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Money Talks

Campaign Finance Laws and the First Amendment

BY TONY MAURO

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It happened again.

The year 2001 seemed to offer the strongest chance in years for Congress to enact the most sweeping change in campaign finance law since the post-Watergate era. Yet by July, it appeared that the “reform” effort would fail again, as it has so many times before.

Also as in years past, the First Amendment played a significant role in the debate, coloring how both Congress and the Supreme Court evaluated various proposals for change. In the end, however, it was politics more than the First Amendment that ran the reform campaign into the ground.

On April 2, 2001, the unthinkable had actually happened. The United States Senate, by a 59-41 vote, approved the McCain-Feingold legislation that would have banned so-called “soft money” contributions by corporations, unions and individuals to political parties and restricted campaign advertising close to Election Day. (“Soft money” refers to independent donations that support candidates without being coordinated with the candidate’s campaign.) But even as Sen. John McCain, R-Arizona, the driving force behind the legislation, applauded the vote, he told reporters that he would not “pop the cork” on celebratory champagne quite yet.

Postponing the celebration was a smart move. On July 12, the effort to pass a similar bill, known as Shays-Meehan, in the House of Representatives collapsed when House voted 228 to 203 to reject Republican ground rules for debating the

bill. House Speaker Dennis Hastert, who opposes the bill, pulled it from consideration and said it was not likely to return soon. At publication time, sponsors of the bill were exploring strategies to resurrect it, but chances seemed remote that any comprehensive bill would emerge from Congress. And even if it does, most of its features will likely be challenged in court as a violation of the free speech rights of political parties.

On that question of constitutionality, the Supreme Court contributed to the debate, as it has in the past, by issuing a ruling on a feature of past reform efforts even as new reforms were being fashioned. Just before the House debate fizzled, the court issued *Federal Election Commission v. Colorado Republican Federal Campaign Committee* on June 25. By a 5-4 vote, the court upheld longstanding restrictions on money spent by political parties in coordination with their candidates. Even though parties argued that such expenditures are at the core of their constitutionally protected free speech, the court said they could be limited to avoid corruption. The majority opinion, written by Justice David Souter, displayed a remarkably jaded view of political parties as mere “conduits for contributions meant to place candidates under obligation.”

Dissenters led by Clarence Thomas, for their part, expressed amazement at the court’s dismissal of the value of political speech represented by what parties do and spend to elect their candidates.) Thomas wrote, “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.”

The decision was seized on immediately as an encouragement to Congress to pass the soft money bans embraced by McCain-Feingold and Shays-Meehan. “The court explained that limits on coordinated party spending are essential for preserving the integrity of our campaigns,” said E. Joshua Rosenkranz, president of the Brennan Center for Justice. “The very same reasoning applies to a ban on unregulated soft money.”

Opponents of McCain-Feingold were just as quick to say that the court decision had no impact on the pending legislation. “Today’s decision says nothing about soft money or about the unconstitutional issue-advocacy restrictions that the Senate included,” said Laura Murphy, director of the Washington office of the American Civil Liberties Union.

And so the debate goes on. Tension between reform and the First Amendment has framed the discussion about changing the campaign financing system for nearly three decades and may be the single biggest reason why no major legislation on the subject has been passed since the days after Watergate. It all boils down to two words: Money talks. And if money is speech, how can it be restricted without violating the First Amendment?

That question has been asked most often by the Supreme Court—first in *Buckley v. Valeo* in 1976, in the case *Nixon v. Shrink Missouri Government PAC* in January 2000, and most recently in June’s *Federal Election Commission v. Colorado Republican Federal Campaign Committee*.

In the discussion precipitated by *Nixon v. Shrink Missouri Government PAC*, the divide among justices was as stark as ever. In his concurring opinion, Justice John Paul Stevens said flatly, “Money is property; it is not speech.”¹

A few pages later, Justice Clarence Thomas begged to differ. “Contributions to political campaigns,” Thomas said in dissent, “generate essential political speech.”² Thomas could have put it another way: “Money talks.”

These sharply different views came in a decision that some hoped would bring greater consensus on the Supreme Court on one of the most persistent constitutional debates dividing the nation. The First Amendment issue colors and slows every effort at changing the campaign-finance laws; it is “the tree in the middle of the ballfield,” as one commentator has put it.³

It even dominated the debate last year over the nomination of a new commissioner for the Federal Election Commission: Bradley Smith, a law professor who believes most existing and proposed campaign finance laws violate the First Amendment. Senate

Minority Leader Thomas Daschle said putting Smith on the FEC was like “asking Billy the Kid to enforce the peace,” but Smith was confirmed by a 64 to 35 vote.⁴

In the presidential race, thanks in part to the primary campaign of Senator McCain, the campaign finance issue occupied at least some of the attention of the contenders. Even as millions in contributions fueled the presidential campaigns of Al Gore and George W. Bush, both candidates said they wanted to reduce that glut of money next time around.

Vice President Al Gore pledged to the Democratic National Convention that if elected president, he would “put our democracy back in your hands, and get all the special-interest money—all of it—out of our democracy by enacting campaign finance reform. I feel so strongly about this, I promise you that campaign finance reform will be the very first bill that Joe Lieberman and I will send to the United States Congress.”⁵

Chastened by his own embarrassments over campaign fundraising, Gore promised comprehensive reform: an end to “soft money” contributions to political parties, improved disclosure of lobbying and of issue advertisements, free air time for candidates and a “Democracy Endowment” to finance campaigns that would be funded by tax-deductible donations from the public.

In spelling out a more modest series of proposed changes, the Republican platform made explicit mention of the constitutional restraints on Gore’s more sweeping pledge. “The First Amendment enshrines in our Constitution and guarantees indispensable democratic freedoms of speech, press, and association, and, the right to petition our government,” the platform stated, adding that George W. Bush as president would “preserve the right of every individual and all groups—whether for us or against us—to express their opinions and advocate their issues. We will not allow any arm of government to restrict this constitutionally guaranteed right.”⁶

During debate over the McCain-Feingold legislation in the Senate, now-President Bush sounded a more conciliatory tone, telegraphing that he might sign legislation that improves the system. But the ban on soft money is still a sore point for Bush and for political parties generally, which view the prohibition as a direct assault on their free-speech rights.

Some see this First Amendment issue as a fig leaf, a noble-sounding argument against changing campaign finance regulation that hides more venal motives. Others, including respected scholars and Supreme Court justices, say it is a legitimate, fundamental concern. There is no doubt, says liberal legal scholar and Stanford Law School dean Kathleen Sullivan, that “restrictions on political money amount to restrictions on political speech.”⁷

There was some hope that the Supreme Court would break the constitutional logjam—or uproot the tree from the ballfield—when it took up the issue in the challenge to a Missouri law that restricted contributions to state candidates.

But the court changed little when it ruled 6-3 in the case of *Nixon v. Shrink Missouri Government PAC* on Jan. 24, 2000. It was clear that the division would continue. Any efforts at reforming the system would still have to walk a constitutional tightrope that could doom even the most limited, well-intentioned changes.

Until the McCain-Feingold debate began, the only major new restriction on campaign money in the last 20 years was one that came last year. It targeted so-called “527s,” the latest breed of players on the campaign money scene. Taking advantage of Section 527 of the U.S. Tax Code, tax-exempt groups that spent millions of dollars on issue-advertising campaigns had been able to promise their donors anonymity. The new law, signed by President Clinton on July 1, 2000, does not restrict these donations or the spending that results but requires “527” committees to disclose their contributions and expenditures publicly.

Under the First Amendment shadow that hangs over any “reform” effort, laws requiring disclosure are deemed the safest constitutionally. Some reporting requirements have been held consistent with the First Amendment, though the Supreme Court has also, in several decisions, given constitutional protection to anonymous speech.⁸ Sure enough, the new law was challenged in federal court as a First Amendment violation. Republicans in Alabama claimed in the lawsuit that the new law would have a “chilling effect” on free speech.

Like rising floodwaters, campaign money eventually overcomes the barriers that are meant to contain it. Political scientists Samuel Issacharoff and Pamela Karlan have identified what they call the “Third Law of Political Motion,” namely that “every

reform effort to constrain political actors produces a corresponding series of reactions by those with power to hold onto it.”⁹

Last fall, even as the presidential candidates decried soft money, for example, it flowed ever faster into party coffers. In September 2000, the public interest group Common Cause reported that the Democrats had raised \$118 million in soft money in the current political season, while the Republican party had raised more than \$137 million—both parties raking it in twice as fast as during the 1996 election. Some of the individual contributions given at major fundraising events were as high as \$500,000. By the end of the campaign, nearly \$500 million had been given to the parties. Green Party candidate Ralph Nader urged both parties to give the money back, but neither side wants to “disarm” unilaterally. *The New York Times* opined in May 2000: “The new numbers are so outlandish that they numb the mind and threaten to dull the capacity for outrage.”¹⁰

Substantial “reform,” in short, is an uphill battle against not only political odds but constitutional barriers. On the constitutional front, the first question is: How did we get to this point? The answer begins—and ends, some would say—with the Supreme Court’s 1976 decision in *Buckley v. Valeo*. Following is a look at the decision, its background and its impact.

How we got here

Reformers have championed restrictions on campaign money for more than a century. In 1907, Progressive Era concern about “fat cat” contributions led to passage of the Tillman Act, which prohibited contributions from corporations and national banks to candidates for federal office. That law set a baseline for early reform that has gone relatively unquestioned.¹¹

Enforcement and further legislation to restrict campaign money were half-hearted for decades after that, until the Watergate scandal erupted before the 1972 election. Secret and illegal contributions had been made to Nixon’s re-election campaign in 1972, and many of those that were not secret were huge. More than 140 contributors donated more than \$50,000 each, and one insurance executive

donated \$2 million. Some contributions were intended to influence pending government action or to win ambassadorships, it was revealed.

The revelations were among the factors that led to the resignation of President Richard Nixon and left Congress and the public eager to find ways of reforming the campaign and election process. Congress responded by amending a 1971 law that required reporting of campaign contributions and expenditures. The amendments imposed strict limits on both contributions to candidates and parties and spending by candidates in federal elections. An individual, for example, could give a maximum of \$1,000 to a candidate for federal office and \$20,000 to a political party.

On the spending side, the law limited House candidates to spending \$70,000 per election, Senate campaigns to 12 cents per voter and presidential candidates to \$20 million for the general election. It also limited the amount of money a candidate could draw from his or her own funds for a campaign, and limited to \$1,000 the amount someone could spend on a candidate independent from the candidate's campaign. An independent Federal Election Commission was created to implement the law, and Congress approved expanded public funding for presidential elections. Anticipating a challenge to the law, Congress also authorized a fast-track process for the courts to review the law so that regulations could be in place for the 1976 election.

Buckley v. Valeo: the background

Conservative New York Sen. James Buckley and liberal former Minnesota Sen. Eugene McCarthy challenged the law. They argued that the limits in the law violated their own First Amendment rights as candidates, as well as the rights of campaign contributors and political and other organizations. As a formality, they filed suit against Francis Valeo, secretary of the U.S. Senate. An appeals court upheld most of the law, and the challenge moved quickly to the Supreme Court, where it was argued in November 1975.

The Supreme Court was under considerable pressure to act quickly; the first federal campaign funds for the 1976 election were due to be paid out to

candidates on Jan. 2, 1976. According to the book *The Brethren*, the court was also distracted by the fact that the ailing William O. Douglas, who had been on the court for the oral arguments but resigned soon after, was attempting to stay in the case and write an opinion. The court had to remind him finally that retired justices do not have a vote.¹²

To speed the opinion writing, the court decided to assign a committee of justices to draft a “per curiam” or unsigned decision. Each justice would write a separate section of the decision. But in the end, with several justices writing separate dissents, the decision turned into one of the lengthiest in court history—and one of the most difficult to interpret.

Buckley v. Valeo: the decision

So what did the court actually decide? It ruled that the post-Watergate limit placed on the amount of money a candidate for federal office might spend was an unconstitutional violation of the candidate’s freedom of speech. Another provision of the law, limiting the amount of money that individuals and organizations could contribute to a candidate, was deemed not to be unconstitutional, because it served the important interest of preventing corruption. The court also struck down the method of appointment for members of the Federal Election Commission, which was charged with implementing the law.

A series of mix-and-match majorities dictated each result. The limits on expenditures were struck down by a 7-1 vote, while limits on campaign contributions were upheld by a 6-2 vote. Composition of the Federal Election Commission was ruled unconstitutional by an 8-0 vote. Justices Lewis F. Powell Jr., William J. Brennan Jr. and Potter Stewart were in the majority in all of the votes, while Chief Justice Warren Burger and Justices Harry A. Blackmun, William H. Rehnquist, Byron R. White and Thurgood Marshall dissented in certain sections of the decision. Justice John Paul Stevens, new on the court, did not participate.

In their separate writings, most justices saw First Amendment problems with the broad new regime of campaign regulations. But some thought that at least some

portions of the law should be upheld. To strike a compromise, the court made a distinction between campaign contributions—money given by individuals, companies or political committees to candidates or parties—and campaign expenditures, defined as money spent by the candidates or parties to win votes. This distinction has been questioned ever since, but it was key to the court’s resolution of the case because it enabled the court to treat the two types of transactions differently under the First Amendment.

Campaign spending by candidates, the court reasoned, was closely related to political speech, which the court has always given the highest level of First Amendment protection. Campaign money is spent on flyers, campaign advertising and generally getting the candidate’s message out—all core political speech. Under the court’s First Amendment precedents, the more valuable the speech, the harder it is for government to restrict it, so the court struck down the spending limits. For the same reason, the limit on candidates’ ability to use their own money was also struck down.

But when an individual gives money to a campaign, the court suggested, the money’s relationship to important, protected speech is less direct. Therefore, it can be regulated more easily.

“While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor,” the court said.

The court also saw a stronger connection between the limit on contributions and the political corruption that the law was meant to prevent, making the limit easier to justify under the First Amendment.

But this distinction between spending and contributions was only supported by five justices, and one—Thurgood Marshall—said the expenditure of a candidate’s own money should be regarded as a contribution that could be regulated.

Other justices weighed in to poke holes in the court’s rationale. “The contribution

limitations infringe on First Amendment liberties and suffer from the same infirmities that the Court correctly sees in the expenditure ceilings,” Chief Justice Burger wrote. He added, perhaps presciently, “What remains after today’s holding leaves no more than a shadow of what Congress contemplated. I question whether the residue leaves a workable program.”

Justice Marshall said that allowing candidates to spend their own money without limit would have a negative impact on politics. “The perception that personal wealth wins elections may not only discourage potential candidates without significant personal wealth from entering the political arena, but also undermine public confidence in the integrity of the electoral process.”

Justice Byron White was the only member of the court who thought that spending limits in general were constitutional.

“It would make little sense to me, and apparently made none to Congress, to limit the amounts an individual may give to a candidate or spend with his approval but fail to limit the amounts that could be spent on his behalf. Yet the Court permits the former while striking down the latter limitation,” said White.

On the First Amendment issue, White said, “The argument that money is speech and that limiting the flow of money to the speaker violates the First Amendment proves entirely too much.” White pointed out that tax laws, for example, when applied to newspaper companies, limit the amount of money that can be used for communicative activities. Yet no one would suggest that those laws violate the First Amendment.

While striking down the limits on campaign spending, the court said limits were permissible for presidential candidates who agreed to the limits in exchange for federal funding of their campaigns.

Speaking unanimously, the court also said the way that Congress had structured the Federal Election Commission, with four of its six members appointed by Congress, violated the constitutional separation of powers. The law gave the commission executive branch-type powers, the court said, so its members had to be appointed by the executive branch, namely the president.

Excerpts from the main unsigned opinion of the court in *Buckley v. Valeo*, 424 U.S. 1 (1976)

“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.’ ”



“The expenditure limitations contained in the Act represent substantial, rather than merely theoretical, restraints on the quantity and diversity of political speech. The \$1,000 ceiling on spending ‘relative to a clearly identified candidate,’ would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication.”



“By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor’s ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.

“Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated.

“We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify (the) ceiling on independent expenditures.

“The ceiling on personal expenditures by candidates on their own behalf, like the limitations on independent expenditures contained in (the law), imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression. The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates.

“The major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions. The interest in alleviating the corrupting influence of large contributions is served by the Act’s contribution limitations and disclosure provisions, rather than by its campaign expenditure ceilings.

“In any event, the mere growth in the cost of federal election campaigns, in and of itself, provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution, it is not the government, but the people—individually, as citizens and candidates, and collectively, as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.”



Buckley v. Valeo: the impact

The most immediate result of the decision was to put the Federal Election Commission temporarily out of business. Because the court said the method of selection for the FEC's members was unconstitutional, Congress passed new legislation to reconstitute the body as a six-member commission, all of whose members were appointed by the president.

Abiding by the court's judgment, Congress also repealed the expenditure limits on all candidates except those who accepted public funding.

Beyond the immediate impact, the court's complex decision in *Buckley v. Valeo* has impeded every subsequent effort to limit the influence of money in campaigns. Senate Judiciary Committee Chairman Orrin Hatch, R-Utah, has described the *Buckley* ruling as "the granddaddy" of cases affecting reform. "*Buckley* established the free-speech paradigm in which to weigh the competing campaign reform proposals," Hatch says.¹³ At both the federal and state level, efforts to restrict campaign expenditures are challenged and usually are struck down because of *Buckley's* "money-is-speech" rationale.

Critics say that because the *Buckley* decision left campaign spending unregulated, the demand for money in politics has increased uncontrollably, creating incentives to get around the contribution limits. In 1996, more than \$2 billion was spent in federal elections, and "soft money" contributions accounted for \$260 million of that. By the end of the 2000 campaign, Republicans and Democrats together had raised \$500 million in unregulated money. Candidates can be just as beholden to those who give soft money as to direct contributors, critics say.

Many organizations and scholars still agree strongly with the court's view that the First Amendment does, and should, prevent restrictions on campaign money. At least one current justice, Clarence Thomas, has indicated he thinks that restrictions on contributions as well as spending should be struck down on First Amendment grounds. In a 1996 decision, *Colorado Republican Federal Campaign Committee v. FEC*, Thomas said, "Broad prophylactic bans on campaign expenditures and contributions are not designed with the precision required by the First Amendment, because they sweep protected speech within their prohibitions." Sen. Mitch

McConnell, R-Ky., has argued vigorously against recent campaign reform measures in Congress, citing First Amendment concerns.

Even if the Supreme Court ultimately overturns *Buckley v. Valeo*, some commentators think that its underlying view of the importance of campaign speech will require a reassessment of First Amendment doctrine before significant changes in election law can be enacted. “As long as American free speech doctrine and culture remain so intolerant of the regulation of speech, any attempts to permit the regulation of electoral speech must confront the question of whether the domain of electoral speech can be distinguished from the larger domains it might be thought to inhabit,” wrote Frederick Schauer and Richard H. Pildes in the recent book *If Buckley Fell*. “If the regulation of electoral speech cannot be distinguished from these larger domains, then the regulation of electoral speech would be constitutionally doomed even were *Buckley v. Valeo* no longer the law... The justification of a separate domain for electoral speech is thus a necessary task for any potential regulator of campaign speech who recognizes the futility of wholesale changes in the American approach to freedom of speech and freedom of the press.”¹⁴

Buckley v. Valeo was followed by a series of Supreme Court decisions on other aspects of campaign finance regulation, most of which applied the basic principles of *Buckley* to different types of campaign regulation. Here, based on summaries found on The Freedom Forum Online (www.freedomforum.org), are the leading cases:

FIRST NATIONAL BANK OF BOSTON V. BELLOTTI, 435 U.S. 765 (1978)

The court ruled 5-4 that political expression could not be prohibited simply because its source was a corporation rather than an individual. The court struck down a Massachusetts law banning corporate political advocacy.

The state law had made it a crime to use corporate contributions and expenditures to influence the outcome of a ballot measure—unless the question materially affected the corporation. The law did not permit corporations to spend money on referenda concerning income or property taxes.

“If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech,” wrote Justice Lewis Powell Jr. for the majority. “It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation, rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union or individual.”

In dissent, Justice Rehnquist saw no reason why Massachusetts could not give less protection to corporate speech than to individual expression. “The free flow of information is in no way diminished by the Commonwealth’s decision to permit the operation of business corporations with limited rights of political expression,” Rehnquist wrote. “All natural persons, who owe their existence to a higher sovereign than the Commonwealth, remain as free as before to engage in political activity.”

1981 CALIFORNIA MEDICAL ASSOCIATION V. FEC, 435 U.S. 182

The court upheld a portion of the Federal Election Campaign Act prohibiting individuals and associations from contributing more than \$5,000 per year to any political action committee.

A plurality of the court determined that the law was necessary to prevent individuals from channeling monies through such a committee in order to evade the \$1,000 limit on contributions to federal candidates.

“The ‘speech by proxy’ that CMA [the California Medical Association] seeks to achieve through its contributions,” the court said, “is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection.” As a result, as it had said in *Buckley*, the court said the government could regulate such political activity.

1981 CITIZENS AGAINST RENT CONTROL V. BERKELEY, 454 U.S. 290

The court struck down a California ordinance that set a \$250 limit on individual contributions to committees formed for the express purpose of supporting or opposing a ballot measure.

The court determined that the justifications for contribution limits in Buckley did not apply to referenda or other ballot measures.

“There is no risk that the voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure, since the contributors must make their identities known under the disclosure provisions of the ordinance,” the court wrote.

1985 FEC V. NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, 470 U.S. 480

The court struck down the Presidential Election Campaign Fund Act provision placing a \$1,000 limit on the amount a political action committee could spend on behalf of a presidential candidate who has chosen to receive federal campaign financing.

The court ruled that the limits on the PAC’s independent expenditures—which were not coordinated with Ronald Reagan’s 1984 re-election campaign—were an unconstitutional effort to curb the appearance of corruption.

Even if the government could demonstrate that PACs had a corrupting influence, the court wrote that this FEC regulation would remain “a fatally overbroad response to that evil. It is not limited to multimillion-dollar war chests, but applies equally to informal discussion groups that solicit neighborhood contributions to publicize their views about a particular Presidential candidate.”

1986 FEC V. MASSACHUSETTS CITIZENS FOR LIFE, 475 U.S. 1063

The court ruled that portions of the Federal Election and Campaign Act of 1971 pertaining to corporations could not be applied to a citizen’s political group.

The court determined that the FEC wrongly sought action against the Massachusetts Citizens for Life after the anti-abortion group paid for a newsletter to inform voters about the campaigns of nearly 400 candidates

for state and federal office. The court said the 1971 campaign act was designed to regulate groups seeking corporate gain.

“MCFL was formed to disseminate political ideas, not to amass capital,” wrote Brennan for the majority in a 5-4 opinion. “MCFL is not the type of traditional corporatio[n] organized for economic gain ... that has been the focus of regulation of corporate political activity.”

1990 AUSTIN V. MICHIGAN CHAMBER OF COMMERCE, 494 U.S. 652

The court upheld a Michigan state law that prohibits corporations from using general treasury funds for campaign spending but allows them to make such expenditures from funds designed solely for such purposes.

In upholding the Michigan law, the court noted that the Michigan Chamber of Commerce was a large coalition of corporations (in contrast to Massachusetts Citizens for Life, the small, issue-oriented organization involved in the 1986 case).

The court reasoned that the Massachusetts group formed for the sole purpose of influencing the political process, with members who could easily withdraw if they disagreed with policy changes. The Michigan chamber, however, was formed for business purposes. The court noted, too, that the law was not a complete ban on corporate political advocacy but a requirement to establish a separate and independent fund for such activity.

The court wrote that the state tailored the law narrowly enough to satisfy its objective: to eliminate the appearance of corruption associated with corporate spending. “Because persons who contribute to segregated funds understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors’ support for the corporation’s political views,” the court wrote.

1996 COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE V. FEC, 116 S. CT. 2309, 2325.

In what is considered the most important campaign-finance decision since *Buckley*, the court ruled that campaign spending by political parties on behalf

of congressional candidates may not be limited, as long as the parties work independently of the candidates rather than in coordination with them.

The court noted that while the government could restrict the parties' direct contributions to candidates, it could not limit the parties' spending without violating their First Amendment rights.

“We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties,” Justice Breyer wrote in a plurality decision.

By striking down the limits on “uncoordinated” expenditures for political parties, the court cleared the way for political parties—particularly the Republican and Democratic parties—to spend unlimited amounts of “soft” money on behalf of their candidates.

2000 NIXON V. SHRINK MISSOURI GOVERNMENT PAC, NO. 98-963.

By a 6-3 vote the court reaffirmed the basic framework of *Buckley* by upholding a Missouri statute that imposed limits ranging from \$275 to \$1,075 on contributions to candidates for state office.

Justice David Souter said the *Buckley* principles still apply, even in the context of a state law. “In defending its own statute, Missouri espouses those same interests of preventing corruption and the appearance of it that flows from munificent campaign contributions,” Souter wrote. “Even without the authority of *Buckley*, there would be no serious question about the legitimacy of the interests claimed, which, after all, underlie bribery and anti-gratuity statutes.”

In a separate concurrence, Justice John Paul Stevens sought to minimize the First Amendment arguments against contribution limits. “Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not

follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results.”

In dissent, however, Justice Anthony Kennedy said the *Buckley* framework had triggered a flood of unregulated soft money flowing to political parties. “The very disaffection or distrust that the Court cites as the justification for limits on direct contributions has now spread to the entire political discourse. *Buckley* has not worked.”

Current reform proposals

The McCain-Feingold bill—now languishing after Senate passage—would make sweeping change throughout the complex landscape of campaign finance regulation. It would increase the limit on individual contributions to candidates for federal office from \$1,000 to \$2,000, and enable individuals to contribute up to \$30,000 cumulatively to all candidates, up from the previous \$25,000 limit. It would increase reporting requirements on candidates and parties, and expand restrictions on fundraising from government property and on donations from foreign nationals. It would also limit, for the first time, donations to presidential inaugural ceremonies and events.

But the most significant—and controversial—feature of the bill is its ban on the soft-money donations that have soared since first being permitted by the Federal Election Commission in 1978.

There is considerable doubt about whether a ban on soft money would be found constitutional, however. Rightly or wrongly, *Buckley* and other decisions of the Supreme Court have suggested that the court finds less danger of corruption in “independent” expenditures that do not directly benefit candidates than in direct contributions. And under the *Buckley* framework, if there is less danger of corruption, government has less justification in imposing limits. Hatch also argues that many party activities funded by soft money “are protected by the First Amendment’s freedom of association—the right to freely associate with a party, union or association—as well as by free speech.”¹⁵

Even more vulnerable to First Amendment attack may be restrictions that the bill would impose on broadcast advertising for candidates in the final days of campaigns. Outside groups would be barred from referring to specific candidates in issue advertisements within 60 days of an election. Critics of the provision say it muzzles organizations during the period when their voices might have the most impact, clearly violating the First Amendment.

“The law clearly restricts the ability of a variety of associations to convey their political views on issues of public importance,” says constitutional scholar Daniel Troy in an analysis of the bill by The Media Institute. Troy notes that throughout history, public policy issues have become “inextricably bound up” with the names of individual members of Congress—the McCain-Feingold bill being the latest example. To force organizations not to use those names in their advertising would “dramatically hamper” their ability to communicate with voters,” Troy says.¹⁶

Broadcasters may also challenge a feature of the law that requires them to give candidates discounted rates for political advertising. “These rates would be substantially lower than the rate paid by even the most favored commercial advertisers,” said Eddit Fritts, president and CEO of the National Association of Broadcasters. “Cheaper rates translate into more ads purchased, more political ad clutter and more campaign spending, not less.” Fritts called the provision “patently unconstitutional,” adding, “Government regulation of speech, including speech on broadcast stations, must be both the least restrictive means available and must directly advance a governmental interest. This amendment does not stand up to the test.”¹⁷

Where to go from here – two views

It is clear that no matter what happens to the McCain-Feingold legislation, campaign finance reform will continue to be viewed through the prism of *Buckley v. Valeo* and the First Amendment.

That was clear in the majority decision in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*. Justice Thomas, joined by justices Antonin

Scalia and Anthony Kennedy, said *Buckley* should be overturned. Chief Justice William Rehnquist also dissented but stopped short of advocating *Buckley*'s demise. Souter's majority used the *Buckley* framework to decide the case. He viewed the party's expenditures on behalf of candidates as the equivalent of contributions to candidates, which could, under *Buckley*, be restricted.

In May 2000, a federal appeals court had struck down the provision that limits the amount of money a political party can spend in coordination with its candidates for Congress—hard money, rather than soft. “In the case of political parties ... a limit upon the amount a party can spend in coordination with its candidates certainly entails more than a “marginal restriction” upon the party's free speech,” wrote the U.S. Court of Appeals for the 10th Circuit. “Indeed, in the context of an election, a party speaks in large part through its identified candidates; candidates, in significant measure, speak for their political parties.”¹⁸

The closeness of the Supreme Court vote in the *Colorado Republican* case suggests the importance of the Supreme Court nominations President Bush may make in the next few years. Any new nominee can be expected to face questioning from the Senate about his or her views on the constitutionality of campaign reform, among other issues.

But until the court clarifies or abandons its *Buckley* framework, the pattern of the last 20 years is likely to repeat itself. Periodically, a reform proposal will be enacted. It will be challenged, appraised in light of the First Amendment and then, often as not, struck down. If the law falls, parties, candidates and contributors will rush to take advantage of the new opening. If the law is upheld, the same entities will find another way to make their money talk.

To assess how the campaign-finance debate will develop in coming years, two experts on opposing sides of the First Amendment issue recently offered their views in discussions conducted via e-mail just before the Supreme Court's decision in *FEC v. Colorado Republican Federal Campaign Committee* came down.

E. Joshua Rosenkranz is executive director of the New York University School of Law's Brennan Center for Justice. He authored *Buckley Stops Here*, a report of the

F I R S T R E P O R T S

Twentieth Century Fund. The Brennan Center also has been active in litigation defending campaign finance regulations against First Amendment challenges.

Rosenkranz argues that the First Amendment should not be an obstacle to meaningful reform. Because of divisions on the issue in the Supreme Court, Rosenkranz says, “The fate of campaign finance regulation for the next three decades joins the list of issues that are likely to be determined by the president’s Supreme Court nominees.”

Roger Pilon, vice president for legal affairs at the libertarian Cato Institute, believes the First Amendment makes restrictions on campaign money difficult to sustain. Founder and director of Cato’s Center for Constitutional Studies, Pilon wrote in a letter to Congress in 1999: “The Constitution provides broad protections for political speech, not broad power to regulate such speech.” In his view, many parts of the McCain-Feingold campaign “reform” bill—should it ever become law—would be unconstitutional.

Two views on the future of campaign finance laws



Joshua Rosenkranz

Joshua Rosenkranz is executive director of the New York University School of Law's Brennan Center of Justice.

Mauro: You've described *Buckley v. Valeo* as the "tree in the middle of the ballfield" in terms of campaign finance restrictions and the First Amendment. In light of recent court rulings—notably *Nixon v. Shrink Missouri* and the *Mariani* case from the 3rd Circuit and the *Colorado Republican* ruling from the 10th—is the tree still in the ballfield, is it leaning or has it been moved aside?

Rosenkranz: The metaphor once aptly described how policymakers have had to contort campaign finance proposals to conform to their prognostications of what the courts would uphold. But lately, at least in the lower courts, the tree has been behaving more like one of those apple trees in *The Wizard of Oz*, capable of reaching to snatch balls randomly out of midair. There is just no telling what the lower courts will read into *Buckley* these days. For example, some court-watchers predicted that the *Mariani* case would come out the other way, giving credence to an argument that just a few years ago would have been considered downright bizarre.

For better or worse, though, the tree is rotting at the core, just waiting for a strong wind to blow it over. In *Shrink*



Roger Pilon

Roger Pilon is vice president for legal affairs at the Cato Institute and director of Cato's Center for Constitutional Studies.

Mauro: As passed by the Senate, the McCain-Feingold campaign reform package includes many provisions that could be subject to First Amendment attack. How vulnerable do you think it is under the Supreme Court's precedents going back to *Buckley v. Valeo*?

Pilon: If enacted as law, most provisions of the McCain-Feingold bill, as passed recently by the Senate, should be dead on arrival at the Supreme Court. Yet what was so striking about the two-week debate that preceded the Senate vote was how little the "reformers" even mentioned the Constitution. But for the opposition, the debate took place in a constitutional vacuum. Whatever became of the oath the senators took to support the Constitution?

Let's start with first principles. In the seminal 1976 case of *Buckley v. Valeo* the Supreme Court made it clear, as it has in many cases since, that political contributions and expenditures are core political speech and thus are protected under the First Amendment. That means that regulations of either are subject to strict judicial scrutiny: they have to serve a compelling state interest, and they must be narrowly tailored to serve that interest. And the only interest that justifies such restrictions, the court continued, is the prevention of corruption or its appearance, which the court made clear means *quid-pro-quo* corruption—political gifts for political favors.

Unfortunately, the court then upheld what amounts to a prior restraint on speech—limits on contributions—

Two views

Missouri, six Supreme Court justices are on record as disputing the central premise of *Buckley*, that contributions and spending have a different First Amendment status. So the only question is which way the tree will fall: Will the court uphold regulation of both forms of financial transaction or prohibit regulation of both?

Mauro: What's your assessment of the lineup of the justices in this issue?

Rosenkranz: Justices Stevens, Ginsburg and Breyer have declared that reasonable spending limits ought to be constitutionally permissible, just as contribution limits are. Justices Scalia and Thomas have staked out the position that contribution limits should be struck down, leaving no limits at all. Justice Kennedy has indicated a visceral attraction to the Scalia/Thomas position but a willingness to consider the opposite result should a legislature pass a spending limit as part of a truly comprehensive regulatory scheme. The other three justices have remained silent.

So the current tally is three for more limits against two for no limits, with another one on the fence and three abstentions. With a tally like this, there is little doubt the tree will fall; the issues are when, and which way.

Mauro: So which way will the tree fall—and when?

Rosenkranz: Nose-counting on the Supreme Court is always a dicey business, but here goes. If the issue were to be

without any serious arguments or evidence indicating that such limits prevent corruption. That led to the distinction between regulated “hard money” contributions to candidates and their campaigns; partially regulated independent expenditures by individuals, corporations, and unions; and unregulated “soft money” contributions to political parties. And it led also to the need to determine whether otherwise independent expenditures are “coordinated” with candidates or campaigns to a degree that would render them hard money contributions and thus subject to greater regulation.

That bare outline only begins to capture the complexity of the current law, to say nothing of the McCain-Feingold changes. It is a body of “law” that is so complex and so uncertain as to burden and chill speech from the start. Indeed, the unwary who venture into campaigns today without an armada of lawyers at their side do so at their peril. For all their complaints about the absence of “grassroots” participation in modern campaigns, “reformers” have done about all they could to imperil and thus discourage such participation.

Thus, we come to the heart of the matter. All the talk of corruption aside—corruption that no one seems to be able to put his finger on—campaign finance “reform” is not about reform. It's about incumbency protection—about making it more difficult for challengers to mount well-funded, credible challenges to incumbents. Do we need any better evidence than the new provision in McCain-Feingold that lifts the caps on contributions to candidates facing wealthy, self-financed challengers? If individual contributions above \$1,000 are presumed to corrupt a candidate—as they are under present law—how is it that the presumption disappears when the opponent is self-financed?

Two views

decided by the current court, the key would obviously be in the three who remained mute on the subject. Tellingly, all three—Chief Justice Rehnquist and Justices O'Connor and Souter—joined the *Shrink Missouri* majority opinion (written by Souter), which read like a veritable paean to contribution limits. I just don't see two of them peeling off to join the no-limits camp. If I had to predict, I'd say that Justice Souter joins the pro-regulation camp and the chief justice sticks with the *Buckley* compromise, which he endorsed back when the case was decided. (The chief is the only member of the current court who voted in *Buckley*.) Unless Justice Kennedy changes his tentative predilection, that leaves Justice O'Connor likely casting the deciding vote—a role she has often played, quite unpredictably, in cases relating to regulation of politics.

But, of course, the case will most likely not be decided by the current court, because the perfect test case is probably at least a few years away. By then, there is a very good chance that two of the swing votes (the chief justice and Justice O'Connor) could be off the court, as could one member of the pro-regulation camp (Justice Stevens). So the fate of campaign finance regulation for the next three decades joins the list of issues that are likely to be determined by the new president's Supreme Court nominees.

Mauro: Congress recently passed—and President Clinton signed—legislation requiring public disclosure of funding sources for, and spending by “527

Mauro: What other provisions of McCain-Feingold are vulnerable?

Consider the bill's broad definition of “electioneering communication,” which would prohibit issue advocacy now permitted if the ad “refers to a clearly identified [federal] candidate” within 60 days of a general election or 30 days of a primary, convention or caucus. That would encompass ads urging support for or opposition to “the McCain-Feingold bill”! It is meant, clearly, to shield incumbents from ads criticizing them prior to an election.

By way of background, in rejecting most of the post-Watergate regulations of any speech made “relative to a clearly identified candidate” or “for the purpose of . . . influencing” the nomination or election of candidates for federal office, the *Buckley* court began by recognizing that the First Amendment affords “the broadest protection” to “discussion of public issues and debate on the qualifications of candidates.” Accordingly, it drew a sharp distinction between candidate advocacy and issue advocacy, allowing regulation only of the former, and only of what it called “express advocacy.” However unwise it may have been to leave even that regulation standing, the court drew its distinction with a bright-line test: government could regulate only those communications that advocate the election or defeat of a candidate using “explicit words” like “vote for (against),” “elect,” “defeat” or “reject.”

Plainly, the express-advocacy test was meant to protect all other speech, all issue advocacy, even though such speech might “influence” elections, as the court recognized. Indeed, not even the prevention of corruption or its appearance would justify restrictions on issue advocacy, the court said. The point was summed up by the *Buckley* court as follows: “So long as persons and groups eschew

Rosenkranz
Solid Pilon

Two views

committees,” which had previously evaded disclosure under the tax laws. Do you expect the law will survive a First Amendment challenge?

Rosenkranz: My prediction is that the challenge will fail, at least once it gets to the Supreme Court. The argument against regulating 527s is based upon a fundamental misreading of a footnote in *Buckley*. The Supreme Court there was troubled by Congress’s failure to provide any meaningful definition of what speech qualified as regulable electioneering when it drafted the Federal Election Campaign Act. Congress’s various definitions of regulable electioneering were so broad that the act could easily have applied to speech about issues (and entirely unrelated to candidates), and the definitions were so vague as to provide virtually no guidance as to what speech would be regulable, creating a worrisome trap for the unwary speaker. In order to save the entire statute from invalidation, the Supreme Court stepped into the breach and declared that it would interpret the act to apply only to speech that used the so-called “magic words.”

Buckley never pronounced a categorical rule prohibiting any legislature from ever devising a sensitively drawn alternative regulatory boundary, a definition that did not rely on magic words. Other formulations are perfectly permissible so long as they are sufficiently sensitive to First Amendment concerns. Any definition must be narrowly tailored to cover electioneering activity and sufficiently

expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views.” For a quarter of a century that conclusion has only been reinforced by the Supreme Court and upheld by lower federal courts and state courts alike. Yet McCain-Feingold would obliterate the underlying distinction between express advocacy and issue advocacy by ignoring the bright-line test, thus sweeping in activities that are now not regulated.

To be sure, McCain Feingold’s expansive regulation of “electioneering communications” allows a minor exception, but it turns out to be illusive. First, it applies only to 501(c)(4) and section 527 non-profit organizations, not to 501(c)(3)s, veterans groups, trade associations, and labor unions, which would not be able to engage in issue advocacy 60 days before an election. Second, it applies only if the organization operates like a federal PAC by creating a separate, segregated fund for such expenditures, to which only individuals may contribute, with rigorous reporting requirements—requirements that run contrary to *Buckley*’s holding that issue-oriented groups are immune from such burdens. Finally, the exception does not apply if the expenditure is for a “targeted” communication—that is, an ad distributed by a station “whose audience consists primarily of residents of the State for which the clearly identified candidate is seeking office.” Here too we have a blatant example of the bill’s effort to protect incumbents from criticism.

Mauro: What about the prohibitions on “coordinated expenditures”?

Here, recall, the question is whether otherwise independent *expenditures* are “coordinated” with candidates sufficiently to render them hard money *contributions* subject to greater regulation. What

Rosenkranz
Solid Pilon

Two views

precise so that it does not trap an unwary speaker.

In closing the 527 loophole, Congress did just that. It said, in essence, that any entity that officially declares that it is in the business of influencing elections will be subject to election laws. Any entity that declares its *raison d'être* is to influence elections cannot plausibly complain that it was unwittingly trapped by election laws.

Mauro: Does this legislation also suggest that disclosure requirements—rather than limits—are the only type of campaign finance reform that can pass Congress, in light of constitutional concerns?

Rosenkranz: No. I think it reflects a realization by Congress that it cannot withstand the tide of public support for campaign finance reform. The constitutional arguments launched by opponents of reform like Sen. Mitch McConnell have been scanty fig leaves to cover their transparent political motives. Senator McConnell and his allies were making the usual specious First Amendment arguments when the 527 law passed overwhelmingly. The difference was not that their constitutional stance was less solid, but that members of Congress had started to worry about facing their constituencies on Election Day after opposing campaign finance reform.

Mauro: How do you assess the McCain-Feingold Bill in terms of its political and constitutional viability?

McCain-Feingold does is define a “coordinated expenditure” to include a payment made “pursuant to any general . . . understanding with [a] candidate.” That language is so vague and overly broad as to provide no notice to organizations subject to the bill’s civil and criminal sanctions. Moreover, it reaches not only express advocacy but issue advocacy. In fact, it would mean that those working with Senator McCain to promote campaign finance “reform” could be found to have had a “general understanding” sufficient to deem an organization’s expenditures an illegal contribution to his campaign. The bill even goes so far as to require the Federal Election Commission to write regulations regarding whether the use of “common vendors” constitutes coordination. In sum, the bill goes well beyond the narrow understanding and specific proof the courts have required to show coordination.

Notice also that news stories, commentaries or editorials “distributed through the facilities of any broadcasting station” are exempted from the definition of “electioneering communications,” as they should be. And, of course, wealthy individuals can spend all they want on behalf of issues and candidates. Thus, the implication is clear: these regulations will restrict ordinary Americans, those whose voices can be heard only if they join together in organizations such as issue-oriented groups, labor unions or political parties. McCain-Feingold leaves the powerful and the wealthy alone.

Mauro: How will McCain-Feingold affect political parties?

Nowhere are McCain-Feingold’s restrictions on organizations more clear than in the case of political parties. Driven by its obsession with “soft money”—which is the creature of previous regulations—the bill imposes federal election law on state and local parties and drastically limits the activities of national parties.

Rosenkranz
Solid Pilon

Two views

Rosenkranz: Right now the political momentum appears to favor passage of the McCain-Feingold Bill. The pro-reform senators have won the early rounds and defeated a number of Republican poison-pill amendments. But the debate really is wide open and free-wheeling, so the final product may be quite different from the original proposal. I don't see the competing Hagel Bill picking up any significant support at this time, and this group of senators appears committed to pass some meaningful campaign finance reform. President Bush has been reluctant to say where he will draw the line, but it will be very difficult for him politically if he were to veto this bill.

In terms of the constitutionality, I believe that the courts will uphold the two central portions of McCain-Feingold—the ban on soft money and the regulation of sham issue advocacy. Ending soft money is the easier of the two propositions, since ending soft money is really just closing a loophole (albeit an enormous one) in the current law. The tougher question is whether the new definition provided in McCain-Feingold for “electioneering” ads will survive court review. McCain-Feingold defines as electioneering all television and radio ads that name a candidate within 60 days of an election and that are targeted to the candidate's electoral district. Our study of political ads run in the 1998 and 2000 federal elections demonstrates that this definition is a remarkably accurate guide for distinguishing between true electioneering ads and true issue ads.

If there is a federal candidate on the ballot, McCain-Feingold requires state and local parties to pay for “federal election activity” with money raised under federal-law limits, not with money raised under state law. That means that they must use “hard money” for everything from voter registration during the 120 days before an election to voter identification, get-out-the-vote activity and party promotion. In effect, the bill federalizes many activities of state and local parties. In the case of national parties, the bill prohibits their raising soft money, thus restricting their ability to engage in issue advocacy as well as legislative and organizational activities.

That alone raises serious constitutional questions since parties too—indeed, especially—have a right to engage in issue advocacy, and the *Buckley* court held that not even the corruption-prevention rationale justifies restrictions on such advocacy. Moreover, as the court said in its 1996 *Colorado Republican* decision, “[W]e are not aware of any special dangers of corruption associated with political parties.”

Political parties have long been recognized as primary, if not the primary, institutions through which individuals associate to pursue common political interests. Their role in funding candidates—and especially in ensuring competitive races—has been crucial. Yet McCain-Feingold undermines that role, demonstrating once again that incumbency protection is the driving force behind the bill.

Mauro: How do you think the Supreme Court will rule on McCain-Feingold?

Pilon: Given the recent *Shrink Missouri* decision, I'm less certain than I once was that the court will uphold the First Amendment as it did in *Buckley*—but only slightly less certain. Let's be clear, *Buckley* has stood for a quarter of a century. In fact, if

Two views

A court would be hard-pressed to find that the McCain-Feingold definition of electioneering is either vague or overbroad, which were the two problems under the prior Federal Election Campaign Act. So I predict that McCain-Feingold, as a whole, will be upheld by the courts.

Mauro: Why are you confident that bans on soft money will be found constitutional?

Rosenkranz: Beginning in 1907, Congress prohibited corporations from influencing elections, a prohibition that included a ban on corporate contributions to political parties. In the 1940s, the ban extended to labor unions. For this entire century, then, it has been understood that elections are for human beings—and it is perfectly constitutional to protect the integrity of elections by restricting their financing to human sources. As recently as 1990, the Supreme Court reaffirmed this basic proposition.

The soft-money loophole is just that, a loophole. It wasn't even created by Congress. It was the FEC that was most responsible for opening the loophole. To suggest that the loophole has somehow acquired constitutional protection is specious.

Mauro: A more open-ended question: How do you think significant campaign finance reform can coexist with First Amendment freedom of speech? Do we need to think entirely differently about the meaning of freedom of speech?

anything, it has grown only stronger over that period. A reversal now simply doesn't seem to be in the cards. This is a core First Amendment issue, after all. I don't see the court undertaking the radical reassessment that upholding McCain-Feingold would constitute.

Mauro: How important is the *Colorado Republican* case, pending before the Supreme Court, which involves restrictions on party expenditures that are coordinated with party candidates?

Pilon: This is the second go-round for the *Colorado Republican* case, which began, let me note, in 1986. That alone speaks volumes about this body of "law." In the case, after a plurality of the Supreme Court in 1996 concluded that the state party's radio advertisement was an "independent expenditure," not a "coordinated expenditure" subject to the limits of the Party Spending Provision (section 441a(d)(3)) of FECA, as the FEC had contended, the FEC and the party both contested whether FECA's limits on coordinated expenditures by parties violated the First Amendment. In a split decision, the 10th Circuit, after struggling with the Supreme Court's *Shrink Missouri* ruling, held that that limit was not closely drawn to a recognized government interest and so was in violation of the First Amendment. It is not a little noteworthy, however, that when the majority found that the limit on coordinated expenditures imposed more than a "marginal restriction" on the party's free speech, it called into question Buckley's contribution/expenditure dichotomy—as Thomas had done in his *Shrink Missouri* dissent. If the ruling holds, as in my judgment it should, then at least this issue is clarified, and the cause of liberty has advanced.

Mauro: A more open-ended question: Where do we go from here? If the First Amendment trumps virtually any "reform" measure, what do you tell the

Two views

Rosenkranz: Let's go back to first principles. First words, actually. "We the People" established the Constitution as a charter by which to govern ourselves. "We the People." Not "We the corporations, unions, and the People." Not "We the wealthiest individuals who can afford to buy access to the representatives of the People." It is important to keep this in mind when we talk about what that same Constitution permits us, the People, to do when we try to protect the integrity of the single most important mechanism of our democratic self-government, our elections.

I am not by any means suggesting we think entirely differently about free speech. Free speech is critically important in our democracy. Yet, free-speech protections often bend in a variety of contexts where government interests are overriding. The Supreme Court has made it clear that the election is one of those contexts. Elections are so unique, and so important to protect, that the First Amendment tolerates regulations of the flow of money toward elections that would not be tolerated in any other speech context.

The courts simply need to focus more intensely on why the Supreme Court ever tolerated restrictions on the flow of money into elections in the first place. Once they do, they will free legislators and citizens to enact reforms that actually protect our elections—carefully, sensitively, and sensibly—rather than paying lip-service to the goal while adhering to strictures that make it impossible to fulfill.



public, which seems to want some reduction in the influence of money on the political process?

Pilon: Just what the public wants in the way of campaign finance "reform," or how intensely it wants whatever it may want, is anything but clear. That is one of those assumptions that start to break apart once they're challenged. Not surprisingly, "reform" is promoted primarily by the political class, the people who believe in government—the more the better. And why not? That's how they make their living, get their kicks, or both. It's hardly a secret, again, that past reforms, to say nothing of McCain-Feingold, have worked to the advantage of incumbents. And incumbents tend overwhelmingly to believe in and promote more government. Thus, contribution caps, which disadvantage all but independently wealthy challengers, are favored by incumbents because they address the incumbent's worst fear—a well-financed challenger—while leaving the advantages of incumbency untouched.

And the political media generally have no problems with restricting the speech of others—the First Amendment notwithstanding—because that enhances their own power relative to those others. After all, what is a Herblock or a "Doonesbury" cartoon worth, if it were counted as a campaign contribution (or hit), to say nothing of a *New York Times* editorial? No one counts those as "contributions"—not yet. And no one would restrict that speech—not yet, at least—but we restrict the speech of ordinary people to what can be bought for \$1,000, which certainly keeps the competition down for the political media, while enhancing their power.

Where do we go from here? Maybe a little candor would be the place to start.



Notes

- ¹ *Nixon v. Shrink Missouri Government PAC*, concurring opinion. <http://laws.findlaw.com/us/000/98—963.html>.
- ² *Ibid.*, dissenting opinion.
- ³ E. Joshua Rosenkranz, *Buckley Stops Here: Loosening the Judicial Stranglehold on Campaign Finance Reform* (New York: The Century Foundation, 1998), p. 9.
- ⁴ Helen Dewar, “Senate Confirms Critic of Campaign Fund Laws for FEC,” *The Washington Post* (May 25, 2000).
- ⁵ Gore acceptance speech, August 17, 2000. Text at http://www.algore.com/speeches/sp_08172000_dnc.html.
- ⁶ Republican Party platform, text at <http://www.rnc.org/2000/2000platform7>.
- ⁷ Kathleen Sullivan, “Paying Up Is Speaking Up,” *The New York Times* (Oct. 24, 1999).
- ⁸ In the 1995 decision *McIntyre v. Ohio*, for example, the Supreme Court struck down a state ban on the distribution of anonymous or unsigned campaign literature.
- ⁹ Samuel Issacharoff and Pamela Karlan, “The Hydraulics of Campaign Finance Reform,” *Texas Law Review*, Vol. 77, No. 6 (June 1999), p. 1705.
- ¹⁰ “The Soft Money Explosion,” editorial, *The New York Times* (May 28, 2000).
- ¹¹ The venerable law did run into trouble briefly in an October 1999 federal court case from Pennsylvania. Federal Judge Thomas Vanaskie said that a local company had made a plausible First Amendment argument against the law. In May 2000, however, the U.S. Court of Appeals for the 3rd Circuit turned back the challenge, asserting that it was up to Congress, not the courts, to decide how corporate contributions should be regulated. *Renato Mariani v. United States*, No. 99-3875.
- ¹² Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon and Schuster, 1979), p. 399.
- ¹³ Orrin Hatch, Testimony before the Committee on Rules and Administration, April 26, 2000.
- ¹⁴ E. Joshua Rosenkranz, ed., *If Buckley Fell: A First Amendment Blueprint for Regulating Money in Politics* (New York: The Century Foundation, 1999).

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¹⁵ Hatch, loc. cit.

¹⁶ Daniel Troy, “McCain-Feingold and the First Amendment,” *The Media Institute Legal Analysis*, May 6, 2001, p. 5.

¹⁷ Letter to Senate Regarding Campaign Finance, 3-29-01, at <http://www.nab.org/newsroom/Issues/campaignfinance/default.asp>

¹⁸ *Federal Election Commission v. Colorado Republican Federal Campaign Committee*. <http://laws.findlaw.com/10th/991211.html>

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.

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