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Thursday, February 22, 2001

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Analysis of S. 27, “McCain-Feingold 2001”

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Introduction

McCain-Feingold 2001 is a broad-based and pernicious attack on the rights of average citizens to participate in the democratic process, thereby enhancing the power of already powerful wealthy individuals, millionaire candidates, and large news corporations – the archetypal story of big guys enhancing their power to dominate the little guy.

McCain-Feingold 2001 is a major assault on the average citizen’s ability to participate in the political process because it targets and imposes severe restrictions on two key citizen groups, which serve as the only effective vehicles through which average citizens may pool their money to express themselves effectively: issue advocacy groups and political parties. However, McCain-Feingold 2001 leaves wealthy individuals and candidates and powerful news corporations unscathed, thereby enhancing their relative power in the marketplace of ideas.

Both issue advocacy groups and political parties are private organizations that provide a vehicle for average citizens to effectively participate in the political process by pooling their resources to enhance their individual voices. These organizations participate broadly in our democratic process by advocating issues of public concern, lobbying for legislation, and directly promoting the election of candidates.

Issue advocacy groups and political parties enhance individual efforts by association. One individual of average means can accomplish little alone in the public arena, but thousands of average citizens who pool their resources with like-minded individuals can accomplish great things by working together. The right to associate, therefore, is so fundamental to our democratic Republic and the ability of average citizens to affect public policy so important that the United

¹Additional information on the James Madison Center for Free Speech can be obtained by visiting its website <<http://www.jamesmadisoncenter.org>>.

States Supreme Court has recognized it as a fundamental right with powerful constitutional protection.

Furthermore, political parties are not just about electing candidates, particularly federal ones. Political parties constitute a vital way by which citizens come together around issues and values expressed in the planks of their party platforms – at all levels of government. Parties advocate these issues in the public forum in addition to lobbying for legislation and engaging in efforts to elect candidates. Parties are just as focused on the promotion of issues as are ideological corporations, such as the National Right to Life Committee or The Christian Coalition of America, and labor unions, such as the American Federation of Labor and Congress of Industrial Organizations, although with a broader spectrum of issues. McCain-Feingold 2001 ignores this reality and treats political parties as simply federal candidate election machines.

McCain-Feingold 2001 attacks the abilities of ordinary citizens to participate in the political process in two ways: (1) by focusing restrictive efforts on issue advocacy corporations, labor unions, and political parties – three organizations vital to the ability of average citizens to pool their resources to make their opinions heard, and (2) by imposing sweeping restrictions that reach broadly beyond direct participation in elections to restrict issue advocacy (limiting discussion of issues of public concern, the views of candidates on issues, and grassroots lobbying for favored legislation).

If McCain-Feingold 2001 succeeds, the influence of the average citizen would be drastically reduced because association with like-minded individuals is essential to effective participation in the public policy arena. With the little guys locked in the dungeon of nonparticipation, the rich and powerful will run politics, much as they did before the first and foremost campaign reform adopted by our Nation, the First Amendment, which protects the right of association and demands that “Congress . . . make no law . . . abridging the freedom of speech” – especially speech about those in power and on the critical issues of the day.

Campaign finance “reform” proposals, notably McCain-Feingold 2001, do not, and could not, eliminate the power of the giant news media corporations, which are protected by the First Amendment from regulation of editorial content and news coverage. Neither may the wealthy be prohibited from spending their own money – either to express their views on public issues and candidates² or to advocate their own election. But the wealthy don’t need to pool their resources to be effective, they have all the money they need to pay for communications about the issues they care about. Furthermore, millionaire candidates remain unaffected by proposed campaign “reforms” because they need not rely on contributions from others – they can spend their own money to campaign – and officeholders of all stripes have the incredible power of incumbency to

²For example, billionaire New York financier Jerome Kohlberg formed and almost entirely bankrolled a nonprofit organization called Campaign for America, which expended over \$400,000 in the 1998 election to run independent expenditures attacking Republican Senate nominee Jim Bunning in Kentucky for opposing so-called campaign finance “reform.” Kohlberg is a long-time contributor to liberal Democratic causes and candidates. The Democratic candidate was Congressman Scotty Baesler, who has strongly advocated placing severe restrictions on the right of such advocacy groups (he calls them “special interests”) to spend money to praise or criticize federal politicians. Baesler’s own campaign “reform” bill (H.R. 1366, in 1998) would have prohibited such expenditures, but he hypocritically made no effort to oppose the expenditures on his behalf.

support their candidacy. Thus, campaign finance “reform,” as proposed by McCain-Feingold 2001, strips power from the People and gives it to the already wealthy and powerful.

So there are winners and losers under McCain-Feingold 2001. The losers are citizens of average means, citizens groups, advocacy organizations, labor unions, and political parties. The winners are the wealthy, major news corporations, and incumbent politicians. It is small wonder then that the wealthiest foundations and individuals are prime supporters of so-called campaign finance “reform,”³ that the mainstream media is the primary cheerleader for it, and that incumbent politicians are so attracted to it.⁴

But in our Republic, founded by the People for the People, the right of the People to speak out on the most critical issues of the day in the political arena through issue advocacy and the right of the people to come together to pool their resources through associations may not be infringed without violating the Constitution. The United States Supreme Court and other federal courts have been stalwart in defense of the citizens’ rights of free speech and association. Be assured that if these unconstitutional measures pass, we stand ready to promptly challenge them in the courts with a high probability of success.⁵

However, there are some campaign reform measures that should be enacted to enhance, not stifle, the voice of the People, including raising contribution limits to adjust for inflation, and providing a tax credit up to \$250 per person per year for political contributions.

³For example, Public Campaign’s founder Ellen Miller has criticized the million-dollar contributions to political parties, yet she accepted “\$1 million from former Democratic representative Cecil Heftel of Hawaii and \$3 million from the foundation of philanthropist George Soros to pay for her crusade to have taxpayers finance congressional campaigns.” Chuck Raasch, *Big money, with interest*, USA Today, June 17, 1997, at A7. Such major donors helped Public Campaign to put together “a \$9.2 million, three-year push for the public financing of campaigns.” *Id.* Figures on such major donations are difficult to establish, however, because when asked to disclose donors (as S. 27 would require) groups like Public Citizen, Sierra Club Foundation, and the U.S. Public Interest Research Group all decline. *Id.*

The extended Gannett News Service article, from which the above article was derived, gave evidence that the major donor giving to campaign finance “reform” organizations is on the way up. Chuck Raasch, *Do public interest groups that push campaign reform really represent citizens?*, June 13, 1997, at 3. Raasch noted also that the Schumann Foundation (New Jersey) gave or pledged more than \$14 million to various campaign-finance reform causes (between 1994 and 1997) and that Robert Pambianco, a scholar of campaign-finance reform, stated that contributions to such efforts “had become trendy among foundations” and were expected to expand. *Id.* at 4.

⁴In a press release available on Sen. Thad Cochran’s website, Cochran provided some telling reasons why he had switched from opposing campaign finance “reform” to supporting it: “Candidates are unable to compete with independent groups . . .” Sen. Thad Cochran, *Senator Cochran’s Statement on Campaign Reform* (visited Feb. 20, 2001) <<http://www.senate.gov/~cochran/press/pr01040.html>>. He declares: “I think we have a system now that is too heavily influenced by fundraising and the spending of money not just by candidates, but other groups . . .” “I just think that the whole system has become overwhelmed by organizations which use enormous sums of money to influence campaigns.” *Id.* Cochran apparently believes that the free speech and association rights of the People hinge on whether candidates can “compete.” Ironically, he declares that “we should protect [political parties’] role,” but supports McCain-Feingold 2001, which does the opposite. *Id.*

⁵For instance, the author’s law firm, BOPP, COLESON & BOSTROM, often with the funding assistance of the James Madison Center, has filed 52 cases challenging state and federal election laws on First Amendment grounds. Of the 35 cases completed to date, it has won 32 (91%) and has won 8 cases in a row against the Federal Election Commission – without a defeat.

The following analysis sets out the ways in which McCain-Feingold 2001 unconstitutionally bars the average citizen from the public square and why, therefore, the Congress should reject such efforts. It concludes with some proposed reforms that would amplify, not squelch, the voice of the People.

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Analysis⁶

I. McCain-Feingold 2001 Suppresses Rights of Average Citizens to Participate in the Political Arena by Pooling Resources.

“Many of the so-called reforms floating around Washington are in fact nothing more than incumbent protection acts.”⁷ “Many politicians feel threatened by negative advertisements and want to control what is said during campaigns.”⁸ Others want to reduce spending on campaigns.⁹

Chief among these proposals is McCain-Feingold 2001, the self-styled “Bipartisan Campaign Reform Act of 2001” (S. 27),¹⁰ sponsored principally by Senators John McCain and Russell Feingold. Though announced with the promise of reducing the corrupting influence of big money, McCain-Feingold 2001 is instead a broad attack on citizen participation in our democratic Republic. This bill shakes a fist at the First Amendment; if passed, it is destined for a court-ordered funeral.¹¹ The most egregious provisions and their infirmities are discussed below.

As noted in the introduction, average citizens must pool their resources to have an effect in the political sphere of issue advocacy, lobbying, and electoral activity. The wealthy and powerful have no such need. So ordinary people band together in ideological corporations, labor unions, and political parties to amplify their voices. This right to associate is a bedrock principle of our democratic Republic, powerfully protected by the U.S. Constitution. McCain-Feingold 2001, however, would suppress this ability, along with the foundational constitutional right to free speech.

It should be noted at the outset of this analysis that political speech and association are at the heart of the First Amendment protections. As the United States Supreme Court has declared, “the constitutional guarantee [of the First Amendment] has its *fullest and most urgent application* precisely to the conduct of *campaigns for political office*.”¹² Free expression in connection with elections is no second-class citizen, rather political expression is “at the core of our electoral

⁶Portions of this analysis are derived from a Heritage Foundation Backgrounder prepared by the author entitled *Campaign Finance “Reform”: The Good, The Bad, and The Unconstitutional*. The author expresses appreciation to attorney Richard E. Coleson, of the law firm of BOPP, COLESON & BOSTROM, for assistance in preparing the present analysis.

⁷Comments of House Majority Whip Tom Delay, *Money & Politics Report*, Bureau of National Affairs, Inc., May 26, 1999, at 1.

⁸*Id.*

⁹See statement of Senator Russell Feingold (D-WI) upon the introduction of S. 26 (the McCain-Feingold campaign finance reform bill of 1999): “The prevalence—no—the dominance of money in our system of elections and our legislature will in the end cause them to crumble.” 145 CONG. REC. S422-23 (daily ed. Jan. 19, 1999).

¹⁰McCain-Feingold 2001, S. 27, is available online at the U.S. Congress’ website at <<http://thomas.loc.gov/cgi-bin/query/D?c107:2:./temp/~c107HoTqut:>>. Page cites in this analysis are to the PDF version (which is an actual “picture” of the original document and readable with Acrobat Reader, downloadable free at numerous Internet websites).

¹¹See generally Franz & Bopp, *The Nine Myths of Campaign Finance Reform*, 10 Stanford L. & Pol’y Rev. 63 (1998).

¹²*Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (emphasis added).

process and of the First Amendment freedoms.”¹³ Thus, “there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates.”¹⁴

Furthermore, the fundamental right of association was well articulated by the United States Supreme Court in the case of *NAACP v. Alabama*,¹⁵ when the Court reviewed a suit against the National Association for the Advancement of Colored People brought by the State of Alabama seeking disclosure of all its members.

The unanimous U. S. Supreme Court strongly affirmed the constitutional protection for the freedom of association:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom in association for the advancement of beliefs and ideas is an inseparable aspect of the “liberty” assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.¹⁶

Thus, the Court held that “[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs,”¹⁷ and it, therefore, protected the identity of members of the NAACP from disclosure.

In *Buckley v. Valeo*, the Supreme Court reaffirmed the constitutional protection for association. “[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. [Consequently,] the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas.”¹⁸ The Court then noted that “action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”¹⁹ This highest level of constitutional protection, of course, flows from the essential function of associations in allowing effective participation in our democratic Republic. Organizations, from political action committees (“PACs”) to ideological corporations to labor unions to political parties, exist to permit “amplified individual speech.”²⁰

¹³*Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

¹⁴*Mills v. Alabama*, 384 U.S. 214, 218 (1966).

¹⁵357 U.S. 449 (1958).

¹⁶*Id.* at 460-61 (citations omitted).

¹⁷*Id.* at 462.

¹⁸ *Buckley*, 424 U.S. at 15.

¹⁹*Id.* at 24.

²⁰*Democratic Party v. National Conservative PAC*, 578 F. Supp. 797, 820 (E.D. Pa. 1983).

A. McCain-Feingold 2001 Prohibits Effective Political Participation by Citizens of Average Means by Barring Corporations and Labor Unions from Engaging in any “Electioneering Communication.”

McCain-Feingold 2001 prohibits political participation by citizens of average means by broadly defining “electioneering communication” so that issue advocacy expenditures currently permitted become forbidden under federal law²¹ for corporations and labor unions.²²

1. “Electioneering communication” sweeps in protected issue advocacy, ignoring the bright-line “express advocacy” test.

McCain-Feingold 2001 restricts the issue advocacy of ideological, nonprofit corporations and labor unions by first defining “electioneering communication” to include issue advocacy, i.e., “any broadcast, cable, or satellite communication” to “members of the electorate” that “refers to a clearly identified [federal] candidate” “within 60 days before a general . . . election (30 days before primaries),” S. 27 at 15, and then adding it to the list of prohibited activities by corporations and labor unions. S. 27 at 18.

The broad definition of “electioneering communication” plainly sweeps in and prohibits a wide variety of issue advocacy communications traditionally engaged in by such organizations. First, Congress is often in session within 60 days before a general election and 30 days before a primary. As a result, grass-roots lobbying regarding a bill to be voted on during this 60 period would be prohibited if the broadcast communication named a candidate by referring to the bill in question (“the McCain-Feingold bill”) or by asking a constituent to lobby their Congressman or Senator.²³

With corporations and labor unions prohibited from making such communications,²⁴ McCain-Feingold 2001 then requires those that may still do so, individuals and PACs, that spend

²¹2 U.S.C. § 441b(a) makes “[i]t is unlawful for . . . any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election . . .” McCain-Feingold 2001 adds to the definition of “contribution or expenditure” in § 441b(b)(2) “any applicable electioneering communication.” S. 27 at 18.

²²The AFL-CIO issued a position paper at its Los Angeles executive council meeting February 13-15, 2001, stating strong opposition to McCain-Feingold 2001’s restrictions on “electioneering communication” and “coordinated activities” that would prohibit issue advocacy by labor unions. AFL-CIO, *S. 27 – McCain-Feingold Campaign Finance Reform Bill* (Feb. 2001).

²³There are also proposals to increase the scope of “electioneering communication” to include printed material. If this is accomplished, this prohibition would also encompass the release of session-end scorecard reports and nonpartisan voter guides which have been approved by the Internal Revenue Service for distribution by charities such as the League of Women Voters. Rev. Rul. 78-248, 1978-1 C.B. 153; Rev. Rul. 80-282, 1980-2 C.B. 178.

²⁴An exception is made, however, for certain non-profits, i.e. organizations exempt under section 501(c)(4) and section 527, if the group creates a separate, segregated fund for such expenditures to which only individuals can contribute and with respect to which reports are filed on its contributors and expenditures, i.e., like a federal PAC. However, this exception still means that the organization itself, using its existing resources, is still prohibited from making such communications. Furthermore, as explained *infra*, the disclosure of contributors violates the privacy of donors and discourages association. As a result, the U.S. Supreme Court has held that such disclosure cannot be required of issue advocacy groups.

over \$10,000 per year, to file reports with the FEC. Among other things, the reports must list every disbursement over \$200 and to whom it was made, the candidate(s) to be identified, and the identity of all contributors aggregating \$1,000 or more during the year. S. 27 at 12-14. The \$10,000 triggering expenditure occurs when a *contract* is made to disburse the funds, which might be months in advance – allowing ample time for incumbent politicians, who object to the general public being informed of their voting record or positions on issues, to attempt to discourage the broadcast medium, or to intimidate the person or PAC paying for the ad, from actually running the ad.

In sum, the issue advocacy communications of nonprofit corporations and labor unions, are treated like express advocacy communications and organizations doing such issue advocacy are treated like PACs. However, as seen next, there is no constitutional warrant for Congress to regulate issue advocacy or the organizations that primarily engage in it. Period.

2. The bright-line “express advocacy” test protects issue advocacy from regulation.

To protect First Amendment freedom, the Supreme Court has created a bright line between permitted and proscribed regulation of political speech. Government may only regulate a communication that “expressly advocates the election or defeat of a clearly identified candidate” (“express advocacy”), by “explicit words” or “in express terms,” such as “vote for,” “support,” or “defeat.” Election-related speech that discusses candidates’ views on issues is known by the legal term of art “issue advocacy.” Although issue advocacy undoubtedly influences elections, it is absolutely protected from regulation – even if done by corporations, labor unions, or political parties.

Although the First Amendment says that “Congress shall make *no* law . . . abridging the freedom of speech” (emphasis added), the “reformers,” and the incumbent politicians that their efforts would protect, have refused to take “no” as an answer. But the federal courts have consistently enforced the First Amendment against all attempts to regulate issue advocacy.

The Supreme Court has recognized that the freedom of speech is both an inherent liberty and a necessary instrument for limited representative government.²⁵ The Court observed that “[i]n a republic where the people[, not their legislators,] are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those elected will inevitably shape the course that we follow as a nation.”²⁶ As a result, “it can hardly be doubted that the constitutional guarantee [of the freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.”²⁷

The seminal case is the 1976 decision of *Buckley v. Valeo*, where the Supreme Court was faced with constitutional questions regarding the post-Watergate amendments to the Federal Election Campaign Act (“FECA”) – which was by far the most comprehensive attempt to

²⁵*Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 257 n.10 (1986) (“*MCFL*”).

²⁶*Buckley*, 424 U.S. at 14-15.

²⁷*Id.* at 15 (citation omitted).

regulate election-related communications and spending²⁸ to date. One of the more nettlesome problems with which the Court struggled was the question of what speech could be constitutionally subject to government regulation. The post-Watergate FECA was written broadly, subjecting any speech to regulation that was made “relative to a clearly identified candidate”²⁹ or “for the purpose of . . . influencing” the nomination or election of candidates for public office.³⁰

In considering this question, the Court recognized that the difference between issue and candidate advocacy often dissipated in the real world:

[T]he distinction between discussion of issues and candidates and advocacy of the election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.³¹

Thus, the Court was faced with a dilemma – whether to allow regulation of issue advocacy because it might influence an election or to protect issue advocacy because it is vital to the conduct of our representative democracy, *even though it would influence elections*.

The Court resolved this dilemma decisively in favor of protection of issue advocacy. First, the Court recognized that “a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates.”³² Thus, the Court concluded that issue advocacy was constitutionally sacrosanct:

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

²⁸The fact that laws regulate the spending of money on speech, rather than the speech itself, does not change the constitutional calculus. As the Court explained in *Buckley*,

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number or issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.

Id. at 18-19. Thus, “[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.” *Id.* at 19 n.18.

²⁹Section 608(e)(1) limited expenditures by individuals and groups “relative to a clearly identified candidate” to \$1,000 per year.

³⁰Section 431(e) and (f) defined the terms “contribution” and “expenditure” for the purposes of FECA’s disclosure requirements in then Section 434(e).

³¹*Buckley*, 424 U.S. at 42-3.

³²*Id.* (citation omitted).

assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”³³

Second, in order to provide this broad protection to issue advocacy, the Court adopted the bright-line “express advocacy” test which limited government regulation to only those communications which “expressly advocate the election or defeat of a clearly identified candidate,” in “explicit words” or by “express terms.”³⁴ In so doing, the Court narrowed the reach of the FECA’s disclosure provisions to cover only “express advocacy.”³⁵ A decade later, the Court reaffirmed the express advocacy standard and applied it to the ban on corporate and labor union contributions and expenditures in connection with federal elections.³⁶

Finally, not even the interest in preventing actual or apparent corruption of candidates, which was found sufficiently compelling to justify contribution limits, was deemed adequate to regulate issue advocacy. The Court rejected this interest even though it recognized that issue advocacy could potentially be abused to obtain improper benefits from candidates.³⁷

In adopting a test that focused on the words actually spoken by the speaker, the Court expressly rejected the argument that the test should focus on the *intent* of the speaker or whether the *effect* of the message would be to influence an election:

[W]hether words intended and designed to fall short of invitation [to vote for or against a candidate] would miss the mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.

Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.³⁸

Some “reformers” claim that the Court was not sufficiently farsighted to see the effect that issue advocacy would eventually have in influencing elections and, if we only bring this to

³³*Id.* at 14 (citation omitted) (emphasis added).

³⁴*Id.* at 43, 44. To ensure that there was not any confusion about the meaning of “express advocacy,” the Court gave examples of such “express terms” – “‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’” *Id.* at 44 n.52.

³⁵*Id.* at 80; *see also* Bopp & Coleson, *The First Amendment is not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 U.W.L.A. LAW REV. 1, 11-15 (1997).

³⁶*MCFL*, 479 U.S. at 249 (“We therefore hold that an expenditure must constitute ‘express advocacy’ in order to be subject to the prohibition in § 441b.”); *see also id.* (“finding of express advocacy depend[s] upon the use of language such as ‘vote for,’ ‘elect,’ ‘support,’ etc.”) (citations omitted).

³⁷*Buckley*, 424 U.S. at 45.

³⁸*Id.* at 43 (citation omitted). While “reformers” often espouse the view that the express advocacy test was intended only to fix the vagueness problem, which this passage addresses, they ignore the Court’s confirmation that the express advocacy limitation was also imposed on the FECA “to avoid problems of overbreadth.” *MCFL*, 479 U.S. at 248 (citing *Buckley*, 424 U.S. at 80).

their attention, then the Court will allow government regulation of it. However, the Court made clear that it was not so naive:

Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, as well as more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.³⁹

As a result, the Court explicitly endorsed the use of issue advocacy to influence elections:

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.⁴⁰

The several lower federal courts and state courts that have been faced with restrictions on issue advocacy have faithfully adhered to the “explicit” or “express” words of advocacy test according to its plain terms.⁴¹

For example, in Michigan, the Secretary of State promulgated a rule that banned corporate and labor union communications made within 45 days of an election that merely contained the “name or likeness of a candidate.” Two traditional adversaries, Right To Life of Michigan and Planned Parenthood, challenged the rule in separate federal courts and had the rule declared unconstitutional.⁴² Consequently, if passed, McCain-Feingold 2001’s materially identical “electioneering communication” definition is dead on arrival in the federal courts.

The weight of authority is indeed heavy; the express advocacy test means exactly what it says. Campaign finance statutes regulating more than explicit words of advocacy of the election or defeat of clearly identified candidates are “impermissibly broad”⁴³ under the First Amendment.⁴⁴

³⁹*Buckley*, 424 U.S. at 43 n.50 (citation omitted).

⁴⁰*Id.* at 45. Some argue that the “express advocacy” test was ill considered by the Supreme Court. The evidence does not admit this conclusion. The Court reiterated the “express advocacy” test in eight different passages throughout its opinion. *Id.* at 43, 44, 44 n.52, 45 (twice), 80 (thrice). Others, contend that the “express advocacy” test is a “magic words” test – that so long as the words used in *Buckley*’s footnote 52 are avoided, political speakers avoid regulation. Footnote 52 belies this view: “This construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, *such as* ‘vote for,’ . . .” (Emphasis added.) Thus, the Court adopted an “explicit words of advocacy” test, not a “magic words” test.

⁴¹*See Appendix A.*

⁴²*Right To Life of Michigan, Inc. v. Miller*, 23 F. Supp. 2d 766 (W.D. Mich. 1998); *Planned Parenthood Affiliates of Michigan, Inc. v. Miller*, 21 F. Supp. 2d 740 (E.D. Mich. 1998).

⁴³*Buckley*, 424 U.S. at 80.

⁴⁴Furthermore, nonprofit ideological corporations, which do not serve as conduits for business corporation contributions, cannot even be prohibited from making independent expenditures or contributions to candidates. *Massachusetts Citizens for Life v. FEC*, 479 U.S. 238 (1986); *see case listed in Appendix C.* It is inconceivable that they can be prohibited from engaging in issue advocacy.

3. The minor exception for certain nonprofits requires them to act like quasi-PACs, in violation of constitutional rights.

McCain-Feingold 2001 makes a very minor exception for nonprofits that (1) permits expenditures for “electioneering communication,” (2) applies only to those organizations tax exempt under §§ 501(c)(4) or 527 of the Internal Revenue Code, and (3) applies only if they are made by a quasi-PAC established by the corporation, to which contributions can only be made by individuals and with respect to which all receipts and disbursements must be reported.⁴⁵ S. 27 at 18-19.⁴⁶

The first thing to be noted about this minor exception is that it only applies to 501(c)(4) and 527 organizations. That means all other nonprofits are excluded from engaging in issue advocacy for a couple of months before an election, including 501(c)(3)s, veterans groups, trade associations, and labor unions.

Furthermore, this quasi-PAC is required to report all of its contributors of \$1,000 or more. S. 27 at 14. This is a very substantial burden because it exposes contributors to harassment and intimidation by ideological foes.⁴⁷ The United States Supreme Court in *Buckley* held that

⁴⁵Furthermore, if the “electioneering communication” is “coordinated” with a candidate, it is subject to candidate contribution limits. S. 27 at 17.

⁴⁶Moreover, a 501(c)(4) organization that “derives amounts from business activities or receives funds from any [corporation] shall be considered to have paid for any communication out of such amounts unless such organization paid for the communication out of [the quasi-PAC fund].” S. 27 at 20. This applies regardless of whether the business income flows from sale of items closely related to the ideological issue of the nonprofit (e.g., sale of pro-life literature by the National Right to Life Committee), how minimal the corporate contributions are, whether “electioneering communication” is the major purpose of the organization, and whether the organization poses any threat of quid pro quo corruption, contrary to the teaching of the federal courts in several cases. *See* cases cited in *Appendices B* and *C*.

⁴⁷Campaign finance “reformer” organizations accept major donations (e.g., Public Campaign accepted “\$1 million from former Democratic representative Cecil Heftel of Hawaii and \$3 million from the foundation of philanthropist George Soros”), but then decline to disclose their donors. Chuck Raasch, *Big money, with interest*, USA Today, June 17, 1997, at A7.

The extended Gannett News Service article from which the above article was derived gave the reasons stated by these organizations for not wanting to disclose their donors. Note the irony of the answers given in light of the donor disclosure requirements that McCain-Feingold 2001 would impose on other citizen advocacy groups that obviously have similar rights and interests:

Top officials in Public Citizen and the Sierra Club Foundation, a separate tax-exempt offshoot of the environmental organization, argued that divulging their donor list either would give an unfair advantage to competitors or unfairly expose identities of their members.

“As I’m sure you are aware, citizens have a First Amendment right to form organizations to advance their common goals without fear of investigation on harassment.” Public Citizen President Joan Claybrook told GNS. “. . . We respect our members’ right to freely and privately associate with others who share their beliefs, and we do not reveal their identities. We will not violate their trust simply to satisfy the curiosity of Congress, or even the press.”

. . . .

Bruce Hamilton, national conservation director for the Sierra Club Foundation, said . . . “[t]hat is

(continued...)

such burdens could not be applied to issue-oriented groups, as McCain-Feingold 2001 does, because disclosure of private associations is an unconstitutional burden.⁴⁸

B. McCain-Feingold 2001 Also Prohibits Corporations and Labor Unions from Engaging in Any “Coordinated Activity.”

McCain-Feingold 2001 also prohibits corporations and labor unions for funding any “coordinated activity.” S. 27 at 31.⁴⁹ “Coordinated activity” is so broadly defined and uses such vague terms that it would ban nearly everything of any conceivable value to a candidate by converting it into a forbidden “contribution.” S. 27 at 26-29.

“Coordinated activity” is “anything of value provided by a person [including corporations and labor unions] in connection with a Federal candidate’s election who is or previously has been within the same election cycle acting in coordination with that candidate . . . (regardless of whether the value being provided is in the form of a communication that expressly advocates a vote for or against a candidate).” S. 27 at 26-27. Thus, there are two key concepts to this prohibition: (1) “anything of value” and (2) “coordination.” Each of these is analyzed below.

1. “Coordinated activity” is so broad that it encompasses “anything of value” to a candidate.

A “coordinated activity” includes “anything of value provided by a person in connection with a Federal candidates’ election.” S. 27 at 26. “Anything of value” is breathtakingly broad and vague and any such thing is subject to being coordinated. It provides no limit or notice to organizations subject to civil and criminal sanctions for coordinating it with a candidate.

Furthermore, with respect to communications, it is not limited to express advocacy and thus clearly encompasses issue advocacy by an organization. While the courts are currently divided on whether a coordinated communication must contain express advocacy to be subject to

⁴⁷(...continued)
basically like saying . . . ‘give us your membership’ In effect, it is saying, ‘we want public disclosure of the 650,000 members of the Sierra Club,’ which is a valuable resource, coveted by others, because they can turn around and make their own list.”

“And it can also be turned around and used against them. We have members in small towns in Wyoming, Alaska, (who could be hurt) if word got out they belonged to the Sierra Club.”

Chuck Raasch, *Do public interest groups that push campaign reform really represent citizens?*, June 13, 1997, at 3.

⁴⁸ 424 U.S. at 42-45.

⁴⁹McCain-Feingold 2001 further amends the corporate and labor union prohibition on “contributions or expenditures,” § 441b(a), by incorporating in § 441b(b)(2)’s definition of these terms, the definition of “contribution” in § 431(8). S. 27 at 31. Section 431(8) is amended by the bill to add the definition of “coordinated activity.” S. 27 at 26-30. A further consequence of adding the expanded definition of “coordinated activity” to the definition of “contribution” in § 431(8) is that an organization whose major purpose becomes “coordinated activity” is deemed to be a federal PAC, subject to all PAC the limitations and regulations. Of course, issue advocacy cannot be counted as political speech that deems an organization to be a PAC. See cases listed in *Appendix B*.

regulation or prohibition,⁵⁰ no court has suggested that any and all communications are so subject.⁵¹

2. “Coordination” is so broad it would ban nearly everything of value to a candidate.

Under current law, coordination between a candidate and a citizen group exists only when there is actually prior communication about a specific expenditure for a specific project that effectively puts the expenditure under the candidate’s control or is made based on information provided by the candidate about the candidate’s needs or plans.⁵² However, McCain-Feingold 2001 expands “coordination” to include, inter alia, mere discussion of a candidate’s “message” any time during “the same election cycle,” i.e., a two-year period or, perhaps, a four-year period, if it relates to a President, or a six-year period if it relates to a Senator. S. 27 at 26.

For example, if an incorporated ideological organization praised Sen. McCain for his work on campaign finance “reform” early in a session of Congress and worked with him on promoting such “reform” legislation, then “coordination” would be established and anything of value to Sen. McCain’s candidacy would be deemed coordinated, would be a contribution to his campaign, and would be illegal because corporations cannot make contributions to candidates.⁵³

However, the very notion that American citizens should be punished for communicating, or even working, with their elected officials on a wide range of public issues important to the official and his constituency by having any subsequent efforts to praise the candidate’s issue position or to support the candidate in his or her campaign considered a coordinated activity is repugnant to our constitutional scheme of participatory government in a democratic Republic run by and answerable to the People. In a conceptually related context, in *Clifton v. FEC*,⁵⁴ the First Circuit struck down the FEC’s voter guide regulations which prohibited any oral communications with candidates in preparation of voter guides.⁵⁵ The court held that this rule is “patently offensive to the First Amendment” and that it is “beyond reasonable belief that, to prevent corruption or illicit coordination, the government could prohibit voluntary discussions between citizens and their legislators and candidates on public issues.”⁵⁶

⁵⁰Compare *Clifton v. FEC*, 927 F. Supp. 493 (D. Me. 1996), with *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 91-92 (D.D.C. 1999).

⁵¹See *Appendix D*.

⁵²See *id.* The FEC has also published final rules governing coordinated expenditures that defines “coordination” narrowly. 65 Fed. Reg. 76146 (daily ed. December 6, 2000).

⁵³This “contribution” must also be reported by the candidate, here Senator McCain, even if he did not know about it. 2 U.S.C. § 434. It is a potential crime if Sen. McCain does not. 2 U.S.C. § 437g(d) (if the violation is found to be “knowing and willful” despite the candidate’s assertion of no knowledge).

⁵⁴114 F.3d 1309 (1st Cir. 1997).

⁵⁵11 CFR § 114.4(c)(5).

⁵⁶*Clifton*, 114 F.3d at 1314. Furthermore, as if this provision has not driven a big enough wedge between officeholders and citizens groups, McCain-Feingold 2001 also prohibits officeholders from assisting citizens groups in their fundraising, unless it is for their PAC. S. 27 at 5-6.

And coordination would also be presumed, under McCain-Feingold 2001, if the ideological corporation used the same vendor of “professional services,” including “polling, media advice, fundraising, campaign research, political advice, or direct mail services (except for mailhouse services)” if the vendor had worked for a candidate and if the vendor is retained to do work related to that candidate’s election. S. 27 at 29. Under this scheme, a vendor’s decision to do work for a candidate could unilaterally lock an ideological corporation out of otherwise permitted issue advocacy at election time. And even if the corporation has a connected PAC, the PAC would be prohibited from making an independent expenditures of more than \$5,000, since that expenditure would also be deemed to be a contribution.

This presumption is also fatally infirm as coordination must be proven. In *Colorado Republican Federal Campaign Comm. v. FEC*, the FEC took the position that party expenditures were presumed to be coordinated with their candidates as a matter of law. The Supreme Court rejected this view: “An agency’s simply calling an independent expenditure a ‘coordinated expenditure’ cannot (for constitutional purposes) make it one. . . . [T]he government cannot foreclose the exercise of constitutional rights by mere labels.”⁵⁷ The Court held that there must be “actual coordination as a matter of fact.”⁵⁸ Congress, therefore, cannot merely recite some factual scenarios wherein it might be possible, or even probable, that coordination with candidates takes place and then presume as a matter of law that it has occurred in such instances. To do so, would allow the government to drastically curtail independent expenditures by mere labels, which cannot be constitutionally limited.⁵⁹

Finally, McCain-Feingold finds “coordination” if there is any “general understanding” with the candidate about the expenditure. S. 27 at 27. This general catchall goes way beyond the narrow understanding that the courts have on what “coordination” is. Consistent with other federal courts, the District Court in *FEC v. Christian Coalition*⁶⁰ held that a communication

becomes ‘coordinated’ where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over a communication’s: (1) Contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) ‘volume’ (e.g., number of copies of printed materials or frequency of media spots). ‘Substantial discussion’ or ‘negotiation’ is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners.

This is a far cry from a “general understanding.”

⁵⁷518 U.S. 604, 622 (1996) (Breyer, J., plurality opinion).

⁵⁸*Id.* at 617.

⁵⁹*Id.* at 626; *id.* at 2321 (Kennedy, J., Rehnquist, C.J., Scalia, J., concurring in the judgment); *id.* at 644-45 (Thomas, J., Rehnquist, C.J., Scalia, J., concurring in the judgment); *see also FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985); *Buckley*, 424 U.S. at 47, 51; *New Hampshire Right To Life Political Action Comm. v. Gardner*, 99 F.3d 8, 18-19 (1st Cir. 1996); *Georgia Right To Life v. Reid*, No. 1:94-cv-2744-RLV (N.D. Ga. Jan. 22, 1996); *Common Cause v. Schmitt*, 512 F. Supp. 489 (D. D.C. 1980).

⁶⁰52 F. Supp. 2d 45, 92 (D.D.C. 1999).

3. A bright-line definition is necessary to protect the issue advocacy of citizens groups.

While it may be theoretically possible to do issue advocacy without running afoul of it being a prohibited “electioneering communication” or “coordinated activity,” only the reckless, foolish, or wealthy and powerful are likely to try. Particularly in Washington, D.C., the punishment is in the process. Any organization that does something that could be deemed of value to a candidate can expect to be the subject of an FEC complaint and investigation to ferret out whether the activity was “coordinated.” Thus, publicly praising an officeholder for her vote on a bill invites investigation by the FEC. Daring to tell constituents to get an incumbent to change his position on an upcoming vote could provoke an FEC investigation. This is the world of ubiquitous FEC investigations that all advocacy groups can expect.

And these “mere” investigations themselves violate the First Amendment. As the U.S. Supreme Court explained when Congress was busy investigating Communist influence in the 1940’s and 50’s, “[t]he mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of government interference” with First Amendment freedoms.⁶¹

4. PACs could do a “coordinated activity,” but are severely limited by contribution limits, eliminating most independent expenditures.

For any individual, and for any organization that can actually do a “coordinated activity,” which seems to be only a federal PAC, the “coordinated activity” would be limited by contribution limits. S. 27 at 30-31.⁶² So a substantial amount of traditional “independent expenditures” by PACs are now swept under the control of McCain-Feingold 2001 and limited because a multi-candidate PAC can only make a contribution of \$5,000 per election to a candidate.

5. For the few independent expenditures not trapped by other provisions, disclosure must be made when contracting for media time, creating opportunity for mischief by opposing candidates.

The small number of independent expenditures that are not trapped by the coordination problem are yet hammered by McCain-Feingold 2001 because the report of the independent expenditure must be made when a contract is made for broadcast time, not when the communication is made as under current law. S. 27 at 22-23. This advances substantially when reporting is due and creates a window of opportunity during which incumbent politicians can try to kill the communication by, e.g., threatening the broadcaster or organization’s donors with retaliation, contacting corporate board members to use their influence, or threatening to oppose legislation favored by the contracting organization or broadcasting corporation.

⁶¹*Watkins v. United States*, 354 U.S. 178, 196 (1957); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

⁶²In addition, any “coordinated” “electioneering communication” is also subject to contribution limits. S. 27 at 17. This additional provision seems at best redundant, and at worst overkill. After all, an “electioneering communication” has got to be a subset of “anything of value.”

C. The news media exception highlights the expanded power McCain-Feingold 2001 gives powerful news corporations and the wealthy.

McCain-Feingold 2001 contains an exception from the definition of “electioneering communication” for “a news story, commentary, or editorial distributed through the facilities of any broadcasting station,” provided the station is not “owned or controlled by any political party, political committee, or candidate . . .” S. 27 at 15-16. And biased news coverage, whether by slant, tone, manipulation of images, volume of coverage, or even outright advocacy of election or defeat of a candidate by a news corporation, is nowhere restricted by McCain-Feingold 2001. While the news media is protected by the same First Amendment as are other citizen groups, as it should be, this exception makes plain that McCain-Feingold is a direct attack only on the average citizen, who needs to exercise his constitutional right of association in order to effectively participate in the political arena.

Similarly, wealthy individuals don’t care about the McCain-Feingold 2001 restrictions. First, if they choose, they can start or buy a media outlet and use it with impunity to support the issues and candidates they choose. Furthermore, as individuals, they can do what is forbidden to corporations and labor unions. Likewise, they don’t care about the donor reporting requirements because there are no donors to disclose but themselves.

Finally, however, wealthy individuals should care about the passage of McCain-Feingold 2001 because its passage will greatly increase their power vis-a-vis citizens of average means.⁶³ The wealthy should be for its passage. Thus, it appears that the multi-million dollar contributions that the wealthiest individuals and private foundations are making to “reformer” groups is money well spent.

D. McCain-Feingold 2001 Further Limits Average Citizen Participation in the Political Arena by Restricting the Activities of Political Parties.

In its effort to regulate “soft money,” S. 27 at 2-10, McCain-Feingold 2001 has two dramatic adverse effects on political party activity: (1) it imposes federal election law limits on the state and local activities of national political parties, and (2) it dramatically limits the issue advocacy, legislative, and organizational activities of political parties. But first it is important to recall the U. S. Supreme Court’s comment that “[w]e are not aware of any special dangers of corruption associated with political parties . . .”⁶⁴ Political parties are merely the People associating with others who share their values to advance issues, legislation, and candidates that further those values. When they do these things, they are just doing their historic job as good citizens. The notion that they are somehow corrupt for doing so is both strange and constitutionally infirm.

⁶³Even as candidates, McCain-Feingold 2001 increases the power of the wealthy, since it includes a provision prohibiting candidates from using campaign funds for personal expenses. S. 27 at 32-33. After all, the wealthy already have the funds to pay living expenses while campaigning full time. Citizens of average means, however, are faced with a dilemma – do they campaign only at night and on weekends in order to keep their job to feed their family or do they quit their job to campaign full time and face this crippling loss of family income. Furthermore, this provision benefits all incumbents, whether wealthy or not, since the government continues to pay them a salary, even though they are campaigning full time.

⁶⁴*Colorado Republican*, 518 U.S. at 616.

1. McCain-Feingold 2001 federalizes state and local activities of national parties.

First, McCain-Feingold 2001 federalizes political party activity. Although national parties care about local, state, and federal elections, they are treated by McCain-Feingold 2001 as if they only care about federal elections. As to state and local political parties, if there is a federal candidate on the ballot, they too are treated as if only the federal candidate matters. In short, McCain-Feingold 2001 federalizes the state and local election activities of national, state, and local political parties.

As to national political parties, this happens as a result of the total ban on national political parties receiving “soft money.” S. 27 at 2-10. This happens to state and local political parties as a result of the definition of “federal election activity,” which governs political party expenditures if any federal candidate is on the general election ballot, and which includes “voter registration” during the 120 days before an election, “voter identification, get-out-the-vote activity, or [any activity promoting a political party].” S. 27 at 7. Therefore, if state and local political parties do “federal election activity,” they must use “hard money,” i.e., money subject to FECA restrictions, for such activity if a federal candidate is on the ballot.

These activities are traditional activities that state and local parties have always done and the national political parties have supported. The fact that there is a federal candidate on the ballot, along with the state and local candidates for whom state and local parties have the greater concern, does not justify federalizing and limiting these activities.

2. McCain-Feingold 2001 prohibits “soft money” from being used to pursue issue advocacy, legislative, and organizational activities.

Furthermore, “federal election activity” includes “a public communication that refers to a clearly identified [federal] candidate . . . and that promotes or supports a candidate or opposes a candidate . . . (regardless of whether the communication expressly advocates a vote for or against a candidate) . . .” S. 27 at 7. Presently, political parties, like any other entity, may receive and spend an unlimited amount of money on issue advocacy. McCain-Feingold 2001 would virtually eliminate this basic constitutional freedom for national political parties, by prohibiting the receipt of all “soft money,” and severely limit it for state and local political parties, by requiring only hard money to be used if a federal candidate is involved.

Because McCain-Feingold 2001 prohibits the raising of “soft money” by national political parties, they have no such money available for issue advocacy, legislative, and organizational activities. It treats political parties as if they were just federal-candidate election machines. As a result, McCain-Feingold 2001 has effectively amputated these other important, historical activities of political parties.

Yet, these restrictions fail constitutional muster. Political parties enjoy the same unfettered right to issue advocacy as other entities, which is especially appropriate because advancing a broad range of issues is their *raison d’etre*. “Reforms” banning political parties from receiving and spending so-called “soft money” cannot be justified as preventing corruption, since the Supreme Court has already held that interest insufficient for restricting issue advocacy in *Buckley*.

If individuals and narrow interest groups enjoy the basic First Amendment freedom to discuss issues and the position of candidates on those issues, how can political parties, which have wide bases of interests that are necessarily tempered and diffused, be deprived of the right to engage in such issue advocacy?

However, proponents of abolishing “soft money” argue that this is simply a “contribution limit.”⁶⁵ The fallacy of that argument, of course, is that the Supreme Court has justified contribution limits only on the ground that large contributions create the reality or appearance of *quid pro quo* corruption,⁶⁶ which, as discussed above, cannot justify a limit on issue advocacy.⁶⁷

Furthermore, the proposed ban on soft money contributions cannot be justified on the theory that political parties corrupt federal candidates, which the Supreme Court has already rejected. In *Colorado Republican*, the FEC took the position that independent, uncoordinated expenditures by political parties ought to be treated as contributions to the benefitted candidate.⁶⁸ Such treatment would have resulted in allowing individuals, candidates, and political action committees to spend unlimited amounts of money on independent expenditures to advocate the election of a candidate, while limiting the amount a political party could spend for the same purpose.

The Supreme Court disagreed with the FEC, noting that “[w]e are not aware of any special dangers of corruption associated with political parties” and, after observing that individuals could contribute more money to political parties (\$20,000) than to candidates (\$1,000) and PACs (\$5,000) and that the “FECA permits unregulated ‘soft money’ contributions to a party for certain activities,” the Court concluded that the “opportunity for corruption posed by these greater opportunities for contributions is, at best, attenuated.”⁶⁹ The Court continued in this vein with respect to the FEC’s proposed ban on political party independent expenditures, which has direct application to McCain-Feingold 2001’s ban on soft money contributions:

[R]ather than indicating a special fear of the corruptive influence of political parties, the legislative history [of the Act] demonstrates Congress’ general desire to enhance what was seen as an important and legitimate role for political parties in American elections. . . .

We therefore believe that this Court’s prior case law controls the outcome here. We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties.⁷⁰

⁶⁵Brief of Amici Curiae U.S. Sens. Carl Levin, John D. McCain and Russell D. Feingold at 9, *Republican National Committee v. FEC*, 1998 U.S. App. LEXIS 28505 (D.C. Cir. 1998) (Nos. 98-5263, 98-5364).

⁶⁶See generally Bopp, *Constitutional Limits on Campaign Contribution Limits*, 11 REGENT U. L. REV. 235 (1998-99).

⁶⁷*Buckley*, 424 U.S. at 45.

⁶⁸518 U.S. at 619.

⁶⁹*Id.* at 616.

⁷⁰*Id.* at 618.

The concurring justices also found little, if any, opportunity for party corruption of candidates because of their very nature and structure.⁷¹

The Supreme Court echoed the same theme with respect to the independent expenditures of political action committees:

The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.⁷²

If this is true of PACs, then *a fortiori* there can be no corruption or appearance of corruption resulting from issue advocacy by political parties.

In addition, the Supreme Court in *MCFL* provided further guidance on whether the threat of corruption is posed by an organization such as a political party. The Court considered the ban on independent expenditures by corporations under 2 U.S.C. § 441b. The *MCFL* Court evaluated whether there was any risk of corruption with regard to an MCFL-type organization that would justify such a ban on its political speech. While *MCFL* considered whether an ideological corporation was sufficiently like a business corporation to justify the ban on using corporate dollars for independent expenditures, there are several transferable concepts to evaluating the threat of corruption posed by a political party.

The concern raised by the FEC in *MCFL* was that § 441b served to prevent corruption by “prevent[ing] an organization from using an individual’s money for purposes that the individual may not support.”⁷³ The Court found that “[t]his rationale for regulation is not compelling with respect” to MCFL-type organizations because “[i]ndividuals who contribute to [an MCFL-type organization] are fully aware of its political purposes, and in fact contribute precisely because they support those purposes.”⁷⁴ “[I]ndividuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction.”⁷⁵ “Finally, a contributor dissatisfied with how funds are used can simply stop contributing.”⁷⁶ Thus, the Court held that the prohibitions on corporate contributions and expenditures in § 441b could not be constitutionally applied to non-profit ideological corporations which do not serve as a conduit for business corporation contributions.⁷⁷

Political parties similarly pose no risk of corruption because people give money to parties precisely because they support what the political party stands for. A contribution to a political party is for the purpose of enhancing advocacy of the issues the party represents. Any individual

⁷¹*Id.* at 626 (Kennedy, J., Rehnquist, C.J., Scalia, J., concurring in the judgment); *see also id.* at 631 (Thomas, J., Rehnquist, C.J., Scalia, J., concurring in the judgment).

⁷²*FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985).

⁷³*MCFL*, 479 U.S. at 260.

⁷⁴*Id.* at 260-61.

⁷⁵*Id.* at 261.

⁷⁶*Id.*; *see also Day v. Hollahan*, 34 F.3d 1356, 1363-65 (8th Cir. 1994).

⁷⁷*See Appendix C.*

unhappy with the use of the money may simply quit contributing and leave the political party. In sum, the threat of corruption cannot justify a limit on issue advocacy and, even if it could, political parties pose no threat of corruption to their candidates.

Finally, the Supreme Court also found that, just as independent expenditures of interest groups pose no danger of corrupting candidates, neither do those of political parties. And while no one disputes that expenditures on express advocacy actually coordinated with candidates are properly contributions to the candidate because of the possibility of *quid pro quo* corruption, the Court held that coordination must be proven as a matter of fact; it cannot be presumed. “Reforms” may not presume coordination where it does not actually exist.

Thus, there is no justification, in either policy or law, for the severe limits on national, state, and local political parties that McCain-Feingold 2001 imposes.

II. True Campaign Reform Should Be Enacted to Enhance, Not Eliminate, the Voice of the People.

There are constitutional ways to reform the campaign finance laws – ways that enhance the People’s participation in the political process rather than suppressing it.⁷⁸ Some of these are discussed next.

A. Contributions Limits Should Be Raised.

Contribution limits must be raised substantially. Raising contribution limits and indexing them for inflation⁷⁹ would enable more individual citizens to run for office, enable all candidates to concentrate more on the job at hand and less on fund raising, and remove some of the incentives for interest groups to make independent and issue advocacy expenditures. The \$1,000 limit on individual contributions to candidates should be raised to at least \$3,000 and indexed for inflation. While a \$1,000 contribution may have been sufficiently high in 1974 when it was imposed, it would be worth about \$3,000 today. In addition, the aggregate individual contribution limit should be similarly raised from \$25,000⁸⁰ to \$75,000 and indexed for inflation.⁸¹

The individual and multi-candidate PAC contribution limits to political parties should be increased from \$20,000⁸² and \$15,000,⁸³ respectively, to \$50,000 and indexed for inflation.⁸⁴

⁷⁸See Bopp & Coleson, *The First Amendment is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 U. West L.A. L.R. 1, 72-78 (1997).

⁷⁹Those who take issue with the validity of the Consumer Price Index as a measure to annually increase the contribution limits are reminded that it is used to annually increase the amount that presidential candidates eligible for matching funds may expend, as well as the amounts that may be expended by national and state parties on federal candidates. See 2 U.S.C. § 441a(c)(1).

⁸⁰2 U.S.C. § 441a(a)(3).

⁸¹McCain-Feingold 2001 contains a provision raising the aggregate individual contribution limit from \$25,000 to \$30,000. S. 27 at 10-11.

⁸²2 U.S.C. § 441a(a)(1)(B).

⁸³2 U.S.C. § 441a(2)(B).

⁸⁴McCain-Feingold 2001 would only increase contributions to state political parties from \$5,000 to
(continued...)

These limitations have diminished the relative force of political parties and encouraged them to seek soft money. Strengthening the clout of political parties in the election process serves to reduce the relative weight of narrow interests and the likelihood of corruption. Political parties are one of the mediating institutions in the political process that should be permitted to completely fulfill their legitimate political role.

B. Tax Credits Should Be Provided for Contributions to Candidates, Parties, and PACs Up to \$250 Per Year.

A provision that would encourage the number of small contributions would be the restoration of the individual tax credit for small political contributions. The 1974 FECA amendments provided for a tax credit for political contributions up to \$100 but it was repealed in 1986.⁸⁵ The re-adoption of a tax credit for political contributions up to \$250 per year per person would provide an appropriate incentive for increasing the level of participation of small contributors in campaign financing and would provide a counter-weight to large contributors.

Such reforms as described above would encourage direct citizen participation in campaigns, reducing the incentive for indirect involvement through independent expenditures and issue advocacy. They would also ameliorate the disincentives facing potential challengers to incumbents, making “term limits” a constitutionally achievable reality.

C. The “McCain Disclosure Loophole” Should Be Closed.

Senator McCain didn’t mind taking advantage of the express-advocacy/issue-advocacy distinction, that he would eliminate for others under McCain-Feingold 2001, when it was to his benefit during his presidential primary campaign leading up to the Fall 2000 election. Senator was running against now-President George W. Bush in the Michigan primary when his campaign launched a massive telemarketing campaign to Catholic homes in Michigan attacking then-candidate Bush as anti-Catholic.⁸⁶

Even though funded by candidate McCain, the calls were done anonymously and under the deceptive title “Catholic Voter Alert,” instead of ending with the “disclaimer” statement (identifying by whom the communication was made and whether it was authorized by a

⁸⁴(...continued)
\$10,000. S. 27 at 10.

⁸⁵Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986).

⁸⁶The text of the “Catholic Alert” call is as follows:

This is a Catholic Voter Alert. Governor George Bush has campaigned against Senator John McCain by seeking the support of Southern fundamentalists who have expressed anti-Catholic views. Several weeks ago, Governor Bush spoke at Bob Jones University in South Carolina. Bob Jones has made strong anti-Catholic statements, including calling the Pope the anti-Christ, the Catholic Church a satanic cult! John McCain, a pro-life senator, has strongly criticized this anti-Catholic bigotry, while Governor Bush has stayed silent while seeking the support of Bob Jones University. Because of this, one Catholic pro-life Congressman has switched his support from Bush to McCain, and many Michigan Catholics support John McCain for president.

The Hotline, National Journal’s Daily Briefing on Politics, *Text of the Catholic Alert Call* (visited Feb. 24, 2000) <<http://www.nationaljournal.com/pubs/hotline/h000222.htm>>.

candidate) normally required by 2 U.S.C § 441d(a). Section 441d(a) only requires such a disclaimer, however, for communications “expressly advocating the election or defeat of a clearly identified candidate.” Candidate McCain was able to take advantage of this “loophole,” since the communication was issue advocacy (which he decries when engaged in by others), and for days candidate McCain falsely claimed that he was not behind these calls.

Interestingly, Senator McCain has never called for closing this “loophole” for candidates, although it clearly involves candidate campaign spending, communications to the public, and the same sort of express-advocacy/issue-advocacy distinction he rejects elsewhere. Furthermore, McCain-Feingold 2001 has no provision that would close this “loophole” that Senator McCain, as a candidate, so ruthlessly exploited. While the U.S. Supreme Court rightly held in *McIntyre v. Ohio Elections Comm’n*⁸⁷ that the First Amendment protects anonymous political speech,⁸⁸ the lack of a provision in McCain-Feingold 2001 closing the “McCain Disclosure Loophole” highlights the obvious fact that “McCain-Feingold legislation contains no provision that an incumbent would find offensive.”⁸⁹

Conclusion

Issue advocacy in the context of electoral politics enjoys absolute First Amendment protection. The Supreme Court has defined only a narrow scope of non-issue advocacy that can be regulated – only explicit words of advocacy of the election or defeat of a clearly identified candidate. Congress cannot eviscerate this bright line test with a “no-advocacy” name-or-likeness test without running afoul of the First Amendment. Further, political parties are not exempt from the enjoyment of this protection and, therefore, cannot be constitutionally forbidden from receiving and expending soft money. Nor is there a need to. Because of their nature, political parties are incapable of corrupting their own candidates.

Congress also cannot take away the constitutional right to engage in unfettered issue advocacy and unlimited independent expenditures by simply presuming that coordination with candidates exists. Legislatively created labels cannot obviate the freedom of speech. McCain-Feingold 2001, therefore, will fail a court test.

Congress could do something constitutional and enhance, not squelch, the voice of the People in *their* elections, as outlined above. “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 campaign.”⁹⁰ McCain-Feingold seeks to strip this right from the People.

⁸⁷514 U.S. 334 (1995).

⁸⁸The courts are currently split on whether this protection for anonymous speech extends to disclaimers on communications funded by candidates. Compare *Kentucky Right to Life v. Terry*, 108 F.3d 637 (6th Cir. 1997) with *Stewart v. Taylor*, 953 F. Supp. 1047 (S.D.Ind. 1997).

⁸⁹Edward Zuckerman, *McCain-Feingold: the dark side of campaign reform*, XXII PACS & LOBBIES 1, 4 (Feb. 14, 2001).

⁹⁰*Buckley*, 424 U.S. at 57.

The First Amendment is not a loophole to be plugged by unconstitutional legislation in misguided efforts to “reform” campaign finance. Free political speech was the first and is the best campaign finance reform, and it is the very core of what James Madison drafted and the Framers adopted when they guaranteed the People that “Congress shall make no law . . . abridging the freedom of speech.”⁹¹

⁹¹U.S. CONST. amend. I. For further reading on the issues discussed in this memorandum, *see Appendix E*.

APPENDIX A

Cases Recognizing First Amendment Protection of Issue Advocacy

Supreme Court Cases:

Buckley v. Valeo, 424 U.S. 1 (1976)

FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986)

Lower Federal Cases:

Florida Right to Life v. Mortham, 98-770-CIV-ORL-19A, 11 n.8, 9 (M.D.Fla. Dec. 15, 1999),
aff'd per curiam, *Florida Right to Life v. Lamar*, 2001 U.S. App. LEXIS 613 (11th Cir.
Jan. 17, 2001)

Citizens for Responsible Gov't State Political Action Comm. v. Davidson, 2000 U.S. App.
LEXIS 33727, *22-26 (10th Cir. Dec. 26, 2000)

Perry v. Bartlett, 231 F.3d 155, 160-162 (4th Cir. 2000)

Vermont Right to Life Comm. v. Sorrell, 216 F.3d 264, 275-77 (2d Cir. 2000);

Iowa Right to Life Comm. v. Williams, 187 F.3d 963, 969-970 (8th Cir. 1999)

North Carolina Right To Life v. Bartlett, 168 F.3d 705 (4th Cir. 1999)

Brownsburg Area Patrons Affecting Change v. Baldwin, 137 F.3d 503, 506 (7th Cir. 1998)

Virginia Soc'y For Human Life v. Caldwell, 152 F. 3d 268 (4th Cir. 1998)

FEC v. Christian Action Network, 110 F.3d 1049 (4th Cir. 1997) (*CAN II*)

FEC v. Christian Action Network, 894 F. Supp. 946 (W.D. Va. 1995), *aff'd per curiam*, 92 F.3d
1178 (4th Cir. 1996) (*CAN I*)

Maine Right To Life Comm., 914 F. Supp. 8, 12 (D. Me. 1996), *aff'd per curiam*, 98 F.3d 1 (1st
Cir. 1996)

Faucher v. FEC, 928 F.2d 468, 472 (1st Cir. 1991)

FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987)

FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 53 (2d Cir. 1980) (*en
banc*)

North Carolina Right to Life v. Leake, 108 F. Supp. 2d 498 (E.D. N.C. 2000)

Richey v. Tyson, 120 F. Supp. 2d 1298, 1309 (S.D. Ala. 2000)

South Carolina Citizens for Life v. Davis, C.A. No. 3:00-124-19 (D.S.C. Feb. 9, 2000)

Virginia Society for Human Life v. FEC, 83 F. Supp. 2d 668 (E.D. Va. 2000)

FEC v. Freedom's Heritage Forum, Civil Action No. 3:98 CV-549-S, slip op. at *5-*8 (W.D. KY Sept. 29, 1999)

FEC v. Christian Coalition, 52 F. Supp. 2d 45, 62 (D.D.C. 1999)

Kansans for Life v. Gaede, 38 F. Supp. 2d 928 (D. Kan. 1999)

Planned Parenthood Affiliates of Mich. v. Miller, 21 F. Supp. 2d 740 (E.D. Mich. 1998)

Right To Life of Dutchess County v. FEC, 6 F. Supp. 2d 248 (S.D. N.Y. 1998)

Right to Life of Mich. v. Miller, 23 F. Supp. 2d 766 (W.D. Mich. 1998)

Clifton v. FEC, 927 F. Supp. 493 (D. Me. 1996), *aff'd on other grounds*, 114 F.3d 1309 (1st Cir. 1997)

West Virginians For Life v. Smith, 919 F. Supp. 954 (S.D. W. Va. 1996)

FEC v. Survival Educ. Fund, 1994 WL 9658, (S.D. N.Y. Jan. 12, 1994), *aff'd in part and rev'd in part on other grounds*, 65 F.3d 285 (2d Cir. 1995)

FEC v. Colorado Republican Fed. Campaign Comm., 839 F. Supp. 1448 (D. Colo. 1993), *rev'd* 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded on other grounds*, 518 U.S. 604 (1996)

FEC v. NOW, 713 F. Supp. 428 (1989)

FEC v. AFSCME, 471 F. Supp. 315, 317 (D. D.C. 1979)

State Cases:

Osterberg v. Peca, 12 S.W.3d 31, 51-65 (Tex. 2000)

Washington State Republican Party v. Washington State Public Disclosure Comm'n, 4 P.3d 808, 814-829 (Wash. 2000)

Alaska v. Alaska Civil Liberties Union, 978 P.2d 597, 614 (Alaska 1999)

Brownsburg Area Patrons Affecting Change v. Baldwin, 714 N.E. 2d 135 (Ind. 1999)

Elections Bd. v. Wisconsin Mfr. & Commerce, 597 N.W.2d 721, 737 (Wisc. 1999)

Doe v. Mortham, 708 So. 2d 929, 932 (Fla. 1998)

Virginia Soc'y for Human Life v. Caldwell, 500 S.E.2d 814 (Va. 1998)

State v. Proto, 526 A.2d 1297, 1310-11 (Conn. 1987)

Klepper v. Christian Coalition, 259 A.D.2d 926 (N.Y. App. Div. 1999)

APPENDIX B

Cases Recognizing Major Purpose Test

Supreme Court Cases:

Buckley v. Valeo, 424 U.S. 1, 75-80 (1976)

FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 248-249 (1986)

FEC v. Akins, 524 U.S. 11, 26-29 (1998)

Lower Federal Cases:

Florida Right to Life v. Lamar, 2001 U.S. App. LEXIS 613 (11th Cir. January 17, 2001), *aff'g Florida Right to Life v. Mortham*, 98-770-CIV-ORL-19A, *10-*17 (M.D.FL Dec. 15, 1999)

Brownsburg Area Patrons Affecting Change v. Baldwin, 1999 U.S. App. LEXIS 23325, *2 (7th Cir. Sept. 17, 1999)

North Carolina Right to Life v. Bartlett, 168 F.3d 705, 712-13 (4th Cir. 1999)

Brownsburg Area Patrons Affecting Change v. Baldwin, 137 F.3d 503, 505 n.5 (7th Cir. 1998)

FEC v. Survival Educ. Fund, 65 F.3d 285, 294-95 (2d Cir. 1995)

FEC v. Florida for Kennedy Comm., 681 F.2d 1281, 1286-1287 (11th Cir. 1982)

FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 391-393 (D.C. Cir. 1981)

United States v. National Comm. for Impeachment, 469 F.2d 1135, 1141-42 (2d Cir. 1972)

Richey v. Tyson, 120 F. Supp. 2d 1298, 1315-1318 (S.D. Ala. 2000)

Perry v. Bartlett, 1999 U.S. Dist. LEXIS 5881, *9 (E.D. N.C. March 8, 1999)

Volle v. Webster, 69 F. Supp. 2d 171, 174-75 (D. Me. 1999)

Florida Right to Life v. Mortham, 1998 U.S. Dist. LEXIS 16694, *15 (M.D. Fla. Sept. 30, 1998)

Wisconsin Manufacturers & Commerce v. Wisconsin Elections Bd., 978 F. Supp. 1200 (W.D. Wisc. 1997)

FEC v. GOPAC, 917 F. Supp. 851, 858-862 (D. D.C. 1996)

New York Civil Liberties Union v. Acito, 459 F. Supp. 75, 89 (S.D. N.Y. 1978)

Buckley v. Valeo, 519 F.2d 821, 869-878 (D.C. Cir. 1975)

ACLU v. Jennings, 366 F. Supp. 1041, 1055-56 (D.D.C. 1973)

APPENDIX C

Cases Recognizing First Amendment Protection of Ideological Corporations

Supreme Court Cases:

Massachusetts Citizens for Life v. FEC, 479 U.S. 238 (1986)

Lower Federal Cases:

North Carolina Right to Life v. Bartlett, 168 F.3d 705 (4th Cir. 1999)

Minnesota Concerned Citizens for Life v. FEC, 113 F.3d 129 (8th Cir. 1997)

FEC v. Survival Education Fund, 65 F.3d 285 (2d Cir. 1995)

Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994)

Beaumont v. FEC, No. 2:00-CV-2-BO(2) (E.D.N.C., October 3, 2000)

Iowa Right to Life Committee v. Williams, No. 4-98-CV-10399 (S.D. Iowa, Oct. 26, 1999)

Montana Right to Life Ass'n v. Eddleman, 999 F. Supp. 1380 (D. Mont. 1999)

State Cases:

State v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999)

Community Advocate v. Ohio Elections Comm'n, 705 N.E.2d 414 (Ohio App. 1997)

APPENDIX D

Cases Recognizing “Coordinated Expenditures” Require Considerable Control, Cooperation, or Prearrangement with a Candidate

Supreme Court Cases:

Buckley v. Valeo, 424 U.S. 1, 46-7 (1976)

FEC v. Nat’l Conservative Political Action Comm., 470 U.S. 480, 498 (1985)

Colorado Republican Fed. Campaign Comm., v. FEC, 518 U.S. 604, 617-18 (1996)

Lower Federal Cases:

Iowa Right to Life Comm., Inc v. Williams, 187 F.3d 963, 968 (8th Cir. 1999)

Clifton v. FEC, 114 F.3d 1309, 1311 (1st Cir. 1997)

Orloski v. FEC, 795 F.2d 156 (D.C. Cir. 1986)

Landell v. Sorrell, 118 F. Supp. 2d 459, 490-91 (D. Vt. 2000)

FEC v. Christian Coalition, 52 F. Supp. 2d 45, 91-92 (D.D.C. 1999)

FEC v. Freedom’s Heritage Forum, Civil Action No. 3:98 CV-549-S, slip op. at *3-*5 (W.D. Ky. Sep. 29, 1999)

FEC v. Public Citizen, 64 F. Supp. 2d 1327, 1335 (N.D. Ga. 1999)

Republican Party of Minnesota v. Pauly, 63 F. Supp. 2d 1008, 1015 (D. Minn. 1999)

Clifton v. FEC, 927 F. Supp. 493 (D. Me. 1996)

FEC v. Colorado Republican Fed. Campaign Comm., 839 F. Supp. 1448 (D. Col. 1993)

State Case:

Wisconsin Coalition for Voter Participation, v. Wisconsin Elections Board, 605 N.W.2d 654, 662 n.10 (Wis. Ct. App. 1999)

APPENDIX E

Other Reading Materials

- Bopp, *All Contribution Limits Are Not Created Equal: New Hope In The Political Speech Wars*, 49 CATHOLIC U. LAW REV. 11 (1999)
- Bopp, *The Constitutional Limits on Campaign Contribution Limits*, 11 REGENT U. LAW REV. 235 (1998-99);
- Franz & Bopp, *The Nine Myths of Campaign Finance Reform*, 9 STANFORD LAW & POL. REV. 63 (1998)
- Bopp & Coleson, *The First Amendment is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 UWLA LAW REV. 1 (1997)
- Bopp & Meyer, *Free Speech and the Christian Coalition Case*, Free Speech and Election Law News, Summer 1999, at 1
- Bopp, *Campaign Finance "Reform": The Good, The Bad, and the Unconstitutional*, The Heritage Foundation Backgrounder, No. 1308, July 19, 1999
- Bopp, *All in the Name of Campaign Reform*, Washington Post, August 29, 1997, at A23
- Bopp, *Needed: More, Not Less, Political Free Speech*, Washington Times, December 10, 1996, at A19
- Bopp, *The FEC's Assault on the First Amendment*, Free Speech and Election Law News, Fall 1996, at 7