What Did They Do and What Does It Mean? The Three-Judge Court's Decision in *McConnell v. FEC* and the Implications for the Supreme Court

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Richard Briffault

INTRODUCTION

My role at this symposium is to provide a brief overview of the three-judge court’s decision in McConnell v. FEC,¹ review the opinions, piece together what the court actually decided, and see how the Bipartisan Campaign Reform Act of 2002 (“BCRA”)² now stands. I will try to do that briefly, while giving a few general comments about what the court’s opinions tell us about the state of campaign finance law today. As a preliminary matter, the three-judge court’s opinions provide us with two radically different world views—almost two different intellectual universes—for thinking about campaign finance law.

In one world view, embraced enthusiastically by Judge Henderson and occasionally by Judge Leon, campaign finance is the domain of pure speech and core political association. The speech in campaign contributions and spending creates few dangers for the political process, and to the extent that it does, those dangers must be tolerated for the protection of speech and association. In this conceptual universe, campaign finance regulation is a threat to constitutional values. In order to sustain legislation that restricts campaign finance practices, Congress must meet a very high standard of proof. The government must present considerable evidence that such legislation is strictly necessary to deal with any of the corruption dangers that arguably flow from campaign contributions and expenditures. Moreover, such legislation must be very precisely tailored to meet the purported dangers of unregulated campaign finances; the law must be neither overbroad, nor—to use a word employed by some members of the court that I had not seen before—can it be underbroad.³

In the other world view, embraced wholeheartedly by Judge Kollar-Kotelly and occasionally by Judge Leon, the focal point is the

¹ Vice Dean and Joseph P. Chamberlain Professor of Legislation, Columbia Law School.
⁴ See McConnell, 251 F. Supp. 2d at 571 (Henderson, J., concurring in the judgment in part and dissenting in part) (blasting BCRA’s definition of “electioneering communication” provision for “underbreadth”); id. at 644 (Kollar-Kotelly, J.) (discussing and rejecting plaintiffs’ “underbreadth” challenge to the definition of electioneering communication).
threat to electoral and governmental integrity posed by campaign money. In this intellectual universe, the potential for corruption and the threat to public confidence in government is central.\(^4\) In this universe, corruption is defined to mean not quid pro quo deals\(^5\) but the opportunity for special access to lawmakers and the possibility of undue influence over government.\(^6\) There is widespread evidence that large unregulated contributions, particularly corporate and union treasury funds, give their donors special access to Congress and the President and have an impact on governance.\(^7\) In this universe, any harm from the imposition of limits on very large donations to the political parties or from barring the use of corporate and union treasury funds to pay for pre-election electioneering communications is entirely speculative and pales in significance to the dangers of corruption in the absence of regulation. In this universe, Congress is entitled to considerable deference when it determines that campaign finance practices generate the corruption-causing dangers that warrant regulation, and when it decides what form that regulation should take.\(^8\) Moreover, rather than require that federal legislation be precisely tailored, this approach accepts that “[i]n the area of campaign finance regulation, congressional action has been largely incremental and responsive to the most prevalent abuses or evasions of existing law at particular points in time.”\(^9\)

These are the two world views that collided in this case, producing a staggering 1637 pages in the slip opinion and 774 pages in *West’s Federal Supplement 2d.*\(^10\) In fairness to the three-judge court, these two worlds have both been critical in shaping campaign finance law over the last quarter-century and are deeply embedded in our jurisprudence. Both universes are well represented in the Supreme Court today.\(^11\) Given the sharp divide in legal thinking in campaign finance, it is not surprising that the three-judge court had a hard time with

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\(^4\) Id. at 512-17 (Kollar-Kotelly, J.); id. at 870-74 (Leon, J.).

\(^5\) See id. at 481 (Kollar-Kotelly, J.) (“The record does not contain any evidence of bribery or vote buying in exchange for the donations of nonfederal money . . . .”); id. at 851-53 (Leon, J.).

\(^6\) See id. at 481-512 (Kollar-Kotelly, J.) (discussing what corruption means in this context); id. at 856-66 (Leon, J.) (describing the relationships between contributions and access).

\(^7\) See id. at 856 (Leon, J.).

\(^8\) See id. at 799 (Leon, J.) (“[O]ne point bears emphasizing: Congress is infinitely more familiar than this Court with the circumstances and practical ramifications surrounding federal elections and campaign finance law.”).

\(^9\) Id. at 433 (Kollar-Kotelly, J.).

\(^10\) This includes the 743 pages that report the opinions of the court in the principal *McConnell* case, the 29-page additional opinion of Judge Kollar-Kotelly ordering the unsealing of certain documents in the record, and the 2-page final judgment and order.

\(^11\) Compare *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 398-99 (2000) (Stevens, J., concurring) (“[C]ampaign money “is property; it is not speech”), with id. at 410-30 (Thomas, J., dissenting) (requiring the restrictions on contributions be subject to strict scrutiny and rejecting the argument that concern about corruption can justify contribution limitations).
this case. Indeed, the court's struggle may very well foreshadow a similar conflict in the Supreme Court.

In *McConnell v. FEC*, the court was so divided that the three judges issued *four* separate opinions. There is, first, the 83-page per curiam opinion that was joined by just Judges Kollar-Kotelly and Leon.\(^\text{12}\) That opinion consists of a long background section on federal campaign finance law,\(^\text{13}\) a legislative history of BCRA,\(^\text{14}\) a review of the procedural history of the BCRA litigation,\(^\text{15}\) a summary of the provisions of BCRA,\(^\text{16}\) very minimal findings of fact,\(^\text{17}\) and conclusions of law concerning just a handful of relatively marginal issues.\(^\text{18}\) The per curiam opinion does not address either the soft money or issue advocacy provisions that constitute the heart of BCRA.

Second, there is the 166-page opinion of Judge Henderson,\(^\text{19}\) who, in her own words, found the statute "unconstitutional in virtually all of its particulars."\(^\text{20}\) -- indeed, not only unconstitutional, but "pernicious."\(^\text{21}\) According to Judge Henderson, BCRA "breaks faith with the fundamental principle—understood by our nation's Founding Generation, inscribed in the First Amendment and repeatedly reaffirmed by the United States Supreme Court—that 'debate on public issues should be uninhibited, robust, and wide-open.'\(^\text{22}\) She found constitutional precisely one of the provisions of BCRA that was under attack,\(^\text{23}\) although she found several claims not justiciable on standing or ripeness grounds so that several sections of the statute emerged

\(^\text{12}\) *McConnell*, 251 F. Supp. 2d at 183-266 (per curiam).

\(^\text{13}\) Id. at 188-201.

\(^\text{14}\) Id. at 201-06.

\(^\text{15}\) Id. at 206-09.

\(^\text{16}\) Id. at 209-20.

\(^\text{17}\) Id. at 220-33. These consist largely of very terse identifications of the parties, *id.* at 220-27, and some findings concerning both the need for, and the consequences of, the enhanced disclosure BCRA would require, *id.* at 227-33.

\(^\text{18}\) Id. at 233-65. The per curiam dismissed challenges predicated on the free press (as distinguished from the free speech) provision of the First Amendment, *id.* at 233-36, and reviewed and sustained most of the disclosure provisions of BCRA Section 201 without directly considering the section's new definition of "electioneering communication," *id.* at 236-49; sustained the extension of the rules governing coordinated expenditures to include coordinated electioneering communications, *id.* at 249-50; found the challenge to Section 212's reporting requirement for certain independent expenditures not ripe, *id.* at 250-52; considered the challenges to Section 214's regulation of party-candidate coordinated expenditures, *id.* at 252-65; and upheld Section 311's clarity standards for the identification of sponsors of election-related advertising, *id.* at 265.

\(^\text{19}\) Id. at 266-432 (Henderson, J., concurring in the judgment in part and dissenting in part).

\(^\text{20}\) Id. at 266.

\(^\text{21}\) Id. (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

\(^\text{22}\) *Id.*

\(^\text{23}\) Judge Henderson found that BCRA Section 323(e), which prohibits any federal candidate or officeholder from soliciting, receiving, or transferring nonfederal funds—e.g., soft money—"in connection with" a federal, state, or local election, subject to certain exceptions, is constitutional. *Id.* at 417-22.
from her opinion unscathed even if not exactly validated. These provisions aside, Judge Henderson voted to invalidate all the major provisions of BCRA, including nearly all of the prohibitions on soft money and all provisions dealing with "electioneering communication."

Weighing in at 324 pages, Judge Kollar-Kotelly's principal opinion is by far the longest opinion in the case. Judge Kollar-Kotelly exhibited great deference to Congress's power to protect the integrity of federal elections and great respect for Congress's ability to act incrementally and through evolutionary change. She would have upheld all but three of the challenged provisions of BCRA although she, like her colleagues, would have dismissed some of the claims as not justiciable.

The fourth and final opinion was written by Judge Leon. At a mere 163 pages, Judge Leon's is the briefest of the three signed

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24 See id. at 426-49 (finding as not ripe the challenges to BCRA's Section 305, which imposes a "stand by your ad" requirement as a condition for eligibility for the "lowest unit" broadcast charge benefit the Federal Communications Act provides federal candidates); id. at 429-432 (finding as lacking standing the plaintiffs who filed challenges to the sections of BCRA raising the hard money limits and providing for increases in the otherwise applicable contribution-to-candidate and coordinated expenditure limits if the candidate's opponent spends a "personal funds amount" over a certain sum).

25 Like the per curiam, Judge Henderson also wrote at length concerning the history of campaign finance regulation, id. at 271-81; BCRA's provisions, id. at 281-95; and the procedural history of the case, id. at 266 n.1, 266-70, 295-96. Making it "clear" that she did not join in the per curiam's statement of the facts, id. at 297 n.55, and that she believed that the factual findings in the separate opinions of Judges Kollar-Kotelly and Leon were replete with errors, id., she also included extensive findings of facts, id. at 296-356.

26 Id. at 388-422.

27 Id. at 360-81.

28 Id. at 432-756 (Kollar-Kotelly, J.). This opinion includes a 37-page "appendix" analyzing some of the expert reports—and the challenges to those expert reports—concerning issue advocacy and the impact of BCRA's electioneering communication provisions on political advertising. Id. at 719-56.

29 Judge Kollar-Kotelly also published a 29-page opinion as part of her order unsealing certain documents in the case.


31 Judge Kollar-Kotelly joined her colleagues in finding unconstitutional BCRA Section 213, which would preclude a political party from making both independent and coordinated expenditures on behalf of a candidate once the party has nominated a candidate, id. at 650-51; BCRA Section 318, which prohibits minors from making campaign contributions, id. at 717-18; and BCRA Section 504, which requires broadcast licensees to collect and disclose records of any request to purchase broadcast time that is made by or on behalf of a legally qualified candidate for federal office or that relates to any political matter of national importance, id. at 718. In addition, Judge Kollar-Kotelly joined the per curiam opinion's determination that the portion of BCRA Section 201 that treats a person who has executed a contract to make an expenditure as actually having made the expenditure is unconstitutional. Id. at 242.

32 See id. at 716 (finding that challenges to the stand by your ad, increased hard money limits, and millionaire provisions were not justiciable).

33 Id. at 756-919 (Leon, J.).
opinions, but with respect to most issues it was the pivotal one because Judge Leon was the median voter on the three-judge panel. Judge Leon joined with Judge Henderson in striking down most of BCRA’s proscriptions on political party soft money and in invalidating BCRA’s primary effort to expand the regulation of issue advocacy. Yet, he voted to save a key part of the soft money restriction and, joined by Judge Kollar-Kotelly, who would have upheld all of the soft money regulations, that became the ruling of the court. Similarly, he voted to uphold a modified version of BCRA’s backup definition of electioneering communication and, with Judge Kollar-Kotelly joining him on this point, that resulted in the court’s validation of the modified backup definition.

Although Judge Leon frequently joined Judge Henderson in result, he often broke with her reasoning. Thus, Judge Leon rejected Judge Henderson’s determination that soft money regulation must be subject to strict judicial scrutiny and instead agreed with Judge Kollar-Kotelly that a restriction on soft money need be only “closely drawn” to pass constitutional muster, which, he noted, is “a standard of review somewhat less rigorous than strict scrutiny.” Judge Leon, however, concluded that many of BCRA’s key soft money provisions did not satisfy even his less restrictive standard. Similarly, Judge Leon disagreed with Judge Henderson’s conclusion that the “express advocacy” standard for defining electioneering communication is constitutionally mandated and instead concurred with Judge Kollar-Kotelly that Congress could adopt a more expansive definition that did not meet the “magic words” test of Buckley v. Valeo. However, Judge Leon still agreed with Judge Henderson that Congress’s primary definition of electioneering communication was unconstitutionally overbroad.

Judge Leon took an unusually creative approach to the judicial role. He literally rewrote the two key sections of the statute in order to make them comply with his constitutional analysis. With respect to soft money, Congress had provided for a complete ban on national

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34 Id. at 758-73, 777-80, 790-91, 792-99.
35 Id. at 773-77, 780-90, 792.
36 Id. at 799-803.
37 Id. at 761.
38 Compare id. at 360-74 (Henderson, J., concurring in the judgment in part and dissenting in part) (stating that express advocacy test is constitutionally mandated), with id. at 594 (Kollar-Kotelly, J.) (concluding that express electoral advocacy is not a constitutional requirement), and id. at 793 (Leon, J.) (“[T]he Supreme Court never intended the so-called express advocacy test to be a constitutional rule of law limiting the power of Congress to regulate expenditures for certain uncoordinated advocacy that directly affects federal elections, notwithstanding the absence of these ['magic'] words.”). For the source of the “magic words” test, see Buckley v. Valeo, 424 U.S. 1, 44 & n.52 (1976).
39 McConnell, 251 F. Supp. 2d at 773-77, 802-03 (Leon, J.).
party soft money and a more limited requirement that state and local political parties use only hard money to pay for four statutorily defined federal election activities. Judge Leon—and, thus, the court—held that the complete ban on national party soft money was overbroad but, looking to the restriction on state parties, he picked out one of the four defined federal election activities, narrowed the regulation of national party activities to a ban on national party use of soft money for that activity, and, as so narrowed by him, upheld the soft money ban. Similarly, Congress provided two alternative definitions of electioneering communication. Again, Judge Leon writing as the court rejected the primary definition and then rewrote the backup definition by deleting a key clause, and, as so rewritten, upheld the backup definition.

The two central themes of Judge Leon's opinion, and thus of the three-judge court, are that Congress has broad authority to regulate the funding of communications, by both parties and nonparty campaign participants, that promote or oppose federal candidates but that Congress may not otherwise regulate political party finances. He found that communications that promote or oppose clearly identified candidates for federal office, even if they do not use the magic words of express advocacy, have a direct effect on federal elections, and thus may be regulated. On the other hand, building on an extremely positive evaluation of the role of political parties in our democratic system, Judge Leon was quite hostile to the regulation of the money funding party programs that do not directly involve public communications that promote or oppose federal candidates, even though these activities may have an effect on federal elections.

Two more preliminary facts are worth noting. First, not only was the three-judge court deeply divided in its legal analysis, but the court also failed completely to reach agreement on findings of facts. The per curiam's findings come to a mere dozen pages, and Judge Henderson did not even join those. The three judges, in their separate opinions, each made extensive, but different, findings of facts. Together, the three sets of findings amount to almost 320 pages. Although some findings were common to two, and very rarely, three judges, the enormous fragmentation of the findings effectively deprives the Supreme Court of any benefit it might have gotten from the lower court's review of the record. Second, although five months

40 See id. at 759, 820-21 ("Our national political structure is firmly anchored by our two major parties. The role those national parties play... is critical to the stability our political system has enjoyed over the past 200 years.").

41 Id. at 758-92.

42 See id. at 296-356 (findings of Henderson, J.); id. at 438-590 (findings of Kollar-Kotelly, J.); id. at 813-919 (findings of Leon, J.).
passed between argument and decision and the three judges devoted more than 750 pages to their work, the result is distressingly sloppy. Not only does the decision of the court have to be pieced together, opinion by opinion, by appraising the determinations of individual judges with respect to specific claims, but, with respect to two sections of BCRA, it is very difficult to determine exactly what the court as a whole actually decided. Let us hope that the Supreme Court’s decision is not only shorter, but also clearer.

I. MCCONNELL AND BCRA’S SOFT MONEY PROVISIONS

A. BCRA’s Soft Money Provisions

Title I of BCRA provides for the regulation of political party soft money. Strikingly, BCRA actually uses the term “soft money” which previously had been considered a bit of insider jargon and not a formal legal category. As all election law cognoscenti know, “soft money” is the term for money that is used in federal campaigns that is not subject to the requirements of federal law—specifically, the disclosure requirements, the dollar limitations on contributions, and the prohibition on the use of corporate and union treasury funds. Prior to BCRA, soft money was exempt from federal regulation on the theory that it does not involve contributions to federal candidates, to parties for contributions to or coordinated expenditures with federal candidates, or independent expenditures expressly advocating the election or defeat of federal candidates. Those activities must be funded with money that complies with federal law, also known as “hard money.” Soft money was used by the political parties to support generic party activities; so-called mixed activities, such as voter registration and get-out-the-vote drives, that support state and local as well as federal candidates; and spending on communications supporting or opposing candidates but not using words of express advocacy. The Federal Election Commission (“FEC”) had held that political party committees could use money that does not comply with the requirements, limitations, and prohibitions of federal campaign law—

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44 Unlike Congress, the members of the McConnell panel appeared to be somewhat squeamish about the “soft money” term. All four opinions preferred to characterize BCRA’s soft money title as the regulation of “nonfederal funds.” See McConnell, 251 F. Supp. 2d at 184, 187-88 (per curiam) (listing “soft money” as an example of nonfederal funds); id. at 279 n.30 (Henderson, J., concurring in the judgment in part and dissenting in part) (“[T]his opinion generally uses the terms ‘federal funds’ and ‘nonfederal funds’ in lieu of ‘hard money’ and ‘soft money.’”); id. at 499, 653 (Kollar-Kotelly, J.) (noting “soft money” as an alternate name for nonfederal money); id. at 758 (Leon, J.) (listing “soft money” as an example of nonfederal funds in the same way the per curiam opinion does).
that is, soft money—to pay for some significant portion of these activities.\textsuperscript{45}

Title I of BCRA adds six distinct regulations of soft money to Section 323 of the Federal Election Campaign Act ("FECA"). The first, Section 323(a), prohibits the national parties from dealing in soft money. Specifically, it prohibits the national political party committees from soliciting, receiving, transferring, spending, or directing to another person or committee any funds that do not comply with federal campaign law. Next, Section 323(b) bans state and local political parties from using soft money contributions for something defined by FECA Section 301 (20)(A) as "Federal election activity." This consists of (i) voter registration activities within 120 days before a regularly scheduled election for federal office; (ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for federal office appears on the ballot; (iii) a public communication that refers to a clearly identified candidate for federal office which promotes or opposes that candidate, even if it does use the magic words of express advocacy; and (iv) services provided by party staffers who spend more than 25 percent of their time working in connection with a federal election. Third, Section 323(c) requires that the expenses political parties incur in raising the funds that will pay for federal election activities must be paid from hard money. Fourth, Section 323(d) prohibits political parties from soliciting funds for or donating funds to Section 501(c) organizations that make expenditures in connection with federal elections or to Section 527 organizations.\textsuperscript{46} The provision deals with the fact that the parties have at times raised money for, or directed money to, these entities, which have then used the funds to aid party candidates without complying with FECA's requirements and restrictions. Fifth, Section 323(e) prohibits federal candidates and officeholders from soliciting, receiving, spending, transferring, or directing soft money in connection with any election for federal, state, or local office.\textsuperscript{47} Finally, Section 323(f) prohibits state and local candidates from spending soft money on electioneering communications.


\textsuperscript{46} Section 501(c) and Section 527—the sections refer to the Internal Revenue Code—organizations are not-for-profits that participate in electoral politics.

\textsuperscript{47} Federal officeholders running for state office may solicit, accept, and spend soft money as part of their state campaigns provided they comply with applicable state laws.
that support or oppose federal candidates even if these fall short of express advocacy.

B. The Decision

How did these six provisions fare in the three-judge court's decision in *McConnell*? The short answer is: one provision was completely invalidated; one provision was entirely sustained; one provision was largely sustained, possibly even entirely sustained, although it is also possible that part of it was invalidated; two provisions were sustained in part and invalidated in larger part; and one provision did not receive conclusive treatment at all although apparently it survived at least in part.

1. 323(a): National Party Soft Money

The complete ban on national party soft money was, to a considerable degree, invalidated. Instead, as a result of Judge Leon's opinion, it was converted into a ban on the national parties' use of soft money only on expenditures for public communications that promote or oppose clearly identified candidates for federal office. Judge Henderson would have invalidated the entire measure; Judge Kollar-Kotelly would have upheld the entire measure. Judge Leon agreed with Judge Kollar-Kotelly that as the soft money restrictions affect the sources and amounts of contributions to parties, not the amounts and purposes of party expenditures, the standard of review is the standard the Supreme Court has used in other contributions cases—whether the provision is "closely drawn" to prevent corruption and the appearance of corruption. He thus disagreed with Judge Henderson's view that as the soft money restrictions do not apply to contributions to candidates, the standard of review ought to be strict judicial scrutiny.

Judge Leon determined that national party expenditures on communications that promote or oppose federal candidates "directly affect federal elections," even when they avoid the "magic words" of express advocacy. As a result, the contributions to the parties from wealthy individuals, corporations, and unions that are used to fund these communications raise precisely the dangers of corruption and appearance of corruption that the Supreme Court has indicated can

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49 See id. at 389-94 (Henderson, J., concurring in the judgment in part and dissenting in part). Judge Henderson relied heavily on *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), which held that a restriction on contributions to a committee that engaged in expenditures in connection with a ballot proposition campaign is subject to strict scrutiny.
justify restrictions on contributions. But he concluded that the requirement that the national political parties fund all their activities with hard money went too far. Judge Leon noted that many national party activities, such as the support of state and local candidates in off-year elections, have no bearing on federal elections. Furthermore, he determined that party spending on mixed activities, such as get-out-the-vote drives in connection with an election in which both federal and state candidates are on the ballot "at the most indirectly affect federal elections." As much of the benefit from these expenditures goes to nonfederal candidates, he concluded there was insufficient evidence to show that contributions funding these activities raise a danger of corruption or the appearance of corruption of federal candidates sufficient to justify the hard money requirement. So, Judge Leon in effect rewrote Section 323(a), lifting one, but only one, of the four subsections in the definition of federal election activity in Section 301(20)(A), which had been intended to define the scope of the soft money ban for state and local parties; importing it into Section 323(a); and then saving that part of Section 323(a), but only that part, which he had just placed there.

2. Section 323(b): State and Local Party Soft Money

Judge Leon, and thus the court, took the same approach to state and local party soft money. Once again, he concluded that public communications that clearly promote or oppose a federal candidate, even if they avoid the magic words of express advocacy, have a direct bearing on federal elections; that federal candidates are likely to be aware of and grateful for donations that fund such communications that benefit them; and that the public is likely to perceive "that the special access and influence it believes are accorded to these donors is in gratitude for that assistance." As a result, he upheld the ban on use of soft money to pay for state and local party public communications in support of or opposition to clearly identified federal candidates.

But Judge Leon held unconstitutional the requirement that state and local parties use only hard money to pay for the other federal election activities, that is, voter registration activities within four months of an election; voter mobilization and generic party activities in connection with an election in which a federal candidate is on the ballot, and the payment of the costs of party staff who devote a quar-

51 Id. at 763-68.
52 Id. at 768.
53 Id. at 769.
54 Id. at 786.
ter or more of their time to federal candidates. These were mixed activities that plainly have some bearing on federal elections. Indeed, the FEC has long regulated state and local party spending on federal election activities, and has required that these activities be funded with a mix of hard and soft money. Judge Leon, however, concluded that because much of the benefit of these activities is enjoyed by state and local candidates, federal candidates are unlikely to feel indebted to the soft money donors who contribute to these activities, and the public is unlikely to perceive this as a source of corruption. As a result, Congress cannot limit the use of soft money for these activities.

Finding insufficient evidence that funds used for state and local party federal election activities create a danger of the corruption, or appearance of corruption, of federal candidates, Judge Henderson voted to invalidate the state and local party soft money ban. Conversely, Judge Kollar-Kotelly found there was sufficient evidence that contributions for these activities raise the specter of undue influence and loss of public trust, and would have sustained all of them. Consequently, Judge Leon's differentiation among the various statutorily defined federal election activities—his finding that expenditures on public communications supporting or opposing clearly identified federal candidates are intimately connected with federal elections and present the danger of corruption but that expenditures on voter registration, voter mobilization, and party administrative overhead that support both federal and state candidates are not sufficiently linked to federal elections as to present a danger of corruption or the appearance of corruption—became the opinion of the court.

3. Section 323(c): Party Fund-raising

It is actually quite difficult to determine how the McConnell court dealt with this section of BCRA. Judge Henderson concluded that, as this section built on the provision limiting state and local party federal election activities, it automatically fell with that provision. Judge Kollar-Kotelly observed that this section was not specifically challenged by any plaintiff. Judge Leon's opinion does not appear to mention it at all, and neither does the per curiam. Indeed, this

55 Id. at 778-80.
56 Id. at 388-422 (Henderson, J., concurring in the judgment in part and dissenting in part).
57 Id. at 651-716 (Kollar-Kotelly, J.).
58 Id. at 412 (Henderson, J., concurring in the judgment in part and dissenting in part).
59 Id. at 705 (Kollar-Kotelly, J.).
60 See id. at 790 (Leon, J.) (going directly from discussion of Section 323(b) to discussion of Section 323(d) without mentioning Section 323(c)).
subsection is not included in the per curiam's chart laying out the court's rulings on a subsection by subsection basis.\footnote{Id. at 187 (per curiam).}

One reading of the court's action is that with one negative vote and two silences, Section 323(c)'s restriction on national, state, and local party fund raising survived unscathed. On the other hand, given that Judge Leon joined Judge Henderson in holding unconstitutional three of the four elements of the statutory definition of "Federal election activity," it is difficult to see how a statutory subsection premised on the statutory definition of "Federal election activity" could survive. By the logic of Judge Leon's treatment of Sections 323(a), 323(b), and 301(20), Section 323(c) should survive only to the extent that it requires expenses incurred raising money to pay for public communications that promote or oppose federal candidates to be paid exclusively from hard money. Since, as a result of Judge Leon and Judge Henderson's determinations, the other "federal election activities" could still be financed with soft money, presumably the expenses parties incur to raise that soft money could be paid for with soft money as well. To be sure, no one on the panel actually said this, but it seems more consistent with the approach of the majority than a complete validation of the section.

4. Section 323(d): Party Solicitation for and Donations to Tax-Exempt Organizations

Judges Henderson and Leon combined, over the opposition of Judge Kollar-Kotelly, to invalidate this section.\footnote{Compare id. at 412-17 (Henderson, J., concurring in the judgment in part and dissenting in part) (invalidating section 323(d)), and id. at 790-91 (Leon, J.) (same), with id. at 705-07 (Kollar-Kotelly, J.) (upholding section).} Both judges in the majority relied in part on the breadth of the statutory language, particularly the fact that the section precludes all party financial transfers to tax-exempt organizations, whether or not the recipient organization uses the funds to affect federal election activity.\footnote{Judge Kollar-Kotelly found there was sufficient "evidence in this case and the record before Congress" of the role played by tax-exempt organizations in "circumventing FECA's contribution restrictions," id. at 707, to justify the restriction on party solicitation for transfer to tax-exempt organizations as a loophole closing measure.}

5. Section 323(e): Fund-raising by Federal Candidates and Officeholders

All three judges agreed that the core of this section—the ban on federal candidates and officeholders raising soft funds in connection with any federal, state, or local election—is constitutional. This is the only section of BCRA that all three members of the \textit{McConnell} court
agreed is constitutional. However, Judges Henderson and Leon each thought that a part of the section was unconstitutional, although they found different parts unconstitutional. As a result it is difficult to determine what, if any, part of the section was held unconstitutional.

In noting that this is the only section that all three judges voted to uphold, I am really pointing out that this is the one section that Judge Henderson voted to uphold. Indeed, Judge Henderson found that it withstood strict judicial scrutiny. The key to her vote here is that this section, unlike the four previous provisions of Title I, regulates only federal candidates and officeholders, not political party committees or other political committees. Although she found "defendants' generalized, anecdotal evidence" of corruption and the appearance of corruption inadequate to sustain restrictions on political parties or independent organizations, that evidence was enough to support restrictions on federal candidates and officeholders since it is "hardly a novel or implausible proposition that a federal candidate's solicitation of large donations from wealthy individuals, corporations and labor organizations... can raise an appearance of corruption."

"[I]n severing the most direct link between the federal candidate and the nonfederal donor... section 323(e) can serve to prevent the appearance of corruption where it is the most acute." Moreover, by leaving federal candidates and officeholders free to associate with their parties in other significant ways—including hard money fund-raising, attending party fund-raising events, and soft money fund-raising for tax-exempt organizations—Section 323(e) "is no more restrictive of political speech than may be necessary to prevent apparent corruption of the federal candidates and officeholders it regulates."

Judge Henderson did vote to invalidate a small portion of this subsection. Section 323(e)(1)(A) provides that a federal candidate or official may not "solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of [FECA]." As Judge Henderson had voted to invalidate the BCRA provision defining

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64 Id. at 417-22 (Henderson, J., concurring in the judgment in part and dissenting in part); id. at 707-08 (Kollar-Kotelly, J.); id. at 791 (Leon, J.).
65 Id. at 420 (Henderson, J., concurring in the judgment in part and dissenting in part).
66 Id. at 421.
67 Id. at 422.
"Federal election activity," she also voted to strike this phrase from Section 323(e)(1).  

Judge Leon voted to uphold the core ban on federal candidates and officeholders raising soft funds in connection with any election and he also voted to uphold the ban on receiving soft funds in connection with the federal election activity defined in Section 301(20)(A), including this time the funds for such mixed activities as voter registration, voter mobilization, and party committee staff salaries. But then he dissented from the prohibition on a federal candidate or officeholder soliciting soft funds on behalf of his national party. According to Judge Leon, this threatens fund-raising activity which "is fundamental to the successful operation of the major national parties" and is unjustified by the anti-corruption goal since most nonfederal funds are used by the parties for activities that do not directly affect federal elections. As a result, Judge Leon would affirm a complete ban on federal candidates and officials receiving soft money, but would enable them to solicit soft money for those activities of the national parties that do not directly affect federal elections.

It is not completely clear how the efforts of Judge Henderson and Judge Leon to knock out part of Section 323(e) fit together or how they affect the outcome. As Judge Leon voted with Judge Kollar-Kotelly to uphold the prohibition on federal candidates and officeholders receiving, directing, or transferring nonfederal funds in connection with any election, that portion of the statute was upheld notwithstanding Judge Henderson's disagreement. But Judge Leon's vote to invalidate that portion of the statute that would ban federal candidates and officeholders from soliciting funds when combined with Judge Henderson's vote to strike completely the reference to "funds for any Federal election activity" from Section 323(e) appears to mean that on this point Judge Leon actually prevailed, even though both Judge Leon and the per curiam state that he is in dissent on this point.

Again, as with Section 323(e), we can only hope that the Supreme Court will be clearer, and more accurate, than the members of the three-judge court in telling us what they have decided.

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69 McConnell, 251 F. Supp. 2d at 417 n.173 (Henderson, J., concurring in the judgment in part and dissenting in part).
70 Id. at 791 & n.95 (Leon, J.).
71 Id. at 792.
72 Id.
73 Oddly, neither the per curiam opinion nor Judge Leon's opinion actually acknowledged that Judge Henderson voted to invalidate part of Section 323(e). Both opinions stated that she voted to uphold section 323(e) in its entirety, even though she did not. See id. at 184, 187 (per curiam opinion); id. at 791 (Leon, J.).
74 Id. at 184 (per curiam); id. at 791 (Leon, J.).
6. Section 323(f): Restrictions on State Candidates

Judges Kollar-Kotelly and Leon agreed that this provision, which requires that when state candidates spend money on public communications that support or oppose clearly identified candidates for federal office they must use hard money, is constitutional. So, Section 323(f) is sustained. Judge Henderson would have thrown it out as inseverable from the rest of the soft money ban, which she had voted to invalidate.

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So, to recap on soft money, under the court’s ruling, Section 323(a), which was the blanket ban on national parties having anything to do with soft money, would apply only to national party expenditures on public communications that promote or oppose clearly identified candidates for federal office—in other words, party issue ads. The rest of the subsection was invalidated. Similarly, the court voted to narrow Section 323(b), which requires that state and local parties use only hard money for four defined federal election activities, to apply just to party issue ads. It is difficult to determine what the court decided about Section 323(c)’s requirement that parties use only hard money to pay their fund-raising expenses; either it emerged unscathed or the court limited it to fund-raising for electioneering ads. Section 323(d) restricting political party support for tax-exempt organizations was held unconstitutional in its entirety. Section 323(e) was upheld almost in its entirety; however, it appears that as a result of the interplay of the Henderson and Leon opinions, the court ruled that it may not be applied to prevent federal candidates and officeholders from soliciting soft money for the nonfederal activities of their parties. Finally, Section 323(f) was upheld in its entirety.

C. Analysis

The three-judge court awarded a very significant half-a-loaf to soft money reform. Although the court upheld only the bans on federal candidate and officeholder fund raising and on party use of soft money for candidate advocacy, these are probably the campaign activities that have been the greatest source of public concern. Candidate advocacy is the number one use of party soft money. As Judge

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75 Id. at 708 (Kollar-Kotelly, J.).
76 Id. at 792 (Leon, J.).
Leon suggested, this is the most direct form of party aid to candidates and the use of large individual donations and corporate and union treasury funds to pay for party advocacy concerning candidates is the most blatant evasion of campaign finance law. By the same token, some supporters, as well as opponents, of reform had been troubled by the possibility that a general limit on soft money would curtail spending on voter registration and get-out-the-vote drives, which have been important party programs for increasing citizen participation. Indeed, the Levin Amendment relaxes some of BCRA's soft money limitations to permit parties to raise additional funds for voter mobilization activities. By requiring that only hard money be used for party advocacy of candidates, but permitting the unrestricted use of soft money for voter registration, voter mobilization, and generic party activities, the court may have struck a balance that many reformers could be comfortable with. It is also significant that two of the three members of the court found the standard of review of limitations on contributions to political parties is not strict scrutiny but the less restrictive review employed when contributions to candidates are at issue. This also facilitates regulation of party campaign finance practices.

On the other hand, the court's ruling also gave at least half-a-loaf to the opponents of reform. Candidate advocacy may be the single largest use of soft money, but it accounts for less than half of soft-money-funded party spending. The decision would allow the flow of most soft funds into the parties unabated. Moreover, although candidate advocacy may be the most blatant use of soft money, funds from large donors, corporations, and unions are also used to pay for other party activities. Voter registration and mobilization are surely desirable activities but large private donations that fund these programs can be a source of donor influence with parties and candidates. In asserting that he found it implausible that federal candidates and officeholders would feel grateful to donors who provide substantial sums to pay for activities that benefit federal and nonfederal candidates simultaneously, Judge Leon appeared to be conflating the concept of mixed activities with the notion of indirect influence. If spending on voter registration and get-out-the-vote benefits candidates, it is hard to see why the "federal candidate's sense of indebtedness" is attenuated just because the spending benefits nonfederal candidates, too.

Moreover, Judge Leon's invalidation of three of the four defined state party election activities, and his unwillingness to apply the na-

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spent $162 million on "electioneering issue ads" and that issue ads accounted for 37.8% of all party soft money spent in the 1999-2000 election cycle).

78 McConnell, 251 F. Supp. 2d at 779 (Leon, J.)
tional party soft money ban to these activities, should be particularly troubling to reformers precisely because he applied a lower standard of review. Judge Leon concluded that there was not enough evidence that large donations for voter registration, voter mobilization, or party administrative costs are a source of undue influence over federal officeholders to meet even the lower "closely drawn" standard.

Indeed, one implication of the Henderson-Leon decision is that the FEC's pre-BCRA regulations of soft money might also have been unconstitutional. For many years prior to BCRA's enactment, the FEC had subjected national and state party funding of mixed federal-state activities to disclosure and allocation requirements so that some significant portion of party spending on these programs had to be hard money funded. In fact, the FEC regulations required that most national party spending on mixed activities like voter registration, get-out-the-vote, generic communications, and administrative overhead had to be hard money funded; although, the FEC's allocation formulae tended to allow state parties to finance a larger share of these activities with soft money. If Judges Henderson and Leon are right that these expenditures are unlikely to have a corrupting effect on federal candidates or a demoralizing effect on public opinion—or that the defendants have failed to produce enough evidence of corruption or the appearance of corruption—then the pre-existing allocation and disclosure requirements are arguably unconstitutional, too. To be sure, they do not say this. But if there is no evidence that federal candidates are indebted to the donors who finance mixed programs and if, as Judge Leon contends, the spreading of the benefits of these programs across a range of federal and nonfederal candidates dilutes even further the danger of corruption, then it is unclear how the FEC could require that these programs be even partially hard money funded.

II. **McConnell and the Regulation of Issue Advocacy**

**A. BCRA and Electioneering Communications**

The other key provision of BCRA creates and regulates a new category of federal campaign activity known as "electioneering communication" in order to deal with the problem of so-called issue advocacy. As we all know, in *Buckley v. Valeo* the Supreme Court sustained FECA's requirement that persons making independent expenditures in federal elections over a threshold amount must comply with federal reporting and disclosure rules. In so doing, the Court recognized that the statutory term "expenditure," when applied to the activities of individuals and groups other than candidates and their political committees, raised dangers of vagueness and overbreadth; it "could be interpreted to reach groups engaged purely in..."
issue discussion.\textsuperscript{79} To avoid the First Amendment problem, the Court construed the statute to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."\textsuperscript{80} In a footnote, the Court indicated this construction would restrict the statute "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"\textsuperscript{81} These have since become notorious as the "magic words" of "express advocacy." A decade later, in \textit{FEC v. Massachusetts Citizens for Life, Inc.} ("MCFL"),\textsuperscript{82} the Court determined that the same express advocacy standard would be read into the federal statutory ban on the use of corporate and union treasury funds to pay for expenditures in connection with federal election campaigns.

Under \textit{Buckley} and \textit{MCFL}, only advertisements that expressly advocate the election or defeat of a clearly identified federal candidate are subject to FECA. Advertisements that promote or oppose a federal candidate but avoid the "magic words" of express advocacy are considered to be "issue advocacy," whether or not they actually include the discussion of any issues. Such issue advocacy is exempt from federal regulation: the sponsors of issue ads need not disclose the sources of their funding and corporations and unions can spend treasury funds to pay for such ads. By one widely accepted estimate, nearly $500 million was spent on unregulated issue advocacy advertising in the 2000 election cycle.\textsuperscript{83} BCRA addresses this situation by defining a new form of expenditure called "electioneering communication" and then plugging that term into both FECA's disclosure requirement and the ban on corporate and union treasury funds in federal elections.

Actually, fearful that the courts might be unsympathetic to its effort to expand the scope of regulable election speech, Congress did something unusual. It adopted two definitions of electioneering communication—a primary definition, and a backup definition that would kick in if the primary definition were invalidated. The primary definition has four parts. It defines an electioneering communication, subject to federal disclosure regulation and the ban on the use of corporate and union treasury funds, as (i) a broadcast, cable, or satellite communication that (ii) refers to a clearly identified candi-

\textsuperscript{79} Buckley v. Valeo, 424 U.S. 1, 79 (1976).
\textsuperscript{80} Id. at 80.
\textsuperscript{81} Id. at 80 n.108, 44 n.52.
\textsuperscript{82} 479 U.S. 238 (1986).
\textsuperscript{83} McConnell, 251 F. Supp. 2d at 304 (Henderson, J., concurring in the judgment in part and dissenting in part); id. at 527 (Kollar-Kotelly, J.); id. at 879 (Leon, J.).
date for federal office; (iii) is broadcast within sixty days of a general election or thirty days of a primary; and (iv) is targeted on the candidate mentioned by being aired in the candidate’s constituency. The backup definition, which becomes law only in the event that the primary definition is tossed out by the courts, has three parts. First, like the primary definition, it applies only to broadcast, cable, or satellite communications. Second, the communication must promote or support, or oppose or attack, a candidate regardless of whether it uses the magic words of express advocacy. Finally, the communication must be “suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.”

B. The Decision

The three-judge court, with Judge Leon again playing the decisive role, invalidated the primary definition of electioneering communication but modified and then upheld the backup definition. In so doing, the court—again, really just Judge Leon—deleted the last element of the backup definition so the definition that resulted was not only far broader then that the backup definition passed by Congress, but also in some respects even broader than the primary definition, which the court invalidated as overbroad.

How did this occur? Once again, the opinions of Judges Henderson and Kollar-Kotelly are straight-forward. Judge Henderson concluded the issue was entirely controlled by Buckley’s express advocacy test. In her view, Buckley made express advocacy a constitutional prerequisite for regulation of the communications of noncandidates. As both definitions of electioneering communication went beyond express advocacy, they were unconstitutional. Judge Kollar-Kotelly, by contrast, concluded that Buckley’s express advocacy test was only “a means of statutory construction” that dealt with the “vague and subjective terms associated with the provisions of FECA” and “not a substantive rule of constitutional law.” Putting the express advocacy test to one side, in her view the question is whether there is a constitutional basis for regulating electioneering communication, and

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84 BCRA, Pub. L. No. 107-155, §201, 116 Stat. 81, 88-89. With the targeting requirement, an ad attacking the McCain-Feingold bill is subject to regulation only if it is aired in McCain’s state when he is running for reelection, or in Feingold’s state when he is running for reelection. The targeting requirement also requires that the communication must be capable of being received by 50,000 or more people in the constituency.

85 Id.

86 McConnell, 251 F. Supp. 2d at 360-67 (Henderson, J., concurring in the judgment in part and dissenting in part).

87 Id. at 597 (Kollar-Kotelly, J.)

88 Id. at 603.

89 Id. at 597.
whether the statutory definition meets. First Amendment standards of clarity and narrow tailoring. She concluded that issue advocacy advertisements broadcast during the sixty- and thirty-day preelection periods were virtually indistinguishable from express advocacy in terms of their effect on elections, that the constitutional concerns justifying regulation of express advocacy equally justify regulation of electioneering issue advocacy, and that some regulation of “electioneering communication” is necessary to prevent the widespread evasion of federal disclosure requirements and the ban on the use of corporate and union treasury funds.  

She determined that the primary definition was not vague and, giving particular attention to the sixty-/thirty-day test, that it was not overbroad, either. 

With his colleagues so far apart, once again Judge Leon forced a resolution somewhere between them, although, this time he landed far closer to Judge Kollar-Kotelly. Judge Leon agreed with Judge Kollar-Kotelly that Buckley’s express advocacy test was meant only to cure the vagueness in the original FECA language, and was “never intended . . . to be a constitutional rule of law limiting the power of Congress to regulate expenditures for certain uncoordinated advocacy that directly affects federal elections . . . .” He also agreed that most of the issue advocacy that would be caught by the primary definition is in fact indistinguishable from express advocacy, that issue advocacy is intended to and does have an impact on federal elections, and that the concerns that justify the regulation of express advocacy also justify the regulation of such issue advocacy.

However, Judge Leon also found that the primary definition would capture a certain number of true issue ads, that is advertisements that, even though they mention federal candidates and are aired in the immediate preelection period, are primarily intended to address legislative or other issues and not the impending election. Looking to two controversial reports by outside experts that were part of the record in the case, Judge Leon estimated that if BCRA’s primary definition of electioneering communication had been applied in the 1998 and 2000 elections, 14.7% and 17%, respectively, of the ads it would have regulated would have been true issue ads. For Judge Leon, that rendered the statute fatally overbroad.

Judge Leon then turned to the backup definition, which, unlike the primary definition, does not include a temporal test. He concluded that by eliminating the sixty-/thirty-day rule and focusing instead on whether an ad supports or opposes a candidate, the primary

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90 Id. at 594-616.
91 Id. at 616-650.
92 Id. at 793 (Leon, J.)
93 Id. at 798.
definition eliminates the overbreadth problem. However, in his view, the final clause in the backup definition, limiting "electioneering communication" to messages that are "suggestive of no plausible meaning other than an exhortation to vote," is unconstitutionally vague since it would be "extremely difficult, if not impossible, for a speaker to determine with any certainty prior to airing an ad whether it meets that requirement." To remedy the vagueness problem he employed the "saving construction" of simply striking out the clause. As a result, he reduced the backup test to the two elements of (i) a broadcast, cable, or satellite message, that (ii) supports or opposes a candidate. As Judge Leon notes, this renders the definition of electioneering communication for purposes of the disclosure of communications by independent groups and the ban on corporate and union treasury funds quite similar to the definition of the national and state political party "public communication" for which the use of soft money is banned. Although Judge Kollar-Kotelly "strongly believe[d]" the primary definition to be constitutional, she joined without discussion Judge Leon's opinion regarding the backup definition, thereby making his opinion dispositive on this point.

C. Analysis

Although the court struck down BCRA's primary definition of electioneering communication, this decision—including both the Kollar-Kotelly and Leon opinions—is almost certainly the strongest judicial statement ever that regulation of election-related communications that go beyond the magic words of express advocacy is constitutional. Previously, the federal courts were nearly unanimous in treating the express advocacy/magic words test as a constitutional requirement. Only one court—the Ninth Circuit in FEC v. Furgatch—had suggested there was room for even modest regulation beyond the magic words and Furgatch limited itself to a finding that the advertisement before it, which lacked the magic words, was "susceptible of no other reasonable interpretation but as an exhortation to vote . . ." This was the source of the limiting final clause in

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94 Id. at 802.
95 Id.
96 Id. at 803.
97 Id. at 650 (Kollar-Kotelly, J.).
98 Id.
100 807 F.2d 857 (9th Cir. 1987).
101 Id. at 864.
BCRA’s backup definition. Indeed, Congress’s reliance on *Furgatch* in crafting the backup test suggests that some reform pessimists were doubtful that the courts would ever uphold anything more restrictive than *Furgatch*. So the opinions of Judges Kollar-Kotelly and Leon that *Buckley*’s express advocacy test is not constitutionally mandated and a much broader test is constitutionally permissible are quite significant.

Just as important is the court’s finding that much of contemporary issue advocacy is really electoral advocacy. Indeed, all three judges acknowledged that the express advocacy/magic words test fails utterly to distinguish between election-related speech and nonelection-related issue speech. And, after reviewing the record’s extensive evidence concerning issue advocacy, including the story boards of many particular issue ads, both Judges Kollar-Kotelly and Leon agreed that in many cases electioneering communication that takes the form of issue advocacy is the functional equivalent of express advocacy. Consequently, they found that the voter information and anticorruption rationales that justify the disclosure of the sources of the funds used for express advocacy and the ban on the use of corporate and union funds to pay for express advocacy also justify comparable regulation of electioneering communications that do not use the magic words. For these judges, the question is not whether electioneering communication that does not use words of express advocacy can be regulated but only whether Congress wrote an electioneering communication definition that is sufficiently clear and narrowly tailored.

Although it is uncertain whether the panel’s findings and reasoning will have any persuasive value with the Supreme Court, it should be heartening to reform advocates that at least two of the three judges who immersed themselves in the close review of specific issue

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102 Before BCRA, the *Furgatch* standard had been adopted by the FEC in a regulation defining express advocacy, but several courts invalidated that regulation, see, e.g., FEC v. Me. Right to Life Comm., Inc., 98 F.3d 1 (1st Cir. 1996); Right to Life of Dutchess County, Inc. v. FEC, 6 F. Supp. 2d 248, 253-54 (S.D.N.Y. 1998) (noting the new FEC regulation, “encompass[ed] substantially more communication than is permissible pursuant to the statute, as narrowed by the Supreme Court to avoid First Amendment overbreadth problems”); or otherwise repudiated *Furgatch*, see, e.g., Fla. Right to Life, Inc. 238 F.3d 1288 (11th Cir. 2001); Citizens for Responsible State Gov’t PAC v. Davidson, 236 F.3d 1174 (10th Cir. 2000) (explaining that state regulation of independent campaign advocacy that goes beyond the magic words violates the First Amendment); FEC v. Christian Action Network, Inc., 110 F.3d 1049 (4th Cir. 1997) (treating *Furgatch* as inconsistent with Supreme Court precedent). *But see* Crumpton v. Keisling, 982 P.2d 3 (Or. Ct. App. 1999) (applying *Furgatch* to Oregon disclosure law enforceable by civil, but not criminal, sanctions).

103 *McConnell*, 251 F. Supp. 2d at 303 (Henderson, J., concurring in the judgment in part and dissenting in part); id. at 529, 532 (Kollar-Kotelly, J.); id. at 874 (Leon, J.).

104 *Id.* at 599-645 (Kollar-Kotelly, J.); *id.* at 793 (Leon, J.).
ads were willing to conclude that these are electioneering communications that are the functional equivalent of express advocacy and that they can be regulated to deal with the same dangers that express advocacy poses. Moreover, although Judge Leon invalidated the primary definition and upheld only the backup definition, due to his excision of the backup definition’s final clause, the result is quite expansive—possibly as broad if not broader than the primary definition. The backup definition has no temporal limit. It could apply to ads aired in February or March of an election year, or conceivably in the year before, and not just in the September or October before the election.

As Judge Leon noted, the consequence of his deletion of the final clause from the backup definition was to convert that definition into something very close to the “public communication” provision in the soft money title’s definition of party federal election activity. This was the only part of the definition of federal election activity that Judge Leon held could be applied to require state and local parties to use hard money, and he then read it into the regulation of national parties to require that national party spending on public communications that support or oppose federal candidates be hard money funded. In upholding the public communication portion of the party soft money ban, Judge Leon gave weight to the fact that “the ‘speaker’ running this type of advertisement is a national or state party” since that “supports the defendants’ contention that most of the advertisements, referring to a candidate in this manner, will be intended to promote or attack that particular candidate.” As he explained:

A political party, as opposed to corporations and other nonparties, exists to a large extent for the purpose of electing candidates of its party to office . . . . While not all party advertisements are intended to directly influence a federal election . . . the presumptive electoral focus [sic] of parties suggests that party communications that do mention candidates are, more likely than not, to have some impact on a federal election.

Judge Leon also explained that “political parties are sophisticated participants in the election arena” and thus are “much more likely to recognize the line between candidate advocacy and genuine issue advocacy.” Therefore, they are likely to avoid unintentionally subjecting themselves to regulation. In other words, the especially close ties parties have to candidates and their expertise in election law justify

\[105\] Compare id. at 773-77 (Leon, J.), and id. at 780-90, with id. at 799-803.

\[106\] Id. at 786-87 (citing Richard Briffault, The Political Parties and Campaign Finance Reform, 100 COLUM. L. REV. 620, 655-57 (2000)).

\[107\] Id. at 787.

\[108\] Id. at 788.
treating all party communications that support or oppose candidates as electioneering that must be funded with hard money.

But as a result of his editing of the backup definition, Judge Leon applied the same definition of electioneering communications to corporations, unions, and all individuals and interest groups. He acknowledged that "the sophistication in electioneering communications of the parties being regulated is not equally applicable to the backup definition." That said, it is hard to see why if the application of a fairly broad definition of public communication to the parties is justified by their special ties to candidates and their political sophistication, the very same definition can also be applied to organizations that lack those ongoing institutional ties and expertise.

III. THE DECISION'S DISPOSITION OF BCRA'S OTHER PROVISIONS

A. The Wellstone Amendment

BCRA Sections 203 and 204 engage in an interesting two-step with respect to the regulation of not-for-profit corporations. Section 203, also known as the Snowe-Jeffords Amendment, applies the definition of electioneering communication to the long-standing ban on the use of corporate treasury funds in federal elections, and then provides an exception for the communications of corporations organized under Sections 501(c)(4) and 527 of the Internal Revenue Code. In other words, these political not-for-profit organizations can use treasury funds to engage in electioneering communications and may do so without complying with FECA's disclosure requirements. Section 204, also known as the Wellstone Amendment, then undoes much of Section 203 by providing that the exception does not apply to a "targeted communication"—that is a broadcast, cable, or television ad which promotes or opposes a candidate and is aired to the candidate's constituency—by the otherwise protected not-for-profit.

Both Section 203 and Section 204 are shadowed by the Supreme Court's decision in MCFL, which held that the ban on the use of corporate treasury funds in federal elections could not constitutionally be applied to organizations that were created for political, not business, purposes; that do not have shareholders or other persons affiliated so as to have a claim on the corporation's assets or earnings; and that do not accept contributions from business corporations. Many campaign finance experts had assumed that MCFL's exclusion of political corporations from the ban on the use of corporate treasury funds means that something like Section 203's exclusion of the elec-

109 Id. at 803.
tioneering communications of political not-for-profit corporations from regulation is constitutionally mandated. As a result, Section 204's re-regulation of not-for-profits' electioneering communication has been seen as constitutionally suspect.

Section 204, however, survived the three-judge court. Unsurprisingly, Judge Henderson voted to throw out the provision along with BCRA's regulation of electioneering communications generally. Judge Kollar-Kotelly found that not all political not-for-profits would qualify for MCFL's protection and thus subjecting the not-for-profits to regulation is not unconstitutional on its face, although a not-for-profit corporation that qualified for MCFL treatment would be constitutionally entitled to exemption. Judge Leon agreed with Judge Henderson that it would be unconstitutional to apply Section 204 to an MCFL corporation, but concurred with Judge Kollar-Kotelly that Section 204 is constitutional as applied to not-for-profit corporations that do not qualify for MCFL status. The distinction between the Kollar-Kotelly and Leon positions is quite nuanced—almost evanescent. Judge Kollar-Kotelly rejected the plaintiffs' facial challenge, but indicated that an MCFL exception is likely to be read into the statute to exclude MCFL-qualifying corporations in an appropriate as-applied case. Judge Leon said that the statute is unconstitutional as applied to MCFL-qualifying corporations, but constitutional as applied to non-MCFL-qualifying corporations. I think the effect is the same.

B. Other Disclosure Requirements

Section 201 imposes new disclosure provisions with respect to expenditures in excess of $10,000 on electioneering communications. This was generally sustained by the per curiam except for one subpart, Section 201(5), which requires the disclosure of contracts to make disbursements, in other words, plans for future independent expenditures. As Judge Henderson would have invalidated the entire disclosure section, all three judges agreed that the advance disclosure provision was unconstitutional.

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111 McConnell, 251 F. Supp. 2d at 373 (Henderson, J., concurring in the judgment in part and dissenting in part).
112 Id. at 639-43 (Kollar-Kotelly, J.). As Judge Kollar-Kotelly noted, the Supreme Court in MCFL did not invalidate the federal ban on the use of corporate treasury funds to pay for independent expenditures but simply found that MCFL and similar corporations were entitled to an exception.
113 Id. at 803-05 (Leon, J.).
114 Id. at 237-49 (per curiam).
115 Id. at 237-42.
C. Coordinated Expenditures for Electioneering Communications as Contributions

For most regulatory purposes, FECA treats coordinated expenditures as equivalent to contributions to the candidate with whom the expenditure is coordinated. Building on the new definition of "electioneering communication," Section 202 of BCRA provides that expenditures for electioneering communications that are coordinated with a candidate are also to be treated as contributions to the candidate with whom they are coordinated. The per curiam upheld this over Judge Henderson's dissent. 116

D. Coordinated and Independent Party Expenditures

The three-judge court displayed an unusual bit of unanimity and dealt reform a rare unqualified setback when all three judges voted to invalidate BCRA Section 213, which provides that once a party nominates a candidate, the party can make either independent expenditures on behalf of or coordinated expenditures with the candidate, but not both. Section 213 is a response to the Supreme Court's 1996 decision in Colorado Republican I. 117 Speaking through a plurality opinion, Colorado Republican I rejected the argument that political parties are incapable of making expenditures independent of their candidates and that all party expenditures supporting or opposing a candidate must be deemed coordinated with the party's candidate. Instead, the plurality found that political parties, like other groups, are capable of making independent expenditures; that the burden of proving the expenditure is not independent is on the FEC; and that, like the independent expenditures of all other campaign participants, party independent expenditures may not be subject to a dollar limitation.

The Colorado Republican I decision makes some sense on its facts. The case involved a state party expenditure on advertising aired very early in an election year that criticized the likely nominee of the opposite party. The expenditure was incurred six months before the party nominated its own candidate and was, in fact, not coordinated with any of the party's contenders. But although Colorado Republican I demonstrates that it is empirically possible for a party to engage in a truly independent expenditure, in most situations party independent expenditures seem implausible. Parties have institutionally close rela-

116 Compare id. at 216 (per curiam), with id. at 381-88 (Henderson, J., concurring in the judgment in part and dissenting in part).
tionships with and commitments to their nominees which belie the claim of independence. Indeed, in *Colorado Republican I* three justices who concurred in the result and were necessary to the majority referred to the "practical identity of interests between the two entities [parties and candidates] during an election"\(^\text{118}\) while the two dissenting justices found that "[a] party shares a unique relationship with the candidate it sponsors because their political fates are inextricably linked."\(^\text{119}\)

In Section 213, Congress sought to limit *Colorado Republican I* to its facts, while preventing the evasion of FECA's dollar limitations on party coordinated expenditures.\(^\text{120}\) Section 213's provision that once a party has nominated a candidate the party must thereafter choose between coordinated and independent expenditures seems sensible as once a party has nominated a candidate, the party and the candidate have the same goal—the candidate's election. Moreover, if a party has also begun to coordinate expenditures with a candidate, it is difficult to see how a party can also be independent of the candidate. The three-judge panel, however, disagreed, finding that *Colorado Republican I* gives a political parties an unqualified right to make independent expenditures on behalf of its candidates, even after it has a nominee and has coordinated expenditures with the nominee.\(^\text{121}\) All three judges voted to hold Section 213 unconstitutional.

**E. Other Provisions**

All three members of the court agreed, following the reasoning of Judge Henderson, to dismiss for lack of standing or ripeness the challenges to (i) the increases in and indexation of FECA's hard money limits;\(^\text{122}\) (ii) the so-called "millionaire provisions," which allow candidates who are being opposed by other candidates who spend defined large sums of money out of their own pockets to raise contributions in amounts greater than FECA ordinarily allows;\(^\text{123}\) and, (iii) the so-

\(^{118}\) *Id.* at 630 (Kennedy, J., concurring, joined by Rehnquist, C.J. and Scalia, J.).

\(^{119}\) *Id.* at 648 (Stevens, J., dissenting, joined by Ginsburg, J.).

\(^{120}\) The limitation on party coordinated expenditures was upheld against constitutional attack in *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) ("*Colorado Republican II*").

\(^{121}\) McConnell, 251 F. Supp. 2d at 388 (Henderson, J., concurring in the judgment in part and dissenting in part); *id.* at 650 (Kollar-Kotelly, J.); *id.* at 805-08 (Leon, J.).

\(^{122}\) See *id.* at 429-30 (Henderson, J., concurring in the judgment in part and dissenting in part); *id.* at 716 (Kollar-Kotelly, J., concurring with Henderson, J.); *id.* at 186, 188 (per curiam). Judge Leon did not address this issue but apparently concurred in Judge Henderson's finding of nonjusticiability.

\(^{123}\) *Id.* at 431-32 (Henderson, J., concurring in the judgment in part and dissenting in part); *id.* at 716 (Kollar-Kotelly, J., concurring with Henderson, J.); *id.* at 186, 188 (per curiam). Judge
called stand-by-your-ad provision, which limits the availability of broadcasting's lowest unit charge to federal candidates who either don’t attack their opponents or, if they do attack them, place in the ad a statement clearly identifying the sponsor. All three judges agreed that BCRA’s absolute ban on all political contributions by minors is unconstitutional, with Judges Henderson and Leon applying strict scrutiny and Judge Kollar-Kotelly declining to decide what level of review was appropriate since in her view the government had failed to produce sufficient evidence of parents using minors to circumvent the limits on the parental contributions to justify the total prohibition. The decision once again demonstrates the conceptual difference between voting and participating in campaign financing since minors have no right to vote. Finally, all three judges agreed that the provision requiring broadcast licensees to maintain and disclose records of all requests to purchase broadcast time concerning both elections and “any political matter of national importance” is unconstitutional.

IV. CONCLUSION

The three-judge court decision was surprising in its substance as well as in its length and delay. Prior to BCRA’s enactment many observers had assumed that, given Buckley’s express advocacy standard, issue advocacy regulation would be constitutionally problematic but that soft money control, except perhaps on the soft money used to fund issue advocacy, would be easy to sustain since the soft money rules limit contributions and the Supreme Court has been fairly deferential to contribution limits. The three-judge court reached the opposite result, crafting and upholding a fairly significant restriction on issue advocacy while striking down all restrictions on party soft money, except the ban on the use of soft money to fund party issue advocacy. Given the extreme fragmentation within the three-judge court and its failure to even find a common set of facts, let alone a

Leon did not address this issue but apparently concurred in Judge Henderson’s finding of non-justiciability.

Id. at 426-49 (Henderson, J); id. at 716 (Kollar-Kotelly, J., concurring with Henderson, J.); id. at 186, 188 (per curiam). Judge Leon did not address this issue but apparently concurred in Judge Henderson’s finding of nonjusticiability.

Id. at 422-26 (Henderson, J., concurring in the judgment in part and dissenting in part); id. at 808-11 (Leon, J.).

Id. at 717-18 (Kollar-Kotelly, J.).

See id. at 391 (Henderson, J., concurring in the judgment in part and dissenting in part); id. at 718 (Kollar-Kotelly, J., concurring in opinion of Leon, J.); id. at 811-13 (Leon, J.).

shared rationale for its holdings, it is unclear whether its rulings will have any persuasive effect at all with the Supreme Court. Still, for the moment, the decision may give us a sense of the shape of the questions before the Court, if not the Court's ultimate decision.

With respect to issue advocacy, Buckley's express advocacy holding is now truly open for reconsideration. Two federal judges have held that the express advocacy standard is not an immutable constitutional mandate, but merely the Supreme Court's effort to address the failure of Congress in the early 1970s to define the meaning of expenditure. In their view, "express advocacy" is no more than the Supreme Court's "first cut" at a definition of election-related communications undertaken well before the proliferation of new forms of campaign advertising that avoid the "magic words" and mock FECA's disclosure requirements and restrictions on corporate and union treasury funds. The real question for them was whether Congress had crafted a definition of electioneering communication which, in light of current campaign practices and the goals of campaign finance law, is as clear and narrowly tailored as First Amendment principles require. This is not to say, of course, that either of BCRA's tests will pass constitutional muster. Only one judge voted to uphold either the sixty/thirty-day rule or the backup test as written by Congress. While two judges endorsed the backup definition as rewritten by Judge Leon, his test seems open to both vagueness and overbreadth challenges. Still, the three-judge court's decision provides some basis for thinking that the Supreme Court may undertake a new effort to reconcile the competing goals of effective campaign finance regulation and the protection of nonelection-related speech, or else the Court will have to explain why the clearly useless "express advocacy" test continues to be required.

As for soft money, the three-judge court's decision sounds a warning to reformers not to assume that the soft money restrictions will automatically be saved by the contributions standard of review. Judge Henderson rejected that standard while Judge Leon, who claimed to be applying it, found that the government had failed to produce sufficient evidence that contributions given to the parties for activities not coordinated with or linked exclusively to federal candidates are a source of "corruption or the appearance of corruption" in the Buckley sense. Given the lack of a unified set of findings, and hundreds of pages of conflicting findings, a central issue for the Court will be the question of whether soft money presents the corruption danger. This is, in part, an empirical question, involving an assessment of the evidence in the record of just how much of an impact these expendi-

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129 McConnell, 251 F. Supp. 2d at 389-94 (Henderson, J., concurring in the judgment in part and dissenting in part); id. at 758-90 (Leon, J.).
tures have on federal elections, and how much of an impact the pursuit of soft money contributions has on governance. But, perhaps more importantly, this will involve a determination of just how much credit the Court will give to Congress's assessment of the electoral and political consequences of soft money and soft-money-funded expenditures. Congress clearly has far greater experience with and understanding of the role of campaign money in electoral politics and the legislative process than does the Court. Yet, relying on the First Amendment concerns that infuse this area, the Court has never given Congress carte blanche over campaign finance law.

Moreover, as Judge Leon emphasized, BCRA's soft money regulations bear directly on the political parties. As the fragmented Colorado Republican I and closely divided Colorado Republican II decisions indicate, there is no clear consensus on the Court concerning the constitutional rights of the political parties in the campaign finance process. The parties have been treated by different justices as, variously, independent actors, close adjuncts of the candidates, potential conduits for the contributions of large donors, and, as Judge Leon suggested, especially valuable players in the political process. The McConnell appeal will force the Court once again to come to grips with the uncertain place of the parties in the campaign finance system—and to consider the extent to which a Congress composed overwhelmingly of party politicians and party leaders should decide that question.