

Campaign Finance Reform, Free Speech and the Supreme Court

by Derek Langhauser



*In December 2003, the United States Supreme Court upheld all the key provisions of the Bipartisan Campaign Finance Reform Act (BCRA) of 2002. In their 5-4 decision, the justices deferred broadly to the limitations set by Congress on unregulated “soft money” and “issue ads” in political campaigns. Derek Langhauser, who worked in Senator Olympia Snowe’s office as counsel in *McConnell v FEC*, as this case was called, gives a legal history of the challenge of balancing Congress’ interest in protecting the integrity of elections with the Constitution’s competitive rights of free speech and association. He describes in detail the Supreme Court’s decision, the implications of the decision, and the role of the Court in representative democracy.* 

The best test of truth is the power of thought to get accepted into the marketplace of ideas.

Supreme Court Justice
Oliver W. Holmes, 1919¹

If the wealthy have more access to the most potent media of communication in the marketplace of ideas, is the trade really free and, if not, is the end product really the truth?

Harvard Law Professor
Laurence H. Tribe, 1988²

INTRODUCTION

Today, Justice Holmes and Professor Tribe would have quite a debate about the United States Supreme Court's recent campaign finance decision in *McConnell v. Federal Election Commission*. There, the Court upheld all of the key provisions of the Bipartisan Campaign Reform Act of 2002 (or BCRA, pronounced "bik-ra").³ In doing so, the Court deferred broadly to the congressional judgment that the primary source of funding in today's political campaigns—unregulated or "soft" money—and the primary means of influencing public opinion—so-called "issue ads" run by labor unions and corporations—should be subject to meaningful limitations and disclosure requirements.

The Court upheld this new law by rejecting almost out of hand a variety of challenges that those provisions violated the speech and associational rights of political activists of all stripes. Indeed, one is hard-pressed to recall or anticipate another instance where the Democratic, Republican and Libertarian parties, let alone the National Rifle Association and the American Civil Liberties Union, all found themselves on the same—albeit losing—side of an issue. This article explains how that came to be by outlining the history of related campaign finance laws and BCRA. The article then provides an insider's view of the litigation, and concludes with observations on the Supreme Court's role in judging how we access our representative democracy.

FROM ROOT TO WATER-GATE AND BUCKLEY

It has long been recognized that unregulated political campaigns can divest the electorate of its power to make reasoned choices. Indeed, United States Secretary of State Elihu Root observed as long ago as 1894 that "massive donations to political parties and candidates have done more to shake the confidence of the plain people of small means...than any other practice... since the foundation of our government."⁴ Yet it also has been long recognized that undue regulation of political campaigns can be used to perpetuate the rule of a sitting government. Witness the observation by a dissenting Justice in *McConnell* that "the first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech."

The challenge, therefore, has always been to balance the police power of Congress to protect the integrity of elections with the Constitution's competitive rights of individual speech and association. In striking this balance, the courts have essentially said that any such laws must be "closely drawn" or "narrowly tailored" to address the specific problem to diminish any undue intrusion on First Amendment rights. But how close or narrow need such laws be? On the one side of the continuum, there are disclosure laws. These intrude minimally onto speech and associational rights, but they are clearly not sufficient to stem more pervasive problems. On the other side, there are bribery laws that effectively regulate blatant *quid pro quo* exchanges. But as the *McConnell* majority recognized, "classic *quid pro quo* corruption... occurs only occasionally," and the "danger that officeholders will decide issues not on their merits or the desires of their constituencies, but according to the wishes of those

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Congress took its first major step to enact targeted regulation when, in 1935, it focused on the unique aggregations of wealth presented by corporations and labor unions. Concerned with the potential undue influence that such wealth can have on political campaigns, Congress prohibited corporations and labor unions from using their general treasury funds to influence federal elections. These laws did not, however, prohibit corporations and labor unions from using non-treasury funds—such as those monies raised by a political action committee—on federal elections.



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The next significant step was the Federal Election Campaign Act or FECA (pronounced “fe-ka”).⁵ Enacted in 1971 and amended in 1974 in response to the widespread election abuses of Watergate, FECA limited the amount that individuals, groups and candidates could *contribute*, and the total amounts that certain entities could *spend*, in certain elections. Significantly, FECA’s source and amount limitations did not apply to contributions to national or state political parties and their committees, or to certain tax-exempt organizations. Nonetheless, FECA did impose disclosure requirements on many, but not all, contributions and expenditures, and created the Federal Election Commission to interpret and enforce this new law.

FECA was quickly challenged as unconstitutional in the case *Buckley v. Valeo*, 424 U.S. 1 (1976). The

opponents of the law argued that FECA violated the central purpose of the First Amendment: to secure the widest possible dissemination of information from diverse and antagonistic sources, and to ensure unfettered interchanges of ideas for bringing about political and social changes desired by the people. They argued that Congress was simply trying to restrict the speech that had made itself the loudest in the marketplace, and that the government may not restrict the speech of some in our society solely in order to enhance the voice of others. As the opponents of FECA saw the issue, a political contribution affiliates a person with a candidate, and it is by aggregating these individual affiliations that the voices of like-minded people may be amplified. They argued that this ability to express and combine one’s support with others was not only not a *problem*; it was a purposive *goal* of the speech and associational rights.

In weighing these arguments, the Supreme Court in *Buckley* asked this question: Did FECA safeguard the integrity of the electoral process without directly and substantially restricting political debate and discussion? In a 294-page opinion, the Supreme Court said “yes” and “no.” The Court upheld FECA’s disclosure requirements as inherently non-intrusive, and upheld FECA’s contribution (as distinguished from expenditure) limitations as justified by the government’s interest in preventing both the actual and perceived corruption that can arise from elected officials’ indebtedness to large donors. The Court agreed with Congress that, to the extent that large contributions are given to secure political *quid pro quos* from current and potential officeholders, the integrity of our system of representative democracy is undermined. The Court found that such contributions, by shaping public officers to the viewpoints of their benefactors, fettered speech even if it increased its quantity. Given this compelling concern, the Court viewed contribution limitations as imposing “only a marginal restriction on the contributor’s ability to engage in free communication.”

The Court, however, took a different view of FECA’s *expenditure* limitations. There, the Court found that restrictions on expenditures imposed “direct and substantial” restraints on one’s ability to engage in political debate. This was because the Court viewed

the expenditure limitations as an attempt to equalize the relative ability of individuals and groups to influence the outcome of elections. Finding no persuasive justification for such an attempt, the Court struck down FECA's expenditure limitations.

Finally, the *Buckley* Court upheld the ongoing restrictions on the use of corporate or union treasury funds to influence federal elections. But the Court applied an important limitation: It said that the restriction would apply, not to all election-related treasury expenditures, but only to those treasury expenditures that "expressly advocated" for a candidate's election or defeat. Consequently, as long as an advertisement paid for by corporate or union treasury funds did not use the "magic words," as they came to be known, to "vote for" or "vote against" a candidate, the expenditure was lawful.

FROM BUCKLEY TO BCRA

As interpreted by these rulings in *Buckley* in 1976 and subsequent F.E.C. regulatory rulings, FECA served as the legal cornerstone for campaign finance law until 2002, when Congress enacted BCRA. It was during that 26-year period that these two dominant dynamics emerged: Mass media communications became the essential medium of political campaigns, and large sums of money were required to use that medium successfully. This led candidates, parties and other political players to seek aggressive ways around FECA's and *Buckley*'s limitations. The result of these converging forces was an exponential spending increase in both "soft money" and "issue ads."

The term "soft money" is commonly used to define those moneys that were not subject to FECA's source and amount contribution limitations and disclosure requirements. In other words, as long as the money was donated through, and spent by, national political parties and their committees, state political parties and their committees or certain tax exempt organizations, the money was not limited or disclosed. In 1980, federal soft money so routed totaled only \$19 million. By 1992, it rose to \$74 million. By 1996, soft money reached \$262 million and, by 2000, it had risen to \$487 million. Because of this trend, a *Portland Press Herald* survey in 1996 revealed that 70% of respon-

dents believed that politicians listen to special interests more than individual voters.

Similarly, "issue ads" are those advertisements typically run by a union or for-profit or non-profit corporation that identify a federal candidate but do not use the so-called "magic words"—prohibited by FECA and *Buckley*—of "expressly advocating" for the election or defeat of that candidate. Instead, the ads simply identify a candidate and then make clear the sponsors' views of the candidacy. According to BCRA's supporters, such ads were thinly disguised "express advocacy" designed to benefit wealthy corporations and labor unions. They pointed to studies that found that 99% of these ads refer to a candidate by name; 95% run in the last two months of an election; and that 94% were viewed as clear attempts to influence the outcome of an election. However, only 4% of these ads actually used the "magic words" that would have rendered them illegal. Spending on such ads increased from \$150 million in 1996 to \$340 million in 1998, and then to a remarkable \$500 million by 2000.

By 1996, prominent members of Congress on both sides of the aisle believed that the exponential growth in soft money and issue ads was, at best, a primary source of voter cynicism and apathy, and, at worst, the reason for the perception that elected officials were corrupted by special interests. Congress thus began in earnest to amend FECA in two key ways. First, Congress sought to regulate the flow of soft money by imposing limitations and disclosure requirements on previously exempted national and state political parties and their committees, as well as certain tax exempt organizations. Arizona Senator John McCain and Wisconsin Senator Russell Feingold were the primary champions of these provisions, hence the common moniker "McCain-Feingold." Second, Congress would regulate what many came to call "sham issue ads," but what BCRA would call "electioneering communications." To ensure that this provision was "narrowly tailored" if tested for constitutionality, the regulations applied only to ads run on television that refer to a candidate; are aired within 60 days of a general election; 30 days of a primary election; paid for by a corporation or labor union; and are shown in a region of at least 50,000 constituents. Senator Snowe was a primary architect and proponent of this new regulation.

FROM BCRA TO THE SUPREME COURT

It took six years, but Congress finally passed BCRA by close votes in each house in March of 2002. One day after President Bush signed BCRA into law, the first of over 90 plaintiffs filed the first of 12 lawsuits challenging the law's constitutionality. The plaintiffs spanned the spectrum of conservative and liberal interests. They included the Republican National Committee, Democratic state parties and a Libertarian state party. They also included a slew of uncommon political bedfellows: the National Rifle Association (NRA), U.S. Chamber of Commerce, AFL-CIO, National Association of Broadcasters, American Civil Liberties Union and National Right to Life Committee. Although the NRA was prepared to lead the litigation, it allowed Kentucky Senator Mitch McConnell to file his challenge first so that the case would carry his name, "*McConnell v. F.E.C.*" Knowing this, one cannot help but note the irony that the "*McConnell*" decision will forever stand in favor of the law that the senator from Kentucky so fiercely opposed.

On the other side, United States Senators McCain, Feingold and Snowe all intervened to help with the defense. They did so because the number and wealth of the plaintiffs suggested that additional political and legal resources would be helpful. Between May and December of 2002, the plaintiffs and defendants compiled and debated approximately 200,000 pages of documents regarding the predominant election practices and abuses that BCRA was enacted to address. In December of 2002, a special three-judge trial court held a two-day trial and, in May of 2003, issued a 2-1 decision striking down the heart of the soft money and issue ad provisions. The judges issued four opinions exceeding 1,600 pages, and they essentially held that the key pieces of both provisions intruded too deeply on individual speech and associational rights (*McConnell v. F.E.C.*, 251 F.Supp. 2d 176 and 948 [D.D.C. 2003]).

Over 70 of the plaintiffs and all of the defendants then appealed to the U.S. Supreme Court. The defendants wanted to resuscitate BCRA and the plaintiffs wanted to finish it off. The plaintiffs' primary claims were that BCRA violated the right of free speech under the First Amendment by unduly burdening the

ability of various participants in the political process to express their views, and their right of association by unduly burdening their ability to coordinate such expression. They also argued that BCRA violated due process under the Fifth Amendment by being too vague, overbroad and, somewhat hypocritically, under-inclusive. Finally, the Plaintiffs argued that BCRA violated equal protection under the Fifth Amendment by treating dissimilarly those who are similarly situated, and the rights of states under the Tenth Amendment to legislate exclusively over certain state-related aspects of federal campaign activities.

Because, technically, there were 12 different appeals with over a dozen primary legal challenges and eight different constitutional arguments, briefs surpassed 1,000 pages. Given the importance and complexity of the case, and because presidential primaries were not far off, the Supreme Court held a special session in September of 2003, just to hear this case. The Court allowed a highly unusual four-hour argument by seven different lawyers. Typically, the Court only meets in its regularly scheduled sessions and hears 30 minutes of argument from one attorney on each side of the case. In an unprecedented event, three solicitor generals (one current and two former) were among the lawyers who argued orally to the Court.

THE SUPREME COURT'S DECISION

On December 10, 2003, the Supreme Court, by a 5-4 vote, largely reversed the trial court and upheld BCRA's essential provisions in the 300-page decision, *McConnell v. F.E.C.*, 540 U.S. (2003). The majority opinion was written by moderate Justices John Paul Stevens and Sandra Day O'Connor, and joined by Justices Ruth Bader Ginsberg, David Souter and Stephen Breyer. Their opinion stands on five pillars.

First, the majority was willing to defer institutionally to Congress. There, the Court expressly noted that "the respect that the legislative and judicial branches owe to one another" was a "powerful" factor in its decision. Second, the majority was willing to show subject matter deference to Congress' factual findings about modern campaign practices and Congress' policy judgment about the ill-effects of those practices:

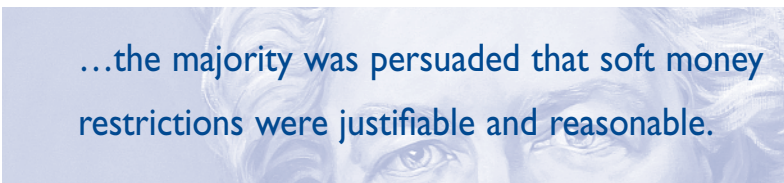
Many years ago we observed that to say that Congress is without power to pass appropriate legislation to safeguard... an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection. We abide by that conviction in considering Congress' most recent effort to confine the ill-effects of aggregated wealth on our political system....

Third, the majority was persuaded that soft money restrictions were justified and reasonable:

Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on their merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation.

Fourth, the majority upheld the issue ad regulations by relaxing the "magic words" standard that it had set in *Buckley*. The plaintiffs in *McConnell* had argued that the "electioneering communications" regulation was overbroad because it failed to respect the *Buckley* safe harbor for ads that were not "express advocacy." Defendants conceded that fact, but argued that the *Buckley* standard was not binding and, more importantly, no longer legitimate. To the surprise of many, the Court sided with the defendants when it wrote that "*Buckley's* express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption, and Congress enacted the BCRA to correct the flaws it found in the existing system." This opened the door to the majority upholding the provision, which it did after recognizing that the provision did not ban a corporation or union from speaking through an ad; it only required that such speech be paid for out of non-treasury funds.

A very interesting twist underlying this ruling on the issue ads was that Justice O'Connor and Chief Justice Rehnquist voted on opposite sides. They also had voted on opposite sides of a very similar state law in the 1990 case, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). However, in *McConnell*, both Justices changed the views that they expressed in *Austin*. In *McConnell*, the Justices were still on opposing sides, so their respective shifts cancelled each other out.



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Finally, the majority was unmoved by plaintiffs repeated claim that BCRA violated due process because it purported to address some, but not all, campaign finance problems:

We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day.

Voting against all of these findings by the majority were the four conservative Justices of the Court. These dissenting justices, led by Chief Justice William Rehnquist, viewed the essential issues in very different terms. On the issue of deference, the dissent wrote that "[n]o doubt Congress was convinced by the many abuses of the current system that something in this area must be done. Its response, however, was too blunt." On the core issues of speech, the dissent wrote that:

The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people and Government may not prescribe the means used to conduct it....

Impact of *McConnell* on Maine's Politics

Here in Maine, we can expect several important effects on our own electoral and political processes. Most importantly, *McConnell* should fulfill BCRA's essential goal: to enhance the people's confidence in both the process and outcome of their federal government. The disclosure provisions will act to better inform Maine voters before an election, and enhance their ability to hold federal officials more accountable thereafter. Likewise, the new contribution limitations will reduce candidates' incentive to be unduly responsive to certain donors.

Another, perhaps more visible impact will be a dramatic reduction in the number "issue ads" we see on television. We also should see an increased role for political action committees as the agents and accountants for political activity, as well as a move by the political parties to more grass roots efforts. Both of these effects, again, are likely to flow from the changes in soft money regulations. However, it is not anticipated that the overall amounts of money in Maine's federal political campaigns will decline. Their rate of increase may slow a little, but otherwise the key change will be in knowing the source and recipients of the monies, whatever their amounts.

Finally, *McConnell* and BCRA may serve as templates for amending laws that regulate state races. This will certainly be true in larger states, where much larger amounts of money are spent in elections for state offices, but the escalation of fund-raising activity in Maine's gubernatorial races may be sufficient to attract BCRA-type regulation of races for the Blaine House.

Likewise, the dissent found no meaningful evidence of "corruption," whether real or perceived:

[A] close association with others, especially in the realm of political speech, is not a surrogate for corruption; it is one of our most treasured First Amendment rights. The court's willingness to impute corruption on the basis of a relationship greatly infringes associational rights and expands Congress' ability to regulate political speech....

Finally, the dissent was particularly critical of the issue ad provision:

The chilling endpoint of the Court's reasoning is not difficult to foresee: outright regulation of the press.... What is to stop a future Congress from determining that the press is 'too influential,' and that the 'appearance of corruption' is significant when the media organizations endorse candidates or run 'slanted' or 'biased' news stories in favor of candidates or parties?

Justices Anthony M. Kennedy, Clarence Thomas, and Antonin Scalia joined Chief Justice Rehnquist in the dissent. Despite their concerns, BCRA, with both its soft money and issue ad provisions in tact, was upheld 5-4.

CONCLUSION: A WORD ABOUT HOW WE JUDGE ACCESS TO REPRESENTATIVE DEMOCRACY

Congress sought with BCRA to enhance the people's confidence in both the process and outcome of their government. Yet despite these uncontested merits, it remains remarkable that BCRA became law, particularly because BCRA had to overcome widespread and well-funded opposition of uncommon political allies, years of legislative defeat, and the contrary self-interests of many incumbents.

That BCRA overcame all of these challenges is compelling testament to the power of the represented to demand meaningful change. Indeed, the very essence of our representative government is that the people, by their millions, delegate to just 535 members of Congress and the president the power to decide the rules by which we all live. In making this delegation, the people vote their trust and trust their vote until the next election. However, public cynicism about the meaningfulness of individual votes and the legitimacy of decisionmaking given the proliferation of unlimited and unreported donations challenged this very trust.

BCRA prevailed upon Congress and the president solely because this majoritarian challenge was simply too stern. But where, in the end, did this act of the

majority finally get decided? In the courts and, therefore ironically enough, in the decidedly *anti*-majoritarian process of judicial review. Indeed, in order to stop BCRA, the plaintiffs needed only to persuade *five* judges, elected by no one, to defeat the clear will of the people and their hard-fought representative majority.

This profound paradox necessarily returns us to the central and stabilizing decision that our Constitution has made for us. This is the decision—not of *what* gets decided, but of *who* gets to decide—for in the Constitution we have consciously committed ourselves to require appointed judges, and not elected politicians, to have final decisionmaking authority over how we govern ourselves.

As Professor Tribe insightfully observed many years ago, the Constitution memorializes our “deepest beliefs” and commands our “enduring adherence” to those beliefs in a “setting carefully insulated from momentary pressures.”⁶ This command takes final decisionmaking authority away from elected politicians who may be enticed to decide in simple favor of retaining their own power and, in their place, stands the Justices of the Supreme Court. The consequence is that the debate is not one of masked political expediency, but one of “shared language of constitutional rights and responsibilities.” Such debates do not—and are not intended—to yield “one permanent reconciliation of conflicting impulses.” Instead, they are intended to be a part of a “judicially modulated unending struggle” that recognizes that historical principles will always be challenged by the changing realities of our evolving national life. It also recognizes that the very process of engaging in a judicial, and not a political, debate creates a bulwark of legitimacy for the immediate decision at hand, as well as the more important possibility that the nation may find in its commitment to such discipline both an institutional stability and a meaningful sense of national morality. 🐉



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ENDNOTES

1. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (paraphrased).
2. Tribe, Laurence. *American Constitutional Law* (2nd ed.). Mineola: Foundation Press, 1988 (paraphrased).
3. *Public Law No. 107-155 (2002); 116 Stat. 81*. BCRA consists of a series of amendments to the Federal Election Campaign Act of 1971 (FECA), 86 Stat. 11, as amended, 2 U. S. C. A. §431 et seq. (main ed. and Supp. 2003); the Communications Act of 1934, 48 Stat. 1088, as amended, 47 U. S. C. A. §315; 18 U. S. C. A. §607 (Supp. 2003); 36 U. S. C. A. §§510.511; and several other portions of the United States Code.
4. Root, Elihu. “Political Contributions by Corporations (Sept. 3, 1894).” In *Addresses on Government and Citizenship*. Eds. R. Bacon and J. Scott. Cambridge: Harvard UP, 1916: 143-44
5. 86 Stat. 11, as amended, 2 U. S. C. A. §431 et seq. (main ed. and Supp. 2003).
6. Tribe, Laurence. *American Constitutional Law* (2nd ed.). Mineola: Foundation Press, 1988: 10-17