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# Turning The Faucet Back On: The Future of McCain-Feingold's Soft-Money Ban After Davis v. Federal Election Commission

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# Turning The Faucet Back On: The Future of McCain-Feingold's Soft-Money Ban After Davis v. Federal Election Commission

## **Keywords**

Political campaigns, Modern Campaign Finance Legislation, Campaign Finance Legislation, Federal Election Commission

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COMMENTS

TURNING THE FAUCET BACK ON:  
THE FUTURE OF MCCAIN-FEINGOLD'S  
SOFT-MONEY BAN AFTER *DAVIS V. FEDERAL  
ELECTION COMMISSION*

KEVIN J. MADDEN\*

*There are two things that are important in politics. The first is money, and  
I can't remember what the second is.*

-Mark Hanna<sup>1</sup>

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1. See MELVIN I. UROFSKY, *MONEY AND FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS* 3 (2005) (quoting Mark Hanna). Hanna represented Ohio in the United States Senate from 1897–1904, was chairman of the Republican National Committee, and was the most notorious political operative of his time. U-S-history.com, Mark Hanna: Politics and Public Service, 1837–1904, <http://www.u-s-history.com/pages/h882.html> (last visited Dec. 1, 2009).

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#### INTRODUCTION

Political contributions are the “mother’s milk of politics” and the “fuel” necessary for a successful political campaign.<sup>2</sup> In the most recent presidential election, President Obama *alone* raised and spent nearly \$750,000,000 in his pursuit of the White House.<sup>3</sup> This staggering amount of money renders Mark Hanna’s statement more accurate today than ever before. The difference between Hanna’s era and today’s, however, is illustrated by the growing resentment toward, and congressional action against, the role of money in politics.<sup>4</sup> Modern campaign finance laws have installed new rules that would have rendered Hanna’s political operation almost

2. UROFSKY, *supra* note 1, at 3.

3. According to the Federal Election Commission (FEC), President Obama’s campaign had a total receipt of \$747,800,000, while Senator McCain’s campaign had a total receipt of \$351,600,000. Overall, the FEC indicates that the aggregate total of contributions received by candidates running for President during the 2008 election cycle was \$1,686,400,000. Federal Election Commission, Presidential Campaign Finance: Contributions to All Candidates by State, <http://www.fec.gov/DisclosureSearch/mapApp.do> (last visited Dec. 1, 2009).

4. See generally Paul Edwards, *Madisonian Democracy and Issue Advocacy: An Argument for Deregulating Private Funding of Political Parties*, 50 CATH. U. L. REV. 49, 62 (2000) (arguing that the modern legislative trend of enacting restrictive campaign speech regulations is unconstitutional, while admitting that certain speech is not always desirable).

non-existent.<sup>5</sup> These new laws regulating the role of money in political campaigns are some of the most intensely debated topics in the political world,<sup>6</sup> pitting those who view political contributions as acts of free speech protected by the First Amendment against those who are weary of money's corruptive influence.<sup>7</sup>

The most recent piece of legislation enacted to reform campaign finance laws is the Bipartisan Campaign Finance Reform Act of 2002.<sup>8</sup> Better known as McCain-Feingold, after its two lead Senate sponsors,<sup>9</sup> the legislation amended existing campaign finance laws by closing several notorious loopholes.<sup>10</sup> At the heart of the legislation was a new regulation banning political parties from spending or soliciting a type of political contribution known as "soft money."<sup>11</sup>

Soft money is a contribution to a political party or national campaign committee that is not earmarked for a specific candidate and is therefore not subject to the regulations of the Federal Election

5. See UROFSKY, *supra* note 1, at 10–11 (acknowledging that Hanna was best known for his management of President McKinley's presidential campaign and his work securing the staggering financial support of the business world, which would be forbidden under modern campaign finance regulations).

6. Compare 147 CONG. REC. S2439 (2001) (statement of Sen. McConnell) ("None of us really likes the degree to which outside groups get involved in our campaigns. . . . We would like to control these campaigns. But under the First Amendment, the campaign is not ours to control, and be it ever so irritating when some group who hates us comes in and starts talking . . . that doesn't mean we can legislate it out of existence through our votes in this Chamber."), with *id.* at S2434 (statement of Sen. McCain) ("As long as the wealthiest Americans and richest organized interests can make the six and seven figure donations to political parties and gain the special access to power that such generosity confers on the donor, most Americans will dismiss the most virtuous politician's claim of patriotism.").

7. See Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law, in THE CONSTITUTION AND CAMPAIGN FINANCE REFORM* 201, 204 (Frederick G. Slabach ed., 1998) (acknowledging the inherent difference between the deliberative and pluralistic theories of government and claiming that individual preferences for either theory will determine individual analysis regarding the risks of corruption).

8. Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 and 47 U.S.C.).

9. The bill's sponsors were Senators John McCain (R-AZ) and Russ Feingold (D-WI). See Bernie Becker, *Election Commission Decisions Deadlocking on Party Lines*, N.Y. TIMES, Sept. 27, 2009, at A16 (noting Senator McCain and Senator Feingold's displeasure with the FEC's partisan deadlock).

10. See generally Joseph Cantor & L. Paige Whitaker, *Bipartisan Campaign Reform Act of 2002: Summary and Comparison with Previous Law, in CAMPAIGN FINANCING AND AMERICA'S EVOLVING ELECTION SYSTEM* 19, 21–22 (Collin V. Pantesh ed., 2007) (describing the major changes resulting from McCain-Feingold as (1) the enactment of a ban on the use of soft money by political parties and (2) the creation of a new category of election advertisements that could be regulated by the government).

11. See 2 U.S.C. § 441i(a)(1) (2006) ("A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.").

Campaign Act.<sup>12</sup> Prior to the enactment of McCain-Feingold's soft-money ban, individuals and organizations such as labor unions and corporations made soft-money donations to support national political parties' general activities.<sup>13</sup> Political parties would then use the funds to support state and local party operations and bankroll issue ads that helped federal candidates by increasing voter turnout and raising name recognition.<sup>14</sup> Unfortunately, the legitimate and worthwhile use of donations by political parties was also a means to leverage tremendous access to politicians and the political process.<sup>15</sup>

McCain-Feingold amended past campaign financing laws and took soft money out of the political equation by instituting a new rule: "[n]on-Federal funds may not be used for the purpose of influencing any election for federal office."<sup>16</sup> The regulations also prevented national political parties, federal candidates, and federal office holders from soliciting, receiving, or directing individuals to contribute or donate soft money or anything of value that was not subject to the Federal Election Campaign Act's contribution limits.<sup>17</sup>

Subsequent to the Act's enactment, the composition of the Supreme Court has shifted, and it now appears that the Court favors the deregulation of campaign finance laws.<sup>18</sup> This shift presents serious questions about the future viability of McCain-Feingold's

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12. See FEC Non-Federal Funds, 11 C.F.R. § 300.2(k) (2009) (indicating that soft money contributions are also known as non-federal funds because they are not subject to federal campaign finance regulations).

13. See S. REP. NO. 96-319, at 4 (1979) (stating that general party activities could be paid for with soft money as long as the contribution was not earmarked for a specific candidate); see also Ruth Marcus & Sarah Cohen, *The Loophole Lesson in 'Soft Money': Campaign Reformers Confront History of Unintended Results*, WASH. POST, Mar. 18, 2001, at A1 (listing soft money donations over the past decade by a variety of groups, including the security industry (\$72 million), building industry (\$45 million), various labor unions (\$59 million), individual donors (the largest gave \$3.1 million), and corporations such as tobacco companies, energy companies, and pharmaceutical manufacturers).

14. See FEC Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 11 C.F.R. § 300.10 (2009) (attempting to restrict the uses of soft money).

15. See Katharine Q. Seelye & Alison Mitchell, *Pocketing Soft Money Till Pocket Is Sewn Up*, N.Y. TIMES, Mar. 4, 2002, at A1 (describing how soft money donors to President Clinton were awarded with lavish dinners and overnight stays in the Lincoln Bedroom).

16. Prohibited & Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,065 (Jul. 29, 2002).

17. 2 U.S.C. § 444i(a) (2006).

18. See Richard Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064, 1065 (2008) ("Now, with the replacement of Chief Justice William Rehnquist and Justice Sandra Day O'Connor with Chief Justice John Roberts and Justice Samuel Alito, the pendulum has swung sharply away from deference toward perhaps the greatest period of deregulation . . .").

soft-money ban.<sup>19</sup> The Court has heard several important cases regarding campaign finance issues,<sup>20</sup> the most recent case being *Davis v. FEC*.<sup>21</sup> In *Davis*, the Court held a provision of McCain-Feingold, known as the Millionaires' Amendment,<sup>22</sup> unconstitutional because it failed to meet the sole justification approved by the Supreme Court for regulating campaign speech—combating corruption—and unacceptably favored certain candidates over others.<sup>23</sup>

The Roberts Court's recent campaign finance holdings have formulated a stringent two-pronged anti-corruption test: (1) the regulation must have an actual anti-corruption effect, and (2) the primary legislative intent motivating the regulation must be anti-corruption.<sup>24</sup> This approach allows the Court to apply the proper level of judicial scrutiny in its political speech analysis.<sup>25</sup>

McCain-Feingold's total ban on the use of soft money fails to achieve an actual anti-corruption effect because it directs large financial contributions to unregulated third-party groups,<sup>26</sup> and thus allows these groups and individuals to circumvent existing campaign finance laws.<sup>27</sup> Additionally, the soft-money ban infringes on the rights of political parties and individuals, overshadowing its anti-corruption purpose.<sup>28</sup> The soft-money ban is similar to campaign

19. *See id.* at 1106 (predicting that under the Roberts Court's analysis a majority of campaign finance regulations will be found unconstitutional, leading to an almost complete deregulation of the system).

20. *See* *FEC v. Wis. Right to Life, Inc. (WRTL II)*, 551 U.S. 449, 461 (2007) (concerning campaign speech that has been characterized as "express advocacy"); *Randall v. Sorrell*, 548 U.S. 230 (2006) (regarding state contribution and expenditure limitations).

21. 128 S. Ct. 2759 (2008). The Supreme Court has heard a more recent campaign finance case, but it has yet to report an opinion. *Citizens United v. FEC*, 530 F. Supp. 2d. 274 (D.D.C. 2008) *cert. granted*, 76 U.S.L.W. 3469 (U.S. 2008) (No. 08-205).

22. 2 U.S.C. § 441a(i) (2006), *invalidated by* *Davis v. FEC*, 128 S. Ct. 2759 (2008) (allowing a candidate to accept individual contributions three times the statutory limit when their opponent contributed a certain amount of their personal fortune to their campaign).

23. *See Davis*, 128 S. Ct. at 2770 ("[L]imits on discrete and aggregate individual contributions and on coordinated party expenditures . . . cannot stand unless they are 'closely drawn' to serve a 'sufficiently important interest,' such as preventing corruption . . . ." (quoting *McCConnell v. FEC*, 540 U.S. 93, 136 (2003))).

24. *See* discussion *infra* Part II (discussing and applying the Roberts Court's new test).

25. *See Davis*, 128 S. Ct. at 2771 ("When contribution limits are . . . too restrictive, we have extended a measure of deference to the judgment of the legislative body that enacted the law. . . . [B]ut limits that are too low cannot stand.")

26. *See infra* notes 89–95 and accompanying text (discussing the ways that third-party groups used unregulated funds).

27. *Id.*

28. *See infra* Part II.B.2.

finance regulations that the Supreme Court has recently struck down as unconstitutional because the intent was not primarily anti-corruption, but rather the creation of preferences for certain speakers at the expense of others, namely the wealthy.<sup>29</sup> The Roberts Court's more exacting scrutiny of campaign finance regulations strikes back against the growing encroachment by Congress into the realm of campaign-related speech.<sup>30</sup> This new analysis will seriously impact the future of campaign finance regulations because it opens the door for new challenges to a majority of the campaign finance regulations that make up the current system.<sup>31</sup> The likely result will be a laissez-faire system of campaign finance regulations and a new approach to political campaigning.<sup>32</sup>

This Comment argues that the Supreme Court's holding in *Davis* was correct and that, coupled with other recent campaign finance cases, it provides the necessary rationale to support a successful challenge to McCain-Feingold's ban on the use of soft money by political parties.<sup>33</sup> Part I discusses the legislative and judicial developments relating to the Federal Election Campaign Act of 1971 (FECA)<sup>34</sup> since the 1970s, focusing on the changes affecting contributions and expenditures. This Part will highlight the emergence of soft money, McCain-Feingold's enactment and subsequent ban, and two seminal political speech cases: *Buckley v. Valeo*<sup>35</sup> and *McConnell v. FEC*.<sup>36</sup> Part II compares and analyzes previous Supreme Court decisions with recent Roberts Court holdings and demonstrates that the environment surrounding campaign finance has evolved so that a total ban on the use of soft money by political parties is no longer constitutional, primarily because McCain-Feingold fails to achieve a legitimate anti-corruption purpose and gives the legislature too much power to impermissibly influence

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29. See *infra* notes 142, 147 (explaining that the Court in *Davis v. FEC* found that the Millionaires' Amendment prejudices wealthy candidates).

30. See *Davis*, 128 S. Ct. at 2774 n.8 (stating that excessive congressional regulation will not lead to improved political speech).

31. See Hasen, *supra* note 18, at 1066–67 (speculating on the future of campaign finance regulations given the Roberts Court's tendency toward deregulation).

32. *Id.* (describing how the deregulatory direction of the Court's holdings will lead to successful challenges of campaign regulations).

33. See discussion *infra* Part II.B (discussing the potential rationale the Roberts Court could rely on if it strikes down the soft money ban).

34. Pub. L. No. 92-225, 86 Stat. 3 (codified as amended in scattered sections of 2, 18, and 47 U.S.C.).

35. 424 U.S. 1 (1976) (per curiam).

36. 540 U.S. 93 (2003).



elections.<sup>37</sup> This Comment concludes that the new anti-corruption analysis employed by the Roberts Court will ensure that the voters retain their constitutional right to be the final arbitrators in the American electoral system.<sup>38</sup>

I. THE DEVELOPMENT OF MODERN CAMPAIGN FINANCE LEGISLATION  
AND JUDICIAL INTERPRETATION OF CAMPAIGN FINANCE  
LEGISLATION

A. *The Federal Election Campaign Act of 1971*

Frustrated with the increasing amount of time devoted to fundraising and rising campaign costs, Congress enacted two major pieces of legislation in 1972 that forever changed campaign finance laws.<sup>39</sup> The first, the Revenue Act, established the Presidential Campaign Fund in an attempt to lessen a candidate's dependence on private funding.<sup>40</sup> Second, President Nixon signed FECA into law with two main goals: "tightening requirements and limiting expenditures for media advertising."<sup>41</sup>

FECA is the foundation for all modern campaign finance laws<sup>42</sup> and, at the time of its enactment, represented a shift in focus away

37. See discussion *infra* Part II (arguing how the soft money ban encourages circumvention of existing campaign finance laws and was the result of a legislative intent to diminish the rights of a selected group).

38. See discussion *infra* Part II (arguing that the Roberts Court's new analysis properly protects the constitutional rights of the voters and contributors).

39. Revenue Act of 1971, Pub. L. No. 92-178, 85 Stat. 497 (codified as amended at 26 U.S.C. §§ 991-997 (2006)); Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 2, 18, and 47 U.S.C.). There were several motivating factors behind the enactment of these pieces of legislation. As the cost of political campaigns continued to increase with the advent of television advertising, the amount of time spent fundraising also increased. See GARY C. JACOBSON, MONEY IN CONGRESSIONAL ELECTIONS 184 (1980) (describing frustration on the part of Senators Edward Kennedy and Albert Gore, Sr. regarding the influence of television advertising, and specifically the negative impact it was having on congressional campaigns).

40. See FEDERAL ELECTION COMMISSION, PUBLIC FUNDING OF PRESIDENTIAL ELECTIONS, at 2 (1996), [http://www.fec.gov/pages/brochures/public\\_funding\\_brochure.pdf](http://www.fec.gov/pages/brochures/public_funding_brochure.pdf) (explaining how the public presidential fund collects voluntary donations from tax payers (three dollars for single filers) and that each major party candidate that follows expenditure requirements receives fifteen cents for every person in the voting age population).

41. UROFSKY, *supra* note 1, at 41. Urofsky further explains that the Nixon White House only agreed to support the legislation on the condition that its implementation be delayed until the 1976 elections. *Id.*

42. See 2 U.S.C. §§ 431-455 (2006) (codifying portions of FECA into the most recent version of the United States Code); see also ANTHONY CORRADO ET AL., THE NEW CAMPAIGN FINANCE SOURCEBOOK 20 (2005) ("The adoption of FECA signaled the beginning of the modern era of campaign finance reform. . . . The statute altered most of the major provisions of federal campaign law.").

from campaign contribution and expenditure limitations in favor of provisions mandating disclosure and increased transparency.<sup>43</sup> Previous campaign finance regulations failed to provide a uniform system for the disclosure and tracking of contributions and expenditures, diminishing their ability to prevent corruption.<sup>44</sup> As a remedy, FECA instituted specific filing requirements for both contributions and expenditures.<sup>45</sup> Each candidate was required to file quarterly financial disclosure reports detailing every contribution or expenditure over \$100.<sup>46</sup> Drafters of the legislation were so optimistic that increased transparency would restrain the rising cost of campaigns that they eliminated previously enacted contribution and expenditure limitations.<sup>47</sup>

Despite the drafters' optimism, the disclosure requirements failed to offset the increasing cost of campaigns.<sup>48</sup> The legislation did, however, facilitate the exposure of the most notorious political scandal in American history—Watergate—by providing a paper trail of contributors and corresponding contribution amounts that allowed investigators to follow the money.<sup>49</sup> The discovery and

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43. See Joseph E. Cantor, *Campaign Financing In Federal Elections: A Guide to the Law and its Operation*, in CAMPAIGN FINANCING IN THE UNITED STATES: ISSUES AND LAWS 55, 63 (Auguste V. Anschutz ed., 2002) (indicating that the changes were intended to increase transparency by requiring disclosure reports that would track the names of contributors and where contributions were spent).

44. See *id.* at 58 (stressing the failures of previous campaign finance laws, specifically the Federal Corrupt Practices Act, because the disclosure requirements did not require financial reports for presidential or vice presidential candidates, political committees operating in only one state, or primary candidates). During its entire tenure as the primary campaign finance regulation, no candidate for the House or Senate was ever prosecuted for violating the Federal Corrupt Practices Act. *Id.*

45. See generally 2 U.S.C. § 433 (requiring any political committee planning on spending more than \$1,000 during a calendar year to file an organizational statement that includes the principal officers, scope of activities, and names of the candidates it supported); *id.* § 434 (requiring committees to file a report with information regarding any expenditure, loan, or contribution over \$100).

46. See Cantor, *supra* note 43, at 62 (explaining that House candidates were monitored by the Clerk of the House, Senate candidates by the Secretary of the Senate, and presidential candidates by the Comptroller General and General Accounting Office).

47. See UROFSKY, *supra* note 1, at 41 (explaining the new law only preserved contributions prohibitions on corporations and labor unions).

48. See *id.* at 42 (explaining that the disclosure requirement was more successful at limiting media advertising).

49. See HERBERT E. ALEXANDER & BRIAN A. HAGGERTY, *THE FEDERAL ELECTION CAMPAIGN ACT: AFTER A DECADE OF POLITICAL REFORM* 23 (1981) (stating the disclosure requirements helped bring major campaign violations against Nixon's Committee to Re-Elect the President).

subsequent investigation of Watergate<sup>50</sup> provided the momentum to reform FECA and to adopt a new approach that featured a combination of disclosure requirements and new, tougher contribution and expenditure limitations.<sup>51</sup>

*B. Watergate Strikes Again: The 1974 Amendments to the Federal Election Campaign Act*

The 1974 amendments created a “souped-up FECA.”<sup>52</sup> In other words, Congress responded to public pressure<sup>53</sup> and amended the Watergate-exposed shortcomings of FECA with more encompassing regulations.<sup>54</sup> Specifically, the amendments shifted the focus back toward strict campaign contribution and expenditure limitations<sup>55</sup>

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50. See E. JOSHUA ROSENKRANZ, *BUCKLEY STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM* 23–24 (Century Foundation Press 1998) (describing examples of corruption, including the selling of ambassadorships for large political donations and the creation of bogus corporations to hide contributors and contribution amounts).

51. See discussion *infra* Part I.B (describing the FECA amendments enacted after the Watergate scandal).

52. ROSENKRANZ, *supra* note 50, at 24. The amendments improved numerous provisions in the previous law by requiring candidates to establish one central campaign committee. *Id.* The amendments also created an independent enforcement agency—the Federal Election Commission (FEC). Congress tasked the FEC with monitoring and developing campaign finance regulations. In the hope of fostering a bipartisan approach to future regulations, the new law required that the commission be made up of six members appointed to six year terms, and that no more than three members of the commission could be from the same political party. 2 U.S.C. § 437(c) (2006).

53. See ROBERT E. MUTCH, *CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW* 46 (1988) (stating that members of Congress were blitzed by constituents demanding changes to campaign finance laws after being motivated by the mainstream press and pro-reform lobbyists). Specifically, Common Cause, a citizen lobbying group and a leader in the effort to reform campaign financing laws, won an important court ruling establishing its right to bring challenges to existing campaign finance laws on behalf of the American people. See *Common Cause v. Democratic Nat’l Comm.*, 333 F. Supp. 803, 812–13 (D.D.C. 1971) (finding a private right of action under the Hatch Act because voters concerned about corruption in campaign financing were the intended beneficiaries of the statute).

54. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263, 1263 (amending 2 U.S.C. § 441a (1971)) (imposing additional limits on the amount of money that could be made through contributions in federal elections).

55. See 2 U.S.C. § 441a(a)–(b) (imposing limitations based on the candidate’s desired political office and state demographics; capping individual contributions at \$1,000 per candidate up to \$25,000 in total for all federal candidates in one election cycle; and limiting contributions by political committees to \$5,000 “with respect to any election for federal office”).

while also maintaining the disclosure requirements included in the original statute.<sup>56</sup>

The 1974 amendments represented a broad attempt to regulate campaign costs, eliminate corruption, and restore faith in our electoral process, but were also highly controversial.<sup>57</sup> The new laws created significant burdens for candidates attempting to challenge incumbents by making it more difficult for these individuals to raise money and increase name recognition.<sup>58</sup> First Amendment challenges were immediately brought against the new contribution and expenditure limitations<sup>59</sup> by conservatives and liberals alike.<sup>60</sup> The Supreme Court ultimately decided the issue in the keystone political speech case, *Buckley v. Valeo*.

### C. *Money is Speech: The Buckley Decision*

In 1976, the United States Supreme Court set the standard for all future political speech cases by *allowing* statutorily imposed limitations on contributions while simultaneously *prohibiting* any limitations on campaign expenditures.<sup>61</sup> *Buckley v. Valeo* was brought by a diverse group of challengers and was heard by the United States

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56. Cantor, *supra* note 43, at 63 (asserting that the changes in the law enacting strict contribution and expenditure limits were in direct response to Watergate).

57. See UROFSKY, *supra* note 1, at 49 (identifying numerous constitutional problems raised by the legislation, including the legitimacy of publicly funded campaigns and the probable failure of the legislation to curtail corruption). The amendments incorporated many of the changes to campaign finance laws that reformers had lobbied for before and after Watergate. *Id.* at 46.

58. See JACOBSON, *supra* note 39, at 186–87, 193 (noting that many Senators and Representatives admitted they would not have been elected if they first ran for office under the spending limits because of the difficulty they would have had raising funds). Incumbents have been able to raise significantly more money than their challengers because they are a known quantity and can use their elected office for leverage. *Id.* Conversely, many challengers who wished to be competitive had to be personally wealthy and willing to spend significant amounts of their own fortune to help finance their campaign. See Joel Gora, *Buckley v. Valeo: A Landmark of Political Freedom*, 33 AKRON L. REV. 7, 24 (1999) (discussing the relationship between the enactment of contribution limitations and the high success rates of incumbents).

59. See UROFSKY, *supra* note 1, at 52 (asserting that it was the advocates for free speech who opened the door for a court challenge).

60. See ELIZABETH DREW, *THE CORRUPTION OF AMERICAN POLITICS: WHAT WENT WRONG AND WHY* 49 (2000) (explaining how an aide to Senator James Buckley identified the advantages of filing a joint suit with individuals from across the political spectrum because it would bring greater publicity and provide political cover).

61. See Cecil C. Kuhne, III, *Restricting Political Campaign Speech: The Uneasy Legacy of McConnell v. FEC*, 32 CAP. U. L. REV. 839, 843 (2003) (describing *Buckley v. Valeo* as a “landmark decision” because of the Court’s refusal to limit campaign expenditures while admitting that the government had a significant interest in the prevention of corruption through limiting contributions).

Court of Appeals for the District of Columbia Circuit.<sup>62</sup> The circuit court rejected the majority of the challengers' arguments, holding that the law did not violate the constitutional right of free speech because there was a "clear and compelling interest in safeguarding the integrity of elections."<sup>63</sup> The challengers appealed to the Supreme Court. The Supreme Court's decision in *Buckley* created the legal framework for all future interpretations of campaign finance regulations by holding that political contributions receive less First Amendment protection than campaign expenditures.<sup>64</sup> In rejecting both the "conduct" and "time, place, and manner" tests as justifications for the campaign finance laws,<sup>65</sup> the Court held that political contributions and expenditures are examples of speech that "operate in an area of the most fundamental First Amendment activities."<sup>66</sup> Despite this sharp rebuke of previous tests, and stalwart defense of the importance of all campaign-related speech, the Court held that contributions and expenditures are different.<sup>67</sup> Relying on a distinction between "substantial" and "marginal" restrictions, the Court found that contribution and expenditure limitations invoked the right of political speech in different ways.<sup>68</sup> Expenditure limitations substantially limited speech and served no legitimate

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62. See *Buckley v. Valeo*, 424 U.S. 1, 7–8 (1976) (listing the amendment's challengers as ranging from conservative Senator James Buckley to liberal presidential candidate Eugene McCarthy).

63. See *Buckley v. Valeo*, 519 F.2d 821, 841 (D.C. Cir. 1975), *aff'd per curiam*, 424 U.S. 1 (1976). *But see id.* at 832 (holding § 437a to be "unconstitutionally vague and overbroad" because it could require groups or individuals who have no connection to the election to file expenditure reports because they took part in a discussion on public issues).

64. See Wendy Fritz, Note, *Campaign Finance Reform After Colorado Republican II: The Constitutionality of the Campaign Reform Act's Soft Money Ban*, 12 B.U. PUB. INT. L.J. 183, 185 (2002) (stating how the *Buckley* holding shaped future legislation).

65. See *Buckley*, 424 U.S. at 15–18 (rejecting the argument that the *O'Brien* conduct test applied to campaign finance laws because the expenditure of money was not similar to the burning of a draft card and did not reduce the level of judicial scrutiny traditionally required in First Amendment cases (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968))); *see also id.* at 18 (stating that while the regulation had a neutral application, a time, place, and manner restriction did not apply because FECA expenditures and contribution restrictions impose a direct restriction on the quantity of speech (citing *Cox v. Louisiana*, 379 U.S. 559, 563–564 (1965))).

66. See *id.* at 14 (stressing that the First Amendment affords broad protection to political expression because of the need to ensure the free flow of ideas that spur social and political change (citing *Roth v. United States*, 354 U.S. 476, 484 (1957))).

67. See *id.* 19–21 (arguing that contributions only express a general view of political expression, while expenditures by candidates represent direct examples of political expression).

68. See *id.* (explaining that the expenditure limitation would essentially limit debate and discussion during a campaign, while contribution limits do not impose such direct limitations but only inhibit symbolic support).

government purpose.<sup>69</sup> The Court held that contribution limits do not directly implicate First Amendment rights because contributions only express a general view of support, and individuals have alternative means of expressing their political speech rights.<sup>70</sup>

Shifting its focus to the challenged legislation, the Court became more specific about its choice to differentiate the treatment of contributions and expenditures.<sup>71</sup> The Court held that it was “unnecessary to look beyond the Act’s primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions.”<sup>72</sup> The contribution limits were tailored to accomplish what the Court held to be a sufficiently important governmental interest.<sup>73</sup> The Watergate scandal directly influenced the Court, which expressed its concerns regarding the corruptible influence of large financial contributions at the “quid pro quo”<sup>74</sup> level, as well as the importance of preventing the mere appearance of corruption.<sup>75</sup> The Court reasoned that limiting contributions by individuals to candidates was justified because preventing actual or perceived corruption would protect the sanctity of the electoral process and only narrowly interfere with the right of political expression and speech.<sup>76</sup> Furthermore, the Court explained that contribution limitations did not prevent individuals from personally expressing their support for a candidate or the candidate’s ideas through volunteer activities and public discussion.<sup>77</sup>

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69. *See id.* at 57 (holding that expenditure limitations were effectively a legislative effort to determine which political views were important).

70. *See id.* at 19–21, 53 n.58 (declaring that contributions are different from expenditures because contributions do not directly facilitate speech).

71. *See id.* at 19–21 (distinguishing the marginal burden imposed by limitations on contributions compared to the more substantial burden created by limiting expenditures).

72. *See id.* at 25–26 (rejecting two additional government interests presented by the government: reducing the influence of affluent individuals and groups in the election process and curbing the rising cost of elections). Further discussion of the Supreme Court’s anti-corruption rationale will be analyzed *infra* Part II.

73. *See id.* at 21–22 (stating that contribution limits did not reduce funds available for political expression and only required candidates to solicit contributions from a larger donor base).

74. *See id.* at 27 (acknowledging the fear that large unregulated donations in exchange for favors would undermine the integrity of American politics and its democratic system).

75. *See id.* (arguing that the appearance of corruption from large financial contributions was just as dangerous to the political process as actual corruption).

76. *See id.* at 28–29 (stressing the multiple opportunities individuals have to assist in party activities, including volunteering).

77. *See id.* at 28 (rationalizing the allowance of contribution limits because of its ability to confront the problem of corruption, while still respecting individuals’ various rights to associate with a political party).

Conversely, the Court struck down all of the expenditure limitations because they “impose direct and substantial restraints on the quantity of political speech.”<sup>78</sup> The Court held that the limitations on expenditures were a “severe restriction[]” on the rights of candidates because they limited the candidates’ ability to engage in political expression and association by significantly curtailing the means of disseminating a candidate’s message and views to the public.<sup>79</sup> Finally, the Court noted the only discernable reason for the enactment of expenditure limitations was to control the rising costs of political campaigns, which the Court found to be an insufficient government interest to justify infringing First Amendment rights.<sup>80</sup>

*Buckley*’s contribution-versus-expenditure distinction was immediately controversial<sup>81</sup> because many thought (and continue to think) that there is no legitimate First Amendment difference between contributions and expenditures.<sup>82</sup> The current controversy regarding soft money was a result of the distinction between contributions and expenditures and the Court’s choice to apply different First Amendment protections.<sup>83</sup> After the *Buckley* decision, Congress amended the legislation to stand as a constitutionally viable campaign finance law.<sup>84</sup>

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78. See *id.* at 39 (stating that expenditure limitations accomplished one thing, limiting political expression (citing *Williams v. Rhodes*, 393 U.S. 23, 32 (1968))). Specifically, the Supreme Court struck down three sections of the Federal Election Campaign Act: the limitations against independent expenditures, the limitation on the use of personal funds, and the ceiling on total campaign expenditures. *Id.*

79. See *id.* at 19–23 (distinguishing the type of speech exercised through expenditures from that of contributions and explaining that expenditure limitations hamper numerous aspects of political communication since virtually all methods of communicating with the public require spending money).

80. See *id.* at 57 (finding that while the cost of campaigns rose three hundred percent over the past twenty years, the mere fact that such an increase occurred is not substantial enough for the government to impose limitations on spending).

81. Compare *id.* at 58 (reiterating that contribution limitations serve a government interest by preventing actual or perceived corruption and only marginally infringe on First Amendment rights, while expenditure limitations do not serve an important enough government interest to justify their infringement on First Amendment rights), with *id.* at 241 (Burger, C.J., dissenting) (“Yet when it approves similarly stringent limitations on contributions, the Court ignores the reasons it finds so persuasive in the context of expenditures. For me contributions and expenditures are two sides of the same First Amendment coin.”).

82. See Gora, *supra* note 58, at 24 (arguing that the Court’s contribution-versus-expenditure distinction fails to address several problems with contribution limitations, including: acting as a “defacto [sic] restraint” on expenditures, overwhelmingly benefiting incumbents, and forcing money into unregulated areas).

83. See discussion *infra* Part I.D–F (discussing the rise of soft money and subsequent attempts to control it).

84. See generally Frank Sorauf, *What Buckley Wrought, in IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS* 11, 12 (E. Joshua

D. *Congressional Reaction to Buckley and the Rise of Soft Money*

Congress had to rework FECA to come into conformity with the *Buckley* opinion.<sup>85</sup> In 1979, Congress attempted to fine-tune the campaign finance laws.<sup>86</sup> The purpose behind the 1979 amendments was to relieve some of the burdens imposed on individuals, candidates, and state and local committees by FECA requirements.<sup>87</sup> The majority of changes had little effect on substantive campaign finance laws, but the relaxation of one provision did lead to the increased use of soft money, which quickly became the primary political tool used by political parties.<sup>88</sup>

The amended provision allowed unlimited and unregulated contributions to national political parties provided they were not earmarked for a specific candidate and were directed toward party-building activities; these funds became known as “soft money.”<sup>89</sup> State and local political committees were allowed to spend unlimited funds toward “get out the vote” efforts for presidential and other federal elections activities.<sup>90</sup> Subsequently, the FEC implemented a rule

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Rosenkranz ed., 1999) (stating that the goals of the 1974 FECA amendments were never achieved because of the Court’s decision in *Buckley*).

85. *See id.* at 12–13 (discussing the broad scope of the 1974 FECA amendments but noting “[t]hat imposing regulatory edifice never went into effect” because “[g]reat chunks of it fell to the Supreme Court’s assault in *Buckley v. Valeo* in 1976”). Congress again amended FECA in 1976, and these amendments remained the basis for campaign finance laws until after the turn of the century. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified as amended in scattered sections of 2 U.S.C.). The amendments increased the individual contribution limit, overhauled the FEC, and required that Political Action Committees (PACs) could only solicit contributions from members of the PAC or defined constituent groups. UROFSKY, *supra* note 1, at 62.

86. Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (codified as amended in scattered sections of 2 U.S.C.).

87. *See Federal Election Campaign Act Amendments of 1979: Hearing on Amendments to the Federal Election Campaign Act of 1971 Before the S. Comm. on Rules and Administration*, 96th Cong. 8–9 (1979) (statement of Robert Tiernan, Chairman of the Federal Election Commission) (recommending amending the Federal Election Campaign Act to give political parties a strengthened role in the political process where volunteer activities will be encouraged); S. REP. NO. 96-319 at 4 (1979) (arguing that previous versions of the Federal Election Campaign Act failed to consider the impact of regulations on political parties).

88. *See* H.R. 5010, 96th Cong. § 101(9)(B) (1979) (allowing political parties to use soft money for activities designed to encourage individuals to vote).

89. *See* S. REP. NO. 96-319, at 4 (“The bill would permit a State or local committee of a political party to pay the costs of certain campaign material used in connection with volunteer activities on behalf of candidates, without the cost constituting a contribution or expenditure under the act, so long as party funds were not earmarked for a particular candidate.”).

90. *See* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 11 C.F.R. § 100.14 (2009) (stating that funds used by local and state political parties and local and state candidates are not bound by federal regulations).



change allowing national political parties to pay for some state and local party activities with unregulated soft money.<sup>91</sup> Parties circumvented statutorily imposed limitations and stockpiled large sums of contributions by soliciting soft-money donations from individuals and groups.<sup>92</sup> The donations were then stored in non-federal accounts and transferred to state and local committees to cover general party building or administrative activities.<sup>93</sup> The emergence of soft money allowed political parties to use federally regulated hard money exclusively to support specific federal candidates.<sup>94</sup> This tactic encouraged the use of soft money contributions for everything else.<sup>95</sup>

Subsequently, many campaign finance reformers focused their efforts on eliminating the use of soft money.<sup>96</sup> Reformers argued that soft-money contributions allowed political parties to circumvent existing campaign finance laws by collecting large contribution

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91. Transfers of Funds: When Registration and Reporting Required, 11 C.F.R. § 102.6(a)(2) (1977); Op. Fed. Election Comm'n 1978-10 (1978); Op. Fed. Election Comm'n 1979-17 (1979).

92. See Jason Conti, Note, *The Forgotten Few: Campaign Finance Reform and Its Impact on Minority and Female Candidates*, 22 B.C. THIRD WORLD L.J. 99, 130 (2002) (explaining that use of soft money was directly linked to the revitalization of state and local political parties).

93. See L. Paige Whitaker, *Campaign Finance: Constitutional and Legal Issues of Soft Money*, in CAMPAIGN FINANCING IN THE UNITED STATES: ISSUES AND LAWS 31-32 (Auguste V. Anschutz ed., 2002) (explaining that soft money transferred from national political parties pays for state and local party activities, including grassroots and voter mobilization efforts that assist federal candidates).

94. See UROFSKY, *supra* note 1, at 67 (describing how an excess of soft money replaced federally regulated hard money as the main source of party financial support). One of the largest uses of soft money contributions was to finance issue ads. The Supreme Court held that ads that did not directly advocate for the election or defeat of a particular candidate were issue ads, and government regulation could not limit their funding. See *Buckley v. Valeo*, 424 U.S. 1, 45 n.52 (1976) (explaining that issue ads could not be regulated because limitations on expenditures only applied to ads that "clearly identified [a] candidate for federal office"). Thus, the limitations would only apply to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.*

95. See Whitaker, *supra* note 93, at 33 (explaining that during the 1995-1996 election cycle the FEC reported that both major political parties increased soft money expenditures by over two hundred percent from the 1992 election cycle); THE CAMPAIGN LEGAL CENTER, THE CAMPAIGN FINANCE GUIDE 11 (2004), <http://www.campaignlegalcenter.org/attachments/1223.pdf> [hereinafter CAMPAIGN FINANCE GUIDE] (displaying a chart depicting the rapid growth of soft money donations recorded by the two major political parties between 1992 and 2002).

96. See generally CAMPAIGN FINANCE GUIDE, *supra* note 95, at 4-15 (discussing the various attempts to reform campaign finance laws starting in the 1980s and how the McCain-Feingold Act was sparked as a result of the questionable practices of the 1996 election cycle).

amounts and transferring them to state and local political parties.<sup>97</sup> The emergence of soft money was seen as a dramatic step backwards in the battle to reform campaign financing laws because it undercut both contribution limitations and transparency requirements enacted by previous statutes and upheld by the Supreme Court.<sup>98</sup> Eventually, a few members of Congress, overcoming strong opposition from politicians and interest groups, secured congressional and executive approval for a new law instituting a total ban on the use of soft money by political parties.<sup>99</sup>

*E. Turning Off the Faucet: The Bipartisan Campaign Finance Reform Act of 2002*

The Bipartisan Campaign Finance Reform Act—better known as McCain-Feingold—completely revamped campaign finance laws and closed the door on the use of soft money to influence federal elections.<sup>100</sup> At the heart of the new legislation were two main provisions: a total prohibition on the solicitation and use of soft money<sup>101</sup> and new restrictions on media advertising, or “electioneering communication.”<sup>102</sup>

The most significant contribution of the legislation was to amend existing campaign finance laws to prevent national political parties

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97. See *supra* notes 89–95 and accompanying text (discussing the way soft money funds can be used to finance issue ads).

98. See Editorial, *Campaign Reform on Trial*, N.Y. TIMES, Dec. 4, 2002, at A30 (arguing that parties exploited the soft money loophole and were underwriting individual campaigns with soft money contributions).

99. The members of Congress who led efforts to overhaul the campaign finance laws were bipartisan teams in both Houses of Congress: Senators John McCain (R-AZ) and Russ Feingold (D-WI) and Representatives Martin Meehan (D-MA) and Christopher Shays (R-CT).

100. See Lillian R. BeVier, *First Amendment Basics Redux: Buckley v. Valeo to FEC v. Wisconsin Right to Life*, 2007 CATO SUP. CT. REV. 77, 77 (2007) (“The Act imposed extensive new regulations on and restrictions of campaign finance practices.”); Kuhne, *supra* note 61, at 845 (stressing how McCain-Feingold was the most ambitious and aggressive statute enacted to reform campaign spending). The legislation was first introduced seven years before it was eventually signed into law in 2002. Editorial, *Election Law Coup d’Etat*, N.Y. TIMES, June 24, 2002, at A18.

101. See 2 U.S.C. § 441i(a)(1) (2006) (“A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.”).

102. See *id.* § 434f(3) (defining an electioneering communication as “any broadcast, cable, or satellite communication,” that “refers to a clearly identified candidate for Federal office”). Additionally, the legislation prevents corporations and unions from using general treasury funds to make a “contribution or expenditure in connection with any election to any political office” including any communication categorized as electioneering communications. *Id.* § 441b.

and congressional campaign committees from soliciting and spending soft money.<sup>103</sup> Candidates were also forbidden from raising or directing soft-money contributions for generic party-building activities.<sup>104</sup> Although the legislation did increase the amount individuals and groups could contribute in hard money,<sup>105</sup> both sides of the political aisle attacked McCain-Feingold as an unconstitutional infringement on the First Amendment right of free speech.<sup>106</sup>

*F. The Supreme Court Backs the Reformers: McConnell v. FEC*

In its 2003 decision in *McConnell v. FEC*, the Supreme Court upheld McCain-Feingold's ban on the use of soft money by political parties.<sup>107</sup> The first test of the soft-money ban was a consolidated challenge by various individuals and groups and was heard by a three-judge panel in the United States District Court for the District of Columbia.<sup>108</sup> The district court upheld the ban on the use of soft money only when the money was used for federal election activities or for the financing of issue ads.<sup>109</sup> Opponents of the soft-money ban immediately filed an appeal, which quickly rose to the United States Supreme Court.<sup>110</sup>

103. See *id.* § 441i(a)(1) (clarifying that national political parties could only receive donations "subject to the limitations, prohibitions, and reporting requirements of this Act").

104. See *id.* § 441i(b)(C) (emphasizing that soft money cannot be transferred between national, local, and state political parties).

105. See *id.* § 441a(a) (limiting individual contributions to a candidate for an election to \$2,000; to a national political committee to \$25,000; to a state political committee to \$10,000; and to any other political committee to \$5,000). The legislation also limited an individual to \$37,500 in contributions, in the aggregate, to candidates and political committees. *Id.* § 441a(a)(3)(A). The contribution limits were indexed for inflation. *Id.* § 441a(c). The FEC recently announced that contribution limits for the 2010 election cycle will be increased; individual donors will now be able to donate \$2,400 per election (primary and general) and \$30,400 to national parties. Reid Wilson, *Campaign: Contribution Limits Raised for '10 Cycle*, HILL, Jan. 23, 2009, <http://thehill.com/homenews/campaign/2112-contribution-limits-raised-for-10-cycle>.

106. See *Constitutional Issues Raised by Recent Campaign Finance Legislation Restricting Freedom of Speech Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 107th Cong. 15 (2001) (statement of Nadine Strossen, President of the American Civil Liberties Union) ("Simply put, these bills are a recipe for political repression because they egregiously violate longstanding rights of free speech and freedom of association . . .").

107. See 540 U.S. 93, 141–42 (2003) (extending the ban on the use of soft money to all uses intended to influence federal elections).

108. *McConnell v. FEC*, 251 F. Supp. 2d 176, 177 (D.D.C. 2003), *aff'd*, 540 U.S. 93 (2003).

109. *Id.* at 187.

110. See UROFSKY, *supra* note 1, at 191–92 (explaining that the Supreme Court modified its schedule to ensure a hearing of oral arguments and an opinion before the next election).

In a voluminous decision spanning 167 pages and including separate opinions by five Justices,<sup>111</sup> the Supreme Court expanded the district court's ruling and banned the use of soft money in all situations.<sup>112</sup> Applying the *Buckley* contribution-versus-expenditure distinction,<sup>113</sup> the Court found that donations of soft money were "contributions" and thus could be limited.<sup>114</sup> The Court reasoned that banning soft-money contributions did not unconstitutionally infringe on First Amendment rights because, like the contributions in *Buckley*, they "entail[] only a marginal restriction upon the contributor's ability to engage in free communication."<sup>115</sup> Furthermore, the Court rejected arguments that banning the use of soft money unconstitutionally interfered with political parties' right to associate at the national and state levels.<sup>116</sup> In rejecting these arguments, the Court noted that the limits only prevented national parties from spending or soliciting soft money and not from entering into joint planning opportunities with local and state offices.<sup>117</sup>

The Court also upheld portions of McCain-Feingold that prevented the circumvention of the soft-money ban.<sup>118</sup> The Court upheld the prohibition on "soft-money washing" transfers from national political parties to local and state committees because "[p]reventing

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111. Justices Stevens and O'Connor jointly, as well as Chief Justice Rehnquist and Justice Breyer wrote opinions for the Court, while Justices Scalia, Thomas, Kennedy, Chief Justice Rehnquist, and Justice Stevens each wrote separate opinions. *McConnell*, 540 U.S. at 114, 224, 233, 247, 264, 286, 350, 363.

112. *See id.* at 144-45 (Stevens and O'Connor, JJ.) (holding that because the use of soft money allowed contributors to circumvent the law, those contributions were also unconstitutional).

113. *See id.* at 120-21 (stating that the majority opinion followed the contribution-versus-expenditure distinction established in the *Buckley* opinion).

114. *See id.* at 142-43, 145 (acknowledging that the majority applied lower judicial scrutiny to contributions). The Court explained that actual corruption is not only quid pro quo relationships but also those where individuals enjoy undue influence upon candidates and officeholders. *Id.* The Court maintained that "common sense and the ample record in these cases" clearly show that large financial contributions have a corruptible influence or at least present the appearance of corruption that would jeopardize the public faith in our political system. *Id.* at 145.

115. *Id.* at 134-35 (citing *Buckley v. Valeo*, 424 U.S. 1, 20 (1976)). The majority required contributions to be so low that they prevented party candidates from being able to effectively compete in any given election before those limits would be considered as creating an unconstitutional burden. *Id.* at 135 (citing *Buckley*, 424 U.S. at 21).

116. *See id.* at 160 (stating that individuals were still allowed to volunteer and support political parties in a variety of ways).

117. *See id.* (rejecting the concept that prohibiting political parties' use of soft money contributions will negatively affect party operations because state, local, and national parties were free to sit and discuss strategy).

118. *See id.* at 174 (describing congressional efforts to prevent circumvention of contribution limits as "entirely reasonable").

corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important governmental interest.”<sup>119</sup>

The holding laid down by the Court in *McConnell* was an acceptance of a broad reading of the anti-corruption rationale.<sup>120</sup> This decision seemingly allows Congress to take a larger role in regulating federal elections by deciding which people or groups will have the most influence.<sup>121</sup> The Court’s analysis and holding in *McConnell* exhibited greater deference to Congress, which many consider an overextension of the *Buckley* holding.<sup>122</sup> Specifically, it signaled a departure from the strict anti-corruption purpose that the Court required in *Buckley* and other campaign finance cases.<sup>123</sup> Subsequently, the Roberts Court’s campaign finance holdings have readjusted the trajectory of campaign finance jurisprudence to align more closely with *Buckley*’s application of First Amendment rights for campaign speech.

## II. LOOSENING THE FAUCET BY TIGHTENING THE TEST

The Roberts Court’s new campaign finance analysis conflicts with previous holdings, which applied the anti-corruption standard more broadly and allowed more congressional leeway.<sup>124</sup> The Court has employed a cautious approach in announcing its new analysis

119. *Id.* at 165-66; *see also id.* at 175-77 (stating that without this provision political parties would be able to avoid the limitations of the new law, and the same problems of corruption would only shift toward third-party organizations).

120. *See id.* at 287 (Kennedy, J., dissenting) (arguing that the majority’s opinion expanded on *Buckley* and compromised First Amendment protections). One example of the negative effects of the legislation includes the law’s preference for certain speakers. *Id.*

121. *See id.* at 137 (majority opinion) (deferring to the “expertise” of Congress in this area).

122. Election law expert Professor Richard Hasen argues that “*McConnell* represented the most important in a series of New Deference cases in which the Court continued to speak the anticorruption language of *Buckley* but whose holdings appeared in serious tension with the anticorruption rationale.” Hasen, *supra* note 18, at 1071.

123. *See McConnell*, 540 U.S. at 291-92 (Kennedy, J., dissenting) (explaining that *Buckley* focused on actual quid pro quo corruption and not the broader definition of corruption advanced by the majority).

124. *See* Rachel Gage, Comment, Randall v. Sorrell: *Campaign-Finance Regulation and the First Amendment as a Facilitator of Democracy*, 5 FIRST AMEND. L. REV. 341, 351 (2007) (explaining that the Supreme Court in *McConnell* and *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000), took an extra step that the *Buckley* Court was unwilling to take—accepting a lower standard of judicial scrutiny for contribution limits and making it acceptable to grant the legislature greater leeway in deciding what regulations would prevent corruption).

through recent campaign finance holdings.<sup>125</sup> Despite its soft rhetoric, the Roberts Court developed a new test for examining campaign finance regulations: whether the regulation has an actual anti-corruption effect and whether the legislative intent was primarily anti-corruption.<sup>126</sup> The Roberts Court's new test is more consistent with what many would argue is the proper protection of individual First Amendment rights.<sup>127</sup> This section uses the Court's two most recent campaign finance cases, *Davis v. FEC*<sup>128</sup> and *Randall v. Sorrell*,<sup>129</sup> to demonstrate the Roberts Court's test.<sup>130</sup> This section then applies the new test to McCain-Feingold's soft-money ban and demonstrates how the soft-money ban fails to meet this more exacting and protective view.<sup>131</sup>

A. *Strict and Narrow: The Roberts Court's  
New Anti-Corruption Standard*

The Roberts Court's approach strictly examines campaign finance regulations to ensure that First Amendment rights are only minimally affected when a challenged regulation is motivated by an actual anti-corruption intent<sup>132</sup> and has an anti-corruption effect.<sup>133</sup> The Supreme Court has held that the only legitimate justification for imposing contribution limits is the prevention of actual or perceived

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125. See Hasan, *supra* note 18, at 1105 (arguing that Chief Justice Roberts and Justice Alito have been sensitive to prior precedent while still clearly invoking a deregulatory approach).

126. See *Davis v. FEC*, 128 S. Ct. 2759, 2774 (2008) (finding no anti-corruptive purpose behind the Millionaires' Amendment and rejecting the legislative intent to create an equal playing field as a valid justification for the amendment); *Randall v. Sorrell*, 548 U.S. 230, 253 (2006) (stressing a study by a political scientist finding that the regulations lacked an anti-corruptive effect and unconstitutionally limited the ability of the state political parties to support their candidates).

127. See Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1809-11 (1999) (acknowledging that the majority of academics and members of society view the First Amendment as an absolute right).

128. 128 S. Ct. 2759 (2008).

129. 548 U.S. 230 (2006).

130. See *Davis*, 128 S. Ct. at 2771-73 (ruling that the appropriate test for campaign finance regulations requires the law to be motivated by an anti-corruption intent and have an anti-corruptive effect).

131. See *infra* Part II.B (discussing how the ban on soft money fails to have an anti-corruptive effect and that its intent was primarily to diminish the ability of the wealthy to participate in political expression).

132. See *Davis*, 128 S. Ct. at 2773 (arguing that the intent of the Millionaires' Amendment was not anti-corruption because even *Buckley* recognized that a politician's use of his own money posed no possible threat of corruption).

133. See *id.* (explaining that without any potential for corruption, the legislation cannot possibly have any anti-corruptive effect).

corruption because they both equally shake the foundation of the public trust in the electoral process.<sup>134</sup>

During congressional debate, the sponsors of McCain-Feingold made explicit references to the relationship between soft-money contributions and corruption to bolster the chances of constitutional approval.<sup>135</sup> When the ban on the use of soft money was before the Supreme Court, the majority in *McConnell* found the sponsors' argument persuasive;<sup>136</sup> however, the composition of the Court has changed.<sup>137</sup> The Court's recent campaign finance cases have narrowed its view of acceptable anti-corruption regulations and set the stage for a reexamination of previously upheld regulations, including the soft-money ban.<sup>138</sup>

Most recently, the Court heard *Davis v. FEC* and struck down a previously untested portion of McCain-Feingold<sup>139</sup> as

134. See *Buckley v. Valeo*, 424 U.S. 1, 28–30 (1976) (arguing that there is a public interest in eliminating the dangers of large financial contributions); see also *Davis*, 128 S. Ct. at 2770 (noting that limits on campaign contributions serve the important government interest of preventing corruption); *McConnell v. FEC*, 540 U.S. 93, 143 (2003) (recognizing that in addition to direct bribery, large contributions can also be used to exercise undue influence over elected officials); *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado Republican II)*, 533 U.S. 431, 456 (2001) (expressing the opinion that bypassing campaign finance laws to donate unlimited amounts of soft money to candidates gives, at the very least, an appearance of corruption); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000) (reaffirming the reasoning in *Buckley* that large financial contributions can give the appearance of corruption).

135. See 147 CONG. REC. 3864 (2001) (statement of Sen. Feingold) (“I am sorry the Senator from Kentucky does not want us to talk about it, but the Court says we can’t do a bill about it unless we do talk about it. So we are going to talk about it. We are going to talk about corruption, but, more importantly, what is much more obvious and much more relevant is the appearance of corruption. It is what it does to our Government and our system when people think there may be corruption even if it may not exist.”).

136. See *McConnell*, 540 U.S. at 154 (asserting there is “substantial evidence” that large financial contributions to political parties are corruptive).

137. Justice Kennedy, the new swing vote, has indicated in previous campaign finance cases that he supports a broader First Amendment protection for contributions. See *id.* at 286 (Kennedy, J., dissenting) (asserting that McCain-Feingold’s new laws force individuals away from speaking through political parties and organizations); *Nixon*, 528 U.S. at 406 (Kennedy, J., dissenting) (arguing that it is up to the Supreme Court to address the unintended consequences of their previous decisions, which have led to a deterioration of First Amendment protections for political contributions); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 696 (1990) (Kennedy, J., dissenting) (denouncing the majority opinion upholding a Michigan law that institutes criminal penalties when a nonprofit corporate speaker supports or opposes a candidate for office as being “repugnant to the First Amendment and contradicts its central guarantee, the freedom to speak in the electoral process”).

138. See Hasen, *supra* note 18, at 1105 (discussing how recent campaign finance decisions by the Roberts Court will lead to more successful challenges of campaign finance regulations, including the soft money ban).

139. See *McConnell*, 540 U.S. at 229–30 (Rehnquist, C.J., concurring in part) (arguing that the individuals who challenged the Millionaires’ Amendment lacked

unconstitutional.<sup>140</sup> The provision, commonly known as the “Millionaires’ Amendment,” allowed a “non-self financing” candidate to receive contributions three times larger than normally allowed when his opponent’s self-contributed funds exceeded \$350,000.<sup>141</sup> The Supreme Court held that the Millionaires’ Amendment was unconstitutional because it did not have a legitimate anti-corruption purpose and its true intent was to diminish the rights of the wealthy.<sup>142</sup>

Justice Alito’s majority opinion indicates the new direction of the Roberts Court’s campaign finance jurisprudence.<sup>143</sup> The Court found that the regulation did not serve a legitimate anti-corruption purpose because the use of personal funds did not increase the risk of corruption.<sup>144</sup> Because the use of private funds did not raise any fear of corruption, the Court determined that the provision had no anti-corruption effect.<sup>145</sup>

The Court also determined that the intent of the provision lacked an anti-corruption purpose.<sup>146</sup> The Court declared that the Millionaires’ Amendment was “antithetical to the First Amendment” because the real intent was to eliminate a wealthy candidate’s alleged advantage.<sup>147</sup> Justice Alito labeled the regulation as a punishment on wealthy candidates because it “impos[ed] different contribution and

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standing because there was no cognizable injury resulting from the application of McCain-Feingold).

140. See *Davis v. FEC*, 128 S. Ct. 2759, 2774 (2008) (analyzing the First Amendment violation that resulted because the Millionaires’ Amendment had no anti-corruption purpose or effect).

141. 2 U.S.C. § 441i(C) (2006); see *Davis*, 128 S. Ct. at 2767 (explaining that a self-financer would still be required to adhere to normal contribution limits but that a non-self-financing candidate could receive \$6,900 from individuals).

142. See *Davis*, 128 S. Ct. at 2774 (holding the regulation serves no anti-corruption purpose).

143. See *id.* at 2772–74 (asserting that the use of personal funds poses no threat of corruption).

144. See *id.* (arguing that if Congress found that increasing the limits for non-self-financers did not invoke fears of corruption, “it is hard to imagine how the denial of liberalized limits to self-financing candidates can be regarded as serving anticorruption goals sufficiently to justify the resulting constitutional burden”). Additionally, the Court disproved any similarities between limitations upheld by *Buckley* and the Millionaires’ Amendment because the statute in question requires that a person either abide by a personal expenditure limit or allow his opponent to enjoy liberalized contribution restrictions. *Id.* at 2772.

145. See *id.* at 2771 (asserting that limiting a candidate’s ability to contribute to his own campaign clearly violates the First Amendment).

146. See *id.* at 2773 (stating that the Court has never upheld campaign finance regulations that were intended solely to equalize electoral opportunities).

147. See *id.* at 2774 (distinguishing the intent of the Millionaires’ Amendment from the contribution caps set forth in *Buckley* because the Millionaires’ Amendment only prevents the wealthy from freely self-financing).



coordinated party expenditure limits on candidates vying for the same seat<sup>148</sup> and it required certain types of candidates to make a false choice between providing support for their campaign and allowing their opponent to ignore contribution rules.<sup>149</sup> In so holding, the Court rejected the argument that the Millionaires' Amendment was necessary to correct previous regulations that imposed significant burdens on candidates and fed the "public perception that wealthy people can buy seats in Congress."<sup>150</sup> The Court said this objective went beyond the scope of Congress's ability to regulate campaign finance and infringed on voters' role in the electoral process.<sup>151</sup>

The narrow application in *Davis* built off of the holding in *Randall v. Sorell*, where the Supreme Court held for the first time that contribution limits were unconstitutional because they were too low.<sup>152</sup> In *Randall*, the Court struck down Vermont's Act 64 because the contribution limits failed to have an anti-corruption effect.<sup>153</sup> Applying *Buckley*,<sup>154</sup> the Court agreed that contributions could be limited but held that some limits "may fall outside tolerable First Amendment limits."<sup>155</sup> The Court found "danger signs present"<sup>156</sup> with the Act's two-hundred-dollar-per-election-cycle limitation on contributions (to candidates running for governor) because they were "well below the limits this Court upheld in *Buckley*."<sup>157</sup>

148. *Id.*

149. *See id.* at 2772 (explaining that if a candidate's personal expenditures triggered the new contribution rules for the opposing candidate, then the opposing candidate would be able to drown out the wealthy candidate).

150. *Id.* at 2774.

151. *See id.* at 2773–74 (arguing that these types of regulations grant too much leeway to Congress).

152. 548 U.S. 230, 237 (2006). The Court held that the expenditure limits instituted by the Act were the same type the Court had rejected in *Buckley* and were unconstitutional because there was no sufficient government justification to limit the quantity of political expression. *Id.* at 244–45.

153. *See id.* at 236–37 (holding the act unconstitutional because it was inconsistent with the First Amendment). The Act limited expenditures to various amounts based on the scope of the office—from \$300,000 for campaigns for Governor to \$2,000 for single member state representative districts. *Id.* at 247. Contributions by individuals, organizations, and parties were limited to \$400 for statewide offices, \$300 for state senate offices, and \$200 for state representative offices. *Id.* The Act also limited contributions to political parties to \$2,000 for each election cycle. *Id.*

154. *Id.* at 247.

155. *See id.* at 253 (identifying the problems with the legislation as: restricting challenger's ability to run against incumbents; limiting political parties to the same contribution levels as candidates, including volunteer expenses as campaign contributions; and setting a record low maximum contribution level without adjusting for inflation).

156. *Id.* at 249.

157. *Id.* at 250.

The Court rejected Vermont's argument that the limitations qualified as anti-corruption regulations because reducing the amount of time a candidate spent fundraising would prevent corruption.<sup>158</sup>

Even though the Court agreed that the suggested purpose of the legislation carried some merit, it held that the act was not sufficiently tailored to meet those goals without overly affecting core First Amendment rights.<sup>159</sup> Vermont's contribution limitations were unconstitutional because they substantially interfered with an individual's ability to raise funds and be competitive, prevented political parties from helping their candidates, and restricted the ability of individual citizens to volunteer.<sup>160</sup> The holdings in *Davis* and *Randall* clearly project the strict analysis the Roberts Court will apply to future campaign finance cases.

The Court narrowed its examination of campaign finance laws by focusing on both the *effect and intent* of the regulation, which allows the Court to apply the appropriate level of judicial scrutiny.<sup>161</sup> Arguably, both the Millionaires' Amendment and Vermont's Act 64 fulfilled some anti-corruption purpose.<sup>162</sup> The Millionaires' Amendment limited the perception that only the wealthy can be candidates for federal office.<sup>163</sup> Vermont's Act 64 reduced the amount of time a candidate would need to devote to fundraising and the solicitation of funds, which limited the opportunity for actual corruption and exposure to donors who would ask for political

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158. *See id.* at 245–46 (holding that Vermont's limits were too restrictive because they inhibited the ability of candidates to run effective campaigns).

159. *See id.* at 261–62 (stressing that the Act was not narrowly tailored to survive constitutional scrutiny because it disproportionately burdened the First Amendment rights of the people of Vermont).

160. *See id.* at 253–61 (explaining the rationale through five points: (1) the contribution limit will restrict the amount of funding available to challengers; (2) requiring political parties to comply with the same low limits will infringe on their right to associate; (3) the act fails to exclude expenses of campaign volunteers from campaign contributions; (4) contribution limits are not adjusted for inflation; (5) the contribution limit is so low it produces a serious burden).

161. *See Davis v. FEC*, 128 S. Ct. 2759, 2772 (2008) (holding that the Millionaires' Amendment "imposes a substantial burden on the exercise of the First Amendment right[s] . . . [and] cannot stand unless it is 'justified by a compelling state interest'" (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986))); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 428 (2001) (Thomas, J., dissenting) ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." (quoting *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 496–97 (1985))).

162. *But see Davis*, 128 S. Ct. at 2773 (holding that the burden imposed by the Millionaires' Amendment on First Amendment speech rights is not justifiable); *Randall*, 548 U.S. at 248 (arguing that contribution limits that are set too low may harm the political process).

163. *See Davis*, 128 S. Ct. at 2773 (rejecting the government's argument that this treatment was necessary to fix the current system).

favors.<sup>164</sup> While the current Supreme Court agrees that “a measure of deference”<sup>165</sup> should be extended to the legislatures that enacted the law, it has also been more exacting with its review, providing stronger First Amendment protections.<sup>166</sup> The Roberts Court now examines campaign finance laws to see if the regulation’s anti-corruption purpose has a legitimate effect on preventing corruption and whether the legislative intent of the regulation was broader than its anti-corruption purpose, placing it outside the bounds of constitutional protection.<sup>167</sup>

The Roberts Court has struck down campaign finance regulations when it determines that the actual effects of the regulations have little to do with the prevention of actual or perceived corruption.<sup>168</sup> Previously, the Court was not concerned with actual empirical evidence regarding anti-corruption regulations,<sup>169</sup> but in *Randall* the Court explicitly referenced the work of a political scientist to show that the alleged anti-corruption regulations failed to achieve their anti-corruption purposes and instituted overly burdensome regulations on candidates and political parties.<sup>170</sup> Similarly, in *Davis*, the Court held that a candidate using personal funds lacked any plausible corruptible influence that would justify the “penalty” imposed on these candidates and the “resulting drag” on their First

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164. See *Randall*, 548 U.S. at 245–46 (dismissing Vermont’s argument that contribution limits alone fail to prevent corruption).

165. *Davis*, 128 S. Ct. at 2771 (citing *Randall*, 548 U.S. at 248).

166. Compare *Davis*, 128 S. Ct. at 2771 (questioning the goal of Congress when they enacted the Millionaires’ Amendment and how they hoped to achieve that goal), with *Nixon*, 528 U.S. at 386–87 (reinforcing a lower standard for contribution limits and deferring to the members of Congress to craft regulations they deem appropriate).

167. Compare *Randall*, 548 U.S. at 254 (relying on a political scientist’s expert testimony to show that the contribution limits had a significant impact on the ability of candidates to run an effective campaign and that the risk of actual or perceived corruption was so limited that it did not support the infringement on speech rights), with *Nixon*, 528 U.S. at 391 (confirming that a specific “quantum of evidence” showing corruption or the perception of corruption was not necessary).

168. See *Randall*, 548 U.S. at 248–49 (observing that a simple anti-corruption rationale cannot justify a “lower the limit the better” mentality; rather, there should be an “independent judicial judgment” to see if the restrictions are specifically tailored to pass a constitutional test).

169. See *Nixon*, 528 U.S. at 391 (rejecting the need for a minimum amount of evidence reflecting the corruptive nature of large financial contributions to satisfy a showing of a compelling government interest in regulating campaign contributions).

170. See *Randall*, 548 U.S. at 253–55 (relying on the work of political scientist Clark Bensen, which indicated a dramatic reduction in the amount of money available to candidates and parties, and linking it directly with the downward trend in the competitive nature of several races).

Amendment rights.<sup>171</sup> This view differs from *McConnell*, which cited numerous stories relating to the corruptive influence of soft-money contributions but failed to show that the regulation would have any actual effect on preventing corruption.<sup>172</sup> In his dissent in *McConnell*, Justice Kennedy argued that contributions to political parties “lack[] a possibility for *quid pro quo* corruption of federal officeholders”<sup>173</sup> and regulation of party receipts fails to “equal regulation of *quids* to party’s officeholders.”<sup>174</sup> By requiring that the regulation have an actual anti-corruption effect, the Roberts Court has narrowed the applicability of campaign finance regulations.<sup>175</sup>

Additionally, the Roberts Court examined the legislative intent of the regulation.<sup>176</sup> The majority in *Davis* was concerned about the “ominous implications” of broad anti-corruption campaign finance regulations, predicting the regulations would grant Congress too much influence in the electoral process.<sup>177</sup> While Congress does have a role in protecting elections from “disorder,”<sup>178</sup> that role does not

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171. See *Davis*, 128 S. Ct. at 2772 (noting that the statute should not discourage the use of personal funds because reliance on personal funds actually reduces the threat of corruption).

172. See *McConnell v. FEC*, 540 U.S. 93, 146–52 (2003) (noting that many lobbyists, CEOs, and wealthy individuals make donations to secure influence over federal officials, and recognizing the connection between soft money and the manipulation of the legislative calendar). But see *id.* at 300–04 (Kennedy, J., dissenting) (explaining that the majority incorporated a faulty syllogism: federal office-holders are linked with their political party, all party receipts create corrupt donor favoritism, thus regulation of these donations will prevent officer holders from being corrupt). Justice Kennedy further contended that the majority only cited one example where a Senator felt pressure to conform with the ideals of a soft-money donor, and that this example differed from contributions to a party because the Senator was referencing contributions to his personal campaign committee. *Id.* at 302.

173. *McConnell*, 540 U.S. at 301 (Kennedy, J., dissenting) (recognizing that independent party activity includes independent receipt and spending of soft money).

174. See *id.* at 300 (pointing out that not all monies a party receives are *quids* for party candidates and officeholders).

175. See generally Richard Briffault, WRTL and Randall: *The Roberts Court and the Unsettling of Campaign Finance Law*, 68 OHIO ST. L.J. 807, 843 (2007) (concluding that recent cases indicate the Supreme Court is unlikely to give significant deference to federal and state campaign regulations).

176. See *Davis*, 128 S. Ct. at 2773 (stressing that the government’s intent for the legislation was to create equal electoral opportunities for candidates with different personal wealth).

177. See *id.* at 2773–74 (“[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments’ and ‘may consider, in making their judgment, the sources and credibility of the advocate.’” (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 791–92 (1978))).

178. See *Timmons v. Twin City Area New Party*, 520 U.S. 351, 358 (1997) (noting that “[s]tates may . . . enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder”).

give the legislative branch the power to alter the very nature of representative politics by overextending its influence through attenuated anti-corruption regulations.<sup>179</sup> Couching the Millionaires' Amendment as a means to address and correct the perception that only the wealthy can be successful candidates for federal office did not overcome what the Court saw as the true intent of the regulation—"level[ing] electoral opportunities."<sup>180</sup> Justice Alito articulated the Court's concerns by stating:

Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives . . . and it is a dangerous business for Congress to use the election laws to influence the voters' choices.<sup>181</sup>

Previous campaign finance cases have demonstrated the Supreme Court's willingness to accept any regulation as long as the government could articulate how the regulation served any possible anti-corruption purpose.<sup>182</sup> However, many of these regulations, including the ban on the use of soft money, had much broader implications and represented efforts by Congress to express "preferences for certain speakers."<sup>183</sup> Thus, the Roberts Court's

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179. See *Davis*, 128 S. Ct. at 2774 n.8 (dismissing the concept that regulation of political speech will lead to a higher quality of political speech); *McConnell*, 540 U.S. at 297 (Kennedy, J., dissenting) (describing the nature of the elected representative as built upon the financial support of candidates who support policies the contributor supports). But see Lori Ringhand, *Defining Democracy: The Supreme Court's Campaign Finance Dilemma*, 56 HASTINGS L.J. 77, 83-84 (2004) (acknowledging the debate between those who view democracy as a pluralist system and those who see it as a civic republicanism and advocating for the adoption of the latter because it reduces the influence of interest groups and raises the level of political debate).

180. *Davis*, 128 S. Ct. at 2773.

181. *Id.* at 2774.

182. See, e.g., *McConnell*, 540 U.S. at 136-37 (relying on the anti-corruption purposes of the bill to support upholding the regulation and choosing not to consider the risk of unintended consequences).

183. See *id.* at 287 (Kennedy, J., dissenting) (explaining that the new regulations imposed by the Bipartisan Campaign Finance Reform Act would have made Ross Perot's efforts to build the Reform Party a felony and would have also made it a felony for environmental groups to run ads within sixty days of an election, while simultaneously enhancing the speech rights of corporate media corporations).

inclusion of an analysis of the legislative intent behind regulations will limit Congress's ability to enact more sweeping measures.<sup>184</sup>

The Roberts Court's adoption and application of a strict and narrow anti-corruption rationale exposes previously upheld regulations to the correct constitutional scrutiny. The ban on the use of soft money by political parties is now susceptible to new challenges because it raises issues similar to those that the Roberts Court recently addressed in *Davis* and *Randall*.<sup>185</sup>

*B. McCain-Feingold's Soft-Money Bans Fails the Roberts Court's New Test*

The ban on the use of soft money does not meet the searching anti-corruption analysis the Roberts Court has established. First, the ban fails to have an actual anti-corruption effect because it does not eliminate the influence of large financial contributions and encourages circumvention of existing laws.<sup>186</sup> Second, the ban also fails to have an anti-corruption effect because it infringes too far on the rights of political parties and contributors to justify a total ban on the use of soft money.<sup>187</sup> Next, the section will show that the soft-money ban represents a choice by the legislature to diminish the rights of wealthy individuals to favor other individuals and groups.<sup>188</sup> The Roberts Court will likely hold McCain-Feingold's ban on the use of soft money unconstitutional because the McCain-Feingold remedy is worse than the soft-money disease.<sup>189</sup>

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184. *But see* *Randall v. Sorell*, 548 U.S. 230, 261–62 (2006) (recognizing the need to defer to Congress in certain situations).

185. *See* Hasen, *supra* note 18, at 1066–67 (speculating on the next likely challenges to campaign finance regulation and predicting their success).

186. *See infra* Part II.B.1 (discussing how the increased role of independent third-party groups in the electoral process negates the anti-corruption goals of the soft money ban).

187. *See infra* Part II.B.2 (explaining that soft money contributions to political parties lack the threat of corruption necessary to justify its negative effect on political parties).

188. *See infra* Part II.B.3 (asserting that the true purpose of the soft money ban was to reduce the ability of wealthy individuals to participate in the electoral process).

189. *See* 147 CONG. REC. 3853 (2001) (statement of Sen. McCain) (stating that the goal of the legislation was to eliminate the influence and appearance of special access to contributors).

1. *The ban on soft money fails to eliminate the negative influence of large financial contributions*

The actual effect of the soft-money ban is to encourage the circumvention of campaign finance regulations.<sup>190</sup> An important rationale behind the *McConnell* holding was that a total ban on the use of soft money by political parties was necessary to protect against the creation of “soft-money surrogates.”<sup>191</sup> The Court upheld provisions that prevented political parties from soliciting and directing large financial contributions to third-party groups because such actions undercut efforts to prevent corruption or the perception of corruption resulting from large financial contributions.<sup>192</sup> The Court failed to recognize that by upholding a total ban on the use of soft money by political parties it had effectively directed those same large financial contributions to unregulated third-party groups, circumventing the regulation.<sup>193</sup>

While the growth of unregulated outside groups cannot be denied,<sup>194</sup> many argue that the importance of eliminating the appearance of corruption justifies the total soft-money ban.<sup>195</sup> The potential for the appearance of corruption is more visible and dramatic when large contributions are given to political parties rather than to outside third-party groups.<sup>196</sup> Thus, it is argued that while no actual corruption may be occurring, there is a societal interest in

190. See UROFSKY, *supra* note 1, at 231 (“This law will not remove one dime from politics. Soft money is not gone, it has just changed its address” (quoting Sen. Mitch McConnell)).

191. *McConnell v. FEC*, 540 U.S. 93, 177 (2003).

192. See *id.* at 175 (expressing fears that many of the problems the legislation intended to remedy would be transferred to third-party organizations where they would be outside the scope of regulation).

193. See Sara Tindall Ghazal, Comment, *Regulating Nonconnected 527s: Unnecessary, Unwise, and Inconsistent with the First Amendment*, 55 EMORY L.J. 193, 198 (2006) (arguing that the rise of 527 groups was related to the ban on soft money because Democrats were afraid that they would be unable to raise as many funds as the Republicans and began using 527 groups to circumvent the prohibitions).

194. See, e.g., Thomas B. Edsall, *Democratic ‘Shadow’ Groups Face Scrutiny: GOP, Watchdogs to Challenge Fundraising*, WASH. POST, Dec. 14, 2003, at A5 (recognizing the rise of many new pro-Democratic organizations created in response to, and to fill the void created by, the soft-money ban).

195. See, e.g., Schauer & Pildes, *supra* note 127, at 1820 (arguing that the societal interest in preventing corruption warrants the application of an exceptionalist First Amendment theory allowing for the regulation of campaign contributions and expenditures just like many other areas of regulation having secondary First Amendment issues).

196. But see Kuhne, *supra* note 61, at 850 (asserting that the vague definition of what constitutes “corruption” and the “appearance of corruption” allow supporters of campaign finance regulations to label anything as being corruptive of the electoral process).

maintaining McCain-Feingold's soft-money ban despite the unintended consequences associated with the inherently problematic nature of large contributions to a political party.<sup>197</sup>

The ban on the use of soft money does not have an actual anti-corruption effect because it trades one problem—large financial contributions to political parties—for another that is more damaging to the electoral process: large financial contributions given to federally unregulated third-party groups that fund overtly negative and untrue advertisements without any connection to an established voter-accountable group, unlike a political party or candidate.<sup>198</sup> It follows that the influence of outside groups has a more corruptive effect on the political process than soft-money contributions because they cannot be held directly accountable by the voters.<sup>199</sup>

The problem with McCain-Feingold's soft-money ban is that it did not eliminate the influence of soft money—it only “changed its address.”<sup>200</sup> The enactment and subsequent Supreme Court decision upholding the soft-money ban's legality has directed large financial contributions away from political parties to unregulated third-party groups.<sup>201</sup> Individuals who previously made soft-money contributions to political parties did so because they supported the overall goal of the party and wanted to help support their party's efforts.<sup>202</sup> The ban

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197. See Fritz, *supra* note 64, 200–01 (arguing that a functional and anti-circumvention approach provides the rationale to support the soft-money ban because soft money is “tailor-made to undermine contribution limits,” and the ban is necessary to reduce the influence of large financial contributions that Congress and the Court have tried to eliminate).

198. See Scott Helman, *Soft Money Battle Brewing: Millions Raised; Attack Ads Set*, BOSTON GLOBE, Apr. 6, 2008, [http://www.boston.com/news/nation/articles/2008/04/06/soft\\_money\\_battle\\_brewing/](http://www.boston.com/news/nation/articles/2008/04/06/soft_money_battle_brewing/) (discussing the rise in independent spending and how third-party organizations are able to evade regulations and wield a great deal of influence on election day).

199. See Ann Gerhart, *Ground War—Steve Rosenthal Wages a \$100 Million Battle to Line Up Democratic Votes*, WASH. POST, July 6, 2004, at C1 (highlighting that even though there is no direct connection between third-party groups and political parties, outside groups are tasked with vital responsibilities that political parties and candidates cannot legally participate in or afford, such as lining up new voters or coordinating expenditures between different groups).

200. See UROFSKY, *supra* note 1, at 231 (“This law will not remove one dime from politics. Soft money is not gone, it has just changed its address.” (quoting Sen. Mitch McConnell)).

201. *Cf.* Randall v. Sorell, 548 U.S. 230, 247–48 (2006) (stating that some contribution limits may impose more harm than their alleged anti-corruption objectives justify).

202. See FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263–64 (1986) (suggesting that people contribute to political purposes because they support those purposes). *But see* McConnell v. FEC, 540 U.S. 93, 147 (2003) (reporting that many individuals who made soft money contributions made them to both political parties,



on the use of soft money by political parties forced these individuals to donate to unregulated third-party groups, whose influence is on the rise.<sup>203</sup>

The emergence of third-party groups and their unregulated influence on the electoral process directly challenges the effectiveness of any anti-circumvention arguments the Court has used to support upholding the ban.<sup>204</sup> Contributions to third-party groups circumvent the ban on the use of soft money by providing a means for those seeking to gain access and influence.<sup>205</sup> Thus, large financial contributions can still be used to influence federal elections with far less scrutiny.<sup>206</sup>

In addition to circumventing current campaign finance systems, these political ads enable outside groups to alter elections. A modern example is the Swift Boat Veterans for Truth and the negative ads the group launched against 2004 Democratic Presidential Nominee Senator John Kerry, which many credit as being influential in his defeat.<sup>207</sup> Many sponsors of those ads and others like them are not directly connected to a political candidate or party, placing them outside the reach of current campaign finance laws.<sup>208</sup> The sponsors of the Swift Boat ads were also individuals who had previously given

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indicating that they did not support the views of the party but rather were trying to secure political influence).

203. See John Samples & Patrick Basham, Op-Ed, *Meet the New Loopholes*, N.Y. TIMES, Nov. 5, 2002, at A27 (describing the optimism of groups such as the Club for Growth and the National Abortion and Reproductive Rights Action League that are outside the scope of federal regulations and anticipated a dramatic increase in contributions after the enactment of McCain-Feingold).

204. See, e.g., *McConnell*, 540 U.S. at 177 (finding that the statute's solicitation restriction was closely drawn to prevent political parties from using tax-exempt organizations to circumvent regulation); see also *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado Republican II)*, 533 U.S. 431, 465 (2001) (declaring that coordinated expenditures may be limited to prevent circumvention of existing campaign finance laws).

205. See Helman, *supra* note 198 (describing the Republicans' need for outside groups to counteract the fundraising advantage of the Democrats and highlighting the successes of the previous ads in attacking the reputation and electoral chances of previous candidates).

206. See Ghazal, *supra* note 193, at 210–11 (noting the influence and power of various outside groups such as MoveOn.org and the Swift Boat Veterans for Truth during the 2004 Presidential election).

207. See Jim Rutenberg, *Obama Campaign Wages Fight Against Conservative Group's Ads*, N.Y. TIMES, Aug. 27, 2008, <http://www.nytimes.com/2008/08/28/us/politics/28ayers.html> (describing the efforts of President-Elect Obama's campaign to prepare to confront outside attack groups, like the Swift Boat Veterans for Truth, which were "widely believed to have damaged Mr. Kerry's [electoral chances]").

208. See Ghazal, *supra* note 193, at 197 (explaining that outside interest groups do not qualify as a political committee under the Federal Election Campaign Act and thus can receive unlimited contributions from individuals and groups).

large financial contributions to political parties, but were prohibited from doing so after the enactment of the soft-money ban.<sup>209</sup>

The Swift Boat ads are a prime example of the serious corruptive influence third-party groups can have on an election.<sup>210</sup> The advertisements are extremely negative and are often misleading or blatantly untrue.<sup>211</sup> Moreover, the ads corrupt the political process because candidates can be sure the public hears negative advertisements that slander their opponent's personalities and policy ideas, but still deny responsibility for them.<sup>212</sup> Ultimately, the ban on the use of soft money by political parties created an unencumbered avenue for large financial contributions that have negative and corruptive influence on the electoral process because these third-party groups can flood the national airwaves with negative and false advertisements that disenfranchise voters and slander candidates.<sup>213</sup>

This unfortunate consequence of the soft-money ban prevents it from meeting the Roberts Court's new anti-corruption analysis because it fails to have an actual anti-corruption effect. The ban on the use of soft-money transfers the dangers intended to be remedied by the regulation to a more dangerous forum for corruption—these third-party groups are unregulated, can accept unlimited contributions, and cannot be held accountable by the voters.<sup>214</sup> The growing influence of third-party groups and the lack of regulations pertaining to these groups renders the soft-money ban effectively toothless, and the Roberts Court is unlikely to find a legitimate anti-corruption effect.

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209. See Helman, *supra* note 198 (emphasizing that the same individuals who funded the Swift Boat Veterans for Truth ads had been longtime Republican donors and are now using their soft money donations to fund outside groups that are unregulated by the federal government).

210. See Rutenberg, *supra* note 207 (stating the damaging effects of the Swift Boat ads on John Kerry's 2004 Presidential Campaign).

211. See, e.g., Patrick Healy, *Let's Call a Lie a Lie . . . Finally*, N.Y. TIMES, Sept. 21, 2008, at 5 (discussing the difficulties candidates face when trying to react to lies and misleading ads in campaigns).

212. See Jim Rutenberg & Michael Luo, *Interest Groups Step Up Efforts in a Tight Race*, N.Y. TIMES, Sept. 16, 2008, at A23 (describing how both the McCain and Obama campaigns initially tried to discourage the activities of outside groups but ultimately turned a "blind eye" to their actions).

213. See Kuhne, *supra* note 61, at 857 (explaining that the limitations upheld by the Court in *McConnell* favor certain types of interest groups and further complicate campaign finance legislation, making it more difficult to run for office and easier to be susceptible to political damage).

214. See Ghazal, *supra* note 193, at 193 (describing the criticism of unregulated groups because they are outside the scope of the FEC and thus able to accept huge contributions from wealthy individuals).

2. *The ban on soft money infringes on the rights of political parties and does not achieve an anti-corruption effect*

The ban on soft money also fails to prevent corruption because the link between soft-money contributions to political parties and political corruption is too attenuated.<sup>215</sup> The enactment of McCain-Feingold's ban was the most obtrusive and extreme route Congress could have taken in the wake of the explosion and overuse of soft money.<sup>216</sup> Moreover, the ban has directly weakened the role of political parties.<sup>217</sup> The Court has commented numerous times on the important role political parties play in the American electoral process.<sup>218</sup> Specifically, political parties provide important organizational structure, help disseminate political information, and assist candidates who support the party's ideas and policies become elected.<sup>219</sup>

215. See *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado Republican I)*, 518 U.S. 604, 616–18 (1996) (finding that soft money donations to political parties pose little threat of corruption).

216. See S. Amend. 146 to The Bipartisan Campaign Finance Act of 2001, S. 27, 107th Cong. (2001). Senator Chuck Hagel (R-NE) introduced the legislation on March 26, 2001 and it was tabled on March 27, 2001 by a vote of 52 yeas, 47 nays, and one not voting. 147 CONG. REC. 4605 (2001). Senator Hagel's alternative would have allowed an individual to donate \$60,000 in soft money to political parties during each year of an election cycle. In addition, it would have created more stringent regulations to monitor the amount of soft money contributions and to regulate the ratio state and local political committees could spend on federal election as compared with state and local elections. S. Amend. 146 to The Bipartisan Campaign Finance Act of 2001, S. 27, 107th Cong. (2001).

217. See James Bopp, Jr. & Richard E. Coleson, *The First Amendment Needs No Reform: Protecting Liberty from Campaign Finance "Reformers"*, 51 CATH. U. L. REV. 785, 816 (2002) (explaining how the enactment of McCain-Feingold has limited the advocacy, legislative, and organizational activities of political parties).

218. See *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado Republican II)*, 533 U.S. 431, 479–80 (2001) (emphasizing that parties do not simply elect candidates, but rather act as agents for spending on behalf of those who seek to produce obligated officeholders); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (recognizing that the right to form political parties is protected by the First Amendment); *Norman v. Reed*, 502 U.S. 279, 288 (1992) (recognizing that political parties enable like-minded voters to gather in pursuit of shared political goals); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) (articulating the view that a state election law is unconstitutional if it burdens the rights of political parties and their members without advancing a compelling state interest); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214–17 (1986) (asserting that although the First Amendment protects political parties' important role in helping like-minded individuals further a common goal, Congress has the right to regulate political parties).

219. See Bopp & Coleson, *supra* note 217, at 816 (quoting Haley Barbour, former Chairman of the Republican National Committee, who defined a political party as "an association of like-minded people who debate issues, who attempt to influence government policy, and who work together to elect like-minded people to local, State and Federal office").

Despite the Court's recognition of the importance of political parties, supporting the ban on their use of soft money is easy to understand. First, political parties "made their own bed" by failing to police themselves and control the access and leverage provided to soft-money contributors.<sup>220</sup> Their failure to do so undergirds arguments that the ban is necessary to prevent the appearance of corruption in wake of the public outcry surrounding the "Lincoln Bedroom" and other contribution-related scandals.<sup>221</sup> Additionally, it is arguable that political parties' role as associations of individuals who support certain political ideals has not been diminished or prohibited by the ban.<sup>222</sup>

The Roberts Court appears poised to strike down campaign finance regulations even if they serve some anti-corruption purpose when the regulation prevents a political party from effectively supporting its candidates.<sup>223</sup> McCain-Feingold's soft-money ban has had a negative effect on the political parties' ability to function because the ban has funneled resources away from political parties to unregulated outside groups.<sup>224</sup> In *Randall*, the Court denounced the negative effects of Vermont's Act 64, which constrained the ability of political parties to coordinate expenditures, accept contributions, and assist in pivotal races.<sup>225</sup> Specifically, the Court emphasized the importance of allowing individuals to contribute to a party without specifying a candidate because expressing general support for a

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220. Editorial, *Campaign Reform on Trial*, N.Y. TIMES, Dec. 4, 2002, at A30 (arguing that the new law was necessary to stop political parties from using soft money contributions to get around campaign finance laws and also to ensure that all Americans can meaningfully participate in the electoral process).

221. Katharine Seelye & Alison Mitchell, *Pocketing Soft Money Till Pocket Is Sewn Up*, N.Y. TIMES, Mar. 4, 2002, at A1 (stating that big donors to the Clinton-Gore campaign were rewarded with stays in the Lincoln Bedroom).

222. *But see* Bopp & Coleson, *supra* note 217, at 820 (arguing that McCain-Feingold's regulations, specifically the ban on the use of soft money by political parties, prohibits the use of such funds for issue advocacy, legislative, and organizational purposes and treats political parties as "federal-candidate election machines," ignoring the effect on other obviously important party activities).

223. *See* *Randall v. Sorell*, 548 U.S. 230, 257-58 (2006) (affirming the important role political parties play in electing candidates who share their political ideals and fearing that strict contribution limits could have a tremendous effect on the parties' ability to reach their goals).

224. *See* Ruth Marcus & Juliet Eilperin, *Campaign Bill Could Shift Power Away From Parties*, WASH. POST, Apr. 1, 2001, at A1 (discussing the negative effects the soft-money ban will likely have on political parties).

225. *See* *Randall*, 548 U.S. at 257-58 (explaining the ramifications of the law and how it would prohibit the party from using the collective sums of individual contributors to support candidates as the party saw fit).

political party was sufficient to invoke First Amendment association rights.<sup>226</sup>

This important right, recognized by the Court in *Randall*, is the same right infringed upon by the ban on soft money.<sup>227</sup> The ban significantly diminishes the ability of people to associate with political parties and, thus, to effectively support their candidates.<sup>228</sup> Limitations on contributions act as a “defacto [sic] restraint”<sup>229</sup> on campaign expenditures, which the Court has routinely struck down.<sup>230</sup> Contribution limits have a direct effect on the amount a candidate or party is able to spend in an election and prevent challengers from running effective campaigns against entrenched incumbents who monopolize local political donors.<sup>231</sup> By preventing soft-money contributions to political parties, McCain-Feingold advantages incumbents at the expense of challengers, which decreases the benefits of a competitive democracy.<sup>232</sup> Furthermore, denying political parties the use of soft money to support legislative efforts prevents political parties from fully participating in one of their most historically important functions.<sup>233</sup> The Roberts Court will likely view the total ban on the use of soft money as overly intruding on the

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226. *Id.*

227. The Court in *Randall* spoke in terms of small individual contributions (\$20 or \$40) to political parties. *Id.* While this differs from the large soft money contributions made prior to McCain-Feingold, the sentiment is the same because contributions that support the general activity of the political party and the association rights of individuals can be overly restricted by certain campaign finance regulations and can be found unconstitutional. *Id.*

228. Compare *McConnell v. FEC*, 540 U.S. 93, 160–61 (2003) (rejecting any association infringement arguments against the ban on soft money because political parties are still able to meet and discuss strategy with local and state committees), with *Bopp & Coleson*, *supra* note 217, at 816 (describing two significant negative effects McCain-Feingold has had on political parties: imposing federal election law limits on state and local parties and “drastically limit[ing] the issue advocacy, legislative, and organizational activities of political parties”).

229. See *Gora*, *supra* note 58, at 24 (arguing that the Court’s reasoning in *Buckley* for striking down limits on expenditures is applicable to contributions as well because the primary beneficiaries of contribution limits are personally wealthy candidates who are better able to expend large amounts than candidates who are “not well-connected or well-heeled”).

230. See *Randall*, 548 U.S. at 242 (stating that the Supreme Court has followed *Buckley*’s holding for the last thirty years).

231. See *Kuhne*, *supra* note 61, at 856 (noting that Justice Scalia’s dissenting opinion properly indicates that soft money assists challengers more often than incumbents).

232. See *Conti*, *supra* note 92, at 132–34 (asserting that challengers, especially minority and female candidates, are disadvantaged by contributions limits).

233. See *Bopp & Coleson*, *supra* note 217, at 820 (stressing the point that political parties are more than “election machines” and necessarily support a broad range of issue advocacy, legislative, and organizational activities).

important territory of political parties, which overshadows its anti-corruption purpose.<sup>234</sup>

Additionally, donations to political parties do not present the same risks of corruption as donations to particular political candidates.<sup>235</sup> Contribution limits were enacted to prevent actual quid pro quo relationships as well as instances of perceived corruption.<sup>236</sup> In past decisions, the Supreme Court has held that political parties have never been seen as the purveyors of political corruption that they were painted to be by McCain-Feingold.<sup>237</sup> Several of the Justices who upheld the soft-money ban in *McConnell* at one time admitted that the risk of corruption from soft-money contributions to political parties is “at best, attenuated,”<sup>238</sup> because there is no direct connection between the contribution and the office holder.<sup>239</sup>

Due to the obviously negative effect the ban has had on political parties, it will not meet the first prong of the Roberts Court’s new test. Because the ban funnels financial support away from political parties and lacks a basis in a legitimate fear of corruption, the Roberts Court will likely find that the ban on the use of soft money fails to meet the first prong of its test and does not respect the constitutional rights of political parties.<sup>240</sup>

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234. See Hasen, *supra* note 18, at 1106 (predicting that the constitutionality of the soft money ban is in jeopardy because of the Roberts Court’s narrowing of acceptable justifications for infringements and the new respect it showed for the rights of political parties in *Randall*).

235. See *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado Republican I)*, 518 U.S. 604, 616 (1996) (citing *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985)) (reasoning that the danger a contribution will be seen as an effort to obtain a quid pro quo is no greater when made to a political party than to a Political Action Committee, whose expenditure limits the Court has held unconstitutional).

236. See UROFSKY, *supra* note 1, at 46 (describing the influence of Watergate on the enactment of the 1974 Amendments, which led to the decision in *Buckley*). But see Kuhne, *supra* note 61, at 852 (distinguishing soft money from the type of “quid pro quo” corruption that is said to “justify contribution limits”).

237. See *Colorado Republican I*, 518 U.S. at 616 (“We are not aware of any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction.”); see also *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 496–500 (1985) (examining a Political Action Committee (PAC) and holding that a large PAC does not have the sufficient corruptive tendency to overcome the “fatally overbroad” restriction on expenditures).

238. *Colorado Republican I*, 518 U.S. at 616.

239. See Ghazal, *supra*, note 193, at 223–24 (stating that in the absence of coordination a large contribution is less likely to act as a corruptive influence because it is too attenuated from the candidate or government official).

240. See Bopp & Coleson, *supra* note 217, at 823 (citing *Jacobus v. Alaska*, 182 F. Supp. 2d 893 (D. Alaska 2001), *aff’d in part, rev’d in part*, 338 F.3d 1095 (9th Cir. 2003)) (arguing that while the soft money ban may have some anti-corruption effects, there is no sufficient justification for allowing the government to prevent the

3. *The ban on soft money intentionally diminishes the rights of wealthy contributors*

The ban on the use of soft money intentionally limits the First Amendment rights of wealthy individuals in order to favor other types of individuals and groups.<sup>241</sup> Individual participation in elections is a well-respected and protected right.<sup>242</sup> The Court has held that it is imperative that individuals enjoy equal opportunity to express their views through the political process.<sup>243</sup> Recently, in *Davis*, the Court has indicated the wealthy enjoy this same right.<sup>244</sup> The main intent behind the ban on the use of soft money is similar to that of the Millionaires' Amendment, which the Court recently struck down as unconstitutional, because both intentionally favor certain individuals and groups over wealthy individuals by directly limiting the ability of wealthy individuals and groups to participate in the electoral process.<sup>245</sup>

Many scholars argue that any anti-corruption requirements should be disregarded because they fail to serve the best interests of

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use of separate soft money accounts that can be used to support issue advocacy and voter mobilization).

241. See *Davis v. FEC*, 128 S. Ct. 2759, 2773 (2008) (holding regulations intending to "equaliz[e] the relative ability of individuals and groups to influence the outcome of elections . . . wholly foreign to the First Amendment" (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976))); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 694, 705 (1990) (Kennedy, J., dissenting) ("[T]he notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative influence of speakers on elections is antithetical to the First Amendment . . .").

242. See *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates."); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) ("It is a prized American privilege to speak one's mind . . . and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion.'") (internal citations and quotations omitted).

243. See *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 14 (1986) (plurality opinion) (recognizing the right of different political views between two groups but not requiring that one group "be forced . . . to help disseminate hostile views").

244. See *Davis*, 128 S. Ct. at 2774 (listing wealthy supporters who will donate large amounts to a campaign as a strength for candidates that Congress should not diminish); see also Hasen, *supra* note 18, at 1105 (arguing that the Roberts Court will find that wealthy individuals have a "right[]" to make large donations to political parties).

245. See *Davis*, 128 S. Ct. at 2774 ("Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the members of the House of Representatives."); see also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.31 ("Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves.").

society.<sup>246</sup> Supporters of this approach argue for greater deference to the legislature in its pursuit of creating a better system.<sup>247</sup> They argue that the soft-money ban is necessary to create a system grounded in a tradition of civic republicanism, which addresses societal interests.<sup>248</sup> By allowing the legislature more latitude in enacting broad laws, the Court will clear the way for improving electoral politics and benefit the country as a whole.<sup>249</sup> A fierce tension fills the space between supporters of greater legislative restriction of campaign finance issues and those, including many members of the Supreme Court, who believe in the “individual rights first” approach.<sup>250</sup> Although an approach favoring regulation has some attractive qualities, it fails to consider the larger impact that greater legislative deference could have on the electoral process.<sup>251</sup>

The Millionaires’ Amendment and the ban on the use of soft money both disproportionately affect wealthy individuals and groups. The Millionaires’ Amendment “punished” wealthy candidates for federal office by forcing them to make a lose/lose decision: either forgo using their own wealth to assist their candidacy or use their personal wealth and allow their opponent to disregard federal contribution limitations, which diminishes the effectiveness of a

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246. See, e.g., Ringhand, *supra* note 179, at 93–94, 112 (arguing that the fluidity of the corruption-based paradigm has created serious problems and uncertainty in campaign finance jurisprudence and negates members of the Court from fully expressing what the author argues is proper decision-making methodology).

247. See *id.* at 112 (arguing that because judicial reasoning in the area of campaign finance relies on certain unjustified preferences regarding democracy, deference to the legislative arena will allow for clearer and more consistent regulations).

248. See *id.* at 83–84 (describing how the goals of a civic republican system include reducing the influence of outside groups, raising the quality of political debate, and promoting political equality).

249. See Shauer & Pildes, *supra* note 127, at 1820, 1835–36 (asserting that the idea that campaign contributions and expenditures are protected by the First Amendment is “long on rhetoric and short on substance,” and advocating for an approach that would remove election-related speech jurisprudence from the sphere of First Amendment protection and allow for stronger regulation based on various policy reasons).

250. See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 679 (1990) (Scalia, J., dissenting) (“Attention all citizens. To assure the fairness of elections by preventing disproportionate expression of the views of any single powerful group, your Government has decided that the following associations of persons shall be prohibited from speaking or writing in support of any candidate . . . . It is rudimentary that the State cannot exact as the price of [special advantages conferred on certain associations and individuals] the forfeiture of First Amendment rights.”).

251. See *Davis v. FEC*, 128 S. Ct. 2759, 2773 (2008) (expressing concerns about the intrusion of government regulation on campaign and election-related speech because it would usurp the traditional role voters play in the American electoral experience).



wealthy candidate's speech.<sup>252</sup> Similarly, the ban on the use of soft money imposed by McCain-Feingold prevents wealthy individuals or groups from making financial contributions that are not earmarked for specific candidates.<sup>253</sup> The soft-money ban then prevents political parties from spending these contributions on various campaigns and transferring contributions to state political committees for their use, as well as historically important party activities including legislative research, voter mobilization, and administrative activities.<sup>254</sup> While wealthy individuals and groups are still allowed to contribute a sizeable amount of hard money to political parties, they are not allowed to contribute any soft money.<sup>255</sup> This diminishes a wealthy contributor's ability to exercise his support for general party activities.<sup>256</sup> Both regulations directly impose substantial burdens on the rights of wealthy individuals and groups to engage in the political process.

The enactment of the soft-money ban and the Millionaires' Amendment are similar because they represent an unacceptable legislative choice.<sup>257</sup> The Millionaires' Amendment was a choice by the legislature to eliminate the alleged advantage wealthy candidates

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252. *See id.* at 2770 (introducing the argument that the Millionaires' Amendment unconstitutionally burdens First Amendment rights, which the Court ultimately held to be correct).

253. *See* 2 U.S.C. § 441i(b)(2)(B)(i) (2006) (exempting contributions to "clearly identified candidate[s]").

254. *Cf. McConnell v. FEC*, 540 U.S. 93, 174 (2003) (upholding contribution limits as not adversely affecting the relationship between national, state, and local political parties, but narrowly construing the ban to apply only to funds not raised in compliance with FECA).

255. *See* 2 U.S.C. § 441i (prohibiting all donations of soft money to political parties).

256. *See id.* § 441a(a)(1)(B), (1)(D), (3)(B) (limiting contributions to national political parties to \$25,000 and to state political parties to \$10,000; and preventing donations of more than \$57,500 in total to political committees).

257. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994) (reiterating that *Buckley* requires that laws or regulations affecting the First Amendment rights of certain individuals and not of others be analyzed under strict scrutiny to determine if "the legislature's speaker preference reflects a content preference"); *see also Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976) (rejecting an argument that the "First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society").

Since a corporation or other organization deserves the same free speech and expression rights as an individual, it would follow logically that this inequality also affects corporations and their right of political expression. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-83 (1978) (extending First Amendment protection to corporations when the expression is based on "public discussion and the dissemination of information and ideas."). *But see Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 657-61 (1990) (holding that corporations enjoy less First Amendment protection than real persons).

enjoy by creating asymmetrical contribution limitations that benefit non-self-financing candidates.<sup>258</sup> The ban on the use of soft money increases the power and influence of third-party groups, celebrities, and the corporate media at the expense of political parties and wealthy contributors to those political parties.<sup>259</sup> These regulations decrease the ability of specific individuals, namely the wealthy, to engage in certain types of political expression because Congress did not like the level of influence or alleged advantages those individuals had over others.<sup>260</sup>

The Supreme Court has upheld campaign finance regulations requiring a candidate to make a choice regarding expenditures.<sup>261</sup> In *Buckley*, the Court allowed Congress to set conditions for candidates using public funds.<sup>262</sup> However, the majority in *Davis* clearly distinguished that choice from the one forced upon wealthy candidates under the Millionaires' Amendment because the regulation imposed a penalty on the candidates, no matter which choice they made.<sup>263</sup> The soft-money ban also provides no recourse for wealthy individuals, groups, and political parties because it does not allow individuals or groups to donate or use even a limited amount of non-earmarked soft money.<sup>264</sup>

Some may argue that the Millionaires' Amendment and the ban on soft money are dissimilar because they implicate two divergent

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258. See *Davis v. FEC*, 128 S. Ct. 2759, 2774 (2008) (detailing the government's argument that the Millionaires' Amendment is necessary because strict contribution limits make it difficult for non-wealthy candidates to compete).

259. See *McConnell*, 540 U.S. at 286 (Kennedy, J., dissenting) (denouncing the soft-money ban because it provides safe harbor to the "mainstream press" and forces speakers to abandon their own choice to speak through parties and organizations); Marcus & Eilperin, *supra* note 224, at A9 ("What we are doing is destroying the party system in America. The political parties would be neutered, and third-party groups would run the show." (quoting Congressman Martin Frost)).

260. See *Davis*, 128 S. Ct. at 2774 (stressing that congressionally enacted regulations should not dictate which types of strengths should be exposed to the public and which should be limited).

261. See *Buckley*, 424 U.S. at 57 n.65 ("Congress may . . . condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations.").

262. *Id.*

263. See *Davis*, 128 S. Ct. at 2772 (describing that conditions for the acceptance of public financing still allowed individuals the right to choose to opt out of public financing and spend as much money as they wanted). With the Millionaires' Amendment, however, candidates are either limited in the amount of personal funds they may spend, or if allowed to spend as much as they please, their opponent is then given much larger contribution limitations. *Id.*

264. See *McConnell*, 540 U.S. at 289 (Kennedy, J., dissenting) (stating that the First Amendment problems with the legislation are obvious).

categories: contributions and expenditures.<sup>265</sup> This argument misses the larger problem inherent in both regulations: they are examples of a legislative effort to diminish the influence of a certain group of people while intentionally expressing a preference for other individuals and groups.<sup>266</sup> It is not Congress's role to limit the quantity of certain individuals' political speech in hopes of improving political speech as a whole.<sup>267</sup> It is also unclear that either the Millionaires' Amendment or the ban on the use of soft money would clearly produce that result.<sup>268</sup> Additionally, after the holding in *Davis*, there is an inequality in the treatment of wealthy candidates and donors under existing campaign finance regulations.<sup>269</sup> Justice Alito embraced the idea that individual strengths of candidates can be diverse and include being personally wealthy and "hav[ing] wealthy supporters who are willing to make large contributions."<sup>270</sup> By choosing to diminish wealthy contributors, the ban on the use of soft money conflicts with the *Davis* holding because it allows Congress, instead of the voters, to decide which strengths should be heard and valued.<sup>271</sup> Weary of the growing expansion of congressional involvement in the influencing of elections, the Roberts Court has developed a stricter anti-corruption rationale that considers the intent of the regulation.<sup>272</sup> Similar to the Millionaires'

265. See *Buckley*, 424 U.S. at 53 n.58 (finding that the use of personal funds directly facilitates speech, as opposed to contributions, which only express a general view).

266. See *Kuhne*, *supra* note 61, at 856 (explaining that the new limitations upheld by *McConnell* significantly limit the ability of parties to support "cash-strapped challengers," and only allow transfers of non-monetary sources, such as media access and notoriety).

267. See *Davis*, 128 S. Ct. at 2774 n.8 (describing the idea of controlling the quantity of political speech as dangerous); *McConnell*, 540 U.S. at 227 (stating that there is no legal right to have the same resources to influence the election process).

268. See *Davis*, 128 S. Ct. at 2774 n.8 (discussing Justice Stevens's suggestion that a limitation on the quantity of campaign speech would lead to an improvement in the quality of campaign speech, but concluding that there is no reason to believe such an effect would occur).

269. The ban on soft money significantly limits the ability of contributors to participate in political expression by generally supporting a political party. See *Conti*, *supra* note 92, at 134 (denouncing the negative effects of the ban on the use of soft money because it overly burdens minority and female candidates). Conversely, after *Davis*, wealthy candidates no longer face an unenviable choice between limiting their personal contribution to their campaign or allowing their opponent to enjoy liberalized contribution limitations. See *Davis*, 128 S. Ct. at 2775 (holding the Millionaires' Amendment to be unconstitutional).

270. *Davis*, 128 S. Ct. at 2774.

271. See *BeVier*, *supra* note 100, at 83 (denouncing *McConnell*'s departure from *Buckley* "in favor of a vision of the more perfect democracy that they believed BCRA's regulatory regime embodied").

272. See *Davis*, 128 S. Ct. at 2774 ("[I]t is dangerous business for Congress to use the election laws to influence the voters' choices.").

Amendment, the ban on soft money represents the intent of the legislature to diminish the influence of wealthy individuals by restricting their ability to support general party activities.<sup>273</sup> Under the Roberts Court's test, such intent is impermissible.

#### CONCLUSION

The Supreme Court's recent campaign finance jurisprudence jeopardizes the future of McCain-Feingold's controversial soft-money ban. Compared to past decisions, the Roberts Court has developed a stricter anti-corruption analysis in recent campaign finance cases. The new analysis focuses on both the legislation's actual anti-corruption effect *and* the legislative intent behind the regulation. The ban on the use of soft money by political parties is similar to recent campaign finance regulations that the Roberts Court has declared as unconstitutional because it fails to achieve an actual anti-corruption purpose, infringes too far on the rights of political parties to justify its supposed anti-corruption purpose, and represents a legislative choice to favor certain individuals and groups at the expense of wealthy donors. The application of this test will have significant impact on American politics and all federal elections because it will provide the rationale to strike down the soft-money ban and other regulations that trespass too far into protected First Amendment grounds.<sup>274</sup> This return to a strict anti-corruption analysis takes the power to influence and determine elections away from Congress and restores it to its proper place: the American people.<sup>275</sup>

Finally, lost behind the negative propaganda surrounding the participation of wealthy individuals in politics is the fact that large contributions to political parties can make a significant difference in reducing social ills. As an example, J.K. Rowling, the wealthy British author, recently made donations of one million pounds to the British Labour Party.<sup>276</sup> Rowling made the donations based on the party's

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273. See 147 CONG. REC. 3853 (2001) (statement of Sen. McCain) ("As long as the wealthiest Americans and richest organized interests can make six and even seven figure donations to political parties . . . most Americans will dismiss the most virtuous politician's claim of patriotism.").

274. See Hasan, *supra* note 18, at 1106 (anticipating that under the Roberts Court's campaign finance jurisprudence the soft money ban will likely be severely reduced in scope or eliminated altogether).

275. See *Davis*, 128 S. Ct. at 2774 ("The Constitution . . . confers upon voters, not Congress, the power to choose . . .").

276. See *JK Rowling Gives Labour £1M Donation*, GUARDIAN, Sept. 20, 2008, <http://www.guardian.co.uk/politics/2008/sep/20/labourconference.jkrowling>

reputation for confronting child poverty.<sup>277</sup> Prime Minister Gordon Brown, the head of the Labour Party, graciously thanked the author for her generous donation and stated that the funds would be used to repay party debt but also to help support the party's effort to address child poverty and related issues.<sup>278</sup> Rowling, a wealthy contributor, was allowed to donate a large financial contribution to a political party of her choice based solely on the party's general policy stances.<sup>279</sup> In the not too distant future, individuals and groups here in the United States, who share the same support for our own political parties as Rowling, will again be able to express their support in a similar fashion.

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(describing Rowling's belief that poor families would fare better under the Labour party).

277. *See id.* (noting that Rowling supported Labour's stance on child poverty instead of the Tory party's support of tax breaks for married couples).

278. *Id.*

279. *See id.* (emphasizing that Rowling made her contribution because of the Labour party's consistent advocacy for a cause she supports).