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MAGIC WORDS AND MILLIONAIRES: THE SUPREME COURT'S ASSAULT ON CAMPAIGN FUNDING

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I. INTRODUCTION

Every couple of years, when campaign season rolls around, television and radio sets across the country, and especially those in a contested "swing" state during a presidential election, get bombarded with advertisements extolling the virtues of this candidate, or enumerating that candidate's shortcomings. The advertisements are often very well done, some bordering on slick. They can be clever, and even, occasionally, informative. But the most striking thing about these political advertisements is that they just keep coming, and coming, and coming. It makes you wonder, where does all the money come from?

After you've seen or heard a commercial a few times, you begin to notice some curious things about these ads. At the end of a pretty good commercial explaining why John Smith ought to be your next congressman, an awkward looking fellow appears on the screen and, in a painful statement of the obvious, says, "Hi, I'm John Smith and I approve this ad." Why is he telling you something you already know?

The really nasty, negative ads can be fun to watch. At the end of most of them, a blurb flashes across the bottom of the screen saying that the commercial was "paid for by" some group you've never heard of, like the "Swift Boat Veterans for Truth" from the 2004 presidential election. Who are they, you wonder, and why do they care about who you vote for?

There can be little dispute that the federal campaign finance system is complicated and confusing. The government book containing the federal campaign regulations (not the laws themselves, just the regulations) is 378 pages long.[1] Even the Supreme Court has recognized this mess: "federal election

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1. 11 C.F.R. §§ 1.1-9039.3 (2008).

campaign laws, which are already so voluminous, so detailed, so complex, that no ordinary citizen dare run for office, or even contribute a significant sum, without hiring an expert advisor in the field. . . ."[2] How did it become so confusing, and does it need to be this complicated?

Congress has twice passed legislation, the initial 1972 Federal Election Campaign Act (FECA),[3] and the more recent Bi-Partisan Campaign Reform Act of 2002 (BCRA),[4] designed to limit the influence of money in the political process. This Article will focus on these laws and the confusion resulting from the Supreme Court's treatment of these laws in the face of constitutional challenge. While the Court has generally accepted contribution limitations, it has consistently rejected Congressional attempts to limit campaign expenditures. As a result, Congress is virtually powerless to limit the total amount of campaign spending, but instead simply forces the money in this direction or that, resulting in the confusing hodge-podge of the current law.

In particular, this Article will focus on the Supreme Court's most recent decisions regarding separate provisions of the 2002 legislation. In the first decision, *FEC v. Wisconsin Right to Life*,[5] the Court invalidated a major provision of the 2002 legislation,[6] after appearing to have upheld it only a few years earlier.[7] The Court, in the second decision, *Davis v. FEC*,[8] likewise struck down another major provision of the 2002 Act regarding fundraising by individual candidates facing wealthy opponents.[9] Through these decisions, the Supreme Court demonstrates that it is increasingly intolerant of Congressional efforts to "reform" the campaign finance laws by reducing over-all spending, and perhaps more significantly, shows its hostility toward the current campaign finance system, and an invitation to Congress to scrap the entire system and start over.

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2. McConnell v. FEC, 540 U.S. 93, 264 (2003) (Scalia, J., concurring in part and dissenting in part).

3. Federal Election Campaign Act, Pub. L. No. 92-225, 86 Stat. 3, (codified as 2 U.S.C.A. §§ 431-455 (West 2008)).

4. Bi-Partisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 and 36 U.S.C.).

5. 127 S. Ct. 2652 (2007).

6. *Id.* at 2673.

7. *See McConnell*, 540 U.S. at 245 (holding that the BRCA is constitutional under a strict scrutiny balancing test that weighs First Amendment interests with the interests served by the legislation).

8. 128 S. Ct. 2759 (2008).

9. *Id.* at 2772.

II. WHY IS IT SO COMPLICATED? THE HISTORY OF CAMPAIGN FINANCING REGULATION

A. *Campaign Finance Limits Split in Two*

The story begins, as many tragedies do, with good intentions. In the aftermath of the 1972 election, Congress decided to confront the perception that the political and election process had become corrupted by the influence of large political contributions.[10] In short, Congress believed that the amount of money in federal elections could create "the appearance of improper influence" which must be avoided "if confidence in the system of representative government is not to be eroded to a disastrous extent."[11]

FECA tackled the issue of money in elections head-on. But it did so in an even handed way—it limited both money coming into elections, by limiting contributions to candidates by individuals and political action committees, and going out, by imposing limits on the amount of money that any candidate or committee could spend on their campaign.[12] The Act also continued a pre-existing ban on political contributions by corporations and labor unions.[13] FECA also created the system of public financing of presidential elections whereby candidates agree to accept public funds for their presidential campaigns and agree to voluntarily limit their expenditures to that amount.[14] In short, the Act limited the amount of money a candidate could raise and spend in pursuit of election to a federal office.

Whether such a simplistic statutory structure would have proven effective will never be known, because shortly after its passage, the Supreme Court took up the constitutionality of the Act in *Buckley v. Valeo*.[15] In *Buckley*, the Court upheld the limits on campaign contributions, concluding that "a limitation upon the amount that any one person or group may contribute to a

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10. *See* Buckley v. Valeo, 424 U.S. 1, 26-27 (1976) (referring to the "the deeply disturbing examples surfacing after the 1972 election" of large contributions given in exchange for political quid pro quos). Such quid pro quo contributions undermine "our system of representative democracy." *Id.*

11. *Id.* at 27 (quoting U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO, 413 U.S. 548, 565 (1973)).

12. *See Buckley*, 424 U.S. at 19-20 (analyzing FECA's restrictions on campaign contributions and expenditures).

13. 2 U.S.C.A. § 441b(a) (West 2008). Corporations and labor unions could participate in the political process by establishing a political action committee that could solicit voluntary personal contributions from employees and members, respectively. 2 U.S.C.A. § 441b(b)(2)(C).

14. 26 I.R.C. § 9006(a) (West 2008) (creating income tax check-off for public funding of presidential elections).

15. 424 U.S. at 1.

candidate or a political committee entails only a marginal restriction upon the contributor's ability to engage in free communication."[16] In the Court's judgment, a contribution to a candidate could be limited because it was a "general expression of support" lacking explanation of the basis for that support.[17]

On the other hand, the Court struck down expenditure limits (both for committees and individual candidates) because "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[18]

Congress' attempt to limit the influence of money in elections was thus greatly curtailed. Congress passed a law intended to limit the money being raised and spent on campaigns, but the Court's decision in *Buckley* replaced it with a system that limited the amount being raised, but not the amount being spent, on elections.

Buckley thus created a system in which more money could be spent on elections than could be raised under the contribution limits. The limits imposed an artificial ceiling on the amount of money that candidates could raise through contributions, but the absence of expenditure limits provided an incentive to raise more and more money. In many respects, the federal campaign finance system operated like a currency exchange in a third-world banana republic, where the government tries to artificially prop up the value of its currency through an "official", and artificially high, exchange rate that is almost universally ignored for a more realistic "unofficial" or black market exchange rate. Only in the case of federal elections, this dichotomy became known as the system of "hard" and "soft" money.

B. Buckley's *Legacy: Magic Words and Millionaires'*

1. Hard Money, Soft Money and the Rise of the Issue Ad

FECA originally limited the amount an individual could contribute to a candidate for federal office to $1,000 per election, with an aggregate personal annual contribution limit of $20,000.[19]

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16. *Id.* at 20.
17. *Id.* at 21.
18. *Id.* at 19.
19. 2 U.S.C.A. § 441a(a)(1) (West 1972), *amended by* 2 U.S.C.A. § 441a(a)(1) (West 2002). The 2002 amendments raised the single candidate limit to $2,000 and the aggregate limit to $25,000. 2 U.S.C.A. § 441a(a)(1). *See infra* note 111 and accompanying text (explaining that the inflation adjusted individual contribution limit for 2007-08 is $2,300).

Political committees could contribute $5,000 per year.[20] These statutory limits were hard and fast, hence the name "hard" money.[21] These limits applied to any funds contributed "for the purpose of influencing any election for Federal office."[22] The Act similarly defined "expenditure" as the use of funds by any person "for the purpose of influencing any election for Federal office."[23] This very broad, but seemingly simple, concept was designed to cover the field of campaign related expenditures and further Congress' goal of reducing the influence of money in political campaigns.[24] However, this is where *Buckley* threw its second punch at FECA and delivered the knock-out blow to effective regulation from which the system has never recovered.

What does it mean to "influence" a federal election? And what about expenditures that were not made for that purpose? In *Buckley*, the Court considered these questions and determined that FECA's 'definitions were overly vague and could be upheld only upon the narrowest of readings.[25] Noting that the ambiguity of the phrase "for the purpose of influencing" posed "constitutional problems," the *Buckley* Court recognized its "obligation to construe the statute. . . to avoid the shoals of vagueness."[26] The Court therefore limited FECA's definitions to apply only to expenditures, and therefore contributions that "expressly advocate the election or defeat of a clearly identified candidate."[27] In the now infamous "footnote 52," the Court explained that "express words of advocacy" included phrases such as ""vote for', 'elect,' 'support,' 'cast your ballot for', 'Smith for Congress', 'vote against,' 'defeat,' and 'reject.'"[28]

The Court's limitation of FECA's definitions to communications containing express advocacy either for or against

20. 2 U.S.C.A. § 441a(a)(2).

21. *See McConnell*, 540 U.S. at 122 (explaining the origin of the distinction between hard and soft money); *see also* Robert Bauer, SOFT MONEY HARD LAW: A GUIDE TO THE NEW CAMPAIGN FINANCE LAW, 1-3 (2002) (describing the limits on campaign financing and the distinction between soft and hard money contributions).

22. 2 U.S.C.A. § 431(8)(a)(i) (West 2008).

23. 2 U.S.C.A. § 431(9)(a)(i).

24. *Buckley*, 424 U.S. at 7 (stating that the D.C. circuit, in upholding the Act, had viewed FECA as "by far the most comprehensive reform legislation (ever) passed . . . concerning the election of the President, Vice-President, and members of Congress" (quoting Buckley v. Valeo, 519 F.2d 821, 831 (D.C. Cir. 1975)).

25. *Buckley*, 424 U.S. at 41 (deciding that "[t]he use of so indefinite a phrase as "relative to" a candidate fails to clearly mark the boundary between permissible and impermissible speech").

26. *Id.* at 77-78.

27. *Id.* at 80.

28. *Id.* at 44 n.52.

a candidate's election was important for two reasons. First, it drew a bright line distinction between election related communications and all other forms of speech. If a communication contained "magic words"[29] such as "vote for" or "re-elect" it fell under the purview of the Act and its limitations.[30] If, on the other hand, the communication simply avoided the use of the magic words, it was beyond FECA's scope and could be free of regulation.[31] Secondly, and equally important, if a communication avoided the magic words, the funds used to pay for it also remained beyond FECA's scope.[32] As a result, the hard and fast contribution limits applicable to federal candidates would not apply to expenditures that did not contain express advocacy.

Needless to say, even advertisements and other communications that did not include the magic words were nonetheless intended to influence voters and their behavior.[33] But they did not do so by urging the audience to either vote for or against a candidate.[34] Instead, these advertisements had the pretense of attempting to influence the audience to "call your congressman" and urge him to act one way or another on a particular issue.[35] As a result, and to differentiate from express advocacy advertisements, these communications urging the audience to do something other than vote for or against a candidate became known as "issue ads."[36] However, the distinction between express and issue advocacy was, for all practical purposes, nonexistent, and an "issue ad" was really just a term for a campaign commercial that did not contain the magic words.[37] The Supreme Court, in later considering the issue recognized that the distinction between an "issue ad" and a campaign commercial was "functionally meaningless."[38] In fact, campaign professionals generally agreed that the most effective campaign advertisements eschewed the magic words anyway, the

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29. THE CAMPAIGN LEGAL CTR., THE CAMPAIGN FINANCE GUIDE 37 (2004), *available at* http://www.campaignlegalcenter.org/attachments/1223.pdf. *See also* FEC v. Furgatch, 807 F.2d 857, 863 (9th Cir. 1987) (rejecting the strict "magic words" test; this was the first federal circuit court to use the phrase "magic words" when referring to *Buckley* list of examples of express advocacy).

30. THE CAMPAIGN LEGAL CTR., *supra* note 29, at 37.

31. *Id.*

32. *Id.*

33. *McConnell*, 540 U.S. at 126.

34. *Id.* at 126-27.

35. *Id.* at 127.

36. *Id.* at 126.

37. *Id.* at 126-27.

38. *See id.* at 193 (citing McConnell v. FEC, 251 F. Supp. 2d 176, 303-04 (D.D.C. 2003) (Henderson, J.); *id.* at 534 (Kollar-Kotelly, J.); *id.* at 875-79 (Leon, J.)) (noting that all three district court judges had agreed on the lack of utility of the magic words test).

same way that effective product advertisements do not urge the viewer to buy the product.[39]

In fairly short order, federal elections had essentially two campaign finance systems. The first governed funds used for express advocacy that were subject to the "hard" contributions limitations contained in FECA. A candidate who wanted to air a television commercial urging candidates to "vote for" him in the upcoming election, would have to finance that advertisement through individual contributions of no more than $1,000 per person or $5,000 per political action committee.[40] A million dollar advertising campaign would thus require the maximum $1,000 contribution from 1,000 separate donors, or 200 separate political action committees. Needless to say, raising that much money was challenging because the "hard money" necessary to finance it was subject to FECA's limitations and prohibitions.

The second system operated beyond FECA's scope and was similar to the black market currency exchange in third world countries. Avoiding FECA became simply a matter of semantics: avoid the magic words and avoid regulation entirely. If a particular advertisement did not contain express advocacy, its sponsors could finance it entirely with soft money.[41] More importantly, if that sponsoring group never engaged in express advocacy at all, its entire existence would be beyond FECA's scope. As a result, the prohibitions on corporate or labor union contributions would not apply. The individual contribution limit of $2,000 would not apply, nor would the aggregate annual limit of $25,000. Returning to the example, the same candidate could finance the same million dollar advertising campaign with $100,000 contributions from only ten donors. The only difference is that in this second, unregulated instance, the candidate could extol his virtues, talk about how great a congressman he would be, tout his stance on any issues, but would simply avoid urging the viewer to "vote for" him. Because the funds used to finance this second, unregulated system were not subject to the hard rules governing express advocacy, it came to be described as "soft money."[42]

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39. *McConnell*, 540 U.S. at 127.

40. 2 U.S.C.A. § 441a(a)(1) (West 1972), *amended by* 2 U.S.C.A. § 441a(a)(1) (West 2002). The 2002 amendments raised the single candidate limit to $2,000 and the aggregate limit to $25,000. 2 U.S.C.A. § 441a(a)(1). *See generally McConnell*, 540 U.S. at 93 (invalidating other portions of § 441a, but not the increased individual contribution limits). *See infra* note 111 and accompanying text (explaining that the inflation adjusted individual contribution limit for 2007-08 is $2,300).

41. *McConnell*, 540 U.S. at 123-24.

42. *Id.* at 122-23. The term "soft money" was meant to connote the opposite of "hard money," but perhaps should have been more accurately described as

Not only could a candidate extol his or her virtues and position, but perhaps more importantly, soft money could be used to attack an opponent without reservation.[43] Because the communications were financed with unregulated soft money, and not the candidate's own campaign funds, the attacking candidate was able to distance him or herself from the communication.

Political parties, because of their pre-existing structure, became the principal outlets for soft money.[44] FECA explicitly recognized that political party committees had a dual purpose—supporting candidates for federal office and also candidates for state and local offices.[45] Because a party's activities supporting federal candidates were subject to FECA's restrictions and limitations, but those supporting state and local candidates were not, party committees had to separate their federal election related funds from their state and local (or, in the vernacular) non-federal funds.[46] These non-federal accounts that party's maintained became the perfect conduit for soft money.

In time, soft money became the principal vehicle for fundraising and financing both presidential and congressional elections. In presidential elections, the candidates were confined by the spending limits imposed by public financing,[47] but because soft money did not involve express advocacy, it provided candidates a method to communicate with voters above and beyond the public financing limitations. In Congressional elections, the abundance of soft money that corporations, unions, and other special interest groups were willing to contribute made financing elections infinitely easier.[48]

Beginning in 1988, both political parties began to solicit large amounts of soft money for the purposes of influencing, without expressly advocating, the presidential and Congressional

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"easy money."

43. *See id.* at 123-24 (reporting the increasing use of "soft money" outside FECA's purview).

44. *See id.* at 124 (explaining that national parties transferred large amounts of soft money to state parties which could use a larger percentage to fund mixed-purpose activities under FEC rules).

45. 2 U.S.C.A. § 431(20)(B)(ii); 11 C.F.R. §§ 106.5, 106.7 (2008). These sources provide restrictions on political party committees' spending in relation to candidates for federal office as well candidates for state and local office.

46. *See* THE CAMPAIGN LEGAL CTR., *supra* note 29, at 11-12 (describing the evolution of non-federal funds in the wake of FECA).

47. *See* 2 U.S.C.A. § 441a(b) (dictating the dollar limits on expenditures by presidential candidates).

48. David B. Magleby & Eric A. Smith, *Party Soft Money in the 2000 Congressional Elections*, *in* THE OTHER CAMPAIGN 27, 27-50 (David B. Magleby ed., 2003).

election.[49] By the 1992 election cycle, both the Republican and Democratic parties raised and spent between thirty-five and forty million dollars in soft money.[50] By 2000, that number had exploded to over $200 million by *each* party.[51]

2. Buckley's *Legacy: Soft Money & Self-Finance*

In *Buckley*, the Supreme Court concluded that contributing money to a political candidate was a lesser First Amendment expression than using the same money to make a direct political statement.[52] The Court recognized that "although [FECA's] contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions."[53]

The Court invalidated expenditure limits because "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[54] The limitation on candidates' expenditures of their own money was particularly problematic because "it is extremely important that candidates ensure that their views are made known to the electorate in order for the electorate to evaluate the candidates' personal qualities and their positions on the issues before casting their ballot on election day."[55] The Court recognized that the whole point of campaign finance restrictions was "avoiding undisclosed and undue influence on candidates from outside interests" and it that was not a concern when a candidate used his or her own funds to finance a campaign.[56] In fact, a self-financed candidate was less dependent on outside contributions and was less susceptible to" the coercion and dangers which the limitation in the FECA sought to prevent. . . ."[57] A limitation on contributions, on the other hand, "entails only a marginal restriction upon the contributor's ability to engage in free communication."[58] The Court also concluded that the effect of

49. THE CAMPAIGN LEGAL CTR., *supra* note 29, at 11.

50. *See id.* at fig. (graphing the rise in soft money fundraising between 1992 and 2002).

51. *Id.*

52. *Buckley*, 424 U.S. at 20-21.

53. *Id.* at 23.

54. *Id.* at 19.

55. *Id.* at 52-53.

56. *Id.* at 53 (quoting *Buckley*, 519 F.2d at 855).

57. *Id.*

58. *Id.* at 20-21.

FECA's "contribution ceilings" was to compel candidates to raise funds from a larger number of donors, and to force people otherwise inclined to contribute more than the statutory limit to "to expend such funds on direct political expression," instead of reducing "the total amount of money potentially available to promote political expression."[59]

The Supreme Court surely had no way to foresee how prescient that comment would become. *Buckley* created a system where an unlimited amount of money could be spent on a political campaign, but the amount the candidate could raise from individual donors was severely limited. Thus, candidates who wanted to spend more money on their campaign than they could raise had two options: (a) pay for it themselves; or (b) encourage the indirect expenditure on their campaign's behalf through soft money.

III. A NEW ERA: BI-PARTISAN CAMPAIGN REFORM ACT OF 2002

A. *Soft Money: Out of the Frying Pan and Into the Fire*

After the 2000 election, the sheer volume of soft money coupled with other prominent fundraising scandals—Vice President Gore making fundraising calls from the White House,[60] contributions by foreign nationals,[61] and overnights in the Lincoln bedroom[62]—led Congress to pass the most sweeping amendments to FECA since its enactment. With great fanfare, Congress passed the BCRA, popularly referred to as "McCain-Feingold" after its principal sponsors, on March 27, 2002.[63] Through BCRA, Congress tried to cut its own addiction to soft money.

Congress attempted to curtail the ability to raise and spend

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59. *Id.* at 21-22.

60. *See* Leslie Wayne, *Gore's Calls to Big Donors Number 86, Papers Show*, N.Y. TIMES, Aug. 27, 1997, at A16, *available at* http://query.nytimes.com/gst/fullpage.html?res=9E05E5DB1731F934A1575BC0A961958260 (reporting on then Vice President Gore making eighty-six fundraising calls from his White House office during the 1996 campaign).

61. *See* Don Van Natta, Jr. & Jill Abramson, *In Justice Inquiry, Clinton Denies Seeking Financial Help for Friend*, N.Y. TIMES, July 25, 2000, at A1, *available at* http://query.nytimes.com/gst/fullpage.html?res=9F0DEEDB103AF936A15754C0A9669C8B63 (reporting that President Clinton denied being pledged a one million dollar campaign contribution from friend and Indonesian businessman James T. Riady).

62. *See Newshour: Motel 1600?* (PBS television broadcast Feb. 25, 1997) *available at* http://www.pbs.org/newshour/bb/white_house/february97/davis_2-25.html (discussing allegations with White House Counsel that overnight stays in the Lincoln bedroom were exchanged for campaign contributions).

63. Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 and 36 U.S.C.).

soft money. First, BCRA prohibited national parties[64] and federal candidates[65] from raising soft money. As a result, national political parties must now fund all of their political activity with hard money.[66] Congress also attempted to limit the ability to spend soft money by creating a concept called the "electioneering communication."[67] Any communication that fit the definition would become subject to FECA's limitations and prohibitions.[68] As a result, corporations and labor unions were prohibited from using their treasury funds for the purpose of making electioneering communications.[69]

Recognizing the absurdity of the magic words, Congress drew a bright line rule that attempted to dispose of the semantic games involving express advocacy. BCRA defined an "electioneering communication" as any broadcast, cable or satellite communication that: (1) "refers to a clearly identified candidate for Federal office;" and (2) is made within sixty days of a general election or thirty days of a primary election.[70] In addition, the communication must be intended to reach at least 50,000 people in the candidate's electorate.[71]

Because the whole concept of the magic words came, not from Congress, but from the Supreme Court's vagueness concerns about some of FECA's definitions, Congress was careful to devise a precise definition of electioneering communication that would withstand constitutional attack. And Congress succeeded; whatever can be said about the definition, it is not vague. An electioneering communication is intended to reach more that 50,000 people in an electorate and references a federal candidate.[72] That's it. The communication is prohibited if it is made within a very definite period: thirty days before a primary election, or sixty days before a general election.[73]

Predictably, shortly after BCRA went into effect in March 2002, eleven separate lawsuits were filed, challenging virtually all

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64. 2 U.S.C.A. § 441i(a)
65. 2 U.S.C.A. § 441i(e)
66. 2 U.S.C.A. § 441i(b)
67. *See* 2 U.S.C.A. § 434(f)(3)(A)(i) (West 2008) (defining "electioneering communication" as any television broadcast that refers to a candidate for federal office within a proscribed time period prior to an election).
68. 2 U.S.C.A. § 441i(b)(2)
69. *Id.* Corporations and labor unions could use their political committees, known as "separate segregated funds" for purposes of engaging in federal election activity, including electioneering communications. 2 U.S.C.A. § 441i(b)(1).
70. 2 U.S.C.A. § 434(f)(3)(A)(i).
71. 2 U.S.C.A. § 434(f)(3)(C).
72. *McConnell*, 540 U.S. at 157.
73. 2 U.S.C.A. § 434(f)(3)(A)(i).

of the Act's major provisions.[74] In a remarkably quick process through litigation, the Supreme Court accepted jurisdiction a little over a year later, in June, 2003, heard arguments in September, and rendered a decision on December 10, 2003, eleven months ahead of the next general election.[75]

In *McConnell*, a divided Supreme Court upheld virtually all of BCRA's major provisions. The Justices voting to uphold BCRA were Stevens, O'Connor, Souter, Ginsberg and Breyer.[76] Justices Scalia, Thomas, Kennedy and Chief Justice Rehnquist all dissented from some of the major portions of the decision, and concurred in other less significant sections.[77]

The majority opinion, authored by Justices Stevens and O'Connor,[78] addressed each of BCRA's major points. First, echoing it's sentiments almost thirty years earlier in *Buckley*,[79] the Court upheld the ban on national parties, federal office holders, and candidates soliciting soft money: "[t]he Government's strong interests in preventing corruption, and in particular the appearance of corruption, are thus sufficient to justify subjecting all donations to national parties to the source, amount, and disclosure limitations of FECA."[80]

Similarly, the Supreme Court upheld the definition of "electioneering communication" by noting that the definition "raises none of the vagueness concerns that drove our analysis in *Buckley*" because the elements of the definition "are both easily understood and objectively determinable."[81] As a result, "the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy is simply inapposite here."[82]

In addition, the Court upheld the prohibition on corporations and unions from using their corporate treasury funds (soft money) for making electioneering communications.[83] The plaintiffs challenged this aspect of BCRA on the basis that it was overbroad and would prohibit speech that was not designed to influence the

74. *McConnell*, 540 U.S. at 132.
75. *Id.*
76. *Id.* at 110.
77. *Id.*
78. *Id.*
79. *See Buckley*, 424 U.S. at 26 (holding that "[i]t is unnecessary to look beyond the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the $1,000 contribution limitation").
80. *McConnell*, 540 U.S. at 156.
81. *Id.* at 194.
82. *Id.*
83. *Id.* at 204-05.

outcome of an election; in other words, a bona fide issue ad.[84] The Court rejected this notion because "the "issue ads broadcast during the 30- and 60- day periods preceding federal primary and general elections are the functional equivalent of express advocacy."[85] The Court reasoned that, although corporations and unions could not make electioneering communications, "they remain free to organize and administer segregated funds, or PACs, for that purpose. Because corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view the provision as a 'complete ban' on expression rather than a regulation."[86]

In rejecting the argument that BCRA would have the effect of banning a legitimate issue ad during the prohibited thirty and sixty day periods, the Court concluded that, "in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund."[87]

In short, the *McConnell* decision prohibited corporations and unions from making electioneering communications with corporate or treasury funds.[88] Justice Scalia, in his stinging dissent, summed up the case a little differently:

> This is a sad day for freedom of speech. Who could have imagined that the same Court which, within the past four years, has sternly disapproved of restrictions upon such inconsequential forms of expression as virtual child pornography, tobacco advertising, dissemination of illegally intercepted communications and sexually explicit cable programming, would smile with favor upon a law that cuts to the heart of what the First Amendment is meant to protect: the right to criticize government.[89]

BCRA was particularly offensive to Justice Scalia because, not only did it prohibit criticism of government (at least members of Congress by name), it applied to "those entities most capable of giving such criticism loud voice: national political parties and

84. *Id.* at 205-06.

85. *Id.* at 206. The Court would shortly revisit the notion of "functional equivalency." *Id.* at 212.

86. *See id.* at 204 (citing FEC v. Beaumont, 539 U.S. 146, 163 (2003)) (stating that "[t]he PAC option allows corporate political participation without the temptation to use corporate funds for political influence . . . without jeopardizing the associational rights of advocacy organizations' members"). "PAC" stands for "political action committee." THE CAMPAIGN LEGAL CTR., *supra* note 29, at 7.

87. *McConnell*, 540 U.S. at 206.

88. *Id.*

89. *Id.* at 248 (Scalia, J., concurring in part and dissenting in part) (citations omitted).

corporations,"[90] but it also applies during "pre-election"[91] periods when the public is more likely to be paying attention.[92]

Indeed, Justice Scalia mocked the entire soft money hullabaloo with a little perspective: "[a]ll campaign spending in the United States, including state elections, ballot initiatives, and judicial elections, has been estimated at $3.9 billion for 2000 . . .which . . . 'shattered spending and contribution records.'"[93] Even assuming that number, which was the highest of several estimates available,[94] was correct, Justice Scalia continued, it totaled only "half as much as . . . spent on movie tickets ($7.8 billion); about a fifth as much as . . . spent on cosmetics and perfume ($18.8 billion); and about a sixth as much as . . . spent on pork (the nongovernmental sort)."[95]

Nonetheless, the Court upheld Congress' attempt to "cut off the soft money"[96] and to ensure that there was "less money in politics."[97] Indeed, in passing BCRA several legislators decried the "enormous amounts of special interest money that flood our political system"[98] and which result in "more negativity and an increasingly longer campaign period."[99] However, and perhaps predictably, BCRA neither reduced the amounts of money spent on political campaigns nor reduced the negativity in federal campaigns.

In very short order, it became clear the BCRA had the opposite effect of its principal goals: to reduce both the amounts of money and the amount of negativity in political campaigns. The ban on national parties and federal candidates raising and spending soft money did not remove soft money from election campaigns, instead the soft money financing system went, for lack of a better term, underground.

Prior to BCRA, the vast majority of soft money was raised by political parties.[100] The parties and their elected officials were, at

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90. *Id.*
91. *Id.*
92. *Buckley*, 424 U.S. at 68.
93. *McConnell*, 540 U.S. at 262 (citing Candice Nelson, *Spending in the 2000 Elections*, *in* FINANCING THE 2000 ELECTION 22, 24, tbl. 2-1) (David B. Magleby ed., 2002) (emphasis in original).
94. *McConnell*, 540 U.S. at 262.
95. *Id.*
96. *Id.* at 260 (citing 147 CONG. REC. 5049 (2001) (statement of Sen. McCain)).
97. *Id.* at 261 (citing 147 CONG. REC. 5199 (2001) (statement of Sen. Murray)).
98. *Id.* at 261 (citing 148 CONG. REC. 3612 (2002) (statement of Sen. Kennedy)).
99. *Id.* at 261 (citing 148 CONG. REC. 3612 (2002) (statement of Sen. Kerry)).
100. Magleby & Smith, *supra* note 48, at 28.

least theoretically if not sometimes in practice, accountable to the electorate for the negative ads they produced. The pre-BCRA soft money system was therefore one of at least some accountability and disclosure. After BCRA, however, with the parties and candidates no longer directly involved, soft money did not go away, but it simply shifted to private organizations, known as "527 Organizations" after the section of the federal tax code that governed them,[101] that felt no accountability to the voters for their ads.

The best example of these groups, and their immunity to disclosure and accountability, is of course, the "Swift Boat Veterans for Truth," a group of private citizens who produced a stinging criticism of John Kerry's record as a soldier in Vietnam during the 2004 presidential campaign.[102] The results were both effective and controversial.[103] But as an example of lack of accountability these 527 groups feel, President Bush, the ostensible beneficiary of the Swift Boat effort, publicly asked the group to stop running its attacks on his opponent.[104] The group refused.[105] It is hard to imagine that if that ad had been produced by the Republican Party that it could have refused the President's call to desist—he was, after all the head of the Party at the time.

B. *Self-Funded Candidates and the Millionaires' Amendment*

Otto Von Bismarck famously said that "laws are like sausages. . . it is better not to see them being made,"[106] and BCRA was no exception. BCRA's so-called "Millionaires' Amendment,"[107]

101. 26 I.R.C. § 527 (West 2008); 26 C.F.R. § 1.527-1 to 527.9 (West 2008); *see also* Internal Revenue Service, Tax Information for Political Organizations, http://www.irs.gov/charities/political/index.html (last visited Nov. 14, 2008) (providing information about § 527 of the tax code).

102. *See* Swiftvets and POW's for Truth, http://swiftvets.com/index.php (last visited Nov. 14, 2008) (arguing that John Kerry exaggerated his war service and claims that he was part of a "band of brothers," when most of those other vets don't support him).

103. *See* Glen Justice & Eric Lichtblau, *Bush's Backers Donate Heavily to Veteran Ads*, N.Y. TIMES, Sept. 11, 2004, at A13, *available at* http://www.nytimes.com/2004/09/11/politics/campaign/11swift.html?_r=1&oref =slogin (stating that the money raised by Swift Boat Vets was significant and resulted in an accusation of violating campaign laws by coordinating efforts with the Bush campaign).

104. *See Bush Calls for Halt to Swift Boat Veterans' Ads*, Msnbc.com Staff & News Service Reports, Aug. 23, 2004, http://www.msnbc.msn.com/id/5797164 (reporting that Bush criticized a commercial by Swift Boat Vets which criticized Kerry's war record).

105. *Id.*

106. Quotation Details, http://www.quotationspage.com/quote/27759.hmtl (last visited Nov. 14, 2008).

107. 2 U.S.C.A. § 441a-1(a)(1).

fundamentally altered the campaign finance system, but only in the limited (but undoubtedly troubling for an incumbent) circumstance where a candidate was running against a wealthy opponent who was willing to contribute significant amounts of his or her personal fortune to their election effort. Under FECA, an individual could contribute no more than $1,000 per election to a candidate's campaign fund.[108] BCRA raised that amount to $2,000 per election,[109] and included periodic inflation adjustments.[110]

At first glance, this appears to be contrary to Congress' goal that there be "less money in politics"[111] because it more than doubled the contribution limits in certain circumstances. However, this increase in regulated "hard" money was, in Congress' eyes, worth it for the corresponding ban on soft money by parties and candidates. Rather than welcome the prospect of increased limits in exchange for a ban on soft money, however, several incumbents looked down the road to their next election and did not like the potentially rocky road ahead.

This is where Bismarck comes in. Aware that in *Buckley* the Supreme Court held that a candidate has a First Amendment right to spend as much of their own money as they would like in support of their own campaign,[112] Congress foresaw a circumstance where a wealthy, self-financed opponent could challenge them and they would be without their most potent financial weapon: soft money. So rather than face an opponent where they would run the risk of being outspent, Congress attached the Millionaires' Amendment[113] to BCRA shortly before its passage.[114]

The Millionaires' Amendment was an enormously complicated scheme that, essentially, allowed candidate's opposing wealthy, self-funded opponents to raise money under increased contribution limits.[115] In a nutshell, the Amendment allowed a candidate facing a self-funded opponent to raise up to three times the

108. 2 U.S.C.A. § 441a(a)(1) (West 1972), *amended by* 2 U.S.C.A. § 441a(a)(1) (West 2002).

109. 2 U.S.C.A. § 441a(a)(1)(A).

110. 2 U.S.C.A. § 441a(c) (West 2008). For the 2008 General Election, the inflation-adjusted contribution is $2,300. *See* Price Index Increase, 11 C.F.R. § 110.17 (West 2008) (setting the procedure by which contribution limits will be increased to account for inflation); *see also* Price Index Increases for Expenditure and Contribution Limitations, 72 Fed. Reg. 5295 (Feb. 5 2007) (reporting that the individual contribution limits for 2007-08 will be $2,300).

111. *McConnell*, 540 U.S. at 261 (Scalia, J., dissenting in part) (citing 147 CONG. REC. 5199 (2001) (statement of Sen. Murray)).

112. *Buckley*, 424 U.S. at 16.

113. 2 U.S.C.A. § 441a-1.

114. *See supra* note 63 and accompanying text (reporting that the BCRA with the "Millionaires' Amendment attached was passed on Mar. 27, 2002).

115. 2 U.S.C.A. § 441a-1.

otherwise imposed limit.[116] What is a self-financed opponent? Candidates were required to report the amount of money that they personally spent on their campaigns,[117] and that amount was compared to the amount other donors had contributed to the self-funded candidate.[118] If a self-funded candidate contributed more than $350,000 to his or her own campaign than other donors had contributed, the amount individuals could contribute to the opponent (the non-self-funded candidate) would triple.[119] In short, a candidate facing a self-financed opponent would operate under contribution limits three times higher than other candidates.

That incumbent members of Congress feared these self-funders cannot be seriously disputed.[120] The Millionaires' Amendment imposed an almost comical reporting scheme on self-funded candidates. First, self-funded candidates were initially required to file, within fifteen days of entering the race and before spending a nickel, a "declaration of intent" indicating not only that he or she intended to spend at least $350,000 on their own campaign, but also disclosing how much more than $350,000 they intended to spend.[121]

Once the candidate passed the $350,000 threshold, he or she was required to file an "initial notification."[122] A self-funder had to file an additional notification every time he or she spent an additional $10,000.[123] Each of these notices must include the date and amount of the expenditure, and must be provided not only to FEC, but also to the self-funder's opponents and the opponents' national political party.[124]

Self-funder's were required to file each of these notices within twenty-four hours of hitting the applicable thresholds.[125] The absurdity of this complicated scheme is perhaps best understood by noting that in most states, sex offenders have a considerably longer time to register with the state registry. For example, in Illinois, a sex offender has three days to complete the registration upon arriving in a community to either live, work or study.[126]

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116. *Id.* § 441a-1(a)(1)(A).
117. *Id.* § 441a-1(a)(1).
118. *Id.* § 441a-1(a)(2).
119. *Id.* § 441a-1(a)(1).
120. *See* Center for Competitive Politics, *Supreme Court to Hear Challenge to Millionaire's Amendment*, http://www.campaignfreedom.org/blog/id.482/blog_detail.asp (Jan. 11, 2008) (stating that the 'Millionaires' Amendment is a way to help incumbents win reelection).
121. 2 U.S.C.A. § 441a-1(b)(1)(B)
122. 2 U.S.C.A. § 441a-1(b)(1)(C)
123. 2 U.S.C.A. § 441a-1(b)(1)(D)
124. 2 U.S.C.A. §§ 441a-1(b)(1)(E)(ii), 441(b)(1)(F)(i), (ii)
125. 2 U.S.C.A. § 441a-1(b)(1)(C), (D)
126. 730 ILL. COMP. STAT. 150/3(a-10)(b) (2007).

In *McConnell*, the lead plaintiff was Senator Mitch McConnell, an incumbent legislator.[127] Not surprisingly, perhaps, he did not challenge the constitutionality of the Millionaires' Amendment. However, a separate group of plaintiffs,[128] "[representing] voters, organizations representing voters and candidates"[129] did challenge the constitutionality of the Amendment.[130] The Supreme Court, undoubtedly engendering a sigh of relief on Capitol Hill, brushed aside this challenge because "none of the [challenging] plaintiffs is a candidate in an election affected by the millionaire provisions—i.e., one in which an opponent chooses to spend the triggering amount in his own funds —and it would be purely 'conjectural' for the court to assume that any plaintiff ever will be."[131] As a result, the Court dismissed the challenge because none of the plaintiffs had standing to challenge the Amendment.[132]

IV. SO MUCH FOR THE NEW ERA

A. *The "Functional Equivalent" of a Reversal:* FEC v. Wis. Right to Life

In *McConnell*, the Supreme Court upheld the definition of "electioneering communication" and its effective ban on issue ads during the thirty days before a primary election and sixty days before a general election.[133] The Court recognized that this would prohibit some protected speech, i.e., genuine issue ads that were made during the prohibited periods but that did not contain an electioneering purpose.[134] The Court was nonetheless willing to accept that restriction because "in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund."[135] In other words, a corporation or union could run a genuine issue ad during these pre-election periods by simply avoiding the use of a candidate's name or by paying for it through a PAC.

Almost four years later, however, in *FEC v. Wis. Right to Life, Inc.*, the Supreme Court reversed ground and invalidated the

127. *McConnell*, 540 U.S. at 224-25.
128. The Supreme Court consolidated all challenges to BCRA and issued one opinion. *McConnell*, 540 U.S. at 94.
129. *Id.* at 226.
130. *Id.* at 230.
131. *Id.* (quoting *McConnell*, 251 F. Supp. 2d at 431).
132. *Id.*
133. *Id.* at 206-07.
134. *Id.* at 205-06.
135. *Id.* at 206.

black and white definition of "electioneering communication."[136] The Court went to some lengths to distinguish between the facial challenge to BCRA in *McConnell* and the as-applied challenge in *Wis. Right to Life*: "the [*McConnell*] Court concluded that those challenging the law on its face had failed to carry their 'heavy burden' of establishing that *all* enforcement of the law should therefore be prohibited."[137] In fact, in prior consideration of *Wis. Right to Life*, the Court vacated the district court's dismissal and remanded the case for trial after concluding that *McConnell* "did not purport to resolve future as-applied challenges."[138]

Despite the niceties of the distinction between facial and as-applied challenges, the Court effectively reversed itself. In *McConnell*, the Court upheld the ban on pre-election issue ads because unions and corporations had the opportunity to make political expenditures by either avoiding the use of a candidate's name or by paying for it through a PAC.[139] In doing so, the Court concluded that issue ads had become the "functional equivalent" of campaign commercials.[140] The *McConnell* decision, however, recognized that the amount of legitimate ads aired during the black-out periods was "a matter of dispute" but upheld the ban "whatever the precise percentage may have been in the past."[141]

In *Wis. Right to Life*, however, the Court declared that its decision in *McConnell* applied, not to all pre-election issue ads, but only to those that were the "functional equivalent" of campaign ads.[142] *Wis. Right to Life* involved several ads aired by a non-profit corporation, Wisconsin Right to Life, Inc., criticizing Senators Feingold and Kohl for supporting a Democratic filibuster of President Bush's judicial appointments.[143] Because the ads mentioned the Senators by name, they would have fit the definition of electioneering communication, and therefore would have been prohibited during the thirty days before the Wisconsin primary election.[144] Rather than knowingly violate BCRA, Wisconsin Right to Life filed suit seeking a declaratory judgment that BCRA's prohibition on electioneering communications did not apply to their ads.[145]

Chief Justice Roberts, new to the Court since *McConnell*, concluded that the Court's prior use of the phrase "functional

136. 127 S. Ct. 2652, 2696-97 (2007).
137. *Id.* at 2659 (quoting *McConnell*, 540 U.S. at 207) (emphasis in original).
138. Wis. Right to Life, Inc. v. FEC, 546 U.S. 410, 411-12 (2006).
139. *McConnell*, 540 U.S. at 207.
140. *Id.* at 206.
141. *Id.*
142. *Wis. Right to Life*, 127 S. Ct. at 2654-59.
143. *Id.* at 2660-61.
144. *Id.* at 2661.
145. *Id.*

equivalent" did not simply reflect the political reality that issue ads had *collectively* become indistinguishable from campaign ads, but rather that the Court intended to ban only *individual* ads that were the functional equivalent of political ads.[146] In an opinion joined by Justices Scalia, Thomas, Kennedy and Alito, Chief Justice Roberts concluded that BCRA's scope could only be limited to those ads that are "the functional equivalent of express advocacy."[147]

Chief Justice Roberts' statements to the contrary notwithstanding, *Wis. Right to Life* effectively reversed, at least insofar as issue ads are concerned, *McConnell.*

In *McConnell,* recall that the Court advised corporations and labor unions as to exactly how they could engage in political expression despite the new definition of electioneering communication. These groups were free to run legitimate issue ads during the pre-election blackout periods two different ways: either by not mentioning a candidate by name or by paying for it through a PAC.[148] Nowhere did the Court mention that there was a third way to avoid BCRA, by running an ad that mentioned a federal candidate and was aired during the blackout period, but was not paid for by a PAC, so long as it was not the "functional equivalent" of a campaign ad.

But why was *Wis. Right to Life* an effective reversal of *McConnell,* rather than simply the creation of a third exception to the electioneering communication ban? The answer lies in the tricky business of determining the "functional equivalent" of a campaign ad. The Court specifically rejected any inquiry into the intent behind the ad, because "an intent-based test would chill core political speech."[149] Under such a system, "no reasonable speaker would choose to run an ad covered by BCRA" because such a standard ""blankets with uncertainty whatever may be said' and 'offers no security for free discussion.'"[150]

Instead, the Court determined that in order to "safeguard this [First Amendment] liberty, the proper standard. . . must be objective, focusing on the substance of the communication rather than on amorphous considerations of intent and effect."[151] In substance, the Court concluded that an "ad is the functional equivalent of express advocacy only if the ad is susceptible to no reasonable interpretation other than as an appeal to vote for or

146. *Id.* at 2665.
147. *Id.* at 2667.
148. *McConnell,* 540 U.S. at 206.
149. *Wis. Right to Life,* 127 S. Ct. at 2665.
150. *Id.* at 2666 (quoting *Buckley,* 424 U.S. at 43).
151. *Id.* at 2666.

against a specific candidate."[152] The Court noted that the ads at issue "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position and urge the public to contact public officials with respect to the matter."[153]

Additionally, the Court noted that the content of the ads "lacks indicia of express advocacy: [t]he ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office."[154] But, wait a minute. Don't those sound like magic words? One of *Buckley's* magic words, "elect,"[155] was transformed to "election,"[156] and the others are all similarly related.

In the end, issue ads have come full circle. Under *Buckley*, a corporation or union could run issue ads and escape FECA by simply avoiding the magic words, regardless of how blunt the electioneering message. With *McConnell*, the Court accepted BCRA's bright line rule that any ad run during the blackout periods, regardless of how benign the electioneering message, was prohibited. But after *Wis. Right to Life*, we are back where we started. In order to escape FECA and BCRA, a corporation or union need only avoid the magic words (the old and the new), and, it appears, any character assassination.

For example, suppose an ad states that the incumbent congressman voted wrong on an issue (guns, abortion, taxes, whatever) in the last session. The ad would point out why the vote was wrong, and implore the voter to call the legislator and urge them to reverse their position. It is hard to imagine how that ad could be susceptible to "no other reasonable interpretation" than as a campaign message in disguise. In other words, it's time to open the soft money spigot again.

This "I know it when I see it" approach is, of course, good for political consultants and election lawyers, who are once again free to push the envelope and test the new boundaries of functional equivalency, and argue about the urgency of this issue or that as a legitimate issue ad. This is certainly not, however, what Congress intended with BCRA or what the Court accepted in *McConnell*.

B. *Revenge of the Rich:* Davis v. FEC

Although the Supreme Court has stifled Congressional attempts to put the "brake on the skyrocketing cost of political campaigns"[157] that "flood our political system",[158] it did so

152. *Id.* at 2667.
153. *Id.*
154. *Id.*
155. *Buckley*, 424 U.S. at 42.
156. *Wis. Right to Life*, 127 S. Ct. at 2667.
157. *Buckley*, 424 U.S. at 26.

consistently. In *Buckley*, the Court struck down limitations on campaign expenditures because it would have the effect of reducing the total amount of political speech.[159] Similarly, in *Wis. Right to Life*, the Court's functional equivalency decision increases the total amount of political speech by permitting previously prohibited issue ads.[160] Campaign finance cases could thus be understood to turn on a couple basic principals—laws that restricted contributions were generally upheld, but laws that had the effect of reducing the total volume of political speech were invalidated. Thus, it was surprising, when last term, the Court's struck down the Millionaires' Amendment.

The Millionaires' Amendment indisputably had the effect of increasing the total volume of political speech. When a self-financed candidate spent more than $350,000 on his or her own campaign, that candidate's opponents could take advantage of increased contribution limits and, as a result, increase the total amount of communication in the campaign. Despite this effect, however, in *Davis v. FEC*,[161] the Supreme Court invalidated the Millionaires' Amendment because it "imposes different contribution limits for candidates competing against each other . . . ."[162]

Davis was an unsuccessful candidate for Congress from New York in both 2004 and 2006.[163] In 2006, he spent $2.3 million in personal funds while raising only $126,000 from contributors.[164] As a result of his personal expenditures, his incumbent opponent was able to raise an additional $1.5 million under the adjusted contribution limitations applicable under the Millionaires' Amendment.[165] Davis filed suit seeking to have the Amendment declared unconstitutional, although the case was not decided until after he had lost the election.[166] Unlike the plaintiffs in *McConnell*, the Court concluded that Davis had standing to challenge the Millionaires' Amendment because it allowed his opponent to receive contributions on more favorable terms while burdening his personal expenditure of funds . . . ."[167]

Davis argued that the increased contribution limitations available to his opponents diminished his own First Amendment

158. *McConnell*, 540 U.S. at 261.
159. *Buckley*, 424 U.S. at 17-22.
160. *See supra* Part IV-A (analyzing *Wis. Right to Life* and its effect on campaign financing).
161. 128 S. Ct. 2759 (2008).
162. *Id.* at 2765.
163. *Id.* at 2767.
164. *Id.* at 2767-68.
165. *Id.* at 2767.
166. *Id.*
167. *Id.* at 2769.

rights.[168] How so? Davis argued that the increased limits allowed his opponent to "raise more money and use that money to finance speech that counteracts and thus diminishes the effectiveness of [his] own speech."[169] The Court agreed, finding that the Millionaires' Amendment's "scheme" impermissibly burdened Davis' First Amendment rights.[170]

In reaching its conclusion, the Court compared the personal expenditure limits it invalidated in *Buckley*, and noted that although the Millionaires' Amendment did not impose an expenditure cap, it imposed an "unprecedented penalty on any candidate who robustly exercises that First Amendment right."[171] As a result, a self-financed candidate must choose between either "unfettered political speech" or the resulting "discriminatory fundraising limitations" of the Millionaires' Amendment.[172] This "drag" on First Amendment rights, the Court held, is "not constitutional simply because it attaches as a consequence of statutorily imposed choice."[173]

The Court concluded that the Millionaires' Amendment imposes a "substantial burden" on First Amendment rights that could not be justified by a compelling state interest.[174] The Court noted that the traditional justification for campaign finance restrictions, "eliminating corruption or the perception of corruption" was not present, especially because Congress had determined that high limits "do not "imperil anticorruption interests" for opponents of self-financers.[175]

Instead, the government defended the Amendment because the increased limits "'level" electoral opportunities for candidates of different personal wealth.[176] The Court squarely rejected this argument because it did not find any support for the claim that leveling electoral opportunities was a legitimate government objective.[177] In fact, over thirty years ago, the Court held in *Buckley* that "'the interest in equalizing the . . . financial resources of candidates'" did not justify expenditure limits.[178]

168. *Id.* at 2770.
169. *Id.*
170. *Id.* at 2764.
171. *Id.* at 2771.
172. *Id.*
173. *Id.* at 2772.
174. *Id.* at 2772-73.
175. *Id.* at 2773. If high limits are acceptable for "non-self-financing candidates," the Court reasoned, then high limits are acceptable for wealthy self-financiers. *Id.*
176. *Id.* (quoting Brief for the Appellee at 34, Davis v. FEC, 128 S. Ct. 2759 (2008) (No. 07-320)).
177. *Id.*
178. *Id.* at 2771 (quoting *Buckley*, 424 U.S. at 54).

The Court was certainly correct in finding no legitimate interest in the increased limits afforded by the Millionaires' Amendment, but it is less clear that the Amendment imposes a substantial burden on self-financers' rights. Indeed, the District Court concluded the opposite: 'not only did the Millionaires' Amendment not impose a substantial burden, but it did not impose any burden at all on a self-financer's rights.[179] A self-funder is free to make as much political speech as possible, and the increased limits serve to increase the total level of political expression.[180]

As the District Court noted, "the Millionaires' Amendment does not limit in any way the use of a candidate's personal wealth in his run for office."[181] The District Court likened the Millionaires' Amendment to regularly upheld systems, where candidates who *voluntarily* agreed to public financing were able to raise funds with higher limits than their opponents who had declined public financing.[182] The District Court rejected Davis' argument that his First Amendment rights would be "chilled" because he had voluntarily decided to self-finance his campaign.[183] Furthermore, the District Court found that Davis failed to produce any evidence to support his contention that self-financed candidates run for office less, or self-finance their campaigns less, as a direct result of the Millionaires' Amendment.[184] Most importantly to the District Court, Davis could not show that that his right to free speech was constrained in any way due to the Amendment and the benefits it gave to his challenger.[185]

The District Court's opinion hits the nail on the head: self-financed candidates will not decide against running for Congress because of the Millionaires' Amendment, nor will they self-finance less. Anyone determined enough to enter the race in the first place will do everything he can to win the election and the effect of the law on an opponent is very unlikely to have any unconstitutional chilling effect. In his separate opinion, Justice Stevens, which Justices Souter, Ginsberg and Breyer joined, indicated that he agreed "en masse with the District Court's

179. Davis v. FEC, 501 F. Supp. 2d 22, 31-33 (D.D.C. 2007), *rev'd*, 128 S. Ct. 2759 (2008).

180. *Id.* at 29.

181. *Id.*

182. *Id.* (citing Daggett v. Comm'n on Gov't Ethics & Election Practices, 205 F.3d 445, 464-65 (1st Cir. 2000); Gable v. Patton, 142 F.3d 940, 948 (6th Cir. 1998); Rosenstiel v. Rodriguez, 101 F.3d 1544, 1551 (8th Cir. 1996); Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 39 (1st Cir. 1993)).

183. *Id.* at 30.

184. *Id.* at 31.

185. *Id.*

"comprehensive and thought-out opinion.[186] In her separate opinion, Justice Ginsburg also agreed with the District Court's "careful and persuasive opinion."[187]

Although he did not write separately in *Davis*, Justice Scalia's disdain for BCRA in general and the Millionaires' Amendment in particular is hardly a secret. In his *McConnell* opinion, Justice Scalia wondered:

> Is it an oversight, do you suppose, that the so-called "'millionaire provisions raise the contribution limit for a candidate running against an individual who devotes to the campaign (as challengers often do) great personal wealth, but do not raise the limits for a candidate running against an individual who devotes to the campaign (as incumbents often do) a massive election war chest?[188]

Justice Scalia may very well be correct in his view that BCRA and the Millionaires' Amendment are unabashed incumbent protection, but that does not make the law unconstitutional. So why did the Court go out of its way to strike down a provision that increased the total amount of political expression, and break from a consistent track record? It probably has to do with the Court's unabashed hostility toward the campaign finance system. In his concurring opinion in *Wis. Right to Life*, Justice Scalia continued his denunciations of Congressional attempts to limit campaign expenditures:

> A Moroccan cartoonist once defended his criticism of the Moroccan monarch (*lese majeste* being a serious crime in Morocco) as follows: "I'm not revolutionary, I'm just defending freedom of speech . . . never said we had to change the king —no, no, no, no! But I said that some things the king is doing, I do not like. Is that a crime?" Well, in the United States (making due allowance for the fact that we elected representatives instead of a king), it *is* a crime, at least if the speaker is a union or corporation (including not-for-profit public-interest corporations) and if the representative is identified by name

186. *See Davis*, 128 S. Ct. at 2778 (Stevens, J., concurring in part and dissenting in part) (explaining his view 'that the District Court was correct when it held that the Millionaires' Amendment does not abridge First Amendment rights').

187. *Id.* at 2782 (Ginsburg, J., concurring in part and dissenting in part).

188. *McConnell*, 540 U.S. at 249 (Scalia, J., concurring in part and dissenting in part). Regarding some of BCRA's other provisions, Justice Scalia wondered: "[i]s it accidental, do you think, that incumbents raise about three times as much 'hard money' – the sort of fundraising generally *not* restricted by this legislation – as do their challengers?" *Id.* (emphasis in original). "[I]is it mere happenstance, do you estimate, that national-party fundraising, which is severely limited by the Act, is more likely to assist cash-strapped challengers than flush-with-hard-money incumbents?" *Id.* at 249-50. Finally, "[w]as it unintended, by any chance, that incumbents are free personally to receive some soft money and even to solicit it for other organizations, while national parties are not?" *Id.* at 250.

within a period before a primary or congressional election in which he is running.[189]

Justice Thomas is also unabashedly hostile to the campaign finance regime. He has called BCRA "the most significant abridgement of the freedoms of speech and association since the Civil War."[190] Justice Thomas has believed for a long time that *Buckley* was an incorrect decision and should be overruled.[191] He opposes continuing to follow the mistakes of the *Buckley* opinion.[192] Justice Thomas believes, not unreasonably, "that contribution limits infringe as directly and as seriously upon freedom of political expression and association as do expenditure limits."[193] To him, a contribution is simply an indirect expenditure, and that "the practical judgment by a citizen that another person or an organization can more effectively deploy funds for the good of a common cause than he can ought not deprive that citizen of his First Amendment rights."[194]

Justice Kennedy has also complained of the current campaign finance structure claiming that "[i]t "is an effort by Congress to ensure that civic discourse takes place only through the modes of its choosing,"[195] and that the "Government cannot be trusted to moderate its own rules for suppression of speech."[196] In particular, Justice Kennedy objects to the extension of *Buckley's* anti-corruption rationale for limiting contributions to candidates to apply equally to political parties, corporations and unions.[197] Addressing the ban on issue ads considered in *McConnell*, Justice

189. *Wis. Right to Life*, 127 S. Ct. at 2674-75 (quoting Whitlock, *Satirist Continues to Prove Himself a Royal Pain*, Wash. Post, Apr. 26, 2005, at C1, C8).

190. *McConnell*, 540 U.S. at 264 (Thomas, J., concurring in part and dissenting in part).

191. *Id.* at 277 (citing FEC v. Colo. Republican Campaign Comm. [*Colorado II*], 533 U.S. 431, 465, (2001); Nixon v. Shrink Mo., 528 U.S. 377, 410 (2000); Colo. Republican Campaign Comm. v. FEC [*Colorado I*], 518 U.S. 604, 640 (1996)).

192. *Id.* at 266.

193. *Colorado I*, 518 U.S. at 640 (Thomas, J., concurring in part and dissenting in part).

194. *Id.* at 638.

195. *McConnell*, 540 U.S. at 287 (Kennedy, J., concurring in part and dissenting in part).

196. *Id.* at 288.

197. *Id.* at 294. According to Justice Kennedy:

> The very aim of *Buckley's* standard, however, was to define undue influence by reference to the presence of *quid pro quo* involving the officeholder. The Court, in contrast, concludes that access, without more, proves influence is undue. Access, in the Court's view, has the same legal ramifications as actual or apparent corruption of officeholders. This new definition of corruption sweeps away all protections for speech that lie in its path. *Id.* at 294.

Kennedy derided BCRA: "It prohibits a mass communication technique favored in the modern political process for the very reason that it is the most potent. That the Government would regulate it for this reason goes only to prove the illegitimacy of the Government's purpose."[198]

Justice Alito appears to share Justice Scalia's hostility toward the current financing regime, and is equally skeptical of BCRA and the Millionaires' Amendment as a nasty bit of incumbent protection. In his majority opinion in *Davis*, which was joined by Justices Scalia, Thomas, Kennedy and Chief Justice Roberts, Justice Alito wrote:

> 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 Members of the House of Representatives, Art. I, § 2, and it is a dangerous business for Congress to use the election laws to influence the voters' choices.[199]

At the end of his opinion, Justice Alito invites Congress to revisit the entire system. The Court noted that the Millionaires' Amendment arose from the disparate treatment between contributions and expenditures first set forth in *Buckley*.[200] The Court declared,

> If the normally applicable limits on individual contributions . . . are seriously distorting the electoral process, if they are feeding a "public" perception that wealthy people can buy seats in Congress . . . and if those limits are not needed in order to combat corruption, then the obvious remedy is to raise or eliminate those limits.[201]

In other words, the Court is hoisting Congress by the seat of its own petard: Congress defends limits on campaign contributions as necessary to combat corruption or the appearance of corruption, but now claims that those limits (and the attached corruption risk) do not apply if your opponent is wealthy. By calling Congress out on this discrepancy, the Court suggests that it no longer believes that the limits are really designed to combat corruption, but that instead Congress is using the anti-corruption cloak to disguise its

198. *Id.* at 323.
199. *Davis*, 128 S. Ct. at 2774.
200. *Id.*
201. *Id.* (quoting Brief for the Appellee at 34, Davis v. FEC, 128 S. Ct. 2759 (2008) (No. 07-320)).

incumbent protection legislation.

V. CONCLUSION

For thirty years, Congress and the Supreme Court have struggled with the dichotomy between permitted limits on contributions and prohibited expenditure limits. The surge of soft money and issue ads throughout the 1990's caused Congress to pass sweeping legislation, in the name of reform, aimed at reducing the influence of soft money. In attaching the Millionaires' Amendment, Congress may have pushed its luck a little too far. The current Supreme Court, with the addition of Chief Justice Roberts and Justice Alito, appears more and more willing to act upon its latent hostility toward the current campaign finance regime.

In the past two years, the Court has authorized the return of soft money issue ads by corporations and unions and greatly restricted incumbents' ability to raise money when running against wealthy self-funded candidates. As a result, the environment in which incumbent members of Congress seek re-election is very different, and in their eyes, much more difficult than the one they envisioned when they passed BCRA. By making the current campaign financing system as difficult as possible for incumbents (vulnerable to attacks from soft money issue ads and at a financial disadvantage to wealthy opponents), the Court is forcing Congress to revisit the entire structure. When and if Congress will take up the Court's suggestion remains to be seen, but in the meantime, the airwaves will remain just as cluttered, and just as confusing, as ever before.