

“Great Cases, Like Hard Cases, Make Bad Law”

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*Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.*¹

—Oliver Wendell Holmes (1904)

AFTER THREE CONSECUTIVE Supreme Court decisions sustaining stringent regulation of campaign finance,² the pro-regulation community had confidently predicted a clear and decisive victory on the Bipartisan Campaign Reform Act's centerpiece provision prohibiting national political parties from soliciting, receiving, directing, transferring, or spending any money not fully regulated by federal law. Although *McConnell v. Federal Election Commission*³ upheld this so-called “soft money ban” in large part, it did so with a bare 5 to 4 majority, after narrowing certain key provisions in important ways, with a proliferation of opinions. This is not the strong endorsement of strict campaign finance regulation sought by the pro-regulation community. Even so, BCRA pushed the majority to the frontiers of First Amendment jurisprudence, and it is fair to ask whether *McConnell*, like *Buckley*, can stand the test of time.

Some might read *McConnell* as an invitation for further campaign finance regulation, and it might well turn out to be so. But it might also prove the high water mark for regulation, as Congress comprehends that the promise of such regulation has far exceeded its reality, and as the judiciary better understands the violence done to the First Amendment in the name of “campaign finance reform.”

In this commentary, we step back to ask two important sets of questions. First, what is the legacy of the various campaign finance reforms? Have they fulfilled their promise by reducing “corruption” or the “appearance of corruption” or increasing public confidence in elected officials? We believe the answer to these questions is clearly “no.” Second, can the basic propositions of campaign finance regulation be squared with traditional First Amendment jurisprudence, and if so, what might these propositions foretell for the development of First

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¹ *Northern Securities Co. v. United States*, 193 U.S. 197, 400–411 (1904) (Holmes, J., dissenting).

² *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000) (6–3); *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 531 (2001) (“Colorado Republican II”) (5–4); *FEC v. Beaumont*, 123 S.Ct. 2200 (2003) (7–2).

³ 124 S. Ct. 619 (2003).

Amendment law in other areas? We fear that the casual approach to core First Amendment values shown in *McConnell* threatens our tradition of free speech in the whole range of public discourse.

I.

Reformers have advocated, and Congress has enacted, an extensive array of campaign finance regulation on the stated premise that this regulation is necessary to prevent corruption of elected federal officials, or at least to avoid the appearance of corruption. After more than 30 years of increasingly stringent campaign finance regulation, is the government perceptibly less corrupt, or vested with greater public confidence, than it was at the outset of the reform movement in the late 1960s? First, recent years have disclosed no crisis of corruption among our elected officials. As every party in *McConnell* conceded, the local, state, and federal governments in the United States are more transparent and less “corrupt” today than at any time in our nation’s history.⁴

Second, other Western-style democracies such as Germany, Great Britain, France, Italy, and Japan, without the restriction of the First Amendment, impose *more* stringent limits (such as spending caps) on campaign funding than does the United States.⁵ Yet it would be error to suppose that these more stringent measures have produced less corruption than in the United States.⁶ Reformers might respond by saying that campaign finance regulations have at least increased public confidence in the government. Not so. From its height in the Kennedy Administration, confidence in government has been on a declining trend for 40 years—despite major campaign finance reforms at the federal level in 1971, 1974, 1976, 1979, and 2002.⁷

So why the outcry about corruption? In its more candid moments, the pro-regulation community admits that its true goal is to equalize political debate by imposing public financing of political campaigns.⁸ Experience to date with public financing of presidential campaigns confirms the common sense notion that extensive volume and content regulation would accompany public funding.⁹ But the Supreme Court

has made clear that elimination of actual or apparent corruption is the only acceptable basis under the First Amendment for regulating political speech through campaign finance restrictions.¹⁰ So proponents of regulation talk about corruption because they must, even if it means engaging in hyperbole suggesting that the United States government is as corrupt as a Latin American banana republic.

Yet in *McConnell*, the Government made a binding admission that it had no evidence of *quid pro quo* corruption related to soft money donations,¹¹ and a majority of the lower court, charged with fact-finding in the case, found no evidence of actual corruption and no statistical support for the proposition that political contributions affect legislative votes or outcomes.¹²

⁴ Declaration of Dr. Morton Keller in *McConnell v. FEC*, at ¶ 55.

⁵ See generally “Campaign Financing of National Elections in Foreign Countries: Comparative Analysis,” Report for Congress by Law Library of Library of Congress (May 1997).

⁶ See, e.g., Cecilie Rohwedder, “Scandal Sparks Questions on Germany’s Political Funding System,” *Wall Street Journal Europe* (Dec. 30, 1999) (describing German campaign finance scandal); Cecilie Rohwedder, “Aging Delinquents: Europe Can’t Decide Whether Dirty Money in Politics Is A Problem,” *The Wall Street Journal*, A1 (Feb. 9, 2000) (describing political corruption problems in Western Europe).

⁷ See Declaration of Q. Whitfield Ayres in *McConnell v. FEC*, at ¶11 & Ex. B.

⁸ See, e.g., E. Joshua Rosenkranz, “Campaign Reform: The Hidden Killers,” at 3 (May 5, 1997), available at www.brennancenter.org (visited on Jan. 9, 2004); Common Cause, “Supreme Court Decision Upholding Soft Money Ban is Major Victory for America” (Dec. 10, 2003), available at www.commoncause.org (visited on Jan. 7, 2004) (announcing intent to pursue “public financing for Congressional elections and in the states”).

⁹ Presidential candidates who accept public primary or general election funding must also accept spending limits, 2 U.S.C. § 9033(b)(1) (spending limits for publicly financed primary candidates); *id.* § 9003(b)(1) (spending limits for publicly financed general election candidates), accept limits on their rights to use their personal funds, *id.* § 9035(a) (primary); *id.* § 9004(d) (general), agree to spend such funds only on so-called “qualified campaign expenses,” *id.* § 9042(b)(1) (primary); *id.* § 9012(b)(1) (general), acquiesce in a full post-election audit of receipts and expenditures, *id.* § 9033(a)(3) (primary); *id.* § 9003(a) (general), and accept numerous other restrictions.

¹⁰ *FEC v. National Conservation Political Action Committee*, 470 U.S. 480, 496–97 (1985).

¹¹ See FEC Responses to Republican National Committee’s Requests for Admission Nos. 1, 2.

¹² See *McConnell v. FEC*, 251 F.Supp.2d 176, 349–50 (Henderson, J.); *id.* at 851–53 (Leon, J.).

Disregarding these findings, the Supreme Court majority opinion co-authored by Justices Stevens and O'Connor relied upon conclusory declarations from Senators McCain and Simpson for the proposition that "soft money has led to the defeat of tobacco, prescription drug, and tort reform legislation," and quoted Senator Simpson as saying:

"Donations from the tobacco industry to Republicans scuttled tobacco legislation, just as contributions from the trial lawyers to Democrats stopped tort reform."¹³

Legislators attributing the failure of their pet legislative proposals to "soft money" donations are no more difficult to find than sports fans complaining about team losses due to bad officiating. But the undisputed record before the Supreme Court, and the findings of fact by the lower court, soundly refuted this urban legend. The tobacco industry actually *reduced* its donations of "soft money" during the time the tobacco legislation was pending, while spending 15 times as much on lobbying and funding a \$40 million advertising campaign opposing the legislation.¹⁴ As for the suggestion that "contributions from the trial lawyers to Democrats scuttled tort reform," any true link is obscured by Senator Simpson's clever failure to distinguish "soft money" donations to the Democratic Party from still-permissible and more prevalent "hard money" contributions by trial lawyers.¹⁵

Further, by diverting resources away from political parties to special interests, BCRA is having the effect of increasing, not decreasing, any appearance of corruption. We believe the strength of political parties in the United States has brought stability and accountability to our political process. The record before the Court in *McConnell*,¹⁶ and existing Supreme Court precedent,¹⁷ are consistent with this belief. Parties build broad-based coalitions and mediate among interest groups. In contrast, special interest groups tend to cater to the most extreme elements of society and have a natural propensity to take uncompromising positions (think of the debate between Hand Gun Control Inc. and the National Rifle Association) in order to appeal to their narrow constituencies. Yet BCRA is already forcing hundreds of millions of dollars into the hands of special interest groups for electoral use.¹⁸

In short, the anti-corruption predicate for BCRA is little more than a pretext for a reform community pursuing a much different agenda—reducing the role of private money for electoral speech and thereby "leveling the playing field"—that has been soundly rejected as a basis for limiting political debate.¹⁹

II.

Our First Amendment analysis focuses on four propositions. First, electoral speech is core speech deserving of maximum constitutional protection.²⁰ This proposition is, we hope, not subject to serious debate. This means, of course, that if a government interest, however questionable, can be conjured up to support regulation of electoral speech, no other form of speech is immune.

Second, campaign finance regulation is content-based regulation of speech.²¹ A person with \$100 has a universe of uses for his money. He can spend it on dinner, contribute it to a charity, or donate it to a political campaign. Only if it is used as a political donation does it fall within the maze of campaign finance reg-

¹³ See *McConnell v. FEC*, 124 S.Ct. 619, 664 (2003).

¹⁴ See FEC Responses to Requests for Admission Nos. 45–50 and 52–54 in *RNC v. FEC*, 98-CV-991 (D.D.C.).

¹⁵ See Peter H. Stone, "The Return of Hard Money," *National Journal* (Oct. 19, 2002) (describing trial lawyers' association's hard money operation).

¹⁶ See 251 F.Supp.2d 176, 851 (D.D.C. 2003) (Henderson, J.); *id.* at 820 (Leon J.).

¹⁷ See *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000).

¹⁸ See, e.g., Laura Blumenfeld, "Soros's Deep Pockets vs. Bush," *New York Times*, A3 (Nov. 11, 2003) (reporting multi-million dollar contributions by George Soros and others to newly formed liberal special interest groups). See note 35 *infra*.

¹⁹ See *supra* note 10; *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) ("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. . . .").

²⁰ See *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) ("[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.") (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

²¹ To Justice Stevens and others who share his view that "[m]oney is property; it is not speech," *Nixon v. Shrink Missouri PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring), this proposition might not be self-evident.

ulations. It is clear, then, that the “property” becomes subject to campaign finance regulation if, and only if, it is used for core political speech.

Since at least the time when the Supreme Court declared “the power to tax involves the power to destroy,”²² the inextricable link between funding and the activity funded has been clear. We dare say that a statute setting advertising rates for print or broadcast media, or restricting the identity of advertisers from whom print or broadcast media may accept payment, would raise the most serious First Amendment issues. The Supreme Court has previously struck down differential taxation on print media.²³ If the First Amendment imposed no constraints on the regulation of the speakers’ funding, it would be a simple task to abridge political debate.

BCRA also draws distinctions among the purveyors of content. In other contexts, such discrimination among speakers has itself doomed a regulation.²⁴ But not in *McConnell*:

BCRA imposes numerous restrictions on the fundraising abilities of political parties, of which the soft-money ban is only the most prominent. Interest groups, however, remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications). We conclude that this disparate treatment does not offend the Constitution.²⁵

In addition to the disparate treatment of like speech, this aspect of BCRA casts doubt on the statute’s purported anti-corruption purpose. As the Court correctly observed in *Buckley*, “no societal interest would be served by a loophole closing provision . . . that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain influence over candidates.”²⁶

Our third proposition is that the evolution of *Buckley*’s actual or apparent corruption standard into an “anti-circumvention rationale” even more dramatically lowers the hurdle for governmental regulation of political speech. The “appearance of corruption” always seemed a dangerously weak reed upon which to base

the regulation of core political speech. It is an inherently subjective standard that places fundamental freedoms at the mercy of public misperceptions, no matter how loosely connected those perceptions are (if at all) to provable facts.²⁷

Moreover, given the American public’s healthy suspicion of government, the “appearance of corruption” is always present, without regard to the prevailing campaign finance regime.²⁸ Even since BCRA became effective, the pro-regulation community has continued to conjure up perceived improprieties of money in politics, setting the stage for even more regulation of perceived abuses.²⁹

Of greater long-term import, the regulators may have persuaded the Court to move beyond “appearance of corruption” to an even less substantial standard. *McConnell* suggests that a particular reform need not itself further the vague anti-corruption purpose, but must be simply a device to avoid “circumvention” of an earlier anti-corruption provision. Once a restriction passes constitutional muster, the regulators devise a limitless series of “anti-circumvention” measures in support of it. A regulation that could not have withstood scrutiny last year will withstand scrutiny today

²² *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819).

²³ See *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987) (“a discriminatory tax on the press burdens rights protected by the First Amendment.”).

²⁴ See *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 99–101 (1972).

²⁵ *McConnell*, 124 S.Ct. at 686.

²⁶ 424 U.S. at 45.

²⁷ Cf. *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976) (rejecting application of “appearance of impropriety” standard to lawyers because “a lawyer need not yield to every imagined charge of conflict of interest, regardless of the merits, so long as there is a member of the public who believes it.”). In 1983, the American Bar Association’s Model Rules of Professional Conduct repudiated the “appearance of impropriety” standard for lawyers as too vague and subjective.

²⁸ According to the FEC’s public opinion expert in *McConnell*, public cynicism about the role of money in politics is long-standing and consistent over time. Cross-examination of Prof. Robert Shapiro, Transcript at 40–41.

²⁹ Juliet Elperin, “Trade Groups Turn to Individual Campaign Donors; Uncertain Legal Status of ‘Soft Money’ Has Fundraisers Asking PACs to Mobilize Their Members,” *Wash. Post*, May 6, 2003 at A5 (“House Democrats are . . . offering PACs greater access to senior lawmakers if they can raise as much as \$50,000”).

because it is intended to avoid “circumvention” of a provision that narrowly passed muster last year. This “anti-circumvention” rationale is the antithesis of narrow tailoring, close drawing, or even rational relation to fulfillment of a government interest.

The fourth proposition is that *McConnell* appears to weaken the rule that abridgements of the First Amendment must actually accomplish their claimed objective. The structure of BCRA itself belies any true anti-corruption rationale. At oral argument, no fewer than five justices—including three of the five in the eventual majority—found it puzzling that BCRA imposes more severe restrictions on national parties than it imposes on the officeholders who are the purported participants in the purported corruption.³⁰ Indeed, employees of national political parties are prohibited absolutely from raising any amount of “soft money” for any purpose whatsoever because (we are told) they will be corrupted by the donor, and then in turn will corrupt their party’s officeholders. But federal officeholders themselves are expressly permitted to solicit “soft money” in unlimited amounts for any special interest group that engages in such campaign activities as voter mobilization and most electoral advertising, so long as that campaign activity is not the group’s “principal purpose.”³¹ In other contexts, the Court has appropriately struck down statutes that failed to address meaningfully the government interest asserted to justify them, reasoning that the asserted interest was a mere ruse.³²

As opponents of the statute have long warned, the principal legacy of BCRA will not be to reduce corruption but to force money outside the regulated environment. Indeed, the Court itself seemed to concede as much: “Money, like water, will always find an outlet.”³³

The wave of “new soft money” fundraising by special interests is already upon us.³⁴ The best-known example is billionaire George Soros’s reported contribution of \$15 million to such groups as Americans Coming Together (ACT) and MoveOn.org. These and other groups reportedly expect to raise and spend at least \$250 million of “soft money” for the stated purpose of defeating President Bush.³⁵ Yet, un-

like “soft money” donations to political parties, which were disclosed in amount, source, and purpose, these interest groups are subject to minimal reporting; the public will never know the true extent of this “new soft money,” or its effect on democracy.

III.

It would be difficult at this point to ascertain the full impact on the major political parties, or on American democracy, of forcing hundreds of millions of dollars into the hands of special interest groups, to be used for activities that the parties have traditionally performed. Perhaps Congress will, as it did in the 1979 amendments to the original Federal Election Campaign Act (“FECA”), recognize the adverse effect on the political process of weakening the parties and repeal the most extreme of BCRA’s restrictions. But also consequential will be the effect on First Amendment jurisprudence of the *McConnell* Court’s highly deferential approach to government regulation of core political speech.

The media have ample cause for concern. True, FECA contains a “media exemption” insulating bona fide news shows from regulation.³⁶ Yet media endorsements of federal candidates could create the “appearance of corruption,” especially those that take place while

³⁰ See Tr. of Oral Argument in *McConnell v. FEC* (Sept. 8, 2003) at pp. 64 (Ginsburg), 65 (Scalia), 66 (Rehnquist), 67 (Souter), 67 (Breyer).

³¹ See BCRA § 323(e)(4)(A).

³² See *City of Ladue v. Gilleo*, 512 U.S. 43, 51–52 (1994); *Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173, 187–91 (1999).

³³ *McConnell*, 124 S. Ct. at 706.

³⁴ See, e.g., Tr. of Report by Wyatt Andrews, *CBS Evening News*, Dec. 10, 2003, 2003 WL 5212975 (“[A]nyone who thinks this ruling ends soft money in politics is wrong. Political groups . . . are already organizing in droves to—guess what—raise unlimited soft money.”); See Alan Murray, “Forget Theory—Finance Law Fails to Work in Practice,” *Wall Street Journal*, Dec. 23, 2003, A4 (“[R]eform has pushed more money toward shadowy ‘independent’ groups that are less transparent and less accountable than political parties”).

³⁵ See *Blumenfeld*, *supra* note 18; Lorraine Woellert, “The Evolution of Campaign Finance?” *Business Week* at 62 (Sept. 15, 2003).

³⁶ 2 U.S.C. § 431(9)(B)(i).

legislation affecting media interests is pending in Congress. Polling data demonstrating public suspicion about the media—or even one or two affidavits from Senators claiming media coverage improperly affected (“corrupted”) the legislative process—would not be difficult to come by. If Congress were to withdraw the media exemption, would there be any principled basis under *McConnell*’s complaisant standard of review for the courts to stand in the way?

Nor are academics and activists safe from regulation. Special interest donors such as George Soros and major American corporations spent millions financing the Brennan Center for Justice, the Pew Foundation, and other organizations that published studies and propaganda supporting the legislative agenda of Senators McCain and Feingold. The public might imagine that Soros and the President of Pew would have had fairly easy “access” to John McCain. What principled basis is there under *McConnell* for striking down restrictions on funding of research and public advocacy that directly aids legislators in pursuing a high-profile agenda? Other examples in the legislative context abound; little imagination is required to envision judicial deference to legislative judgments endangering all manner of previously protected activity.

IV.

To the surprise of no one, BCRA has already failed. This election cycle, “soft money”

will abound in the political process. The pro-regulation community is even now preparing further regulation to close the “loopholes” in BCRA that Congress knowingly left open for special interest groups.³⁷ When coupled with the real world impact of BCRA, the damage to First Amendment values from a successful legislative effort to close these “loopholes” could be quite severe. As important, the assumption by many in the pro-regulation community that campaign finance is a parallel universe in which the usual First Amendment rules do not apply may well prove wrong, if *McConnell*’s reasoning is successfully invoked in other contexts to justify abridgements of speech.

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³⁷ See Alan Murray, *supra* note 34, (reporting that reformers are now going “back to the drawing boards, seeking new court rulings and new legislation to plug loopholes. . . .”).