

Pledge Our Grievance To The Flag: Could McCain-Feingold Also Help Bring Young People Back to Politics?

*All that's sacred, comes from youth
Dedications, naïve and true
With no power . . . [we'll] remember
Why don't you?¹*

I. INTRODUCTION

Federal campaign finance reform remains a constant struggle against entrenched power and maintaining our First Amendment rights.² Yet at its foundation, campaign finance reform involves recapturing our democratic ideals and empowering future generations.

In 1995, former U.S. Senator Barry Goldwater³ articulated the central premise for enacting comprehensive reform. He reasoned, "Senators and Representatives, faced incessantly with the need to raise ever more funds to fuel their campaigns, can scarcely avoid weighing every decision against the question, 'how will this affect my fundraising prospects?', rather than 'how will this affect the national interest?'"⁴

Improving our nation's federal campaign financing system has experienced renewed momentum in recent years. Although President Clinton once argued that he provided wealthy donors "a respectful hearing, [not a] guaranteed result,"⁵ questions surrounding his pardon of Marc Rich⁶ and the 1996 Clinton/Gore fundraising practices⁷ brought heightened focus. The 1998 re-election victory of U.S. Senator Russell Feingold⁸ raised greater awareness⁹ and the intense media focus on U.S. Senator John

1. E. VEDDER, PEARL JAM, *Not For You*, on VITALOGY (Epic Records 1994).

2. However, "[i]t is highly unlikely that the ratifiers of the First Amendment had any specific intentions at all on the topic of campaign finance, but even if they did, why would we want to be bound by their specific intentions when the words they ratified do not require it?" Edward B. Foley, *Philosophy, the Constitution and Campaign Finance*, 10 STAN. L. & POL'Y REV. 23, at 25 (1998).

3. In 1964, Senator Goldwater also secured the Republican presidential nomination.

4. 145 CONG. REC. S12,661 (daily ed. October 15, 1999) (statement of Sen. Daschle quoting Sen. Goldwater).

5. Kathleen Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663 (1997) citing *Excerpts From the First News Conference of Clinton's Second Term*, N.Y. TIMES, Jan. 29, 1997, at B6.

6. See Carter M. Young, *Does 'Soft Money' Really Matter?*, ABCNEWS.COM, Mar. 19, 2001, available at http://dailynews.yahoo.com/h/abc/20010319/pl/campaign_finance010319_1.html.

7. See Nancy Gibbs & Michael Duffy, *Legal Tender*, Mar. 17, 1997, available at <http://www.cnn.com/ALLPOLITICS/1997/03/10/time/donorgate.html>.

8. Despite a \$1 million blitzkrieg of Republican television attacks spearheaded by U.S. Senator Mitch McConnell, Kentucky's high profile campaign finance reform opponent, Senator Feingold successfully gambled his re-election chances on his commitment to campaign finance reform. See *The 1998 CAMPAIGN*:

McCain's competitive 2000 campaign for Republican presidential nomination continues to foster public interest.¹⁰ More importantly, both Senator McCain and Senator Feingold remain lead advocates for promising reform legislation before Congress.¹¹

In the 2000 presidential election, partly in response to McCain's national emergence, both major party nominees visibly addressed campaign finance reform. The Democratic nominee, Vice President Al Gore, promised that McCain-Feingold would be the first piece of legislation he would send to Congress.¹² Gore also proposed a \$7.1 billion "Democracy Endowment."¹³ Designed to help minimize the rising costs of federal campaigns and better allow for wider participation in the campaign process, the proposal called for a voluntary public financing system of congressional campaigns.¹⁴

Not surprisingly, Republican nominee Governor George W. Bush selected a different approach to campaign finance reform. Bush opposed McCain-Feingold and rejected steps toward voluntary public financing of congressional campaigns. Instead, Bush called for banning "soft money"¹⁵ donations by corporations and labor unions and urged

WISCONSIN; Campaign Funds at Center of Wisconsin Race, N.Y. TIMES, Oct. 23, 1998, at A1. Refusing to accept special interest money, Senator Feingold maintained, "[n]o career, including mine, is as important as breaking the hold of this system of legalized bribery. The issue is my issue now." *Id.*

9. Senator Feingold's victory challenges Bradley A. Smith's premise that voters do not care about the issue. See Bradley A. Smith, *A Most Uncommon Cause: Some Thoughts on Campaign Reform and A Response to Professor Paul*, 30 U. CONN. L. REV. 831, 833-835 (1998).

10. Senator McCain's presidential campaign remains especially unique because campaign finance reform stood as one of his central issues. However, for Senator McCain's New Hampshire primary victory, "just 9 percent of voters cited campaign finance reform as the most important issue in their vote, placing it fifth out of seven issues tested." Dan Merkle, *Poll: Few Demand Campaign Reform*, ABCNEWS.COM, Mar. 27, 2001, available at http://dailynews.yahoo.com/h/abc/20010327/pl/poll010327_1.html.

11. See S. 27, 107th Cong. (2001) [hereinafter McCain-Feingold]. The comparable bill in the U.S. House of Representatives is H.R. 380, 107th Cong. (2001). There have been other campaign finance proposals, see S. 22, 107th Cong. (2001) (creating a monthly election year filing requirement for Senate and House candidates, providing for public inspection of broadcast time requests by federal candidates, limiting yearly soft money donations to \$60,000, and raising individual, political committee, national party, and senate campaign committee contribution limits); H.R. 1039, 107th Cong. (2001) (also requiring better reporting, limiting soft money contributions, and increasing individual contribution limits); H.R. 1867, 106th Cong. (1999) (prohibiting national political parties and federal candidates from raising and using soft money in federal elections and requiring disclosure of broadcast communications referring to federal candidates); H.R. 1922, 106th Cong. (1999) (requiring disclosure of all national party fund transfers to state and local parties); H.R. 2668, 106th Cong. (1999) (mandating disclosure of all national party fund transfers to state and local affiliates, regardless if funds are regulated by federal election law). However, because of the popularity attached to the bill's sponsor and co-sponsor, this Note will solely focus on McCain-Feingold.

12. See GORE/LIEBERMAN 2000, CAMPAIGN FINANCE REFORM, available at http://www.algore.com/campaign_finance_reform/cfr_agenda1.html (last visited Oct. 25, 2000) (all cited Gore/Lieberman website information on file with Journal of Legislation).

13. For a more detailed proposal on publicly financing federal elections see generally Richard Briffault, *Point/Counterpoint: Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563 (1999); Rep. Harold Ford Jr. & Jason M. Levin, *A New Horizon for Campaign Finance Reform*, 37 HARV. J. ON LEGIS. 307 (2000).

14. See GORE-LIEBERMAN 2000, *supra*, note 12.

15. Although undefined by federal regulation, soft money refers to campaign funds not raised or used in direct connection with a federal election. The non-partisan organization Common Cause defines soft money as:

increasing the individual maximum contribution level to adjust with inflation.¹⁶

This Note will illustrate the need for federal campaign finance reform in reconnecting young voters¹⁷ to the political process. Finally, this Note will examine current law and recommend that the U.S. Congress and President George W. Bush take the crucial first step and enact McCain-Feingold.

II. YOUNG PEOPLE AND CAMPAIGN FINANCE REFORM

Although adhering to a generational obligation to refine democratic inconsistencies appears noble, great resistance remains toward altering the current campaign finance system. Reform opponents emphasize the constitutional right to use private property to voice public political opinion.¹⁸ In the tradition of *laissez-faire*, anti-reformers relying on a strict reading of the Constitution dismiss media reports of historic abuse and repeatedly block progressive intervention. They argue for leaving the system untouched or completely de-regulating the current scheme.¹⁹

However, this view of our campaign finance system is profoundly misguided. First Amendment rights are not absolute,²⁰ and the intensity of today's media offers young

[F]unds raised by Presidential campaigns and national congressional political party organizations purportedly for use by state and local party organizations in non-federal elections, from sources who would otherwise be barred from making such contributions in connection with a federal election, e.g., from corporations and labor unions and from individuals who have reached their federal contribution limits.

Common Cause v. Fed. Election Comm'n, 692 F. Supp. 1391 at 1392 (D.D.C. 1987) (quoting *Common Cause's* petition). Hard money is also not expressly defined by federal regulation; however, it entails campaign funds subject to federal contribution and source limits, used and solicited in connection with federal candidates. See generally 2 U.S.C. § 441a (1994).

16. See BUSH-CHENEY 2000, CAMPAIGN FINANCE REFORM, available at <http://www.georgewbush.com/issues/campaignfin.html> (last visited Oct. 25, 2000).

17. Referring to 18-24 year old voters.

18. See generally Foley, *supra* note 2, at 23 (contrasting this libertarian view with campaign egalitarianism, which argues for financial equality of political process in examining social inequality).

19. See generally William P. Marshall, *The Last Best Chance For Campaign Finance Reform*, 94 NW. U. L. REV. 335 (2000) (urging a decentralization of federal campaign finance regulation); John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69 (2000) (calling for reform legislation mandating that congressional members recuse themselves from legislation directly affecting contributors); Bradley A. Smith, *A Most Uncommon Cause: Some Thoughts on Campaign Reform and a Response to Professor Paul*, 30 U. CONN. L. REV. 831 (1998) (critiquing the various aims of McCain-Feingold); Bradley A. Smith, *Faulty Assumptions and UnDemocratic Consequences of Campaign Finance Reform*, 105 YALE L. REV. 1049 (1996) (arguing that current media attention overemphasizes the need for reform; campaigns funded with large contributions are equally democratic to those funded with small contributions; money does not buy elections; nor is money a corrupting influence on politicians); Kathleen Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663 (1997) (confronting pro-campaign finance reform assumptions such as voting and political inequality, denial of voter preference, corruption of legislators and the legislative agenda, and decline in debate quality).

20. See generally EUGENE VOLOKH, *FIRST AMENDMENT: LAW, CASES, PROBLEMS, & POLICY ARGUMENTS* (forthcoming 2001) (illustrating various U.S. Supreme Court interpretations of the First Amendment). "It is ironic that the current regime is defended on the basis of First Amendment values when so little real debate takes place and so many incumbents are able to eschew live discussion in favor of superficial

Americans far greater insight into political corruption and influence, how it works, and why it should be changed. If we are to increase young voter participation, allow issue-merit to dictate legislative action, and improve future opportunity for all to competitively seek federal public office, enacting campaign finance reform is vital. As Archibald Cox proclaimed, “[w]e can’t survive as a self-governing people if it doesn’t happen.”²¹

A. Young Voter Apathy

Conquering voter apathy and re-instating confidence in government, especially with young voters, is the first critical reason for enacting campaign finance reform. For the 2000 presidential election, with neither candidate significantly leading in the polls up until Election Day, preliminary reports argued that only 51% of all eligible voters exercised their right to vote.²²

A closer examination of recent youth voting patterns reveals significant apathy with our current political system. During the 1998 election cycle, 39.2% of eligible young voters were registered, while only 16.6% voted.²³ In 1996, a presidential election year, 48.8% of 18-24 year olds were able to vote, but just 32.4% actually went to the polls.²⁴ Young voters have good reason for apathy. In the 2000 presidential election, most key campaign issues did not pertain to young people.²⁵ Because they lack necessary resources, many young people do not feel that their viewpoints are considered, let alone adequately represented.²⁶ Senator Feingold confirms, “[w]ithout question, big contribu-

attack and voice over ads issued as unreturnable sallies.” Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Campaigns*, 94 COLUM. L. REV. 1160, at 1183 (1994).

21. John B. Anderson, *Campaign Finance: The Impact On the Legislative and Regulatory Process*, 50 ADMIN L. REV. 81, at 83 (1998) quoting *Conversation with Archibald Cox*, HARV. L. BULL., at 10 (Summer 1997).

22. See John Dean, *Why American's Don't Vote- and How That Might Change*, Nov. 8, 2000, available at <http://www.cnn.com/2000/LAW/11/columns/fl.dean.voters.02.11.07/>. Because official data has not been published by the United State Census Bureau, this Note was not able to include in-depth analysis regarding the 2000 election.

23. See U.S. CENSUS BUREAU, REPORTED VOTING AND REGISTRATION, BY SEX AND SINGLE YEARS OF AGE: NOVEMBER, 1998, available at <http://www.census.gov/population/socdemo/voting/cps1998/tab01.txt> (last visited Nov. 20, 2000).

24. See U.S. CENSUS BUREAU, REPORTED VOTING AND REGISTRATION, BY RACE, HISPANIC ORIGIN, AND AGE, FOR STATES: NOVEMBER 1996, available at <http://www.census.gov/population/socdemo/voting/96cps/tab4A.txt> (last visited Nov. 20, 2000).

25. An examination of the “issues sections” on the campaign websites of Vice President Al Gore and Governor George W. Bush illustrates that only four of the thirty-two different “issue sections” potentially pertained to general youth interests. Those sections were education, abortion, environment, and campaign finance reform. See generally BUSH-CHENEY 2000, ISSUES, available at <http://www.georgewbush.com> (last visited Oct. 25, 2000); GORE/LIEBERMAN 2000, ISSUES, available at <http://www.algore.com> (last visited Oct. 25, 2000).

26. A 2000 study by the non-partisan Campaign Study Group, found that 68% of today’s young voters, 18-24 years old, felt ignored by the current political system and only 55% believed that voting would make a

tors give donations to influence the work of Congress. So today, when Congress debates the issues that affect your lives, you have every reason to wonder if [their] campaign money plays a role in the decisions we make."²⁷

B. Issue-Merit²⁸

Another reason to support campaign finance reform involves challenging political parties and elected officials to respond to issue-merit, not well-financed special interest donors.²⁹ As mentioned by Barry Goldwater's remarks,³⁰ most federal legislators currently depend on large contributions to finance their campaigns. In turn, wealthy special interests can easily control votes on particular pieces of legislation with campaign donations.³¹ As witnessed by federal legislators, special interests can also dictate a party's entire legislative agenda. Veteran U.S. Representative John B. Anderson maintains:

[T]he current campaign finance system is designed to achieve stasis – inaction which will not disturb the *status quo* of those who are fairly well off and intend to keep it that way. The proof lies among the thousand bills that flood the hopper in the House but never see the light of day, let alone debate and discussion, nor are they intended to.³²

difference. By contrast, in 1968, 88% of young voters felt that voting could bring change. See Madhusmita Bora, *Gen Y Different From Its Predecessors*, MEDILL NEWS SERVICE available at <http://www.yvote2000.com/Archive/2000/7/24-37958.html> (last visited Mar. 20, 2001). Even at their own universities, students are being overlooked in favor of campaign contributors. At the University of Wisconsin, University of Texas, University of California-Berkeley, and University of Washington, nearly all of the recent appointees to the various Boards of Regents were influential contributors to that state's current governor. See PUBLICCAMPAIGN.ORG, WHY STUDENTS SHOULD CARE . . . ABOUT CAMPAIGN FINANCE REFORM, available at <http://www.publiccampaign.org/newsletters/students.html> (last visited Nov. 20, 2000).

27. Reuters, *Democrats: Fundraising Changes Would Restore Faith*, Mar. 24, 2001, available at http://dailynews.yahoo.com/h/nm/20010324/pl/dems_finance_dc_1.html quoting Senator Russell Feingold, Democratic Weekly Radio Address, (Mar. 24, 2001).

28. Issue-merit refers lawmakers debating the actual national interest behind proposed legislation without contemplating past, present, and future special interest campaign contributions. While lawmakers will receive contributions from philosophically like-minded individuals and groups, Senator Charles Schumer correctly connects reform with creating more issue-merit debate. He argues,

[b]ut how about if Senator C believes that a certain facility or company needs dollars to bring jobs to his area and receives contributions closely related to that? Everyone doubts it. . . . Every – every – move we make in Washington is now under a cloud. It is under a cloud because of the system by which we finance campaigns. We must change it.

145 CONG. REC. S12,595 (daily ed. October 14, 1999) (statement of Sen. Schumer).

29. “[M]ore and more young Americans see action as a solution to the powerlessness they feel in the political process.” *All Things Considered: Growing Youth Volunteerism Coupled With Youth Absence In The Voting Booth* (National Public Radio broadcast, Aug. 3, 2000) (transcript on file with Journal of Legislation). While increased volunteerism remains encouraging, political disenfranchisement's negative influence deserves correction.

30. See *supra* note 4.

31. See generally Thomas Stratmann, *The Market For Congressional Votes: Is Timing of Contributions Everything?*, 41 J.L. & ECON. 85 (1998).

32. Anderson, *supra* note 21, at 86.

The amount donated to political parties also indicates the way special interests, not young voters, dominate legislative priorities. Regarding student loan repayment, an issue affecting the financial future of many young people, big money contributions have thwarted recent progress. A proposal by U.S. Representative Harold Ford Jr. and U.S. Senator Charles Schumer, called the "1999 Make College Affordable Act,"³³ simply amended the Internal Revenue Code of 1986 to provide full tax deductions for higher education expenses³⁴ and interest on student loans.³⁵ However, the Republican congressional majority buried the bill in committee.³⁶

The stalemate is not surprising if one examines comparative congressional campaign contributions.³⁷ As compiled from Federal Election Commission (FEC) data by the non-partisan Center for Responsive Politics, the commercial finance industry contributed heavily to Congress. As of November 2, 2000, the industry donated \$222 million to federal candidates and committees during the 2000 election cycle, over three-fifths going to Republicans.³⁸ During the 1998 cycle, the industry donated almost \$150 million, three-fifths given to Republicans.³⁹ During that same period, education-related contributions were virtually non-existent. Education-related donations to federal candidates and committees totaled only \$12 million, with 57% going to Democrats.⁴⁰ During the 1998 cycle, education-related giving was just \$8 million, with 70% going to Democrats.⁴¹ As a result, dominant monetary pressure from the commercial finance industry virtually guaranteed deadlock. An issue simply designed to help students and parents ease the increasing cost of a modern-day economic necessity did not stand a chance.⁴² The current system prohibited serious contemplation on the strengths or weakness of an

33. See generally H.R. 2750, 106th Cong. (1999); S. 1974, 106th Cong. (1999).

34. Higher education expenses refer to an educational institution's tuition and fees, related to academic instruction, while a student attends. See H.R. 2750, § 221(c); S. 1974, § 222(c).

35. The fully deductible interest portion would be for the amount equal to the interest paid on any qualified education loan. See H.R. 2750, § 221(d); S. 1974, § 25B(a).

36. See *supra* note 33. The Ford proposal never left the House Ways and Means Committee and the Schumer proposal was read twice and did not exit the Senate Finance Committee.

37. For the purpose of comparison, this Note assumes that the commercial finance contributors would favor maintaining the current state of higher education finance, which allows only limited tax deductions for higher education expenses and increases the need for securing variable interest financial loans. In addition, this Note presupposes that education-related contributors would advocate reforming the current system and minimizing the necessity for securing variable interest financial loans.

38. See OPENSECRETS.ORG, FINANCE/INSURANCE/REAL ESTATE: LONG TERM CONTRIBUTION TRENDS, available at <http://www.opensecrets.org/industries/indus.asp?Ind=F> (last visited Nov. 20, 2000).

39. See *id.*

40. See OPENSECRETS.ORG, EDUCATION: LONG-TERM CONTRIBUTION TRENDS, available at <http://www.opensecrets.org/industries/indus.asp?Ind=W04> (last visited Nov. 20, 2000).

41. See *id.*

42. "There is also little doubt that political campaign contributions get results." John J. Sweeney, *Campaign Finance Reform: Let's Limit Big Money, Not Public Participation*, 10 STAN. L. & POL'Y REV. 81, at 82 (1998).

under-represented issue and simply rewarded the power of those able to contribute.⁴³

C. Future Candidate Viability

The exclusionary consequences surrounding increasingly expensive congressional campaigns⁴⁴ provide a final reason for enacting reform. The present system unfairly favors incumbents and essentially denies present and future candidates of modest means and personal connections from successfully winning federal office. Senator McCain acknowledges how the current scheme discourages young voters and future candidates, “[t]hey say they will not run for public office, that they believe we are corrupt . . . that is causing young Americans to divorce themselves from the political process.”⁴⁵ Historically, due to their unlimited access to contributors, incumbents have been able to raise far more money than challengers. During the 1998 and 2000 election cycles, U.S. Senate and House Democratic incumbents amassed over \$360 million, while Democratic challengers gathered only \$163 million.⁴⁶ During the same time period, Senate and House Republican incumbents raised \$450 million, while GOP challengers only collected \$134 million.⁴⁷

Because they can utilize their financial advantage for extensive television advertisements, direct mailings, and “get-out-the-vote” efforts (GOTV), incumbents currently enjoy incredibly high re-election rates. The 1998 and 2000 election cycles proved no different. In 1998, U.S. Senate incumbents won 90% of their races.⁴⁸ In 2000, 83% proved victorious. In the U.S. House of Representatives, incumbents won 98% of their races during the 1998 and 2000 elections.⁴⁹ As a result, our current campaign finance structure unequivocally maintains power and discourages change and fresh ideas. This is not only a tremendous disservice to those without monetary and personal influence, but stymies political, social, and economic progress for those who may need it most.

Consequently, the only competitive method to counter inequity in the system now appears to involve self-financing campaigns. The 2000 elections were glaring proof that

43. See Burt Neuborne, *Campaign Finance Reform: The Constitutional Questions: Buckley's Analytical Flaws*, 6 J.L. & POL'Y 111, at 113 (1997) (Stating that “[t]he only ideas we hear are ideas that can raise enough money to be heard”).

44. During the last ten years, the cost of running a successful U.S. congressional race skyrocketed. In 1990, winning U.S. Senate candidates solicited almost \$120 million. In 2000, successful U.S. Senate candidates raised almost \$250 million. In 1990, winning U.S. House candidates compiled almost \$194 million; in 2000, they amassed almost \$400 million. See Press Release, Fed. Election Comm'n, Congressional Financial Activity Soars for 2000, (Jan. 9, 2001) available at <http://fecweb1.fec.gov/press/post-general2000.htm>.

45. 145 CONG. REC. S12,586 (daily ed. October 14, 1999) (statement of Sen. McCain).

46. See FED. ELECTION COMM'N, FINANCIAL ACTIVITY OF GENERAL ELECTION CONGRESSIONAL CANDIDATES - 1990-2000, available at <http://www.fec.gov/press/cansum20pre.htm> (last modified Nov. 3, 2000).

47. See *id.*

48. See Darrell West, *Analysis of 2000 Election*, available at

<http://www.insidepolitics.org/ps111/election2000.html> (last visited Nov. 22, 2000).

49. See *id.*

only those with vast personal wealth can now viably seek federal office. In his successful run for New Jersey's open U.S. Senate seat, Democrat John Corzine spent nearly \$53 million of his own fortune.⁵⁰ Minnesota Democratic challenger Mark Dayton's victorious Senate campaign cost him nearly \$9 million.⁵¹ In Washington State, Democratic challenger Maria Cantwell spent almost \$8 million to defeat incumbent Republican Senator Slade Gorton.⁵² Narrowly losing West Virginia's open 2nd District U.S. House race, Democrat James F. Humphrey spent over \$5.5 million.⁵³ Losing to House incumbent Robert Barr in Georgia's competitive 7th District race, Democratic challenger Roger F. Kahn used nearly \$3 million.⁵⁴ In Texas' 25th District, losing Republican House challenger Phil Sudan spent \$2.5 million.⁵⁵ To narrowly win New Jersey's 7th District open House seat, Republican Mike Ferguson spent over \$600,000.⁵⁶ To retain Louisiana's 1st District House seat, Republican incumbent David Vitter spent over \$400,000.⁵⁷

Unfortunately, under our current system, political competition is fast becoming a game for the extraordinarily wealthy. In maintaining the status quo, we exclude and discourage the best and brightest solely for lack of financial and personal resource. This not only deprives the public of quality leadership, but creates a government that fails to accurately reflect the citizens and values it purports to represent.

III. RELEVANT CASE LAW

The key U.S. Supreme Court case in analyzing campaign finance reform remains *Buckley v. Valeo*.⁵⁸ In *Buckley*, the Court considered the constitutionality of the 1974 amendments to the Federal Campaign Act (FECA).⁵⁹ In response to President Nixon's Watergate scandal, the 1974 amendments⁶⁰ limited political expenditures and contributions, created optional public financing for presidential elections, and implemented disclosure and reporting requirements.

In its decision, the *Buckley* Court upheld disclosure and reporting requirements⁶¹

50. See OPENSECRETS.ORG, *Election Overview: The Story So Far*, available at <http://www.opensecrets.org/2000elect/storysofar/topraces.asp> (last visited Nov. 23, 2000).

51. See *id.*

52. See *id.*

53. See *id.*

54. See *id.*

55. See OPENSECRETS.ORG, *Election Overview: The Story So Far*, available at <http://www.opensecrets.org/2000elect/storysofar/topraces.asp> (last visited Nov. 23, 2000).

56. See *id.*

57. See *id.*

58. 424 U.S. 1 (1976).

59. See generally Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. § 431-456 (1994)).

60. See generally Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 86 Stat. 1263 (codified as amended at 2 U.S.C. § 431-456 (1994)).

61. See *Buckley*, 424 U.S. at 58, 60-85.

and optional public financing for presidential elections.⁶² The Court also maintained that congressional limits on contributions to candidates, political parties, and political action committees (PACs) survived strict scrutiny.⁶³ Although campaign contributions involved First Amendment rights, the Court maintained that assuring a federal government free of apparent or actual corruption⁶⁴ qualified as a compelling state interest worthy of congressional regulation.⁶⁵

However, the Court maintained that Congress could not restrict expenditures by candidates, PACs, or individuals.⁶⁶ In its opinion, the majority stated, “[t]hese provisions place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.”⁶⁷ Specifically, the Court did not feel that expenditure ceilings were justified by a compelling government interest in curbing corruption or its appearance.⁶⁸

In 1981, the Court decided *California Medical Association v. Federal Election Commission*⁶⁹ and upheld contribution limits to political committees regarding issue advocacy. The Federal Election Commission (FEC) brought action against the California Medical Association (CMA) for accepting contributions exceeding \$5,000 to its own PAC (CALPAC).⁷⁰ The CMA challenged the constitutionality of the \$5,000 contribution limit as an unlawful expenditure limit.⁷¹ Delivering the plurality opinion, Justice Marshall found that CMA’s contributions to CALPAC equaled “speech by proxy”⁷² and rejected CMA’s claim that limiting contributions to CALPAC deprived CMA of First Amendment protection.⁷³ Justice Marshall argued that the yearly \$5,000 contribution

62. *See id.* at 85-109.

63. Strict scrutiny refers to the judicial technique for evaluating First Amendment issues. To survive strict scrutiny, a statute must serve a compelling state interest, and be narrowly tailored to serve the compelling state interest. *See generally* VOLOKH, *supra* note 20. Specifically, the *Buckley* Court argued, “[FECA’s] contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.” *Buckley*, 424 U.S. at 28-29.

64. Nine years later, the Court more explicitly defined corruption as when “[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.” *Fed. Election Comm’n v. Nat’l Conservative Action Comm.*, 470 U.S. 480, at 497 (1985).

65. *See Buckley*, 424 U.S. at 23-38.

66. *See id.* at 39-59. The Court struck down regulations regarding independent expenditures, candidate expenditures from personal funds, and overall campaign expenditures.

67. *Id.* at 58-59.

68. *See id.* at 45, 54-56.

69. 453 U.S. 182 (1981).

70. *See id.* at 185-86.

71. *See id.* at 193-99 (Marshall J., plurality).

72. *See id.* at 196 (Marshall J., plurality).

73. *See id.* at 195-97 (Marshall J., plurality). Justice Marshall argued,

If the First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign organization which advocates the views and candidacy of a particular candidate, the rights of a contributor are similarly not

limit to PACs for issue advocacy⁷⁴ is constitutional, regardless of whether First Amendment rights are impaired.⁷⁵ Although actual or apparent corruption was not at issue, Justice Marshall viewed FECA's PAC contribution limit as a "useful supplement" in "protecting the integrity of its legislative scheme."⁷⁶

The Court revisited the corruption rationale in *Federal Election Commission v. National Conservative Political Action Committee*⁷⁷ (NCPAC) and *Federal Election Commission v. Massachusetts Citizens for Life*⁷⁸ (MCFL). Both organizations operated as corporations; NCPAC was a political committee⁷⁹ and MCFL operated as a non-profit, pro-life organization interested with issue advocacy and elections.⁸⁰ In *National Conservative Political Action Committee*, the Court struck down a \$1,000 independent expenditure limitation in publicly funded presidential campaigns.⁸¹ The Court eschewed Marshall's "useful supplement" and "speech by proxy" arguments.⁸² Evidently, hypothetical corruption "was not enough to show that a particular political activity posed the danger to corrupt influence or even its appearance."⁸³

In *Massachusetts Citizens for Life*,⁸⁴ the Court also failed to find requisite corruption in the organization's letter to members and the public rating specific candidates against the organization's ideas.⁸⁵ The FEC brought suit against MCFL for violating 2 U.S.C. § 441(b)'s corporate independent expenditure restriction.⁸⁶ However, the Court found that MCFL "was formed to disseminate political ideas, not to amass capital."⁸⁷ Subsequently, the Court rejected a broad "prophylactic rule"⁸⁸ regulating all independent corporate spending and differentiated MCFL from other corporations.⁸⁹ Today, MFCL and similar ideological organizations can make independent expenditures if they have expressly formed for a political purpose, do not conduct business activities, and their

impaired by limits on the amount he may give to a multicandidate political committee, such as CALPAC, which advocates the views and candidacies of a number of candidates.

Cal. Med. Ass'n v. Fed. Election Comm'n, 453 U.S. 182, 197 (1981) (Marshall J., plurality).

74. See 2 U.S.C. § 441(a)(2)(a).

75. See *Cal. Med. Ass'n*, at 196-97 (Marshall J., plurality).

76. *Id.* at 199, n.20 (Marshall J., plurality).

77. 470 U.S. 480 (1985).

78. 479 U.S. 238 (1986).

79. See *Nat'l Conservative Political Action Comm.*, 470 U.S. at 490.

80. See *Mass. Citizens for Life*, 479 U.S. at 241-42.

81. See generally 26 U.S.C. § 9001-9003 (1997).

82. See *Nat'l Conservative Political Action Comm.*, 470 U.S. at 495-96.

83. Robert F. Bauer, *The Demise of Reform: Buckley v. Valeo, the Courts, and the "Corruption Rationale,"* 10 STAN. L. & POL'Y REV. 11, at 14 (1998) (commenting on the Court's decision in *NCPAC*).

84. 479 U.S. 238 (1986).

85. See *Mass. Citizens for Life*, 479 U.S. at 243-46, 259.

86. See *id.* at 241. 2 U.S.C. § 441(b) prohibits corporations from making non-segregated contributions or expenditures on behalf of candidates for any political office. See 2 U.S.C. § 441(b).

87. See *Mass. Citizens for Life*, at 259.

88. *Id.* at 260.

89. See *id.*

members lack a financial stake in the organization. Labor or business cannot form these groups, nor can ideological organizations accept labor and business contributions.⁹⁰

In *Austin v. Michigan State Chamber of Commerce*,⁹¹ the Court tackled independent expenditures by non-ideological corporations that supported or attacked individual candidates for state office.⁹² The majority found that the state possessed a compelling interest in regulating corporate independent expenditures.⁹³ The Court argued that “[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions.”⁹⁴ Further, the majority found that the state narrowly tailored its ban on non-segregated⁹⁵ corporate treasury money in elections.⁹⁶ The Court maintained that the ban did not “impose an *absolute* ban on all forms of corporate political spending, but permits corporations to make independent political expenditures through separate segregated funds.”⁹⁷ Most importantly, *Austin* illustrates the ability to constitutionally regulate corporate participation in the campaign finance scheme,⁹⁸ regardless of *Buckley*’s contribution/expenditure distinction.⁹⁹

In 1996, the Court dealt with congressional regulation of political party spending in connection with a U.S. senatorial campaign.¹⁰⁰ In a plurality opinion, the Court held that the Colorado Republican Federal Campaign Committee’s advertisement expenditure, attacking the likely Democratic candidate, was not coordinated with a particular candidate.¹⁰¹ Thus, FECA’s “Party Expenditure Provision”¹⁰² was unconstitutional when applied to independent expenditures.¹⁰³ Under *Buckley*, because the state committee’s

90. *See id.* at 264.

91. 494 U.S. 652 (1990).

92. *See id.* at 655.

93. *See id.* at 659-60.

94. *Id.* at 660.

95. Non-segregated refers to the corporate account to which contributors donated without full knowledge that those funds would be used for the corporation’s political purposes. *See id.*

96. *See Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990).

97. *Id.*

98. *See Daniel M. Yarmish, Note, The Constitutional Basis for a Ban On Soft Money*, 67 *FORDHAM L. REV.* 1257, at 1275 (1998).

99. *See generally Buckley v. Valeo*, 424 U.S. 1, 58-59 (1976).

100. *See Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n*, 518 U.S. 604 (1996). The key issue involved whether the state committee has violated FECA’s “Party Expenditure Provision,” 2 U.S.C. §441(a)(d)(3), which limits party expenditures in a senatorial race to \$20,000 or two cents multiplied by a state’s voting age population.

101. *See Colo. Republican*, at 613-14.

102. *See generally*, 2 U.S.C. § 441a(d)(1). The provision exempts political parties from the \$5,000 contribution limits imposed under § 441a(a)(4) and \$5,000 coordinated expenditure regulation from § 441a(a)(7)(B)(i).

103. *See Colo. Republican*, at 618. Moreover, the Court did not find concern with the potentially corrupting effect of independent expenditures. “[T]his Court’s opinions suggest that Congress wrote the Party Expenditure Provision not so much because of a special concern about the potentially “corrupting” effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending. *Id.* at 618.

expenditures were not coordinated with any particular candidate, the Court held that political parties possessed a constitutional right to make unlimited independent expenditures.¹⁰⁴ Avoiding the contribution issue, the Court's ruling has greatly influenced the widespread solicitation and use of soft money in today's campaign finance system.¹⁰⁵

In *Nixon v. Shrink Missouri Government PAC*, the Court recently upheld *Buckley's* contribution limits for state elections.¹⁰⁶ In addition, various justices signaled for a re-examination of the campaign finance system created by *Buckley* and its progeny. In reiterating its concern with the corruptive role money can play in the political process, the Court argued "[l]eave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."¹⁰⁷

In separate opinions, other justices laid a solid foundation to constitutionally enact new campaign finance reform legislation, even overturn *Buckley*. Justice Stevens bluntly stated:

Money is property; it is not speech. Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field. Money meanwhile has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results.¹⁰⁸

Justice Breyer, joined by Justice Ginsburg, maintained that "a decision to contribute money to a campaign is a matter of First Amendment concern – not because money is speech (it is not); but because it enables speech."¹⁰⁹ Countering a presumption against constitutionality when considering campaign finance reform efforts, Justice Breyer attacked the literal meaning of the Court's language in *Buckley*.¹¹⁰ Breyer argued, "[t]he Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many – in Congress, for example, where constitutionally protected debate, ART. I, §6, is limited to provide every Member an equal opportunity to express his or her views."¹¹¹ More importantly, Justice Breyer signaled concern that *Buckley* and its progeny should grant Congress the flexibility to ensure political integ-

104. See *id.* at 613-15.

105. See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, at 414 (2000) (Kennedy, J., dissenting).

106. See *Nixon*, at 397-98.

107. *Id.* at 390.

108. *Id.* at 398 (Stevens, J., concurring).

109. *Id.* at 400 (Breyer, J., concurring).

110. See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 401-02 (2000) (Breyer, J., concurring). Specifically, Breyer took issue with, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others [as] wholly foreign to the First Amendment" *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

111. *Nixon*, at 402 (Breyer, J., concurring).

city.¹¹² If not, Justice Breyer felt the Constitution required the Court to reconsider the decision.¹¹³

Dissenting in *Nixon*, Justice Kennedy also provided real hope for new constitutional campaign finance reform.¹¹⁴ Lamenting the structure devised under *Buckley* and *Colorado Republican*, Justice Kennedy maintained that “[t]he Court has forced a substantial amount of political speech underground, as contributors and candidates devise ever more elaborate methods of avoiding contribution limits, limits which take into account of rising campaign costs . . . This mocks the First Amendment.”¹¹⁵ Justice Kennedy went further by stating a willingness to overrule *Buckley*, and allow Congress to enact campaign finance reform limiting both contributions and expenditures.¹¹⁶

IV. CAMPAIGN FINANCE TODAY

The resulting hard money guidelines from *Buckley* and its progeny still dictate. Individual contributions to candidates may not exceed \$1,000 per election, primary and general.¹¹⁷ Individual donations to political committees cannot exceed \$5,000 per year.¹¹⁸ Aggregate individual contributions cannot exceed \$25,000 per calendar year.¹¹⁹ Political committee contributions to candidates or other political committees may not exceed \$5,000.¹²⁰ National political parties may not accept individual contributions over \$20,000 per year.¹²¹ National political parties can only accept \$15,000 per year from political committees.¹²² Labor unions and corporations are both prohibited from directly donating money “in connection” with federal campaigns.¹²³ The discrepancy that now allows for far more unregulated money to enter the campaign system involves the method that FECA uses in defining expenditures. Instead of subjecting national political parties to the \$5,000 limit for contributions to candidates,¹²⁴ FECA treats party expenditures on behalf of a specific candidate as an expenditure.¹²⁵ Under this dichotomy, the hard/soft money expenditure distinction now also exists.

The current hard/soft money controversy emanates from a 1978 Federal Election

112. *See id.* at 404 (Breyer, J., concurring).

113. *See id.* at 405 (Breyer, J., concurring).

114. *See id.* at 405-10 (Kennedy, J., dissenting).

115. *Id.* at 406 (Kennedy, J., dissenting).

116. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 409-10 (2000) (Kennedy, J., dissenting).

117. *See* 2 U.S.C. § 441a(a)(1)(A).

118. *See id.* § 441a(a)(1)(C).

119. *See id.* § 441a(a)(3).

120. *See id.* § 441a(a)(2)(A); § 441a(a)(2)(C).

121. *See id.* § 441a(a)(1)(B).

122. *See* 2 U.S.C. § 441a(a)(2)(B).

123. *See id.* § 441b(a).

124. *See id.* § 441a(a)(2)(A).

125. *See id.* § 441a(a)(d)(1). FECA's contribution limits also do not apply transfers between and among national, state, district or local political party committees. *See id.* § 441a(a)(d)(4).

Commission Advisory Opinion.¹²⁶ In the ruling, the FEC declared that national political parties (Democrat and Republican) could use money not subject to FECA¹²⁷ for generic voter registration, and GOTV and benefit both state and federal candidates.¹²⁸

In response to a 1984 lawsuit brought by Common Cause,¹²⁹ a non-partisan pro-reform organization, the FEC attempted to specify its hard/soft money distinction. Its new changes created dual hard/soft money account system for national political parties.¹³⁰ For money spent in connection with federal candidates, the national parties must use regulated hard money.¹³¹ For coordinated administrative costs¹³² that aid both federal and non-federal candidates, national parties must also use hard money.¹³³

However, for coordinated administrative costs the national parties can also use unregulated soft money. In presidential election years, the national parties must pay for at least 65% of administrative costs with hard money. Conversely, they can spend up to 35% with soft money.¹³⁴ Abusing this restriction and 2 U.S.C. § 441a(a)(d)(4), national parties increasingly assign large sums of soft money to state parties. State laws are often far more lenient regarding the use of soft money. Thus, national parties increasingly raise more soft money, transfer it to the states, and still benefit their federal candidates.¹³⁵

For soft money advertisements, the key issue involves whether the advertisement contains an electioneering message.¹³⁶ In 1995, the FEC ruled that national parties must use hard money to pay for advertisements with an electioneering message.¹³⁷ Thus, national parties can pay for non-electioneering message advertisements with soft-money. As a result, both parties now exploit the current ambiguity by using soft money to fund

126. See Fed. Election Comm'n., Advisory Op. 1978-10 (1978) available at <http://herndon3.sdrdc.com/ao/ao/780010.html> (last visited Mar. 20, 2001).

127. Soft money. See *supra* text accompanying note 15.

128. See *id.*

129. See *Common Cause v. Fed. Election Comm'n.*, 692 F. Supp. 1391 (D.D.C. 1987).

130. See generally 11 C.F.R. §106.5 (1997).

131. See *id.* §106.5(a).

132. See *id.* §106.5(a)(2)(i)-(iv). These include direct fundraising costs, voter registration, rent, GOTV, volunteer campaign literature leafleting, and sample ballot creation and distribution.

133. See *id.* §106.5(b)(1). However, Democratic and Republican U.S. Senatorial Committees (DSCC & NRSC), and Democratic and Republican U.S. House Committees (DCCC & NRCC) are subject to different rules, and can use some soft money that benefit both federal and non-federal candidates. See *id.* §106.5(c).

134. See *id.* §106.5(b)(2)(ii). In non-presidential years, the national parties only need to pay for 60% of administrative costs with hard money.

135. See Note, 111 HARV. L. REV. 1323, 1327-28 (1998) citing Lisa Rosenberg, *A Bag of Trick: Loopholes in the Campaign Finance Systems*, CENTER FOR RESPONSIVE POLITICS, available at http://www.opensecrets.org/pubs/law_bagtricks/contents.html (last visited Feb. 16, 2001).

136. See Fed. Election Comm'n., Advisory Op. 1985-14 (1985) quoting *United States v. United Auto Workers*, 352 U.S. 567, at 587 (1957) available at <http://herndon3.sdrdc.com/ao/ao/850014.html> (last visited Mar. 20, 2001). An electioneering message vaguely refers to statements "designed to urge the public to elect a certain candidate or party." *Id.*

137. See Fed. Election Comm'n Advisory Op. 1995-25 (1995) available at <http://herndon3.sdrdc.com/ao/ao/950025.html> (last visited Mar. 20, 2001).

“issue ads” implicitly designed to elect federal candidates and congressional majorities for the national political parties.¹³⁸

In the end, we now endure a campaign finance system widely manipulated by national parties beholden to the corrupting monetary influence FECA seeks to regulate.¹³⁹ From January 1, 1999 through October 18, 2000 both major parties combined to raise almost \$1 billion.¹⁴⁰ Compared to 1995-96, while 2000 hard money solicitation increased only 6% for Republicans and 24% for Democrats; 2000 soft money receipts soared.¹⁴¹ Republican soft money receipts increased 74% and Democratic soft money receipts jumped 85%.¹⁴² According to the FEC, “soft money now represents 42% of all National Republican Party financial activity and 53% of Democratic National Party fundraising.”¹⁴³

V. THE MCCAIN-FEINGOLD LEGISLATION

McCain-Feingold¹⁴⁴ reigns as the most recent high-profile attempt at improving our current campaign finance system. The legislation amends the FECA in a number of ways. To begin, the bill defines federal election activity.¹⁴⁵ Specifically, federal election activity involves voter registration that begins 120 days before a scheduled federal election, and ends the day of the election.¹⁴⁶ The definition also includes voter identification, GOTV, and basic campaign activity for a federal candidate that appears on the ballot.¹⁴⁷ McCain-Feingold also characterizes federal election activity as:

[A] public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly

138. See Note, *supra* note 135, at 1328.

139. A current study revealed ample evidence to suggest that soft money now dominates the outcome of federal elections. See generally CENTER FOR THE STUDY OF ELECTIONS AND DEMOCRACY: BRIGHAM YOUNG UNIVERSITY, ELECTION ADVOCACY: SOFT MONEY AND ISSUE ADVOCACY IN THE 2000 CONGRESSIONAL ELECTIONS, (David B. Magleby ed.) available at <http://www.byu.edu/outsidemoney/2000general/contents.htm> (last visited Feb. 18, 2001).

140. See Press Release, Fed. Election Comm'n, Party Fundraising Escalates (Nov. 3, 2000), available at <http://www.fec.gov/press/pty00text.htm> (last visited Feb. 16, 2001).

141. See *id.*

142. See *id.*

143. *Id.* Capitalizing on lenient state law, national parties allocated enormous sums of money to the states during the last election cycle. Soft money transfers by the Democrats totaled \$106.5 million, and \$98.5 million for the Republicans. See *id.*

144. See generally S. 27, 107th Cong. (2001).

145. See *id.* § 101(b).

146. See *id.*

147. See *id.* Federal election activity does not apply to federal officials attending state, local, or district fundraisers. See *id.* § 101(a). It also does not involve generic campaign activity advocating only candidates for state, local, or district office. S. 27, 107th Cong. § 101(b) (2001).

advocates a vote for or against a candidate).¹⁴⁸

This clause is important because it effectively regulates the “issue ads” that political parties now use to circumvent FECA and effectively promote particular federal candidates.¹⁴⁹

For federal election activity, McCain-Feingold bans the use and solicitation of soft money by national political parties.¹⁵⁰ Prohibiting national parties¹⁵¹ to “solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of [FECA]”¹⁵² the bill eliminates the hard/soft money distinction that parties and candidates now manipulate. McCain-Feingold also places similar restrictions on state, district, and local committees who engage in federal election activity.¹⁵³

Better regulating political parties, McCain-Feingold limits federal election activities by certain tax-exempt organizations.¹⁵⁴ The proposal prohibits national, state, or local political parties, from receiving or donating funds to tax-exempt entities.¹⁵⁵ Consequently, McCain-Feingold substantially impairs the ability of political parties to avoid FECA restrictions and exchange large amounts of money with like-minded tax-exempt organizations.

Regarding federal candidates, McCain-Feingold limits both incumbents and those seeking office. By eliminating the solicitation and receipt of funds not subject to FECA,¹⁵⁶ McCain-Feingold eliminates a key advantage incumbents enjoy over challengers. Political parties can no longer use their well-connected challengers and incumbents to raise soft money from the special interests buying influence over votes and the

148. *Id.*

149. These advertisements were used widely, and perhaps illegally, in the 2000 general presidential election. See Fred Wertheimer, *Gore, Bush, and the Big Lie*, WASH. POST, July 24, 2000, A23. They were also utilized extensively in the 1996 presidential election. See generally RICHARD S. MORRIS, *BEHIND THE OVAL OFFICE* (1999) (describing the effectiveness of these advertisements in President Clinton's 1996 re-election campaign).

150. See S. 27, 107th Cong. § 101(a) (2001).

151. This term also includes a political party's national congressional campaign committees, and any organization or individual acting for a national committee. See *id.* § 101(a).

152. *Id.* § 101(a).

153. See *id.* § 101(a). The bill also regulates “services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election” as federal election activity. *Id.* § 101(b).

154. The tax-exempt organizations the bill targets involve those “described in section 501(c) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code (or has submitted an application for determination of tax exempt status under such section); or . . . described in section 527 of such Code (other than a political committee).” S. 27, 107th Cong. § 101(a) (2001). A potential concern involves the possibility that tax-exempt organizations may simply file for application in order to avoid regulation.

155. See *id.*

156. See *id.*

legislative agenda. By eradicating the incentive to influence candidates and lawmakers with huge amounts of soft money, the bill also dismantles the edge wealthier special interests currently possess over their less affluent counterparts. Thus, McCain-Feingold should help control special interest dominance and allow more non-partisan, merit-based ideas to enter the legislative process.

Although McCain-Feingold tightens the solicitation and use of money by political parties and federal candidates, it increases the amount that FECA allows¹⁵⁷ individuals to contribute to political parties. Individuals can contribute \$10,000 yearly to state parties.¹⁵⁸ The aggregate amount a single individual may donate increases from \$25,000 to \$30,000 per year.¹⁵⁹ Although McCain-Feingold does not increase the FECA's individual contribution limits to candidates,¹⁶⁰ lawmakers should consider amending the bill.¹⁶¹ By increasing the limits individuals can now contribute, an additional proposal would recognize inflationary changes since 1971 and allow for greater individual participation in the campaign financing process. Limiting the role of special interests while enhancing individual influence, an amendment to McCain-Feingold could help increase voter confidence and provide non-incumbents with an opportunity to build better-financed campaigns.¹⁶² However, lawmakers should be aware that increasing individual contribution limits may only provide wealthy individuals with greater influence. This does little to placate the diminished influence less-advantaged young voters still suffer.¹⁶³

McCain-Feingold also reforms campaign finance disclosure requirements for political parties and committees.¹⁶⁴ More importantly, the bill places restrictions on electioneering communication.¹⁶⁵ Exempting independent expenditures and news stories,¹⁶⁶ McCain-Feingold defines electioneering communication as:

[A]ny broadcast, cable, or satellite communication which--refers to a clearly identified candidate for Federal office; is made within--60 days before a general, special, or

157. See generally 2 U.S.C. § 441a(a)(3).

158. See S. 27, 107th Cong. § 102(a).

159. See *id.* § 102.

160. See 2 U.S.C. § 441a(a)(1)(C).

161. See S. 27, 107th Cong. amend. 149 (2001) (modifying and indexing current hard money contribution limits). On Mar. 20, 2001, the Senate agreed to S. 27, 107th Cong. amend. 115 (2001) (amending FECA to modify hard money contribution limits in regard to expenditures from a candidate's personal funds).

162. Perhaps S. 27, 107th Cong. amend. 122 (2001) (amending the Communications Act of 1934 to require television broadcast providers to offer their lowest rate for political committees buying time on behalf of candidates) effectively addresses the perceived need raise individual contribution limits by reducing the cost of campaign television advertisements.

163. Only one percent of all campaign donors contribute the \$1,000 maximum. Jim Abrams, *Senate to Vote on Hard Money Limit*, ASSOCIATED PRESS, Mar. 28, 2001, available at http://dailynews.yahoo.com/h/ap/20010328/pl/campaign_finance_84.html. U.S. Senator Christopher Dodd also argues that raising individual contribution limits might be "getting [us] further and further and further removed from the average citizen in this country." *Id.*

164. See generally S. 27, 107th Cong. § 103(a) (2001).

165. See *id.* § 201.

166. See *id.*

runoff election for such Federal office; or 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for such Federal office; and is made to an audience that includes members of the electorate for such election, convention, or caucus.¹⁶⁷

McCain-Feingold requires every person, who disburses \$10,000 or more in a calendar year for an electioneering message, to file a statement within twenty-four hours.¹⁶⁸ Such persons must disclose their identity, their principal place of business, the election, and all candidates that the electioneering message targets.¹⁶⁹ The statement must also illustrate all individual disbursements exceeding \$200 and all contributors who donated over \$1,000.¹⁷⁰ This requirement provides immediate accountability for use of campaign funds and allows the public to better identify those behind advertisements.

The bill also addresses activity by corporations and labor unions.¹⁷¹ The bill allows non-members, working under a labor agreement, to formally object to the use of fees used unrelated to collective bargaining. If non-members formally object, unions must proportionally reduce their dues according to the amount spent on collective bargaining.¹⁷² Although this provision implements current case law, a similar restriction affecting corporations may be appropriate.¹⁷³

Under McCain-Feingold's electioneering communication provision,¹⁷⁴ for-profit corporations and labor unions also cannot use treasury funds to pay for television or radio advertisements thirty days prior to a primary election and sixty days before a general election.¹⁷⁵ For 501(c)(4) non-profit organizations, McCain-Feingold only permits electioneering communications exclusively financed by individual contributors.¹⁷⁶ This prevents for-profit corporations and labor unions from evading regulation and discreetly channeling money through 501(c)(4) organizations.

McCain-Feingold helps clarify the expenditure/contribution debate regarding coordinated¹⁷⁷ electioneering communications.¹⁷⁸ Any electioneering message coordinated

167. *Id.*

168. *See id.*

169. *See* S. 27, 107th Cong. § 201 (2001).

170. *See id.*

171. *See id.* § 203; § 304.

172. *See id.* § 304 (codifying *Communication Workers of America v. Beck*, 487 U.S. 735 (1988)).

173. Unfortunately, on Mar. 21, 2001, the Senate tabled S. 27, 107th Cong. amend. 134 (2001) (requiring disclosure and consent of corporate members and shareholders for the use of funds for political activities). On Mar. 22, 2001, the Senate also tabled S. 27, 107th Cong. amend. 136 (2001) (requiring corporations to disclose to members and shareholders the use of money for political purposes).

174. *See* S. 27, 107th Cong. § 201 (2001).

175. *See id.* § 203(b).

176. *See id.*

177. McCain-Feingold essentially describes coordinated activity as the transfer of anything valuable to a federal candidate, political party, or committee, within the same election cycle, regardless if it definitively advocates a vote for or against a candidate. The bill also treats coordinated activity as a regulated contribution. *See id.* § 214(a)(B).

178. *See id.* § 202.

with a federal candidate or a candidate's authorized political committee¹⁷⁹ is treated as a contribution.¹⁸⁰ Instead of listing coordinated electioneering communication as an unregulated expenditure, this revision limits excessive collusion between well-financed political parties and candidates. It minimizes the power of parties to greatly influence election outcomes and creates a disincentive for special interests to donate to political parties.

For independent expenditures,¹⁸¹ McCain-Feingold requires political parties to choose how they aid candidates during a general election. Political parties cannot make coordinated expenditures and unlimited independent expenditures; only one method is allowed.¹⁸² The bill also creates independent expenditure reporting requirements.¹⁸³ Specifically, it targets independent expenditures made toward the end of campaigns. The bill requires those making independent expenditures in excess of \$1,000, after the twentieth day but twenty-four hours prior to an election, to file a report describing the expenditure within one day.¹⁸⁴ For those independent expenditures over \$10,000, up to and including the twentieth day before an election, one must file a similar report within two days.¹⁸⁵ McCain-Feingold is also an appropriate continuation in improving disclosure of independent political organizations.¹⁸⁶ It should help alleviate ambiguity regarding independent advertisement authors and help voters better discern advertisement validity. McCain-Feingold also attacks unethical federal candidates and office holders. The bill prohibits the conversion of campaign contributions for personal housing payments, clothes, and car expenses.¹⁸⁷ It outlaws federal candidates and office holders from using contributions for country or health club memberships, personal vacations, and tuition.¹⁸⁸ This provision should help diminish the reputation politicians currently have for using the public for private gain.

McCain-Feingold also addresses the Clinton/Gore campaign's use of the White House to raise money during the 1996 presidential race.¹⁸⁹ In addition to prohibiting

179. This refers to federal, state, or local political parties and committees. *See* S. 27, 107th Cong. § 202 (2001).

180. *See id.* § 202. Thus, the contribution cannot exceed the limits set under 2 U.S.C. § 441a.

181. The bill expressly defines independent expenditures as those "expressly advocating the election or defeat of a clearly identified candidate; and that is not a coordinated activity with such candidate or such candidate's agent or a person who has engaged in coordinated activity with such candidate or such candidate's agent." S. 27, 107th Cong. § 211 (2001).

182. *See id.* § 213.

183. *See id.* § 212.

184. *See id.*

185. *See id.*

186. In July, 2000, President Clinton signed a provision into law requiring certain tax exempt organizations (called "527s") to disclose contribution and expenditures. *See generally* Act to Amend the Internal Revenue Code of 1986, Pub. L. No. 106-230, 114 Stat. 477 (2000).

187. *See* S. 27, 107th Cong. § 313 (2001).

188. *See id.*

189. *See* Young, *supra* note 6.

foreign contributions,¹⁹⁰ McCain-Feingold prohibits federal employees from soliciting or accepting donations on federal property while discharging official duties.¹⁹¹ This section will be crucial in restoring honor and integrity to federal property as a public possession. Federal property is not, and should never be, a political vehicle to raise money for the employees we hire.

Finally, McCain-Feingold wisely ensures its overall survival if parts are deemed illegal.¹⁹² Reform opponents would enjoy nothing more than to see the entire bill fail due to one section failing constitutional inspection.¹⁹³

VI. CONCLUSION

Our current campaign finance system remains a real cause of voter apathy and mistrust in government, especially for younger voters. In 1999, Senator McCain commented:

[I]ndisputably, the greatest change in Washington over the past twenty-five years . . . has been the preoccupation with money. . . . It affects the issues raised and their outcome; it has changed employment patterns in Washington; it has transformed politics; and it has subverted values. It has led good people to do things that are morally questionable, if not reprehensible. It has cut a deep gash, if not inflicted a mortal wound in the concept of public service.¹⁹⁴

While not addressing every campaign finance inequity, McCain-Feingold takes the critical first-step in restoring accountability and integrity to our current system. Banning soft money can limit the manipulating role of special interests. It will also direct elected officials to perform for their constituents, not their campaign contributors. Strengthening disclosure requirements should provide greater awareness and accountability to the public in choosing elected federal officials. Limiting incumbent advantage will provide greater opportunity for new leaders and new ideas. Most importantly, McCain-Feingold can help reintroduce young people to a new political process.

If the bill passes through Congress, the true test sits with President George W. Bush. Failing to win the popular presidential vote,¹⁹⁵ and viewed as beholden to the special interests that now dominate our current system,¹⁹⁶ the president has an opportunity to illustrate real courage.

190. See S. 27, 107th Cong. § 303 (2001).

191. See *id.* § 302.

192. See *id.* § 401.

193. See Abrams, *supra* note 163.

194. 145 CONG. REC. S12,585-86 (daily ed. October 14, 1999) (statement of Sen. McCain *quoting* ELIZABETH DREW, *THE CORRUPTION OF AMERICAN POLITICS* §4 (1999)).

195. See FED. ELECTION COMM'N, 2000 OFFICIAL PRESIDENTIAL GENERAL ELECTION RESULTS, *available at* <http://fecweb1.fec.gov/pubrec/2000presgeresults.htm> (last visited Mar. 22, 2001).

196. Press Release, Common Cause, Bush Tax Cut Catering to Special Interests, (Feb. 8, 2001) *available at* <http://www.commondreams.org/news2001/0208-07.htm>.

President Bush has gestured that he might sign McCain-Feingold,¹⁹⁷ and he should not hesitate. If the president is truly confident in the power of his ideas, not the strength of his contributors, he has nothing to lose and America's future has everything to gain.

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¹⁹⁷. See Abrams, *supra* note 163.

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