Court decided another defamation case. Drawing on the self-governance theory, the Court held that speakers criticizing public officials’ credentials,

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<sup>219</sup> *Id.* at 20.

<sup>220</sup> 376 U.S. 254 (1964); see also William J. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

<sup>221</sup> 376 U.S. at 270.

<sup>222</sup> *Id.* at 274.

<sup>223</sup> Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 16 (1965).

without actual malice, were protected from criminal prosecution for defamatory statements.<sup>224</sup> In 1974, the Court held that the First Amendment does not require that representatives of the media to interview specific prisoners in person.<sup>225</sup> However, three dissenting justices relied on Meiklejohn's self-government theory of the First Amendment to argue that allowing the media access to the prisoners would give the public information they might not otherwise receive.<sup>226</sup> This theory regained majority support when the Court found that public access to criminal trials would promote informed discussion among citizens about the criminal process.<sup>227</sup>

Cass Sunstein and Owen Fiss have continued in this vein, arguing for the protection of "deliberative democracy."<sup>228</sup> This deliberative democracy approach centers not on the speaker's right of free expression, but on the necessity of deliberation, of public debate.

In the Meiklejohnian tradition, Justice Breyer has posited a theory he calls "active liberty," which is grounded in the idea that

the First Amendment's constitutional role is not simply one of protecting the individual's "negative" freedom from governmental restraint. The Amendment in context also forms a necessary part of a constitutional system designed to sustain that democratic self-government. The Amendment helps to sustain the democratic process both by encouraging the exchange of ideas needed to make sound electoral decisions and by encouraging an exchange of views among ordinary citizens necessary to their informed participation in the electoral process. It thereby helps to maintain a form of government open to participation ... by "all the citizens, without exception."<sup>229</sup>

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<sup>224</sup> Garrison v. Louisiana, 379 U.S. 64 (1964).

<sup>225</sup> Saxbe v. Washington Post. Co., 417 U.S. 843 (1974).

<sup>226</sup> *Id.* at 862.

<sup>227</sup> Richmond Newspapers v. Virginia, 448 U.S. 555, 586-87 (1980). The self-government theory also has been expanded to application in areas that Meiklejohn likely did not intend, such as protecting commercial speech based on the consumers' right to receive information. *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. at 748.

<sup>228</sup> See, e.g., CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1995); Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087 (1991).

<sup>229</sup> Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 252-53 (May, 2002).

Breyer's theory, which once debuted in a concurring opinion, is gathering strength on the Court and in academic debate.<sup>230</sup> Active liberty, although seemingly evolving from self-government focuses more on the societal interests of the political debate than on the individual.<sup>231</sup>

### **Justifying Campaign Finance**

Regulating private donations and expenditures during political campaigns has become accepted as a given in American politics. However, the Supreme Court has warned that campaign finance regulations "operate in an area of the most fundamental First Amendment activities" affecting "discussion of public issues and debate on the qualifications of candidates" which is "integral to the operation of the system of government established by [the] Constitution."<sup>232</sup> From this perspective, declared in the first modern campaign finance case, the Court has attempted to reconcile the First Amendment and campaign finance reform laws.

In campaign finance reform, regulations of contributions and expenditures have been touted as "inconsistent with the marketplace of ideas" by effectively "taking from rich speakers for the benefit of poor ones."<sup>233</sup> The U.S. Supreme Court agreed in *Buckley v. Valeo*, writing that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."<sup>234</sup>

Supporters of reform often attempt to counterbalance the First Amendment interests with one or more general themes. Scholar Kathleen M. Sullivan identified several themes prevalent in

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<sup>230</sup> Scholars have identified the application of Breyer's theory in a plurality opinion authored by Breyer, in *Randall v. Sorrell*, 126 S. Ct. 35 (2005). See Rachel Gage, *Randall v. Sorrell: Campaign-Finance Regulation and the First Amendment as a Facilitator of Democracy*, 5 FIRST AMEND. L. REV. 341 (Spring, 2007).

<sup>231</sup> *Id.*

<sup>232</sup> *Buckley v. Valeo*, 424 U.S. 1, 14. For a full discussion of the *Buckley* decision, see Chapter 3, *infra*.

<sup>233</sup> Cass R. Sunstein, *Exchanges in the Welfare State: Free Speech Now*, 59 U. CHI. L. REV. 255, 291 (1992).

<sup>234</sup> *Id.* at 291 (quoting 424 U.S. 1 at 48-49).

the campaign finance debate: political inequality in voting, distortion, corruption or political inequality in representation, carpet bagging, diversion of legislative and executive energies, quality of debate, and lack of competitiveness.<sup>235</sup> The most common themes cited by reform advocates and addressed by the Supreme Court are prevention of corruption and political equality. As Sullivan explained, these themes sometimes contrast sharply with First Amendment values, even when they are put forth under the guise of free speech protections.

### **Prevention of Corruption in the Electoral System**

The Supreme Court has said that “preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”<sup>236</sup> This corruption is generally portrayed as a quid pro quo scenario in which campaign contributions are exchanged for promises of political favors, such as support for or opposition to a piece of legislation. There is opposition to the continued use of the anti-corruption rationale both from practical standpoints and from conceptual outlooks on campaign finance reform. However, the longevity of the anti-corruption rationale does not appear to be lessening in the Court’s analysis, although its prominence may be.

One of the main academic criticisms of the anti-corruption rationale is the lack of clear criteria for identifying “corruption.”<sup>237</sup> Definitions proposed by scholars can be grouped by their basis in legality, public interest, or public opinion.<sup>238</sup> According to John Peters and Susan Welch,

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<sup>235</sup> Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 671-86 (Spring, 1997).

<sup>236</sup> Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 496 97 (1985).

<sup>237</sup> See Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127, 128-130 (1997).

<sup>238</sup> John G. Peters & Susan Welch, *Political Corruption in America: A Search for Definitions and a Theory, or If Political Corruption Is in the Mainstream of American Politics Why Is It Not in the Mainstream of American Politics Research?*, 72 AM. POL. SCI. REV. 974 (1978) (citing JAMES SCOTT, *COMPARATIVE POLITICAL CORRUPTION* (Prentice-Hall, 1972)).

the legal-based definition, which confines corruption to the violation of formal laws or rules, is “simultaneously too narrow and too broad in scope; all illegal acts are not necessarily corrupt and all corrupt acts are not necessarily illegal.”<sup>239</sup> The public interest definition finds corrupt any act that “violates responsibility toward at least one system of public or civic order. This definition allows for the possibility that an act, while illegal, may actually benefit the political system.<sup>240</sup> The difficulty with this type of definition is that it requires first a definition or delineation of “public interest.”<sup>241</sup> The third category of corruption definitions is based on public opinion – that is, acts are judged to be corrupt or not by the public. This approach necessitates the estimation of public sentiment, but allows for a continuum of corruptness. For example, Peters and Welch explain that scholars have identified “black” and “white” corruption. Black corruption is an act that both the public and other public officials would find to be both corrupt and deserving of severe punishment (heroin trafficking is the example provided). On the opposite end of the spectrum would be white corruption, which the public and public officials may deem to be corrupt but not deserving of punishment (fixing a parking ticket is the example provided).

As Peters and Welch found each of these categories to be insufficient for identifying corruption, they proposed a method of analyzing the components of a potentially corrupt act: the public official involved, the favor provided by the official, the payoff gained by the official, and the donor of the payoff or the recipient of the favor.<sup>242</sup> Each of these elements are assessed using

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<sup>239</sup> *Id.* at 975.

<sup>240</sup> *Id.* The authors provide the example of a politician ‘fixing’ immigration papers for an illegal alien who has aided economic growth.

<sup>241</sup> *Id.* at 975.

<sup>242</sup> *Id.* at 976.

a model for “more corrupt” and “less corrupt” to identify where the behavior falls in the spectrum.<sup>243</sup>

Additionally, there has been doubt cast on the actual presence of or potential for corruption in the electoral system. Many large donors hedge their bets – giving to both major political parties. Kathleen Sullivan argued that this bet hedging demonstrates a “weak level of confidence in [the donors’] ability to obtain results from any particular beneficiary of their contributions.”<sup>244</sup> In fact, congressional behavior suggests that there is a low correlation between contributions and voting behavior. Rather, congressmen vote along party lines. Although, as Sullivan points out, donors may be repaid in less formal methods, the claimed corruption of the electoral system seems less certain than originally proposed.<sup>245</sup>

The anti-corruption rationale assumes that politicians, without large contributions, would consider all constituents equally.<sup>246</sup> However, groups of constituents that are more organized or reputable in the community often carry more weight with politicians because they are able to mobilize voters. Sullivan questioned whether it is just to more easily suspect corruption of groups that accomplish this success through the accumulation of campaign funds.<sup>247</sup>

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<sup>243</sup> *Id.* at 976-78. The authors then tested the design with ten different scenarios: 1) A presidential candidate who promises an ambassadorship in exchange for campaign contributions; 2) a member of Congress using seniority to obtain a weapons contract for a firm in his or her district; 3) a public official using public funds for personal travel; 4) a secretary of defense who owns \$50,000 in stock in a company with which the Defense Department has a million-dollar contract; 5) a public official using influence to get a friend or relative admitted to law school; 6) the driveway of the mayor’s home being paved by the city crew; 7) a state assembly member while chairperson of the public roads committee authorizing the purchase of land s/he had recently acquired; 8) a judge with \$50,000 worth of stock in a corporation hearing a case concerning that firm; 9) a legislator accepting a large campaign contribution in return for voting “the right way” on a legislative bill; 10) a member of Congress who holds a large amount of stock (about \$50,000 worth) in Standard Oil of New Jersey working to maintain the oil depletion allowance. *Id.* at 978.

<sup>244</sup> Sullivan, *supra* note 58 at 679.

<sup>245</sup> *Id.* at 680.

<sup>246</sup> *Id.* at 680.

<sup>247</sup> *Id.* at 680.

The anti-corruption rationale was not fully explicated in *Buckley*, and has evolved to the point of a barrier for campaign finance law enforcement.<sup>248</sup> Initially, the Court deferred to the FEC's decision-making regarding corruption prevention measures. However, in the 1990s, the Court began to question the FEC's decision-making process. In *FEC v. National Conservative Political Action Committee*, the Court invalidated expenditure limits associated with presidential campaign public funding.<sup>249</sup> The Court rejected the FEC's record demonstrating corruption and the efficacy of the proposed laws in the prevention of that corruption.<sup>250</sup> The Court's wholesale rejection of the Commission's factual record left it unclear as to how the FEC could ever show the presence of corruption in a campaign financing scheme.<sup>251</sup>

Since *Buckley*, the Court has applied the anti-corruption rationale in a variety of ways. Thomas Burke identified three standards in the Court's jurisprudence from *Buckley* to *Austin v. Michigan Chamber of Commerce* in 1990. The first standard that the Court has applied is a quid pro quo type of corruption in which money is donated on the arrangement of future votes.<sup>252</sup> This was the standard originally announced in the *Buckley* decision, although further examination of the opinions reveal that the Court may have been recognizing a broader scope of corruption.<sup>253</sup>

One of the possible broader conceptions that Burke identified is monetary influence. This idea was expressed by Chief Justice William Rehnquist in *FEC v. National Conservative*

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<sup>248</sup> See Rovert F. Bauer, *The Demise of Reform: Buckley v. Valeo, The Courts, and the “Corruption Rationale”*, 10 STAN. L. & POL’Y REV. 11 (Fall, 1998).

<sup>249</sup> *FEC v. National Conservative Political Action Comm'n*, 470 U.S. 480 (1985).

<sup>250</sup> *Id.* at 498.

<sup>251</sup> Bauer, *supra* note 71 at 14.

<sup>252</sup> Burke, *supra* note 60 at 130. See also *Buckley*, 424 U.S. 1, 26.

<sup>253</sup> *Buckley*, 424 U.S. at 26; but see 424 U.S. at 28 (arguing that laws focusing on the prevention of bribery alone “deal with only the most blatant and specific attempts of those with money to influence governmental action”).

*Political Action Committee*, “Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors.”<sup>254</sup> Although Justice Rehnquist broadened the environment to include rather than be defined by quid pro quo, his opinion continued to strike down expenditure limits, relying on language from Buckley that “the absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”<sup>255</sup>

Another conception of corruption in the Court has been distortion. Justice Marshall identified this as a different type of corruption from the traditionally acknowledged quid pro quo. Rather distortion is “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.”<sup>256</sup> Justice Scalia criticized Marshall's opinion for trying to revive a justification rejected by the Court in 1974 – political equality – under the guise of a “new corruption”.<sup>257</sup>

### **Political Equality in the Electoral System**

Although prevention of corruption is more commonly accepted, it has been argued that corruption is a derivative problem. David Strauss contended that corruption actually stems from

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<sup>254</sup> 470 U.S. 480, 497 (1985).

<sup>255</sup> *Id.*

<sup>256</sup> *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659-60 (1990).

<sup>257</sup> *Id.* at 684-85 (Scalia, J., dissenting).

political inequality.<sup>258</sup> The political equality argument suggests that limits on campaign finance promote political equality for voters during an election—equalizing the voices of all citizens. The Government in *Buckley v. Valeo* raised political equality as one of its justifications for limiting contributions and expenditures during elections.<sup>259</sup>

Kathleen Sullivan explained that this view equates the campaign process to a “kind of shadow election” that results in unequal value of votes.<sup>260</sup> However, as Sullivan noted, a serious flaw in this argument is that financing during campaigns is more akin to political speech than it is to casting a vote at the ballot box. Generally, political speech is protected from such equalizing restrictions.

[I]n the informal realm of political speech -- the kind that goes on continuously between elections as well as during them -- conventional First Amendment principles generally preclude a norm of equality of influence. Political speakers generally have equal rights to be free of government censorship, but not to command the attention of other listeners. Under virtually any theory of the justification for free speech, legislative restrictions on political speech may not be predicated on the ground that the political speaker will have too great a communicative impact, or his competitor too little. Conventional First Amendment norms of individualism, relativism, and antipaternalism preclude any such affirmative equality of influence -- not only as an end-state but even as an aspiration.<sup>261</sup>

Meiklejohn’s theory has been used to bolster this argument that government restraints on political speech in the form of campaign finance laws are necessary for effective public debate.<sup>262</sup> It has been argued that a Meiklejohnian approach to the First Amendment would

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<sup>258</sup> David Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370 (1994).

<sup>259</sup> *Buckley v. Valeo*, 424 U.S. at 26.

<sup>260</sup> Sullivan, *supra* note 58 at 672.

<sup>261</sup> *Id.* at 673.

<sup>262</sup> See, e.g. *Buckley v. Valeo*, 424 U.S. 1 (1976); Sunstein, *supra* note 52.

permit regulations of political speech as “restrictions on the liberty to speak, but not of the freedom of speech.”<sup>263</sup>

This argument was proposed to the Supreme Court in 1976 as a compelling government interest for enacting the Federal Election Campaign Act.<sup>264</sup> The Federal Election Commission argued that Congress had attempted to “increase opportunities for meaningful participation by ordinary citizens, as voters, supporters and candidates.”<sup>265</sup> However, the Court held that limiting campaign expenditures in an effort to equalize the political discourse during elections was unacceptable.<sup>266</sup> “[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”<sup>267</sup> The Court further dismissed the political equality argument when it relegated it to the sphere of ancillary, opting to focus instead on the prevention of corruption argument.<sup>268</sup> Not all of the justices found the political equality rationale so easy to repudiate. Justice Byron White dissented from the Court’s ban on expenditure caps, emphasizing the need to “dispel the impression that federal elections are purely and simply a function of money.”<sup>269</sup>

In addition to the internal strife, scholars criticized the Court’s opinion for failing to recognize the value of political equality. For example, John Rawls wrote:

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<sup>263</sup> J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1965 (May, 1995) (reviewing Cass Sunstein’s *Democracy and the Problem of Free Speech*).

<sup>264</sup> Brief for the Attorney General and the FEC at 23, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (Nos. 75-436, 75-437), 1975 WL 171459 (hereinafter *Buckley* brief).

<sup>265</sup> *Id.*

<sup>266</sup> 424 U.S. at 26.

<sup>267</sup> *Id.* at 49.

<sup>268</sup> *Id.*

<sup>269</sup> 424 U.S. at 265 (White, J., concurring in part and dissenting in part).

The Court fails to recognize the essential point that the fair-value of the political liberties is required for a just political procedure, and that to insure their fair-value it is necessary to prevent those with greater property and wealth, and the greater skills of organization which accompany them, from controlling the electoral process to their advantage.... On the Court's view, democracy is a kind of regulated rivalry between economic classes and interest groups in which the outcome should properly depend on the ability and willingness of each to use its financial resources and skills, admittedly very unequal, to make its desires felt.<sup>270</sup>

The revival of political equality as a compelling interest for campaign finance reform laws has been heavily supported. Senator John McCain, a chief architect of the Bipartisan Campaign Reform Act of 2002, heralded the 2002 reform efforts for reminding the American people that the American government belongs to all citizens, not just those who “can afford enormous payments to parties and candidates.”<sup>271</sup> Sen. McCain focused on effective participatory self-government as a goal of the reform efforts he spearheaded. Judge Calabresi of the U.S. Court of Appeals for the Second Circuit wrote, “The notion that intensity of desire [to support a candidate] is not well-measured by money in a society where money is not equally distributed has been, since Buckley, the huge elephant--and donkey--in the living room in all discussions of campaign finance reform.”<sup>272</sup>

Since the *Buckley* decision, scholars have debated advantages of political equality as a justification for campaign finance reform laws. Noted scholar Cass Sunstein argued, “Insofar as Buckley rejects political equality as a legitimate constitutional goal, it should be overruled.”<sup>273</sup> Richard L. Hasen has argued that political equality is not possible when the media is elevated to

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<sup>270</sup> JOHN RAWLS, POLITICAL LIBERALISM 362-63 (Cambridge, Mass., 1993).

<sup>271</sup> John McCain, *Reclaiming Our Democracy: The Way Forward*, 3 ELECTION L.J. 115, 115 (2004).

<sup>272</sup> Landell v. Sorrell, 406 F.3d 159, 162 (2d Cir.) (Calabresi, J., concurring), cert. granted sub nom., Randall v. Sorrell, 126 S. Ct. 35 (2005). See also Jacobus v. Alaska, 338 F.3d 1095, 1107 (9th Cir. 2003) (upholding limits on soft money contributions in Alaska). In *Jacobus*, the 9th Circuit panel held that unregulated campaign finance creates an environment in which individual citizens’ voices are “drown out” by wealth.” *Id.*

<sup>273</sup> Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1400 (1994).

“an even more preeminent place than they already have in the shaping of public attitudes toward federal candidates.”<sup>274</sup> Jamin Raskin and John Bonifaz contended that political equality is the “key First Amendment issue at stake” because it ensures that all citizens are able to participate in the electoral process.<sup>275</sup> However, Bradley A. Smith, former chairman of the Federal Election Commission, averred that political equality is not a right guaranteed by the Constitution, and, further, that promoting such equality effectively abridges the right to free speech.<sup>276</sup>

In the midst of this scholarly debate, the Supreme Court reopened the legal conversation on the equality rationale . Since *Buckley*, the Court staunchly refused to uphold any campaign finance reform efforts unless they were purposed to prevent corruption.<sup>277</sup> However, the Court’s decision in *McConnell v. FEC* has been heralded as a shift in campaign finance jurisprudence. Even in the aftermath of this proposed shift, the Court has not expressly adopted the political equality argument that was summarily rejected in *Buckley*.

Leading up to the McConnell decision, the Court provided some foreshadowing beginning to its jurisprudential shift. In 2000, Justice Breyer issued a concurring opinion in *Austin v. Shrink Missouri PAC*, in which he announced that *Buckley*’s rejection of political equality as a compelling interest “cannot be taken literally.”<sup>278</sup> Breyer noted that there are many times that the First Amendment “permits restrictions on the speech of some in order to prevent a few from

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<sup>274</sup> Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627, 1629 (1999) (discussing the media exception built into the campaign finance reform structure).

<sup>275</sup> Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1161-62 (1994).

<sup>276</sup> See generally BRADLEY A. SMITH, *UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM* (Princeton University Press 2003).

<sup>277</sup> Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 31-32 (Nov., 2004).

<sup>278</sup> Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 402 (Breyer, J., concurring).

drowning out the many.”<sup>279</sup> Specifically, Breyer considered the restrictions placed on congressmen for the efficacy and democratization of floor debates as one example.<sup>280</sup>

The *McConnell* decision has been heralded as the true turning point for the Court in relation to the political equality rationale. Professor Hasen wrote that the majority opinion “takes pains to show its fidelity to Buckley, tripping over itself to apply the corruption (as anticircumvention) rationale to as many BCRA [Bipartisan Campaign Reform Act] provisions as possible. However, a more natural reading of the more controversial aspects of the joint majority opinion is as a sub silentio acceptance of the participatory self-government rationale.”<sup>281</sup> In a well-cited note, the Court reaffirms commitment to “preserving the integrity of the electoral process, preventing corruption, and ‘sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government’ [as] interests of the highest importance.”<sup>282</sup> Hasen also observed that the *McConnell* Court was highly selective in its review of the *Buckley* precedent. Specifically, the *McConnell* opinion did not include any mention to *Buckley’s* “explicit rejection of the equality rationale as a justification for expenditure limits.”<sup>283</sup> Hasen commented, “It seems as probable as not that the Court’s elisional history was intentional and not inadvertent.”<sup>284</sup>

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<sup>279</sup> *Id.* at 402 (Breyer, J., concurring).

<sup>280</sup> *Id.*

<sup>281</sup> Hasen, *supra* note 101 at 57-58.

<sup>282</sup> *McConnell v. FEC*, 540 U.S. 93, 206 n. 88 (2003).

<sup>283</sup> Hasen, *supra* note 101 at 60.

<sup>284</sup> *Id.* at 60.

In 2006, Justice Breyer’s focus on participatory self-government was evident when he authored a plurality opinion in *Randall v. Sorrell*.<sup>285</sup> Breyer, although specifically refusing to overturn *Buckley* focused the plurality opinion striking down Vermont campaign finance reforms on protecting the “integrity of the electoral system.”<sup>286</sup> Breyer does not strike down these contribution limits merely because the state failed to meet a standard of corruption, but rather because the limits were so low that they “burden[ed] First Amendment interests in a manner that is disproportionate to the public purposes they were enacted to advance.”<sup>287</sup> Throughout the opinion, Breyer demonstrates how the limits will hinder political deliberation, particularly in the face of a competitive campaign scenario. This focuses on the participation in the electoral process rather than the prevention of corruption, signaling perhaps a new approach to campaign finance reform litigation.

### **Campaign Finance and the First Amendment**

In examining campaign finance reform laws, the Court has been challenged to balance the freedom of expression and these justifications for reforming the political process. In its attention to campaign finance litigation, the Court has continually developed a key area of contention—whether money is speech. In its initial assessment of the issue in *Buckley*, the Court determined that the Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.<sup>288</sup> However, the Court did create a dichotomy between contributions and expenditures.

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<sup>285</sup> *Randall v. Sorrell*, 126 S. Ct. 2479 (2006).

<sup>286</sup> *Id.* at 2492.

<sup>287</sup> *Id.* at 2500.

<sup>288</sup> *Buckley v. Valeo*, 424 U.S. 1 at 16.

This dichotomy has persisted throughout campaign finance jurisprudence, although courts and scholars are beginning to question the practicality of such distinction. The impact on First Amendment law has been to create different standards of review. Limitations on contributions were not as invasive to the freedom of expression as those on expenditures. Congress' desire to prevent corruption, even the appearance of corruption, was "weighty" enough to justify what minimal infringement the limits imposed on the First Amendment. Limitations on expenditures, however, "impose direct and substantial restraints on the quantity of political speech."<sup>289</sup> Because of this direct, substantial impact, preventing corruption was not sufficient to support limits on expenditures under the "exacting" First Amendment scrutiny.<sup>290</sup>

Thus far, expenditure limits have continued to fall under the protection of the First Amendment. However, if there is a paradigm shift, as suggested by scholars, it is unclear if the equality rationale emphatically rejected in Buckley could find support and overcome the First Amendment challenges that have defeated the anti-corruption rationale. In fact, Justice Breyer, applying his active liberty theory, concluded that courts should approach campaign finance challenges from the perspective that the First Amendment "lie[s] on both sides of the constitutional equation."<sup>291</sup> Rather than evaluating campaign finance laws under a strict scrutiny approach, Breyer suggested that the courts should balance, with no presumption, the "speech-restricting" and "speech-enhancing" characteristics of reform measures.<sup>292</sup>

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<sup>289</sup> *Id.* at 39.

<sup>290</sup> *Id.* at 39.

<sup>291</sup> Breyer, *supra* note 53 at 253.

<sup>292</sup> *Id.*

## CHAPTER 3

### HISTORY OF CAMPAIGN FINANCE LAW

Although campaign finance laws trace back to the early 20th Century, the first comprehensive campaign finance reform was not passed until 1971.<sup>293</sup> Until Congress passed the Federal Election Campaign Act of 1971 (FECA), the campaign finance laws consisted of piecemeal legislation regulating disclosure and contributions. Since 1971, Congress has continued to amend the statute to address new concerns and close loopholes in the law. The seminal campaign finance case followed amendments to the law in 1974. The Supreme Court, in *Buckley v. Valeo*, determined the constitutionality of the law – striking independent expenditures, but upholding limits on contributions.

The most recent overhaul was the Bipartisan Campaign Reform Act of 2002, which was aimed at closing loopholes that left elections vulnerable to unintended influence.<sup>294</sup> Since 1976, the FEC has been charged with and has executed the adoption of regulations for the enactment of campaign finance laws.

This chapter will discuss the evolution of campaign finance reform. First, this chapter will offer a brief summary of early efforts of reform beginning in the early 1900s. Next this chapter will explain the Federal Election Campaign Act of 1971 and the amendments in 1974. Then, this chapter will discuss the 1976 *Buckley v. Valeo* decision and the subsequent amendments to the FECA. Then, this chapter will discuss the provisions of the Bipartisan Campaign Reform Act of 2002. Specifically, this chapter will discuss how the provisions of BCRA address the different media.<sup>295</sup> Finally, this chapter will offer a concluding summary of the current laws, including a

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<sup>293</sup> Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431–455, Pub. Law No. 92-225 (hereinafter FECA).

<sup>294</sup> Pub. L. No. 107-155 (2002) (codified at 2 U.S.C. § 431, et seq.).

<sup>295</sup> The application of BCRA to the different media will be discussed in Chapter Four, *infra*.

brief discussion of FEC regulations specific to the FECA provisions that directly impact campaign communications.

### **Early Campaign Finance Reform Efforts**

Campaign finance reform dates back to the late 19th century. The notion of campaign finance reform was not part of the national debate during the first decades of American federal politics.<sup>296</sup> However, as the party system evolved, campaign expenditures increased steadily. By the late 19th century, corporations and wealthy individuals were playing key roles in financing political campaigns.<sup>297</sup> Although financing by corporations was well-known, it was not until a campaign was tainted with the air of corruption that reform was initiated.<sup>298</sup> Reform began to address disclosure requirements, contribution and spending limits, and public financing of campaigns.

In 1907, Congress passed what is now considered the first effort to reform campaign finance in response to the Equitable Life Insurance scandal.<sup>299</sup> Hearings investigating the corporate spending of the company revealed vast donations to the reelection campaign of Theodore Roosevelt as well as annual retainer fees paid to republican senators.<sup>300</sup> As the investigation continued, it was discovered that insurance companies had donated nearly

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<sup>296</sup> Bradley A. Smith, *The Sirens' Song: Campaign Finance Regulation and the First Amendment*, 6 J.L. & POL'Y 1, 3 (1997).

<sup>297</sup> *Id.* at 4. “[In the presidential election of 1896, Republican National Chair Mark Hanna systematized fundraising to an unprecedented level and raised as much as \$7 million (approximately \$140 million today) to support the campaign of William McKinley . . . Hanna raised much of this money from corporations and banks but large individual donors also became increasingly important in the late nineteenth and early twentieth centuries.” *Id.*

<sup>298</sup> Robert E. Mutch, CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 3-7 (Praeger 1988).

<sup>299</sup> *Id.* The public and legislators were concerned when an investigation initiated by the state of New York revealed large corporate donations to the Republican Party by Equitable Life Insurance. *Id.*

<sup>300</sup> Adam Winkler, “*Other People’s Money*”: Corporations, Agency Costs, and Campaign Finance Law, 92 GEO. L.J. 871, 892 (2004).

\$250,000 to presidential campaigns between 1896 and 1904.<sup>301</sup> To respond to the public disapproval of these practices and to prevent corporate executives from misusing the corporation owners' money, Congress banned campaign donations and spending by corporations and federally chartered banks.<sup>302</sup> In 1910, Congress required a post-election report on all contributions and expenditures that exceeded \$100 and were related to campaigns for the House of Representatives.<sup>303</sup> One year later, the 1910 Publicity Act was amended to include in the disclosure requirements contributions and expenditures for Senate campaigns. The 1911 amendments also required pre-election reporting for both primary and general elections.<sup>304</sup> Additionally, the 1911 amendments instituted the first spending limits. House campaigns could not exceed a total of \$5,000, and Senate campaigns could not exceed \$10,000.<sup>305</sup>

In the early 1920s, President Warren G. Harding's administration became the target of an investigation of bribery.<sup>306</sup> The Teapot Dome investigation revealed links between an oil reserve lease through the Department of the Interior and large contributions to the Republican party.<sup>307</sup> These donations allowed the party to pay off nearly \$1.5 million of debt it had incurred during the 1920 elections.<sup>308</sup> The contributions were not initially reported because the disclosure acts did not require reporting in off-election years. Although there was no concrete evidence of a

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<sup>301</sup> *Id.*

<sup>302</sup> Tillman Act, 34 Stat. 864 (1907). *See also* Mutch, *supra* note 6.

<sup>303</sup> Publicity Act of June 25, 1910, ch. 392, 36 Stat. 822, 823 (1910).

<sup>304</sup> Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 7, 14 (Anthony Corrado et al. eds., 2005).

<sup>305</sup> *Id.*

<sup>306</sup> Mutch, *supra* note 6 at 24.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

connection between the lease and the contributions, Congress amended the Federal Corrupt Practices Act of 1925 (FCPA), previously known as the Publicity Act.<sup>309</sup> This law required political committees to file quarterly finance reports every year, even in non-election years. These reports had to include every contribution of \$100 or more. The FCPA also raised the Senate campaign spending limits to \$25,000.<sup>310</sup>

Although the FCPA was an attempt to curb political corruption, the act had no real enforcement powers.<sup>311</sup> The Clerk of the House and the Secretary of the Senate were responsible for collecting these reports, but did not have any powers to force submission. Nor were there any requirements for the reports to be open to the public. Because there were no uniform standards for format, content, or accounting method, the reports that were submitted were so disparate they were of little use.<sup>312</sup> Additionally, the FCPA provided no oversight power to ensure accuracy or compliance.<sup>313</sup> The only prosecution under the act was in 1928 against a religious organization that failed to report accurate amounts of contributions during a presidential campaign.<sup>314</sup>

During Franklin D. Roosevelt's third term as president, there were accusations that Roosevelt used federal workers to interfere with primary elections in an effort to unseat some anti-New Deal Democrats.<sup>315</sup> The Hatch Act of 1939, which banned partisan political activity on the part of federal employees, was passed to prevent the coercion of federal employees to

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<sup>309</sup> Ch. 368, §301, 43 Stat. 1053, 1070 (1925) (repealed in 1971).

<sup>310</sup> Corrado, *supra* note XX at 15.

<sup>311</sup> Mutch, *supra* note XX at 25; *see also* Corrado *supra* note XX at 15.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 25.

<sup>314</sup> *Id.* at 28.

<sup>315</sup> Mutch, *supra* note 6 at 33.

contribute to campaigns.<sup>316</sup> However, some argued that these restrictions, meant to protect employees and the public from corruption, actually prevented voluntary political activity and restricted employees' individual rights to participate in the political process.<sup>317</sup> In 1940, the Hatch Act was amended to extend this protection to state and local government workers who received federal funding. Additional provisions of the amendments included a limit on individual contributions of \$5,000 per year to a candidate or committee; the application of these laws to primary elections as well as the general elections; and expenditure limits on multi-state political committees.<sup>318</sup> The Taft-Hartley Act of 1947 further restricted contributions and expenditures by prohibiting labor unions and corporations from using treasury funds for either of these activities.<sup>319</sup>

Between 1947 and the adoption of the Federal Election Campaign Act of 1971, there were no major campaign finance legislative developments.<sup>320</sup> However, between 1947 and 1971, campaign finance continued to be a concern as campaigns changed dramatically. The heavy reliance on party money began to decrease as candidates shifted to raising money for their own committees. Additionally, the use of television as a campaign tool led to marked increases in campaign costs.<sup>321</sup> A 1962 Commission on Campaign Costs formed by President John F.

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<sup>316</sup> Scott J. Bloch, *The Judgment of History: Faction, Political Machines, and The Hatch Act*, 7 U. PA. J. LAB. & EMP. L. 225, 231 (Winter, 2005).

<sup>317</sup> *Id.* at 232.

<sup>318</sup> Act of July 19, 1940, ch. 640, Pub. L. No. 76-753, 54 Stat. 767 (amended 1940).

<sup>319</sup> Corrado, *supra* note at 17-18. Previously, corporations were prohibited from making contributions from treasury funds, but the Tillman Act of 1907 did not prohibit expenditures. The result of this new prohibition was the birth of Political Action Committees (PACs). These groups are formed as ancillary committees of corporations and unions to support candidates. The groups collect money from their members to finance political activities.

<sup>320</sup> Corrado, *supra* note 12 at 19.

<sup>321</sup> Dwight D. Eisenhower's campaign cost \$6.6 million in 1952; this cost increased to nearly \$10 million in both John F. Kennedy and Richard Nixon's campaigns in 1960. See Alissa J. Rubin, *History of Changes in Campaign Law*, CONGRESSIONAL QUARTERLY WEEKLY REPORT 794 (Apr. 5, 1995).

Kennedy offered suggestions for a comprehensive reform agenda.<sup>322</sup> However, this was not achieved until 1971, nearly ten years after Kennedy submitted the report to Congress and urged it to adopt the proposed reforms.

### **Federal Election Campaign Act**

In 1971, Congress passed the Federal Election Campaign Act of 1971 (FECA) in order “to promote fair practices in the conduct of election campaigns for Federal political offices.”<sup>323</sup> FECA placed limits on contributions and expenditures by corporations and candidates in connection with federal election.<sup>324</sup> The Act was intended “to give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters” and “to halt the spiraling cost of campaigning for public office.”<sup>325</sup>

However, during the 1972 election cycle, there were more than 7,000 reports of campaign finance abuse to the Department of Justice. This led Congress to significantly amend FECA in 1974. Almost immediately following the passage of the 1974 amendments, the law was challenged in court by Senators James L. Buckley and Eugene McCarthy. In response to these challenges, the United States Supreme Court issued a decision that has shaped campaign finance law for more than thirty years.

### **Major FECA Provisions**

After the 1974 amendments, the law largely consisted of six major areas. First, the law limited the amount of contributions and expenditures made by individuals and groups. Second,

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<sup>322</sup> Corrado, *supra* note 12 at 19 (citing President’s Commission on Campaign Costs, Financing Presidential Campaigns (1962)).

<sup>323</sup> See FECA.

<sup>324</sup> *Id.*

<sup>325</sup> S. Rep. No. 92-96, at 1774 (1971).

limits were placed on the candidates and their campaigns. Third, national party activities were restricted. Fourth, disclosure requirements were strengthened. Fifth, a public financing system was set in place for presidential races. Finally, the amendments created the Federal Election Commission.

The 1974 law limited contributions to candidates and committees in a given year. Contributions by individuals or groups of individuals to each candidate could not exceed \$1,000 each year. Additionally, the annual aggregate amount each individual contributed to all candidates and political committees could not exceed \$25,000. Although political committees were not restricted to an aggregate amount, they were prohibited from contributing more than \$5,000 to a candidate per election. Candidates and their immediate families were also limited in the amount they could personally contribute to their campaigns. The total contributions for a presidential campaign by the candidate and his or her family were limited to a total of \$50,000. The total contributions for Senate and House candidates were limited to \$35,000 and \$25,000 respectively. The 1974 law continued the ban on contributions from corporations and labor unions.

The new provisions also placed limits on expenditures. Independent expenditures by individuals or groups were limited to \$1,000 per year. National party committees could not spend more than \$10,000 and \$20,000 per candidate in House and Senate general elections. The expenditure limits for presidential candidates used a system of multipliers based on the voting-age population.<sup>326</sup> Parties were also restricted on the amount they could spend on nominating conventions. Major parties were limited to \$2 million for convention expenses, while minor parties were limited to less money.

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<sup>326</sup> National parties were permitted to spend \$0.02 multiplied by the voting-age population across the nation for presidential elections. Mutch, *supra* note 6.

The law also placed limits on total campaign expenditures. Senate campaigns were limited to \$100,000 in a primary and \$150,000 in a general election. House candidates could not spend more than \$70,000 in either the primary or the general election. Presidential campaigns were limited to \$10 million in a national primary and \$20 million in the general election.<sup>327</sup> The law did permit all candidates to spend an additional 20 percent of their limits for fundraising activities.<sup>328</sup>

The 1974 amendments also strengthened disclosure requirements. Specifically, all candidates were required to create one central committee through which all contributions and expenditures would flow and be reported. Campaigns also were required to disclose the bank depositories authorized to receive campaign funds. In election years, campaign committees and active political committees were required to file a financial report each quarter. If a committee received or spent \$1,000 or more in the quarter, then additional reports had to be filed ten days before and thirty days after each election. Contributions of more than \$1,000 that were received within fifteen days of an election had to be reported within 48 hours. In non-election years, committees were required to file year-end reports.

The FECA also included exemptions for the media and volunteers to these provisions. Any services provided individuals volunteering for a candidate were not considered contributions.<sup>329</sup> The media exemption was adopted to "assure the unfettered right of newspapers, TV networks, and other media to cover and comment on political campaigns." This exemption provides that

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<sup>327</sup> Presidential spending in each state was limited to twice what a senate candidate could spend in the state.

<sup>328</sup> All limits were forecasted to adjust based on the consumer price index. In the original 1971 legislation, there were no total campaign spending limits. Rather, the campaign spending limits were placed on specific types of media buys. For example, under the 1971 provisions, no more than 60% of a candidate's overall media spending could be devoted to radio and television advertisements.

<sup>329</sup> 2 U.S.C. § 431 (8)(B).

"any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication" is not considered an expenditure for the purposes of FECA.<sup>330</sup> Additionally, the FEC extended this exemption so that the cost of covering or carrying those stories or commentaries is not considered a contribution.<sup>331</sup>

A major change in the financing of presidential campaigns was accomplished through the public financing system put in place by the 1974 amendments. This system allowed for full financing of presidential general election campaigns. Presidential nomination candidates were eligible for matching funds. This system was funded by optional tax check-off that allowed individuals to designate \$1 of their tax payment for the presidential election campaign fund.

In a general election for the office of the President, major party candidates could receive \$20 million, the national spending limit, if they refrained from raising private money. Minor party or independent candidates were eligible for a portion of the subsidy based on their performance the previous election.<sup>332</sup> In the presidential primaries, candidates had to raise at least \$5,000 in contributions of \$250 or less in at least 20 states. If they qualified, the federal government would match dollar-for-dollar the amount raised with a maximum of \$5 million, or half the national spending limit. Nominating committees could also use public financing for their nominating convention expenses. Major parties could receive the entire limit of \$2 million, while minor parties were eligible only for portions based on public support in the previous election.

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<sup>330</sup> 2 U.S.C. 431(9)(B)(i).

<sup>331</sup> See 11 C.F.R. 100.73.

<sup>332</sup> For example, if an independent candidate had received 10 percent of the vote in the previous election, he or she would be eligible for \$200,000. Candidates could also apply for post-election funding based on their performance in the instant election. Post-election funding was the only public financing option for new candidates. Corrado, *supra* note 12.

Finally, one of the most substantial changes the 1974 amendments made to campaign finance law was the creation of the Federal Election Commission (FEC). The amendments empowered the FEC to receive campaign reports from all candidates and committees; to promulgate rules for the enactment of these laws; to make reports to Congress and the president; to conduct audits and investigations; to subpoena witnesses and information; and to seek civil injunctions to ensure compliance with campaign finance laws.

FECA was set to be implemented for the 1976 elections. However, the law was challenged in the courts shortly after being signed into law. Before the 1976 election cycle, the Supreme Court overruled some aspects of the law in *Buckley v. Valeo*, forcing Congress to reconfigure portions of the law in order to implement the provisions.

### **Buckley v. Valeo**

Almost immediately following the passage of FECA, challenges to the law were being tested in court. Senator James L. Buckley and presidential candidate Eugene McCarthy—along with contributors, political committees and parties, and non-profit organizations—opposed the new law on constitutional grounds.<sup>333</sup> Specifically, Buckley and his fellow appellants argued that the use of money for political purposes equates to speech. Therefore, limiting the ability to spend money on political communications violates the principles of the First Amendment.<sup>334</sup> In addition to opposing the contribution and expenditure limits, appellants argued that the law

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<sup>333</sup> *Buckley v. Valeo*, 424 U.S. 1, 8 (1976). Plaintiffs included a candidate for the Presidency of the United States, a United States Senator who is a candidate for re-election, a potential contributor, the Committee for a Constitutional Presidency – McCarthy '76, the Conservative Party of the State of New York, the Mississippi Republican Party, the Libertarian Party, New York Civil Liberties Union, Inc., the American Conservative Union, the Conservative Victory Fund, and Human Events, Inc.” *Id.* The suit was originally brought in the United States District Court for the District of Columbia. Through several procedural steps, the case was considered by the Court of Appeals. 171 U.S. App. D.C. 192. The appellate court upheld nearly all provisions of FECA. Plaintiffs appealed to the Supreme Court.

<sup>334</sup> 424 U.S. at 11.

infringed on individuals' right of association based on the disclosure and reporting requirements.<sup>335</sup>

The Court issued a per curiam opinion which shaped the future landscape of campaign finance laws. In its analysis of the major provisions of FECA, the Court recognized the significance of the activities that the law was regulating:

The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.<sup>336</sup>

The Court acknowledged that there was indeed a link between money and speech. Limiting how much an individual could spend, limited how much an individual could speak. However, the Court found that some aspects of FECA, while triggering a balancing test of First Amendment interests and government purposes, survived the constitutional challenges.

In its holding, the Court laid out several basic tenets. First, the Court drew a distinction between contributions and expenditures. The Court, purporting to apply a strict scrutiny review of the FECA provisions, held that the contribution limits survived the First Amendment challenges.<sup>337</sup> The *Buckley* Court held that limits on candidates' expenditures and "independent" expenditures by individuals and groups were unconstitutional and infringed on First Amendment rights.<sup>338</sup>

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<sup>335</sup> 424 U.S. at 11. Appellants also opposed the FEC's composition and powers and argued that the presidential public funding system violated the First and Fourth Amendments. However, those issues are not relevant to the discussion in this study.

<sup>336</sup> *Id.* at 14.

<sup>337</sup> *Id.* at 58-59, 68.

<sup>338</sup> *Id.* 43.

Second, the Court further distinguished types of financial support of candidates by holding that expenditures coordinated with candidates as the functional equivalent of contributions.<sup>339</sup>

Finally, the Court ruled that disclosure requirements were also constitutional means of preventing corruption of the political process.

### **Contributions and expenditures receive different treatment in the Court's balancing test**

One of the most significant results of the Buckley decision was the constitutional splitting of “contributions” and “expenditures.” Although the Court found that limitations on both of these “operate[d] in an area of the most fundamental First Amendment activities,” they were treated differently under First Amendment analysis. Limits on contributions were found to be constitutional, but the Court found expenditure limits to be an unconstitutional violation of individuals’ free speech rights.

The government provided three justifications for contribution limitations. First, the government offered the need to prevent corruption, or the appearance of corruption, from the influence of large financial contributions. Second, the government contended that the contribution limits provided equalization to the “relative ability of all citizens to affect the outcome of elections.”<sup>340</sup> Finally, the government proposed that these limits would act check the rising costs of campaigns, thus allowing easier access to candidates without much money or large contributors.<sup>341</sup> The Court found the first rational sufficient – “to the extent that large contributions are given to secure political quid pro quo’s from current and potential office holders, the integrity of our system of representative democracy is undermined.”<sup>342</sup>

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<sup>339</sup> *Id.* at 46-47.

<sup>340</sup> 424 U.S. at 26.

<sup>341</sup> *Id.*

<sup>342</sup> 424 U.S. at 26-27.

The Court found that limitation on contributions “entails only a marginal restriction upon the contributor’s ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.”<sup>343</sup> The Court concluded that limiting contributions would have no direct impact on the contributor’s freedom of expression, nor did it find any evidence that the limits would have a “dramatic adverse effect” on campaign financing or political association funding.<sup>344</sup> In fact, the Court found that the limits would increase the total amount of political communication because candidates and committees would gather smaller donations from more people and convince those who would give more to spend that money on independent communications.<sup>345</sup> The Court did recognize that the limits on contributions infringed on an individual’s freedom of association. However, the Court noted that this right has never been absolute. As the limits advanced a sufficient government interests and posed only minimal threats to the First Amendment, the Court upheld the limits on contributions.

Although the Court found the limits on contribution constitutionally valid, the Court was not so willing to accept the limits placed on independent expenditures. The Court found that limits on expenditures raised more significant First Amendment concerns because they are intended to “restrict the quantity of campaign speech” and therefore “limit political expression ‘at the core of our electoral process and of the First Amendment freedoms.’”<sup>346</sup> For example, the Court determined that the expenditure limits would make it unlawful for an individual to

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<sup>343</sup> *Id.*

<sup>344</sup> *Id.* at 21.

<sup>345</sup> *Id.* at 22.

<sup>346</sup> *Id.* at 39.

purchase a “single one-quarter page advertisement ‘relative to a clearly identified candidate’ in a major metropolitan newspaper.”<sup>347</sup>

The Court found that limits on expenditures did not advance the government’s interest in preventing corruption in the electoral system. Nor did the Court find persuasive the government’s argument that these limits promoted political equality of citizens. The Court rejected this as a compelling interest stating that pursuing such equality at the expense of silencing “some elements of our society” was “wholly foreign to the First Amendment.”<sup>348</sup> The Court held that while limiting independent expenditures served no substantial governmental interest, it did “heavily burden[ ] core First Amendment expression.”<sup>349</sup> The Court held that while limiting independent expenditures served no substantial governmental interest, it did “heavily burden[ ] core First Amendment expression.”<sup>350</sup>

The Court did find that expenditures that are controlled by, or coordinated with, a candidate were “disguised contributions.”<sup>351</sup> The Court found that these types of expenditures posed the same threats of corruption as direct contributions.<sup>352</sup> Thus, while truly independent expenditures are fully protected by the First Amendment, any coordination with a candidate or a candidate’s staff converts that expenditure into a contribution that can constitutionally be limited.

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<sup>347</sup> *Id.* at 40.

<sup>348</sup> *Id.*

<sup>349</sup> 424 U.S. at 48.

<sup>350</sup> *Id.*

<sup>351</sup> *Id.* at 46.

<sup>352</sup> *Id.*

## **Disclosure requirements are constitutional**

The 1974 FECA required candidates and committees to disclose sources of funding and campaign expenditures. The Court found that disclosure requirements did not impermissibly infringe on First Amendment free speech rights. However, the Court did require that disclosure laws survive “exacting scrutiny” because it found that disclosure of this information revealed political associations. Therefore, compelling individuals to disclose this information to the government could infringe on the First Amendment freedom of association.<sup>353</sup> The Court required that the government prove that its interest be “more than a mere showing of some legitimate governmental interest” and that the interest is “substantially” related to the information that would be disclosed under the FECA.<sup>354</sup>

The Court identified three categories of governmental interests that were ostensibly served by the disclosure requirements: 1) providing the electorate with information; 2) deterring corruption, or avoiding the appearance of corruption; and 3) detecting violations of FECA limits on contributions.<sup>355</sup> Although the Court found that these were substantial interests and that the disclosure requirements “directly” served them, the Court continued to analyze the burdens that the requirements placed on individuals to complete the balancing test.

The Court noted that the requirements may deter some individuals from contributing to candidates or political parties. The Court also recognized the potential for contributors to be subjected to harassment for their donation. However, the Court found that the balance fell in

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<sup>353</sup> *Id.* at 64.

<sup>354</sup> The government argued that this law was different than those at issue in the Court’s precedent on this matter because FECA only required a list of contributors; FECA did not require organizations to provide membership lists. *Id.* at 65. However, the Court supported the idea that joining monetary resources often was just as essential as joining groups in effectively disseminating a message or effecting change. *Id.* at 65-66.

<sup>355</sup> *Id.* at 66-68.

favor of the disclosure requirements as they “appear[ed] to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist.”<sup>356</sup>

## Reconstructing FECA

After the Court deconstructed the 1974 law, Congress made the changes to the law necessary to conform with the Court’s ruling.<sup>357</sup> In addition to revising the provisions that the Court struck down, Congress made other significant amendments to the law.<sup>358</sup> The new amendments expanded the FEC’s enforcement powers by allowing it to prosecute violations of FECA.<sup>359</sup> The contribution limit provisions were revised to include limits on the amount individuals could donate to political action committees or national party committees.<sup>360</sup> Although the Court struck down independent expenditures, Congress enacted additional disclosure requirements to ensure reporting of these activities.<sup>361</sup>

Congress continued to mold the law with changes in 1979 after candidates and party leaders complained that the law was too restrictive.<sup>362</sup> Congress increased reporting thresholds for individual contributions and expenditures to reduce the amount of information candidates and

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<sup>356</sup> *Id.* at 68. The Court also addressed whether this balance changed when disclosure requirements were applied to minor parties or independents. The Court found that there may be the possibility that disclosure would be too burdensome, but that a general exemption was too broad and refused to create one. This area of disclosure law is extremely interesting, but outside the scope of this paper.

<sup>357</sup> Corrado, *supra* note 12 at 27.

<sup>358</sup> *Id.*

<sup>359</sup> However, Congress limited this power by requiring a majority of the commissioners to vote on any actions. Additionally, any advisory opinions that the Commission issued were restricted to the factual situations presented and cannot respond to hypothetical situations.

<sup>360</sup> P.L. 94-283 § 112. Although these types of contributions were not originally included in the aggregate total limit, Congress did not increase the total limit to accommodate these new restrictions.

<sup>361</sup> P.L. 94-283. This included mandatory reporting of expenditures and a sworn statement as to whether the expenditure was “made in cooperation, consultation, or concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate.”

<sup>362</sup> Corrado, *supra* note at 28.

committees had to report to the FEC.<sup>363</sup> Additionally, the 1979 amendments exempted from the disclosure requirements candidates and committees that raised less than \$5,000.<sup>364</sup> To ease the budget restraints on party expenditures, Congress exempted activities primarily aimed at party building. For example, parties could spend unlimited amounts on voter registration drives and promotional items, such as buttons and bumper stickers.<sup>365</sup>

There were minor changes in the law and continued debate over the topic.<sup>366</sup> The amendments in 1979 constituted the last major Congressional effort to reform campaign finance law until the 2002 Bipartisan Campaign Finance Reform Act.<sup>367</sup>

### **Bipartisan Campaign Reform Act of 2002**

The efforts to significantly overhaul FECA began in 1996, when the first versions of what became the Bipartisan Campaign Reform Act of 2002 (BCRA) were introduced.<sup>368</sup> However, a bill was not passed until January 2002. The reform bill was aimed to “close” some of the loopholes that had developed under FECA.<sup>369</sup> Specifically, the sponsors of the bill, Senators John McCain and Russel Feingold, expressed concern with the unregulated soft money donations in federal elections. Soft money is contributions that parties solicited and spent outside the purview

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<sup>363</sup> *Id.* at 29.

<sup>364</sup> *Id.*

<sup>365</sup> *Id.* The 1979 amendments also withdrew the FEC’s authority to conduct random audits, decreased the amount of public subsidy for nominating conventions, and prohibited the use of excess campaign funds for personal spending.

<sup>366</sup> *Id.* at 31-35.

<sup>367</sup> *Id.* at 30.

<sup>368</sup> Corrado, *supra* note 12 at 36. Efforts were met with Republican-led filibusters and opposition that held the bill in committees.

<sup>369</sup> BCRA, *supra* note 8. On February 13, 2002, the House of Representatives passed H.R. 2356. The bill was then adopted by the Senate on March 18 and 20, 2002. President George W. Bush signed H.R. 2356 into law on March 27, 2002. BCRA is also known as the McCain-Feingold Act, after its Senate co-sponsors, Senators John McCain and Russell Feingold.

of FECA. This type of fundraising and spending had allowed contributors to bypass FECA's contribution and coordinated expenditure limits for years.<sup>370</sup>

In addition to addressing concerns over soft money, provisions in BCRA included increased contribution limits and limits on communications leading up to an election. To mitigate soft money donations and expenditures, Congress set limits on the activities of office holders, candidates, and national parties in relation to fundraising. Congress also amended the definition of "public communications," which determines, in large part, the scope of the campaign finance legal requirements mandated by FECA and BCRA for campaign communications.<sup>371</sup>

Congress restricted the funding for "federal election activity", requiring that these activities be paid for with federal money only – money that is subject to the restrictions of FECA.<sup>372</sup> "Federal election activity" was defined as

- (i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;
- (ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot);
- (iii) a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or
- (iv) services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.<sup>373</sup>

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<sup>370</sup> BCRA, *supra* note 2. See also Corrado, *supra* note at 36.

<sup>371</sup> BCRA was challenged and upheld in *McConnell v. Federal Elections Committee*, 540 U.S. 93 (2003).

<sup>372</sup> 2 U.S.C. § 441i.

<sup>373</sup> 2 U.S.C. § 431(20).

Congress defined “public communication” as “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.”<sup>374</sup> And “generic campaign activity” was defined as “a campaign activity that promotes a political party and does not promote a candidate or non-Federal candidate.”<sup>375</sup> Public communications made by political committees must carry disclaimers on the payment of the communications and whether the candidate supported the communication.<sup>376</sup>

Additionally, Congress significantly changed the campaign finance landscape when it created a category of communications called “electioneering communications.” This is defined as “any broadcast, cable or satellite communication” that refers to a clearly identified candidate for federal office; is publicly distributed shortly before an election for the office that candidate is seeking; and is targeted to the relevant electorate.<sup>377</sup> BCRA prohibited corporations and labor unions from making or funding electioneering communications that are not targeted to their respective audiences (e.g., the labor union’s membership or the corporation’s employees or stockholders). Incorporated organizations – also known as 527s – also are prohibited from making electioneering communications.<sup>378</sup> Individuals may make electioneering communications, provided they can prove that no corporate or labor organization funds were used.

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<sup>374</sup> 2 U.S.C. § 431(22).

<sup>375</sup> 2 U.S.C. § 431(21).

<sup>376</sup> 2 U.S.C. § 441d.

<sup>377</sup> Trevor Potter, *The Current State of Campaign Finance Law*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 48, 56 (Anthony Corrado et al., eds. 2005).

<sup>378</sup> An incorporated state party or candidate committee may make these communications if it is not a political committee, is incorporated for liability purposes only, does fund electioneering communications with corporate or labor union donations, and meets all reporting requirements.

The “electioneering communications” restrictions were created to curb circumvention of spending prohibitions on corporations and unions. Prior to the BCRA “electioneering communication” restrictions, corporations and unions could use treasury funds to distribute advertisements that, while ostensibly “issue ads,” were in fact intended to influence an election for federal office. The “sham issue ads” escaped FECA regulation because they did not fit into the *Buckley* Court’s framework of expressly advocating or opposing a given candidate.<sup>379</sup>

### **Summary of the Current Status of the Law**

Current campaign finance law limits contributions but places no limits on expenditures that are not coordinated with a candidate or a campaign (independent expenditures). The law caps the amount an individual, a political action committee, or a political committee could give to a candidate, national party, and political committees in a given year. Additionally, the Act limited the total amount individuals could give per year. Corporations, labor unions, and national banks are prohibited from making any direct contributions. However, these organizations can form separately funded political action committees for the purpose of contributing to campaigns and political parties, or otherwise attempting to influence the outcome of federal elections.

Expenditures, although unlimited in amount, are subject to disclosure requirements. Independent expenditures aggregating to more than \$250 in a calendar year must be reported to the FEC. These reports must include the name of the person or group making the expenditure; mailing address; the occupation and name of employer; identity of the expenditure recipient; the amount, date, and purpose of the expenditure; a statement as to whether the expenditure was in support or opposition of a candidate; and the name of any other person who contributed to the expenditure.

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<sup>379</sup> Potter, *supra* note 148 at 56.

The definition of contributions and expenditures includes any money spent on “public communications.” Public communications are any communications that promote or oppose a clearly identified candidate for federal office. Congress specifically included communications via broadcast, cable, satellite, newspaper magazine, outdoor advertising, mass mailing, and telephone banks, as well as “any other form of general public political advertising.” Public communications are required to carry disclaimer statements that specify the sponsorship of the communication, as well as a statement as to the authorization of the communication by the candidate. All disclaimer statements must be “clear and conspicuous.”

The FEC has mandated specific requirements for print, radio, and television disclaimer statements. These specific requirements complement the physical characteristics of the medium. Print communications must carry disclaimer statements that are of “sufficient type size to be clearly readable by the recipient,” contained in a printed box set apart from the main content of the communication, and printed in contrasting colors from the background of the communication.<sup>380</sup>

A radio broadcast communication paid for by a candidate or authorized committee must include an audio clip of the candidate’s verbal endorsement of the advertisement. Likewise, a similar advertisement broadcast on television must carry a visual message from the candidate indicating his or her endorsement of the ad. An advertisement paid for by the candidate, or authorized committee, via broadcast, cable or satellite, must carry a written statement at the end that includes the endorsement and source of the advertisement. This statement must be “clearly readable.” The FEC defined clearly readable as: appearing in letters equal to or greater than 4 percent of the vertical picture height; being visible for a period of at least four seconds; and

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<sup>380</sup> 11 C.F.R. § 110.11 (2008).

appearing with a reasonable degree of color contrast between the background and the text of the statement.<sup>381</sup>

A radio or television advertisement paid for by individuals not authorized by the candidate must include a statement that includes the source of the advertisement. The statement must be “spoken clearly.” Television advertisements must also include a visual representation of the individual, group, or committee funding the advertisement and the written copy of the verbal statement of disclaimer.<sup>382</sup> This visual representation also must be “clearly readable.”<sup>383</sup>

These requirements for disclaimer statements are the only distinction made between media entities in the application of the FECA and BCRA. The general provisions of campaign finance laws, such as disclosure requirements and contribution limits, are applied more generally across the various media.

However, some justices on the U.S. Supreme Court have questioned the constitutionality of those general provisions since the *Buckley* decision in 1976. Chapter 4 will discuss the Court’s decisions on campaign finance.

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<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

## CHAPTER 4

### HISTORY OF CAMPAIGN FINANCE JURISPRUDENCE

Modern campaign finance reform began with the Federal Election Campaign Act of 1974.<sup>384</sup> The Supreme Court, in *Buckley v. Valeo*, reviewed the constitutionality of that law in 1976.<sup>385</sup> – The Court struck limits on independent expenditures, but upheld limits on contributions and disclosure requirements. However, the *Buckley* decision was issued as a per curiam opinion, with five separate opinions concurring and dissenting in part. The disagreements among the justices continued in the more than 30 years that *Buckley* has been the controlling precedent in campaign finance jurisprudence.

This chapter will discuss the evolution of campaign finance jurisprudence. Members of the Court specifically have questioned the distinction the *Buckley* decision created. As the Court continued to review campaign finance laws, it explicitly created not only a practical distinction between contributions and expenditures, but a constitutional distinction. This constitutional distinction meant that limits on contributions only had to pass an intermediate scrutiny review, while limits on expenditures were subject to a strict scrutiny review. During this review process, members also disagreed over the acceptance of prevention of corruption as a justification for the application of campaign finance laws. An increasing number of justices have also questioned the validity of the *Buckley* decision, calling for the overturn of that precedent.

#### **The Court struggles to consistently apply *Buckley***

In 1981, five years after the *Buckley* per curiam decision, Justice Blackmun explicated his brief dissent from the *Buckley* opinion.<sup>386</sup> The plurality in *California Medical Association v. FEC*

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<sup>384</sup> See *supra* Ch. 3. The first reform act was passed in 1971, but there were significant amendments in 1974. *Id.*

<sup>385</sup> 424 U.S. 1 (1976). For a full discussion of this case, see Ch. 3.

<sup>386</sup> *California Medical Association v. FEC*, 453 U.S. 182 (1981).

interpreted a lower constitutional standard for contributions than expenditures.<sup>387</sup> Justice Blackmun concurred in the decision, but argued that contributions and expenditures should be held to the same constitutional standard and that the standard should be “exacting scrutiny.”<sup>388</sup>

In *California Medical Association v. FEC*, the Court in a plurality opinion relied on the analysis in *Buckley* to uphold a contribution limit that restricted the amount of money that unincorporated associations could donate to a political action committee.<sup>389</sup> The California Medical Association (CMA), which consisted of California physicians, formed a political action committee (CALPAC) in order to engage in political speech and support candidates for federal office via contributions to candidates.<sup>390</sup> Under the FECA, CMA was limited to a donation of \$5,000 a year to CALPAC.<sup>391</sup> CMA challenged this limit on First Amendment grounds, arguing that CALPAC was the tool that CMA’s members used to engage in political speech.<sup>392</sup> Therefore, the limits constituted an unconstitutional restriction of CMA’s freedom of expression as more similar to a limit on expenditures than on contributions.<sup>393</sup> Alternatively, CMA argued that even if the Court found this limitation to resemble the limitations on contributions, these limitations were different than those at issue in *Buckley*.<sup>394</sup> CMA argued that these contributions

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<sup>387</sup> *Id.*

<sup>388</sup> *Id.* at 202 (Blackmun, J., concurring).

<sup>389</sup> *Id.*

<sup>390</sup> *Id.* at 185.

<sup>391</sup> *Id.* (citing 2 U.S.C. § 441a (a)(1)(c) (1976)).

<sup>392</sup> *Id.* at 195.

<sup>393</sup> *Id.*

<sup>394</sup> *Id.*

posed no danger to the existence of, or the appearance of corruption, because they were going to a political committee not a candidate.<sup>395</sup>

Justice Thurgood Marshall, delivering the opinion of the Court, was not persuaded by CMA’s arguments.<sup>396</sup> Marshall determined that the “‘speech by proxy’ that CMA [sought] to achieve through its contributions to CALPAC is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection.”<sup>397</sup> The contributor’s First Amendment rights were no more impeded by limits on contributions to committees than they are by contributions to candidates. The Court reiterated that *Buckley* offered broad constitutional protection to “direct political advocacy,” not the “general approval” of a committee’s role in the political process evidenced by contributions.<sup>398</sup>

Further, the Court found that CMA’s argument that the limitation on contributions to political committees did not further a government interest was without merit.<sup>399</sup> The Court reasoned that if individuals and unincorporated organizations were allowed unregulated contributions, they could use committees to funnel unlimited funds to candidates. The Court found that this would circumvent the contribution limits upheld in *Buckley*.<sup>400</sup> The Court also rejected CMA’s argument that this particular limitation was unnecessary to protect the integrity

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<sup>395</sup> *Id.*

<sup>396</sup> *Id.* at 184. Justice Marshall’s opinion with respect to the First Amendment challenges was joined by Justices William Brennan, Byron White, and John Paul Stevens. Justice Potter Stewart – joined by Justices Burger, Powell, and Rehnquist – dissented from the opinion of the Court on the basis that the Supreme Court did not have jurisdiction to hear the case. The dissenting opinion is not discussed in detail in this chapter because the First Amendment challenges were not addressed. *Id.* at 204.

<sup>397</sup> 453 U.S. 182 at 196.

<sup>398</sup> *Id.*

<sup>399</sup> *Id.* at 197-98.

<sup>400</sup> *Id.* at 198.

of the other contribution limits because there were other antifraud provisions in the FECA.<sup>401</sup>

The Court reasoned that the activity restricted by the contribution limits was not entitled to full First Amendment protection, therefore, “Congress was not required to select the least restrictive means of protecting the integrity of its legislative scheme.”<sup>402</sup>

Justice Blackmun, although voting with the majority to uphold the contribution limits, disagreed with the Court’s interpretation of the *Buckley* opinion.<sup>403</sup> Blackmun argued that the *Buckley* Court held both contributions and expenditures to be fully protected expressive activities. Specifically, Blackmun said that the plurality in *California Medical* erred in applying a less than “rigorous” standard of review in its First Amendment analysis of the contribution limits. Blackmun argued that under a “rigorous” analysis the Court should reach a different result if the contribution limits were applied to a political committee that was “established for the purpose of making independent expenditures, rather than contributions to candidates.”<sup>404</sup> CALPAC, and other multicandidate committees, according to Blackmun serve as conduits of funds for candidates and, therefore, “pose a perceived threat of … corruption.”<sup>405</sup> However, committees that only engage in independent expenditures pose no more of a threat than individuals making the same expenditures. Accordingly, Blackmun concluded that contributions to political committees “can be limited only if those contributions implicate the governmental

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<sup>401</sup> *Id.* at 199.

<sup>402</sup> *Id.*

<sup>403</sup> 453 U.S. 182 at 201 (Blackmun, J., concurring). Justice Blackmun dissented in *Buckley v. Valeo*, contending that the contribution limits were unconstitutional. However, for the purposes of his analysis in *California Medical*, he accepted the tenets of the *Buckley* decision upholding those limits. *Id.*

<sup>404</sup> *Id.* at 204.

<sup>405</sup> *Id.*

interest in preventing actual or potential corruption, and if the limitation is no broader than necessary to achieve that interest.”<sup>406</sup>

Justice Blackmun’s concurring opinion created a situation in which there was no opinion of the Court for the portion of the case that analyzed the First Amendment interests asserted by CMA.<sup>407</sup> The plurality opinion interpreted *Buckley* as creating not only a definitional distinction between contributions and expenditures, but a distinction based on constitutional standards of review. Blackmun contended in his concurrence that *Buckley* held both these expressions of political preference to an “exacting scrutiny.” The difference in outcome as to the constitutionality of the different measures was a result of the application of the government interest promoted. The *Buckley* Court found that the contribution limits directly advanced the interest of preventing corruption, but expenditure limits did not. Blackmun argued that the intent of the *Buckley* decision was not to create a framework where contributions were held to a lower scrutiny than expenditures.

Also in 1981, the Court applied a more “rigorous” standard, similar to what Justice Blackmun called for in *California Medical*. In *Citizens Against Rent Control v. City of Berkeley* the Court found that the contribution limits to political committees upheld in *California Medical* were unconstitutional when applied to organizations formed for the purpose of political expenditures to support or oppose a ballot measure.<sup>408</sup> Justices Blackmun, joined by newly

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<sup>406</sup> *Id.* at 203.

<sup>407</sup> Justice Marshall delivered an opinion, in which justices Brennan, White and Stevens joined. Justice Blackmun joined the opinion except with respect to Part III, which discussed the First Amendment claims. Justices Stewart issued a dissenting opinion, in which Chief Justice Burger and justices Powell and Rehnquist joined. The dissent addressed only the jurisdictional issues raised in the case, and never arrived at the First Amendment issues.

<sup>408</sup> *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981). Chief Justice Burger delivered the opinion of the Court, which was joined by Justices Powell, Brennan, Stevens, and Rehnquist. Rehnquist, although joining the entire opinion of the Court, issued a short concurrence. Justices Marshall, Sandra Day O’Connor, and Blackmun issued concurring opinions. *Id.*

appointed Justice Sandra Day O'Connor, and Justice Marshall issued separate concurring opinions. Their concurrences focused on the level of scrutiny required for reviewing limits on contributions.

In *Berkeley*, the Citizens Against Rent Control, a committee formed to oppose a ballot measure in 1977, challenged a city ordinance that limited the amount an individual could contribute to candidate and ballot measure committees during an election.<sup>409</sup> The Court analogized that the restrictions on contributions to ballot measure committees are restrictions on “the marketplace for the clash of different views and conflicting ideas” that the Court had “long viewed” as protected by the First Amendment. The Court found reporting requirements sufficient to prevent undue influence by associations in the public discussion of the measure. The Court held that the limit imposed by the Berkeley ordinance “automatically affects expenditures and limits on expenditures operate as a direct restraint on freedom of expression of a group or committee desiring to engage in political dialogue concerning a ballot measure.”<sup>410</sup> The Court briefly contrasted the limits on contributions in *Buckley* by recognizing that there are state interests in regulating contributions to a candidate, but concluded that there was no “significant state or public interest” served by limiting discussion of a ballot measure.<sup>411</sup> The Court reached this conclusion without any guidance as to the level of scrutiny it was applying.

Justice Marshall, who wrote the opinion of the Court in *California Medical*, concurred in the judgment, but wrote separately to affirm that the Court, since *Buckley* has applied a lower scrutiny to contribution limits than to expenditure limits.<sup>412</sup> Justice Marshall expressed concern

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<sup>409</sup> *Id.* (citing the Election Reform Act of 1974, Ord. No. 4700-N. S., § 602).

<sup>410</sup> *Id.* at 299.

<sup>411</sup> *Id.*

<sup>412</sup> *Id.* at 300 (Marshall, J., concurring).

that the opinion of the Court did not explicitly uphold that constitutional distinction.<sup>413</sup> Marshall continued on the assumption that the Court was adhering to a lower standard of review for First Amendment challenges to contribution limits. He concurred in the Court's judgment because he found no evidence that voter confidence, the interest ostensibly served by the ordinance, was undermined by large contributions to ballot measure committees.<sup>414</sup>

Although Justice Blackmun concurred in the judgment as well, he flatly denied the application of the lower standard assumed by Marshall. In his concurring opinion, joined by Justice O'Connor, Blackmun reiterated his position in *California Medical* that any contribution limit must survive "exacting scrutiny."<sup>415</sup> Blackmun recognized that protecting voter confidence was a legitimate interest. However, Blackmun required both proof that voter confidence was threatened and that the ordinance was narrowly drawn to protect voter confidence. Blackmun found that the City failed on both counts.<sup>416</sup>

Justice White issued a scathing dissent in which he admonished the Court for "overstat[ing] the extent to which First Amendment interests are implicated" and for, worse, "assert[ing] that the ordinance furthers no legitimate public interest."<sup>417</sup> White argued that limitations are content neutral and, therefore, must be analyzed as to *how much* they restrict expressive activity. "That First Amendment interests are implicated should begin, not end the inquiry. When the infringement is as slight and ephemeral as it is here, the requisite state interest

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<sup>413</sup> 454 U.S. at 301 (Marshall, J. concurring).

<sup>414</sup> *Id.*

<sup>415</sup> *Id.* at 302 (Blackmun, J. and O'Connor, J., concurring).

<sup>416</sup> *Id.* at 302-303.

<sup>417</sup> *Id.* at 306 (White, J., dissenting).

to justify the regulation need not be so high.”<sup>418</sup> In determining that the contribution limits should be upheld, Justice White adhered to a Meiklejohnian theory of expression. He argued that the contribution limits were justified because if there were any “ultimate impact on speech, it will be presented to assure that a diversity of views will be presented to the voters.”

The *Berkeley* decision further muddies the distinction drawn in *Buckley* between contributions and expenditures. Justice Blackmun, joined by Justice O’Connor, continued to argue for no constitutional distinction at all. He contended that the difference found in *Buckley* resulted from the application of the state interest rather than any difference in value or First Amendment protection. Justice Marshall argued that *Buckley* indeed created a First Amendment dichotomy between contributions and expenditures, with contributions receiving a lower level of protection because they did not directly infringe on speech. Justice White argued for no distinction between the two types of regulations, but rather that they are both content-neutral regulations.<sup>419</sup>

### **Justices Disagree Over Interpretations of *Buckley*’s Corruption Standard**

After *Buckley*, the justices disagreed not only about the extent of the distinction between expenditures and contributions, but also about the requirements of the proof of corruption as a compelling government interest. The Court held that for certain organizations, the corruption rationale was not strong enough to support the application of FECA provisions. For example, the Court found that disclosure requirements could not constitutionally be applied to minority parties because minority parties did not present a significant risk of corruption. The Court also held that some corporations did not warrant the application of FECA corporate spending limits. However,

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<sup>418</sup> *Id.* at 310.

<sup>419</sup> Restricting the analysis to content-neutral regulations lowers the standard of review to intermediate scrutiny, which requires a lesser interest to be proved by the government.

none of these decisions were unanimous, and dissenting justices offered different interpretations of the application of the corruption rationale.

In 1982, the Court held that applying disclosure requirements to minority parties with a history of discrimination is unconstitutional.<sup>420</sup> The Court reasoned that because minority parties have a lower chance of winning the election, they do not present as much of a risk of corruption.<sup>421</sup> The Court also found a greater threat to the First Amendment interests of minor parties and candidates because the financial base is likely to be less “sound” and “more vulnerable to falloffs in contributions” due to fear of hostility when the association is known.<sup>422</sup> Therefore, the government interests promoted by the restrictions are not significant enough when applied to contributors to minor parties and candidates.<sup>423</sup>

A point of contention among the justices was the application of FECA disclosure requirements to recipients of minor party expenditures. The majority found that these requirements also should not apply to minority parties. However, Justice O’Connor, joined by Justices Rehnquist and Stevens, argued that although contributors to minor parites might experience hostility, recipients of expenditures cannot claim the same fears of retribution.<sup>424</sup>

The justices also disagreed on the extent of congressional deference necessary in analyzing the government interest ostensibly advanced by campaign finance law provisions. In *FEC v. Massachusetts Citizens for Life* (MCFL),<sup>425</sup> the Court analyzed the constitutionality of provisions

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<sup>420</sup> *Brown v. Socialist Workers ’74 Campaign Committee*, 459 U.S. 87 (1982).

<sup>421</sup> *Id.* at 92.

<sup>422</sup> *Id.* at 93.

<sup>423</sup> *Id.*

<sup>424</sup> *Id.*

<sup>425</sup> 479 U.S. 238 (1986).

limiting corporate campaign spending to spending via PACs when applied to corporations formed for ideological purposes. The opinion of the Court, written by Justice Brennan, held that these provisions were unconstitutional when applied to ideological organizations because these type of organizations do not present the corrupting influence that the average corporation does.<sup>426</sup> However, Justice Rehnquist wrote a dissenting opinion in which he admonished the Court for second-guessing Congress' decision that corporations, no matter their stated purpose, required additional legislation.<sup>427</sup>

MCFL was a nonprofit corporation formed to "foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political and other forms of activities."<sup>428</sup> The Court noted that MCFL did not accept any donations from corporations, but gathered its resources from individual donors and fundraising activities.<sup>429</sup> MCFL published a newsletter periodically to inform members and readers about the organization and relevant issues, such as the results of legislative and administrative hearings, proposals for constitutional amendments, status of legislation, and the outcome of referenda.<sup>430</sup> These newsletters were produced using money from MCFL's general treasury. During the 1978 election cycle, the MCFL newsletter included a section that listed candidates by name and

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<sup>426</sup> *Id.* at 241. Justice Brennan wrote the opinion for the Court. Parts I and II, which consisted of mostly case facts and history, was joined by all justices. Part III-A, which discussed the burdens imposed on MCFL, was joined by Justices Marshall, Powell, and newly appointed Antonin Scalia. Parts III-B and III-C, which discuss the constitutionality of the challenged provisions, were joined by Justices Marshall, Powell, Scalia, and O'Connor.

<sup>427</sup> *Id.* at 268 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist was joined in his dissent by Justices Blackmun, Stevens, and White. *Id.* at 265.

<sup>428</sup> 479 U.S. 238, 241 (quoting MCFL's articles of incorporation).

<sup>429</sup> *Id.* at 242.

<sup>430</sup> *Id.* at 243.

reported on the candidates' views on abortion. This expenditure was challenged under the FECA, which prohibited corporate spending in support of a candidate from general treasury accounts.<sup>431</sup>

Although the Court found that MCFL's expenditure on the special edition newsletter was controlled by the FECA corporation provisions, it found that application of these provisions to MCFL was unconstitutional. In the plurality portion of the decision, Justice Brennan reasoned that applying the FECA provisions that limited corporate spending would require that MCFL—to "occasionally make independent expenditures on behalf of candidates," – meet "more extensive requirements and more stringent restrictions" than an unincorporated organization with similar purposes. Brennan's opinion noted that the restrictions imposed on corporations might hamper political expression because the alternative means of communication – a PAC – is "more burdensome than the one it forecloses."<sup>432</sup> Justice O'Connor, in a concurring opinion, focused on the burdens created by the organizational restraints of establishing and operating a PAC. O'Connor noted that these burdens are not "insurmountable," but found that the government "failed to show that groups such as MCFL pose any danger that would justify infringement of its core political expression."<sup>433</sup>

Brennan's opinion for the Court noted that limits on corporate spending were intended to prevent the corporate form from providing an unfair advantage in the political marketplace.<sup>434</sup> The marketplace of ideas could be corrupted by influences of the economic marketplace. However, a majority of the Court also found that "groups such as MCFL ... do not pose that

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<sup>431</sup> *Id.* at 244.

<sup>432</sup> *Id.* at 255.

<sup>433</sup> *Id.* at 266 (O'Connor, J., concurring).

<sup>434</sup> *Id.* at 257-260.

danger of corruption. MCFL was formed to disseminate political ideas, not to amass capital.”<sup>435</sup> MCFL was not the type of corporation that engendered concern over corruption of the political marketplace because its wealth was not amassed in the economic marketplace. The Court identified three characteristics that distinguished MCFL from traditional corporations: 1) MCFL operated solely in the political marketplace; 2) MCFL had no shareholders or interested investors; and 3) MCFL was not formed by and did not accept donations from corporations or unions.<sup>436</sup> Therefore, the Court concluded that there was no compelling justification to apply the spending limitations to the MCFL.<sup>437</sup> The law as applied was unconstitutional.

Justice Rehnquist wrote a dissenting opinion that accused the majority of stepping over the Court’s constitutional boundary. Rehnquist – joined by Justices White, Blackmun, and Stevens – argued that the distinction the Court drew between MCFL and other corporations was a “distinction in degree” not a “difference in kind.”<sup>438</sup> Rehnquist noted that Congress had judged that all corporate political activity called for additional legislative restrictions to prevent corporate corruption of the political process. To question that judgment, Rehnquist wrote, is legislative in nature. Rehnquist cited past precedent in which the Court had upheld corporate restrictions. He reasoned that as MCFL was a corporation, the application of the law was constitutional. He concluded that it was not the Court’s duty to draw such distinctions as the majority undertook in MCFL.<sup>439</sup>

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<sup>435</sup> *Id.* 259.

<sup>436</sup> *Id.* at 264.

<sup>437</sup> *Id.* at 263.

<sup>438</sup> *Id.* at 267 (Rehnquist, C.J., dissenting). Justice White joined Rehnquist’s dissent, but also wrote separately to briefly affirm his previous dissent in *Buckley v. Valeo*. *Id.* at 270.

<sup>439</sup> *Id.*

However, the Court did not find that all non-profit corporations were deserving of the *MCFL* exception to the FECA corporation requirements. In *Austin v. Michigan State Chamber of Commerce*, the Court found that provisions similar to those challenged in *MCFL*, were constitutional when applied to a state chamber of commerce, because it resembled a traditional corporation.<sup>440</sup> This case involved a provision of the Michigan Campaign Finance Act that prohibited corporations from using general treasury funds for expenditures that supported or opposed a state office candidate. The Michigan Chamber of Commerce attempted to use its general treasury to fund a newspaper advertisement in support of a particular candidate. The chamber sought a declaratory judgment that would enjoin the state from enforcing the regulation against the chamber.<sup>441</sup> Although the U.S. Supreme Court looked back to its 1986 decision in *MCFL*, the Court said that the chamber of commerce did not exhibit the same characteristics as the *MCFL* did.<sup>442</sup> Rather, the Court said the chamber of commerce resembled a traditional corporation and presented the same threat of corruption as a corporation.<sup>443</sup> As such, the Court held that the application of the Michigan law was permissible under the First Amendment.

Justices Scalia and Kennedy wrote dissenting opinions in this case. Justice Scalia argued, in a lengthy dissent that the limits on corporate spending are counter to the free political exchange guaranteed by the First Amendment. The newly appointed Justice Anthony Kennedy also offered a dissent, which Scalia joined along with Justice O'Connor. Kennedy argues that independent expenditures – whether funded by a corporation or an individual – are at the core of

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<sup>440</sup> 494 U.S. 652 (1990).

<sup>441</sup> *Id.* at 656.

<sup>442</sup> *Id.* at 661-65.

<sup>443</sup> *Id.* at 664.

political speech protected by the First Amendment. He concluded that the Court had become a censor of political speech by selectively restricting speech based on the speaker.<sup>444</sup>

### **Buckley Loses Support**

In the years since *Buckley*, the makeup of the Court had changed significantly. Justices, Marshall, Brennan, White, Blackmun, Stewart, Burger and Powell left the Court. The new associate justices were O'Connor, Scalia, Kennedy, Ginsburg, and Breyer. The only two justices who sat on the Court in 1976 were Justice Rehnquist and Stevens – although Justice Stevens did not participate in the *Buckley* decision.

Beginning with *Buckley*, the justices had questioned the First Amendment distinction between contributions and expenditures. However, this concern became more obvious in 1996 some justices thought the First Amendment scrutiny applied to expenditures was too rigorous; others thought contribution limits should be subjected to stricter review. Some justices also began to emphasize a more systemic based approach to First Amendment analysis rather than a focus on individual free speech rights. This debate is evident in the cases pled by the Colorado Republican Federal Campaign Committee<sup>445</sup> and in *Nixon v. Shrink Missouri Government PAC*.<sup>446</sup>

In *Colorado Republican Federal Campaign Committee v. FEC* (Colorado I)<sup>447</sup> and *FEC v. Colorado Republican Federal Campaign Committee* (Colorado II),<sup>448</sup> the Court analyzed a portion of the FECA that restricted spending by political parties on behalf of candidates. In

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<sup>444</sup> *Id.* at 712 (Kennedy, J., dissenting).

<sup>445</sup> See *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) (Colorado I); *FEC v. Colorado Republican Federal Campaign Committee*, 121 S. Ct. 2351 (2001) (Colorado II).

<sup>446</sup> 528 U.S. 377 (2000).

<sup>447</sup> 518 U.S. 604.

<sup>448</sup> 121 S. Ct. 2351.

*Colorado I*, the main issue was whether political parties could be limited in the amount of funds spent on political communications absent any coordination with candidates. The majority found that such restrictions were akin to the restrictions placed on individual independent expenditures, which the Court struck down in *Buckley*.<sup>449</sup> However, the broader question the Court did not answer in *Colorado I* was whether limits on expenditures coordinated with candidates were constitutional. The majority opinion found it imprudent to answer this question on the facts presented in *Colorado I*.

The Court did take up the issue of coordinated expenditure limits in *Colorado II* four years later.<sup>450</sup> The Colorado Republican Federal Campaign Committee argued that limits on any type of expenditure by a political party, including those coordinated with a candidate, were unconstitutional as it imposed a significant burden on the party's ability to express its political views. The FEC argued that traditionally coordinated expenditures were treated as the equivalent to contributions. In fact, Congress defined contributions to include this functional equivalent, and the Court in *Buckley* upheld this definition. The Court in *Colorado II*, continued to adhere to the *Buckley* precedent. The Court continued to accept coordinated expenditures as comparable to contributions. The challenge to limits on coordinated expenditures by political parties was rejected.

In 2000, the year before the second Colorado case, the Court analyzed the contribution/expenditure dichotomy in *Nixon v. Shrink Missouri Government PAC* in relation to state contribution limits.<sup>451</sup> Until *Shrink*, the Court had continued to adhere, at least in rhetoric, to

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<sup>449</sup> 518 U.S. at 617.

<sup>450</sup> 533 U.S. 431.

<sup>451</sup> 528 U.S. 377 (2000). *Nixon v. Shrink Missouri Government PAC* presented a question to the Court of whether Missouri state contribution limits ranging from \$275 to approximately \$1,000 were constitutional. Using the *Buckley* test of "strict scrutiny," the Eighth Circuit Court of Appeals held that Missouri had not provided any evidence to

the language in *Buckley* that both expenditures and contributions were due core First Amendment protection. However, the force of the holdings seemed to create a stronger constitutional difference between the two types of expression. In *Shrink*, the Court explicitly articulated this difference – limits on contributions are subjected to a lower level of scrutiny.

In these three cases, the justices questioned, in concurring and dissenting opinions, the application of the contribution/expenditure dichotomy developed in *Buckley* and its progeny. In *Colorado I*, Justice Stevens and Justice Ginsburg said that “all money spent by a political party to secure the election of its candidate” should be treated the same – as a contribution. Stevens and Ginsburg argued that, in the case of political parties, limits on both contributions and expenditures should be subject to a lower standard of review. Justice Thomas argued more broadly that the distinction between contributions and expenditures established in *Buckley* was invalid. He said both types of expression should be treated as the “core First Amendment expression” that they are and be held to equally strong scrutiny.<sup>452</sup> Thomas continued this line of argument in his dissent in *Colorado II* when he declared that *Buckley v. Valeo* “should be overruled.” Thomas objected to the lower level of protection that the application of an intermediate standard of scrutiny provided political speech via the *Buckley* framework.

Political speech is the primary object of First Amendment protection, and it is the lifeblood of a self-governing people. I remain baffled that this Court has extended the most generous First Amendment safeguards to filing lawsuits, wearing profane jackets, and exhibiting drive-in movies with nudity, but has offered only tepid protection to the core speech and associational rights that our Founders sought to defend.<sup>453</sup>

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even suggest a problem of corruption. Further, even if the court could recognize a compelling interest to ward off corruption, the Eighth Circuit found that the particular limits in this case “are so small that they run afoul of the Constitution by unnecessarily restricting protected First Amendment freedoms.” *Shrink Mo. Gov’t. PAC v. Nixon*, 161 F.3d 519, 522. The Supreme Court overturned the Eighth Circuit’s ruling. See 528 U.S. 377.

<sup>452</sup> *Id.* at 636-640.

<sup>453</sup> 533 U.S. at 465-66 (Thomas, J., dissenting).

Justice Thomas considered the dichotomy in his dissent in the *Shrink* case as well.

Thomas, joined by Justice Antonin Scalia, argued again that contributions deserve the same level of First Amendment protection as expenditures because the contribution enables the dissemination of messages. “The decision of individuals to speak through contributions rather than through independent expenditures is entirely reasonable . . . Citizens recognize that the best advocate for the candidate tends to be the candidate himself.”<sup>454</sup>

The justices also continued to question the general framework of First Amendment protection for money spent in elections. Justices Stevens and Ginsburg, in *Colorado I*, argued that the First Amendment is not necessarily at odds with campaign finance limits. They argued that individual free speech rights should not be the only First Amendment interests considered and that the integrity of the electoral process may actually benefit from limiting the flow of money into campaigns.

It is quite wrong to assume that the net effect of limits on contributions and expenditures – which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials – will be adverse to the interest in informed debate protected by the First Amendment.<sup>455</sup>

Justice Stevens went one step further in his concurring opinion in *Shrink*. “Money is property; it is not speech.”<sup>456</sup> While Justice Stevens recognized that money could be used to enhance speech, or accomplish the same goals of speech – inspiring listeners – he did not support First Amendment protections for the use of that money. Rather, Justice Stevens urged the Court

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<sup>454</sup> 528 U.S. 377 at 415-416.

<sup>455</sup> 518 U.S. at 649-650 (Stevens, J., dissenting).

<sup>456</sup> 528 U.S. at 398 (Stevens, J., concurring).

to protect such spending through the doctrine of substantive due process, which protects the use of property.<sup>457</sup>

Justice Breyer and Justice Ginsburg, also concurring in the *Shrink* decision, argued that while First Amendment interests are at issue, they lie on both sides of the question.<sup>458</sup> Disagreeing with Justice Stevens, Breyer and Ginsburg argued that contributions and expenditures are entitled to First Amendment protection because spending money “enables speech.”<sup>459</sup> On the other side of the question, the justices argued that campaign finance limits protect the integrity of the electoral process and promote the open discussion and participation at the core of First Amendment values.<sup>460</sup> Justices Breyer and Ginsburg called on a Meiklejohnian reasoning to strongly oppose a “simple” strict scrutiny review. With First Amendment interests on both sides of the campaign finance reform debate, the justices advocate a deferential approach that relied on the expertise of the congressional branch.<sup>461</sup>

As the Court continued to struggle with the application of a law and precedent from 1976, Congress also kept trying to reconfigure the laws. Congress was attempting to address some of the questions that the Court had both raised and created. Congress’s attempts culminated in the Bipartisan Campaign Reform Act of 2002.<sup>462</sup>

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<sup>457</sup> *Id.* at 399.

<sup>458</sup> 528 U.S. 377, 400 (Breyer, J., concurring).

<sup>459</sup> *Id.*

<sup>460</sup> *Id.* at 401.

<sup>461</sup> *Id.* at 402-404.

<sup>462</sup> See Ch. 3.

## **Applying *Buckley* to BCRA**

The Court’s opinions following the passage of BCRA herald changes in the paradigm of campaign finance reform jurisprudence. The first change observable in the Court’s opinions is an increased deference to congressional judgment. The Court’s opinions since BCRA demonstrate a willingness to accept limitations with little to no evidence of the necessity of the resulting restriction on speech. A second major trend in campaign finance jurisprudence is the change in the focus of the First Amendment analysis in which the Court engages. The Court has begun to shift this focus from the individual to the system of democracy – both of which the Court argues are protected by the First Amendment. These changes may be a signal of a new era of campaign finance reform.

### **The Court Shows Deference**

The first case decided by the Supreme Court after the passage of BCRA was *Beaumont*. In this case the Court demonstrated once again its faltering adherence to the principles laid out in *Buckley v. Valeo*. Christine Beaumont served as officer of the non-profit corporation North Carolina Right to Life, Inc. (NCRL).<sup>463</sup> NCRL brought suit against the FEC to challenge the prohibition against spending treasury funds to make contributions to candidates. NCRL based the challenges on the MCFL case discussed above, which some nonprofit organizations do not present the same concerns of corruption as traditional corporations.

In upholding the contribution limits, the Court further distinguished the constitutional standard of review between contributions and expenditures. Unlike limits on expenditures or other types of political speech, limits on political contributions are “subject to relatively

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<sup>463</sup> FEC v. Beaumont, 539 U.S. 146 (2003).

complaisant review under the First Amendment.”<sup>464</sup> Under this lower level of scrutiny, the Court showed extreme deference to the legislature. The Court accepted – without evidence – the contention that contributions made through a corporation’s general treasury – even a non-profit, ideological corporation – poses a threat of corruption.<sup>465</sup> The Court’s willingness to accept without question the legislature’s claim of corrupting influences as a justification for suppression of expression is a harbinger of further distortion of the *Buckley* paradigm. Justice Thomas, in a more abridged manner than in previous cases, continued to admonish the Court for using such a low standard of review.<sup>466</sup> Thomas persisted that all campaign finance regulations should be considered using strict scrutiny.<sup>467</sup>

Although *Beaumont* was the first case decided after the passage of BCRA, the Court first reviewed the constitutionality of that law in *McConnell v. FEC*.<sup>468</sup> The Court rejected the First Amendment challenges to the BCRA, showing great deference to the congressional findings of threats of corruption. In its decision, the Court addressed, among smaller claims, the two major provisions of the BCRA – the ban on soft money and the ban on corporate electioneering communications.

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<sup>464</sup> 538 U.S. at 161.

<sup>465</sup> *Id.* at 157.

<sup>466</sup> *Id.* at 164 (Thomas, J., dissenting).

<sup>467</sup> *Id.*

<sup>468</sup> 540 U.S. 93 (2003).

In addressing the ban on soft money, the Court treated this provision of BCRA as a contribution limit.<sup>469</sup> The Court found that the soft money provisions met the “lesser demand” for contribution limits because they were closely drawn to meet the sufficient interest of preventing corruption. The majority relied on “common sense and the ample record” to support Congress’ claim that soft money contributed to corruption or the appearance of corruption.<sup>470</sup> The Court noted that this lesser standard “shows proper deference to Congress’ ability to weigh competing constitutional interests in an area in which it enjoys particular expertise” and “provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process.”

Four of the justices dissented from this portion of the opinion, including Chief Justice Rehnquist.<sup>471</sup> The Chief Justice found that the majority was too willing to accept anti-circumvention as a legitimate government interest. Rehnquist argued that the ban on soft money, was not closely drawn to prevent corruption and that showing such broad deference equated to a blow to the First Amendment. “Today’s decision, by not requiring tailored restrictions, has significantly reduced the protection for political speech having little or nothing to do with corruption or the appearance of corruption.”<sup>472</sup>

The Court next turned to the challenges raised against Title II of BCRA, under which “electioneering communications” were subject to specific disclosure requirements.<sup>473</sup>

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<sup>469</sup> The majority opinion quickly dismissed the challenge that some of the soft money provisions prevent spending and are therefore deserving of a strict scrutiny analysis. “For purposes of determining the level of scrutiny, it is irrelevant that Congress chose … to regulate contributions on the demand rather than the supply side.” *Id.* at 658.

<sup>470</sup> *McConnell v. FEC*, 124 S. Ct. at 661.

<sup>471</sup> *Id.* at 777. The Chief Justice was joined by Justices Scalia and Kennedy in his dissent of the Court’s ruling with respect to Title I. Justices Kennedy, Thomas, and Scalia also filed separate dissenting opinions for this part.

<sup>472</sup> *Id.* at 781.

<sup>473</sup> 2 U.S.C. § 434. For a complete discussion of these provisions, *see infra*.

Additionally, corporations and unions were prohibited from directly funding these communications.<sup>474</sup> This new definition diminished the bright line previously applied to distinguish express advocacy ads with issue ads.<sup>475</sup> However, plaintiffs challenged this definition, arguing that speakers had an inviolable First Amendment right to engage in expression through issue advertisements.<sup>476</sup> The Court disagreed, concluding that plaintiffs had misconstrued the previous decisions that had created the express advocacy and issue ad distinction.<sup>477</sup> Further, the majority held that such a distinction is counterproductive in preventing actual or apparent corruption. The new definition, however, avoids the vagueness of the express advocacy rule, provides a clear and predictable application of FECA provisions, and targets potential corrupting advertisements.<sup>478</sup>

In a general and sweeping dissent, Justice Scalia criticized the underlying principles of the Court's decision in McConnell. Scalia contended that the majority espoused the view that because money is not speech, regulating the use of money to create speech is not constricted by the high standards of First Amendment analysis. Scalia said that the Court's "cavalier attitude toward regulating the financing of speech . . . frustrates the purpose of the First Amendment."<sup>479</sup> Further, Scalia argued that pooling money was also essential to the First Amendment and that subjecting such activity to less than full First Amendment protection "threatens the existence of

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<sup>474</sup> FECA § 316(b).

<sup>475</sup> *See infra.*

<sup>476</sup> McConnell, 124 S. Ct. at 687.

<sup>477</sup> *Id.* at 687.

<sup>478</sup> *Id.* at 689.

<sup>479</sup> *Id.* at 722.

all political parties.”<sup>480</sup> And, in reference to the restriction of corporate speech, Scalia invoked the marketplace of ideas to combat the sweeping restrictions.

The premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source. If that premise is wrong, our democracy has a much greater problem to overcome than merely the influence of amassed wealth. Given the premises of democracy, there is no such thing as too much speech.<sup>481</sup>

Despite the strong dissents, the Beaumont and McConnell cases demonstrate the Court’s increasing willingness to accept a broadening concept of “corruption” based on Congressional claims. The deference shown in both these cases indicate an opportunity for more expansive campaign finance reforms to survive constitutional challenges. Particularly the language in the McConnell majority opinion that permits Congress to “anticipate and respond to concerns about circumvention” seems to be a harbinger of future acquiescence to Congressional decision making.

### **The Court Signals a New Direction for Campaign Finance Law**

Another key directional shift evident in the McConnell decision was the recognition of a broader sense of corruption. Instead of relying on the traditional notion of big money buying a candidate, the Court examined the threat of systemic electoral corruption.<sup>482</sup> This systemic value of the First Amendment seemed to burst into prominence in the first campaign finance case decided by the new Roberts Court, but was quickly extinguished when the Chief Justice wrote his first campaign finance majority opinion. The fate of this competing value remains uncertain.

In *Randall v. Sorrell*, the Court was presented with a new challenge. Vermont had imposed not only contribution limits but maximum expenditure limits for candidates. With this case, the

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<sup>480</sup> *Id.* at 725.

<sup>481</sup> McConnell, 124 S. Ct. at 726 (Scalia, J., dissenting).

<sup>482</sup> McConnell, 524 U.S. at 116.

Court surprised commentators by striking down both the expenditure limits and the contribution limits, focusing on a lack of evidence as to the necessity of these limits. The Court noted that the limits were so low that they could not be “closely drawn.” Justice Breyer wrote the plurality opinion in which he weighed five factors that led the Court to strike down the limits: 1) the limits “significantly” restrict available funding for challengers; 2) the equating of political parties to individuals for the purpose of contribution caps threatens the ability of individuals to politically associate; 3) the limits restrict the amount volunteers can incur as part of their individual contribution limit; 4) the limits are not subject to inflation; and 5) the record did not present any justification for these problems.<sup>483</sup>

The plurality opinion clearly displayed Justice Breyer’s theory of the First Amendment – what he has termed “active liberty” in other writings.<sup>484</sup> He has argued that individual rights are a byproduct of the true meaning of the First Amendment – the integrity of self-government.<sup>485</sup> In his opinion, Justice Breyer articulated that this larger goal – rather than an individual’s right of free expression – should be the interest protected by the Court in campaign finance cases.<sup>486</sup> The opinion was a stark departure from the Court’s previous cases in which individual rights of freedom of expression were pitted against campaign finance laws. Breyer, in the Randall case, shifted the argument to suggest that campaign finance laws can be congruent with First Amendment interests, thus signaling a change in the Court’s direction on campaign finance.<sup>487</sup>

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<sup>483</sup> 548 U.S. 230, 126 S. Ct. 2479, 2495-98.

<sup>484</sup> See generally STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

<sup>485</sup> Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 253 (2002).

<sup>486</sup> Randall, 126 S. Ct. at 2492.

<sup>487</sup> See, e.g., Lillian R. BeVier, *First Amendment Basics Redux: Buckley v. Valeo to FEC v. Wisconsin Right to Life*, 2006-07 CATO SUP. CT. REV 77, 84-87; Richard Briffault, *WRTL and Randall: The Roberts Court and the Unsettling of Campaign Finance Law*, 68 OHIO ST. L.J. 807, 829 (2007); Rachel Gage, *Randall v. Sorrell: Campaign Finance Regulation and the First Amendment as a Facilitator of Democracy*, 5 FIRST. AMEND. L. REV.

However, the plurality opinion in *Randall* was joined only by three justices, and for only parts of the opinion. The other members of the Court offered separate opinions that resulted in a divisive precedent.<sup>488</sup> Although Justice Thomas concurred in the decision, he disagreed with the reasoning in Justice Breyer's opinion.<sup>489</sup> Thomas, joined by Justice Scalia, reiterated that "Buckley provides insufficient protection to political speech" and should be overturned.<sup>490</sup> Justice Stevens also called for the overturn of *Buckley* in his dissenting opinion.<sup>491</sup> However, Stevens quite adamantly disagreed with Thomas' assessment of the First Amendment interests involved in campaign finance regulation. Rather, Stevens chastised the Court for ever having entertained First Amendment interests in the regulation of money, which is "property, not speech."<sup>492</sup> Justice Souter, joined by Justice Ginsburg, argued that the expenditure limits categorically struck down by the plurality opinion were indeed not foreclosed by *Buckley*.<sup>493</sup> The 1976 decision held that expenditure limits were subject to "exacting scrutiny". Souter argued that the expenditure limits deserved a full review on the merits.<sup>494</sup> The interest advocated by the state of Vermont –

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341 (2007); Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After Randall v. Sorrell*, 68 OHIO ST. L.J. 849, 852 (2007).

<sup>488</sup> Justice Alito delivered a one-paragraph concurring opinion, distancing himself only from the portion of Breyer's opinion that discussed respondents' request for the Court to revisit the *Buckley* decision. *Randall*, 126 S. Ct. at 2500. Alito argued in his concurrence that the respondents made this plea as a sort of last ditch effort without any real conviction. Therefore, Alito concluded – differently than Breyer – that the Court need not reach the issue of reexamining *Buckley*. Justice Kennedy also offered a brief concurring opinion arguing that the Court need not decide whether to reexamine *Buckley* under the issues presented in the *Randall* case. *Id.* at 2501. However, Kennedy expressed concerns about the current system of campaign finance, created in part by the Court itself. *Id.* The concurring and dissenting opinions of Justices Thomas, Stevens, and Souter are discussed in text.

<sup>489</sup> *Randall*, 126 S. Ct. at 2502.

<sup>490</sup> *Id.*

<sup>491</sup> *Randall*, 126 S. Ct. at 2506-2511.

<sup>492</sup> *Id.*

<sup>493</sup> *Id.* at 2511.

<sup>494</sup> *Id.* at 2512.

redirecting candidates and office holders from the demands of fundraising back to the affairs of governing – was not adequately analyzed in *Buckley*. Souter’s dissenting opinion argued that this interest, paired with potentially significant evidence of the problem, could meet the First Amendment scrutiny laid out in *Buckley*.<sup>495</sup>

In 2007, the Roberts Court continued to reshape the structure of campaign finance law when it reevaluated portions of the *McConnell* decision in *FEC v. Wisconsin Right to Life*.<sup>496</sup> This case resulted in a dramatic shift from the *McConnell* decision, due in some part to the change in membership on the Court.<sup>497</sup> The dissenters in *McConnell* won the day in the WRTL II case, with the additional votes of the new Chief Justice, John Roberts, and new Associate Justice Samuel Alito. The majority decision found that the new BCRA electioneering communication provisions were unconstitutionally applied to Wisconsin Right to Life, an incorporated right-to-life organization.

The majority opinion ostensibly adhered to the *McConnell* decision, but in effect turns that precedent on its head. Chief Justice Roberts’ opinion invalidates the corporate bans on electioneering communications and weakens the application of the definition of electioneering communications.<sup>498</sup> The Court, in a direct turn on precedent invalidates the ban on corporate electioneering communications as applied to WRTL.<sup>499</sup> This is not only a deviation from the *McConnell* decision, but also from previous cases that determined as-applied challenges to

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<sup>495</sup> *Id.*

<sup>496</sup> 127 S. Ct. 2652 (2007).

<sup>497</sup> Chief Justice Rehnquist died in 2005 and Justice Sandra Day O’Connor retired in 2006. President Bush nominated John Roberts as Chief Justice and Samuel Alito as Association Justice; both were confirmed and took part in the WRTL II decision.

<sup>498</sup> WRTL II, 127 S. Ct. at 2667-74.

<sup>499</sup> *Id.*

FECA. WRTL differs significantly from the Massachusetts Citizens For Life case because WRTL accepted corporate donations. The fact that MCFL was independent of corporate influence was a significant factor when the Court found the corporate spending provisions unconstitutional as applied to MCFL. The WRTL spending would carry the corruption concerns of a traditional corporation because of the corporate donations. Therefore, the WRTL case is more similar to the Michigan Chamber of Commerce, which was held to corporate spending provisions by the Court because of its strong ties to corporations.

Even more striking than the deviation from precedent, however, is the Chief Justice's discussion of competing interests. In *McConnell* and *Randall v. Sorrell*, the Court had begun to emphasize the systemic First Amendment value of protecting the integrity of the electoral process. This value had traditionally been seen as the government interest at odds with the First Amendment. Chief Justice Roberts employed the traditional value system when he discussed the regulations framed solely against the individualistic First Amendment freedom of speech. This supports a marketplace conception of political discussion that echoes Scalia's previous dissent: "Given the premises of democracy, there is no such thing as too much speech."<sup>500</sup>

### **Conclusion**

The particulars of campaign finance reforms have changed over the years, but the basic foundation has remained stable for more than thirty years. Since the Court announced its decision in *Buckley v. Valeo*, campaign finance reform has been defined by the line drawn between contributions and expenditures. Under the *Buckley* framework, contributions can be constitutionally restricted, but expenditures cannot. In the per curiam opinion issued in that seminal case, the justices indicated that limits on both contributions and expenditures were

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<sup>500</sup> *McConnell*, 124 S. Ct. at 726 (Scalia, J., dissenting).

deserving of strict scrutiny under a First Amendment analysis. However, since issuing that opinion, individual justices have questioned the validity of the contribution/expenditure dichotomy and the deserving analysis for each category of limitation. Many members of the current Supreme Court have written concurrences and dissents that call into question the lasting validity of this framework.

Justice Thomas has been a consistent advocate of overturning the *Buckley* decision, specifically in reference to the distinction between contributions and expenditures. More generally, the level of review for these types of limitations has also been an issue for the justices –some have advocated for an intermediate scrutiny for all reform methods, while others, namely Justice Thomas, have articulated the need to hold all reform efforts to the highest level of scrutiny.

More recently, the debate has centered on the depth of analysis that the Court should enter into when addressing campaign finance laws. During the early *Buckley* progeny, the Court focused on balancing individual First Amendment rights with the compelling interests advanced by the government. However, current case law indicates a shift in this jurisprudential outlook. Rather, the Court, as evidenced in *Randall*, begins the analysis of campaign finance laws from the perspective that these laws may not necessarily be at odds with the First Amendment. Instead, the Court suggested that these reforms may be in furtherance of First Amendment ideals.

*Wisconsin Right to Life* seems to call into question more than any other case the campaign finance structure created under BCRA. Although the Court upheld this law in 2003 in *McConnell*, the decision in WRTL has deconstructed most of the framework created by that legislation.

The most recent cases, Randall and WRTL, have also placed the underlying values of campaign finance jurisprudence on the table for discussion and evaluation. Randall particularly emphasized a new framework for First Amendment interest that focused on the system of democracy. This value would have supported, rather than been in direct opposition, to many of the regulations imposed on election speech. Additionally, this value, as articulated by Justice Breyer, allows for significant congressional deference. In WRTL, however, the individualistic values of the First Amendment guarantees of free political speech and an open, robust debate won the day. These traditionally stand opposed to heavy regulation and require exacting scrutiny of Congress' methods in regulating speech. It is unclear how these values will be applied in future campaign finance cases.

This chapter has discussed the changes in the Court and the trends in campaign finance jurisprudence. Chapter 3 reviewed the current statutory and administrative laws governing campaign communications. The next chapter will discuss the application of these laws to the Internet.

## CHAPTER 5

### REGULATING CAMPAIGN SPEECH ONLINE

The Internet has been heralded as “an open, inexpensive and decentralized medium” that offers “ordinary citizens an opportunity to express political opinions and participate in electoral activities.”<sup>501</sup> Since the 2000 election cycle, the Internet has become an increasingly integral part of elections in the United States for citizens, advocacy groups, political committees, and candidates.<sup>502</sup> But as the Internet became a more powerful tool in campaigns, members of Congress identified a need to regulate online campaign communications.

However, when the FECA was passed in the 1970s, the Internet was not even a consideration for lawmakers. And when Congress amended the campaign finance law in 2002, Internet users and political communicators were only beginning to glimpse the potential of online communication. Congress did not specifically enumerate this new medium as part of the definitions under the Bipartisan Campaign Reform Act of 2002 (BCRA). As a result, the FEC regulation of the Internet was driven by the commission’s interpretation of congressional intent.

The FEC’s interpretation of the BCRA in regard to the Internet has been at the heart of controversy in the four years preceding the 2008 election cycle. Although the FEC had applied the FECA to a restricted class of online communications from 1995 to 2002, the FECs rulemaking for the application of the BCRA included an express exemption of Internet communications from the BCRA regulations.<sup>503</sup> As a result, none of the provisions of the BCRA applied to any campaign activities conducted on the Internet. This administrative decision was

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<sup>501</sup> Center for Democracy and Technology, Political Speech, <http://www.cdt.org/speech/political> (March 29, 2006).

<sup>502</sup> See *supra* Ch. 1.

<sup>503</sup> Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49064 (July 29, 2002) (codified at 11 C.F.R. § 300.2 et seq.).

overturned by a U.S. District Court. The FEC, on direction from the district court, adopted a subsequent rulemaking that included regulation of online communications.<sup>504</sup>

This chapter will trace the history of Internet regulation under the FECA. The first rulings on the online application of campaign finance laws were FEC advisory opinions. Political committees began requesting rulings from the FEC in the mid-1990s. The FEC first issued a proposed rulemaking in 2001 in an effort to codify the application of the FECA to the Internet. However, the FEC failed to adopt this rulemaking before Congress significantly amended the FECA in 2002. The FEC then initiated the controversial rulemaking that was the focus of *Shays v. FEC* in 2004. In 2006, the FEC adopted a rulemaking that included in the definitions for “expenditures” and “contributions” online communications placed on a third-party’s web site for a fee. This chapter will discuss each stage of this evolution of regulating the Internet.

### **Advisory Opinions Offer First Look at Internet Regulations**

Through advisory opinions, the FEC began shaping the regulation of campaign speech online in 1995. In these opinions, the FEC addressed several key issues of concern in regard to the regulation of this medium. The Commission protected individuals and organizations rights to make independent expenditures on the Internet, but maintained the regulations that would normally be applied to the traditional mass media. Specifically, the FEC examined corporate expenditures, independent expenditures by individuals and organizations, disclaimer requirements, non-partisan activity, and the media exemption.

The FEC first addressed the use of the Internet in campaigns in 1995. This advisory opinion offered a range of issues that would be further explicated in later opinions. Newt Watch

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<sup>504</sup> Internet Communications, 71 Fed. Reg. 18589 (Apr. 12, 2006) (codified at 11 CFR Parts 100, 110, 114).

PAC's mission is to provide a forum for publicly available information on selected public officials, most notably Speaker of the House Newt Gingrich. Newt Watch existed primarily as a "virtual PAC on the World Wide Web." The online forum offered information on Gingrich's voting record, Ethics Committee and FEC complaints, campaign contribution data, personal finances, honors, and bill sponsorship. Additionally, the PAC used the web site to solicit contributions.

The FEC concluded that a web site operated by a political committee should be deemed general public political advertising. The significance of this was to determine whether disclaimer requirements and reporting regulations would apply to communications transmitted via the Internet. The FEC further found that Newt Watch PAC met the disclaimer requirements by placing at the end of the home page and immediately following requests for contributor information a disclaimer statement of the source of the site. This statement was consistent in size and type with the rest of the text on the web site. The FEC found these to be "clear and conspicuous."<sup>505</sup>

The FEC further discussed the application of the disclaimer requirements to the Internet in a 1998 advisory opinion issued in response to an independent voter in Connecticut. Leo Smith requested that the FEC advise him as to the reporting and disclaimer responsibilities attached to a web site he created for the purpose of defeating a Republican candidate for the U.S. House of Representatives.<sup>506</sup> Additionally, the web site called for the election of the Republican candidate's opponent. The FEC found that because the web site expressly advocated the defeat of one candidate and the election of another, it was "something of value." The cost of

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<sup>505</sup> FEC Advisory Op. 1995-09, 2 (Apr. 21, 1995). This advisory opinion also determined that online solicitation of contributions by a PAC is permissible under the FECA.

<sup>506</sup> FEC Adv. Op. 1998-22, 1 (Nov. 20, 1998).

maintaining the web site was determined to be a campaign expenditure and categorized as a general public political advertisement. As a result, the site must carry a disclaimer statement providing the sponsorship of the advertisement and the link to the candidate—or lack of a link.<sup>507</sup>

Leo Smith noted in his request for advisory opinion that the Supreme Court recognized a First Amendment right to anonymous political publications. Therefore, Smith argued, the disclaimer requirements were unconstitutional. The FEC found that it was not necessary to address this issue because the Supreme Court recognized that right in its analysis of a state statute, not the federal campaign finance law.<sup>508</sup>

In addition to requiring disclaimer statements to be published on the web site, the FEC found that it may be necessary for Mr. Smith to report to the FEC the expenses related to the maintenance and set up of the web site.<sup>509</sup> “Should the activity qualify as an independent expenditure, [Smith] would be required to file reports with the Commission if the total value of [Smith’s] expenditures exceeds \$250 in one year.”<sup>510</sup> If the online activities are coordinated with the campaign, then the expenses would be reported to the FEC by the campaign as contributions in kind.<sup>511</sup>

The FEC found that the reporting obligations for political committees differed “significantly” from that of an individual such as Leo Smith.<sup>512</sup> X-Pac, a political committee, requested an advisory opinion from the FEC detailing the reporting requirements associated with

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<sup>507</sup> FEC Adv. Op. 1998-22, 3-4.

<sup>508</sup> FEC Adv. Op. 1998-22, 4.

<sup>509</sup> FEC Adv. Op. 1998-22, 5.

<sup>510</sup> FEC Adv. Op. 1998-22, 5.

<sup>511</sup> FEC Adv. Op. 1998-22, 5.

<sup>512</sup> FEC Adv. Op. 1999-37, 4.

a web site advocating the election of a candidate for federal office. Political committees are required to report any independent expenditure of more than \$200 – or a series of expenditures to a single payee that aggregates to more than \$200 in a calendar year. The FEC suggested that for a political committee operating an advocacy web site these expenditures could include registration and maintenance of the web site and domain name as well as the costs of any necessary hardware or software for producing the communications.<sup>513</sup>

X-Pac also requested the FEC to address was whether the expenditures would need to be reported on a one-time production basis, or whether the number of times the online communications were downloaded would act as a sort of multiplier for expenditures.<sup>514</sup> The FEC found that the expenditure reporting requirements only attached to X-PAC's production and initial distribution costs.<sup>515</sup> Users downloading and further use of the communications did not add any attributable costs to X-PAC. Nor was X-PAC required to collect personally identifying information from individuals downloading the materials for republication.<sup>516</sup>

In its response to X-PAC, the FEC also delineated the manner in which disclaimers must be attached to e-mail communications.<sup>517</sup> The FEC likened e-mails to traditional mailers and reasoned that, like mass mailings, e-mails would require a disclaimer if substantially similar messages were sent to more than 100 separate e-mail addresses.

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<sup>513</sup> FEC Adv. Op. 1999-37, 5.

<sup>514</sup> FEC Adv. Op. 1999-37, 5.

<sup>515</sup> FEC Adv. Op. 1999-37, 5.

<sup>516</sup> FEC Adv. Op. 1999-37, 6.

<sup>517</sup> FEC Adv. Op. 1999-37, 5.

Another FEC advisory opinion in 1999 addressed several issues relevant to Internet campaign activity.<sup>518</sup> The George W. Bush for President Exploratory Committee, Inc. was seeking the opinion of the FEC on how the campaign should or must, under the FECA, evaluate potential uses of the Internet, such as “a web site supportive of Mr. Bush . . . established by either Committee volunteers or by individuals unconnected with the campaign”, links from third-party web sites to the campaign web site, and mentions on web sites owned by media outlets, e-mail solicitations, republication of campaign materials, and Internet polling. The Bush Committee, in requesting this opinion, stated that “because the Committee is uncertain as to the Commission’s position on these issues, it has been forced to discourage Internet activity.” In responding to this request the FEC advised that only certain types of online activities would constitute contributions, trigger disclosure requirements, or necessitate disclaimer statements.<sup>519</sup>

Specifically, the FEC found that third-parties providing links to a campaign’s web site was “a service and something of value to the campaign and could, under certain circumstances, meet the definition of a ‘contribution’ under the [FECA] and Commission regulations.”<sup>520</sup> If third-party web sites provided links to the campaign web sites, it must be provided at ordinary market cost in order to avoid being considered a contribution to the campaign. Therefore, if the web site owner ordinarily offered links to other web sites (including non-political sites) for free, then a campaign web site link would not be a contribution. However, if the web site owner would ordinarily charge for a link, then any free or reduced rate would be considered a contribution in-kind to the campaign.<sup>521</sup> Likewise, any payment the campaign committee was to make to secure

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<sup>518</sup> Advisory Op. No. 1999-17 (Nov. 10, 1999), available at <http://www.fec.gov>.

<sup>519</sup> FEC AO 1999-17, 7-8.

<sup>520</sup> FEC AO 1999-17, 7.

<sup>521</sup> FEC AO 1999-17, 8.

such a link on a web site would be an operating expenditure and must be reported and filed with the FEC.<sup>522</sup>

Even when a link or other mention on a third-party web site does not constitute a contribution, it may require a disclaimer. The FEC found that web sites that “expressly advocate the election or defeat of a Federal candidate” must carry disclaimer statements, unless an exemption applies.<sup>523</sup> Specifically addressing whether the inclusion of a link to a campaign web site would require a disclaimer, the FEC opined that it would depend on the surrounding text.<sup>524</sup>

The FEC established that individuals, whether volunteers for the campaign or not, were entitled to create and maintain web sites supporting a candidate without triggering reporting regulations under the FECA.<sup>525</sup> Volunteers using personal time and equipment to send e-mails urging support of a candidate did not equate to a contribution.<sup>526</sup> The FEC reasoned that any costs associated with this activity would be nominal.<sup>527</sup> Volunteers also may use, without restraint, materials downloaded from campaign web sites that were originally produced by the campaign.<sup>528</sup> This mirrors the traditional volunteer exception in the FECA that is applied to traditional media, such as print publications.<sup>529</sup>

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<sup>522</sup> *Id.* at 8-9.

<sup>523</sup> *Id.* at 9.

<sup>524</sup> *Id.*

<sup>525</sup> *Id.*

<sup>526</sup> *Id.* at 10.

<sup>527</sup> *Id.*

<sup>528</sup> *Id.* at 12.

<sup>529</sup> For a full discussion of this exception, *see infra* Ch. 3.

## **Corporations Must Adhere to Contribution and Expenditure Prohibitions**

Corporations may not expressly advocate the election of a candidate for federal office on a web site that is available to the general public.<sup>530</sup> Although the cost of this communication would be minimal, the FEC determined that the reach would be far beyond its restricted membership. This would violate sections of the FECA, which prohibit corporations from using any general funds to communicate with the general public.<sup>531</sup> In another advisory opinion, the FEC further addressed the use and valuation of Internet communications by corporations and corporate employees. Corporate employees may use corporate facilities to send e-mails or create Internet materials on behalf of a campaign, so long as the use of the facilities does not increase the expenses of the corporation.<sup>532</sup> If the overhead or operating expenses of the corporation increase due to the employees' use of the facilities for campaign activity, the campaign must reimburse the corporation for these expenses. If no reimbursement is made, the increased expenses are counted as a contribution, which corporations are generally prohibited from making. This ban also applies to any Internet activity that would be considered a contribution. For example, if a corporation included for free a link on its web site to the campaign web site, when normally the corporation would charge to include a link, the corporation has made an illegal contribution to the campaign.<sup>533</sup> However, the FEC failed to address whether corporations bore any responsibility under the FECA if the links were provided without the urging or cooperation of the campaign.<sup>534</sup>

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<sup>530</sup> FEC Adv. Op. 1997-16, 6-7 (Sept. 19, 1997).

<sup>531</sup> *Id.* at 3-4.

<sup>532</sup> FEC AO 1999-17, 10.

<sup>533</sup> *See id.* at 8.

<sup>534</sup> *Id.* at 8 (finding that the question as to whether independent posting of links by the corporation constituted campaign activity was outside the scope of the advisory opinion).

## **Non-Partisan Activities Are Permissible and Exempt from the FECA**

Government officials may engage in nonpartisan activities to “promote voter participation.” The FEC determined that these nonpartisan activities may include providing free hyperlinks between a government web site (in this case the web site for the Secretary of State for Minnesota) and any candidate who provides a URL for a campaign web site.

The FEC later found that limited liability companies and tax-exempt organizations operating informational web sites to promote voter participation also operated under the non-partisan exemptions to the FECA.<sup>535</sup> The organizations were operating web sites that provided information and limited, mediated voter interaction with all ballot-qualified candidates.

The FEC also issued a perfunctory advisory opinion that found that a non-profit organization could contract with an ISP to send pop-up political ads to the ISP customers for academic research purposes.<sup>536</sup>

## **Media Exemption Applies to Online Web Sites that Provide a News Function**

In 2000, the FEC was asked whether a for-profit corporation’s online activities qualified for the media exemption to the FECA.<sup>537</sup> The corporation owned iNEXTV, which controlled a network of online webcasting channels, such as [www.istyletv.com](http://www.istyletv.com) and [www.aetv.com](http://www.aetv.com).<sup>538</sup> The channel at issue in the 2000 advisory opinion was Executive Branch Television at [www.exbtv.com](http://www.exbtv.com). EXBTM provided webcasting of political news, interviews, and coverage of meetings. Some of EXBTM’s programming featured commentary by Hugh Downs and other

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<sup>535</sup> See FEC Adv. Op. 1999-25 (Oct. 29, 1999); FEC Adv. Op. 1999-24 (Nov. 15, 1999).

<sup>536</sup> FEC Adv. Op. 2000-16 (Aug. 28, 2000).

<sup>537</sup> FEC Adv. Op. 2000-13, 1 (June 23, 2000).

<sup>538</sup> *Id.* at 1.

reputable journalists and public officials.<sup>539</sup> EXBTM proposed to the FEC to cover, gavel-to-gavel, the national conventions of both the Republican and Democratic parties.<sup>540</sup>

The FEC found that this online coverage of the conventions met the requirements for the media exemption to the FECA.<sup>541</sup> In its analysis, the FEC noted that EXBTM is viewable by the general public and similar to traditional news program or periodical. The FEC also noted that the network provides a news function, offering “direct access to governmental and business news events, and its . . . prominent journalists generate reports, interviews, and commentary on current affairs.” Key in the analysis—as it is with traditional media applying for the exemption—was that iNEXTV is not owned or controlled by a political party, political committee, or candidate.<sup>542</sup>

### **Initial FEC Rulemakings**

The FEC attempted to further clarify the “status of campaign-related Internet activity” when it issued a notice of inquiry in 1999 and a notice of proposed rulemaking in 2001.<sup>543</sup> These rules “focus[ed] on the application of the contribution and expenditure definitions and exceptions . . . to Internet campaign activity conducted by individuals, corporations and labor organizations.”<sup>544</sup> These rules proposed regulations on three specific areas: 1) application of the volunteer exemption to Internet activity by individuals; 2) hyperlinks placed on corporate or labor organization web sites; and 3) candidate endorsements announced on corporate and labor

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<sup>539</sup> *Id.* at 2.

<sup>540</sup> *Id.*

<sup>541</sup> *Id.* at 3.

<sup>542</sup> *Id.*

<sup>543</sup> 64 FR 60360 (Nov. 5, 1999); The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations, 66 FR 50358 (Oct. 3, 2001). The FEC said that the advisory opinions did not address all the potential issues, such as the broad exemptions to the FECA. See 66 FR 50359-60.

<sup>544</sup> 66 FR 50360.

organization web sites.<sup>545</sup> For the most part, these rules enumerated the Internet communications that would not be assessed value as contributions or expenditures.<sup>546</sup> These included any activities an individual engages in using his or her own computer or software, hyperlinks on corporate web sites, and publicly available press releases on labor organization web sites.<sup>547</sup> The rules were consistent with the previously issued advisory opinions.

However, the proposed rules were never adopted. Six months after the FEC proposed these rules, the Bipartisan Campaign Finance Reform Act was signed into law. With the amendments to the FECA, the FEC reevaluated its approach to applying the FECA to Internet communications. In 2002, the FEC sought comments on this and adopted new rules that exempted the Internet from the scope of the FECA.<sup>548</sup>

A key provision in the 2002 rules was the interpretation and explication of the definition of “public communication.” The BCRA defined “public communication” as a communication by broadcast, cable, satellite, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising. The FEC determined that the Internet should not be included in the definition of “general public political advertising.”<sup>549</sup> Further, the FEC determined that electronic mail did not constitute “mass mailing” nor did Internet communications over the telephone lines constitute a “telephone bank” regardless of the number of communications transmitted.<sup>550</sup>

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<sup>545</sup> *Id.* at 50361.

<sup>546</sup> See *id.* at 50358-66.

<sup>547</sup> *Id.*

<sup>548</sup> 67 FR 49063, 49071-72, 49111.

<sup>549</sup> 67 FR 4911; CFR § 100.26.

<sup>550</sup> 67 FR 49111; CFR §§ 100.27, 100.28 (2002).

The FEC considered both legislative history and policy arguments in its exclusion of the Internet from these definitions. The FEC found no evidence that Congress intended to include the Internet as part of the public communication definition.<sup>551</sup> The FEC noted that the public communication section did not mention the Internet, while other section in the BCRA and other contemporary legislation specifically mentioned and differentiated the online communication.<sup>552</sup> Nor did the legislative history present evidence of Congress even “contemplat[ing] including the Internet” in this definition.<sup>553</sup>

The FEC also determined that the underlying justification for campaign finance laws – prevention of corruption – is not present on the Internet.<sup>554</sup> The FEC said that the Internet is a “medium that allows almost limitless, inexpensive communication across the broadest possible cross-section of the American population.”<sup>555</sup> The FEC, in agreeing with comments from a public interest group, determined that there is significant public interest in leaving the Internet unregulated by campaign finance laws.<sup>556</sup>

### **Challenging the Internet Exemption: *Shays v. FEC***

Shortly after the FEC adopted these rules that excluded the Internet from the scope of the FECA, Congressmen Shays and Meehan<sup>557</sup> challenged the FEC’s interpretation.<sup>558</sup> The *Shays*

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<sup>551</sup> 67 FR 49072.

<sup>552</sup> *Id.*

<sup>553</sup> *Id.*

<sup>554</sup> *Id.*

<sup>555</sup> *Id.*

<sup>556</sup> *Id.*

<sup>557</sup> Christopher Shays and Martin Meehan are members of the U.S. House of Representatives. Shays is the representative from the Fourth Congressional District of the State of Connecticut; Meehan is the representative from the Fifth Congressional District of the Commonwealth of Massachusetts.

<sup>558</sup> *Shays v. Federal Election Commission*, 337 F.Supp.2d 28 (D.D.C. 2004).

court invalidated the FEC’s definition of “public communication.” Congress defined “public communication” in BCRA as “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.”<sup>559</sup> The FEC specifically excluded communications over the Internet from this definition.<sup>560</sup> Therefore, Internet communications, no matter how closely coordinated with political parties or a candidate’s campaign, could not be considered contributions or expenditures.

A central argument put forth by Shays and Meehan against this definition was that the FEC rules were contrary to the statutory instructions provided by Congress.<sup>561</sup> In order to decide this issue, the court looked at “whether the agency’s construction of the statute is faithful to its plain meaning, or, if the statute has no plain meaning, whether the agency’s interpretation ‘is based on a permissible construction of the statute.’”<sup>562</sup> In applying this test to the exclusion of Internet communications, the court first looked at whether “Congress ha[d] directly spoken on the precise question at issue.” The FEC, in its Explanation and Justification of the promulgated rules, noted that Congress did not include the Internet in the statutory definition; therefore the exclusion of the Internet in the rules was consistent with Congress’ intent.<sup>563</sup> Shays and Meehan argued that

[T]he phrase “*any other form* of general political advertising” plainly includes at least certain communications over the Internet. There can be no question that ‘political advertising’ takes place on the Internet (in exponentially increasing amounts), and that

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<sup>559</sup> 2 U.S.C. § 431(22).

<sup>560</sup> 11 C.F.R. § 100.26.

<sup>561</sup> *Shays*, 337 F. Supp. 2d at 51.

<sup>562</sup> *Id.* (citing *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).)

<sup>563</sup> *Id.* at 66.

there are various mechanisms by which such advertising over the Internet is targeted at the “general public.”<sup>564</sup>

The court found that “any other form of general political advertising” did not cover all Internet communications, but did “clearly” include some Internet communications.<sup>565</sup> Therefore, the court found that there could be no reasonable “wholesale” exclusion of any definition of “public communication.”<sup>566</sup>

The court further found that even if Congress had not spoken specifically to this issue, the FEC’s interpretation would have been counter to the purpose of the FECA. The court noted that excluding all Internet communications from the definition of “public communications” would thereby exclude a whole class of “coordinated communications” from regulation. The court found that allowing

[A]n entire class of political communications to be completely unregulated irrespective of the level of coordination between the communication’s publisher and a political party or federal candidate, would permit an evasion of campaign finance laws, thus “unduly compromis[ing] the Act’s purposes,” and “creat[ing] the potential for gross abuse.”<sup>567</sup>

The Court therefore concluded that the “wholesale” exclusion of Internet communications was an “impermissible” interpretation of the BCRA. The court remanded the issue to the FEC for further consideration, specifically delineating which Internet communications constitute “general public political advertising.”

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<sup>564</sup> *Id.*

<sup>565</sup> *Id.* at 68.

<sup>566</sup> *Id.*

<sup>567</sup> *Id.* at 65.

## **Final FEC Rulemaking**

In response to the *Shays* ruling, the FEC undertook to draft regulations that would only encompass those “aspects of the Internet constitute ‘general public political advertising.’”<sup>568</sup> In adopting the Final Draft Rules,<sup>569</sup> the FEC Commissioners attempted to balance the interests in political speech on the Internet, recognizing the vast opportunities the medium provides citizens, with the interests promoted by campaign finance regulation.<sup>570</sup> The regulations that the Commission approved limit the application of campaign finance regulation to paid communications appearing on a third-party’s website.

These regulations include Internet advertisements as part of the definition of “public communication” in the BCRA. Under the BCRA, all public communications retain certain restrictions to support campaign finance regulation and reform.<sup>571</sup> However, this change in the rules does not affect individuals’ independent Internet activity.<sup>572</sup> The media exemption that applies to other campaign finance laws also applies to the regulations governing Internet activity; media organizations may engage in news stories, commentaries and editorials online without triggering the campaign finance regulations.<sup>573</sup> Email is also offered specific protections from incurring the restrictions of campaign finance laws. These regulations adopted by the Commission appear to successfully balance these interests, however, it is still unclear how these will be applied to the Internet.

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<sup>568</sup> FEC Commission Mtg., Mar. 27, 2006 (Statement by Vice Chairman Robert D. Lenhard and Commissioner Ellen L. Weintraub, FEC).

<sup>569</sup> *Internet Communications*, 71 Fed. Reg. 18612 (to be codified at 11 CFR Parts 100, 110, 114).

<sup>570</sup> FEC Commission Mtg., Mar. 27, 2006 (Statement by Commissioner Hans A. von Spakovsky, FEC).

<sup>571</sup> See *supra* Part II History of Campaign Finance.

<sup>572</sup> Activities of unpaid individuals or groups are exempted from the regulations. Rules, §§ 100.94, 100.155.

<sup>573</sup> Rules, §§ 100.73, 100.132.

## The FEC Redefines “Public Communication”

Under BCRA, Congress defined “public communications” as one of the triggers for requirements such as disclosure, disclaimers, and contribution limits.<sup>574</sup> In striving to include only the Internet communication that would qualify as “public communication,” the FEC determined that content “placed on another person’s website for a fee” constituted “general public political advertising.”<sup>575</sup> Therefore, this particular type of Internet communications qualifies as “public communication” that is regulated by BCRA and the corresponding FEC regulations. The FEC offered examples of this paid content: banner, video, and pop-up advertisements, streaming video, and directed search results.<sup>576</sup>

In its Explanation and Justification of the new regulations, the FEC reasoned that by only including paid Internet communications it was conforming to the spirit of Congress’ original definition of “public communication.”<sup>577</sup> In its definition, Congress specifically enumerated television, radio, and newspapers. The FEC noted that for an individual to communicate via any of these methods, he or she must pay a third-party for the time or space. Thus, only Internet communications that are arranged through an intermediary for a fee would be analogous to this type of communication. This interpretation “avoid[s] infringing on the free and low-cost uses of the Internet that enable individuals and groups to engage in political discussions and advocacy.”<sup>578</sup>

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<sup>574</sup> BCRA § 431(20)(iii). Congress defined a “public communication” as “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.” *Id.* at § 431(22).

<sup>575</sup> *Internet Communications*, 71 Fed. Reg. 18589, 18613 (Apr. 12, 2006) (to be codified at 11 C.F.R. § 100.26).

<sup>576</sup> *Internet Communications* 71 Fed.Reg. 18589, 18594 (Apr. 12, 2006).

<sup>577</sup> *Id.* at 18594.

<sup>578</sup> *Id.*

The new rules also comply with the letter of BCRA; Congress did not include the Internet in its list of specific media incorporated in the definition of “public communication.” But, Congress did leave open the possibility of other types of communication by including “any other general public political advertising” as part of the definition.<sup>579</sup> By consulting several dictionaries, the FEC concluded that Internet communications could only be included under this catch-all if the communications appeared on a “forum controlled by another person” for a fee.<sup>580</sup>

### **The FEC Applies Media Exemption to the Internet**

The new rules also extend the media exemption in BCRA to Internet communications, specifying that any cost incurred for the purpose of news stories, commentaries, or editorials by media companies are not considered contributions or expenditures “unless the [media] facility is owned or controlled by any political party, political committee, or candidate.”<sup>581</sup> The FEC further specified that this exemption extends just as much to media entities with only online presence as it does to traditional media entities that incorporate online components.<sup>582</sup> This decision also brought to the forefront a question that is currently affecting many areas of legal policies: what about bloggers? The FEC considered this and determined that the press exemption would extend to bloggers only in the same way that it extends to traditional media. Traditionally, this means that the FEC will undertake a two-part analysis.<sup>583</sup>

First, the Commission asks whether the entity engaging in the activity is a press entity as described by the Act and Commission regulations. Second, in determining the scope of the

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<sup>579</sup> *Id.*

<sup>580</sup> *Id.*

<sup>581</sup> *Id.* at 18613 (§§ 100.73, 100.132).

<sup>582</sup> *Id.* at 18609.

<sup>583</sup> *Id.* at 18607.

exemption, the Commission considers: (1) Whether the press entity is owned or controlled by a political party, political entity is acting as a press entity in conducting the activity at issue (i.e., whether the entity is acting in its “legitimate press function”).<sup>584</sup>

### **The FEC Exempts Individual Internet Activity**

The new rules also make clear that uncompensated individual Internet activity, even if in coordination with a candidate, party or committee, is not considered a contribution or exemption.<sup>585</sup> The use of equipment or other services in the purpose of these activities is also not a contribution or expenditure.<sup>586</sup> This is likened to the extant exemptions for individuals engaging in political activity; the FEC exempts the “value of services” for individuals volunteering.<sup>587</sup> The Commission also made clear that this exemption applies to groups of individuals as well.<sup>588</sup> This means that an individual can download and republish campaign materials on their own sites without incurring any reporting requirements.<sup>589</sup> However, this does not permit an individual to download campaign materials and pay to have them republished somewhere else – that would constitute a “public communication.”<sup>590</sup>

The FEC provided a nonexclusive list of activities in an effort to define “Internet activity”: sending or forwarding electronic messages; providing a hyperlink or other direct access to another person’s Web site; blogging; creating, maintaining or hosting a Web site; paying a nominal fee for the use of another person’s Web site; and any other form of communication

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<sup>584</sup> *Id.*

<sup>585</sup> *Id.* at 18613 (§§ 100.94, 100.155).

<sup>586</sup> *Id.*

<sup>587</sup> *Internet Communications*, 71 Fed. Reg. 18603.

<sup>588</sup> *Id.*

<sup>589</sup> *Id.* at 18604.

<sup>590</sup> *Id.*

distributed over the Internet.<sup>591</sup> Likewise, the FEC offered a list of “equipment and services” to support the exemption for independent activity: computers, software, Internet domain names, Internet Service Providers (ISP), and any other technology that is used to provide access to or use of the Internet.<sup>592</sup> These “illustrative” definitions were intended to be broad enough to encompass any future technologies.<sup>593</sup>

This exemption extends to a corporation that is “wholly owned by one or more individuals, that engages primarily in Internet activities and that does not derive a substantial portion of its revenues from sources other than income from its Internet activities.”<sup>594</sup> In explaining this extension, the FEC noted that the U.S. Supreme Court “acknowledged . . . that ‘some corporations have features more akin to voluntary political associations than business firms, and therefore should have to bear burdens . . . solely because of their incorporated status.’”<sup>595</sup> This exemption takes into account the benefits of incorporation, while noting that not everyone that takes advantage of those benefits exert the same influence as a traditional corporation.<sup>596</sup> Only incorporated individuals that do not derive any substantial revenue from offline activities are eligible for this exemption.<sup>597</sup>

The “individual activity” exemption also leaves open the possibility for individuals to pay for communications to be placed on another person’s website without incurring requirements

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<sup>591</sup> *Internet Communications*, 71 Fed. Reg. 18613 (codified at 11 C.F.R. §§ 100.94, 100.155).

<sup>592</sup> *Id.*

<sup>593</sup> *Id.* at 18605.

<sup>594</sup> 71 Fed. Reg. 18613 (codified at 11C.F.R. §§ 100.94(d), 100.155(d)).

<sup>595</sup> *Id.* at 18606 (*citing* FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 263 (1986)).

<sup>596</sup> *Id.*

<sup>597</sup> 11 C.F.R. §§ 100.94(d), 100.155(d).

placed on “public communications” if the payment is “nominal.”<sup>598</sup> The Commission took into account public comments, which pointed out that “the Internet has effectively put the power of advertising communication into the hands of every citizen.”<sup>599</sup> Recognizing that many individuals wishing to use the Internet do not maintain their own sites, the Commission excepted nominal fees.<sup>600</sup> However, the Commission failed to adequately define “nominal”; it simply cautioned that it would be the aggregate expense of the advertisement that would be analyzed in determining whether the cost was nominal.<sup>601</sup>

Although the Commission created these exemptions to protect individuals’ participation in the political process, it clearly included the purchase of email lists as contributions and expenditures.<sup>602</sup> Individuals’ payments for such lists are not exempt if the purchase is at the direction of a political committee or if the list is transferred to a political committee.<sup>603</sup> However, if the email list is purchased for individual use, the purchase does not produce in an expenditure or contribution.<sup>604</sup>

### **The FEC Applies Disclaimer Requirement Based on Speaker**

The new regulations extend BCRA disclaimer requirements to certain Internet communications depending on the speaker and the content.<sup>605</sup> The regulations distinguish between political committees and all other persons. Political committees must include

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<sup>598</sup> 11 C.F.R. §§ 10094(e)(1), 100.155(e)(1).

<sup>599</sup> *Internet Communications*, 71 Fed. Reg. 18607.

<sup>600</sup> *Id.*

<sup>601</sup> *Id.*

<sup>602</sup> 11 C.F.R. §§ 100.94(e)(2)-(3), 100.155(e)(2)-(3).

<sup>603</sup> *Id.*

<sup>604</sup> 71 Fed. Reg. 18607.

<sup>605</sup> 11 C.F.R. § 110.11.

disclaimers on all “public communications” for which they disburse funds; all websites run by political committees available to the general public and all unsolicited electronic mail totaling more than 500 communications.<sup>606</sup> The Commission found that this treatment was consistent with BCRA and the “offline” rules.<sup>607</sup> For all other persons, disclaimers must appear only on public communications that “expressly advocate the election or defeat of a clearly identified candidate” and that “solicit any contribution” as well as all electioneering communications, which are ads that clearly identify a federal candidate within 30 days of a primary or 60 days of a general election.<sup>608</sup>

### **Conclusion**

When the Federal Election Commission was first confronted with applying the FECA to online communications, it took what could be considered a common sense approach. The advisory opinions issued on this topic prior to the adoption of the BCRA indicate that the FEC was incorporating online communications into the definitions of expenditure and contribution. Indeed, the FEC issued a notice of proposed rulemaking that exempted certain online activity from the FECA, indicating that there was online communications that would constitute a contribution or expenditure.

However, when BCRA introduced the term “public communication” as part of the definitions for expenditure and contribution, it failed to include Internet communications in any relevant provision. Recognizing the capacity of the Internet as a unique outlet for political speech, the Federal Elections Commission left the medium out of the realm of campaign finance regulation under the new BCRA definitions. However, when the U.S. District Court for the

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<sup>606</sup> 11C.F.R. § 110.11.

<sup>607</sup> *Internet Communications*, 18600.

<sup>608</sup> 11 C.F.R. § 110.11 (a)(2)-(4).

District of Columbia found this to be unlawful and out of sync with congressional intent, the FEC began the process of determining which Internet communications should be regulated.

The rules adopted in 2006 attempted to balance the interests of the integrity of the elections process and of the individual's right to participate in that process. The rules narrowly expanded the definition of "public communication" to comply with the *Shays* court, but protected individual speech rights by incorporating only online communications that appear on a third-party's website for a fee. Additionally, the FEC specifically exempted most individual, uncompensated Internet activities from the definitions of contribution and expenditure. Further, the disclaimer requirement was extended to online speech only in a manner that mirrored the disclaimer requirements placed on traditional mass media. In its Explanation and Justification of these rules, the FEC has consistently noted the unique character of the Internet and its ability to foster widespread participation in political discussion. These new rules are an effort to respect that goal as well as the goals of protecting the election process from undue influence.

## CHAPTER 6

### ANALYSIS AND CONCLUSION

The purpose of this study was to evaluate the current model of regulating online campaign communications using a First Amendment analysis. Specifically, this study examined the policy adopted by the Federal Election Commission in 2006 to regulate online communications under the Federal Election Campaign Act. As discussed in Chapter 4, the FEC determined that online communications should be regulated only when they are placed on third-party web sites for a fee.<sup>609</sup>

As this dissertation demonstrated, campaign finance law is continually evolving. This study examined the current status of campaign finance laws with specific attention paid to the regulation of campaign communications online. This included a review of statutes, Supreme Court cases, and administrative law. The statutes and cases discussed in Chapter 3 laid the foundation for the analysis of the current approach to regulating the Internet under campaign finance law.

This chapter begins with a review of the key findings of this dissertation framed by the research questions. First, this chapter will discuss the interests that have been balanced in campaign finance jurisprudence. This traditionally has been an individual First Amendment free speech interest, explicated by the marketplace of ideas and self-government theories of free speech, weighed against the government interest in preventing corruption, or the appearance of corruption, of the political process. Next, this chapter will summarize the trends in campaign finance jurisprudence. Then, this chapter will summarize the current statutory and administrative laws that govern campaign finance, including online communications.

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<sup>609</sup> See *supra* Ch. 4; 11 CFR 100, et seq. (2006).

After reviewing the legal framework that exists for campaign finance reform, this chapter will discuss whether that framework applied to online communications adequately protects the First Amendment interests of speakers on the Internet. This First Amendment analysis will begin with a discussion of the main theories that have been applied by the U.S. Supreme Court in campaign finance jurisprudence: marketplace of ideas, self-government, and active liberty. After these theories have been applied to the current framework for regulating online campaign communications, the analysis will continue using a strict scrutiny review of the FEC regulations. This analysis will find that, while there are areas in need of clarification and revision, the current regulations survive a strict scrutiny analysis.

### **Summary of Findings**

The first three research questions were broad, expository questions designed to determine the current status of campaign finance law and the underlying theories. Special emphasis was placed on the application of these laws and theories to the Internet. This section will review the findings in Chapters 2, 3, and 4. Chapter 2 discussed theories of the First Amendment, which explain the interests in free speech, and the justifications often offered for campaign finance reform. This section will include a review of those theories as well as a discussion of how those theories apply to the online environment. Chapter 3 outlined in detail the current legal requirements for campaign communications through a review of statutes, administrative materials, and case law. Chapter 4 continued this discussion of campaign finance laws by reviewing Federal Election Commission advisory opinions and rulemakings that applied these legal requirements to online communications. These chapters generally correspond to the first three research questions.

## **Research Question 1: What Are the First Amendment Concerns Associated with Applying Campaign Finance Laws to Internet Communications?**

Political speech is widely recognized as the core of the First Amendment. Campaign communication is the paragon of political speech. As a result, the First Amendment is often placed in opposition to campaign finance reform laws, which limit campaign communications. Some limitations are explicit infringements on political speech – corporations and unions are prohibited from spending money to influence federal elections. Some limitations are indirect infringements – contributions are capped and expenditures amounting to more than \$200 must be reported to the FEC. Contribution limits controls the amount of association individuals and organizations can have with the candidates and political committees. The latter indirect infringement – the reporting requirement – may prevent some individuals from engaging in campaign communications to avoid reporting to the FEC. Whether direct or indirect, campaign finance laws have an impact on the discussion of political candidates.

The interaction of political free speech and campaign finance laws must be balanced as campaign finance laws continue to evolve. Chapter 2 discussed the prevailing First Amendment theories as well as the theories that support campaign finance reform. The free speech theories most prominent in the debate over campaign finance, particularly in the Supreme Court, are marketplace of ideas and self-government. However, Justice Steven Breyer's theory of active liberty has gained support on the Court.<sup>610</sup> The prevailing justification of campaign finance reform in jurisprudence is the prevention of corruption, although political equality has gained a strong foothold in the academic debate. When communication is made via the Internet, the First Amendment interests do not change. The theories of marketplace of ideas, self-government, and active liberty are as relevant as they are when the communication is delivered in print or on

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<sup>610</sup> Randall v. Sorrell, 548 U.S. 230 (2006). Justice Stevens was joined in a plurality opinion by

television. Similarly, the government and reform advocates will purport to advance the same interest by regulating campaign communications online as they do in the more traditional media – corruption and political equality. It is the balance of these interests – free speech and prevention of corruption – that may evolve when the campaign communications are delivered online. The balance is more favorable to the free speech interests when applied to the Internet.

The marketplace of ideas theory imagines a public market in which all ideas are available for consumption. The consumers – or listeners or viewers – determines which ideas they value and accept and which ideas they reject. The supposition of this theory is that through market forces the “true” ideas will rise to the top. Critics of the marketplace argued that television, radio and the institutional print media distorted the marketplace by limiting access to these channels that dominated the marketplace. Although the marketplace theory never required all voices to be heard equally, these media outlets disproportionately affected access to the marketplace. To protect the political debate in the marketplace, the Supreme Court upheld restrictions on campaign financing.<sup>611</sup>

In addition to the marketplace theory, the Supreme Court has framed its campaign finance jurisprudence in the frame of the self-government theory of the First Amendment.<sup>612</sup> This theory, most closely associated with Alexander Meiklejohn, focuses on the necessity of open debate to support a functioning democracy.<sup>613</sup> This theory has been included as a sub-theory of the

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<sup>611</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 263 (1986) (Brennan, J., writing for the plurality) (acknowledging the legitimacy of protecting the political marketplace with restrictions on entering or using the marketplace); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). Cf. *Citizens Against Rent Control v. City of Berkely*, 454 U.S. 290 (1981) (striking down restrictions that too heavily burdened the marketplace).

<sup>612</sup> *McConnell v. FEC*, 540 U.S. 93 (2003); see also Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31 (Nov., 2004); *infra* Ch. 2.

<sup>613</sup> Alexander Meiklejohn, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (HARPER & BROS. 1960); see also *infra* Ch. 2.

marketplace of ideas because part of the political debate is to seek out the truth. The important element to Meiklejohn was that the debate would result in an informed electorate. This theory focused on the individual level of a functioning democracy – the sovereign individual.

Other scholars and jurists have advocated for an approach that focuses more on the necessity of deliberation for the structure of democracy than on the individual's decision making process.<sup>614</sup> Cass Sunstein and Owen Fiss have argued for the protection of “deliberative democracy.”<sup>615</sup> This deliberative democracy approach centers not on the speaker’s right of free expression, but on the necessity of deliberation, of public debate. Similarly, Justice Steven Breyer has advocated a theory of active liberty, arguing that the individual speech rights gained from the First Amendment are merely byproducts of the Amendment’s ultimate goal of sustaining a democracy. However, a self-governing democracy can be sustained only with “citizen participation in government.” That was the centerpiece of active liberty.

In principle, these theories are congruent. They all promote societal purposes — ascertainment of truth, an informed electorate, wide participation in government. However, the application of these theories in the Supreme Court would yield very different results. The Court has traditionally advanced the marketplace and self-government theories in conjunction with individual rights.<sup>616</sup> This approach has considered free speech as a presumptive necessity to the open, debate required to achieve the purposes of the theories. The Court thereby engaged in a strict scrutiny analysis of any government action that might diminish those individual rights.

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<sup>614</sup> See e.g., Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 252-53 (May, 2002); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1995); Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087 (1991).

<sup>615</sup> See, e.g., CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1995); Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087 (1991).

<sup>616</sup> See, e.g., N.Y. Times v. Sullivan,

Active liberty relegates the individual rights associate with the First Amendment by taking out the presumption in favor of free speech. Rather, Justice Breyer, argued that free, unregulated debate does not always promote participation. A more flexible approach would be necessary to balance the First Amendment interests that lie on both sides – individual free speech rights and advancement of participation.<sup>617</sup> This approach would strip away the strict scrutiny that has been the basis for free speech cases, including campaign finance jurisprudence.

Active liberty would place the prevention of corruption not in opposition to the First Amendment, but in the direct advancement of the First Amendment. Traditionally, the prevention of corruption, as advanced by campaign finance reforms has been placed in direct conflict with individual free speech rights and the marketplace of ideas.<sup>618</sup> This has been the prevailing justification for upholding campaign finance reforms, such as contribution limits and disclosure requirements. This rationale aims to prevent elections from being bought, and, in its most liberal reading, to prevent the voters from perceiving an election as having been bought.<sup>619</sup>

Another justification that has not received majority support on the Court, but has played a key role in the academic debate is political equality.<sup>620</sup> The political equality argument suggests that limits on campaign finance promote political equality for voters during an election—equalizing the voices of all citizens. This argument hinges on the idea that campaign finance reforms promote political discourse by limiting the effects of wealth disparity.<sup>621</sup> This theory is

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<sup>617</sup> See Breyer, *supra* note 6.

<sup>618</sup> See, e.g., Buckley v. Valeo, 424 U.S. 1; FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 263; Citizens Against Rent Control v. City of Berkely, 454 U.S. 290.

<sup>619</sup> See Buckley, 424 U.S. 1; Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 671-86 (Spring, 1997).

<sup>620</sup> Sullivan, *supra* note 11.

<sup>621</sup> See Sunstein, *supra* note 52.

often aligned with the self-government theory, and recently with active liberty, because it purports to equalize and enhance public debate.<sup>622</sup>

New technology, specifically the Internet, has served to significantly enhance participation in the public debate. The Internet offers an alternative outlet for communications that more closely creates the exchange of ideas envisioned in the marketplace of ideas theory. The Supreme Court has in fact heralded the Internet as the “new marketplace of ideas.”<sup>623</sup> Many of the criticisms of the marketplace model are mitigated online. Particularly, the theory’s assumption of access to the marketplace is realized. The marketplace of ideas theory, assumed that everyone had access to the marketplace. Critics of the marketplace theory cited the expense and gatekeepers of mass media outlets as a limitation of the marketplace theory – only a select few could access the channels of communication. However, there are no gatekeepers on the Internet, and costs are nominal.

The justifications for campaign finance reform – corruption, and to some extent political inequality – also are mitigated when the political debate occurs online. In general, online communications are inexpensive.<sup>624</sup> The threat of corruption via online communications is considerably less than in the traditional mass media or the physical world. Similarly, political inequality is lessened by the wide access to the Internet. Individuals can create blogs, videos, and web sites that attract users from all over the world. The Center for Democracy and Technology (CDT) pointed to one Internet user who coordinated more than 100 protests against the Republic

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<sup>622</sup> CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1995); Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087 (1991); Breyer, *supra* note 6.

<sup>623</sup> Reno v. ACLU, 521 U.S. 844, 885 (1997); *see also* Stephen C. Jaques, Comment: Reno v. ACLU: Insulating the Internet, the First Amendment, and the Marketplace of Ideas, 46 Am. U.L. Rev 1945, 1947 (Aug. 1997).

<sup>624</sup> Center for Democracy and Technology, et al., Joint Statement Responding to Notice of FEC Inquiry (Jan. 6, 2000).

Party.<sup>625</sup> The CDT also noted that the Internet engages larger numbers of citizens in the political and campaign processes and encourages an increase in smaller contributions.<sup>626</sup>

### **Research Question 2: What Is the Current Framework for Campaign Finance Reform?**

Campaign finance reform is an evolving area of the law. Chapter 3 traced the history of campaign finance laws in Congress and the Supreme Court. The current framework that Congress relies on was announced by the Court in the 1976 case *Buckley v. Valeo*.<sup>627</sup> The broad strokes of this framework are that limits on contributions are acceptable, while limits on independent expenditures are constitutionally invalid. The Court has continued to explore this dichotomy through more than 30 years of case law.

Only five years after the *Buckley* decision, members of the Court began to disagree over the extent of the distinction between contributions and expenditures.<sup>628</sup> Justices, often in the majority or plurality opinions, countered that contribution limits are subject to a less than exacting scrutiny. Some justices, particularly in concurring and dissenting opinions, argued that *Buckley* set the constitutional standard for both contributions and expenditures at an “exacting scrutiny.”

As the debate continued, some justices considered whether there should be any distinction at all. In *Colorado I*, Justice John Paul Stevens and Justice Ruth Bader Ginsburg argued that all

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<sup>625</sup> *Id.* (citing Jon Oram, "Will the Real Candidate Please Stand Up?: Political Parody on the Internet," 5 Journal of Intellectual Property Law 467 (Spring, 1998).

<sup>626</sup> Campaign Finance Regulation and the Internet Principles, Center for Democracy and Technology & Institute for Politics Democracy & the Internet, May 11, 2005, available at [http://www.cdt.org/speech/political/principles\\_w\\_background.pdf](http://www.cdt.org/speech/political/principles_w_background.pdf).

<sup>627</sup> 424 U.S. 1.

<sup>628</sup> See, e.g., California Medical Association v. FEC, 453 U.S. 182 (1981); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).

money spent on campaign communications should be considered a contribution.<sup>629</sup> Although this argument was limited to political parties, it generally questioned the *Buckley* framework. In the same case, Justice Clarence Thomas countered that the contribution/expenditure distinction was invalid.<sup>630</sup> Rather, he argued, all campaign communications, including contributions, deserve the highest First Amendment protection.

This division continued as Justice Stevens, in *Nixon v. Shrink Missouri PAC*, strengthened his argument. “Money is property; it is not speech.”<sup>631</sup> Justice Stevens argued that as a property interest, the activities of making contributions or expenditures should be protected under substantive due process, not the First Amendment.<sup>632</sup> However, Justices Steven Breyer and Ginsburg argued that contributions and expenditures are entitled to some First Amendment protection because those activities “enable speech.” Breyer and Ginsburg, while recognizing some First Amendment protection, did not support a “simple” strict scrutiny. Rather the justices noted the First Amendment interests not only in making contributions and expenditures, but in limiting contributions and expenditures. Justice Thomas continued his assault on the Court for adhering to a low standard of review for campaign finance laws.<sup>633</sup>

In addition to questioning the contribution/expenditure dichotomy, three justices considered a shift in focus to the institutional goals of the First Amendment from the traditional frame of individual free speech rights. The Court’s traditional balancing test focused on individual free speech rights as the First Amendment interests pitted against the government’s

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<sup>629</sup> Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996) (Colorado I).

<sup>630</sup> *Id.*

<sup>631</sup> 528 U.S. 377, 398 (Stevens, J., concurring).

<sup>632</sup> *Id.*

<sup>633</sup> *Id.*; FEC v. Beaumont, 539 U.S. 146, 164 (2003) (Thomas, J., dissenting); McConnell v. FEC, 540 U.S. 93 (2003).

interest is promoting campaign finance reform. The emerging focus on institutional goals approach is in accord with Justice Breyer's theory of active liberty discussed in Chapter 2.

Active liberty was the foundation for the plurality opinion in *Randall v. Sorrell* in 2006.<sup>634</sup> Justice Breyer's opinion for the Court, joined by Chief Justice John Roberts and Justice Alito, emphasized that the First Amendment served the institutional interest of maintaining an effective democracy. As such, campaign finance laws, although infringing on some individual free speech rights, were not necessarily at odds with the First Amendment. Scholars argued that Breyer's opinion in *Randall* signaled a dramatic change in the direction of campaign finance jurisprudence.<sup>635</sup> However, the remaining eight justices, in concurring and dissenting opinions, continued to focus on the individual right of freedom of speech – particularly in the realm of political speech.

Individual rights also was the focus of the 2007 majority opinion in *FEC v. Wisconsin Right to Life*. Chief Justice John Roberts authored his first campaign finance reform opinion, an opinion that narrowly blocked the developing focus on the institutional First Amendment in a 5-4 vote. Instead, Chief Justice Roberts framed the challenge to the Federal Election Campaign Act, as amended by the Bipartisan Campaign Reform Act, in terms of individual First Amendment right of free speech. This explication of the competing interests reinforced the focus of a marketplace model for political discussion.

Even with the divisive opinions on the Court, the basic foundation of campaign finance law has remained the same. Contribution limits are generally permissible under the First Amendment. Expenditure limits for individuals and ideological organizations are constitutionally

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<sup>634</sup> *Randall v. Sorrell*, 548 U.S. 230 (2006).

<sup>635</sup> Rachel Gage

impermissible infringements on free speech. A shift in this paradigm could significantly impact how these laws are applied to campaign communications in the mass media.

It is unlikely that either of these trends – a disruption of the contribution/expenditure dichotomy or a shift away from individual free speech rights – will gain significant traction in the Supreme Court. The justices are too divided to substantially support either of these. (Discuss Gage's tally here).<sup>636</sup>

### **Research Question 3: How Are the Different Communication Media Treated by Current Campaign Finance Laws, Including FEC Regulations?**

This research question is actually two parts. First, this question requires an explication what the current campaign finance laws are. Second, this question requires an analysis of how these laws apply to the different mass media. In Chapter 3, this study discussed the evolution of campaign finance reform laws. This involved a review of congressional efforts, which culminated in the Bipartisan Campaign Reform Act of 2002; case law; and the Code of Federal Regulations. The discussion emphasized provisions that impacted communications.

In general, the provisions of the BCRA apply equally to the different media. There are limited exceptions to this general rule. The first exception is that the FEC promulgated specific requirements for the application of disclaimer statements for the broadcast and print media. These differences were intended to match the requirements to the specific medium. Second, in legislation outside the FECA, Congress placed additional requirements on broadcasters in regard to campaign communications. This section will review the current state of the FECA, as well as briefly summarize the additional requirements on broadcasters.

Current campaign finance law limits contributions but places no limits on expenditures that are not coordinated with a candidate or a campaign (independent expenditures). Expenditures,

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<sup>636</sup> The effect of these trends on Internet communications will be discussed later in the chapter. *See supra* p.

although unlimited in amount, are subject to disclosure requirements. The definition of contributions and expenditures includes any money spent on “public communications.”

Public communications are any communications that promote or oppose a clearly identified candidate for federal office. Congress specifically included communications via broadcast, cable, satellite, newspaper magazine, outdoor advertising, mass mailing, and telephone banks, as well as “any other form of general public political advertising.” Public communications are required to carry disclaimer statements that specify the sponsorship of the communication, as well as a statement as to the authorization of the communication by the candidate. All disclaimer statements must be “clear and conspicuous.”

Congress has exempted from the definition of contribution and expenditure certain activities including non-partisan activities, volunteer services, and news organizations.<sup>637</sup> Non-partisan activities include get-out-the-vote drives and voter registration campaigns. Any money spent on these communications is not considered a contribution or expenditure.<sup>638</sup> Uncompensated activities are also exempt from the definitions of contribution and expenditure. This includes services on behalf of a candidate or committee, use of personal property for campaign activities, and transportation costs incurred during volunteer activities.<sup>639</sup> Likewise, money spent in “covering or carrying a news story” by a broadcast station, newspaper, magazine or other periodical is not a contribution or expenditure.<sup>640</sup> For example, any expenses attached to assigning a reporter to cover the Republican presidential candidate’s campaign would not be considered an “expenditure.” Nor would the resulting broadcasts or publications be considered

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<sup>637</sup> For a full discussion of these exemptions, see Ch. 3.

<sup>638</sup> 2 U.S.C. § 431(C)-(D).

<sup>639</sup> *Id.*

<sup>640</sup> *Id.*

“public communications.” This exemption is applied to all the different media equally. The criterion is not the media format, but the function of the organization. These exemptions are applied to the varying media equally. The process for determining the application of these exemptions focuses on the content of the communication and the speaker, not the media that is used.

However, Congress has placed additional requirements on the broadcasting medium. Requirements for providing access and opportunity for candidate communications are not textually included in the FECA. The Equal Opportunity and Reasonable Access rules in the Communications Act of 1934 guarantee candidates the ability to purchase time on the public airwaves.<sup>641</sup> This burden is not placed on print, cable, satellite, or online media.

The only difference in the treatment of media are the specific disclaimer formatting requirements and the broadcast opportunity rules. The general provisions of the FECA—limits on contributions, reporting requirements for expenditures, and disclaimer requirements for public communications—are applied across the media. The focus of analysis is not the medium of delivery, but the content and source of the communication.

#### **Research Question 4: What Are the Current Campaign Finance Laws and Regulations that Govern Internet Campaign Communications?**

Although the general provisions of the FECA apply across the different media, there was significant disagreement over whether these provisions should be applied, at all, to the Internet.<sup>642</sup> The FEC’s approach to regulating the Internet under the Federal Election Campaign Act and the Bipartisan Campaign Reform Act has been evolving since the mid-1990s. The first

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<sup>641</sup> 47 U.S.C. §§ 312, 315 (2008).

<sup>642</sup> See Comments in Response to FEC Notice of Proposed Rulemaking on Internet Communications, [http://www.fec.gov/pdf/nprm/internet\\_comm/nprm\\_comments.shtml](http://www.fec.gov/pdf/nprm/internet_comm/nprm_comments.shtml).

efforts were made through advisory opinions.<sup>643</sup> In these opinions, the FEC attempted to mirror the application of these laws to other, familiar media formats, particularly the print media.<sup>644</sup> The FEC began in 1999 to engage in a rulemaking process to codify the application of the FECA to online communications. However, before this rulemaking was adopted by the FEC, Congress passed the BCRA, significantly amending the FECA.

After BCRA passed in 2002, the FEC reevaluated its approach to regulating the Internet. Interpreting the BCRA provisions that defined public communication, the FEC determined that Congress had not intended for online communications to be regulated at all. In accordance with this interpretation, the FEC adopted rules that explicitly exempted the Internet from the definition of public communication in 2002.<sup>645</sup> Sponsors of BCRA challenged this interpretation in the courts, arguing that the Internet was too influential a medium to leave wholly unregulated. The U.S. District Court for the District of Columbia agreed and ordered the FEC to reconsider the regulations to include appropriate online communications as part of the definition of public communication.

The regulations that the FEC adopted in 2006 resulted from nearly a year-long public comment period. In the final rules, the FEC explicitly protected individual speakers in the form of blogs, volunteers, and all other independent endeavors online. The FEC limited the application of campaign finance laws to expression that is placed on a third-party web site for a fee. For example, if an individual purchased a banner ad on the DailyKos.com that expressly advocates the election of a candidate, that would be considered a public communication for the purposes of

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<sup>643</sup> These advisory opinions are still reliable guidelines for the application the FECA to online communications because BCRA did not adversely address any issues decided in these opinions.

<sup>644</sup> For full discussion of these advisory opinions, see Ch. 4.

<sup>645</sup> See 67 FR 49064 (July 29, 2002) (codified at 11 CFR 100 et al.) (2002).

FECA. That advertisement ostensibly would be required to carry a disclaimer statement. All online communications that do not occur through a paid intermediary, such as the DailyKos.com, would not be considered a contribution or expenditure.

Although the new rules adopted by the FEC narrowly expand the definition of public communication to include minimal Internet communications, there are several provisions of the 2006 rules require further explication. The disclaimer requirements for online communications are unclear and lack specific guidance on formatting requirements. Also, the concept of “paid” communications can be difficult to delineate online. The FEC also chose to extend its explicit exemption of individual Internet activity to incorporated bloggers. This broadly exempted an entire category of corporations from the FECA. The FEC also broadly applied the media exemption to online communications – a decision that has drawn criticisms from the academic community.<sup>646</sup>

Public communications are required to carry disclaimers of sponsorship and connection to the candidate. The FEC has clarified the formatting requirements for the print and broadcast media. However, the Internet presents an amalgam of these media and it is unclear what specific disclaimer requirements will be most appropriate for this medium. Former FEC Commissioner Hans von Spakovsky expressed his concern that this was left unclear.<sup>647</sup> Spakovsky suggested that the media specific requirements would be applied to the Internet. For example, he believed that the “stand by your ad” requirement for television and radio would not apply for Internet

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<sup>646</sup> See, e.g., David Stevenson, A Presumption Against Regulation: Why Political Blogs Should Be (Mostly) Left Alone, 13 B.U. J. Sci. & Tech. L. 74 (Winter, 2007); Niki Vlachos, The Federal Election Commission & Political Blogging: A Perfect Balance or Just Not Enough?, 24 J. Marshall J. Computer & Info. L. 611 (Summer, 2006).

<sup>647</sup> *Id.*

communications.<sup>648</sup> Nor would the “box, font-size, color” disclaimer requirements for print advertisements.<sup>649</sup>

The concerns of the formatting requirements are relatively minor compared to the larger concern of whether the FEC has limited the application of disclaimers online too much. By restricting the online application of the definition of public communications to paid, third-party communications, the FEC effectively exempted all independent activity from carrying disclaimers. This opens the door for compensated Internet authors to surreptitiously advocate for the candidate who is paying the author. The FEC considered this issue during its rulemaking process. In its final decision, the FEC determined that candidates would be required to disclose the expenditure to the FEC. Therefore, there would be a record of the payment available to the public without compelling the online author to include the disclaimer.

The FEC limited the application of campaign finance laws online to communications placed on a third party’s web site for a fee. The activity that the FEC seemed to be imagining was traditional advertising rather than sponsored Internet speech. The advertisements on web sites are considered expenditures or contributions (depending on whether they are coordinated with the candidate) and must carry disclaimers. However, the content of web sites, no matter how expressly it may advocate for or against a particular candidate, is exempt as individual activity. The concern is that the author of the web site may be paid to post positive comments, without revealing relationship.

The payment may come in the form of paid advertisements, which support the blogger’s activities. The blogger may agree to post positive statements about a candidate in the content

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<sup>648</sup> *Id.* For a full discussion of these requirements, see Ch. 3.

<sup>649</sup> *Id.*

portion of the web site in exchange for the purchase of advertising space on the site. This is less likely in the traditional media because there are so many more people involved in the process of information distribution; but blogs generally operate with very small staffs, if any. There seems to be a high probability of influence with the purchase of advertisements. Disclaimers would give readers the necessary information regarding any potential collaboration or paid sponsorship for the content.

Incorporated bloggers also raise a concern of undue influence. The FEC extended the individual blogger exception to blogger who choose to incorporate for liability purposes.<sup>650</sup> The FEC did limit this extension to any corporation that “is wholly owned by one or more individuals, that engages primarily in Internet activities, and that does not derive a substantial portion of its revenues from sources other than income from its Internet activities.”<sup>651</sup> Although the regulation is broadly tailored to protect individuals, this seems to overstep the bounds of the prohibitions on direct corporate contributions and expenditures.

The FEC should perhaps institute a regulation patterned after the *Massachusetts Citizens for Life* case. In *MCFL*, the Supreme Court excepted a class of corporations from the corporate prohibitions that met three requirements: 1) operates solely in the political marketplace; 2) has no shareholders or interested investors; and 3) was not formed by and did not accept donations from corporations or unions.<sup>652</sup> The FEC has exempted an entire class of online corporations without engaging in the test that the Court laid out in *MCFL*. As the Internet expands, there are a host of

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<sup>650</sup> Incorporation would ostensibly shield the blogger from personal liability for damages from lawsuits arising from such things as defamatory statements.

<sup>651</sup> 11 C.F.R. §§ 100.94(d), 100.155(d).

<sup>652</sup> *Id.* at 264.

corporations that derive their entire revenues from their Internet activities. Not all of these are the types of incorporated bloggers that the FEC envisioned protecting.

**Research Question 5: Do the Campaign Finance Regulations Defining Paid Internet Communications Transmitted via Third Party as Regulated Under Campaign Finance Laws Adequately Protect First Amendment Interests?**

The Supreme Court has said that limits on campaign finance “operate in an area of the most fundamental First Amendment activities.”<sup>653</sup> Cultivating an open debate on the qualifications of candidates for federal office is paramount for the successful self-government model. The Internet offers an outlet for communications that simulates the exchange of ideas envisioned in the marketplace of ideas theory. The Supreme Court has in fact heralded the Internet as the “new marketplace of ideas.”<sup>654</sup>

Regulations restricting the online political marketplace must be subjected to a First Amendment analysis. The Court reviews most speech restrictions under a strict scrutiny analysis. This requires that to infringe on speech, the government prove there is a compelling interest that is directly advanced by the regulation, and that the regulation is narrowly drawn to address the compelling interest in the least restrictive manner possible. The Court has found that a lower standard of review is warranted for some types of speech. For example, for commercial speech to be limited, the government need only prove that the restrictions on speech substantially advance an important or substantial interest.

The Supreme Court has also drawn a distinction between the level of scrutiny for contribution limits and that for expenditure limits. In *Buckley*, the Court said that expenditure limits restrict political expression more severely than contribution limits. As a result, the Court

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<sup>653</sup> *Buckley v. Valeo*, 424 U.S. 1, 14.

<sup>654</sup> *Reno v. ACLU*, 521 U.S. 844, 885 (1997); *see also* Stephen C. Jaques, Comment: *Reno v. ACLU: Insulating the Internet, the First Amendment, and the Marketplace of Ideas*, 46 Am. U.L. Rev 1945, 1947 (Aug. 1997).

found in that case that the contribution limits were constitutional, while the expenditure limits were not. Subsequent cases have used this to justify a lower standard of review for contribution limits than the exacting scrutiny required for expenditure limits.<sup>655</sup>

The public communications being regulated under the 2006 FEC Rulemaking are expenditures. Therefore, a strict scrutiny analysis is required to determine the constitutionality of regulating campaign-related expenditures on the Internet.

The 2006 FEC rules require that all online communications placed on a third-party's web site for fee be considered a public communication for the purpose of regulating campaign finance. By definition, a public communication is considered either a contribution or expenditure. As such, the money spent on the communication, the source, and the recipient must be reported to the FEC in accord with the disclosure requirements of the FECA. Including online communications in the definition of expenditures also applies all prohibitions on direct corporate and union contributions and expenditures to communications over the Internet. Finally, the FEC rules require that all online public communications carry disclaimer requirements.

The Internet has become a primary source of political information for citizens.<sup>656</sup> The plaintiffs in *Shays v. FEC* argued that to leave all communications through this medium completely unregulated would "compromise the [FECA's] purpose and create the potential for gross abuse." The regulations that the FEC adopted in 2006 apply the FECA to online communications in a way that parallels the application to other media, if not in a more limited way.

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<sup>655</sup>

<sup>656</sup> See Ch. 1

By restricting the application to communications placed on a third-party's web site for a fee, the FEC has narrowly drawn the regulations to affect advertisements as opposed to independent communications. Further, the FEC specifically exempted independent Internet activity, such as blogging and e-mailing, in order to clarify the limits of the regulations. This is parallel to the application of campaign finance laws to the print media. For example, an advertisement placed in the local newspaper by Jane Voter would require a disclaimer statement. However, a brochure that Jane Voter created on her computer at home and printed to distribute on the street would not require such a disclaimer. The same is true online. If Jane Voter purchases an pop-up ad on Slate.com, the ad must carry a disclaimer statement. However, if Jane Voter blogs about her favorite candidate on her own web site, or on a public blog, no disclaimer is required.

In the Jane Voter examples, Jane would have to keep a record of all money spent purchasing the advertisements. If the amount spent totaled more than \$250 in a calendar year, Jane Voter would have to make a report to the FEC disclosing her expenditures. However, the independent activity of personally distributing brochures or blogging would not require such reporting.

The purpose of the FECA is to prevent corruption of the electoral process through the use of money. The costs of independent Internet activity are so nominal that regulation of activities such as blogging could not be supported under the First Amendment. However, advertisements purchased on popular web sites are akin to those purchased in major newspapers and broadcast stations. Wealthy individuals and organizations can heavily influence the political debate through this medium. Applying the same disclosure and disclaimer requirements to the Internet that are in place for print and broadcast, is not an unreasonable extension of the law.

Under both the marketplace of ideas theory and the self-government theory of the First Amendment, the Court has allowed regulations when they further the political debate. The FEC has limited the regulations of online campaign communications in accord with previous holdings and with the tenets of these theories. The disclaimer and disclosure requirements give voters more information and make the political process more transparent. Although these requirements may deter some citizens from purchasing advertisements, there is a plethora of alternative avenues available to communicate to the public online.

Further, the goals of campaign finance reform is to protect the integrity of the political debate. The protection of political debate is the central tenet of Meiklejohn's self-government theory of the First Amendment. Meiklejohn argued that political speech should not be limited. However, speakers, he argued could be limited in order to allow for all ideas to be heard and expressed. The end goal of Meiklejohn's theory was an informed electorate. The campaign finance regulations act to ensure that the source and sponsors of paid communications is revealed. This allows voters to more accurately assess the information with which they are presented.

In conclusion, the FEC 2006 Rules adequately protect the First Amendment as defined by the strict scrutiny analysis. The regulations are aimed at continuing to prevent corruption of the political process, an interest that has long been held as "compelling." The regulations directly advance this interest by mandating the disclosure of online expenditures and requiring that public communications online carry sponsorship disclaimers. The regulations are narrowly tailored to paid advertisements on third party web sites. This statement, as explicated in the Explanations and Justifications in the FEC's 2006 Rulemaking, is facially valid and narrowly tailored. As applied challenges may require that the FEC further explicate the term "paid" to include

compensation of bloggers for positive postings. However, as written, these regulations are not restrictive of individual free speech rights beyond what is necessary to accomplish preventing corruption in the political process.

### **Conclusions**

The current laws regulating campaign communications on the Internet survive First Amendment scrutiny. The FEC has created regulations that are consistent with both the marketplace of ideas theory and the self-government theory. These are the optimum theories to operate under when regulating speech on the Internet, particularly the marketplace theory. This theory will permit the least restrictive regulations. Had the FEC not exempted so broadly all independent Internet activity, the regulations perhaps would have acted as an unacceptable burden on the political marketplace.

Although the regulations survive strict scrutiny, there are areas that the FEC should clarify and revise. First, the disclaimer requirements should be clarified as to the formatting requirements for online communications. The FEC's rulemakings address the particular formats required for broadcast and print to ensure that the language is clear and conspicuous. Given the variety of media content that the Internet supports, the format or formats required for these media messages should be clarified.

Also, the FEC should reconsider the broad exemption for incorporated bloggers. This exemption was aimed at protecting from the campaign finance law requirements those bloggers who choose to incorporate. However, the language extends this exemption not only to individual or small groups of bloggers, but to any corporation deriving its revenues solely from Internet activities. This is a much broader exemption than the Supreme Court offered ideological entities that incorporated for liability purposes. The FEC should consider an approach that would extend

the blogger exemption to those online corporations that meet the test announced in *Massachusetts Citizens for Life*.

Also, the FEC should reconsider the use of “paid” for the purposes of defining a public communication. Content on the Internet can be sponsored in a number of ways that are not as likely in the traditional media because there are so many more people involved in the process of information distribution. Bloggers can be influenced by the purchase of unrelated advertisements or direct sponsorship. The content that is posted in response to these types of payments might be the equivalent of a paid advertisement, but does not carry the same disclaimer requirements. This would be difficult to monitor and enforce, but is a potential for abuse and corruption that the FEC should continue to examine.

However, more research is required to determine if the campaign finance laws are effective at preventing corruption, particularly on the Internet. The Internet mitigates much of the concern of corruption in the political process by the inexpensive nature and the capacity for user-generated content. The question of effectiveness cannot be answered with legal research and is outside the scope of this study. If the regulations adopted by the FEC do not in fact prevent corruption, or the appearance of corruption, then they do not directly advance that goal. More or less regulation, particularly with respect to disclaimer statements, may be needed to effectively combat corruption in the electoral process.

More research is also needed to determine how these regulations are impacting online speech. At this point, no advisory opinion has been issued by the FEC in response to a direct challenge to these regulations. Advisory opinions have been requested and filed with the FEC on other Internet activities such as fundraising, matching funds, and solicitation of funds by online political committees. However, no affirmative action had been taken on any of these requests at

the time of this writing due the fact that the FEC has been all but shut down. Congress has failed to confirm any commission nominees for the four vacant commission seats since the fall of 2007. The commission requires a quorum of four commissioners for any official action; it currently only has two active commissioners.

The issue of online campaign communications is not limited to federal elections, though. Research into how the states are addressing online campaign speech is also needed. The FECA only regulates activities related to federal elections. The majority of campaign activity occurs in state and local elections. The researcher is proposing to conduct a 50-state study to determine the different approaches states are taking to apply campaign finance laws to the Internet.

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