McConnell v. FEC: Reforming Campaign Finance

Court Upholds Campaign Finance Act Despite First Amendment Dissents —
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In a clear-cut victory for campaign-finance reformers last December, a sharply divided U.S. Supreme Court upheld virtually the entire Bipartisan Campaign Reform Act of 2002 (BCRA). McConnell v. FEC, No. 02-1674 (slip opinion available on the web at www.supremecourtus.gov). The Court’s 298-page ruling rejected the free speech and other constitutional arguments pressed by an impressive array of challengers who had filed eleven suits against the law.

The Court employed three separate majority opinions to decide the constitutionality of the various provisions contained in the five parts, or “titles,” of the act:
- Justices John Paul Stevens and Sandra Day O’Connor (joined by Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer) delivered the Court’s opinion upholding the constitutionality of the statute’s most important features: Congress’s effort to plug the “soft-money” loophole and its regulation of “electioneering communications.”
- Chief Justice William Rehnquist (joined by all of the other justices in whole or in part) delivered the Court’s opinion stripping down the act’s ban on political contributions by minors, upholding its “stand by your ad” requirements, and declining to rule on either its increase in “hard money” limits or its exception for candidates facing self-financed opponents (the law’s so-called “millionaire exemption”).
- Justice Breyer (joined by Justices Stevens, O’Connor, Souter, and Ginsburg) delivered the opinion upholding the BCRA’s requirement that broadcasters maintain certain publicly available records of politically related broadcasting requests.

Background
In 1997, Congress sought to address three important developments in campaign financing: the increased importance of soft money, the proliferation of issue ads, and the disturbing findings of a Senate investigation into campaign practices related to the 1996 federal elections.

The term “soft money,” though
undefined in federal election laws, generally refers to money raised outside the regulatory structure for federal election campaigns. “Soft money” is money that is (theoretically) used for political parties’ party-building activities and for so-called “issue ads” that supposedly do not target any specific election. “Hard money” refers to federally regulated funds subject to strict contribution limits under the Federal Election Campaign Act of 1971 (FECA). It represents money that a donor contributes for the purpose of influencing an election for federal office. Hard money is regulated by the FECA; soft money was not—until the BCRA.

The resulting legislation was known as either the McCain-Feingold bill, after its main Senate sponsors—Sens. John McCain (R-Ariz) and Russell Feingold (D-Wis)—or Shays-Meehan, after its main sponsors in the House of Representatives, Reps. Christopher Shays (R-Conn.) and Marty Meehan (D-Mass.). The bill sought to close loopholes in the existing campaign-finance system. Rep. Shays explained,

Our legislation aims to end the current system in which corporate treasury and union dues money dows out the voice of individual Americans by banning soft money and closing the sham “issue ad” loophole. By calling sham issue ads what they truly are—very real campaign ads—we enforce the 1907 and 1947 laws and prevent corporate treasury and union dues money from funding campaigns.

To the surprise of some, President George W. Bush (who had previously expressed doubts about the law’s constitutionality) signed the act into law on March 27, 2002. Its three main provisions were: (1) a ban on “soft money” donations to political parties by individuals, corporations and unions; (2) restrictions on “electioneering communications”; and (3) an increase in the limits on donations that individuals may make to candidates for federal office.

The Law
Title I of the Bipartisan Campaign Reform Act not only prohibits national political parties from raising soft money, it also prohibits state and local political parties from spending soft money on so-called “federal election activity.” The government argued that these restrictions were necessary because of “abundant record evidence that describes a systemic exchange of large soft-money donations for access to federal officeholders, through arrangements brokered by the parties.”

Congress also enacted Title II of the BCRA to put a stop to the vast amount of monies (“hundreds of millions of dollars”) being poured into federal elections by corporations and labor unions in the form of “electioneering communications.” The impetus for this provision can be traced to FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, the 1986 case in which the Court determined that while certain non-profit corporations could air so-called “issue ads” that discussed political issues, they could be barred from airing “express advocacy” ads that called for the election or defeat of a specific candidate. After this ruling, corporations and unions began to circumvent the express advocacy ban by pouring money into “candidate-centered” issue ads. “The express-advocacy test is not only easy to circumvent, but it does not accurately identify communications designed to affect candidate elections,” the FEC wrote.

Congress’s solution in Title II was to place new restrictions on all so-called “electioneering communications.” The primary definition of “electioneering communications” is found in § 201 of the act. The term does not cover newspaper or print advertising, but encompasses “any broadcast, cable, or satellite” ad that clearly identifies a candidate for federal office, airs within a specific time period (e.g., within sixty days of a general election and thirty days of a primary), and is targeted to the relevant electorate.

Finally, various other provisions of the BCRA sought to impose other restrictions, such as prohibiting contributions by minors (§ 318), requiring broadcasters to disclose political entities’ requests for ad time (§ 504), identifying sponsors of ads (§ 311), and requiring candidates to refrain from attack ads if they wanted to pay the lowest rate for broadcast ads (§ 305).

The Majority Opinions
On December 10, the justices split five to four in voting to uphold the heart of the Bipartisan Campaign Reform Act—the provisions in Titles I and II regulating “soft money” and “electioneering communications.” The Court then achieved near unanimity in “deciding not to decide” the constitutionality of various provisions in Titles III and IV that increase the law’s contribution limits for “hard money,” require candidates to “stand by their ads” by stating in the ads that they approve their contents, and that allow candidates to spend certain triggering amounts of their personal funds on the campaign. They also agreed to strike down as unconstitutional the ban on political contributions by minors contained in Title III. Finally the Court again split five to four in upholding a provision of Title V requiring broadcasters to maintain certain publicly available records of politically related requests for broadcast time.

The Majority’s View of Title I
Justices Stevens and O’Connor authored the opinion of the Court that dealt with Title I of the BCRA. The majority first addressed § 323(a), a provision that prohibits national party committees from raising and soliciting soft money. The majority determined that substantial evidence supported Congress’s view that large soft-money contributions to national political parties have led to corruption and the appearance of corruption.

The majority opinion found it “particularly telling” that more than half of the top fifty soft-money donors gave “substantial sums” of money to both political parties. To the majority, this meant that these high-level donors were seeking to buy access more than they were seeking to express their First Amendment views.

“The evidence connects soft money to manipulations of the legislative calendar, leading to Congress [sic] failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation,” the majority wrote.

The majority also upheld § 323(b).
Teaching Activities

Michelle Parrini

Activity 1
Point out that one notable feature of *McConnell v. Federal Election Commission* is its frequent reference to the evidence of corruption outlined in a 1998 Senate Committee on Governmental Affairs report about the 1996 presidential election. (“Corruption” occurs when an official violates his or her ethical or legal duties in order to obtain money). The apparent weight of evidence was given by a majority of the Court is also noteworthy. Make sure students understand that the Court determined not only that Congress had a legitimate constitutional interest in preventing the actual corruption of candidates and officeholders, but that it also had an interest in preventing the appearance of corruption. Ask students whether they believe the appearance of corruption is as dangerous as actual corruption. Conclude your discussion by asking students the following questions:

- Which is more important when it comes to elections: preventing the appearance of corruption, or protecting political speech, and why?
- How much weight do you believe the Court should have given the evidence of corruption or appearance of corruption in rendering its decision?
- How much weight should pragmatic considerations be given when considering the constitutionality of laws? (When a person is pragmatic, he or she considers facts or practical matters.)

Ask students to support their positions.

Activity 2
Ask students to debate the following statement: *Money contributed to politicians should be viewed as property, not as a form of political speech protected by the First Amendment.* After students hold their debate, ask them to research Justice Scalia’s dissent in *McConnell v. Federal Election Commission*. Evaluate Scalia’s argument that the Court had its priorities backwards when it rejected the free-speech challenges to the political campaign financing laws in this case even though in other cases it has granted strong First Amendment protection to such “inconsequential forms of expression” as tobacco advertising and sexually explicit cable programming. Why does Scalia think the BCRA is really a pro-incumbency provision designed to protect members already in Congress rather than a measure designed to ensure truly fair elections? Which arguments do students agree with—those in the majority opinions in *McConnell v. Federal Election Commission* or those in the dissent of Justice Scalia—and why?

Activity 3
Explain to students that they will research financial contributions given to elected officials by members of the healthcare sector and evaluate for themselves whether the critics of the role played by money in political campaigns have raised legitimate concerns. To help them evaluate the criticisms of campaign financing, ask the students to look at the debate over the recent Medicare, Prescription Drug, Modernization and Improvement Act (H.R. 1) passed by Congress and signed by President Bush on Dec. 8, 2003. Some critics have argued that the prescription drug provisions of the bill will benefit pharmaceutical companies and healthcare providers at the expense of ordinary citizens.

First, ask the students to use the Internet to research the prescription drug provisions of the Medicare bill. What kind of coverage does the bill offer and under what circumstances? What are the claims of the supporters of the bill? What are the claims of the opponents? Ask students to evaluate the bill based on their research. Do they believe the bill should have been passed? Why or why not?

Next, place the students in two- or three-person teams. Ask each team to research the roll call votes on the Medicare bill (H.R. 1 Conference Report). Each team should focus on a different state and research the votes of both senators from the state and two representatives—if possible one Republican and one Democratic representative. The House ([thekhouse.gov](http://thekhouse.gov)) voted on the bill on November 22, 2003. The Senate ([thensenate.gov](http://thensenate.gov)) voted on November 25, 2003. Each team should also research the amount of PAC money received by their senators and representatives during the 2002 funding cycle from health professionals and the pharmaceutical industry (see “Who Gets” at [www.opensecrets.org](http://www.opensecrets.org)).

**Directions for using the Open Secrets site:** From the home page, select “Who Gets: U.S. Congress.” Type the legislator’s last name in “Search for Member” box. Under “2003-2004 Data,” select “PAC Contributions.”


**Directions for using the House site:** From the home page, under “Quick Links,” select “Roll Call Votes.” Next, select “Roll Call Vote Session 108th Congress, 1st Session (2003).” Under “Roll Call Votes,” select “Roll 668” for H.R. 1.

Each team should present a report to the class answering the following questions:

- How much PAC money did their senators and representatives receive from health professionals and how much from the pharmaceutical industry during the 2002 election cycle?
- What proportion of total PAC money received by their senators and
which prohibits donors from contributing nonfederal funds to state and local party committees to help finance federal-election activity. This provision was designed to prevent donors from evading the restrictions that govern contributions to national party committees by simply giving their money to state and local party committees to be used for the same purposes. According to the majority, Congress rightfully concluded, “the corrupting influence of soft money does not insinuate itself into the political process solely through national party committees.”

The Court upheld other provisions of Title I as well, including a provision prohibiting national, state and local party committees from soliciting funds from tax-exempt Internal Revenue Code § 501(c) charitable and educational organizations, or § 527 political committees. Absent this prohibition, the majority reasoned, party committees would circumvent existing hard-money limits by utilizing tax-exempt organizations as “soft-money surrogates.” The majority noted that sixty-three members of Congress had their own § 527 committees.

The majority also upheld BCRA § 323(e), which prohibits federal candidates and officeholders from soliciting or receiving any soft money in connection with federal elections, or spending soft money in connection with state or local elections. This provision, like most of Title I, was justified as a “valid anticircumvention” measure.

Finally, the majority upheld § 323(f), which prohibits state and local candidates from using soft money to fund public communications for federal elections. The majority agreed with Congress that without this provision “state and local candidates will become the next conduits for the soft-money funding of sham issue advertising.”

The Majority's View of Title II
The majority opinion by Justices Stevens and O'Connor also examined the constitutionality of Title II. It upheld nearly every provision. Most surprising to First Amendment scholars, the Court even upheld the act's tough regulation of “electioneering communications.” Messages that refer to a clearly identifiable federal candidate within sixty days of a general election or thirty days of a primary or preference election now must adhere to the act's disclosure requirements. Another portion of the act prohibits corporations and labor unions from funding such electioneering communications.

The plaintiffs had argued that under Buckley v. Valeo, 424 U.S. 1 (1976), Congress could only require the disclosure of, or regulate the spending for, “express advocacy” ads as opposed to “issue ads.” The Court rejected this distinction, writing, “a plain reading of Buckley makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation, rather than a constitutional command.” The distinction between express advocacy and issue ads is quite blurry and “functionally meaningless” with the proliferation of sham “issue ads” that really function like express advocacy ads. The majority upheld the other aspects of Title II as well, including its requirement that electioneering communications be disclosed to the FEC and its requirement that monies for such communications be treated as campaign contributions if they are coordinated with a candidate or party.

In a significant ruling, the majority also upheld the BCRA provision forbidding corporations (even nonprofit corporations) and labor unions from using their general treasury funds for electioneering communications. Corporations and labor unions remain free to fund electioneering through political action committees.

“BCRA is the most recent federal enactment designed to purge national politics of what was conceived to be the pernicious influence of big money campaign contributions.”

Justices Stevens and O'Connor
What Next?

Election law expert and Loyola Law School (Los Angeles) Professor Rick Hasen (founder of the highly respected “Election Law” blog (electionlawblog.org)) offers us this assessment:

The Supreme Court’s decision in McConnell v. Federal Election Commission signals that both the Supreme Court is going to give Congress and state legislatures a great deal of latitude in writing campaign finance reform laws.

Although recognizing that the Constitution’s First Amendment rights of speech and association are at stake in any law that limits the role of money in politics, the Court held that many limits on campaign contributions and corporate or union election speech may be justified by a desire to prevent corruption of elected officials or at least the appearance of corruption. The Court in McConnell did not require Congress to offer much proof of either corruption or its appearance to sustain the many new rules in the McCain-Feingold campaign finance law.

Although Congress likely will not act again soon to pass major campaign finance reform legislation, the McConnell opinion is a green light for states (and even smaller government entities, such as cities) to enact far-reaching campaign reforms. The big question that may emerge from state or local campaign finance reform efforts is whether the Court might permit some limit on campaign spending. Spending limits were declared unconstitutional in the Supreme Court’s 1976 opinion in Buckley v. Valeo, but McConnell contains hints that might be allowed some day. As with many difficult constitutional issues, the answer may turn on who sits on the Supreme Court if and when that question arrives at the Court.

“This is a sad day for freedom of speech.”

Justice Scalia

The only provision of Title II struck down was § 213, which would have forced political parties to choose between spending that is coordinated with a candidate’s campaign (called “coordinated expenditures”) and purely independent spending (called “independent expenditures”) after nominating a candidate. As a result of the Supreme Court’s ruling, political parties may now make both coordinated expenditures and independent expenditures on behalf of their candidates in the same campaign.

The Majority’s View of Titles III, IV and V

Chief Justice William Rehnquist authored the opinion of the Court addressing the challenges to Titles III and IV. His opinion analyzed § 305, which provides that candidates for federal office will not receive the lowest charge for advertisements before elections unless they avoid making direct reference to other candidates or clearly “stand by their ad” by identifying themselves at the end of the ad and saying that they “approve” of the broadcast. The Court then ruled that in this case the plaintiff, Sen. Mitch McConnell (R-Ky.), lacked standing to challenge this provision because he would not face reelection until 2008.

Rehnquist did strike down a provision (§ 318) that prohibited individuals “17 years of age or younger” from contributing money to candidates or political parties. Citing the famous student black-armband case of Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), the Court wrote, “minors enjoy the protection of the First Amendment.” In this case, Rehnquist reasoned, Congress had insufficient evidence to support its justification for the restriction; the parents were nonetheless donating money through their children to circumvent their own contribution limits.

Finally, Justice Stephen Breyer wrote the opinion for the Court regarding Title V § 504, upholding the act’s requirement that broadcasters keep publicly available records of politically related broadcasting requests.

The Dissents

Justices Antonin Scalia, Clarence Thomas and Anthony Kennedy authored stinging rebukes to the Court’s main opinion. To Justice Scalia, the decision represented a “sad day for freedom of speech.” He concluded that the intent of the members of Congress who supported this legislation was “not to produce fairer campaigns, but to mute criticism of their records and facilitate reelection.”

In an opinion bristling with First Amendment indignation, Justice Thomas maintained his strong stance against the regulation of political contributions and expenditures. Thomas previously had criticized the Court’s decision in Buckley as not going far enough to protect First Amendment freedoms. To Justice Thomas, it is unconstitutional to limit political contributions and expenditures. “Nevertheless, the Court today upholds what can only be described as the most significant abridgement of the freedoms of speech and association since the Civil War,” he wrote. He questioned why political speech should receive less free-speech protection than “defamers, nude dancers, pornographers, flag burners and cross burners.”

He argued that bribery law better deals with the problems of corruption in the political electoral context. “Rather than permit this never-ending and self-justifying process, I would require that the Government explain why proposed speech restrictions are needed in light of actual Government interests, and, in particular, why the bribery laws are not sufficient,” he wrote. “Again, neither the joint opinion nor the defendants point to evidence that the enforcement of bribery laws has been or would be ineffective.”

Justice Anthony Kennedy, another First Amendment stalwart, wrote a lengthier dissent, criticizing the majority’s opinion for its failure to protect fundamen-
tal free-speech principles. "To reach today's
decision, [the Court] replaces discrete and
respected First Amendment principles
with new, amorphous, and unsound rules,
rules which dismantle basic protections for
speech," he wrote.\(^7\)

Kennedy criticized what he termed
the Court's expansive definition of "cor-
rup tion," which he said "sweeps away all
protections for speech that lie in its path."\(^8\)
He said the Court equated "vague and
generic claims of favoritism ... with actual
or apparent corruption."\(^9\) To Justice
Kennedy, the majority had eviscerated
fundamental free-association freedoms
previously enjoyed by political parties.

Kennedy saved his harshest criticisms
for the law's provision that bars corpora-
tions and labor unions from using their
general treasuries to fund electioneering
communications. Kennedy questioned this
discrimination against corporate speakers
and also blasted the act's new definition of
"electioneering," particularly the part that
restricted speech on the basis of whether
it is targeted to the candidate's electorate
(defined as "communications that can
be received by 50,000 or more persons
in the candidate's district"). To Kennedy,
this meant that the most effective political
speech is the type of speech most silenced
by the law: "This Orwellian criterion, how-
ever, is analogous to a law, unconstitutional
under any known First Amendment theory,
that would allow a speaker to say anything
he chooses, so long as his intended audi-
ence could not hear him... I should have
thought influencing elections to be the
whole point of political speech."\(^10\)

Notes
1. McConnell et al. v. FEC et al., No. 02-1674, slip op. at
2 (December 10, 2003) (syllabus).
2. Ibid., 9 (Justice Scalia).
3. Ibid., 2 (Justice Thomas).
4. Ibid., 3 (Justice Kennedy).
5. Ibid., 12 (Chief Justice Rehnquist).
6. Ibid., 17-18 (Justice Scalia).
7. Ibid., 20 (Justice Thomas).
8. Ibid., 3 (Justice Kennedy).
9. Ibid., 40 (Chief Justice Rehnquist).
10. Ibid., 38 (Justices Stevens and O'Connor).
11. Ibid., 56.
12. Ibid., 59.
13. Ibid., 78.
14. Ibid., 84.
15. Ibid., 10 (Chief Justice Rehnquist).
16. Ibid., 14-18 (Justice Scalia).
17. Ibid., 2 (Justice Thomas).
18. Ibid., 7.
19. Ibid., 8.
20. Ibid., 59-64.

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