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## The Legacy of *Buckley v. Valeo*

JOEL M. GORA

HAVING LONG DEFENDED the First Amendment,<sup>1</sup> I considered it a great privilege to have been one of the lawyers who argued *Buckley v. Valeo*<sup>2</sup> on behalf of a great liberal Democratic Senator, Gene McCarthy. And it is a great privilege for me now to help fight the same First Amendment battles on behalf of a great conservative Republican Senator, Mitch McConnell, who has been a stalwart defender of the First Amendment no matter the political cost. Senator McCarthy was a leader in establishing the principles recognized in the *Buckley* case, and Senator McConnell has been a leader in seeking to vindicate those principles.

The common ground on which these two so different leaders meet is the conviction that campaign finance limits are fundamentally at odds with First Amendment freedoms. They believe that the text, history and proper interpretation of the First Amendment's core principal protections of political freedom are basically against permitting government to limit the ability of individuals and groups to use their resources to speak their minds on the political issues and the political figures of the day. I am proud to stand on that same ground and to try to set forth the ways in which the newest campaign finance law runs afoul of those core principles.

Though imperfect in some ways, the decision in *Buckley v. Valeo*, handed down slightly more than 25 years ago, was a landmark of political freedom in its refusal to sanction plenary gov-

ernment control over the very political processes by which government is chosen and held accountable.

In this paper, I will discuss the *Buckley* case, the 25 years of precedential and political developments since the decision, the extraordinary new federal statute that is now being challenged by Senator McConnell and so many others, a word from our sponsors, and the constitutional crossroads we may be approaching.

### THE THIRTY YEARS WAR

#### *The initial salvo*

*Buckley v. Valeo* was actually not the first battle in the Thirty Years War between campaign finance controls and First Amendment freedoms. The first battle in that war actually started 30 years ago in the summer of 1972, when three old-time dissenters came into the ACLU offices in New York and told an incredible story.

In late May of that year—a Presidential election year—they had sponsored a two-page ad in *The New York Times* advocating the impeachment of President Richard Nixon for bombing Cambodia and praising the handful of Members of Congress who had voted against the bombing. This was classic citizen advocacy, a classic example of people spending their money to say what was on their minds about the conduct of the President of the United States. It was exactly the kind of thing James

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<sup>1</sup>This paper was originally prepared to be delivered as a keynote address for the James Madison Center for Free Speech.

<sup>2</sup>424 U.S. 1 (1976).

Madison and the other Founding Fathers had in mind when they wrote the First Amendment. You would have thought the protestors would have gotten a medal for doing exactly what the Framers hoped they would do and protected their right to do.

Instead of a medal, they got a summons from the United States Justice Department, which filed suit against the group, and demanding to know how they were organized and who had paid for the advertisement, and threatening the group with injunctions to prevent them from speaking out again unless they filed reports, statements and disclosures with the government.<sup>3</sup> All these threats and sanctions were triggered by sponsoring an advertisement publicly criticizing the President of the United States.

Ironically, this was a time when First Amendment case law was at its most vigorous in protecting criticism of government officials and policies—newspapers could publish secret government documents without prior restraint<sup>4</sup> and could publish editorial endorsements on election day without penalty<sup>5</sup>; indeed, fiery speakers could even advocate the violent overthrow of the government.<sup>6</sup> How, in the face of all that strong First Amendment precedent, could the Government dare file a lawsuit to suppress classic citizen criticism of government? What kind of a law could possibly justify such a lawsuit?

The answer, of course, was a campaign finance law. The government was suing under the brand new Federal Election Campaign Act of 1971.<sup>7</sup> The government's theory was that the two-page ad, even though it spoke solely about issues, mentioned people—one could say "referred to" them—who were candidates for election that year; that this might affect public opinion and therefore possibly influence the outcome of the elections that year; that this all rendered this ad hoc group a "political committee;" that they had to file reports with the government and disclose their contributors and supporters; and that if they did not, they would be enjoined from further political speech until they complied.

I guess in one sense the government was right. Speech like that might influence people's opinion about the President of the United

States and Members of Congress—all incumbent politicians—and that might influence how people voted at the next election. So, if one is serious about regulating campaign funding, one better not let those issue ads slip by. The ad cost \$18,000. Adjusted for inflation, that would be about \$50,000 today. That is serious money. So if one is serious about controlling political funding, and limiting those who do "too much" of it, or leveling the playing field, or guarding against people using money to "buy access and influence," then I guess one better go after groups like that with injunctions and fines and maybe even criminal penalties for speaking out on public issues and public officials.

But that seems a rather strange way to improve democracy. In our view at the ACLU, the very engine of democracy is freedom of speech and of the press. If, in the name of campaign finance reform, the government is going to suppress freedom of speech and of the press, and make it difficult for people and groups to criticize the government and the officials who run it, that will be the death of democracy, through shutting down its very engine of free speech. That was a wake-up call for us at the ACLU that limits on political funding are limits on political speech and that the campaign finance laws posed severe First Amendment problems because they could be used against groups who do no more than publicly criticize or praise the government and the politicians who run it.

Obviously, that all now has a depressingly familiar ring to it, and sounds like *deja vu* all over again, because key provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) would achieve exactly the same kind of controls on political speech that we fought against thirty years ago in the impeachment speech case.

We at the ACLU defended the impeachment ad group in 1972, and the courts ruled it would be intolerable to allow campaign finance laws

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<sup>3</sup> *United States v. National Committee for Impeachment*, 469 F.2 1135 (2d Cir. 1972).

<sup>4</sup> *New York Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>5</sup> *Mills v. Alabama*, 384 U.S. 214 (1966).

<sup>6</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>7</sup> 2 U.S.C. Sections 431 et seq.

to be used to prevent non-partisan, issue-oriented groups and individuals from criticizing the government.<sup>8</sup> Those early courts understood that one cannot discuss and criticize the actions and policies of government without discussing and criticizing the politicians who run the government and take those actions and make those policies. If every person or group that criticized a politician could be swept within the campaign finance laws, criticism of government would be silenced. To prevent such a result, the courts ruled that campaign finance laws could not be applied to groups that did no more than criticize incumbent politicians, even during an election season.

To put it in today's terminology: The courts ruled that campaign finance laws could not be used to regulate issue advocacy. We at the ACLU breathed a sigh of relief, but, as it turned out, that feeling proved to be short-lived.

#### *The new law*

Within a year, we had Watergate revelations of campaign funding excesses, and Congress was stampeded into enacting the sweeping 1974 restrictions on political activity that would give rise to the constitutional challenge in *Buckley*. In an atmosphere filled with the same kind of rhetoric that we hear today about how money is corrupting politics and destroying democracy, Congress passed a law that was the archetype of government control of political funding and therefore of political speech, association and communication, and therefore, ultimately, of democracy, because, as the Supreme Court has told us time and again, freedom of speech is the engine of democracy.

That law severely restricted candidates, campaigns, contributors, independent political groups, and even non-partisan groups like the ACLU, who had just been assured by the courts that their advocacy would be free of official restraint. Enforcement of those new restrictions was placed in the hands of a commission completely controlled by the House and Senate—a cynical breach of separation of powers that the *Buckley* Court would soon declare invalid.

The Act severely restricted a candidate's overall campaign expenditures, even if the funding all came from small contributors, and

set the limit so low that it would be next to impossible to defeat an incumbent, especially an incumbent whose free mailing privileges and other perks of office exceeded the campaign finance limit. Even most *Buckley* critics concede that the spending limits in the Act were unconscionably low and incumbent-protective.

The Act severely limited the amount of money candidates could contribute to their *own* campaigns, even though candidates could not possibly corrupt themselves. Had they used their money to run for the White House, Ross Perot and Steve Forbes would have wound up in the Big House. The campaigns of previously unknown millionaire Senators like Corzine, Edwards and Cantwell—all of whom voted for the most recent "reform"—never would have gotten off the ground.

Perhaps even worse, independent speakers were all but completely silenced by the new law which placed an annual ceiling of \$1,000 on how much any person could spend relative to a politician. That was about the cost of a one-quarter page ad in *The New York Times*. Spend a dime more on political speech criticizing the President of the United States or your local Congressman or your local Mayor who was running for the Senate, and your free speech would become a felony. What a breathtaking and extraordinary restriction that was. Reformers justified it as a "loophole-closing" device. Of course, the loophole they wanted to close was the First Amendment itself.

Make the smallest of campaign donations—as little as \$15 dollars—and you would get your name and political affiliation publicly disclosed or kept on file for the government.

All the issue-oriented groups that report and comment on the voting records and actions of incumbents up for re-election through Voter Guides and the like would likewise have to file reports with the government disclosing their contributors and supporters. (I should note that this provision was unanimously declared un-

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<sup>8</sup> *United States v. National Committee for Impeachment, supra*; *American Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973) (three-judge court); *vacated as moot*, sub. nom. *Staats v. American Civil Liberties Union*, 422 U.S. 1030 (1975).

constitutional by the *en banc* D.C. Circuit in *Buckley* on the ground that it was an impermissible restriction of citizen and organizational speech about important public issues. Even a court that was enthralled by every other feature of the law, could not countenance the law's overt regulation of issue advocacy. That unanimous ruling alone, which was never even appealed by the government, severely calls into question key provisions of the BCRA.)

Finally, who was put in charge of enforcing these unprecedented restrictions on political speech and association critical of incumbent politicians? A Commission hand-picked by the incumbent politicians themselves, a cynical breach of separation of powers that the Supreme Court would soon rectify.

### *The Buckley challenge*

That was the statute that prompted the lawsuit which became the landmark decision in *Buckley v. Valeo*. The challenge to the new law was brought by the original "strange bedfellows" coalition. That coalition was led by Senator, now Judge James L. Buckley, a political newcomer who had won a Senate seat from New York by being able to raise a significant amount of money from a relatively few supporters; Senator Eugene McCarthy, whose 1968 Presidential campaign was funded in a similar way and managed to bring down a sitting President over the issue of the war in Vietnam; Stewart Mott, one of McCarthy's main backers; and an unusual assortment of groups like the Libertarian Party, the Mississippi Republican Party, the American Conservative Union, and the New York Civil Liberties Union. As Judge Buckley put it in a recent article, that was a band of "political underdogs and outsiders" whose common cause was the strong belief that the FECA would "squeeze independent voices and reform movements out of the political process by making it even more difficult than it already was to raise effective challenges to the political status quo."<sup>9</sup> With virtually the entire political establishment arrayed against us, we felt very much like the Minutemen at Lexington and Concord.

And, indeed, our arguments received short shrift from a D.C. Circuit which seemed com-

pletely persuaded by the law's paradoxical theory that limiting free speech was the best way to advance representative democracy. (Except, of course, for the one provision regulating issue advocacy, which was unanimously struck down.)

It was not until the case got to the Supreme Court, which devoted an extraordinary full day to the oral arguments, that we felt that others shared our view that the First Amendment had something to do with the case. For the questions of many of the Justices made clear that they too had severe doubts about many features of the new law.

### *The Buckley decision*

Until recently, the Court's landmark *Buckley* ruling was condemned in the harshest terms by many academics and commentators; it was almost demonized as a derelict, a sport, a blemish on the law. It was, of course, nothing of the sort. It was a decision in the mainstream of Supreme Court precedent. To appreciate how wrongheaded the harsh criticism of *Buckley* really is, let me share with you some of the key passages of that ruling that would make any observer who believes in political freedom and democracy proud.

First, to set the stage, this is what the Court observed about the central role of the First Amendment in assessing campaign finance laws.

Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Although First Amendment protections are not confined to "the exposition of ideas," "there is practically universal agreement" that a major purpose of

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<sup>9</sup> James L. Buckley, "Bucks and Buckley," NATIONAL REVIEW/SEPTEMBER 27, 1999, p. 40.

that Amendment was to protect the free discussion of governmental affairs, . . . of course including discussions of candidates. . . .” This no more than reflects our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed . . . “it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.”<sup>10</sup>

That is why, the Court concluded, laws regulating campaign speech and finances must be subject to “the most exacting scrutiny.”

The Court correctly recognized that limitations on political funding were limitations on political speech and thereby threatened well-established principles at the core of the First Amendment’s protection.

To the argument that money is not speech, the Court quite sensibly responded that limitations on how much one could spend to speak were limitations on how much one could speak. Whether we are talking about funding for the arts<sup>11</sup> or funding for abortion counseling<sup>12</sup> or funding for legal services programs,<sup>13</sup> there is an obvious and inextricable link between restrictions on funding and restrictions on speech, and the *Buckley* Court soundly recognized that. This was especially apt since the restrictions in *Buckley* were on the use of private funds, not public funds.

To the claim that there is “too much” campaign spending and that it must be controlled by government, the Court responded that the First Amendment denies government the right to make that choice: “In the free society ordained by our Constitution, it is not the government but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political cam-

paign.”<sup>14</sup> Who could possibly quarrel with that principle?

To the claim that the free speech of those with more resources could be restrained in order to enhance the political opportunity of those with fewer resources—a kind of First Amendment Lowest Common Denominator leveling down of freedom of speech—the Court responded: “The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, *which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources and to assure unfettered exchange of ideas for the bringing about of political and societal changes desired by the people.*”<sup>15</sup> That too embodies settled doctrine. I emphasize the italicized portion because critics of *Buckley* often leave it out to create the impression of an unrestrained, royalist ruling. But the Court’s key point was that restrictions on the voices of some will harm all of us who are denied the right to hear what all those voices have to say.

Finally, in answering the claim that issue-oriented speech about incumbent politicians must be regulated because it might influence public opinion and thereby affect the outcome of elections, the Court, with great force, as well as great political sophistication, reminded us of the critical relationship between unfettered issue advocacy and healthy democracy. “Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.”<sup>16</sup> And with equal clarity, the Court observed that in an election season a speaker cannot abstractly discuss issues without discussing the candidates and their stands on those issues. “The distinction between discussion of issues and candidates

<sup>10</sup> 424 U.S. at 14–15 (citations omitted).

<sup>11</sup> *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

<sup>12</sup> *Rust v. Sullivan*, 500 U.S. 173 (1991).

<sup>13</sup> *Legal Services Corporation v. Velazquez*, 121 S.Ct. 1043 (2001).

<sup>14</sup> 424 U.S. at 57.

<sup>15</sup> 424 U.S. at 48–49 (emphasis added).

<sup>16</sup> 424 U.S. at 14.

and advocacy of election or defeat of candidates may often dissolve in practical operation. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and government actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest."<sup>17</sup> If any reference to a candidate in the context of advocacy on an issue rendered the speaker or the speech subject to campaign finance controls, the consequences for First Amendment rights would be intolerable.

Accordingly, the Court fashioned the critical express advocacy requirement, which holds that only the funding of express advocacy of electoral outcomes may be subject to restraint. All speech which does not in express terms advocate the election or defeat of a clearly identified candidate must remain totally free of *any* regulation: "So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, *they are free to spend as much as they want to promote the candidate and his views.*"<sup>18</sup> Those who suggest that the Court naively or simplistically fashioned the express advocacy doctrine should reread the opinion.

Relying on these principles, the *Buckley* Court struck down all limitations on political expenditures by candidates, campaigns and independent groups and also ruled that campaign finance controls could only be imposed on those engaging in "express advocacy." If there was no express advocacy, there could be no campaign finance regulation.

But, in an act of judicial compromise, the Court upheld limits on contributions to candidates and campaign committees because of the concern with "the actuality and appearance of corruption resulting from large individual financial contributions." The Court also upheld disclosure of contributions to candidates and campaigns, though exempting certain controversial third parties from those requirements. Finally, the Court validated public funding of presidential campaigns which would go overwhelmingly to the two major established parties.

### *The Buckley legacy*

Twenty-five years after *Buckley*, what can we say about its legacy as constitutional precedent or its achievement as campaign finance policy?

Despite the efforts by many academics and activists to demonize and undermine the legitimacy of the opinion, the decision has demonstrated surprising stability as precedent. Indeed, many of those who for years roundly condemned *Buckley* have more recently started to embrace the ruling, particularly as the majority of the Court itself seems to regard the decision as sound precedent. In some quarters, *Buckley* has become rehabilitated as the gold standard.

In fact, the Court has left the basic *Buckley* doctrinal structure largely in place. Expenditures are free, but contributions to candidates and campaign committees may be limited. Express advocacy, strictly defined, can be regulated, but issue advocacy and criticism of politicians remains beyond the pale of any legitimate controls. The Court has resisted entreaties to permit greater regulation of political funding, but has likewise declined invitations to relax regulation.

How has the Court's compromise worked out in practice? The decision has had four significant consequences for the campaign finance system.

First, by permitting unlimited expenditures—an essential and irreducible First Amendment position—but allowing limits on contributions, the consequence has been to favor incumbents and other well-heeled and well-connected candidates. This has given a premium to wealthy individuals, but also made candidates more dependent on political action committees and other sources of organized support.

Second, limiting contributions to candidates has led to increased funding of issue advocacy by groups and individuals, which in most respects is a good thing. But that should not have surprised anyone. Indeed, in our *Buckley* brief, we predicted exactly that consequence if con-

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<sup>17</sup> 424 U.S. at 32.

<sup>18</sup> 424 U.S. at 45 (emphasis added).

tributions to candidates were limited: "Limits on individual contributions will, moreover, induce potential contributors to donate funds instead to 'issue' groups. That in turn may create additional pressure for Congress and the courts to see that issue organizations also are regulated in the way that political campaigns are—a clearly unconstitutional approach."<sup>19</sup> And so it goes.

Unfortunately, with title II of the BCRA,<sup>20</sup> the prophecy has become reality. We now have a sweeping Act of Congress designed precisely to prevent and control issue advocacy by organizations, corporations, labor unions, individuals and political parties.

Third, limiting contributions to candidates has resulted in increased fund-raising by political parties in the form of what is widely known as soft money. That should not have surprised anyone either. People who are prevented by law from supporting and contributing to political candidates in whose principles they believe will then try to support political parties in whose principles they believe. There is nothing pernicious about that. We should welcome that. Yet, Title I of the BCRA is based on the view that such support for political parties is evil and must be stopped.

Finally, contribution limits have had at least one other unintended consequence: magnifying the influence of the media. Favorable news media coverage and editorial support can make or break a candidate. When the voter is in the polling booth, a newspaper's election day editorial endorsements may have just as much influence on which lever he pulls as an issue group's score card or a candidate's flyer or a party's slate card. Yet, the individual and corporate owners of major media outlets are largely immune from any campaign finance controls on the use of their resources to affect electoral outcomes, while candidates who wish to reply to a media attack are limited in their ability to seek financial contributions from their supporters. Under BCRA, political parties are now subject to the same restraints in defending themselves against media attack.

The ACLU, of course, has repeatedly defended the unfettered privilege of the press to report on and comment about political candidates. But there is no warrant for affording less

protection to those who invoke the First Amendment to help underwrite a candidate's or a party's response to the media. The rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations. After all, the First Amendment protects both freedom of speech and freedom of the press equally. How can our campaign finance laws justifiably treat them differently by giving special speech privileges to members of the institutional press. The press engages in issue advocacy every day and in express advocacy on election day. Why should they be privileged over other speakers? Why should the Murdochs and the Grahams and the Sulzbergers and the corporate owners of those media get to use their resources to advocate their politics, without restraint, while other individuals, parties and groups are subject to restraints against doing and saying exactly the same thing? I think all speakers—individual or group, press or other—should have the same vigorous rights to use their resources to speak about politics and government. I thought that's what the First Amendment said as well. I think it is the height of irony, if not hypocrisy, that so many of the institutional press clamor for campaign finance restraints that would deny to others the rights of advocacy that the press exercises every single day.

Moreover, of course, the more controls that are placed on other speakers—candidates, PACs, parties, issue groups—the more influence the press will have in shaping our public debate. For anyone who does not think the press plays a vital role in shaping that debate, just think about how different the debate on campaign finance would be if *The New York Times* and *The Washington Post* had the same editorial and news coverage position on that issue as *The Wall Street Journal* or *The Chicago Tribune*: no limits and full disclosure. Then the

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<sup>19</sup> Appellants' Brief in *Buckley v. Valeo*, at p. 126.

<sup>20</sup> The Bipartisan Campaign Reform Act of 2002, PL 107-155, 116 Stat 81, 2 U.S.C., sections 431, et. seq. Title I basically outlaws federal soft money fund-raising and spending. Title II contains the new restraints on issue advocacy. Title III contains provisions significantly raising limits on contributions to individual federal candidates.



media darling on these issues would be named McConnell, not McCain.

Of course, the new Act of Congress regulating and controlling the rights of individuals, organizations, political parties, labor unions and corporations to use their resources to communicate their views explicitly exempts those individuals and corporations that own news media. No wonder so many media moguls love campaign finance “reform.” The media support controls on speech in the name of reform, and the reformers exempt the media from the controls that now apply to everyone else. It sounds suspiciously like a *Quid Pro Quo* to me.

### A FEW WORDS ABOUT THE BCRA

One should not speak lightly about the BCRA, because its sweeping and unprecedented provisions are anything but a laughing matter. In its breadth and depth, it is as appalling as the statute at issue in *Buckley*. The Act contains a double-barreled attack on the First Amendment and its essential core protections of political speech and association.

First, the Act effectively silences a great deal of issue speech and advocacy by non-partisan citizen groups, organizations, labor unions, corporations and individuals by subjecting it to unprecedented regulation and restriction. The new law basically prohibits unions, corporations and issue organizations from effectively informing the public about the conduct of public officials who are candidates for election by imposing a *total blackout* on broadcasting any information about an incumbent candidate during the 60 days before a general election and the 30 days before a primary. Had this law been in effect during the 2000 Presidential elections, for example, it would have silenced issue organizations across the entire political spectrum. The NAACP, for one, would have been prohibited from running its powerful and graphic television ads criticizing the hate-crimes record of then-Governor George W. Bush. The NRA could not have run broadcast ads attacking the gun control position of members of Congress. Handgun Control could not have run its ads taking the contrary position. Planned Parenthood could not have broadcast the voting

records of Members of Congress on abortion and the AFL-CIO could not have run its ads on workers rights and benefits as supported or opposed by politicians. Indeed, all of these groups were accused of running so-called “sham” issue ads by one of the principal reform groups which pushed BCRA through the Congress. Presumably, therefore, all these groups will now be silenced under that new law.

The nation has seen an explosion in recent election cycles of issue advocacy critical of the records of candidates and incumbents. In reaction, Congress has now suppressed independent issue-oriented organizations from describing the actions and positions of Members of Congress on critical public issues during the crucial days leading up to an election, which is exactly the time people are paying the most attention to the positions of their elected officials. If Congress is allowed to take this action, then the only people who will be allowed to speak about the record of politicians will be politicians, PACs and the press—a dismal prospect for the First Amendment.

By the same token, the broadcasting blackout will hamper the ability of groups to communicate with their members and the public about pending legislation and the positions of elected representatives on that legislation. During much of the year 2000, any broadcast criticism of the McCain–Feingold bill—naming, of course, a clearly identified federal candidate whose presidential campaign was based primarily on the push for that legislation—would have been silenced, in the case of unions, corporations or other organizations. Even individual citizens who want to join together to engage in such advocacy are now subjected to new and burdensome restrictions and registration, and reporting and disclosure requirements. For citizen groups whose message is particularly controversial in many parts of the country—advocating gay rights legislation, for example—such disclosure requirements are tantamount to silencing them. In America, one should not have to register with the government and get its permission in order to criticize it and the incumbent officials and politicians who run it.

Secondly, this Act will also effectively stifle issue speech and advocacy and grass-roots de-

mocratic activity by political parties through a total ban on much of the funding which makes that speech and association possible. Indeed, that was the very purpose of the sponsors of the law. Political parties are essential intermediaries between citizens and government. Yet, the Act will make it much more difficult for political parties—all across the political spectrum, not only the Democrats and Republicans—to engage in all the forms of grassroots political activities, such as voter registration drives, get-out-the-vote efforts, voter education, candidate recruitment and development and issue formulation and advocacy by depriving parties of the funding which has sustained such activities. It is ironic that, in the wake of the enormous problems of voting rights witnessed during the 2000 elections, particularly in Florida, Congress would pass a law that would undercut the ability of political parties to wage voter education, voter registration and get-out-the-vote campaigns.

In both of these major assaults on political rights in America, this Act embodies a radical expansion of the scope of the FECA, well beyond its constitutionally valid sphere of operation. In doing so, BCRA flies in the face of more than 25 years of judicial precedent holding that issue advocacy, citizen criticism of government and grass-roots political activity are beyond the proper realm of such oppressive governmental regulation.

Finally, through the new restraints on “coordination” the Act will drive a wedge between citizens and their elected representatives by making it virtually impossible for the myriad of citizen groups who amplify the voices of millions of individual citizens to make their views known to their elected representatives and to praise or criticize the official actions of those elected representatives. Likewise, the law drives a wedge between candidates for election and political parties by severely reducing the ability of parties and candidates to work with each other in their common cause, thereby weakening the ability of candidates and parties to amplify the voices of the voters whose concerns they embody and on whose behalf they speak.

The ACLU has been involved in challenging the constitutionality of campaign finance re-

strictions and limitations for thirty years now, including participating in the *Buckley* case. The *Buckley* decision articulated the guiding principles and set the constitutional standards against which any campaign finance legislation must be judged. In the literally dozens of cases since then, the courts have made it clear that the *Buckley* principles are violated by key provisions of this Act.

At each crucial point, this law unconstitutionally gerrymanders the clear and established dividing lines between campaign finance activity that can be regulated and activity which cannot be controlled consistent with the First Amendment. Thus, the “bright line” line separating issue advocacy involving politicians from express advocacy of the election or defeat of those officials is radically moved and expanded to encompass broadcast speech which does no more than “refer” to that person. “Express advocacy” thus expands to become “electioneering communication” requiring no express advocacy whatsoever to trigger punitive restrictions. Similarly, a new statutory category called “federal election activity”—you might as well call it “First Amendment activity”—is roped off for unprecedented restrictions and controls, especially on political parties. “Federal election activity” encompasses the very staples of democracy: voter registration activity, voter identification, get-out-the-vote activity, generic campaign activity that promotes a political party, public communications that comment favorably or unfavorably on political candidates. Under the new law, if there is even the most tenuous link or proximity between such activity and a federal election or candidate, then only the highly-regulated funding permitted by FECA can be used to sustain such democratic activity. These impose wholesale new limits on what federal political parties can do, what federal political candidates can do and even on what state and local parties can do as well.

One final point about BCRA. The acronym stands for “The Bipartisan Campaign Reform Act.” It was barely bipartisan, as few Republicans voted for it, and it is certainly not reform. If this law were truly about “reform,” it would seek to *expand* political participation and opportunity. In my view, that would include pro-

posals for serious kinds of public financing and other public resources to expand political opportunity and level the playing field by helping those candidates and causes that lack ample resources to mount an effective campaign rather than limiting and restricting the groups who have the resources to speak. The heart and soul of this law is not to expand or encourage political speech, but to subject it to limits, limits and more limits on the paradoxical view that the less campaign speech we allow, the more democracy we will have. Nothing could be further from the truth. The First Amendment was written on precisely the opposite premise. The more democracy we want, the more free speech we need.

Thus, no limits, no forced disclosure, no forms, no filings, no controls should inhibit any individual's or group's ability to support or oppose a tax cut, to argue for more or less regulation of tobacco, to support or oppose abortion, flag-burning, and campaign finance reform and to discuss the stands of candidates on those issues. That freedom must be preserved whether the speaker is a political party, an issue organization, a labor union, a corporation, a foundation, a newspaper or an individual. That is all protected "issue advocacy," and the money that funds it is all, in effect, "soft money." Those who advocate outlawing or severely restricting "soft money" should realize how broadly the proposals sweep and how much First Amendment law they confound.

### A FEW WORDS FROM OUR SPONSORS

In cataloging the ways in which the flawed BCRA violates the First Amendment's protections, one cannot help but wonder how the men who framed those protections might think about the new law's restrictions.

In September 2001, to commemorate the Constitution and its Bill of Rights, and to honor its principal draftsman, James Madison, I was privileged to present the Madison Day Lecture in Madisonville, Kentucky, a town named for the late President and author of the Bill of Rights. The paper I presented explored what the Founding Fathers might think about campaign finance limitations.<sup>21</sup> Here are some of

my conclusions about what they believed and how they would view today's campaign finance debate.

They distrusted government, were skeptical of government power and wanted it apportioned sparingly.

They believed deeply that individuals were fundamentally entitled to have liberty and to acquire property and to exercise their full faculties.

They viewed the freedoms of speech and press as indispensable forms of liberty for two reasons. First, because the unfettered exercise of those freedoms comported with their understanding of the needs of human nature and what we call today human rights. Second, because the unfettered exercise of those freedoms of speech, press and assembly was essential and indispensable to the kind of unprecedented representative government they were trying to create.

They believed that representative government depended by its very nature, on the consent of the governed.

They believed that such consent had to be informed consent, meaning that citizens had to have the greatest freedom possible to discuss and debate government and politics and criticize and lambaste and censure government officials and politicians and to do so in the most unrestricted and uninhibited terms and based upon as much knowledge and information as possible.

They believed that, in order to do that, people could use their resources without restraint to publish and circulate their views.

Moreover, to insure that their speech and debate would be vigorous and uninhibited, they could even engage in it anonymously, as James Madison and so many other founders did.

Finally, in their view, it was illegitimate for government to stifle that debate or to try to distort its terms or dictate its outcome. Because it was the validity of government and its policies and policymakers that was the very subject of the debate, it would be intolerable to let gov-

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<sup>21</sup> Joel M. Gora, "Madison, McConnell and McCain: What Would the Founding Fathers Think About Campaign Finance Reform?" (unpublished manuscript).

ernment control the terms of that debate. To use a sports metaphor: that would be like letting one team—the incumbent politician team—both make up all the rules of the game and appoint the umpires to call the balls and strikes.

The democratic clash of interests and ideas would insure that the public good would prevail, and the protection of the individual's rights of free speech and free press and free assembly would insure that a tyranny of the majority would be less likely to come about.

Given these principles, what would James Madison and the other founding fathers have thought about a law which made it a federal crime for an individual citizen to run a small ad in a newspaper, criticizing the president of the United States or a member of Congress?

What would they—who had pledged their lives, their *fortunes* and their sacred honor to the cause of liberty and democracy—have thought about a law which made it a crime to donate more than a small amount of one's "fortune" to a candidate or cause or party or faction in whom or in which one believed?

What would they have thought about a law which required groups and even individuals to register with the government if they wanted to criticize the government?

What would they have thought about a law which required that the name, address, profession and business address of all individuals who gave even modest contributions to a candidate or cause they believed in be reported to the government for public disclosure?

What would they have thought about a law which made it a federal criminal offense for organizations to communicate information to the electorate about official actions and voting records of incumbent officials within 60 days of an election, thus imposing a 60-day blackout on any effective criticism of politicians—on any public communication that even mentions the name of a politician during the time when the public most needs this information?

What would they think if politicians justified such laws on the grounds that this was a good way to shut down "negative" advertisements or "attack ads" or "phony" or "sham" issue ads? What would they think, in short, if incumbent politicians passed laws that made it

extremely difficult for citizens and their organizations to criticize those incumbent politicians?

What would they think about the existence of government agencies all over the country whose job it is to enforce all these rules and regulations through the kind of government censorship powers over political speech and association that would make the old Kings of England jealous?

Indeed, what would they think about the kinds of limits on political speech and association—by limiting the campaign finance funding to support that speech—that have been characterized as "the most comprehensive use of state power to silence political discussion since the alien and sedition act."<sup>22</sup>

The short answer is: I think they would be spinning in their graves. I think it would require a suspension of disbelief by the framers to imagine that the system of representative government they were trying to create would tolerate the campaign finance regulatory regime we have erected in America.

The BCRA expands that regulatory regime almost exponentially. Its sweep is extraordinary—both horizontal and vertical—in terms of the breadth and depth of its regulation.

Its regulation of "electioneering communication," defined to include the mere mention of the name of a politician in a broadcast communication, will turn the literally tens of thousands of political advertisements that fill the air during our election seasons into federal criminal offenses.

Its expanded "coordination" provisions assault the fundamental rights of association and "to petition the Government for a redress of grievances."

Its destructive regulation of political parties and their candidates and officials is sweeping and pervasive, from the national committees of the major political parties down to the local county committees all over the nation.

The statute challenged in *Buckley* was an unprecedented assault on the First Amendment's political freedoms. Until now. For in its scope

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<sup>22</sup> John O. McGinness, Symposium: Law and the Political Process, 24 *HARV. J.L. & PUB. POL'Y* 25, 36 (2002).

and impact and purpose, the BCRA rivals the FECA in the audacity of its attack on those freedoms.

As the ACLU Legal Director, Steve Shapiro, said in joining the challenge to the new law: "Congress has imposed sweeping restrictions on political speech that lies at the very heart of the First Amendment by limiting what can be said about issues and candidates before an election, which is the very time when people are paying the most attention. . . . The government does not get to decide how Americans choose to express their political views. And the government does not get to decide what political messages the American public is entitled to hear."

### THE "STRANGE BEDFELLOWS" COALITION

It is a deep belief in and commitment to these principles that unites the "strange bedfellows" coalition which has coalesced to challenge the new law.<sup>23</sup> We disagree sharply on many, if not most, political and public policy issues. But we all agree profoundly on the First Amendment and its protection of political speech.

What else could unite the AFL-CIO and the United States Chamber of Commerce, the ACLU and the National Right to Life Committee, the California Democratic Party and the California Republican Party, and the leadership of one of our two great national political parties? What unites these disparate groups is the absolute conviction that the BCRA is not about prevention of corruption, but about censorship of criticism; not about improving politics, but about protecting incumbents from effective challenge; not about inoculating elected officials against improper influence, but about immunizing politicians from "negative," "attack" ads during an election season.

This statute is no more valid an effort to control corruption than the Alien and Sedition laws were a valid effort to prevent sedition. The BCRA is not about protecting democracy, it is about protecting incumbency. Its purpose is, if you will, not real reform, but a "sham" effort to protect the people in power from challenge and accountability. Its effect will be to dam the

vital flow of information to the public on the critical issues of the day and the stands of politicians on those issues.

### BUCKLEY II: WHAT WILL THE COURT DO?

That is what the *McConnell* case is all about, namely, trying to convince the courts that this is what the BCRA is all about.

In a larger sense, the challengers to this new law, like their *Buckley* forerunners, will be trying to persuade the Court that the principles and protections of the First Amendment should be universal and indivisible. The challengers will contend that Congress ignored more limited and First Amendment-friendly remedies to the perceived problems of corruption and undue influence and opted, instead, for the most overbroad and extreme solutions.

The Court's response to these challenges will be a defining and perhaps watershed moment for the First Amendment. In recent years, the First Amendment has been on a roll, and the Court has upheld its protection in rigorous and uncompromising tones. But the Court also sometimes sounds the themes of "balancing" First Amendment freedoms against other concerns and deferring to Congressional assessments of those concerns. In this regard, today's battles are reminiscent of the disputes generations ago between, for example, Justices Hugo L. Black and William O. Douglas, on the one hand, and Justice Felix Frankfurter on the other. Likewise, today, some Justices view limitations on speech as anathema to First Amendment rights, while other Justices regard such restraints as a potential handmaiden to protecting First Amendment values. Some Justices view free speech as the engine of democracy, while others regard limits on free speech as necessary to serve democracy. In my view, if the Court were to say that the government may restrict free speech in order to enhance democracy, we will wind up with neither.

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<sup>23</sup> The various constitutional challenges to the BCRA have been consolidated into one omnibus proceeding styled *McConnell v. Federal Election Commission*, Civ. No. 02-582 (D.D.C.), pending before a statutory three-judge court.

These clashing views are headed for a constitutional showdown in the *McConnell* case. It will tell us whether free speech can be limited and abridged in order to advance democracy, or whether the Framers believed what they said when they wrote: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The *McConnell* case will take the Court to a constitutional crossroads. Yogi Berra once remarked: "When you

get to a fork in the road, take it." Which fork the Court takes will determine the fate of the First Amendment for generations to come.

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1. Alexandre Couture Gagnon, Filip Palda. 2011. The price of transparency: do campaign finance disclosure laws discourage political participation by citizens' groups?. *Public Choice* **146**, 353-374. [[CrossRef](#)]