Washington Law Review

Volume 80 | Number 1

2-1-2005

Regulating the Mother's Milk of Politics: Why Washington's Campaign Finance Law Constitutionally Prohibits State Parties from Spending Soft Money on Issue Ads

Scott Holleman

REGULATING THE MOTHER'S MILK OF POLITICS: WHY WASHINGTON'S CAMPAIGN FINANCE LAW CONSTITUTIONALLY PROHIBITS STATE PARTIES FROM SPENDING SOFT MONEY ON ISSUE ADS

Scott Holleman

Abstract: The possibility that elected officials may exchange their votes on pending legislation for donations to help their re-election campaigns poses a serious threat to democratic government. To alleviate this risk, governments at the state and national levels regulate how politicians finance their campaigns. However, these regulatory efforts have been challenged on First Amendment grounds. In *Buckley v. Valeo*, the United States Supreme Court upheld certain campaign contribution limits, while declaring certain expenditure limits unconstitutional. The Washington State Supreme Court relied on the *Buckley* opinion in *Washington State Republican Party v. Washington Public Disclosure Commission*, when it ruled that the First Amendment barred the state from limiting certain expenditures by political parties on issue advertisements. However, in *McConnell v. Federal Election Commission*, which clarified and expanded upon the *Buckley* decision, the U.S. Supreme Court recently upheld some restrictions on issue ad expenditures. This Comment argues that, in light of the *McConnell* decision, the state court's decision misinterpreted *Buckley*. The Washington State Supreme Court improperly concluded that Washington State's prohibition on the expenditure of soft money for issue advertisements by the state's political parties was unconstitutional. Accordingly, this Comment calls for the state's Public Disclosure Commission to adopt rules barring such expenditures.

Campaign finance regulations present unique legal difficulties.[1] Limitations on raising or spending money to express political ideas interfere with the speech and associational rights that lie at the heart of the First Amendment.[2] At the same time, a total absence of regulation of campaign finances could permit large campaign contributions to compromise the integrity of democratic institutions.[3] Money is essential for effective political communication, yet it can lead to serious abuses of power.[4] Consequently, the United States Supreme Court has attempted

1. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 137 (2003) (asserting interdependence of electoral process and First Amendment freedoms justifies a lower standard of scrutiny for certain campaign finance regulations).

2. U.S. CONST. amend I. *See* Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 264 (1986). "Freedom of speech plays a fundamental role in a democracy; as this Court has said, freedom of thought and speech 'is the matrix, the indispensable condition, of nearly every other form of freedom.'" *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 327 (1937)).

3. *See* Buckley v. Valeo, 424 U.S. 1, 26 (1976) (discussing the corruption that can result from large financial contributions).

4. Because of these dual aspects of money, it is often called the "mother's milk of politics," a

to strike a delicate balance between these concerns in its campaign finance jurisprudence.[5]

Federal and state governments have had mixed success defending campaign finance regulations against constitutional challenges. For example, in *Buckley v. Valeo*,[6] the U.S. Supreme Court upheld statutory limitations on what people could contribute to political campaigns.[7] However, the *Buckley* Court struck down limitations on how much people could spend directly on election-related speech.[8] To avoid unconstitutional vagueness, the Court narrowly construed regulations on "independent expenditures"[9] so that they applied only to money spent "expressly advocating" a candidate's election or defeat.[10] This created a loophole for "issue ads," which do not explicitly call for a particular electoral outcome.[11] Relying on the *Buckley* decision, the Washington State Supreme Court held that a statute restricting the use of soft money[12] by the state's political parties to fund issue ads violated the First Amendment.[13] However, in the recent case of *McConnell v. Federal Election Commission*,[14] the U.S. Supreme Court upheld some limitations on issue ad spending; this undermines the rationale behind the Washington State Supreme Court decision.[15]

---

phrase generally attributed to Jesse Unruh, Speaker of the California Assembly from 1961 to 1968. People v. Hedgecock, 247 Cal. Rptr. 404, 410 n.1 (1988).

5. *See McConnell*, 540 U.S. at 137 (discussing need to weigh competing constitutional interests when dealing with campaign finance regulation).

6. 424 U.S. 1 (1976).

7. *See id.* at 58.

8. *See id.*

9. The phrase "independent expenditure" refers to election-oriented spending that is not coordinated with a candidate's campaign. *See id.* at 46–47.

10. *See id.* at 41–43 (addressing independent expenditure limit); *id.* at 78–80 (addressing independent expenditure disclosure requirements).

11. The phrase "issue ad" refers to advertisements that do not use words of "express advocacy," such as "Vote for Jones" or "Defeat Senator Smith." *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 126 (2003). These ads commonly appear on television shortly before an election and discuss a candidate's positions on issues. The use of such ads is called issue advocacy. *See infra* Part I.D.2.

12. "Soft money" refers to contributions to political parties that are not subject to any amount limitation. *See* McConnell, 540 U.S. at 122–26. In this context, the phrase refers to contributions to state political parties that are exempted from the normal limitations of RCW 42.17.640(6) (2004); this money is also referred to as "exempt." *See infra* Part II.A.

13. Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n, 141 Wash. 2d 245, 274, 4 P.3d 808, 824 (2000).

14. 540 U.S. 93 (2003).

15. *Id.* at 194.

This Comment argues that, in light of the *McConnell* decision, Washington State may prohibit the state's political parties from spending soft money on issue ads without violating the U.S. Constitution.[16] The Washington State Supreme Court misread *Buckley* to stand for the proposition that the First Amendment prevents the government from regulating the use of issue ads in political campaigns.[17] The *McConnell* Court clarified that the First Amendment allows such regulation of issue ads, and the Constitution's Due Process requirements are met if the regulation is not unconstitutionally vague.[18] Therefore, the Washington State Supreme Court erred in its analysis by failing to address the statute's vagueness and failing to apply the appropriate test from the *Buckley* decision.[19] A proper analysis, informed by the *McConnell decision*, should begin with a court classifying Washington State's soft money restriction as a contribution limitation.[20] The court should then analyze the provision's First Amendment implications under the *Buckley* Court's "closely drawn" test.[21] Finally, the court should conclude that the provision is not unconstitutionally vague and that it satisfies the closely drawn test because it furthers the same "sufficiently important" government interest and is more "closely drawn" than analogous federal provisions upheld in *McConnell*.[22]

Part I of this Comment discusses the Federal Election Campaign Act (FECA)[23] and the *Buckley* Court's assessment of its constitutionality. Part II describes Washington's Fair Campaign Practices Act (FCPA) and *Washington State Republican Party v. Washington State Public Disclosure Commission*.[24] Part III explains the changes that the

16. *See id.* at 156 (upholding analogous soft money ban at federal level).

17. *See Wash. State Republican Party*, 141 Wash. 2d at 263, 4 P.3d at 819.

18. *See McConnell*, 540 U.S. at 203–09 (upholding ban on issue ads by corporations and labor unions against First Amendment challenge); id. at 194 (concluding that ban was not unconstitutionally vague).

19. *See Wash. State Republican Party*, 141 Wash. 2d at 263–64, 4 P.3d at 819 (basing holding on idea that "issue advocacy is beyond the reach of government regulation").

20. *See McConnell*, 540 U.S. at 138–39 (concluding analogous federal regulations were contribution limits).

21. *See* Buckley v. Valeo, 424 U.S. 1, 25 (1976).

22. *See McConnell*, 540 U.S. at 161 (upholding national party ban); *id.* at 173 (upholding state party ban).

23. This Comment uses the acronym FECA to refer to the Federal Election Campaign Act as amended in 1974. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431–456 (2000)).

24. 41 Wash. 2d 245, 4 P.3d 808 (2000); The Fair Campaign Practices Act was passed by an initiative in 1992 and is codified in scattered sections of WASH. REV. CODE §§ 41.04 and 42.17

Bipartisan Campaign Reform Act (BCRA) made to FECA and why the *McConnell* Court upheld them. Part IV argues that, in view of the *McConnell* decision, Washington law constitutionally prohibits the state's political parties from using their soft money to purchase issue ads. Part V concludes that the Washington State Public Disclosure Commission should adopt rules to clarify that such expenditures are illegal.

I. THE *BUCKLEY* COURT ESTABLISHED PARAMETERS FOR CONSTITUTIONAL CAMPAIGN FINANCE REGULATION

In *Buckley v. Valeo*, the U.S. Supreme Court established the basic approach used to analyze the constitutionality of campaign finance laws.[25] First, the Court classified FECA's monetary restrictions as either contribution limits or expenditure limits.[26] Next, the Court scrutinized the restrictions for unconstitutional vagueness.[27] Finally, using "closely drawn" scrutiny for the contribution limits and "exacting" scrutiny for the expenditure limits, the Court assessed whether the restrictions violated the First Amendment.[28] The Court concluded that FECA constitutionally limited campaign contributions,[29] but that FECA unconstitutionally limited independent expenditures and overall campaign expenditures in violation of the First Amendment.[30] In the wake of the *Buckley* decision, two loopholes developed, which further undermined FECA's effectiveness.[31]

A. FECA Limited Contributions and Expenditures

The *Buckley* Court began its analysis of FECA by dividing the law's

---

(2004).

25. *See* Note, *Satisfying the "Appearance of Justice": The Uses of Apparent Impropriety in Constitutional Adjudication*, 117 HARV. L. REV. 2708, 2711 (2004) (noting that the *Buckley* decision "established the modern framework for determining the constitutionality of campaign finance restrictions . . .").

26. *Buckley*, 424 U.S. at 7. In addition to monetary restrictions, FECA also restricted the types of donations that could escape public disclosure, *id.* at 62–64, but these provisions are beyond the scope of this Comment.

27. *See id.* at 40–44.

28. *See id.* at 25 (applying closely drawn scrutiny); *id.* at 44–45 (applying exacting scrutiny).

29. *See id.* at 58.

30. *Id.* at 44–45, 58.

31. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 122–29 (2003).

restrictions into contribution limits and expenditure limits.[32] The law's contribution limits capped the amount people[33] could *give* to campaigns, political committees, and political parties.[34] In contrast, the law's expenditure limits capped the amount campaigns could spend,[35] as well as the amount people acting independently of campaigns could spend "relative to" a candidate.[36] FECA did not, however, draw a rigid line between these two forms of restriction.[37] For example, the law defined an expenditure made in coordination with a campaign as a contribution, and the Court accepted this functional definition of a contribution.[38]

B. The Buckley *Court Narrowly Construed FECA's Independent Expenditure Limit*

In *Buckley*, the Court analyzed FECA's contribution and expenditure limitations to determine if they were unconstitutionally vague.[39] Vague laws violate a person's right to due process by failing to give fair warning of prohibited conduct.[40] In order to avoid "trapping the

---

32. *See Buckley*, 424 U.S. at 12–13.

33. FECA defines "person" to include "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons." 2 U.S.C. § 431(11) (2000 & Supp. II 2002).

34. As enacted, FECA limited personal contributions to federal candidates ($1,000 per election), political committees ($5,000 per year), and the national parties ($20,000 per year), with a total aggregate cap of $25,000 per year. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263. In 2002, Congress passed the Bipartisan Campaign Reform Act, which changed some of these dollar limits. They are now $2,000, $5,000, $25,000, and $37,500, respectively. *See* 2 U.S.C. § 441a(a)(1), (3) (Supp. II 2002).

35. *See* 18 U.S.C. § 608 (1976), *repealed by* Act of May 11, 1976, Pub. L. No. 94-283, Title II, § 201(a), 90 Stat. 475, 496 (responding to the *Buckley* decision). The overall ceilings for campaign expenditures ranged from $30 million for a presidential campaign to $140,000 for campaigns for the House of Representatives. *Id.* FECA also limited the expenditure of a candidate's personal funds on his or her own campaign. *Id.*

36. This "independent expenditure" provision barred all persons from spending more than $1,000 relative to a clearly identified candidate during a calendar year. *Id.* § 608(e)(1). It established a few narrow exceptions, such as spending by corporations to communicate with their stockholders. *Id.*

37. *See Buckley*, 424 U.S. at 46–47.

38. *See id.* at 46 n.53; *see also* Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 447 (2001) [hereinafter *Colorado II*] (characterizing coordinated party spending as "functional equivalent" of contribution).

39. *See Buckley*, 424 U.S. at 24 (analyzing contribution limit); *id.* at 41 (analyzing expenditure limit).

40. *See id.* at 76–77; *see also* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.").

innocent," courts require that statutory language be clear and precise.[41] This is especially important when a law implicates First Amendment rights[42]—a murky and indefinite line between permitted and proscribed conduct tends to chill speech by causing people to "steer far wider of the unlawful zone" than they would if the line was clearly demarcated.[43] In such a situation, courts attempt to construe the statute in a way that avoids vagueness.[44]

After concluding that FECA's contribution limits were not vague,[45] the *Buckley* Court narrowly construed the law's limit on independent expenditures "relative to" a candidate in order to avoid unconstitutional vagueness.[46] The Court found that the phrase "relative to," standing alone, was not sufficiently definite to give adequate warning as to what exactly the limitation prohibited.[47] The Court surmised that Congress intended the phrase to mean "'advocating the election or defeat of' a candidate."[48] However, the Court found that this construction was still too vague because the First Amendment protects discussion of general issues, and discussion of candidates could be easily confused with discussion of general issues.[49] To eliminate the possibility of vagueness, the Court introduced an "express advocacy" requirement into the statute[50] by construing the language "relative to" to mean communication using *express* words of advocacy, such as "Vote for Senator Smith" or "Defeat Governor Jones."[51]

---

41. *Buckley*, 424 U.S. at 41.

42. *See id.* at 41 n.48. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* (citing NAACP v. Button, 371 U.S. 415, 433 (1963)).

43. Baggett v. Bullitt, 377 U.S. 360, 372 (1964).

44. *See Buckley*, 424 U.S. at 77–78.

45. *Id.* at 24 n.24 (noting definition of contribution did not present serious problems "because of the limiting connotation created by the general understanding of what constitutes a political contribution").

46. *See id.* at 41.

47. *Id.* (expressing concern that "[t]he use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech . . .").

48. *Id.* at 42.

49. *See id.* at 43 (citing Thomas v. Collins, 323 U.S. 516, 534 (1945)).

50. *See id.* at 41–44.

51. *See id.* at 43–44.

C. *The* Buckley *Court Upheld FECA's Contribution Limits, but Struck Down Its Expenditure Limits*

The *Buckley* Court emphasized that both FECA's contribution limits and its expenditure limits raised serious First Amendment questions.[52] However, the Court also drew a fundamental distinction between the two types of restrictions[53] and subjected them to different levels of scrutiny.[54] The Court found that the provisions that placed an overall cap on expenditures by campaigns or independent persons were far more onerous to First Amendment freedoms than the contribution limits.[55] Therefore, the Court subjected the expenditure limitations to a greater level of judicial scrutiny.[56]

1. *The Court Upheld FECA's Contribution Limits Because They Were Closely Drawn to Advance a Sufficiently Important Interest*

The Court determined that contribution limits are constitutionally permissible as long as they are closely drawn and advance a "sufficiently important" government interest.[57] The Court gave several reasons for applying the relatively deferential standard of closely drawn scrutiny to contribution limits, rather than the "strict" or "exacting" scrutiny applicable to other restrictions on First Amendment rights.[58] First, the Court noted that contributions are speech only in the limited sense that they express the contributor's support for the candidate and the candidate's views.[59] Therefore, limits on the size of a contribution do not

52. *See id.* at 14.

53. *See id.* at 23; *see also* Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985) (noting "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his [or her] campaign").

54. *See Buckley*, 424 U.S. at 25 (addressing contribution limits); *id.* at 44 (addressing expenditure limits).

55. *Id.* at 23.

56. *See id.* at 19–21 (describing contribution limits as imposing "only a marginal restriction upon the contributor's ability to engage in free communication" and expenditure limits as "substantial rather than merely theoretical restraints on the quantity and diversity of political speech").

57. *See id.* at 29 ("[T]he weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling.").

58. *See id.* at 20–21.

59. *See id.* at 21.

significantly undermine free speech rights.[60] Second, the Court acknowledged that contribution limits burden the contributor's freedom of association because making a contribution affiliates a person with a candidate.[61] However, the associational burden is relatively minor if the contribution limit permits contributors to associate with other like-minded individuals by volunteering their time to campaigns and political associations.[62]

The *Buckley* Court upheld FECA's contribution limits using closely drawn scrutiny.[63] The Court reasoned that the government's interest in preventing corruption and the appearance of corruption was sufficiently important to justify the First Amendment burdens the law imposed.[64] The Court also found that the limit was closely drawn because it focused on the large donations that were most likely to lead to corruption and left individuals free to associate with and volunteer for campaigns as they wished.[65] However, the Court stated that contribution limits would violate First Amendment rights if a law's restrictions went so far as to prevent robust discussion of political issues.[66]

2. *The Court Held that FECA Failed to Satisfy the Exacting Scrutiny Test and Thus Unconstitutionally Limited Expenditures*

In contrast to contribution limits, the Court subjected expenditure limits to an "exacting scrutiny" standard because they place a greater burden on First Amendment rights.[67] First the Court determined that expenditure limits cap the *quantity* of expression in the political marketplace by restricting the overall amount of money that campaigns and independent persons can spend.[68] For example, FECA's independent expenditure limit would have prevented an individual or association

60. *See id.* ("At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate.").

61. *Id.* at 22.

62. *Id.* (observing burden that contribution limits impose on free association is less than burden that expenditure limits impose).

63. *See id.* at 25.

64. *Id.* at 26.

65. *See id.* at 28.

66. *See id.* at 21 (observing contribution limits would seriously burden free speech only if they were so low that they prevent "candidates . . . from amassing the resources necessary for effective advocacy").

67. *See id.* at 44–45.

68. *See id.* at 19.

from buying more than $1,000 worth of advertisements to support a federal candidate.[69] Similarly, FECA's campaign expenditure limit would have limited the number of advertisements a campaign could purchase.[70] The Court held that such expenditure limits impose "markedly" greater burdens on protected First Amendment freedoms than contribution limits impose.[71] Consequently, the Court subjected expenditure limits to a higher degree of scrutiny when determining their constitutionality.[72]

The Court concluded that FECA's expenditure limits could not survive exacting scrutiny.[73] It reasoned that the government's interest in curbing corruption inadequately justified the heavy burden imposed by FECA's independent expenditure limit,[74] even after the Court interpreted the limit to apply only to express advocacy.[75] The Court also expressed doubt that independent ads would have a corrupting influence because they would be less useful to a campaign than coordinated spending.[76] Moreover, because the ceiling on independent expenditures applied only to express advocacy, the Court determined that this limit was not effectively tailored to advance its anti-corruption objective.[77] Finally, the Court struck down FECA's limitation on total campaign expenditures because FECA's goal of reducing "wasteful" campaign spending did not justify its burden on free speech.[78]

---

69. *See id.* at 39–40.

70. *See id.* at 19–20 (noting advertisements cost money and campaign expenditure cap would have reduced campaign spending in number of 1974 congressional races).

71. *Id.* at 44.

72. *Id.* ("[T]he constitutionality of [the expenditure limitation] turns on whether the governmental interests advanced in its support satisfy the *exacting scrutiny* applicable to limitations on core First Amendment rights of political expression." (emphasis added)).

73. *Id.* at 58.

74. *Id.* at 45.

75. *Id.* at 44.

76. *Id.* at 47 ("The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.").

77. *See id.* at 45 ("[S]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views.").

78. *Id.* at 57 (noting primary goal appeared to be reducing "skyrocketing" cost of campaigns and stating was not legitimate aim under First Amendment).

D. *After* Buckley, *the Soft Money and Issue Ad Loopholes Further Undermined FECA's Effectiveness*

In the years following the *Buckley* decision, those seeking to buy influence with elected officials increasingly exploited two loopholes in the law.[79] The soft money loophole evolved from FECA itself and administrative interpretations of the law.[80] The issue ad loophole derived from the *Buckley* Court's narrow construction of FECA's independent expenditure restrictions[81] and the resulting express advocacy requirement.[82]

1. *The Soft Money Loophole Enabled Large Donors to Circumvent FECA's Contribution Limits*

The soft money loophole arose out of the definition of "contribution" in FECA.[83] Because the U.S. Constitution gave Congress the authority to regulate federal elections, but not state elections,[84] FECA specifically defined contributions to include only those donations intended to influence federal elections.[85] Thus, the law permitted donations to the political parties that exceeded FECA's contribution limits as long as the contributions were intended to influence state elections.[86] However, some activities influence both state and federal elections, such as voter registration and get-out-the-vote campaigns, and the Federal Election Commission (FEC) determined that political parties could fund these efforts partly with donations that were not subject to FECA's contribution limits.[87] Commentators refer to these donations as

79. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 122–29 (2003).

80. *See id.* at 122–25.

81. Although the Court ultimately struck down FECA's limit on independent expenditures, even after narrowly construing the statute, the Court did uphold the law's disclosure requirement for independent expenditures insofar as it applied to express advocacy. *See Buckley*, 424 U.S. at 80.

82. *See McConnell*, 540 U.S. at 126–28.

83. The core definition of "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for *Federal* office." 2 U.S.C. § 431(8)(A)(i) (2000 & Supp. II 2002) (emphasis added).

84. U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

85. 2 U.S.C. § 431(8)(A)(i); *see McConnell*, 540 U.S. at 122.

86. *See id.*

87. *See id.* at 123.

contributions of "soft money."[88] The soft money loophole thus enabled donors to give huge contributions to the national parties to ostensibly influence state races—but which also had a major impact on federal elections.[89]

2. *The Issue Ad Loophole Also Led to Evasion of FECA's Contribution Limits*

The issue ad loophole resulted from the *Buckley* Court's narrow construction of FECA's independent expenditure restrictions, which regulated people's spending "relative to" candidates.[90] In construing the statute to avoid vagueness, the Court determined that the restrictions applied only to spending that "expressly advocated" the election or defeat of a candidate through use of words like "Vote for John Smith."[91] However, a side effect of this express advocacy requirement was that advertisements that were clearly designed to influence federal elections fell outside of FECA's restrictions if they did not use "magic words" like "vote for" or "vote against."[92] Such issue ads commonly appeared on television shortly before an election and were highly critical of a candidate's positions on issues.[93] Issue ads, combined with the soft money loophole, significantly undermined FECA's regulatory regime.[94]

In sum, FECA was a partially effective congressional attempt to toughen campaign finance restrictions. In *Buckley*, the U.S. Supreme Court held that the law's contribution limits were constitutional because they were closely drawn to meet the important governmental interests of preventing corruption and the appearance of corruption. The law's expenditure limits, however, imposed too great a burden on First Amendment rights to survive exacting scrutiny, even if only applied to

---

88. *See id.* The phrase "soft money" has since been extended to refer to other types of unlimited contributions. For example, Washington State law limits contributions to state political parties, but contains a limited exception for certain donations, which have also been called soft money because they are not subject to the normal contribution limit. *See infra* Part II.A.

89. *See McConnell*, 540 U.S. at 125–26.

90. *See* Buckley v. Valeo, 424 U.S. 1, 43–44 (1976) (construing independent expenditure limit); *id.* at 80 (construing independent expenditure reporting and disclosure requirements).

91. *See id.*

92. *See id.* at 45.

93. *See McConnell*, 540 U.S. at 127.

94. *See id.* at 129–30 (quoting Senator Susan Collins with approval: "The twin loopholes of soft money and bogus issue advertising have virtually destroyed our campaign finance laws, leaving us with little more than a pile of legal rubble.").

express advocacy. After the *Buckley* decision, the exploitation of loopholes in the law further undermined FECA.

II. THE WASHINGTON STATE SUPREME COURT OUTLAWED LIMITATIONS ON ISSUE AD SPENDING BY PARTIES

Washington State citizens have sought to regulate state political campaign activity,[95] but court decisions have undermined their efforts.[96] Specifically, the people of Washington enacted the Fair Campaign Practices Act (FCPA), which includes a provision that prevents political parties from using large organizational contributions to promote individual candidates.[97] When the Washington State Republican Party spent such contributions on an issue ad to promote its candidate for governor, the state's Public Disclosure Commission (PDC), an oversight and enforcement agency, brought an action against the Party for violating FCPA.[98] In the resulting litigation, the Washington State Supreme Court determined that the provision was unconstitutional as applied against the Party.[99] The court reasoned that the *Buckley* decision foreclosed any limit on issue ad spending.[100] In response to this decision, the PDC amended an administrative rule to allow the parties to spend unlimited contributions on issue advertisements.[101]

---

95. Initiative 276, passed in 1972, set up disclosure requirements for lobbying and campaign activity. *See* Initiatives to the People: 1914 through 2003, *available at* http://www.secstate.wa.gov/elections/initiatives/statistics_initiatives.aspx (last visited Jan. 2, 2005) (codified as amended at WASH. REV. CODE § 42.17 (2004)). In 1992, voters approved Initiative 134, the Fair Campaign Practices Act, which imposed a variety of campaign contribution limits. *See* Initiatives to the Legislature: 1914 through 2002, *at* http://www.secstate.wa.gov/elections/initiatives/statistics_initleg_ar.aspx (last visited Jan. 2, 2005) (codified in scattered sections of WASH. REV. CODE §§ 41.04 and 42.17 (2004)).

96. *See* Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n, 141 Wash. 2d 245, 282, 4 P.3d 808, 828 (2000) (holding provision of state campaign finance law violated First Amendment as applied).

97. *See* Fair Campaign Practices Act, WASH. REV. CODE § 42.17.640(6), (14) (2002).

98. *See Wash. State Republican Party*, 141 Wash. 2d at 252, 4 P.3d at 813.

99. *See id.* at 282, 4 P.3d at 828.

100. *See id.* at 263, 4 P.3d at 819.

101. *See* WASH. ADMIN. CODE § 390-17-060(3) (2003) (amended by PDC in response to *Wash. State Republican Party*, 141 Wash. 2d 245, 4 P.3d 808).

A. *FCPA Guards Against Corruption Through a Series of Interrelated Contribution Limits*

In addition to limiting what can be contributed to candidates' campaigns directly,[102] FCPA contains provisions designed to prevent circumvention of these limits through the state's political parties.[103] One such provision limits how much nonparty organizations (corporations, labor unions, and unincorporated political associations) can contribute to state political parties.[104] However, this limitation is subject to an exception that allows contributions in excess of the cap as long as the parties spend these excess funds on specific activities that do not promote individual candidates.[105] This exception is known as the "soft money" exception,[106] and administrative rules require the state political parties to set up separate bank accounts for these exempt contributions.[107]

B. *The* Washington State Republican Party *Court Held that Washington's Limits on Issue Advertising Violate the First Amendment*

Despite FCPA's limitation on the use of political parties' soft money, the Washington State Republican Party used $150,000 from its exempt account for the final three weeks of the 1996 gubernatorial election to

---

102. *See* WASH. REV. CODE § 42.17.640(1) ("No person . . . may make contributions to a candidate for a state legislative office that in the aggregate exceed five hundred dollars or to a candidate for a [statewide] office that in the aggregate exceed one thousand dollars for each election in which the candidate is on the ballot . . . ."). These contribution caps are adjusted to account for inflation and in 2004 were $675 and $1,350 respectively. *See* 2004 State Contribution Limits, *at* http://www.pdc.wa.gov/filerassistance (last visited Dec. 27, 2004).

103. *See, e.g.*, WASH. REV. CODE §§ 42.17.640(3), 42.17.640(6), 42.17.670 (limiting ability of donors to earmark contributions to political parties to benefit individual candidates).

104. *See id.* § 42.17.640(6). The $2,500 per year statutory limit is adjusted for inflation; in 2004 the statutory limit was $3,400. *See* 2004 State Contribution Limits, *at* http://www.pdc.wa.gov/filerassistance (last visited Feb. 3, 2005).

105. *See* WASH. REV. CODE § 42.17.640(14). The exception applies to contributions "for voter registration, for absentee ballot information, for precinct caucuses, for get-out-the-vote campaigns, for precinct judges or inspectors, for sample ballots, or for ballot counting, all without promotion of or political advertising for individual candidates." *Id.*

106. Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n, 141 Wash. 2d 245, 251, 4 P.3d 808, 812 (2000). The phrase "soft money" in this context is slightly different than in the federal context because the underlying statutory provisions are different. However, at both the state and federal level, the term refers to unlimited contributions to political parties. *See supra* Part I.D.1.

107. *See* WASH. ADMIN. CODE § 390-17-060(2) (2003).

purchase a television advertisement critical of Democratic candidate Gary Locke.[108] The advertisement disparaged Locke's record on crime and urged viewers to call Locke to express their opinions.[109] The PDC believed that the Republican Party had violated FCPA because its expenditure on the advertisement did not fall within any of the statutorily permissible uses of soft money.[110] Accordingly, the PDC brought an enforcement action against the Republican Party; the Party countered that such enforcement would violate its First Amendment rights.[111]

In *Washington State Republican Party*, the Washington State Supreme Court struck down FCPA's limitation on soft money expenditures after determining that the ad in question was an issue ad.[112] In its decision, the court focused entirely on the issue-oriented nature of the political speech in the ad.[113] The court did not scrutinize whether the statutory limitation was a contribution limit or an expenditure limit,[114] and it applied neither "closely drawn" nor "exacting" scrutiny to the law.[115] Instead, the court provided an unqualified holding that *Buckley* prevented any government restriction on issue ads.[116] The court justified its position by reasoning that issue ads pose no threat of corruption, even if large corporations or other organizational donors fund the ads.[117] While acknowledging that the Party intended the ad to persuade voters and "was partisan, negative in tone, and appeared prior to the election,"[118] the court nevertheless concluded that the First Amendment protected the ad from government regulation.[119]

---

108. *See Wash. State Republican Party*, 141 Wash. 2d at 251–52, 4 P.3d at 812–13.

109. *Id.*

110. *Id.* at 252, 4 P.3d at 813.

111. *Id.*

112. *See id.* at 263, 4 P.3d at 819 ("A conclusion that the advertisement is issue advocacy largely resolves this case.").

113. *See id.*

114. *See id.* at 274, 4 P.3d at 824.

115. *See id.* at 283, 4 P.3d at 829. Without applying either the closely drawn test for contribution limits or the exacting scrutiny test for expenditure limits, the court concluded "the unconstitutionality in the statute results both from limitations on contributions for issue-oriented political speech and the prohibition on exempt expenditures for such speech." *Id.*

116. *Id.* at 282–83, 4 P.3d at 828–29.

117. *See id.* at 275, 4 P.3d at 824.

118. *Id.* at 273, 4 P.3d at 823.

119. *Id.* The court did not examine how the Free Speech Clause of the state constitution would apply to the soft money limitation, and such an inquiry is beyond the scope of this Comment.

C. *In Response to* Washington State Republican Party, *the PDC Amended Its Rules to Allow Parties to Use Soft Money on Issue Ads*

The FCPA created the PDC to enforce the statute's requirements, giving the PDC authority to adopt administrative rules and carry out the purposes of the law.[120] After the *Washington State Republican Party* ruling, the PDC issued an interpretation concluding that a political party could use its soft money for issue advocacy.[121] The PDC incorporated this result into an administrative rule defining activities that are exempt from FCPA's contribution limits.[122]

In sum, FCPA limited contributions by nonparty organizations to state political parties, unless the parties spent the contributions on certain activities that did not promote individual candidates. The Washington State Supreme Court, however, invalidated this limitation to the extent that it prevented contributions from funding issue ads. The court based its decision on the conclusion that the *Buckley* decision prevented any government restrictions on issue ad spending. Because of this ruling, the PDC currently permits the state's political parties to use their soft money to fund issue advertising.

III. THE U.S. SUPREME COURT UPHELD KEY PROVISIONS OF BCRA IN *MCCONNELL V. FEDERAL ELECTION COMMISSION*

Congress passed the Bipartisan Campaign Reform Act of 2002 to close loopholes in FECA's regulatory regime.[123] FECA had proven inadequate to curb the corrupting influence of large campaign

---

Interestingly, however, the framers of the Washington State Constitution were very concerned with the risk that corporations and special interest groups would exert an undue influence over the legislature, and this concern similarly underlies FCPA. *See* WASH. CONST. art. II § 28 (restricting the legislature's ability to pass special legislation); WASH. CONST. art. XII (restricting corporate powers). WASH. REV. CODE § 42.17.620 (2002) (stating that the intent of the statute is "[t]o Ensure that individuals and interest groups have fair and equal opportunity to influence elective and governmental processes" and "[t]o Reduce the influence of large organizational contributors").

120. See WASH. REV. CODE § 42.17.370(1).

121. *See* PUBLIC DISCLOSURE COMMISSION, INTERPRETATION NO. 00–04, USE OF SOFT MONEY FOR ISSUE ADVOCACY (2000), *at* http://www.pdc.wa.gov/guide/interpretations/pdf/005.pdf (last visited Feb. 3, 2005).

122. *See* WASH. ADMIN. CODE § 390-17-060(3) (2003).

123. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81. BCRA is also known as the McCain–Feingold Law after its primary Senate sponsors.

contributions on the United States' political system.[124] Opponents of BCRA immediately challenged its constitutionality,[125] and the resulting litigation ended with the most comprehensive and important campaign finance decision since *Buckley*.[126] A majority of the *McConnell* Court firmly favored the law's key restrictions.[127] The Court first clarified the distinction between contribution limits and expenditure limits; it then classified restrictions on soft money spending as a type of contribution limitation subject to closely drawn scrutiny.[128] Next, the Court concluded that the law's restrictions were not unconstitutionally vague.[129] Finally, it analyzed the contribution limits using closely drawn scrutiny and the expenditure limits using exacting scrutiny.[130]

A. The McConnell *Decision Clarified the Distinction Between Contribution Limits and Expenditure Limits*

BCRA sought to close the soft money loophole through two key provisions,[131] both of which the *McConnell* Court classified as contribution limits rather than expenditure limits.[132] The first provision bans the national political parties from receiving or spending soft money contributions.[133] The second provision, in an effort to prevent evasion of

---

124. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 132 (2003) (stating Congress passed BCRA to address concerns about issue advertising and soft money loophole, which had undermined FECA's regulatory regime).

125. McConnell v. Federal Election Comm'n, 251 F. Supp. 2d 176, 206 (D.D.C. 2003).

126. *See* Richard Briffault, McConnell v. Fed. Election Comm'n *and the Transformation of Campaign Finance Law*, 3 ELECTION L.J. 147, 147 (2004) (noting decision was "no doubt, the single greatest legal victory for campaign finance regulation since the modern era of campaign finance law was ushered in three decades ago").

127. *See McConnell*, 540 U.S. at 224.

128. *See id.* at 141.

129. *See id.* at 170 n.64 (determining restrictions on public communications were not vague); *id.* at 194 (determining restrictions on electioneering communication were not vague).

130. *See id.* at 141 (determining BCRA's soft money restrictions were contribution limits subject to closely drawn scrutiny); *id.* at 204–05 (determining BCRA's limitations on expenditures for electioneering communications were subject to exacting scrutiny).

131. *See* 2 U.S.C. §§ 441b, 441i (Supp. II 2002). This loophole permitted unlimited contributions to political parties, despite FECA's $20,000 party contribution limit, on the theory that they were intended to influence *state* elections and thus fell outside the statutory definition of contribution. *See supra* Part I.D.1.

132. *See McConnell*, 540 U.S. at 141.

133. *See* 2 U.S.C. § 441i(a)(1) (Supp. II 2002) ("A national committee of a political party . . . may not 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,

this national party ban,[134] prohibits state political parties from spending soft money on "federal election activities."[135] Such activities include any "public communication"[136] that refers to a federal candidate and "promote[s] or support[s] a candidate for that office, or attack[s] or oppose[s] a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)."[137]

Even though these loophole-closing provisions restrict the *expenditure* of soft money by state and national parties, the Court classified them as contribution limits and applied closely drawn scrutiny to determine their constitutionality.[138] The Court reasoned that these restrictions limited contributions by limiting expenditures,[139] and therefore they imposed no greater burden on First Amendment rights than direct contribution limits.[140] Consequently, the Court viewed the ban on national party receipt or expenditure of soft money as a type of contribution limitation,[141] and therefore it received closely drawn scrutiny.[142] The Court applied the same level of scrutiny to BCRA's prohibition on certain expenditures by state political parties because the prohibition was aimed at limiting contributions and merely used expenditure caps as a tool to achieve that end.[143] The Court distinguished

---

prohibitions, and reporting requirements of this Act." (emphasis added)).

134. *See McConnell*, 540 U.S. at 161.

135. *See* 2 U.S.C. § 441i(b)(1) (Supp. II 2002) ("[A]n amount that is expended or disbursed for Federal election activity by a State, district, or local committee of a political party . . . shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.").

136. *See* 2 U.S.C. § 431(22) (2000 & Supp. II 2002) (including any "communication by means of any broadcast, cable, or satellite communication").

137. *Id.* § 431(20)(A)(iii). This proscription includes the subset of issue ads that are most likely to be corrupting: those that are candidate-specific. *See id.*

138. *See McConnell*, 540 U.S. at 141.

139. *See id.* at 138 ("[F]or purposes of determining the level of scrutiny, it is irrelevant that Congress chose in [the soft money bans] to regulate contributions on the demand rather than the supply side.").

140. *See id.* at 138–39 ("The relevant inquiry is whether the mechanism adopted to implement the contribution limit, or to prevent circumvention of that limit, burdens speech in a way that a direct restriction on the contribution itself would not. That is not the case here.").

141. The Court clearly stated that laws that prevent evasion of contribution limits are themselves a type of contribution limit. *See id.* at 144.

142. *See id.* at 141; *cf.* Colorado II, 533 U.S. 431, 443 (2001) (noting importance of "functional" rather than "formal" definition of contribution limit); *id.* at 456 (holding party's contributions to candidate could be limited and coordinated *expenditures* could be counted as contributions).

143. *See McConnell*, 540 U.S. at 167. The Court essentially viewed this expenditure restriction as a type of contribution limit—a contribution limit that was contingent upon how the contributions

BCRA's limits on soft money expenditures from the expenditure limits it had struck down in the *Buckley* opinion by emphasizing that BCRA's limits did not cap the overall amount that a political actor could spend to express political views.[144] Under BCRA, political parties can spend unlimited amounts, as long as they do so by aggregating donations smaller than the contribution limit.[145]

The *McConnell* Court classified another provision of BCRA, which further curtailed the issue ad loophole by prohibiting certain kinds of corporate and labor union issue advocacy,[146] as an expenditure limit.[147] Specifically, the provision outlawed corporate and labor union general treasury money from funding "electioneering communications,"[148] a newly coined term meant to replace the narrowly construed "relative to" language.[149] The Court determined that the provision called for exacting scrutiny because the issue ad ban would necessarily reduce the quantity of campaign speech in the political marketplace, like the limits struck down in *Buckley*.[150]

B. BCRA's Restrictions Were Not Unconstitutionally Vague

The *McConnell* Court dismissed vagueness challenges to BCRA's restrictions on issue advocacy after concluding that the restrictions were

---

were spent.

144. *See McConnell*, 540 U.S. at 139.

145. *See id.*; *cf.* Buckley v. Valeo, 424 U.S. 1, 21–22 (1976) ("The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons . . . .").

146. *See* 2 U.S.C. § 441b(a) (Supp. II 2002) (prohibiting contributions and expenditures by corporations and labor unions, including electioneering communications).

147. *See McConnell*, 540 U.S. at 203–04.

148. "Electioneering communication" includes any "broadcast, cable or satellite communication which

(I) refers to a clearly identified candidate for Federal office;

(II) is made within—

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 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 the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate."

2 U.S.C. § 434(f)(3)(A)(i) (2000 & Supp. II 2002); 2 U.S.C.A. § 434(f)(3)(A)(i) (West Supp. 2004).

149. *See McConnell*, 540 U.S. at 189.

150. *See id.* at 204–05; *see also Buckley*, 424 U.S. at 58 (striking down limits on the overall amount that could be spent by campaigns, independent individuals, or groups to express political ideas).

sufficiently clear to give fair warning as to what conduct they prohibited.[151] The Court emphasized that its earlier express advocacy requirement was a product of statutory construction to avoid unconstitutional vagueness, rather than a First Amendment requirement.[152] Thus, the narrow construction that the *Buckley* Court gave to FECA's campaign regulations is specific to that statutory language and does not extend to statutes that are not vague.[153] The Court then held that BCRA's restriction on state party-funded "public communications" that "promote," "support," "attack," or "oppose" federal candidates is not unconstitutionally vague because a person of ordinary intelligence would understand what the statute prohibits.[154] The Court then concluded that BCRA's definition of "electioneering communication"[155] was also sufficiently specific to meet the Constitution's requirement of definiteness because its provisions were easily understood and objectively determinable.[156]

C. *The* McConnell *Decision Upheld Restrictions on Soft Money Spending and Issue Ads*

The Court held that BCRA's provisions restricting the national and state political parties from receiving or spending soft money did not violate the First Amendment because they were closely drawn to match a sufficiently important government interest.[157] Like the contribution limits upheld in *Buckley*, BCRA's limitations furthered the "sufficiently important" interest of preventing corruption or the appearance of corruption.[158] The national party ban furthered this interest by curtailing evasion of the limit on contributions to parties.[159] Limiting contributions

---

151. *See McConnell*, 540 U.S. at 170 n.64.

152. *Id.* at 190 ("[T]he express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law.").

153. *Id.* at 191–92.

154. *See id.* at 170 n.64 (stating "words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision," and noting any doubts could be resolved through advisory opinions).

155. *See* 2 U.S.C. § 434(f)(3)(A)(i) (2000 & Supp. II 2002); 2 U.S.C.A. § 434(f)(3)(A)(i) (West Supp. 2004).

156. *McConnell*, 540 U.S. at 194 ("[The new] definition of 'electioneering communication' raises none of the vagueness concerns that drove our analysis in *Buckley*.").

157. *See id.* at 156 (upholding national party ban); *id.* at 173 (upholding state party ban).

158. *See id.* at 143.

159. *See* 2 U.S.C. §§ 441a(a)(1)(B), 441i(a) (Supp. II 2002). Prior to BCRA, donors

to the parties was in turn legitimate because it minimized circumvention of the direct limits on campaign contributions.[160] The state party ban prevented large donors from evading the limits of the national party ban by giving money directly to state parties to be spent on activities that would influence federal elections.[161] The Court determined that the provisions were also closely drawn because they focus on a subset of donations most likely to be corrupting.[162]

Using exacting scrutiny analysis, the Court next upheld BCRA's ban on certain issue ad expenditures by corporations and labor unions.[163] Because special characteristics of the corporate form provided a compelling justification for the limit, the Court determined that this independent expenditure limit was dissimilar to the one struck down in *Buckley*.[164] The restriction was also narrowly tailored in that it permitted "separate segregated funds" financed by voluntary union member or corporate shareholder donations.[165]

In sum, the *McConnell* Court affirmed Congress's power to limit contributions to political parties, even if Congress does so by regulating expenditures, as long as the regulations are closely drawn to match a sufficiently important government interest.[166] BCRA's ban on the receipt or expenditure of soft money by the national political parties satisfies this standard because it is closely drawn to prevent the circumvention of

---

accomplished such evasion by donating money to the national parties in excess of the statutory ceiling. The donations ostensibly influenced state elections, but they in fact benefited federal candidates. *See supra* Parts I.D.1–.2; *see also McConnell*, 540 U.S. at 122–26 (discussing evolution of soft money).

160. *See McConnell*, 540 U.S. at 144 (noting contributions to candidate's party can benefit that candidate, thus creating corrupting effect); *see also* Buckley v. Valeo, 424 U.S. 1, 38 (1976) (upholding FECA's total contribution limit of $25,000, including $20,000 limit on contributions to national parties); Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

161. *See McConnell*, 540 U.S. at 161–62.

162. *See, e.g., id.* at 169 (discussing how certain federal election activities are limited to 120 days before general election); *see also* 2 U.S.C. § 431(20)(B) (2000 & Supp. II 2002) (permitting soft money to be used for campaign activity solely referring to state candidates).

163. *See McConnell*, 540 U.S. at 205 (examining whether law was justified by *compelling* government interest).

164. *See id.* "We have repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" *Id.* (citing Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 660 (1990)).

165. *See id.* at 203 (describing corporate and labor union separate segregated funds as constitutionally sufficient).

166. *See id.* at 141.

anti-corruption measures.[167] BCRA's prohibition of soft money expenditures by state and local parties on federal election activities, including public communications that promote, support, attack, or oppose federal candidates, is also constitutional.[168] Lastly, BCRA's bar on corporate and union expenditures for electioneering communications is not unconstitutionally vague and is supported by a compelling government interest.[169]

IV. AFTER *MCCONNELL*, THE HOLDING OF *WASHINGTON STATE REPUBLICAN PARTY* IS NO LONGER VIABLE

By upholding the key provisions of BCRA, the *McConnell* Court demonstrated that Washington State's law preventing political parties from spending their soft money on issue ads is also constitutional. By clarifying that the government can regulate issue ads consistently with the First Amendment,[170] the *McConnell* decision showed that the central basis for the *Washington State Republican Party* decision was erroneous.[171] When next confronted by this issue, Washington courts should apply the basic approach provided by the *Buckley* Court and classify Washington's limitation on the expenditure of soft money as a contribution limit subject to closely drawn scrutiny.[172] The statutory limitation gives fair warning of what conduct it prohibits, and therefore the statute is not vague.[173] Washington's statute should survive a closely drawn scrutiny analysis because it furthers the same sufficiently important government interests as the analogous provisions upheld in *McConnell*, while at the same time it is more closely drawn.[174]

---

167. *See id.* at 156.

168. *See id.* at 173 (upholding 2 U.S.C. § 441i(b) (Supp. II 2002) as "closely drawn to match the important governmental interests of preventing corruption and the appearance of corruption").

169. *See id.* at 209.

170. *See id.* at 192.

171. *See* Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n, 141 Wash. 2d 245, 263, 4 P.3d 808, 819 (2000).

172. *See McConnell*, 540 U.S. at 138–39 (indicating regulating contributions by limiting expenditures is form of contribution limit).

173. *See* WASH. REV. CODE § 42.17.640(14) (2002); *McConnell*, 540 U.S. at 170 n.64 (upholding analogous provisions in BCRA against vagueness challenge).

174. *See McConnell*, 540 U.S. at 161 (upholding national party soft money ban).

A. *The Washington State Supreme Court Erroneously Focused on Absolute Protection for Issue Ads*

In *Washington State Republican Party*, the Washington State Supreme Court's erroneously held that the First Amendment bars any restrictions on issue ads.[175] The U.S. Supreme Court expressly rejected this interpretation in *McConnell*.[176] The *McConnell* Court explained that the *Buckley* Court introduced the express advocacy requirement to avoid finding unconstitutional vagueness in the particular statute at issue, not to preclude regulation of issue ads for all time.[177] As a result, the *McConnell* Court approved BCRA's spending limitations on issue ads.[178] Because the Washington State Supreme Court misconstrued concerns about vagueness as the adoption of an unqualified rule prohibiting regulation of issue advocacy,[179] the Court primarily focused on the nature of the political speech in the ad.[180] The *Washington State Republican Party* court erred because it failed to apply the *Buckley* approach to analyze the legality of the Washington State statute.[181] The court should have assessed whether the law's restrictions were more like the contribution limits upheld in *Buckley* under closely drawn scrutiny, or more like the expenditure limits that the *Buckley* Court struck down as unconstitutional under exacting scrutiny.[182]

B. *Washington's Soft Money Restriction Is a Contribution Limit Subject to* Buckley*'s Closely Drawn Scrutiny Test*

The Washington State Supreme Court should have classified FCPA's limitation on contributions to the state's political parties as a contribution limit and applied the closely drawn scrutiny test to

175. *See Wash. State Republican Party*, 141 Wash. 2d at 276, 4 P.3d at 825.

176. *See McConnell*, 540 U.S. at 191–92.

177. *See id.*

178. *See id.* at 173 (approving limits on public communications); *id.* at 209 (approving limits on electioneering communication).

179. *See Wash. State Republican Party*, 141 Wash. 2d at 263–64, 4 P.3d at 819 (concluding *Buckley* held "issue advocacy is beyond the reach of government regulation").

180. *See id.* at 263–74, 4 P.3d at 819–24.

181. *See id.* at 283, 4 P.3d at 829. Without applying either the closely drawn test for contribution limits or the exacting scrutiny test for expenditure limits, the court concluded, "the unconstitutionality in the statute results both from limitations on contributions for issue-oriented political speech and the prohibition on exempt expenditures for such speech." *Id.*

182. *Cf. McConnell*, 540 U.S. at 138–41 (determining first the appropriate level of scrutiny for BCRA's soft money provisions).

determine its constitutionality.[183] Although the law's general party contribution limit contains an exception for some donations,[184] it does not permit parties to spend the resulting soft money on issue ads.[185] This prohibition is analogous to the national and state soft money bans in BCRA, which limit contributions indirectly by placing limits on expenditures.[186] For example, BCRA limits soft money contributions to state political parties by subjecting the funds that political parties spend on federal election activities, including issue ads, to the $25,000 party contribution limit.[187] Viewing spending limits as a type of contribution limit, the *McConnell* Court applied closely drawn scrutiny.[188] In doing so, the Court stated that "for purposes of determining the level of scrutiny, it is irrelevant that Congress chose . . . to regulate contributions on the demand rather than the supply side."[189] Accordingly, Washington State courts should conclude that FCPA's analogous limits on the expenditure of soft money are also a type of contribution limit and should apply the closely drawn standard to determine their constitutionality.

Additionally, courts should analyze FCPA's soft money spending limit with closely drawn scrutiny because the limit does not place an overall cap on party expenditures.[190] Fundamentally, a lower standard of scrutiny is appropriate for contribution limits because they do not impose an overall cap on what a political actor can spend to express political ideas.[191] As the *Buckley* Court noted, limiting the size of campaign contributions does not limit how much a campaign can spend;

---

183. *See id.* at 141 (emphasizing that, like candidate contribution limits, political party contribution limits are subject to closely drawn scrutiny rather than more exacting scrutiny used for expenditure limitations).

184. *See* WASH. REV. CODE § 42.17.640(14) (2004).

185. *See id.* § 42.17.640(6), (14) (listing permissible uses for soft money, without mentioning issue advocacy, and specifically barring use of soft money to promote or advertise for individual candidates).

186. *See McConnell*, 540 U.S. at 138–39; *see also* 2 U.S.C. § 441i(a)–(b) (Supp. II 2002) (prohibiting expenditures in excess of prescribed caps).

187. *See* 2 U.S.C. §§ 441a(a)(1)(B), 441i(b).

188. *See McConnell*, 540 U.S. at 141.

189. *Id.* at 138 (citation omitted).

190. *See* Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n, 141 Wash. 2d 245, 274, 4 P.3d 808, 824 (2000) (acknowledging party could spend unlimited amount of aggregated contributions).

191. *See* Buckley v. Valeo, 424 U.S. 1, 21 (1976).

it only requires campaigns to raise money from more sources.[192] Therefore, courts should apply closely drawn scrutiny, rather than exacting scrutiny, to Washington's campaign restriction because it does not limit the overall amount that political parties can spend.[193] Indeed, the parties could aggregate an unlimited number of $3,400 contributions for political spending.[194]

C. *Washington State's Limitation on the Use of Soft Money Is Not Unconstitutionally Vague*

Like the measures approved in *McConnell*, Washington State's mechanism for prohibiting the state political parties from using their soft money to fund issue advertising is sufficiently specific to avoid the vagueness concerns that troubled the Court in *Buckley*. Like BCRA's ban on "electioneering communications" by corporations and labor unions, Washington State's regulatory scheme is clear and easy to understand.[195] The law expressly prohibits any use of soft money to "promote" or "politically advertise for individual candidates."[196] Additionally, FCPA spells out a list of specific activities that soft money may be used for, and this list does not include broadcast advertising.[197] Since the U.S. Supreme Court held that BCRA gave clear notice to labor unions and corporations that they could no longer spend their general treasury funds on issue ads,[198] Washington State's law also gives clear notice that it prohibits the political parties from spending soft money on

192. *See id.* at 21–22.

193. *See* WASH. REV. CODE § 42.17.640(6), (14) (2002).

194. Of course, if the parties coordinate their spending with a candidate's campaign, then a different provision of the law would limit the expenditure based on the number of registered voters in the jurisdiction the candidate is seeking to represent. *See id.* § 42.17.640(3). The U.S. Supreme Court made clear in *Colorado II*, however, that closely drawn scrutiny should also apply to this type of "expenditure limit" because coordinated expenditure limits are really limits on what parties can *contribute* to their candidates and do not limit the overall amount that campaigns can spend. Colorado II, 533 U.S. 431, 456 (2001).

195. *Cf.* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 194 (2003) (approving electioneering communications provisions of FECA against vagueness challenge because they were "easily understood and objectively determinable.").

196. WASH. REV. CODE § 42.17.640(14).

197. *Id.*

198. More precisely, the Court upheld a ban on corporate or labor union use of general treasury funds for the subset of issue ads that fit within the definition of electioneering communication. *See McConnell*, 540 U.S. at 206.

such ads.[199]

Even if a court deemed the language of the Washington State statute to be less clear than the electioneering communications provision in BCRA, another BCRA provision that the *McConnell* Court upheld against a vagueness challenge closely parallels FCPA's language.[200] Specifically, BCRA prohibits state political parties from spending soft money contributions on federal election activities.[201] One such activity is "public communication" that "promotes," "supports," "attacks," or "opposes" a candidate for federal office.[202] The statute does not define "promote," "support," "attack," or "oppose," yet the U.S. Supreme Court upheld this provision against a vagueness challenge, concluding that such words give fair notice to political parties as to what kind of spending is prohibited.[203] The Washington statute contains analogous language specifically barring political parties from using their soft money for the "promotion of individual candidates."[204] The U.S. Supreme Court's approval of nearly identical language shows that the language of the Washington statute is not unconstitutionally vague.[205] Additionally, the PDC has the ability to issue rules to clarify any uncertainty in the law's implementation,[206] and this should allay any remaining vagueness concerns.[207]

---

199. *See* WASH. REV. CODE § 42.17.640(14).

200. *Compare* 2 U.S.C. § 431(20)(A)(iii) (2000 & Supp. II 2002), which reads

> 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 advocates a vote for or against a candidate)

with WASH. REV. CODE § 42.17.640(14)(a), which reads

> [t]he following contributions are exempt from the contribution limits of this section: An expenditure or contribution earmarked for voter registration, for absentee ballot information, for precinct caucuses, for get-out-the-vote campaigns, for precinct judges or inspectors, for sample ballots, or for ballot counting, all without promotion of or political advertising for individual candidates.

201. 2 U.S.C. § 441i(b)(1) (Supp. II 2002).

202. *Id.* § 431(20)(A)(iii).

203. *See McConnell*, 540 U.S. at 170 n.64.

204. *See* WASH. REV. CODE § 42.17.640(14)(a).

205. *See McConnell*, 540 U.S. at 170 n.64 (approving prohibition on certain expenditure "promot[ing] a candidate" against vagueness challenge).

206. *See* WASH. REV. CODE § 42.17.370.

207. *Cf. McConnell*, 540 U.S. at 170 n.64 (noting Federal Election Commission could provide advisory opinions to clarify any uncertainty, sufficiently curing any remaining vagueness problem).

D. FCPA Should Survive Closely Drawn Scrutiny

Washington State's limitation on the state political parties is constitutional under the closely drawn test. First, the government has a sufficiently important interest in preventing corruption at the state level.[208] Second, as compared to the federal provisions upheld in *McConnell*,[209] the Washington State law is more closely drawn to achieve the state's interest.[210] Therefore, FCPA satisfies both prongs of *Buckley*'s closely drawn analysis and complies with the First Amendment's requirements.[211]

1. FCPA Attempts to Prevent Corruption and the Appearance of Corruption, a Sufficiently Important Interest

FCPA, like the federal provisions upheld in *Buckley* and *McConnell*,[212] furthers the sufficiently important government interest of preventing corruption and the appearance of corruption. Its restrictions on political parties serve these ends by preventing circumvention of limits on contributions given directly to candidates.[213] The *McConnell* Court unreservedly confirmed that anti-circumvention provisions served a government interest that is sufficiently important to withstand a First Amendment challenge.[214] While the limits upheld in *McConnell* applied at the federal rather than the state level, Washington State's interest in preventing corruption is no less important than the federal government's interest in the same goal.[215]

---

208. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000).

209. *See McConnell*, 540 U.S. at 161 (upholding national party soft money ban); *id.* at 173 (upholding state party soft money ban).

210. *See* WASH. REV. CODE § 42.17.640(6), (14) (2004).

211. *See McConnell*, 540 U.S. at 136 (laying out two-pronged closely drawn scrutiny test).

212. *See id.* at 143 ("Our cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits."); Buckley v. Valeo, 424 U.S. 1, 29 (1976).

213. *See* WASH. REV. CODE § 42.17.640(1) (2004); *cf. McConnell*, 540 U.S. at 144 (discussing how federal limit on contributions to national political parties serves to prevent circumvention of direct contribution limits).

214. *McConnell*, 540 U.S. at 144.

215. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000) (noting states' legitimate interest in preventing corruption and appearance of corruption).

2. *FCPA's Contribution Restriction on Political Parties Is Closely Drawn to Match this Sufficiently Important Interest*

Washington State's restriction on contributions to political parties is actually more closely drawn than the analogous federal provisions approved by the *McConnell* Court. FCPA sweeps less broadly by permitting individuals to give unlimited amounts to the state political parties, whereas the federal regime caps donations to the national political parties at $25,000.[216] Additionally, corporations and labor unions can donate up to $3,400 in Washington State, but under FECA they are barred from contributing or spending any amount in connection with any federal election.[217] Moreover, under Washington State law, these organizations can give as much as they wish beyond the $3,400 limit, as long as the funds are spent on specific activities that do not promote individual candidates.[218] This exception complies with the law's anti-corruption rationale because activities that do not benefit individual office holders pose less risk of corruption.[219] Collectively, these considerations show that Washington State's campaign finance law imposes more modest restrictions on contributions to state political parties than would be constitutionally permissible under the *McConnell* decision.

V. CONCLUSION

Recognizing the corrupting influence large organizational campaign contributions may have on policy makers, the people of Washington State have attempted to restrict the size of campaign contributions. In addition to limiting direct donations to candidates' campaigns, Washington State law seeks to avoid circumvention of these limits by capping contributions to political parties. In *Washington State Republican Party*, the Washington State Supreme Court invalidated this cap on First Amendment grounds to the extent that the law limited issue ad spending. In response to this decision, Washington State's Public

---

216. *Compare* 2 U.S.C. § 441a(a)(1)(B) (Supp. II 2002) (permitting "no person" to give in excess of contribution limit), *with* WASH. REV. CODE § 42.17.640(6) (permitting "no person other than an individual" to give in excess of contribution limit).

217. 2 U.S.C. § 441b(a) (Supp. II 2002). This is an exception to the *Buckley* decision's general rule that expenditures cannot be limited. *See McConnell*, 540 U.S. at 205.

218. *See* WASH. REV. CODE § 42.17.640(14)(a).

219. *Cf.* Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n, 141 Wash. 2d 245, 274, 4 P.3d 808, 824 (2000) (discussing the narrow tailoring of RCW 42.17.640(14)).

Disclosure Commission modified its rules to permit parties to spend their soft money on issue ads. The U.S. Supreme Court's recent *McConnell* decision, however, held that the First Amendment does not bar limitations on issue ad spending. In light of this decision, the Public Disclosure Commission should issue new administrative rules clarifying that the expenditure of soft money by state political parties on issue ads violates Washington State law and will no longer be permitted.