

# A Legislative Strategy Conditioned on Corruption: Regulating Campaign Financing After *McConnell v. FEC*<sup>†</sup>

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## INTRODUCTION

Corruption's influence in American politics is as old as the country itself, and its role in the future of politics is guaranteed. As long as money is involved, corruption is sure to follow. Likewise, where there is politics, money is sure to be

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close by. "There are two things that are important in politics. The first is money and I can't remember what the second one is."<sup>1</sup>

Nothing demonstrates this point better than the Savings and Loan ("S&L") bail out of the 1980s. Many Americans still vividly remember when every man, woman, and child paid an extra \$5,600 in taxes to cover the cost of the S&L bail out.<sup>2</sup> The bail out was perhaps America's largest financial scandal ever.<sup>3</sup> During this period the S&L industry contributed "at least \$11,699,499 in campaign contributions to congressional candidates and political party committees, including \$6.3 million through PACs."<sup>4</sup> At the same time, Congress deregulated the industry which allowed the S&Ls to invest in largely speculative, rather than less risk-averse ventures.<sup>5</sup> Charles H. Keating, Jr., the controlling officer of the Arizona-based thrift organization Lincoln Savings & Loan Association, was involved in a large portion of these risky multimillion dollar investments.<sup>6</sup> The deregulation of the S&L industry was, in large part, due to Keating's ability to influence senators.<sup>7</sup> Keating gained powerful influence over five U.S. senators because of his large contributions to their political campaigns.<sup>8</sup> These senators then used their political power to influence the deregulation of the industry. This same influence also

1. Helen Dewar, *For Campaign Finance Reform, A Historically Uphill Fight*, WASH. POST, Oct. 7, 1997, at A5 (quoting nineteenth-century U.S. Senator Mark Hanna (R-Ohio)), cited in Rep. Harold E. Ford, Jr. & Jason M. Levien, *A New Horizon for Campaign Finance Reform*, 37 HARV. J. ON LEGIS. 307, 307 (2000).

2. SUZANNE M. COIL, CAMPAIGN FINANCING 69 (1994). Coil claims that some experts estimated that the total cost of the bail out was as much as \$1.4 trillion. *Id.* She also notes that for such a price tag the government could have bought a house for every family in New York, Los Angeles, Chicago, Houston, Philadelphia, San Diego, Dallas, Phoenix, Detroit, and twelve other cities. *Id.* Others have argued that "the clean-up bill for the S&L crisis [left to] the American taxpayer, [was] an average cost of \$3000 per taxpayer." Jamin B. Raskin & John C. Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 303 (1993). Regardless of the disagreement of the exact cost, either estimation demonstrates the enormous and unnecessary cost to the taxpayer.

3. MARTIN MAYER, THE GREATEST-EVER BANK ROBBERY: THE COLLAPSE OF THE SAVINGS AND LOAN INDUSTRY 1 (1990); see also Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1139 (1994).

4. Wertheimer & Manes, *supra* note 3, at 1139 (It's a Wonderful Life, Common Cause News (Common Cause, Washington, D.C.), June 29, 1990, at 1 (on file with Columbia Law Review)).

5. See *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 908 (D.D.C. 1990). "Lincoln cut back drastically on its single-family mortgages and it began to make all kinds of non-real estate investments. It made direct investments in equity securities and also included 'high yield-high risk' bonds in its investment portfolio." *Id.*

6. See *Investigation of Senator Alan Cranston: Senate Select Comm. on Ethics*, 102d Cong., 1st Sess., 102-233 (1991) [hereinafter *Keating Report*]. For a detailed explanation of Lincoln Savings and Keating's involvement in the S&L collapse, see generally *Lincoln Savings & Loan*, 743 F. Supp. at 901.

7. See Wertheimer & Manes, *supra* note 3, at 1139. See generally Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 MICH. L. REV. 1, 3 (1996) (noting that Keating's large contributions and undue influence may be the "ultimate . . . [in] political corruption").

8. Keating raised more than \$1.5 million for Senators Alan Cranston, Dennis DeConcini, John Glenn, John McCain, and Donald Riegle. Levin, *supra* note 7, at 3.

caused Congress to increase the federal deposit guarantee insurance from \$40,000 to \$100,000.<sup>9</sup>

Former Senator William Proxmire analogized the S&L lobbyists and members of Congress to a game of baseball. He commented:

Imagine that you're watching a World Series baseball game. The pitcher walks over to the umpire before the game begins. The pitcher pulls a wad of \$100 bills out of his pocket and counts out 100 of them, \$10,000, and hands the whole fat wad to the plate umpire. The umpire jams the bills into his pocket, warmly thanks the pitcher and settles down to call that same pitcher's balls and strikes.<sup>10</sup>

The fans are left wondering what was going on. They had paid to watch a fairly played baseball game, yet they are left to conclude that the game had been fixed.<sup>11</sup>

Like the baseball game, the lobbyists and members of Congress fixed the political game. The dangerous investments made by the S&Ls ultimately failed, leaving the taxpayer with the bill. The government was willing to take such huge risks because of the corrupting influence of money in politics. Five senators "were accused of improperly interfering in regulatory decisions in order to assist" Keating.<sup>12</sup> Speaking of the scandal investigation, Keating said, "[o]ne question . . . had to do with whether my financial support in any way influenced several political figures to take up my cause. I want to say in the most forceful way I can: I certainly hope so."<sup>13</sup>

The corrupting influence of secret offshore bank accounts, large campaign contributions, quid pro quo, and buying exclusive access to politicians is seen as the root of evil within the election process.<sup>14</sup> These evils corrupt and undermine the entire nature of democracy. "The payment of money to bias the judgment or sway

9. See Wertheimer & Manes, *supra* note 3, at 1139-40 (quoting 139 CONG. REC. S6678 (daily ed. May 27, 1993) (statement of Sen. Kerry)).

10. William Proxmire, *Take the Pledge: No More Special Interest Money*, ROLL CALL, Sept. 17, 1990, at 5.

11. *Id.*

12. BRADLEY A. SMITH, UNFREE SPEECH 62 (2001); see also *Keating Report*, *supra* note 6. Of the "Keating Five," the committee only formally reprimanded Senator Alan Cranston. It found that his pattern of fundraising was impermissibly tied too closely to his official activities. *Id.* at 20.

13. Terry Atlas, *Scandal Builds Around Lincoln S&L*, CHI. TRIB., Nov. 19, 1989, at § 7, pg. 7; Michael Kranish, *Five Senators Who Aided S&L Face Queries on Contributions*, BOSTON GLOBE, Oct. 18, 1989, at A12 (quoting Charles Keating).

14. See generally Daniel H. Lowenstein, *On Campaign Finance: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301 (1989) (claiming that money is the root of evil in the political system). Lowenstein also looks at whether contributors actually get access to politicians based upon their contributions. By looking carefully at the evidence, he rejects many studies that attempt to prove that money does not buy political influence. Instead, he argues that money does buy inappropriate influence. *Id.* at 313-22. Concluding that:

The legislative process is not corrupt, but it is tainted with corruption. Legislators, by and large, are not corrupt. Neither are lobbyists. They are doing what they must to carry out their roles in the system as it presents itself to them. They are not corrupt, though sometimes they are corrupted. The campaign finance system is corrupt.

*Id.* at 335. This corrupt campaign finance system is caused by improper influence of money. *Id.*

the loyalty of persons holding positions of public trust is a practice whose condemnation is deeply rooted in our most ancient heritage.”<sup>15</sup>

As long as the corrupting influence of money survives, so too will the goal to keep our “elections free from the [corrupting] power of money.”<sup>16</sup> Congress has worked toward a corruption-free democracy by enacting an assortment of regulations to prevent this undue influence from sabotaging or diminishing the political process.

Congress’s power to regulate the manner of elections comes from the Elections Clause of Article I, Section 4.<sup>17</sup> Its enumerated power to regulate is not, however, limitless. Beginning in 1976, the Court restricted this power based upon First Amendment concerns. When government regulations trespass protected First Amendment rights, they can only be upheld by meeting the governmental interest in preventing corruption or the appearance of corruption.

In 2002, Congress exercised its power to regulate by passing sweeping campaign finance legislation known as the Bipartisan Campaign Reform Act of 2002 (“BCRA”).<sup>18</sup> Almost immediately after BCRA took effect, Senator Mitch McConnell brought suit asking a special three-judge panel of the District Court for the District of Columbia to find the law unconstitutional.<sup>19</sup> He argued, *inter alia*, that BCRA “tramples First Amendment rights.”<sup>20</sup> In response, the Government argued that Congress did have the authority to legislate because—even though BCRA crossed into protected First Amendment activity—the legislation was passed in an effort to drive corruption or the appearance of corruption from the political process. Later, the District Court’s decision was appealed directly to the Supreme Court in *McConnell v. Federal Election Commission*.<sup>21</sup> The Court upheld the major provisions of BCRA by a 5-4 vote.<sup>22</sup> The majority maintained that corruption or the appearance of corruption justified any infringement upon the First Amendment.<sup>23</sup>

With such a “strong affirmation of Congress’s authority to regulate the flow of money in politics,”<sup>24</sup> some in Congress have begun to call for additional reforms.<sup>25</sup>

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15. *Id.* at 302.

16. *United States v. UAW-CIO*, 352 U.S. 567, 575 (1957).

17. U.S. CONST., art. I, § 4.

18. Pub. L. No. 107-155, 116 Stat. 181 (2002).

19. Edward Walsh, *Campaign Finance Hits First Legal Test; Judges to Hear Oral Arguments*, WASH. POST, Dec. 2, 2002, at A1. Senator McConnell was only one of the more than eighty named Plaintiffs in the case which included well known organizations like the Republican National Committee, the National Rifle Association, the A.F.L.-C.I.O., the American Civil Liberties Union, and the California Democratic Party. Neely Tucker & Edward Walsh, *Panel Stays Campaign Finance Ruling; McCain-Feingold Law Restored Until Decision By Supreme Court*, WASH. POST, May 20, 2003, at A1. Richard A. Oppel & Neil A. Lewis, *Campaign Law Set for Big Test In a Courtroom*, N.Y. TIMES, Dec. 3, 2002, at A1.

20. Neely Tucker, *Campaign Law Case Brings Debate, Crowds: McCain-Feingold Bill Called Threat to Free Speech—and Key to Honest Elections*, WASH. POST, Dec. 5, 2002, at A4.

21. 124 S. Ct. 619 (2003).

22. *Id.*

23. See Linda Greenhouse, *Justices, in a 5-To-4 Decision, Back Campaign Finance Law that Curbs Contributions*, N.Y. TIMES, Dec. 11, 2003, at A1; Charles Lane, *Justices Uphold Campaign Finance Law; Court Endorses ‘Soft Money’ Ban, Rejecting Free-Speech Concerns*, WASH. POST, Dec. 11, 2003, at A1.

24. Lane, *supra* note 23, at A01.

This Note argues that Congress's power to regulate elections is not unlimited. *McConnell* does not grant any sort of unlimited power to Congress. Instead, Congress may regulate so long as it follows a careful legislative strategy. This Note discusses a plan under which future campaign finance regulations will be successful and avoid constitutional problems.

To assist in understanding the best possible plan, Part I provides a brief history of campaign financing regulations. Part II discusses the landmark case *Buckley v. Valeo*.<sup>26</sup> *Buckley* provided the starting point for all campaign finance reform analysis. This decision firmly entrenched First Amendment analysis into campaign financing.<sup>27</sup> *Buckley* also first developed the government interest of corruption or the appearance of corruption as sufficient to justify abridging the First Amendment. Part III then explores in greater detail the meaning of corruption or the appearance of corruption as defined by the Court. To gain a better understanding of the Court's definition, this Note looks at significant cases dealing with the justification. Part IV offers a brief overview of how Congress used the justification of corruption to its advantage when passing BCRA. Because Congress properly used the justification the Court upheld BCRA in *McConnell*. Finally, Part V presents details for a successful legislative strategy in the future. Two important aspects of the strategy include remaining true to the Court's definition of corruption and compiling a legislative record containing evidence of that corruption.<sup>28</sup> This Note concludes by arguing that if Congress uses the corruption justification properly, it will have the power to pass future campaign finance laws without violating the Constitution.

#### I. CONGRESSIONAL REGULATION: A BRIEF HISTORY OF EARLY CAMPAIGN FINANCING LAWS

President Theodore Roosevelt's first item of business on his 1906 agenda for Congress was to prohibit contributions to federal candidates made by

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25. Senator John McCain, Remarks at the Carnegie Corporation of New York (Jan. 26, 2004), at <http://www.democracy21.org> (last visited Apr. 20, 2004); see also Tom Gerety, *Statement on the Supreme Court's Ruling on Campaign Finance Reform*, at [http://www.brennancenter.org/programs/bcra/bcra\\_victory.html](http://www.brennancenter.org/programs/bcra/bcra_victory.html) (stating that even after *McConnell*, "[t]here are many more battles to wage in pursuit of a more open and inclusive democracy") (last visited Apr. 20, 2004).

26. 424 U.S. 1 (1976).

27. Some scholars argue that the reasoning of money equaling speech is flawed. They have attempted to show that the entire body of law is unworkable because money is not really speech. See, e.g., Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1289 (1994) (discussing, in part, whether money really equals speech); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005 (1976).

28. Strong arguments have been made against why the Court should not use a type of legislative record review. Indeed, "[r]equiring the legislature to make findings supporting the need for legislation likely strikes many as problematic." Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731, 734 (1996). The intention of this Note is not to argue in favor of or against legislative record review. Instead, it argues that just as the Court has used legislative record analysis in Commerce Clause and Fourteenth Amendment doctrine, so too has the Court begun to rely upon it when reviewing campaign financing cases. Therefore, because the Court has chosen to use this method of review, this Note offers a plan for Congress to follow when enacting future campaign financing regulations.

corporations.<sup>29</sup> In 1907, Congress responded to President Roosevelt by enacting the Tillman Act.<sup>30</sup> The Act provided, "[t]hat it shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office."<sup>31</sup> In 1921, the Supreme Court handed down *Newberry v. United States*,<sup>32</sup> a case that invalidated federal regulation of Senate primary races. The *Newberry* decision eventually led to a considerable revision of the current campaign laws, known as the Federal Corrupt Practices Act of 1925 ("FCPA").<sup>33</sup> At the time, the astonishing growth of organized labor during World War II concerned Congress because this powerful force could begin to behave politically much like corporations.<sup>34</sup> Thus, in the Smith-Connally Act of 1943,<sup>35</sup> Congress extended the prohibition on campaign contributions made by labor organizations for the duration of the war.<sup>36</sup>

"Shortly thereafter [in 1947] Congress again acted to protect the political process from what it deemed to be the corroding effect of money employed in elections by aggregated power."<sup>37</sup> Congress made FCPA permanent, the wartime legislation, "proscrib[ing] any 'expenditure' as well as 'any contribution,' . . . application to labor organizations and to extend its coverage to federal primaries and nominating conventions."<sup>38</sup> This legislation became the Taft-Hartley Act of 1947.<sup>39</sup>

#### *A. Federal Election Campaign Act of 1971*

With John F. Kennedy running for president, the early 1960s brought about the Kennedy era in American politics. Many of Kennedy's opponents argued that he had an unfair advantage because his family was very wealthy and he was able to use much of that wealth in his campaign.<sup>40</sup> Furthermore, due to the rising cost of elections and the more than ever prevalent influence of money, there began an election reform movement that focused on ways that money was raised and spent in elections.<sup>41</sup> In 1971, Congress passed the Federal Election Campaign Act ("FECA").<sup>42</sup> The new law set limitations on the amount of money that federal candidates could personally contribute to their election campaigns, placed limits on what could be spent on media advertising, and required candidates to completely

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29. *United States v. UAW-CIO*, 352 U.S. 567, 575 (1957).

30. *Id.* at 578 (citing the Tillman Act, ch. 420, 34 Stat. 864 (1907)).

31. Tillman Act, ch. 420, 34 Stat. 864 (1907).

32. 256 U.S. 232 (1921).

33. *UAW*, 352 U.S. at 578 (citing the Federal Corrupt Practices Act of 1925, ch. 368, 43 Stat. 1070 (1925)).

34. 57 Stat. 163, 167; *see also* *UAW*, 352 U.S. at 5.

35. Ch. 144, 57 Stat. 163, 167-68 (1943) (terminated 1946).

36. *UAW*, 352 U.S. at 578 (citing the Smith-Connally Act, ch. 144, 57 Stat. 163, 167-68 (1943) (terminated 1946)).

37. *Id.* at 582.

38. *Id.* at 582-83 (quoting the Taft-Hartley Act, ch. 120, 61 Stat. 136, 159-60 (1947)).

39. *Id.* The Taft-Hartley Act was eventually codified at 18 U.S.C. § 610 (1946).

40. COIL, *supra* note 2, at 10.

41. *See id.* at 12.

42. Pub. L. No. 92-225, 86 Stat. 3 (1972).

disclose to the public their campaign contributions and expenditures.<sup>43</sup> FECA went into effect on April 7, 1972.<sup>44</sup>

Prior to the adoption of FECA, "the size and sources of candidate contributions were not publicly disclosed, and there were no effective limits on the amount of money that individuals or groups could contribute to federal campaigns."<sup>45</sup> However, knowing that the status quo would soon change—and that there would no longer be an opportunity for undisclosed secret fundraising—many candidates increased their efforts to raise large sums of money before the new law went into effect.<sup>46</sup> President Richard Nixon was among the candidates who engaged in this eleventh-hour fundraising.<sup>47</sup>

Not long after FECA took effect, news of the Watergate scandal broke.<sup>48</sup> It was eventually discovered that before FECA's April 7, 1972 deadline, the Nixon fundraising machine had generated almost \$20 million in unreported campaign funds.<sup>49</sup> Total contributions came to some \$60.2 million.<sup>50</sup> Much of the unreported money was raised in the last forty-eight hours before the deadline.<sup>51</sup> The revelations showed that there had been more than \$10 million in soon to be illegal corporate contributions,<sup>52</sup> including some \$2 million solely from the dairy industry.<sup>53</sup> To avoid detection, a large portion of that money was collected in cash.<sup>54</sup> Howard Hughes gave one \$100,000 contribution, which was stashed in a safe deposit box.<sup>55</sup>

Other famous and blatantly corrupt uses of money were large donations used as bribes. As reported by the *New York Times*, one of Amerada Hess Corporation's oil refineries came under investigation by the Interior Department.<sup>56</sup> Leon Hess, chairman of Amerada Hess, made secret donations of more than \$575,000 to the campaigns of President Nixon and Senator Henry Jackson (chair of the Interior

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43. COIL, *supra* note 2, at 12. For an in depth discussion of the significant provisions in the 1971 FECA, see Anthony Corrado, *Federal Election Campaign Act of 1971*, in *POLITICAL PARTIES AND ELECTIONS IN THE UNITED STATES: AN ENCYCLOPEDIA* 353-54 (L. Sandy Maisel ed., 1991).

44. COIL, *supra* note 2, at 12.

45. ANTHONY CORRADO, *CAMPAIGN FINANCE REFORM* 9 (2000).

46. COIL, *supra* note 2, at 12.

47. *Id.*

48. SMITH, *supra* note 12, at 31.

49. COIL, *supra* note 2, at 13.

50. *MONEY & POLITICS: CONTRIBUTIONS, CAMPAIGN ABUSES & THE LAW* 35 (Lester A. Sobel ed., 1974) [hereinafter *MONEY & POLITICS*]. A report compiled by Common Cause explained that the Nixon campaign had raised \$11.4 million in secret contributions during the four weeks before April 7, 1972. *Id.*

51. SMITH, *supra* note 12, at 31-32. This included a whopping \$2.9 million on April 6, 1972. *MONEY & POLITICS*, *supra* note 50, at 35.

52. SMITH, *supra* note 12, at 31-32.

53. *Id.* at 32; see also COIL, *supra* note 2, at 13.

54. Some people who made cash donations, including singer Frank Sinatra, also divided their contributions into \$3000 payments in order to avoid paying taxes on the sum. See *MONEY & POLITICS*, *supra* note 50, at 33.

55. COIL, *supra* note 2, at 13; see also *MONEY & POLITICS*, *supra* note 50, at 34.

56. *Senate Panel Data Show Donor Hid Gifts to Jackson's '72 Race*, N.Y. TIMES, Aug. 8, 1974, at 25.

Committee).<sup>57</sup> Shortly after making the contributions, the investigation into Amerasia Hess ceased.<sup>58</sup>

Many of these undisclosed contributions were used for illegal purposes. Two *Washington Post* reporters, Bob Woodward and Carl Bernstein, revealed a secret bank account had been set up by President Nixon's Committee to Reelect the President ("CRP").<sup>59</sup> The secret account contained campaign contributions to CRP, which included illegal corporate money laundered through a Mexico City bank.<sup>60</sup> Funds from the account were used to pay the men who had bugged and burglarized Democratic National Committee headquarters in the Watergate hotel-apartment building.<sup>61</sup>

The Woodward and Bernstein revelation prompted Congress to direct the General Accounting Office ("GAO") to audit CRP.<sup>62</sup> The GAO audit uncovered even more illegal transactions and apparent violations of campaign finance laws than those originally reported by Woodward and Bernstein.<sup>63</sup> After congressional and legal investigations, President Nixon finally released incriminating tape recordings that showed that Nixon knew that the Watergate break-in had been paid for with campaign funds.<sup>64</sup> Furthermore, the tapes clearly proved the President had directed the cover-up—once again paid for with illegal campaign funds.<sup>65</sup> Soon thereafter Nixon resigned the Presidency, effective August 9, 1973.<sup>66</sup>

### B. 1974 FECA Amendments

During the investigation, and in response to the corrupt campaign finance practices of CRP and President Nixon, Senators Edward M. Kennedy (D-MA) and Hugh Scott (R-PA) put forth bills to amend the 1971 FECA to tighten the holes in campaign laws.<sup>67</sup>

Watergate<sup>68</sup> and the 1972 Nixon campaign revealed details of financial abuse

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57. *Id.*

58. Ben A. Franklin, *Miss Woods's Gift List Links Donors to Corporations*, N.Y. TIMES, Mar. 20, 1974, at 30.

59. ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 47 (1988); see also John W. Dean, III, *Watergate: What Was It?*, 51 HASTINGS L.J. 609 (2000) (discussing in detail what the Watergate scandal was, how it happened, and who played the various roles in revealing the high level of corruption within the Nixon administration).

60. MUTCH, *supra* note 59, at 47.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 49.

65. *Id.* at 48-49.

66. *Id.*

67. *Id.* at 49.

68. In his article, *Watergate: What Was It?*, John Dean attempts to define Watergate. He cites two interesting definitions. Dean, III, *supra* note 59, at 645 n.101. First, Watergate is defined as:

1. A political scandal during the 1972 presidential campaign, arising from a break-in at the Democratic Party headquarters at the Watergate building complex in Washington, D.C. and culminating in the resignation of President Nixon.
2. any scandal involving corruption and other abuses of power, and attempt to conceal these activities from the public.



and corruption that raised serious concerns in the public mind and Congress about the influence of money in politics.<sup>69</sup> Soon thereafter Congress amended the 1971 FECA with the 1974 FECA Amendments.<sup>70</sup> The two versions of the amendments were Senate Bill 3044<sup>71</sup> and House Bill 16,090.<sup>72</sup> The stated purpose of the Senate Bill was to "provid[e] complete control over and disclosure of campaign contributions and expenditures in campaigns for Federal elective office."<sup>73</sup> The 1974 FECA Amendments placed dollar limits on the amount individuals could contribute<sup>74</sup> to candidates and political committees.<sup>75</sup> The amendments also limited spending by candidates in federal elections.<sup>76</sup> Finally, the amendments created a system for disclosure requirements and also created the Federal Election Commission ("FEC") to ensure that candidates complied with the new record keeping and disclosure rules.<sup>77</sup>

## II. MONEY AS SPEECH AND A COMPELLING GOVERNMENT INTEREST: *BUCKLEY V. VALEO*

In 1976 the Supreme Court handed down *Buckley v. Valeo*,<sup>78</sup> the most significant decision to date examining the limits on campaign financing. Several politicians including Senator James L. Buckley of New York and Eugene McCarthy, a presidential candidate and former Senator from Minnesota,<sup>79</sup> filed suit challenging the constitutionality of the 1974 FECA Amendments.<sup>80</sup> *Buckley* dealt with four major issues of FECA's amendments: (1) individual contribution and expenditure limitations; (2) reporting and public disclosure of certain expenditures and contributions; (3) public funding for presidential elections; and (4) the creation

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*Id.* (quoting RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1505 (1991)). The second definition given is "[a] scandal that involves officials violating public or corporate trust through perjury, bribery, and other acts of abuse of power in order to keep their elective or appointive positions." *Id.* (quoting THE AMERICAN HERITAGE DICTIONARY 1366 (2d Coll. Ed. 1985) (alteration in original)).

69. For a discussion of how the events of Watergate lead to Congress amending FECA, see HERBERT E. ALEXANDER, FINANCING THE 1972 ELECTION 591 (1976).

70. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (amending Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972)).

71. S. 3044, 93d Cong. (1974), S. REP. NO. 93-689 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5587, 5587.

72. H.R. 16,090, 93d Cong. (1974), H.R. REP. NO. 93-1239 (1974).

73. S. REP. NO. 93-689, at 1, *reprinted in* 1974 U.S.C.C.A.N. at 5587-88.

74. 18 U.S.C. § 608(b) (Supp. IV 1974) (repealed 1976) provided that "no person shall make contributions to any candidate with respect to any election for Federal office . . . exceed[ing] \$1,000." *Id.* The statute also limited aggregate contributions by any one individual to a total of \$25,000. *Id.*

75. 2 U.S.C. § 441a(a) (1974).

76. 18 U.S.C. § 608(e) (Supp. IV 1974) (repealed 1976) provided that "no person may make any expenditure relative to a clearly identified candidate during a calendar year . . . exceed[ing] \$1,000."

77. 2 U.S.C. §§ 432-34, 437 (1974).

78. 424 U.S. 1 (1976) (*per curiam*).

79. *Id.* at 7-8 (describing various plaintiffs).

80. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, §§ 101, 202, 310, 403, 88 Stat. 1263-68, 1275, 1280, 1291 (1974) (codified as amended at 2 U.S.C. §§ 431-56 (1994)).

of the FEC.<sup>81</sup> The challenge was directed, among other things, at various provisions of the 1974 FECA Amendments restricting election spending.<sup>82</sup> The 1974 Amendments had been designed to "purify and equalize federal elections, [by] plac[ing] stringent limitations upon the amounts of money that individuals were permitted to contribute and spend upon campaigns for federal office."<sup>83</sup> When examining these expenditure and contribution limits, the Court was required to decide if the limitations violated the First Amendment Free Speech Clause. This stemmed from the Court's recognition that campaign expenditures and contributions work within "an area of the most fundamental First Amendment activities."<sup>84</sup>

First, the Court carved out a distinction between campaign expenditures and campaign contributions.<sup>85</sup> The Court found that limitations on expenditures produced severe First Amendment concerns.<sup>86</sup> "[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money."<sup>87</sup> The Court reasoned that even "[t]he distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs."<sup>88</sup> The Court concluded that expenditure limitations required the most "exacting scrutiny applicable to limitations on core First Amendment rights of political expression."<sup>89</sup> To overcome this heightened burden, the Government would have to show a substantial governmental interest.<sup>90</sup> The interest asserted by the defenders of FECA—preventing corruption and the appearance of corruption—did not satisfy the

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81. 424 U.S. at 7.

82. *Id.* at 11.

83. Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1050 (1985).

84. *Buckley*, 424 U.S. at 14. The Court found that the Free Speech test from *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (holding that "a government regulation is sufficiently justified if it . . . furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on the alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest"), was not the appropriate test because the "expenditure of money simply cannot be equated with such conduct as destruction of a draft card." *Buckley*, 424 U.S. at 16. The Court also refused to apply First Amendment principles from *Cox v. Louisiana*, 379 U.S. 559 (1965) (reasoning that the government could adopt reasonable time, place, and manner restrictions on speech), to campaign financing. *Buckley*, 424 U.S. at 17-18.

85. *Buckley*, 424 U.S. at 19-20. The definition of a contribution is money given by a donor that is completely turned over to a third party such as: a political party, candidate, or political action committee. These are considered contributions because the donor does not have any say as to how or when the money will be spent. The definition of an expenditure is money that is spent on someone else's behalf, but is controlled directly by the spender. See Daniel R. Ortiz, *Constitutional Restrictions on Campaign Finance Regulation*, in CAMPAIGN FINANCE REFORM: A SOURCEBOOK 63 (Anthony Corrado et al. eds., 1997). Furthermore, Congress said that an independent expenditure encompassed "sums expended on behalf of a candidate without his authorization, as distinct from contributions of money, goods or services put at the disposal of his campaign organization." S. REP. NO. 93-689, 18 (1974), reprinted in 1974 U.S.C.C.A.N. 5587, 5604.

86. *Buckley*, 424 U.S. at 19-20.

87. *Id.* at 19.

88. *Id.*

89. *Id.* at 44-45.

90. *Id.*

exacting scrutiny on independent expenditures,<sup>91</sup> because the risk of corruption resulting from an individual spending his own money was very low. The other interest offered by the Government, "equalizing the relative ability of individuals and groups to influence the outcome of elections,"<sup>92</sup> was also not enough to overcome strict scrutiny. It was not a valid interest because "equalizing" speech was a concept "wholly foreign to the First Amendment."<sup>93</sup> Consequently, the Court struck down all independent expenditure limitations as unconstitutional.<sup>94</sup>

Next, *Buckley* addressed the question of limits on campaign contributions.<sup>95</sup> The Court upheld FECA's limit on contributions because they placed less significant burdens on the protected freedoms of political expression and association.<sup>96</sup> The Court said that limiting contributions "involves little direct restraint on his political communication."<sup>97</sup> *Buckley* held that these protected constitutional rights could be overcome. The test used by the Court was that, "[e]ven a 'significant interference' with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."<sup>98</sup>

The Government argued that three different interests acted to justify the limits on contributions. The first and primary justification was the need to protect against corruption and the appearance of corruption.<sup>99</sup> The second was to reduce the influence of the wealthy and equalize the political process for all participants.<sup>100</sup> The final justification was to reduce the increasing cost of campaigns thus allowing greater access to the political system to those without a lot of money.<sup>101</sup> The Court summarily dismissed the last two interests because the primary goal of protecting against actual and perceived corruption was sufficient to allow some infringement of First Amendment rights.<sup>102</sup>

Looking at corruption, the Court called attention to the potential for quid pro quo between candidates and donors. The giving of large sums of money for political favors had the potential to undermine the integrity of our democracy.<sup>103</sup> In an attempt to define corruption the Court simply noted that corruption is often difficult to detect.<sup>104</sup> The "deeply disturbing examples" from the 1972 election and Watergate scandal, however, were sufficient proof of this kind of corruption.<sup>105</sup> The Court did not cite any specific examples from the 1972 election or provide a clear

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91. *Id.* at 45.

92. *Id.* at 48.

93. *Id.* at 49.

94. *Id.* at 51.

95. See 18 U.S.C. § 608(b) (Supp. IV 1974) (repealed 1976) for contribution limits.

96. *Buckley*, 424 U.S. at 23.

97. *Id.* at 21.

98. *Id.* at 25 (quoting *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975) (quotations omitted) (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963) and *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

99. *Id.* at 25.

100. *Id.* at 25-26.

101. *Id.* at 26.

102. *Id.* at 26-29.

103. *Id.* at 27-28.

104. *Id.*

105. *Id.*

definition of corruption. Instead, it merely addressed examples of corruption in a footnote, citing the examples presented by the court of appeals.<sup>106</sup>

In reaching its conclusions, the court of appeals relied upon a Senate report from the Select Committee on Presidential Campaign Activities.<sup>107</sup> This Committee investigated misconduct surrounding the 1972 presidential election.<sup>108</sup> The report showed several major forms of actual quid pro quo corruption. First, there were enormous contributions<sup>109</sup> made to the Nixon campaign by the dairy industry.<sup>110</sup> In return for the dairy industry's two million dollars, President Nixon overrode the decision of the Secretary of Agriculture and instructed that price supports be raised.<sup>111</sup> Second, the report found that the large contributions from individuals and special interest groups were given to legislators as a means to secure special access.<sup>112</sup> As one person put it, the campaign contributions were essentially likened to a "calling card, something that would get us in the door and make our point of view heard."<sup>113</sup> There were many other examples in the report that pointed to instances of special favors made in return for large donations.<sup>114</sup> Therefore, in reliance on this evidence provided by the court of appeals, the Supreme Court said that the problem of corruption was "not an illusory one,"<sup>115</sup> and concluded that there was a significant governmental interest to allow for regulation of campaign contributions.<sup>116</sup>

In summary, the *Buckley* decision made a distinction between campaign expenditures and contributions. The Court held, among other things, that FECA's restrictions on individual expenditures were unconstitutional. On the other hand, the Court upheld FECA's limitations restricting the amount of money an individual could contribute to a candidate based upon the significant interest of preventing actual corruption or its appearance. In reaching its conclusion, the Court upheld

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106. *Id.* at 27 n.28 (citing *Buckley v. Valeo*, 519 F.2d 821 (1975 D.C. Cir.), *rev'd*, 424 U.S. 1 (1976)).

107. S. REP. NO. 93-981 (1974) [hereinafter 1974 SENATE REPORT].

108. *Buckley*, 519 F.2d at 840 n.35.

109. "[M]ilk producers, on legal advice . . . [and] consultation . . . with Nixon fund raisers, . . . br[oke] down the \$2 million into numerous smaller contributions to hundreds of committees in various states which could then hold the money for the President's reelection campaign, so as to permit the producers to meet independent reporting requirements without disclosure." *Id.* at 840 n.36.

110. *Id.*

111. *Id.*

112. *Id.* at 840 n.37.

113. *Id.*

114. *Id.* These examples also include giving sizeable contributions in order to be considered for ambassadorships. *Id.* at 840 n.38.

115. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976). The Appellants also attempted to argue that even if the restrictions on contributions did serve a significant government interest, they were not narrowly tailored and should fail strict scrutiny. *Id.* The Appellants urged the Court to strike down the contribution limits in FECA because "bribery laws and narrowly drawn disclosure requirements constitute a less restrictive means." *Id.* The Court was not convinced. It simply held that the contribution limitations had identified a problem of corruption and the limits were narrowly tailored enough to solve the problem in a way that did not significantly undermine First Amendment rights. *Id.* at 28.

116. *Id.* The Court said that "Congress could legitimately conclude that the avoidance of the appearance of improper influence is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.* (quotations omitted).

much of FECA by focusing on the government interest in preventing quid pro quo corruption.

### III. CLASSIFYING CORRUPTION: THE COURT CONSTRUCTS THE INTEREST

The *Buckley* decision revealed a workable framework based upon First Amendment jurisprudence in which to analyze campaign financing.<sup>117</sup> That decision was only the beginning, however, leaving many areas open to debate. Many scholars argued that *Buckley* was unworkable, completely wrong, and should be abandoned.<sup>118</sup> Yet the Court built from the principles outlined in *Buckley* making clear that the only recognized governmental interest sufficient to overcome First Amendment scrutiny was actual corruption or the appearance of corruption. Hence, for many years a debate followed over the meaning of corruption and just how much was required to meet First Amendment scrutiny.<sup>119</sup> In reference to political corruption, *Buckley* noted that the "scope of such pernicious practices can never be reliably ascertained."<sup>120</sup> Indeed, it is difficult to say with any great precision what constitutes corruption. Notwithstanding the challenge of defining the governmental interest, the Court's campaign finance decisions following *Buckley* began to shed some light upon the subject. Combining the doctrine from these rulings reveals the various forms of corruption recognized by the Court. In an effort to more fully develop the meaning of corruption, a look at the Court's campaign finance decisions over the quarter century after *Buckley* aids in ascertaining the scope of this interest.

#### A. The Court and Corruption—The First Ten Years After *Buckley*

*First National Bank of Boston v. Bellotti*,<sup>121</sup> was the first campaign finance case decided after *Buckley*. In *Bellotti*, the Court struck down a Massachusetts statute which restricted the participation of banks and corporations in referendum proposals.<sup>122</sup> The Court found that the restrictions violated a corporation's right to free speech.<sup>123</sup> The Commonwealth argued that it had a compelling interest in preventing corruption or perceived corruption because "corporations are wealthy and powerful and their views may drown out other points of view."<sup>124</sup> In its analysis, the Court focused not on whether a corporation had a First Amendment

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117. See generally BeVier, *supra* note 83.

118. See, e.g., E. JOSHUA ROSENKRANZ, *BUCKLEY STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM* 15-21 (1998); Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. OF BOOKS, Oct. 17, 1996, at 19-24.

119. See, e.g., Paul S. Edwards, *Defining Political Corruption: The Supreme Court's Role*, 10 BYU J. PUB. L. 1 (1996); David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 REV. LITIG. 85 (1999); Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45 (1997); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369 (1994).

120. *Buckley*, 424 U.S. at 27.

121. 435 U.S. 765 (1978).

122. *Id.*

123. See generally *id.*

124. *Id.* at 789.

right to free speech, but instead on whether the speech being restricted was the kind of speech meant to be protected by the First Amendment.<sup>125</sup> The Court said,

It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source.<sup>126</sup>

The Court found that while preserving the integrity of the electoral process was of high interest,<sup>127</sup> the risk of corruption was not present in this particular case because it dealt with a public referendum election.<sup>128</sup> Furthermore, the Court refused to find a governmental interest in preventing corruption because the Commonwealth failed to show in the "record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes" or that there was a lack of "confidence of the citizenry in government."<sup>129</sup> The *Bellotti* decision remained consistent with *Buckley* because while Congress may be able to show the existence of real or perceived corruption through large expenditures and contributions to candidates, the threat was not possible in this case because there was no evidence of corporate corruption and no candidate to corrupt.<sup>130</sup>

Next, in 1982 the Court heard *FEC v. National Right to Work Committee*.<sup>131</sup> Writing for the majority, Justice Rehnquist addressed Congress's ability to regulate corporations based on corruption in the federal election process. The Court upheld the statute because "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political

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125. *Id.* at 775-76.

126. *Id.* at 777.

127. *Id.* at 789.

128. *Id.* at 787-88 n.26.

129. *Id.* at 789-90.

130. *Id.* Justice White's dissent, an interesting side note from *Bellotti*, is noteworthy because of its influence in Supreme Court precedent many years later. Justice White expressed concern about corporations being able to "amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process." *Id.* at 809 (White, J., dissenting). Justice White was concerned about the special fundraising advantage because a corporation's ability to gather this wealth is not related in any way to the public support of a candidate or idea. *Id.* at 810. The raising of corporate funds happens through people spending money based upon nonpolitical economic self-interested transactions. As a result, such an unfair advantage and increased ability to raise money was troublesome because large corporate expenditures and contributions could tremendously distort the political process. But, as Justice White noted, the majority opinion did not find a need to address this concern because, "there ha[d] been no showing that the relative voice of corporations ha[d] been overwhelming or even significant in influencing referenda in Massachusetts." *Id.* Yet it was clear that the Court would eventually be required to answer this question. When it finally did, much of the framework for the answers appears to have originated from the ideas expressed by Justice White.

131. 459 U.S. 197 (1982).

debts.”<sup>132</sup> In this case, instead of relying alone on quid pro quo corruption or the appearance of corruption, the Court defined corruption as “political debts.”<sup>133</sup>

During this early post-*Buckley* period, the Court did not thoroughly explain or define corruption. This posed a problem for many lawyers and politicians. In an effort to clear the fog, the Court endeavored to illuminate the definition of corruption in *FEC v. National Conservation Political Action Committee* (“*NCPAC*”),<sup>134</sup> yet it never reached a strong resolution. The Court, with Justice Rehnquist writing for the majority, defined corruption as: “A subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors.”<sup>135</sup> Because quid pro quo was the hallmark of corruption, this suggested that there were other forms of corruption that could act as significant governmental interests. This definition left the door open for other types of corruption such as amassing large amounts of wealth to acquire an unfair advantage. Unfortunately, this issue was never answered in *NCPAC*. Justice Rehnquist simply relied upon the *Buckley* framework that made distinctions between expenditures and contributions and used the usual quid pro quo form of corruption.<sup>136</sup>

The Court upheld the district court’s decision to exclude evidence provided by the FEC to justify the regulations by showing actual corruption or perceived corruption.<sup>137</sup> “[E]vidence of high-level appointments in the Reagan administration of persons connected with [contributing] PACs and newspaper articles and polls purportedly showing a public perception of corruption,”<sup>138</sup> was excluded. The Court held that “[a] tendency to demonstrate distrust of PACs is not sufficient.”<sup>139</sup> Therefore, *NCPAC* provides somewhat of a broader definition of corruption; yet to come within that definition, greater proof than mere speculation of corruption is required.

Next, the Court decided *FEC v. Massachusetts Citizens for Life* (“*MCFL*”)<sup>140</sup> in 1986. In *MCFL*, the Court addressed the issue of whether a federal ban on campaign contributions violated the First Amendment.<sup>141</sup> As applied to *MCFL*, the Court found that § 441(b) of the FECA—that required corporations to make independent expenditures only from a separate segregated fund—unconstitutionally burdened the nonprofit organization’s freedom of expression.<sup>142</sup> The Court first found that the ban placed significant restrictions on free speech.<sup>143</sup> In order to justify the ban, the Government needed to show a compelling state interest, which the Court did not find. The FEC attempted to characterize the interest as one from *National Right to Work* in the prevention of corruption in the corporate form.<sup>144</sup>

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132. *Id.* at 208.

133. *Id.* at 208-11.

134. 470 U.S. 480 (1985).

135. *Id.* at 497.

136. *Id.* at 497-99.

137. *Id.* at 499.

138. *Id.*

139. *Id.*

140. 479 U.S. 238 (1986).

141. *Id.*

142. *Id.* at 263.

143. *Id.* at 251-56.

144. *Id.* at 256-57.

However, the Court found that independent expenditures made by MCFL were permissible because they were not similar to a corporation. In the Court's view, the concern was not that the corporation itself was inherently evil, but that it could amass large amounts of money unfairly. This unusual ability would lay the groundwork for a corporation to become a monetary heavyweight and unfairly influence the political process with its large amounts of wealth.<sup>145</sup> In spite of this apprehension, MCFL was not like a normal corporation, but instead was a nonprofit organization. It did not amass capital through normal market incentives. Rather, all of its funds were raised for one purpose—political communication. Therefore, there was no concern about the corrupting effects of money in this situation.<sup>146</sup>

### B. *Austin v. Michigan Chamber of Commerce*

In *Austin v. Michigan Chamber of Commerce*,<sup>147</sup> the Supreme Court upheld a Michigan statute that prohibited corporations from making independent expenditures citing the state's compelling governmental interest in preventing the distorting effects of wealth on the political process.<sup>148</sup> The *Austin* decision implemented a new standard never before used in campaign finance First Amendment case law. This new standard has been labeled by some as the "New Corruption" test.<sup>149</sup>

In *Austin*, the Michigan Chamber of Commerce ("Chamber") sought to make an independent expenditure from its general treasury funds in support of an individual candidate for the House of Representatives.<sup>150</sup> The statute made this type of independent expenditure illegal and punishable as a felony, thus the Chamber brought suit for an injunction.<sup>151</sup> The Chamber contended that even though it could use its segregated political fund for campaign expenditures,<sup>152</sup> its First Amendment right to free speech was still burdened because it was not free to use its general treasury funds for campaign expenditures.<sup>153</sup> Relying on *MCFL*, the Chamber claimed that it too was a non-profit corporation and should be entitled to spend money from its general fund on independent campaign expenditures.<sup>154</sup> The Court agreed. It determined there was a significant burden which could only be overcome by a compelling state interest.<sup>155</sup>

In response, the State argued that its goal of preventing corruption or the appearance of corruption provided a justifiable compelling state interest. In examining the State's compelling interest, the Court agreed, articulating that it had recognized that "the compelling governmental interest in preventing corruption

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145. *Id.* at 259 ("Regulation of corporate political activity thus has reflected concern not about use of the corporate form *per se*, but about the potential for unfair deployment of wealth for political purposes." (emphasis in original)).

146. *Id.*

147. 494 U.S. 652 (1990).

148. *Id.*

149. *Id.* at 684 (Scalia, J., dissenting).

150. *Id.* at 656.

151. *Id.*

152. The Chamber expected to raise some \$140,000 in its segregated fund by election time. *Id.* at 658.

153. *Id.*

154. *Id.*

155. *Id.*



support[s] the restriction of the influence of political war chests funneled through the corporate form.”<sup>156</sup> The Court found that this “different type of corruption in the political arena,”<sup>157</sup> can be recognized by two features. First, corruption can be “the corrosive and distorting effects of immense aggregations of wealth.”<sup>158</sup> Second, the wealth must have been “accumulated with the help of the corporate form and . . . have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>159</sup> These definitions of corruption illustrate that the Court was beginning to move beyond the mere quid pro quo definition of corruption from *Buckley* to include within the definition the “corrosive and distorting effects of immense aggregations of wealth” that have a negative impact upon the political process.<sup>160</sup>

The Court’s decision did not determine whether a corporation’s right to freedom of speech was different from that of an individual. Rather, it subjected corporations to a more exacting scrutiny because they enjoy “special advantages” which could have a “corrosive and distorting effect.”<sup>161</sup> Consequently, *Austin*’s ramifications in campaign finance cases are significant because it opens the door for a new type of corruption including large “war chests” and, for the first time, recognizes the possibility that independent expenditures can be restricted based upon the governmental interest in preventing corruption.

#### C. Colorado Republican Federal Campaign Committee v. Federal Election Commission

In *Colorado Republican Federal Campaign Committee v. Federal Election Commission* (“*Colorado I*”),<sup>162</sup> the Court decided whether Congress could regulate the amount of spending done by a political party on behalf of a candidate. In April 1986, the Colorado Republican Federal Campaign Committee (“Committee”) bought radio advertisements to attack then Congressman Tim Worth, a democrat running for an open Senate seat.<sup>163</sup> Under FECA,<sup>164</sup> the Committee was allowed to spend only a limited amount of money in coordinated expenditures in the Senate race.<sup>165</sup> The Committee had previously given its entire spending allotment to the National Republican Senatorial Committee. Upon purchasing the advertisements, the State Democratic Party claimed the Committee had violated the law.<sup>166</sup> The

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156. *Id.* at 659 (quoting *FEC v. Nat’l Conservation Political Action Comm.*, 470 U.S. 480, 500-01 (1985)).

157. *Id.*

158. *Id.* at 660.

159. *Id.*

160. Schultz, *supra* note 119, at 130.

161. *Austin*, 494 U.S. at 660.

162. 518 U.S. 604 (1996). This case is referred to as *Colorado I* because it eventually returned to the Supreme Court in 2001 (*Colorado II*) to decide issues left open in *Colorado I*.

163. *Id.* at 612.

164. 2 U.S.C. § 441a(d)(3) (1974).

165. *Colorado I*, 518 U.S. at 612. “Congress [has] acknowledged the unique role political parties play in the election process by allowing parties to supplement any direct contributions they make with expenditures made on *behalf* of individual candidates. These funds, because they are spent in coordination with candidates, are known as ‘coordinated expenditures.’” CORRADO, *supra* note 45, at 14 (emphasis in original).

166. *Colorado I*, 518 U.S. at 612.

Committee defended the charge by asserting that “the Party Expenditure Provision’s expenditure limitations violated the First Amendment.”<sup>167</sup>

The Court concluded that the coordinated party expenditure limit was an unconstitutional violation of the First Amendment as applied.<sup>168</sup> In an attempt to bring the activity within the scope of the recognized governmental interest in preventing corruption, the FEC argued that the activity was a coordinated expenditure. The Court was not persuaded, finding that the expenditure was independent—not coordinated with an individual republican.<sup>169</sup> The evidence showed that the “advertising campaign was developed by the Colorado Party independently and not pursuant to any general or particular understanding with a candidate.”<sup>170</sup> Because this was an independent expenditure, it fit within the *Buckley* framework prohibiting Congress from regulating.<sup>171</sup>

Also significant, the Court reasoned that the evidence in the legislative record revealed the Party Expenditure Provision was enacted “for the constitutionally insufficient purpose of reducing what [Congress] saw as wasteful and excessive campaign spending.”<sup>172</sup> The legislative record lacked any convincing evidence connecting the purpose of the legislation to the interest in preventing corruption. Therefore, the Court found that Congress had exceeded its legislative authority because the Court “d[id] not believe that the risk of corruption present here could justify the markedly greater burden on basic freedoms caused by the statute’s limitations on expenditures.”<sup>173</sup>

#### D. *Nixon v. Shrink Missouri Government PAC*

Four years after *Colorado I*, the Court heard *Nixon v. Shrink Missouri Government PAC*.<sup>174</sup> The *Shrink Missouri* case is important because it adds to the understanding of the “appearance of corruption” standard. In 1994, the Missouri Legislature passed a law that restricted the amount of contributions that could be given to a candidate running for state office.<sup>175</sup> Before the law went into effect, an initiative was approved that included even more restrictive contribution limits.<sup>176</sup> Zev David Fredman, a candidate for state auditor, and Shrink Missouri Government PAC, a political action committee, sought to enjoin enforcement of the new law.<sup>177</sup> “[T]he Court of Appeals held that Missouri was bound to demonstrate ‘that it ha[d] a compelling interest and that the contribution limits at

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167. *Id.*

168. *Id.* at 613.

169. *Id.* at 614.

170. *Id.*

171. The Court said, “restrictions on independent expenditures significantly impair the ability of individuals and groups to engage in direct political advocacy and ‘represent substantial . . . restraints on the quantity and diversity of political speech.’” *Id.* at 615 (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976)). Furthermore, restrictions on independent expenditures do not raise to quid pro quo concerns about corruption because no favors are traded for money when making independent expenditures. *Id.*

172. *Id.* at 618.

173. *Id.* at 617.

174. 528 U.S. 377 (2000).

175. *Id.* at 382.

176. *Id.*

177. *Id.* at 383.

issue [were] narrowly drawn to serve that interest.”<sup>178</sup> Furthermore, the court of appeals “treated Missouri’s claim of a compelling interest in ‘avoiding the corruption or the perception of corruption brought about when candidates for elective office accept large campaign contributions’ as insufficient by itself to satisfy strict scrutiny.”<sup>179</sup> The Supreme Court reversed.

The issue before the Court was whether *Buckley*’s power to limit campaign contributions applied to the States.<sup>180</sup> The Court upheld the *Buckley* decision and found it applicable at the state level.<sup>181</sup> In order to limit contributions, the State was nevertheless still required to overcome First Amendment scrutiny by showing a need to prevent corruption or its appearance.<sup>182</sup> Missouri argued that the law had in fact been passed with these concerns in mind.<sup>183</sup>

The next question before the Court was whether the State had actually passed the law in an effort to curb corruption. The Court looked for evidence of the two forms of corruption discussed in *Buckley*. It found no evidence of quid pro quo corruption, so for the first time the Court looked for “perceived corruption.”<sup>184</sup> The Court expressed the vital need to keep the perception of corruption out of the system in order to maintain a healthy democracy.<sup>185</sup> The Court noted that “[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.”<sup>186</sup> Furthermore, the evidence also had to be genuine and not imaginary—the Court had never been willing to accept mere conjecture.<sup>187</sup> The Court found that Missouri carried its burden by providing an adequate amount of evidence to justify its regulations. The evidence demonstrated that the people of Missouri believed that there was corruption present in the state democracy.<sup>188</sup> This decision was relatively simple as it did not require the Court to resolve what the evidentiary burden should be.<sup>189</sup> Thus, accepting the governmental interest in preventing the appearance of corruption, and evidence supporting that conclusion, the Court upheld Missouri’s statute as constitutional.

#### E. Federal Election Commission v. Colorado Republican Federal Campaign Committee

In *Federal Election Commission v. Colorado Republican Federal Campaign Committee* (“*Colorado II*”),<sup>190</sup> the Supreme Court addressed the issue of whether

178. *Id.* at 384.

179. *Id.*

180. *Id.* at 381-82.

181. *Id.* at 382.

182. *Id.* at 388.

183. *Id.* at 390.

184. *Id.*; see also D. Bruce La Pierre, *The Bipartisan Campaign Reform Act, Political Parties, and the First Amendment: Lessons From Missouri*, 80 WASH. U. L.Q. 1101, 1105 (2002) (“[T]he Court transformed the government’s interest in preventing actual quid pro quo corruption or the appearance of such corruption into a much broader . . . justification [for] contribution limits.”).

185. *Shrink Missouri*, 528 U.S. at 390.

186. *Id.* at 391.

187. *Id.* at 392.

188. *Id.* at 393-95.

189. *Id.* at 393.

190. 533 U.S. 431 (2001).

expenditures made by a political party, and coordinated with a candidate, could be treated “functionally as contributions, the way coordinated expenditures by other entities are treated.”<sup>191</sup> Unlike *Colorado I*, which was an as applied challenge to limits on expenditures, *Colorado II* was a facial challenge to the limit on coordinated party expenditures.<sup>192</sup> The Government argued that the coordinated expenditures should be treated the same because they are “as useful to the candidate as cash, and that such ‘disguised contributions’ might be given ‘as a *quid pro quo* for improper commitments from the candidate.’”<sup>193</sup> Consequently, the FEC argued a coordinated expenditure is like a contribution—a comparison that becomes apparent when individual contributors, having reached their maximum contribution limit, donate more to a political party knowing that the party will reciprocate by spending on their candidate’s behalf.<sup>194</sup> Therefore, if coordinated expenditures were not treated as contributions and restricted, this method of circumvention would increase.<sup>195</sup>

The Court was convinced by the Government’s argument. The Court held that coordinated party spending was the “functional equivalent” of contributions<sup>196</sup> and applied the same analysis to coordinated expenditures as it did to contributions. This determination required that the level of scrutiny applicable to the limit be “closely drawn” to match a “sufficiently important” interest.<sup>197</sup> Thus, the Court looked for the only recognized sufficiently important governmental interest—the prevention of corruption or the appearance of corruption. It held that “circumvention is a valid theory of corruption,”<sup>198</sup> and that “a party’s coordinated expenditures . . . may be restricted to minimize circumvention of contribution limits.”<sup>199</sup> Accordingly, circumvention clearly emerged as a form of recognized corruption.

#### *F. Summary of the Recognized Formulas for Corruption*

Even after all of these cases, “[t]he Court has never actually defined what it means by ‘corruption or the appearance of corruption.’”<sup>200</sup> However, while no solid definition of corruption has been declared, several forms have emerged. The first and perhaps easiest to identify is *quid pro quo*, or money for political favors, which surfaced in *Buckley*.<sup>201</sup> NCPAC also recognized “dollars for political favors” and a “subversion of the political process” as corruption.<sup>202</sup> In *National Right to Work*, the Court acknowledged that corruption could exist in the form of corporations

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191. *Id.* at 444.

192. *Id.* at 437.

193. *Id.* at 446 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)).

194. *Id.* at 447.

195. *Id.*

196. *Id.*

197. *Id.* at 456.

198. *Id.*

199. *Id.* at 465.

200. Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 MINN. L. REV. 1729, 1741 (2001).

201. Richard Briffault, *The Future of Reform: Campaign Finance After the Bipartisan Campaign Reform Act of 2002*, 34 ARIZ. ST. L.J. 1179, 1188 (2002) (noting that *Buckley*’s focus was on *quid pro quo* corruption).

202. 470 U.S. 480, 497 (1984).

amassing large amounts of wealth.<sup>203</sup> *MCFL* reinforced the ability to regulate direct spending of corporate treasury funds for political purposes. With *Austin*, the Court firmly fixed the broad definition of corrosive and distorting effects upon politics to immense aggregations of wealth.<sup>204</sup> Then in *Shrink Missouri*, the appearance of corruption included public perception of improper influence on an office holder's judgment coming from large contributions.<sup>205</sup> Finally, *Colorado I* and *Colorado II* dealt with coordinated expenditures.<sup>206</sup> These coordinated expenditures were struck down to minimize the circumvention of other provisions of FECA.<sup>207</sup> As a result, any of the aforementioned practices satisfy the definition of corruption.

#### IV. CORRUPTION'S CREATION: CONGRESS ACTS AND THE COURT RESPONDS

Since *Buckley*, corruption or its appearance in the political process has caused extensive debate and much discussion about reform. Debate regarding the restructuring of FECA was long and ongoing; resulting in literally hundreds of bills proposed in Congress to reform campaign financing.<sup>208</sup> Many people shared their

203. 459 U.S. 197, 207-08 (1982).

204. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990).

205. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 394-95 (2000).

206. *Colorado II*, 533 U.S. at 437.

207. *Id.* at 465; see also Eric L. Richards, *Federal Election Commission v. Colorado Republican Federal Campaign Committee: Implications for Parties, Corporate Political Dialogue, and Campaign Finance Reform*, 40 AM. BUS. L.J. 83, 116 (2002) (stating that "Colorado II broadly recognized an interest in preventing circumvention of FECA's individual contribution limits").

208. See, e.g., PAC Limitation Act of 2001, H.R. 2533, 107th Cong. (2001); Campaign Reform and Citizen Participation Act of 2001, H.R. 2360, 107th Cong. (2001); Bipartisan Campaign Reform Act of 2001, H.R. 2356, 107th Cong. (2001); Equal Political Opportunity Act of 2001, H.R. 2226, 107th Cong. (2001); Clean Money, Clean Elections Act, S. 719, 107th Cong. (2001); Citizen Leg. and Political Freedom Act, H.R. 1444, 107th Cong. (2001); Common Sense Federal Election Reform Act of 2001, S. 602, 107th Cong. (2001); Fed. Election Reform Act of 2001, H.R. 1080, 107th Cong. (2001); Open and Accountable Campaign Financing Act of 2001, H.R. 1039, 107th Cong. (2001); Conduit Contribution Prevention Act of 2001, H.R. 1019, 107th Cong. (2001); Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong. (2001); Open and Accountable Campaign Financing Act of 2001, S. 22, 107th Cong. (2001); Fed. Elections Reform Act of 2001, S. 17, 107th Cong. (2001); Campaign Fin. Improvement Act of 2000, H.R. 5596, 106th Cong. (2000); Open and Accountable Campaign Financing Act of 2000, S. 2941, 106th Cong. (2000); Campaign Fin. Improvement Act of 2000, H.R. 4685, 106th Cong. (2000); Accountability and Disclosure Act of 2000, H.R. 4621, 106th Cong. (2000); Campaign Fin. Reform and Disclosure Act of 2000, S. 2565, 106th Cong. (2000); FEC Reform and Authorization Act of 2000, H.R. 4037, 106th Cong. (2000); Open and Accountable Campaign Financing Act of 2000, H.R. 3243, 106th Cong. (1999); Citizens' Right to Know Act of 1999, S. 1751, 106th Cong. (1999); Bipartisan Campaign Reform Act of 1999, S. 1593, 106th Cong. (1999); PAC Limitation Act of 1999, H.R. 2866, 106th Cong. (1999); Campaign Spending Control Act of 1999, S. 1502, 106th Cong. (1999); Campaign Reform and Election Integrity Act of 1999, H.R. 2668, 106th Cong. (1999); Citizen Leg. and Political Freedom Act, H.R. 1922, 106th Cong. (1999); Campaign Integrity Act of 1999, H.R. 1867, 106th Cong. (1999); FEC Reform and Authorization Act of 1999, H.R. 1818, 106th Cong. (1999); Fed. Election Law Integrity Act of 1999, H.R. 1778, 106th Cong. (1999); Clean Money, Clean Elections Act, H.R. 1739, 106th Cong. (1999); Clean Money, Clean Elections Act, S. 982, 106th Cong. (1999); Cong. Campaign and Admin. Reform Act of 1999, H.R. 1641, 106th Cong. (1999); Fed. Election Enforcement and Disclosure Reform Act, S. 504, 106th Cong. (1999); Bipartisan Campaign

concerns about corruption in the system. On a number of occasions, Senate Minority Leader Tom Daschle expressed concern about a corrupt system.<sup>209</sup> He stated that the “corrosive effect” of huge money contributions has ruined people’s faith in government.<sup>210</sup> Senator McCain also noted that Americans believe the system is corrupt.<sup>211</sup> He cited a CNN/Time poll, which found 77 percent of Americans “described the current way in which candidates for Federal office raise money for campaigns as either ‘corrupt’ or ‘unethical.’”<sup>212</sup> This general feeling of distrust finally prompted Congress to confront this perceived corruption by making changes in campaign finance laws—the most sweeping since the early 1970s.<sup>213</sup>

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

In March 2002, President Bush signed into law the Bipartisan Campaign Reform Act of 2002 (“BCRA”).<sup>214</sup> The law took effect November 6, 2002—the day after the 2002 general election. The law addressed several perceived problems with the campaign finance system. The most notable provision of BCRA is the ban on soft-money found in Title I. Title I adds a new section to FECA, § 323(a), which “[p]rohibits national party committees from soliciting, receiving, directing, transferring, or spending soft money; generally prohibits spending of soft money for a ‘federal election activity’ by state and local party committees, including an association or group of state or local candidates or officials.”<sup>215</sup> In summary, and for all practical purposes, it eliminates the national parties’ ability to receive or spend soft-money.

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Finance Reform Act of 1999, H.R. 417, 106th Cong. (1999); Advancing Truth and Accountability in Campaign Communications Act, S. 79, 106th Cong. (1999); Bipartisan Campaign Reform Act of 1999, S. 26, 106th Cong. (1999); Congressional Election Campaign Spending Limit and Reform Act of 1999, S. 16, 106th Cong. (1999); Voter Empowerment Act of 1999, H.R. 32, 106th Cong. (1999).

This long list of bills barely scratches the surface and does not attempt to list all of the bills introduced in years past. A more detailed list would include literally hundreds of bills. There were at least 71 bills dealing with campaign funding introduced during the 107th Congress, 77 bills during the 106th Congress, 146 during the 105th Congress, and 107 bills introduced during the 104th Congress.

209. See 148 CONG. REC. S2110, 2110-11 (daily ed. Mar. 20, 2002) (statement of Sen. Daschle).

210. See *id.* at 2111.

211. *Id.* at 2107 (statement of Sen. McCain).

212. *Id.*

213. Briffault, *supra* note 201, at 1180.

214. Pub. L. No. 107-155, 116 Stat. 81 (2002); Statement on Signing Bipartisan Campaign Reform Act of 2002, 38 WEEKLY COMP. PRES. DOC. 517-18 (Mar. 27, 2002); Elisabeth Bumiller & Philip Shenon, *President Signs Bill On Campaign Gifts; Begins Money Tour*, N.Y. TIMES, Mar. 28, 2002, at A1.

215. L. Paige Whitaker, CRS ISSUE BRIEF IB98025, CAMPAIGN FINANCE: CONSTITUTIONAL AND LEGAL ISSUES OF SOFT MONEY, Sept. 12, 2002, at 7, at <http://fpc.state.gov/document/organization/24057.pdf> (last visited Feb. 20, 2004). A federal election activity is defined as: (1) voter registration drives in the last 120 days before an election; (2) get-out-the-vote activities in which a Federal candidate is on the ballot; (3) public communications that refer to a clearly identified federal candidate and promote, support, attack, or oppose a candidate for that office (regardless of whether they expressly advocate a vote for or against); or (4) services by a state or local party employee who spends at least 25% of paid time in a month on activities in connection with a federal election. 2 U.S.C. § 431(20)(A)(i)-(iv) (West Supp. 2003).

The other provisions of BCRA are similarly important, yet in essence, they simply help to reinforce the elimination of soft-money from the federal election system.<sup>216</sup> Title II of BCRA prohibits corporations and labor unions from making "electioneering communications."<sup>217</sup> These electioneering communications include advertisements that refer to a clearly identified candidate running for federal office within sixty days before a general election or thirty days before a primary election.<sup>218</sup> This portion of Title II was designed to target what has become known as "sham issue ads."<sup>219</sup> Title II also broadens disclosure requirements and makes the filing and viewing of reports more user-friendly via the Internet.<sup>220</sup> Additionally, Title II prohibits any political party from making a coordinated expenditure on behalf of a political candidate.<sup>221</sup>

Finally, Title III contains other miscellaneous provisions worth mentioning. For example, Title III increases the limit on hard money contributions by individuals from \$1000 to \$2000 per candidate per election.<sup>222</sup> It also strengthens the ban on foreign money contributions.<sup>223</sup> Furthermore, it contains the extremely complex "millionaire provision" that allows for an increase in individual contributions to a candidate if his or her rich opponent is spending large amounts of personal money. Under these circumstances the "poor candidate" can receive an increased amount of independent expenditures.<sup>224</sup> Lastly, Title III requires the sponsors of election ads to identify themselves in the ad,<sup>225</sup> and prohibits the contributions of minors to candidates or political parties.<sup>226</sup>

216. *McConnell v. Fed. Election Comm'n*, 124 S. Ct. 619, 654 (2003).

217. BCRA, tit. II, § 203(b) (codified at 2 U.S.C. § 441b(b)(2)(c) (West Supp. 2003)). This section does permit corporations and labor unions to possess separate segregated funds which can be used to collect money to be used for strictly political reasons. These funds have commonly been referred to as political action committees ("PACs"). Money collected in these funds can be contributed to candidates as independent expenditures just as they could under the FECA before BCRA. *Id.*

218. BCRA, tit. II, § 201(a) (codified at 2 U.S.C. § 434(f)).

219. Trevor Potter, *Campaign Finance Reform: Relevant Constitutional Issues*, 34 ARIZ. ST. L.J. 1123, 1131 (2002). He describes issue ads as: "ads that promote or attack a federal candidate at election time, but avoid the legal prohibition on corporate and labor expenditures in federal elections by omitting words such as 'vote for' or 'vote against.'" *Id.*

220. *See* BCRA, tit. II, § 201(a) (codified at 2 U.S.C. § 434(a)(11)(B)).

221. *See* BCRA, tit. II, § 213 (amending 2 U.S.C. § 441a(d)).

222. *See* BCRA, tit. III, § 307 (amending 2 U.S.C. § 441a(a)(1)(A)).

223. *See* BCRA, tit. III, § 303 (amending 2 U.S.C. § 441e).

224. *See* BCRA, tit. III, §§ 304, 316 (codified at 2 U.S.C. § 441(a)(i)); Amy Keller, *Millionaire Crackdown May Be Elusive*, ROLL CALL, Jan. 15, 2003 (describing how the "Millionaire Provision" works); *see also* Craig Gilbert, *Senate Votes To Help 'Level Playing Field': 'Millionaire's Amendment' Allows Uneven Donations*, MILWAUKEE J. SENTINEL, Mar. 21, 2001, at 1A; Greg Gordon, *House to Debate Campaign Finance Bill: The Measure's Sponsors Say That the Fall Elections Probably Won't be Affected by Any Action in Congress*, STAR TRIB. (Minneapolis, Minn.), Feb. 13, 2002, at 4A.

225. BCRA, tit. III, § 311 (amending 2 U.S.C. § 441(d)).

226. BCRA, tit. III, § 318 (codified at 2 U.S.C. § 441(k)).

*B. McConnell v. Federal Election Commission*<sup>227</sup>

No sooner had BCRA been enacted—twenty minutes to be exact<sup>228</sup>—than did Senator Mitch McConnell file suit challenging the constitutionality of the law.<sup>229</sup> The case first went before a special three-judge panel which handed down a very long<sup>230</sup> and somewhat confusing decision.<sup>231</sup> In essence, the Panel upheld portions of the law, but struck down other major sections including BCRA's ban on soft-money contributions to national parties.<sup>232</sup> The decision was promptly appealed to the Supreme Court.

In *McConnell*, the Supreme Court upheld the key elements of BCRA. First, the Court upheld the all-important ban on soft-money from Title I. This ban prohibits certain contributions to and expenditures by national political parties,<sup>233</sup> forbids federal office holders from raising or using soft-money,<sup>234</sup> and restricts state and local parties from using soft-money in federal election activities.<sup>235</sup> The Government defended the ban on soft-money by asserting a substantial need in preventing corruption or its appearance.<sup>236</sup> After reviewing the record, the Court determined that Congress was justified in passing the soft-money ban because there was an overwhelming amount of evidence signifying the existence of political corruption and its appearance.<sup>237</sup>

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227. 124 S. Ct. 619 (2003).

228. *Supreme Court Rules on Campaign Finance Case: The Legal and Political Impact of McConnell v. FEC*, (CSPAN television broadcast, Dec. 11, 2003) (statement of Kenneth W. Starr) [hereinafter *Supreme Court Rules*].

229. Edward Walsh, *Campaign Finance Hits First Legal Test: Judges to Hear Oral Arguments*, WASH. POST, Dec. 3, 2002, at A1. Senator McConnell is only one of the more than eight named plaintiffs in the case, which include well known organizations like the Republican National Committee, the National Rifle Association, the A.F.L.-C.I.O., the American Civil Liberties Union, and the California Democratic Party. Oppel & Lewis, *supra* note 19, at A27.

230. To be exact, the decision was 1638 pages long. This decision is thought to be the single longest decision ever handed down by any federal court. *Court Strikes Down Most of Ban on Political Financing*, NEWSDAY, May 3, 2003, at A14; Billy House, *'Soft Money' Ban Narrowed; Federal Court Split on McCain-Feingold Reforms*, ARIZ. REP., May 3, 2003, at 1A.

231. *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176 (D.C. Cir. 2003).

232. *Id.*; Neil A. Lewis & Richard A. Oppel, Jr., *Campaign Finance: The Overview; Mixed Ruling on Constitutionality of New Campaign Finance Law*, N.Y. TIMES, May 3, 2003, at A1; Michael Tackett, *Judges Soften Campaign Finance Law; Portions Found Unconstitutional; High Court Will Review*, CHIC. TRIB., May 3, 2003, at C1; Neely Tucker & Juliet Eilperin, *Election Law is Partly Struck Down: Decision Brings Uncertainty to Election Fundraising*, WASH. POST, May 4, 2003, at A1; Press Release, E. Joshua Rosenkranz, *Decision Today in McConnell v. FEC: Court Upholds Key Portions of Congressional Effort to Clean up Elections* (May 2, 2003), available at [http://www.brennancenter.org/presscenter/releases\\_2003/pressrelease\\_2003\\_0502.html](http://www.brennancenter.org/presscenter/releases_2003/pressrelease_2003_0502.html) (last visited Feb. 4, 2004).

233. *McConnell v. FEC*, 124 S. Ct. 619, 659 (2003).

234. *Id.* at 667-68.

235. *Id.* at 671.

236. *Id.* at 660. While each of the soft-money issues presented the Court with different First Amendment concerns, Congress passed the entire reform act as a whole, relying fully upon the interest of preventing corruption. *Id.* at 659.

237. *Id.* at 666.



The Court also upheld significant sections of BCRA's "electioneering communication" provisions from Title II. BCRA's primary definition of electioneering communications prohibited the airing of ads sixty days before a general election or thirty days before a primary.<sup>238</sup> The Court upheld the definition of electioneering communications, stating that the record demonstrated that the rigid "magic words" test had been rendered "functionally meaningless."<sup>239</sup> Therefore, because *Buckley's* express advocacy definition or magic words test had "not aided the legislative effort to combat real or apparent corruption," Congress was justified in correcting the system with BCRA's ban on issue ads prior to an election.<sup>240</sup>

Additionally, the Court upheld BCRA's ban on using funds from the general treasury of corporations and unions for "electioneering communications."<sup>241</sup> The general treasury fund ban was justified through reliance on *Austin*.<sup>242</sup> The Court maintained that Congress had an interest in preventing corruption through the "immense aggregations of wealth that are accumulated with the help of the corporate form."<sup>243</sup> Thus, based upon this corruption interest, the Court found the ban constitutional.

In the other provisions of BCRA, the Court refused to review some sections of Title III, upheld others, and struck some down. For example, the Court refused to review the increased limit on hard money contributions due to a lack of standing.<sup>244</sup> Likewise, the Court did not review the new "millionaire provisions" from § 304 and § 316. This challenge was also dismissed because the plaintiffs' lacked standing. They failed to show an injury that was "fairly traceable" to BCRA.<sup>245</sup> Thus, the limits on hard money contributions and the "millionaire provisions" all continue to be valid. The Court then upheld § 311, which required those airing political ads to clearly identify themselves as "authorized" communications that represent the candidates or political committees.<sup>246</sup> Conversely, the § 318 ban on contributions by minors was found unconstitutional.<sup>247</sup> There simply was not

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238. *Id.* at 686.

239. *Id.* at 689. The Court gave a striking example of the uselessness of the test by citing COMM. ON GOV'T AFFAIRS, INVESTIGATION OF ILLEGAL OR IMPROPER ACTIVITIES IN CONNECTION WITH 1996 FED. ELECTION CAMPAIGNS, S. REP. NO. 105-167 (1998) [*hereinafter* THOMPSON REPORT]. The Court cited an example contained in the report from a Montana Congressional race. *McConnell*, 124 S. Ct. at 689 n.78. The ad went like this:

Who is Bill Yellowtail? He preaches family values but took a swing at his wife. [ ] He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.

THOMPSON REPORT, *supra*, at 6305. The Court noted that these types of ads had become the "functional equivalent of express advocacy." *McConnell*, 124 S. Ct. at 696. Therefore, the Court upheld the ban on issue ads sixty days prior to the general election and thirty days prior to the primary election. *Id.*

240. *McConnell*, 124 S. Ct. at 696.

241. *Id.* at 695.

242. 494 U.S. 652 (1990).

243. *McConnell*, 124 S. Ct. at 695 (quoting *Austin*, 494 U.S. at 660).

244. *Id.* at 709-10.

245. *Id.* at 710.

246. *Id.*

247. *Id.* at 711.

enough evidence in the record linking it to the governmental interest.<sup>248</sup> Unless the evidence was more convincing, the "interest [was] simply too attenuated for § 318 to withstand heightened scrutiny."<sup>249</sup>

#### V. CORRUPTION'S CONTINUING RESPONSIBILITY: *McCONNELL*'S CONSEQUENCES AND THE EFFECT ON FUTURE CAMPAIGN FINANCE REGULATIONS

The Court acknowledged that BCRA was unlikely to eliminate money from politics because "money is the mother's milk of politics."<sup>250</sup> Because money serves as the lifeblood of political campaigns, it is evident that its presence will not soon disappear. Regardless of various attempts to regulate money's political power, people will invariably find ways to infuse its influence into the system.<sup>251</sup> Simple economics dictates that so long as the demand is present, supply will act to equalize that demand.<sup>252</sup> Or, in other words, "money, like water, will always find an outlet."<sup>253</sup> Consequently, because BCRA does not eliminate money's influence, it is unreasonable to believe that BCRA will drive corruption and its appearance from the system.

The time will soon come when Congress attempts to enact additional campaign finance regulations. Immediately following *McConnell*, Senators McCain and Feingold announced plans to replace the FEC, reform presidential public financing, and reduce the costs of television advertising for candidates.<sup>254</sup> These plans for future reform demonstrate that some members of Congress view *McConnell* as a blank check to enact further campaign finance regulations while possibly

248. *Id.* (finding that "the Government offers scant evidence of this form of evasion").

249. *Id.*

250. *Id.* at 663.

251. Briffault, *supra* note 200, at 1759; see also Christy Hoppe, 'Soft Money' Flows to New Outlets; Interest Groups Taking Over Parties' Role as Fund Debate Continues, DALLAS MORNING NEWS, Dec. 13, 2003, at 1A (discussing how the impact of *McConnell* is shifting the soft-money once given to political parties to unregulated special interest groups).

252. Because campaign financing can be looked at through an economic model, possible reforms have also been proposed which would use traditional economic principles. See generally Justin A. Nelson, *The Supply and Demand of Campaign Finance Reform*, 100 COLUM. L. REV. 524 (2000).

253. *McConnell*, 124 S. Ct. at 706. Even Senators McCain and Feingold did not believe that BCRA would completely "shut down the political money hunt." Jill Abramson, *A Law Survives. Now, Let's Subvert It*, N.Y. TIMES, Dec. 14, 2003, at D1; 150 CONG. REC. S576, 576-78 (daily ed. Feb. 4, 2004) (statement of Sen. McCain); see also Mutch, *supra* note 59, at 47. Mutch, similar to McCain and Feingold, believes that:

The history of campaign finance law offer[s] little reason to believe that legislation can drive interested money out of politics. Partly this is because any law can be evaded: lawyers, accountants, and fund raisers are paid to devise imaginative schemes for getting money past the law. But the deeper reason is that no law can weaken the resolve of the powerful forces behind that money to influence federal elections.

*Id.* at 191; see also Jeanne Cummings & Julia Angwin, *Donors Look For the Loopholes to Campaign-Finance Limits*, WALL ST. J., Dec. 12, 2003, at A1 (noting that even after uphold BCRA, there is plenty of room to use money to influence elections).

254. Abramson, *supra* note 253, at D1. Other groups also began pushing for change shortly after the Court's decision in *McConnell*. Glen Justice, *Campaign Finance Groups to Push for More Changes*, N.Y. TIMES, Dec. 13, 2003, at A12; *Campaign-Finance Reformers Target FEC*, MSNBC NEWS, Dec. 12, 2003, at <http://www.msnbc.msn.com/id/3692715/> (last visited Feb. 26, 2004).

disregarding potential First Amendment violations. Congress, however, must act with caution. Many new regulations may have the potential to infringe upon protected First Amendment speech. While *McConnell* clearly authorizes additional campaign finance regulations, and gives more discretion to Congress, Congress's power still has limits. As the Court declared in *Marbury v. Madison*,<sup>255</sup> even the enumerated powers of Congress "are defined, and limited; and . . . those limits may not be mistaken, or forgotten."<sup>256</sup>

Because the Court has placed limitations on Congress, it is important for Congress to have a plan before enacting future regulations. This Note proposes a plan that includes two basic principles that will help avoid invalidation. First, Congress must act within the scope of the defined government interest in preventing corruption. Previous campaign finance precedent such as *Buckley*, *Austin*, *Shrink Missouri*, and *Colorado II*,<sup>257</sup> have already established that this limitation is constitutionally necessary. Second, to come within the scope of the government interest, Congress must justify future regulations by creating a clear record of corruption. So long as Congress acts within these limitations, future regulation will fall within the boundaries the Court has identified and avoid constitutional concerns.

#### *A. Deferential Approach to Congressional Conclusions Regarding Corruption*

The first step in a successful legislative strategy requires Congress to act within the set boundaries of eliminating corruption or the appearance of corruption as defined by the Court's long line of campaign finance cases. This is important because even after *McConnell*, campaign finance precedent remains intact. The dissent vigorously argued that some if not all of the former precedent should be overturned.<sup>258</sup> However, the majority pertinaciously refused. The significance of the majority's action reaffirms with strong force the importance of all of the prior campaign finance decisions. These decisions were left untouched for the very purpose of acting as a road map for Congress in its future navigation through campaign financing. In the passage of BCRA, Congress successfully used these past decisions as a guide.<sup>259</sup> The Court praised Congress for relying on this authority. It said, "Congress properly relied on the recognition of its authority contained in *Buckley* and its progeny."<sup>260</sup> Thus, these decisions, along with *McConnell*, continue to serve the same purpose and should not be ignored.

One obvious example from *McConnell* was the Court's reliance on earlier precedent defining corruption as the selling of access to federal candidates and officeholders.<sup>261</sup> The Court looked to *Buckley*'s proposition that Congress had the

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255. 5 U.S. (1 Cranch) 137 (1803).

256. *Id.* at 176.

257. See *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000); *Austin v. Michigan Chamber of Commerce*, 454 U.S. 652 (1990); *Buckley v. Valeo*, 424 U.S. 1 (1976).

258. *McConnell*, 124 S. Ct. at 720 (Scalia, J., dissenting) ("I continue to believe that *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), was wrongly decided."); *id.* at 762 (Kennedy, J., dissenting) ("Instead of extending *Austin* to suppress new and vibrant voices, I would overrule it and return our campaign finance jurisprudence to principles consistent with the First Amendment." (citations omitted)).

259. *Id.* at 657.

260. *Id.*

261. *Id.* at 665.

ability to regulate the buying of access. The examples of corruption found in *Buckley* included executives that claimed that campaign contributions were like a "calling card, something that would get us in the door and make our point of view heard . . . ." <sup>262</sup> Today this identical selling of access was also found and likened to a suhway token. <sup>263</sup> While the circumstances were slightly different, the types of corruption in the two examples are the same. Purchasing of political privilege and buying exclusive access are the types of corruption that FECA tried to eliminate and are identical to the corruption that BCRA addressed. Because Congress attempted to regulate essentially the same type of corruption, the Court upheld the law.

It will be argued that *McConnell* gives Congress greater discretion in determining when it can regulate. To some extent this is true and was recognized by the Court. The Court noted that the "less rigorous standard of review" <sup>264</sup> applied to contribution limits "shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise. It also provides Congress with a sufficient opportunity to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process." <sup>265</sup> However, it is important not to mischaracterize this authority beyond its intended meaning. Even though the Court was willing to give greater deference to Congress, the intent was that the definition of corruption, properly construed by Congress, simply included the ability to go beyond actual quid pro quo corruption. The plaintiffs and the dissent both argued in favor of a narrow reading of actual quid pro quo corruption. <sup>266</sup> The majority did not agree, however, and demonstrated deference to Congress's determination that the definition of corruption merited a broader interpretation. Yet even under this broader interpretation, *McConnell* did not recognize any new forms of corruption. Rather, the Court drew from preexisting definitions of corruption including both actual corruption and its appearance. It recognized forms of corruption such as circumvention, buying of access, large money donations, and improper influence. Thus, these are the forms of corruption that will likely be recognized by the Court in the future. Congress has the power to regulate, and is given deference, but must still work within these recognized boundaries.

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262. *Id.* at 646 n.5.

263. Mr. Johnny Chung, a Taiwan businessman, CEO of Automated Intelligent Systems, Inc. of California, and "die hard democrat," contributed \$366,000 during the 1995-96 election cycle to the DNC. THOMPSON REPORT, *supra* note 239, at 783. By contributing such large sums of money Chung was able to gain special access to the White House at least forty-nine different times. *Id.* Chung was granted surprisingly easy access even though he was regarded by the National Security Council as a "hustler." *Id.* He was known to be using the access to entertain his foreign clients. *Id.* Moreover, "White House officials actually collected money from him in the First Lady's office in exchange for allowing him to bring a delegation of his clients to White House events." *Id.* What is most extraordinary about the entire situation is that Mr. Chung acknowledged that his contributions to the DNC bought him special privileges of access. Chung said, "[t]he White House is like a subway: You have to put in coins to open the gates." *Id.*

264. *McConnell*, 124 S. Ct. at 656.

265. *Id.* at 656-57.

266. "[P]laintiffs conceive of corruption too narrowly. Our cases have firmly established that Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption . . . . Justice Kennedy would limit Congress' regulatory interest *only* to the prevention of the actual or apparent *quid pro quo* corruption . . . ." *Id.* at 664-65 (emphasis in original).

Final support for this legislative strategy comes as a warning from the Court itself. It made clear that the deference given to Congress only extends so far. It said that justifying regulation based upon "mere political favoritism or opportunity for influence alone is insufficient" to withstand scrutiny.<sup>267</sup> The Court's unwillingness to recognize political favoritism or opportunity for influence as corruption or the appearance of it reveals that the corruption definition has boundaries. This indicates that the Court is willing to grant Congress deference, but Congress has limited leeway in classifying the type of corruption that fits within the definition. Congress remains under an obligation to work within the boundaries of recognized forms of corruption or the appearance of it. Therefore, a successful legislative strategy for future campaign finance laws includes regulating within the proper bounds established by *Buckley* and its progeny. Remaining true to these directions is fundamental to the successful passage of campaign finance laws.

### *B. Corruption Still Controls: Congress's Duty to Establish a Record*

In addition to exercising its discretion to regulate based upon recognized forms of corruption, Congress must also create a clear record demonstrating corruption in the political system. For example, if Congress wants to overhaul the presidential public financing system—and the new regulations pose potential First Amendment concerns—then it must show that current practices are corrupt. Thus, even with Congress's increased deference, *McConnell* does not relieve Congress's burden to demonstrate a need for change by proving that actual corruption or its appearance exists. On the other hand, by making this showing in the legislative record, Congress satisfies the Court's requirement to demonstrate that corruption or the appearance of it exists, thus justifying the law.

Several areas of constitutional law require Congress to compile a record before enacting legislation. These other areas of constitutional doctrine help to provide insight into what appears to be a similar emerging legislative record requirement in campaign financing. Two examples are found in the doctrine from the Commerce Clause and from § 5 of the Fourteenth Amendment. These clauses give Congress broad power to legislate, yet that power is not infinite. The enumerated regulatory power has been limited by the Court under certain circumstances.<sup>268</sup> In some cases, acts of Congress have been invalidated due to a failure to make a legislative record sufficient to justify its actions.

The limiting of enumerated regulatory powers based upon an insufficient legislative record in these other areas lends support to the idea that the Court is also beginning to impose similar restrictions upon campaign financing.<sup>269</sup> The Court's most recent campaign finance decision shows that the Court is placing a great degree of weight upon evidence from the legislative record. Without support from the record demonstrating corruption, the success of future regulations raises serious

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267. *Id.* at 666.

268. See Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 1 (2003) ("The Court has insisted that it must impose 'judicially enforceable outer limits' on Congress's enumerated powers . . .").

269. While the Commerce Clause and Fourteenth Amendment cases generally deal with Congress's ability to infringe on state rights without violating the Constitution, they provide a fitting analogy offering insight into when Congress can enact campaign finance regulations without violating the First Amendment.

doubt. To show the importance of the legislative record, the analysis begins with a brief look at the role the legislative record plays in both Commerce Clause and § 5 precedent. Finally, the analysis looks at the Court's movement towards a legislative record requirement in campaign financing, concluding that the legislative record is now vital to the success of future campaign finance regulations.

### 1. The Commerce Clause

Congress gets its power to regulate interstate commerce expressly from Article I, Section 8, of the Constitution. It used to be the case that Congress had almost unlimited authority to regulate interstate commerce—including even the entirely *intrastate* activities of a small local dairy farmer in Ohio.<sup>270</sup> However, in 1995, the Supreme Court began to change this all encompassing power by limiting Congress's ability to regulate. In *United States v. Lopez*,<sup>271</sup> the Court invalidated the Gun-Free School Zones Act of 1990.<sup>272</sup> The Court invalidated the law because the possession of a gun within 1000 feet of a school did not "substantially affect" interstate commerce.<sup>273</sup> The Court found it significant that Congress did not establish any legislative findings that gun possession in a school zone actually affected interstate commerce when passing the Gun-Free School Zones Act.<sup>274</sup> In defending the law, the Government was not able to point to a legislative record showing evidence of a substantial effect on interstate commerce.<sup>275</sup> Instead, the Government asked the Court to find that firearm possession in a school zone affects interstate commerce.<sup>276</sup> The Court was unwilling to do so, stating that would require it to "pile inference upon inference."<sup>277</sup> Without some evidence showing a connection between the statute and interstate commerce, allowing such regulations would eliminate any "distinction between what is truly national [commerce] and what is truly local."<sup>278</sup> Therefore, without any evidence of the connection, Congress's power to regulate was limited.

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270. *Wickard v. Filburn*, 317 U.S. 111 (1942) (finding no denial of due process by a federal government regulation restricting intrastate wheat production as applied to a dairy farmer's production of wheat for personal consumption).

271. 514 U.S. 549 (1995).

272. 18 U.S.C. § 922(q) (2000) (held unconstitutional 1995).

273. *Lopez*, 514 U.S. at 567. It has been suggested that *Lopez* may not clearly hold that Congress is prohibited from regulating in this area. Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 797 (1996). Accordingly, "it can perhaps be interpreted as holding only the narrower position that this particular attempt by Congress to regulate the field failed, without saying anything more general that would automatically disqualify all subsequent attempts." *Id.* Interpreting the holding in this fashion requires consideration of the lack of a legislative record. *Id.* at 797-98 n.13.

274. *Lopez*, 514 U.S. 562-63. The Court noted that "as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce . . ." *Id.* at 562. The Government conceded that, "[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." *Id.*

275. *Id.* at 562-63.

276. *Id.* at 563-64.

277. *Id.* at 567.

278. *Id.* at 567-68; see also Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2243 (2001) (noting that "[o]ne of the

Again, in *United States v. Morrison*,<sup>279</sup> the Court declared that Congress had exceeded its Commerce Clause authority. The issue raised in *Morrison* was the constitutionality of a civil claim provision in the Violence Against Women Act of 1994 ("VAWA").<sup>280</sup> For a second time the Court recognized that Congress's ability to regulate using the Commerce Clause was not without limit.<sup>281</sup> It emphasized the *Lopez* holding in which the Court had struck down the Gun-Free School Zones Act because "the link between gun possession and a substantial effect on interstate commerce was attenuated."<sup>282</sup> Unlike *Lopez*, however, the Court did have somewhat of a legislative record to analyze in *Morrison*.<sup>283</sup> The problem for VAWA arose because Congress relied on reasoning that had been previously prohibited by the Court.<sup>284</sup> Congress's reasoning was improper because it drew conclusions that were too attenuated to substantially affect interstate commerce. Congress was correct in their findings that gender-violence did occur, but its findings were not legally sufficient to constitutionally justify regulation by the Commerce Clause.<sup>285</sup> Consequently, the Court was unwilling to uphold the law because the legislative record did not provide proper evidence of the problem that Congress sought to remedy.

As a result, Congress still has extremely broad power to regulate under the Commerce Clause, but the Court has made it clear that this enumerated power has limits. If Congress attempts to exercise its Article 1, Section 8 power, and there is some question whether regulation lies at the fringe of that power, clear evidence of a substantial effect on commerce must be found in the legislative record. Without proper evidence, the law will likely be invalidated.<sup>286</sup> Thus, the key to unlocking the fringe regulatory power is tied to an evidentiary legislative record compiled by Congress.

## 2. The Fourteenth Amendment

The Fourteenth Amendment produces similar circumstances. The importance of legislative findings becomes more apparent by looking at Congress's power to regulate under § 5 of the Fourteenth Amendment. In *City of Boerne v. Flores*,<sup>287</sup> the Court faced the question of the constitutionality of the Religious Freedom Restoration Act of 1993 ("RFRA").<sup>288</sup> Relying on its enforcement power from the Fourteenth Amendment, Congress sought to impose RFRA's "far-reaching and

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difficulties in *Lopez* was the lack of evidence in the congressional record or before the Court demonstrating any real need for concurrent federal criminal jurisdiction and enforcement").

279. 529 U.S. 598 (2000).

280. 42 U.S.C. § 13981 (2000).

281. *Morrison*, 529 U.S. at 608.

282. *Id.* at 612.

283. *Id.* at 614. "In contrast with the lack of congressional findings that we faced in *Lopez*, § 1398 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families." (emphasis in original) *Id.*

284. *Id.* at 615.

285. *Id.* at 617.

286. Larry D. Kramer, *The Supreme Court 2000 Term: Foreword: We the Court*, 115 HARV. L. REV. 5, 142 (2001) (observing that after *Lopez* and *Morrison* "the Court seemed to be leading up to an analysis whereby it would review the legislative record to determine whether Congress's findings were warranted").

287. 521 U.S. 507 (1997).

288. 42 U.S.C. § 2000bb (2000).

substantial . . . provisions" on the States.<sup>289</sup> The Court struck down RFRA, finding that Congress exceeded its remedial power under § 5. Congress's power did not extend to defining the substantive rights granted by the Fourteenth Amendment.<sup>290</sup> Instead, Congress had only the remedial power of enforcing the Amendment. Further, the Court reasoned that those enforcement powers must have a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>291</sup> Also important to the Court's reasoning was the fact that Congress failed to find evidence of religious discrimination sufficient to justify RFRA.<sup>292</sup> The Court stated that "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."<sup>293</sup>

The Court said it afforded great deference to Congress when reviewing provisions enacted pursuant to § 5.<sup>294</sup> Nevertheless, the Court's opinion was quick to point out defects with the legislative findings. The Court did not specifically hold that a lack of legislative findings would prove dispositive, but "the tone of the opinion suggested that perceived inadequacies in the legislative materials would count heavily against the legislation."<sup>295</sup> Consequently, the opinion, in effect, suggested that without a legislative showing of constitutional violations, Congress's power to regulate was void.

Cases following *Boerne* further entrenched this principle of legislative record review into Fourteenth Amendment analysis.<sup>296</sup> In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,<sup>297</sup> the Court invalidated the Patent and Plant Variety Protection Remedy Clarification Act ("Patent Remedy Act").<sup>298</sup> First, the Court recognized Congress's power to abrogate state sovereign immunity pursuant to the Enforcement Clause of the Fourteenth Amendment.<sup>299</sup> Even so, to correctly exercise this power, the legislation had to be "appropriate" under the holding from *Boerne*.<sup>300</sup> The Court reminded Congress that to invoke § 5, "it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."<sup>301</sup> In analyzing the Patent Remedy Act, the Court found that Congress did not act within this power. Congress failed to "identif[y] [a] pattern of patent

289. *Boerne*, 521 U.S. at 516.

290. *Id.* at 516-20.

291. *Id.* at 520.

292. *Id.* at 530; William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 112 (2001).

293. *Boerne*, 521 U.S. at 530.

294. *Id.* at 536.

295. Buzbee & Schapiro, *supra* note 292, at 112-13. Furthermore, "[t]he opinion strongly implied that Congress' invocation of its Enforcement Clause powers entailed a burden of justification and that that burden could be met only through information contained in written materials generated by Congress." *Id.* at 115.

296. See generally Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001) (discussing the "phantom" legislative history requirement in § 5 cases).

297. 527 U.S. 627 (1999).

298. 35 U.S.C. §§ 271(h), 296(a) (2000).

299. *Id.* at 637.

300. *Id.*; see also Erin Rosen, Casenote, *An Occasion for a More Thorough Analysis: The New Findings Requirement and Congressional Power Under Section 5 of the Fourteenth Amendment After United States v. Morrison*, 90 CAL. L. REV. 573 (2002) (discussing "appropriate" legislation after *Boerne*).

301. *Florida Prepaid*, 527 U.S. at 639.



infringement by the States, let alone a pattern of constitutional violations.”<sup>302</sup> After reviewing the evidence in the record, the Court could not find anything substantial enough to justify the legislation. The missing link for Congress was a missing legislative record.<sup>303</sup> The majority did not discuss deference to Congress; conversely, they shifted the focus to Congress’s burden to create a legislative record.<sup>304</sup> Finally, *Florida Prepaid* appeared to place an even greater importance upon the lacking legislative record than did *Boerne*.

During the next term, in *Kimel v. Florida Board of Regents*, the Court answered the question of whether Congress could abrogate the States’ sovereign immunity by imposing liability for violations of the Age Discrimination in Employment Act (“ADEA”).<sup>305</sup> Congress attempted to impose liability on the States using the Enforcement Clause of the Fourteenth Amendment. *Kimel* declared this to be an improper use of the power. Once again the majority found that Congress had not enacted “appropriate legislation.”<sup>306</sup> In determining the appropriateness of the legislation, as in *Boerne* and *Florida Prepaid*, the Court performed a close examination of the legislative record. The Court stated that “the ADEA’s legislative record as a whole . . . reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age.”<sup>307</sup> Because Congress failed to include any evidence of age discrimination, the Court was left without a reason why such legislation could be proportional to any constitutional violation.<sup>308</sup> Accordingly, *Kimel* reaffirms the proposition that “Congress is obligated to make formal findings of fact supported by substantial legislative-record evidence when it acts at (what the Court perceives to be) the margins of its constitutional authority.”<sup>309</sup>

If there was any doubt about the Court’s reliance on the legislative record after *Kimel*, the Court dispelled this uncertainty in *Board of Trustees of the University of Alabama v. Garrett*.<sup>310</sup> In *Garrett*, the Court invalidated an attempt by Congress to abrogate States’ sovereign immunity by subjecting them to liability for violations of Title I of the Americans with Disabilities Act (“ADA”).<sup>311</sup> Writing for the majority, Justice Rehnquist recognized the requirement from *Florida Prepaid* and *Kimel* that Congress must identify a history and pattern of unconstitutional

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302. *Id.* at 640.

303. *Id.* at 642. “[T]he legislative record still provides little support for the proposition that Congress sought to remedy a Fourteenth Amendment violation in enacting the Patent Remedy Act.” *Id.* Because there was no support, it became clear that “the Court struck down a federal statute solely because it found the legislative record supporting the Act incomplete.” A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court’s New “On the Record” Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 351 (2001).

304. Buzbee & Schapiro, *supra* note 292, at 114.

305. 528 U.S. 62 (2000).

306. *Id.* at 82-83.

307. *Id.* at 91.

308. *Id.*

309. Bryant & Simeone, *supra* note 303, at 352; see also Buzbee & Schapiro, *supra* note 292, at 115 (noting that Congress did not produce sufficient evidence of unconstitutional discrimination).

310. 531 U.S. 356 (2001).

311. *Id.* at 360-63.

discrimination.<sup>312</sup> He then explained that Congress had once more failed to do so. "Congress assembled only . . . minimal evidence of unconstitutional state discrimination in employment against the disabled."<sup>313</sup> Because "[t]he legislative record of the ADA . . . simply fail[ed] to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled,"<sup>314</sup> there was not enough evidence to allow for abrogation of sovereign immunity. The Court ultimately based its holding on the feebleness of the legislative record, and thus the lack of congressional findings.<sup>315</sup>

Finally, the most recent case addressing Congress's Enforcement Clause power came in *Nevada Department of Human Resources v. Hibbs*.<sup>316</sup> The issue in *Hibbs* was similar to the one decided in *Garrett*. The Court determined whether Congress could abrogate the states' Eleventh Amendment immunity using § 5 powers, enabling a state employee a remedy under The Family and Medical Leave Act of 1993 ("FMLA").<sup>317</sup> The Court found that this was a valid exercise of § 5 power and that Congress could create a private right of action against the states. The difference between the ADA in *Garrett*, and the FMLA in *Hibbs*, was that Congress had taken notice of the importance of legislative findings and included proof of discrimination in FMLA's legislative history.<sup>318</sup> This information contained in the record proved essential to the Court's analysis. The Court pointed to three specific congressional findings as evidence of discrimination in favor of maternity leave policies over paternity leave policies.<sup>319</sup> The evidence demonstrated that Congress had enacted appropriate legislation congruent and

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312. *Id.* at 368.

313. *Id.* at 370.

314. *Id.* at 368.

315. Geoffrey Landward, Board of Trustees of the University of Alabama v. Garrett and the Equal Education Opportunity Act: Another Act Bites the Dust, 2002 BYU EDUC. & L.J. 313, 320 (2002); see also Kramer, *supra* note 286, at 146 (recognizing that the "constitutionality of the ADA thus . . . turned on an inquiry into whether the congressional prohibition could be justified by a pattern of state discrimination against the disabled").

316. 123 S. Ct. 1972 (2003).

317. *Id.* at 1976-77.

318. *Id.* at 1980-81. Another distinction between *Hibbs* and the earlier Enforcement Clause cases is that unconstitutional gender discrimination by the states was more readily found in *Hibbs* because the equal protection standard for gender discrimination is intermediate, not rational basis, review. *Id.* at 1981-82.

319. *Id.* at 1979. First, "the FMLA's legislative record reflects[] a 1990 Bureau of Labor Statistics (BLS) survey" stating that a significantly greater percentage of employees in the private sector were covered by maternity leave policies as opposed to paternity leave policies. *Id.* (citing S. REP. NO. 103-3, at 14-15 (1993)). Joint Congressional Hearings and other legislative findings determined that this same trend was true in public sector employment. *Id.* at 1979 n.3. Second, testimony given to Congress verified that "[p]aternal leave for fathers . . . is rare. Even . . . [w]here child-care leave policies do exist, men, both in the public and private sectors, receive notoriously discriminatory treatment in their requests for such leave." *Id.* at 1979 (emphasis in original). Lastly,

Congress had evidence that, even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways. It was aware of the "serious problems with the discretionary nature of family leave," because when "the authority to grant leave and to arrange the length of that leave rests with individual supervisors," it leaves "employees open to discretionary and possibly unequal treatment."

*Id.* at 1980 (quoting H.R. REP. NO. 103-8, pt. 2, at 10-11 (1993)).

proportional to preventing unconstitutional gender discrimination. Therefore, Congress had identified a pattern of discrimination and the "record of unconstitutional participation in, and fostering of, gender-based discrimination [was] weighty enough to justify the enactment of prophylactic § 5 legislation."<sup>320</sup>

*Boerne*, *Florida Prepaid*, *Kimel*, *Garrett*, and *Hibbs* all expand the principle that when Congress chooses to exercise its § 5 power, it can do so only after it has made clear findings of constitutional violations.<sup>321</sup> These findings must be contained in the legislative record. If the findings are sufficient, they act as a necessary justification for the law, as they did for the FLMA in *Hibbs*. Conversely, if the legislative record lacks proper evidence, the law will be struck down as in *Florida Prepaid*, *Kimel*, and *Garrett*.

### 3. Campaign Finance

In the same way that Congress has enumerated constitutional power to regulate under the Commerce Clause and § 5 of the Fourteenth Amendment, it also has enumerated power to regulate federal elections. Furthermore, just as the Court has limited Congress's Commerce Clause and § 5 power, it also has limited the Election Clause power. Beginning with *Buckley* and its progeny, the Court created the framework for limiting that power through the First Amendment. To overcome this hurdle, the burden is placed upon Congress to show that campaign finance regulations are passed in an effort to curb corruption or the appearance of corruption. The significance of *McConnell*, like *Florida Prepaid*, *Kimel*, *Garrett*, and *Hibbs*, is that it signifies what Congress must do to fulfill this burden.<sup>322</sup> When congressional regulations approach the outside limits of its power by infringing upon the First Amendment, Congress can regulate using the corruption rationale only by establishing a legislative record. Doing so brings Congress within the scope of its constitutional power. *Buckley*, *Bellotti*, *Colorado I*, and *McConnell* all lend support to the theory that the Court requires a proper legislative record to sustain the constitutionality of a congressional act.

Initially, *Buckley* implicitly demonstrated the need for Congress to make some type of evidentiary showing to justify the use of the corruption rationale,<sup>323</sup> yet the

320. *Id.* at 1981.

321. One possible reason the Court requires a legislative record in § 5 cases arises from its desire to keep somewhat of an oversight over Congress. See *Kramer*, *supra* note 286, at 151 (noting that the legislative record requirement exists because the Court "worries about not letting Congress escape its grasp: close scrutiny of the legislative record is necessary if the Justices are to maintain interpretive control, for otherwise Congress might be able to elude the Court's efforts to cabin its activities").

322. The Commerce Clause and the Fourteenth Amendment cases deal with different legislative powers, yet the analogy still applies to the Election Clause. Under each circumstance, the Court has limited Congress's ability to legislate based on constitutional concerns.

323. See generally Schultz, *supra* note 119 (maintaining that *Buckley* contains a legislative record requirement). Professor Schultz argues that "advocates of legislation [should] document specific evidence of political corruption in their jurisdiction, demonstrating how such corruption or its appearance supports specific forms of reform legislation." *Id.* at 133. This Note supports and develops Professor Schultz's conclusion to a greater degree. Since the writing of his article, recent Court decisions have shaped the requirement and made it even more evident than it was in 1999. Since then, the Court has decided a number of significant cases offering support for the conclusion that legislatures must construct a record showing evidence of corruption when passing campaign finance

Court never fully clarified the existence or importance of the requirement. In the wake of Watergate and the 1972 elections, the Court did not have to search-out or detail evidence of campaign fund misuse. As a result, the "Court spen[t] little time discussing what Congress had to prove to demonstrate that contributions present a serious corruption danger."<sup>324</sup> Shortly afterwards, *Bellotti* again rejected the Government's argument that it had an interest in preventing corruption because it failed to exhibit a "record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes" or that there was a lack of "confidence of the citizenry in government."<sup>325</sup>

Years later the Court began to show an inclination to look to the legislative record in several other cases. *Colorado I* did not deal directly with the Government's burden to justify contribution limits; nevertheless, it indicates the importance of a record of corruption. In its analysis, the Court found that the Government could not "point to record evidence or legislative findings [that] suggest[] any special corruption problem in respect to independent party expenditures."<sup>326</sup> The only evidence in the record about the purpose for the regulations was that Congress enacted them to enhance the role of political parties.<sup>327</sup> This was not sufficient because mere inference or speculation as to corruption was unacceptable.<sup>328</sup> Likewise, Congress's "mere conjecture [was not] adequate to carry a First Amendment burden."<sup>329</sup> *Shrink Missouri* then validated these principles. It confirmed *Colorado I* by recognizing that "the principal opinion . . . charged the Government with failure to show a real risk of corruption . . ."<sup>330</sup>

Furthermore, *Shrink Missouri* indicated that the amount of evidence required to satisfy the burden would vary depending upon the significance and extent of the regulation.<sup>331</sup> *Shrink Missouri* is different in one regard because the Court did not rely upon an overwhelming amount of evidence to justify the law. The Court relied on less substantial amounts of evidence because the case dealt with an atypical and less extensive campaign finance regulation that was not passed by Congress. Furthermore, perhaps the most significant piece of evidence relied upon by the Court was the fact that the contribution limits were enacted by the people of Missouri through a statewide vote on the proposition. "[A]n overwhelming 74

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laws. First, the Court's general trend has been moving toward a legislative record requirement. *Morrison* more firmly entrenches this requirement into Commerce Clause regulation. See *supra* Part V.B.1. And *Florida Prepaid*, *Kimel*, *Garrett*, and *Hibbs*, all decided after 1999, unmistakably demonstrate the Court's practice of requiring a sufficient legislative record to justify prophylactic legislation under § 5. See *supra* Part V.B.2. Second, *Shrink Missouri*, *Colorado II*, and *McConnell* have been handed down since Schultz wrote his article. These recent cases, especially *McConnell*, confirm the Court's requirement for evidence demonstrating corruption and substantiate Schultz's claim that *Buckley* contains a requirement for sufficient evidence to justify reform legislation. See *supra* Part IV.B.

324. Briffault, *supra* note 200, at 1746.

325. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789-90 (1978).

326. *Colorado I*, 518 U.S. 604, 618 (1996).

327. *Id.*

328. *Id.* at 617-18.

329. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000) (citing *Colorado I*, 518 U.S. at 616).

330. *Id.*

331. *Id.* at 391 (stating "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised").

percent of the voters of Missouri determined that contribution limits [were] necessary to combat corruption and the appearance thereof.”<sup>332</sup>

Several other elements made *Shrink Missouri* an easier decision for the Court than many of its other campaign finance cases.<sup>333</sup> First, the regulations were not tremendously significant.<sup>334</sup> Additionally, even though the amount of evidence was small, there was nothing casting doubt on what was presented.<sup>335</sup> Had the circumstances been different, the Court would have likely required a stronger showing.<sup>336</sup> The Court stated that “[t]here might, of course, be need for a more extensive evidentiary documentation” were the circumstances of the case different and more akin to the questions from *Buckley*.<sup>337</sup> Therefore, *Shrink Missouri* did not draw a new line as to the type or amount of evidence required and is not useful in this regard. Instead, it is valuable because, like *Colorado I*, it reaffirms the Court’s intention to look for evidence of corruption or its appearance notwithstanding the situation.

Finally, *McConnell* solidifies these implications in campaign financing. In upholding BCRA’s ban on soft-money, the Court referred to the importance of

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332. *Id.* at 394 (quoting *Carver v. Nixon*, 882 F. Supp. 901, 905 (W.D. Mo. 1995)). Furthermore, there was “no reason to question the existence of a corresponding suspicion among voters.” *Id.* at 395. Missouri does not keep any records of its legislative history, thus making it difficult for the Court to look for evidence of corruption. *See id.* at 393. As a result, the Court looked to what information it did have. It used voting information as evidence to justify the law. Most persuasive was the high percentage of the population that voted in favor of the law, which demonstrated that a majority of the population perceived corruption within the system. *See id.* at 394. This evidence, along with other testimony presented, helped the state to satisfy its evidentiary burden. Gregory Comeau, Recent Development, *Bipartisan Campaign Reform Act*, 40 HARV. J. ON LEGIS. 253, 268 (2003). Other evidence cited by the Court included “an affidavit from State Senator Wayne Goode, the co-chair of the state legislature’s Interim Joint Committee on Campaign Finance Reform . . . , stat[ing] that Contributions have the ‘real potential to buy votes.’” *Shrink Missouri*, 528 U.S. at 393 (quoting affidavit of Wayne Goode). Additionally, both the Supreme Court and the lower court looked at various articles appearing in Missouri newspapers pointing to the public’s perceived belief that money was corrupting the political process and calling for campaign finance reform to get big money out of politics. *Id.* at 393-94 (citing Editorial, *The Central Issue is Trust*, ST. LOUIS POST-DISPATCH, Dec. 31, 1993, at 6C; J. Mannies, *Auditor Race May Get Too Noisy to be Ignored*, ST. LOUIS POST-DISPATCH, Sept. 11, 1994, at 04B; *Shrink Missouri Gov’t PAC v. Adams*, 5 F. Supp. 2d 734, 738 nn.6-7 (E.D. Mo. 1998) (citing John A. Dvorak, *Election Reform Backed Lid on Contributions to Campaigns Wins Carnahan’s Support*, KANSAS CITY STAR, Nov. 14, 1993, at B1; Kevin Q. Murphy, *Low-key Proposition A Would Refashion Election Financing*, KANSAS CITY STAR, Oct. 27, 1994, at A1; *Voters Guide*, ST. LOUIS POST-DISPATCH, Nov. 6, 1994, at 08; Kathy Richardson, *Letter to the Editor*, ST. LOUIS POST-DISPATCH, Nov. 5, 1994, at 15B; Robyn Steely, Editorial, *Money and State Senators*, ST. LOUIS POST-DISPATCH, Aug. 21, 1994, at 3B). Several other relevant articles appearing in newspapers around the same time period including: Editorial, *Four Proposals on the Missouri Ballot*, ST. LOUIS POST-DISPATCH, Oct. 20, 1994, at 6B).

333. The case did not “present a close call requiring further definition of whatever the State’s evidentiary obligation may be.” *Shrink Missouri*, 528 U.S. at 393.

334. *Id.* at 387, 392-93.

335. *Id.* at 394.

336. *Id.* Additionally, had a legislative record with testimony and committee reports been present, it would have alleviated problems further. *See* Christina E. Wells, *Beyond Campaign Finance: The First Amendment Implications of Nixon v. Shrink Missouri Government PAC*, 66 MO. L. REV. 141, 154 (2001).

337. *Shrink Missouri*, 528 U.S. at 394.

evidence in the record more than ten different times. Because of this voluminous record of evidence, the Court found that BCRA fit within the approved government interest making it constitutional. The Court said, “[the record contains] substantial evidence to support Congress’ determination that large soft-money contributions to national political parties give rise to corruption and the appearance of corruption.”<sup>338</sup> Just as the legislative record was sufficient to justify the enactment of prophylactic § 5 legislation in *Hibbs*, the substantial record in *McConnell* justified campaign financing restrictions on First Amendment speech.

In analyzing the all-important ban on soft-money, the *McConnell* Court found that the evidence in the record demonstrated “that candidates and donors alike have in fact exploited the soft-money loophole.”<sup>339</sup> Such findings were ascertained from over 60,000 pages of documents submitted in defense of the law.<sup>340</sup> This collective evidence proved Congress’s belief that corruption or the appearance of corruption existed in the political system.<sup>341</sup> The documents contained many legislative histories and committee reports from previous legislative sessions.<sup>342</sup> One key Senate report emerged from the legislative history of those bills.

This key report was generated by the Senate Committee on Governmental Affairs while investigating alleged campaign financing misconduct by President Clinton and Vice President Al Gore during the 1996 election cycle.<sup>343</sup> The committee investigation had an approved budget of \$4.35 million, issued 427 subpoenas, reviewed over 1,500,000 pages of documents, and took over 200 witness interviews and over 200 depositions.<sup>344</sup> The committee also held thirty-two days of hearings, including testimony from seventy-two witnesses. These hearings

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338. *McConnell v. Fed. Election Comm’n*, 124 S. Ct. 619, 666 (2003).

339. *Id.* at 662. It could be argued that the Court went beyond relying upon any evidence whatsoever when addressing the Levin Amendment prohibiting state parties from using soft-money in federal election activities. The Court stated that in this area Congress had only “made a prediction” about what might happen. *Id.* at 672. However, the Court acknowledged that there was “at least as much evidence as there was in *Buckley* that such donations have been made with the intent . . . of gaining influence over federal officeholders.” *Id.* at 672-73. Thus, simply because Congress made a prediction does not diminish the importance of the fact that it was required to make a “neither novel nor implausible” prediction based upon a substantial record of corruption. *Id.* (quoting *Shrink Missouri*, 528 U.S. at 391).

340. Amy Keller & Dannon Chappie, *Court Battle Set to Kick Off; Reform Law Challenge Starts Wednesday*, ROLL CALL, Dec. 2, 2002. Many of the documents, such as briefs and some of the record, are available from the Supreme Court’s website. See *Bipartisan Campaign Reform Act Cases*, at <http://www.supremecourtus.gov/bcra/bcra.html> (last visited Feb. 23, 2004). Additionally, briefs and other documents relating to the proceedings before the special three-judge panel are available from Stanford Law School. See *Campaign Finance Materials*, Stanford Law School, at <http://www.law.stanford.edu/library/campaignfinance/#press> (last visited Feb. 23, 2004).

341. See *Oppel & Lewis*, *supra* note 229, at A27 (stating that lawyers will be relying on evidence “from lawmakers and political leaders . . . presented [to] the judges with what they believe are repeated examples of the [corrupting] influence of . . . money”).

342. See, e.g., *supra* note 208.

343. *McConnell*, 124 S. Ct. at 652. While a major motivating factor in the Senate investigation was to inspect Democratic fundraising practices, there was also a report prepared by the minority party which brought to light many of the questionable fundraising practices by the Republican Party. *Id.*

344. THOMPSON REPORT, *supra* note 239, at 14-15.

and the report that followed were an attempt by Congress to uncover corruption and the appearance of corruption in current political culture.

Both Congress and the Court relied heavily upon the report's findings. First, the report contained an assortment of problems and possible reforms.<sup>345</sup> These suggested reforms played a substantial role in congressional action leading to BCRA's enactment. During BCRA's debate, various Senators cited the report as evidence of current corruption in the political process.<sup>346</sup> Notably, many of the proposed reforms from the report were eventually implemented. Furthermore, the *McConnell* majority heavily relied on the report in making its conclusions.<sup>347</sup> Shortly after *McConnell*, Senator McCain recognized the importance the Court placed upon the record created by Congress. He said, "[t]he mountain of evidence that was compiled . . . provided a solid foundation for the Supreme Court's decision to close loopholes through which were flowing hundreds of millions of dollars in soft money."<sup>348</sup> The Court cited to these numerous examples in the report as congressional findings of corruption. It was these and other endless examples of corruption that provided the justification for upholding BCRA.

The Court also looked at whether Congress truly believed that soft-money contributions had a corrupting influence. It stated that "[b]oth common sense and the ample record in these cases confirm Congress' belief that they do."<sup>349</sup> The record abounded in examples of individuals exploiting soft-money provisions through the selling of access to candidates and office holders.<sup>350</sup> These examples occurred on both sides of the political aisle. For example, the record showed that the Republican National Committee had two donor programs, which granted access to senior elected republican leadership in exchange for large soft-money donations to the party.<sup>351</sup> On the other hand, large soft-money contributions to the Democratic Party amounted to an invitation to attend one of the 133 "coffees" hosted by President Clinton or an overnight stay in the White House Lincoln Bedroom.<sup>352</sup> This buying of access was the same type of corruption the *Buckley* Court found to be a compelling governmental interest. Likewise, because this evidence was exactly the type relied upon by the Court to justify the law in *Buckley*, it proved an equally sufficient justification for BCRA.

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345. *McConnell*, 124 S. Ct. at 653.

346. 147 CONG. REC. S3138 (daily ed. Mar. 29, 2001) (statements of Sen. Levin and Sen. Thompson).

347. *Supreme Court Rules*, *supra* note 228 (statement of Thomas E. Mann).

348. 150 CONG. REC. S576 (daily ed. Feb. 4, 2004) (statement of Sen. McCain). He also recognized that the "strength of the evidence on the extent of corruption and the appearance of corruption as well as the creativity with which the campaign finance laws were being evaded led the Supreme Court to uphold BCRA." *Id.*

349. *McConnell*, 124 S. Ct. at 661.

350. *Id.* at 664. The Court recognized that the evidence showed many CEOs and business owners held the belief that large soft-money donations were a cost of doing business, and that making these large donations was the only method of getting access to office holders. *Id.* at 663 n.46. The national parties utilize this attitude to their advantage and pressed business leaders to give large donations. *See id.* at 663 n.47.

351. *Id.* at 653.

352. *Id.* at 652; *see also* THOMPSON REPORT, *supra* note 239, at 783. During that election cycle the individuals who attended the "coffees" contributed \$26.4 million, with much of that money contributed especially close to the time they attended the event. *Id.* at 41.

In the plaintiffs' attack on BCRA, they argued that there was no record of corruption. They believed the law should not be upheld because Congress had failed to show any "real or apparent corruption."<sup>353</sup> The Court dismissed the argument, finding that the record supported the opposite conclusion.<sup>354</sup> Congress had in fact made a connection between soft-money and a corrupting influence. This corrupting influence occurred in many forms, but several notable incidents showed that large soft-money contributions were followed by a failure to enact certain legislation.<sup>355</sup> To claim that such improper influence over the legislative calendar was not a corrupting influence was only to disregard common sense.

It is clear that the Court relied heavily on the Thompson Report, as well as other evidence, to buttress Congress's belief that BCRA was passed to curb political corruption.<sup>356</sup> In this case, the record was "replete with examples."<sup>357</sup> These examples from BCRA's record allowed Congress to regulate campaign financing without overstepping its bounds. The Court acknowledged that Congress's power did have boundaries. Similar to the way the Court had limited Congress's power in *Morrison* and *Lopez*, it applied the same limiting principle to the Election Clause.<sup>358</sup> However, unlike *Morrison* and *Lopez*, the *McConnell* Court found that Congress had established a connection to the interest in the legislative record. Congress had demonstrated a "legitimate interest in maintaining the integrity" of the political system by keeping it free from corruption.<sup>359</sup> The key was Congress's ability to justify its actions. The Court stated, "our . . . analysis turns on our finding that those interests are sufficient to satisfy First Amendment scrutiny. Given that finding, we cannot conclude that those interests are insufficient to ground Congress' exercise of its Elections Clause power."<sup>360</sup> As a result, unlike *Lopez* and *Morrison*, BCRA's record contained the necessary and proper information that drew the connection between the government interest in corruption and facts showing that the corruption actually existed. Thus, Congress had properly exercised its Election Clause power.

Finally, by interpreting *McConnell* to impose this type of legislative record requirement upon Congress in campaign financing, Court will maintain ultimate authority to define the law.<sup>361</sup> In this case, granting complete legislative deference and requiring no legislative record would empower Congress with unbridled control to mold and shape vital First Amendment activity. It is unlikely that the Court intended *McConnell* to stand for such a principle. Other areas of constitutional law illustrate the Court's unwillingness to completely give Congress ultimate authority to define the Constitution. Fourteenth Amendment cases show that the Court's method for retaining this ultimate control is to make inquiries into the legislative record. In *Boerne*, the Court was not willing to allow Congress to

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353. *McConnell*, 124 S. Ct. at 664.

354. *Id.*

355. *Id.*

356. Referring to the THOMPSON REPORT, *supra* note 239, the Court observed one Senator's remarks about the hearings. Senator Collins concluded that "*the hearings provided overwhelming evidence that the twin loopholes of soft money and bogus issue advertising have virtually destroyed our campaign finance laws, leaving us with little more than a pile of legal rubble.*" *McConnell*, 124 S. Ct. at 652 (emphasis added).

357. *McConnell*, 124 S. Ct. at 628.

358. *Id.* at 685.

359. *Id.*

360. *Id.*

361. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).



determine the constitutional standard of review. Instead, the Court only permitted Congress to enact remedies with its § 5 power. Further, using legislative record review, the Court in *Boerne* retained an even greater ability to oversee Congress's actions and yielded greater power to the Court. In this way, Congress is given some room to enact legislation, but the Court retains decisive control to define the meaning of law and the Constitution. Similarly, if Congress begins to go too far in regulating campaign financing, *McConnell* provides the Court with a method of keeping Congress in check without having to define a new constitutional standard. Thus, Congress will not be allowed to regulate without first indicating to the Court—through a record of evidence indicating corruption or the appearance of corruption—that it has properly exercised its legislative power.

#### CONCLUSION

A successful legislative plan to enact future campaign finance laws, which implicate First Amendment concerns, must include two considerations. First, Congress can only exercise its power to regulate based upon the defined governmental interest of preventing corruption or the appearance of corruption. To fit within the scope of this interest, future regulations must correspond to the definition of corruption created by the Court in *Buckley* and its progeny. Second, Congress's power to regulate within these limits depends on its ability to draw a connection between the defined interest and the evidence of corruption exhibited in the record. The constitutionality of campaign finance laws has begun to take on an implicit requirement to create a record justifying the enactments of the legislature. Just as the Commerce Clause and Reconstruction Amendment cases "turn[] on the nature of the issue triggering the legislation and the relationship of the legislative response to the perceived need[.]"<sup>362</sup> *McConnell* makes evident that the Court has begun to adopt a similar form of review for campaign finance laws. By utilizing these principles when enacting future campaign finance laws, Congress will not overstep its Election Clause authority and the laws will likely be deemed constitutional.

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362. Buzbee & Schapiro, *supra* note 292, at 98.

