Campaign Finance and the First Amendment

by Erik S. Jaffe

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> "John McCain is a fascist who is trying to take away your First Amendment rights!"
>
> *Anonymous*

Provocative political speech? Yes. Protected by the First Amendment? Without a doubt. But if John McCain and others have their way, it soon may be illegal to offer the above criticism in numerous situations. On April 2, 2001, the Senate passed S. 27, the McCain-Feingold bill, in the latest effort to enact campaign finance reform. That bill would regulate virtually all spending on speech by national political parties; regulate vast tracts of speech by state political parties; ban ever-increasing amounts of speech by business corporations, nonprofit organizations, and labor unions; and force disclosure of the individual identities of persons engaging in many types of political speech or political association. Thus, if an election is imminent, the above speech could violate several provisions of McCain-Feingold depending upon the identity of Anonymous, how the speech is distributed, the source of money paying for the distribution, and the content and cost of any previous speech by Anonymous.

The sweeping restrictions imposed by McCain-Feingold represent significant challenges to current understanding of First Amendment protection for political speech. If enacted into law, a variety of legal challenges are certain and likely will cause the Supreme Court to revisit many of the issues raised in its seminal 1976 decision in *Buckley* v. *Valeo*.[1]

While much of the constitutional debate over McCain-Feingold has focused on current Supreme Court jurisprudence, *Buckley* and its progeny rest on uncertain ground at the Court. Various members of the current Supreme Court have criticized *Buckley* either as too restrictive or too protective of speech. Given

the wide, though contradictory, dissatisfaction with *Buckley*, it cannot be relied upon as scripture, but must be reevaluated in light of first principles.

In this paper, the Center for Individual Freedom (the Center) will focus on principles as well as precedent, and set out what it considers to be the primary First Amendment principles applicable to campaign finance. It will then consider several major aspects of McCain-Feingold that run afoul of those principles.[2]

On first principles, campaign finance restrictions are constitutionally suspect endeavors. Both the First Amendment itself and Supreme Court cases interpreting that amendment afford maximum First Amendment protection to direct speech and association relating to elections. Restrictions on such speech and association are subject to strict scrutiny. Also offensive under the First Amendment, though sometimes condoned by the Court, are restrictions on contributions and expenditures of money for political speech. Both contributions and expenditures of money for political speech are inextricably bound to the resulting speech.

Without constitutional protection for the use of money to generate speech, running a paid ad in a newspaper, on television, or over the radio, or paying to copy leaflets could be made into a crime. Only those who independently own media outlets would have effective avenues for speech, and even they might then be prevented from devoting those outlets – which cost money to run – to disfavored speech. While money itself may not be speech, where money is restricted precisely in those circumstances where it will be used for speech, that restriction on money is merely a means of restricting speech and must be scrutinized rigorously under the First Amendment.

In the case of campaign finance, the legitimate government interest in preventing corruption of elected officials should be limited to instances of *quid pro quo* bribery of actual or potential office-holders. However, contributions and expenditures that are dedicated solely to generating political speech should not be considered bribes, and the value of speech in persuading or

informing the public may not constitutionally be considered "corrupt."

Our democratic system in general and the First Amendment in particular assume that politicians and the public will be influenced by the political speech of competing interest groups and individuals. A system under which influential political speech necessarily costs money certainly carries with it some risk that politicians will place their self-interest in holding office ahead of their duty to their constituents as a whole. But however imperfect or worrisome a system built on such influence may be, it is the system the Constitution established, it is better than the alternatives, and it may not simply be redefined as "corrupt" in order to avoid the First Amendment.

Absent a demonstrable interest in preventing actual corruption, campaign-related restrictions are often said to serve the interest of avoiding a public "perception" of unproven corruption that might shake confidence in our democratic institutions. But mere public suspicions or misperceptions of corruption surrounding contributions and expenditures for political speech is no basis for ignoring the constitutional scheme. Rather, the proper answer to such misperception is either more speech, the election of candidates voluntarily practicing the public's notion of virtue, or, ultimately, a constitutional amendment if the existing system cannot hold the public's confidence. In no event are public misperceptions a justification for distorting constitutional provisions set out precisely to resist even the strongly held desires of a temporal majority.

The above principles show major elements of McCain-Feingold to be incompatible with the First Amendment. First, McCain-Feingold directly restricts the speech and association of political parties and their members by regulating and limiting funds raised for and spent on political speech. For example, in an election where any federal candidate is on the ballot, all levels of political parties are severely restricted in their efforts to exhort the public to join a party, register to vote, or turn out at the polls on election day. Political parties, no less than any other expressive

associations, are entitled to the full protection of the First Amendment.

The influence of parties on candidates, particularly when exercised through public speech, is an entirely proper consequence of free speech and association. Furthermore, any disproportionate influence of large donors over the views of a political party is hardly *improper* influence, but rather is the inevitable consequence of economic and social disparities.

Speech having unequal influence comes in many shapes – speech by the media, speech by celebrities, speech by religious leaders, and speech by the economically successful. Whether through differences in access, quantity, or credibility, the impact of speech will necessarily vary. But the First Amendment places its trust in the public, not government, to sort it all out in the end.

Even if disparities in apparent influence are troubling, the government may not attempt to equalize the political strength of different elements in society by restricting the voice of some to enhance the voice of others. The First Amendment uniquely and especially condones political influence mediated through speech and forbids government manipulation of that aspect of the political process.

Second, McCain-Feingold's added restrictions on speech by corporations and unions improperly suppress the speech of particular associations within society without any compelling basis. Neither Ford Motor Company nor the United Auto Workers Union, for example, would be allowed to run a television ad criticizing McCain-Feingold if either McCain or Feingold were candidates in an imminent election. Many nonprofit corporations would likewise be barred from the most effective channels of communication to criticize the policies or legislative efforts of a federal candidate facing an imminent election.

Use of a corporate structure does not diminish the constitutional character of free association, and nonprofit corporations make essential contributions to political dialogue

through their expenditures for speech. Business corporations and labor unions likewise serve as vital associations based on the shared interests of their members – assuming voluntary purchase of stock by shareholders or payment of dues by union members. That those interests are largely economic does nothing to diminish their constitutional value. Political advocacy and speech driven by economic perspectives are likely universal and in any event are no different than speech motivated by less worldly concerns.

Finally, McCain-Feingold's requirement that certain nonprofit organizations and individuals engaging in "electioneering communication" must disclose their expenditures, receipts, and donors conflicts with the constitutionally protected status of anonymous speech and association. If the ACLU or the NAACP, rather than Ford or the UAW, wanted to criticize McCain-Feingold prior to a relevant election, they would have to pay for it through a restricted fund and disclose the names of the donors to that fund. Requiring public disclosure of the identity of private speakers and supporters of private associations as the price of merely communicating an idea or associating with like-minded individuals is an excessive and unjustified burden on such speech or association. Whatever the value and usefulness such disclosure may have to a curious public, such interests are not even remotely "compelling" in the First Amendment sense. By contrast, the value of privacy and anonymity can be extremely important to individuals who might otherwise remain silent rather than voice controversial views or join unpopular causes. At least where private expenditures for speech are concerned, the First Amendment leaves the balancing of the pros and cons of disclosure to the speaker, not Congress.

First Amendment Principles Applicable to Campaign Finance

Though people often agree on First Amendment generalities, the devil and the disputes are usually in the details. Although political speech is protected, and money is vital for effective speech, does the contribution or expenditure of money for speech command the same value and protection as the direct act of

speaking itself? While government has a compelling interest in preventing corruption, what, beyond actually bribery, is to be considered corruption and is the elimination of even an incorrect "perception" of corruption a compelling government interest sufficient to outweigh First Amendment rights?

Buckley offered some answers to those questions, but few on either side of the debate are necessarily satisfied with those answers. Reviewing First Amendment principles and positing fresh answers to those questions will frame constitutional evaluation of McCain-Feingold.

Campaign Speech Merits Maximum First Amendment Protection. While the First Amendment protects many forms of speech, there is virtually no disagreement that speech about public issues, laws, elected officials, and candidates is subject to the most vigorous protection of the First Amendment. The Supreme Court has repeatedly recognized that "the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." [3]

Even the sometimes disparaged "express advocacy" for the election or defeat of a candidate falls solidly within the core of the First Amendment protection of political speech. As the Supreme Court correctly observed in *Buckley*, "[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." [4] But for *Buckley's* recognition of this basic principle, it could be made a crime for an individual to take out a small advertisement in a national newspaper that read "Vote for Harry Browne."

Political Association Merits Rigorous First Amendment Protection. Another central aspect of the First Amendment is its protection for expressive association. As the Supreme Court explained in *NAACP* v. *Alabama*, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and restrictions on

association are thus "subject to the closest scrutiny" under the First Amendment.[5]

As a corollary to the protection of association itself, the ability of an individual to keep his or her associations private is likewise protected. The deprivation of anonymity has been correctly held to pose a significant burden upon and deterrent to both political speech and association, particularly where an individual associates with a controversial group or voices an unpopular idea. As the Supreme Court has observed,

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association …. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. … Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.[6]

Forced disclosure of the individual identities of persons supporting group speech thus violates the First Amendment absent adequate government interests and narrow means of pursuing those interests.

Expenditures or Contributions for Speech Are Inextricable from Speech Itself. While the bare contribution or expenditure of money is not by itself speech – except in a limited symbolic sense – the contribution or expenditure of money for the specific purpose of generating speech is so integrally entwined with the resulting speech that it is and should be protected to the same extent as the speech itself. As with many rights, exercising the right to speak almost always costs money, especially if the speaker intends to reach a large audience. The right to speak thus necessarily encompasses the right to pay for speech or the distribution of speech, just as the right to counsel encompasses the right to hire a lawyer and the right to free exercise of religion includes the right to contribute to the church of one's choice.

In each of these cases the expenditure or contribution of money is protected not because "money is speech" or "money is a lawyer," or "money is religion," but rather because the expenditure of money is part of the *exercise* of the right to speak, to counsel, or to free exercise of religion. Government restrictions on contributions or expenditures for speech thus necessarily restrict the underlying speech itself.

As the *Buckley* decision at least nominally recognized, a "restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. … The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." [7] Payment for communication is thus protected to the same extent as the resulting communication, and expenditure or contribution limits "impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties." [8]

The Supreme Court in *Buckley* correctly applied this basic equivalence when it protected independent expenditures of money for political speech, but inexplicably lost sight of the main point when it allowed regulation of "contributions" for campaign activities (including "coordinated" expenditures). The cause of the error seems to be the mistaken notion that contribution limitations do not directly limit speech or association because "the quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated symbolic act of contributing," and that contributions spent on subsequent communication merely "involve[] speech by someone other than the contributor." [9] Thus, the Supreme Court recently observed that its cases "drew a line between expenditures and contributions, treating expenditure

restrictions as direct restraints on speech, … which nonetheless suffered little direct effect from contribution limits." [10]

The dichotomy between contributions and expenditures has come under considerable attack over the years, most recently by those who view expenditures as an effective substitute for contributions and thus a means of circumventing contribution limits. But the most telling criticism of the dichotomy is that contributions made for the express purpose of generating speech by the recipient – *i.e.*, campaigning – are indistinguishable from expenditures made to generate speech through various intermediaries. Thus, in the case of associations that receive contributions from their members or supporters and in turn expend such funds on political communication, the Supreme Court has recognized that limiting association expenditures "precludes most associations from effectively amplifying the voice of their adherents" and "'is simultaneously an interference with the freedom of [their] adherents.'" [11]

If a contribution to an association with a favored viewpoint is an amplification of the contributor's voice, then so too is a contribution to a candidate with views favored by the contributor, and the contributor both speaks through and associates with the candidate and other like-minded contributors. Just as with other forms of expressive association, the campaign contributor's own speech is not lost by the fact that the final words are mouthed by someone "other than the contributor." The First Amendment value of contributions for the express purpose of funding speech thus is not merely the symbolic value of the act of contributing, but the full speech-generating value of the funds contributed. Then-Chief Justice Burger recognized in his partial concurrence and dissent in *Buckley* that "contributions and expenditures are two sides of the same First Amendment coin," and criticized the Court for playing "word games" in failing to recognize that "people[,] candidates and contributors spend money on political activity because they wish to communicate ideas, and their constitutional interest in doing so is precisely the same whether they or someone else utters the words." [12]

Current members of the Supreme Court have likewise recognized the equivalent First Amendment value of contributions and expenditures. Justice Thomas, joined by Justice Scalia, has written in dissent that even "in the case of a direct expenditure, there is usually some go-between that facilitates the dissemination of the spender's message …. To call a contribution 'speech-by-proxy' thus does little to differentiate it from an expenditure." [13] Noting that the Supreme Court affords full value to speech-by-proxy in the case of private associations and their contributors, Justice Thomas correctly criticizes the *Buckley* decision for ignoring that "a contribution, by amplifying the voice of the candidate, helps to ensure the dissemination of the messages that the contributor wishes to convey." [14]

Having a valid point about the lack of communicative difference between contributions and expenditures, proponents of McCain-Feingold seek to extend regulation to expenditures in addition to contributions. While the premise is correct, the conclusion is flawed: The similarity between contributions and expenditures suggests not that expenditures may be regulated, but rather that regulation of contributions must be scrutinized with greater rigor and, in most cases, also violates the First Amendment.

The Government Interest in Preventing "Corruption" Is Narrow. There is virtually no disagreement that the government has a compelling interest in preventing corruption of government officials. Bribes in the form of money given to a present or potential government official as a *quid pro quo* for subsequent official acts serving the private interest of the giver pose a sufficiently compelling object of regulation that might restrict First Amendment rights to some degree. More controversial, however, is whether the compelling interest in eliminating "corruption" extends beyond controlling direct bribery and reaches the myriad of indirect potential causes of supposed favoritism for private over public interest.

Justice Thomas has chided the majority of his colleagues for extending the government interest in corruption "beyond its *quid pro quo* roots" to include any supposed deviation from

theoretical purity in the service of public officials, thus allowing "vague and unenumerated harms to suffice as a compelling reason" to restrict speech.[15] The Center agrees that a compelling interest in combating corruption is limited by the First Amendment to the interest in eliminating *quid pro quo* bribery of government officials.

The Center notes two basic limitations on what should be considered a bribe for purposes of establishing a compelling interest in corruption. First, speech, though often valuable to a candidate or official, should not be considered a bribe even where specifically offered in exchange for subsequent official conduct. As a simple example, it is common political practice for a private organization to state to a candidate that it will publicly endorse that candidate if and only if that candidate takes a particular position on some item of government policy or legislation. A group promising endorsement as a *quid pro quo* for a candidate's action to (restrict/safeguard) abortion, for example, is engaging in entirely protected conduct despite that such behavior is theoretically structured as a bribe.

Second, the Center questions whether monetary contributions to a campaign fund that are usable only for political speech are properly equivalent to money that can be converted to a candidate's personal use. While there is no question that money, like speech itself, has value, that value is so integrally tied into the uniquely protected constitutional activity of speech that it may be inappropriate to treat it as a bribe.

Merely monetizing the value of speech does not convert it into a bribe. Furthermore, if the candidate cannot convert the money to personal use, the thing of "value" being given is not the money itself, but assistance in being elected and the presumed *personal* interest the candidate has in his election. But if aid in getting elected is the "value" portion of a bribe, then all of democracy is essentially a bribe wherein candidates are offered election in exchange for taking favored actions once elected. Such an expansive conception of bribery is troubling at best, and is not a compelling basis for restricting speech. Thus, where a contribution

may be used only for campaign speech, and hence is merely one among many forms of assistance in an election, we should be hesitant to analogize it to bribery, particularly absent any *quid pro quo* arrangement.

Avoiding Mistaken "Perceptions" of Corruption Is Not a Compelling Interest. When discussing the government interests in *Buckley*, the Court offered, with little analysis, the claim that "the appearance of corruption stemming from public awareness of the opportunities for abuse" in campaign contributions was of "almost equal concern as the danger of actual *quid pro quo* arrangements."[16] The only support for this assertion, however, was the Court's previously expressed concern, in *Letter Carriers* v. *Civil Service Commission*, over the appearance of corruption where civil servants engaged in openly partisan political activities.[17] But that earlier case involved the conduct of an unelected government employee himself, not conduct by private citizens that might be thought to sway the conduct of elected officials in some non-demonstrable and wholly speculative way. That the mass of the public mistakenly perceives "corruption" where none exists is no credible grounds for restricting speech, even assuming that such perception might eventually lead to a loss of confidence in the supposedly corrupt elected officials. The First Amendment simply does not allow speech to be sacrificed to public opinion in that way.

The First Amendment points us to other solutions to the problem of unsubstantiated public perceptions. The most compatible solution is more speech to educate the public to correct any misperceptions about the incidence of corruption, the means of dealing with genuine corruption, and the non-corrupt nature of any official who cares to defend himself. If more speech does not change the public perception of corruption, the public can always vote against those deemed corrupt or subject to corruption. And if the public perception of corruption were sufficient to erode confidence in the system "to a disastrous extent," as *Buckley* speculated,[18] then surely the public would be motivated enough to vote for a candidate who voluntarily eschews the supposedly corrupting influence of large campaign contributions. If they are

not sufficiently motivated to vote differently, then there is ample reason to question whether any supposed perceptions of corruption present a clear and present danger to democracy.

Finally, if the public perceives that the First Amendment stands as a barrier to eliminating corruption and thus loses confidence in the system, that is a persuasive impetus for a constitutional amendment, not a basis for ignoring the Constitution as it currently is structured. The mechanism for amending constitutional provisions when the public has lost confidence in those provisions is not a threat to democracy, but rather is the proper operation of our democracy. Constitutional amendments are purposefully difficult to adopt, precisely to ensure that any major change in our system of government is the result of a deliberate and considered decision by the people and not a hasty reaction by a momentary majority.

McCain-Feingold Violates the First Amendment

Many aspects of McCain-Feingold tread on First Amendment rights with inadequate or non-existent justification. Even the drafters of the bill seem to have recognized the doubtful constitutional validity of various provisions by including contingent provisions that will be triggered upon judicial invalidation of the primary provisions. Rather than parse every unconstitutional jot and tittle of McCain-Feingold, however, the Center will focus on three major areas in which the bill offends core First Amendment principles. Those areas are speech by political parties, speech by corporations and unions, and forced disclosure of the identity and political expenditures of individuals and associations. In each of these areas, McCain-Feingold goes beyond current law to restrict speech and association in violation of a proper understanding of the First Amendment.

Restrictions on Political Party Speech. One major objection to McCain-Feingold is its restriction of speech by political parties. McCain-Feingold forbids national committees of political parties from spending for political speech except using

"hard money" – *i.e.*, money obtained through federally limited donations and subject to various spending restrictions. It thus eliminates "soft money" – money raised and spent without federal limitation – currently used for political speech that does not expressly advocate election or defeat of a federal candidate. As to state, district, and local committees of political parties, the bill adopts an expansive definition of "Federal election activity" and requires that such activity be conducted with federally regulated money.[19]

For example, in the four months preceding almost any election, a state party may only use hard money subject to stringent federal restrictions to register voters, conduct get-out-the-vote campaigns, or issue a public communication referring to a candidate for federal office regardless of whether the communication advocates the election or defeat of that candidate.[20] Thus, in the not-uncommon situation of a sitting state governor running for federal office, state parties or candidates would be limited to using federal hard money to praise or criticize the governor in the context of their own state or local races. Indeed, even criticism of that sitting governor in connection with his ongoing state conduct would be subject to federal hard-money caps. In the case of national parties, the restriction is even more severe, applying hard-money caps to all political speech even if limited to legislative issues or party-building activities such as membership drives.

The First Amendment analysis of contributions to and communications by political parties is and should be the same as with any other organization as far as the speech interests are concerned. Political parties self-evidently engage in the core speech protected by the First Amendment, as the Supreme Court has repeatedly recognized.

> A political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a

> government that voters can instruct and hold responsible for subsequent success or failure. The independent expression of a political party's views is "core" First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees.[21]

Restrictions on a political party's ability to finance its own political speech thus implicate the First Amendment in its fullest and most immediate sense, regardless of whether such speech involves promoting a candidate, increased voter registration, or any other topic on which a political association might wish to express its views and those of its members.

McCain-Feingold would limit the speech of political parties and their members by forbidding or restricting the collection and expenditure of money necessarily and integrally tied to protected speech. It does so based upon the supposed influence that contributions to and expenditures by the party would have on the candidates and officials endorsed by the party. Such supposed influence on and by political parties, however, is a far cry from the "corruption" of elected officials that might constitute a compelling basis for narrowly tailored speech regulations.

Even assuming that candidates and office-holders will be responsive to the views of their endorsing party and its major supporters, such accommodation is hardly "corrupt." Rather, aggregation of resources and amplification of views through political association are precisely the points of freedom of association, and influencing the public and public officials are likewise the points of political speech. A candidate's responsiveness to the views of his chosen political party is no different than his responsiveness to the views of other influential associations and groups within his constituency. In a system designed for the very purpose of mediating power through speech, it is oxymoronic to then designate the influence of such speech as "corrupt." [22]

Whatever the understandable concern that resource inequality can translate into inequality of political influence, if that influence is mediated through political speech, it is an inequality contemplated by the First Amendment and protected notwithstanding any supposed tension between freedom and equity. First Amendment freedoms simply cannot be sacrificed on the altar of social concern absent a constitutional amendment so altering our system of government.[23]

Corporate and Union Speech. McCain-Feingold adds to existing restrictions on corporate and union speech by forbidding such entities from engaging in "electioneering communication," which includes broadcast, cable, or satellite communication to members of the electorate that "refers to a clearly identifiable candidate" within 60 days of an election or 30 days of a primary.[24] Because that definition includes communications that merely "refer to" a candidate, it covers sweeping amounts of speech containing any reference to an existing representative who may be up for reelection, regardless of whether that speech concerns or directly mentions the election. That goes well beyond current, and questionable, restrictions forbidding expenditures on "express advocacy" of the election or defeat of a candidate or direct contributions to a candidate.

Denying corporations and unions the ability to engage in a particularly effective form of speech at a time when such speech is most relevant to the public is unconstitutional discrimination against certain classes of speakers. Such discrimination seems based on some imagined concern that the views expressed by those speakers will somehow distort the distribution of viewpoint that would be expressed otherwise. While there is no particular reason to believe that corporations and labor unions will lack a diversity of competing and conflicting viewpoints on issues relevant to an election, the very notion of government meddling with speech to alter the balance of viewpoints is all the more reason to protect corporate and union speech rather than to restrict it.

So long as the purchase of corporate stock or the payment of union dues is voluntary, those entities represent just one more

form of association among individuals. Insofar as the associations' activities are expressive, such activities should be protected by the First Amendment just as the expressive activities of any other association are protected. That the viewpoints expressed by such associations are likely based upon the common economic interests of their shareholders or members does not change the equation.

Common economic interests are as valid a basis for expressive association as any other type of common interest. Simply because the associations also engage in certain non-expressive activities generating substantial resources that can be devoted to speech does not distinguish them from associations having wealthy, generous, or numerous members and thus also capable of devoting substantial resources to speech. Justice Scalia aptly criticized corporate speech restrictions premised upon the notion that because

> corporations have so much money, they will speak so much more, and their views will be given inordinate prominence in election campaigns. This is not an argument that our democratic traditions allow – neither with respect to individuals associated in corporations nor with respect to other categories of individuals whose speech may be "unduly" extensive (because they are rich) or "unduly" persuasive (because they are movie stars) or "unduly" respected (because they are clergymen). The premise of our system is that there is no such thing as too much speech – that the people are not foolish but intelligent, and will separate the wheat from the chaff.[25]

The true danger of corruption lies not in an excess of speech by corporations or others with supposedly disproportionate resources, but rather in government restrictions on speech, which the framers of the First Amendment believed inevitably would be used to favor those currently in power, at the expense of the public.

McCain-Feingold's corporate speech restrictions also apply to nonprofit corporations, though tax-exempt corporations under

Internal Revenue Code §§ 501(c)(4) and 527(e)(1) may engage in such communications if they create a separate segregated fund for such communications financed solely by individuals.[26]

Such application of corporate speech restrictions to nonprofit corporations suggests that the provision represents a more direct assault on the freedom of association itself rather than any unique concern with the aggregation of capital through the corporate business form. In that case, the seeming purpose of restricting the core political speech of expressive associations is nothing less than a strike at the heart of the very concept of free association.

The only apparent objection to various nonprofit corporations appears to be that they do precisely what the First Amendment contemplates associations will do: They amplify and increase the effectiveness of the expression of the views of their members and supporters. To label such enhanced communication "corrupt" is incompatible with the First Amendment. That certain egalitarian political theories may view collective expression with disdain and may only value purely individual expression, such theories are not the basis of our Constitution or the First Amendment.

The Constitution protects both individual and collective expression, and rightly so. Where government functions only through the combined choices of the electorate and its representatives, restricting the ability of individuals to combine in the expression of their views would cast a pall of ignorance over subsequent government choices in responding to the collective views and interests of the people. A cacophony of tiny individualized voices incapable of coordinating and combining for coherent expression would simply undermine the responsiveness of government to widespread interests and issues that, even if muzzled, will not go away.

There is no constitutionally valid justification for McCain-Feingold's restrictions on the direct speech of any voluntary association, whether labor union or corporation, business entity or

nonprofit organization. The views of such voluntary associations are as much a part of the public debate guaranteed by the First Amendment as are the views of any other group or individual. Insofar as such associations direct their resources through the medium of speech, they cannot be deemed "corrupt" in a system where speech is a uniquely and necessarily valid form of political currency.

Forced Disclosures. McCain-Feingold allows pre-election speech by individuals and certain nonprofit organizations – those exempt under sections 501(c)(4) and 527 of the Internal Revenue Code – but as to those speakers it exacts a significant price for certain such speech. Speakers engaging in "electioneering communication" via broadcast, cable, or satellite communications and referring to a candidate for federal office, and expending over $10,000 in any year must disclose the details of their expenditures. Where the speakers are exempt nonprofit organizations, they must identify, among other things, all persons who contributed over $1,000 either to the relevant segregated fund or, in some cases, to the organization itself.[27]

The courts have long recognized that forced disclosure of an individual's political affiliations and views can act as a significant deterrent to free association or expression.[28] Where disclosure is required in connection with political speech or association, strict scrutiny requires that the burden of disclosure be justified by a compelling interest. In the case of McCain-Feingold, it is virtually impossible to detect such an interest in connection with independent expenditures or contributions to private associations. Insofar as such disclosure might be thought to add material information about a candidate by revealing the identity of those who simply agree with that candidate but who are not even acting in concert – *i.e.*, coordination – with that candidate, the interest in such marginal information value is not compelling.

An anonymous advertisement saying "Vote for Joe because he supports free trade" tells the public something about Joe's policy views, but is not particularly enhanced by compelled identification of the speaker. The public can readily assume that

the speaker favors free trade and may well stand to gain from free trade. And the public can be as skeptical as it likes based on the anonymity itself. Knowing that the speaker, for example, is "Bob the importer" adds little or nothing to what the public can already surmise, but easily may expose Bob to adverse treatment by those (including Joe's opponent) who disagree with Bob's political views.

The Supreme Court has correctly rejected the marginal informational interest in disclosure in the case of anonymous political handbills.

> Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude. … The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit.[29]

Beyond the informational interest, there is little to justify forced disclosure. Public disclosure of the identity of private speakers and members of private associations also has no connection to corruption of candidates, particularly where the connection between the individual or associational speaker and the candidate is attenuated – *i.e.*, the expenditure is independent.

That the disclosure burden of McCain-Feingold would apply primarily to speech in close proximity to an election or primary and made via the most effective tools of mass communication only makes it more offensive, not less. To place a heightened burden on speech precisely when and how it is most effective suggests that the restriction is targeted at the communicative impact of the speech rather than some non-speech interest. But government substituting its notions of what the content of pre-election speech should be for the views of the

speakers themselves is once again contrary to the most basic premises of the First Amendment. In the Center's view, it is up to each speaker to decide whether to proceed anonymously or for attribution, and it is up to the public to weigh the value of anonymous or attributed speech accordingly. The First Amendment forbids Congress from making those choices for us.

CONCLUSION

McCain-Feingold represents a frontal assault on a variety of First Amendment principles, some, but not all, discussed in this paper. Because *Buckley* and its progeny are under attack from both supporters and opponents of campaign finance restrictions, and because the Supreme Court may well move in a new direction when next called to confront these issues, anyone concerned with individual freedom must consider the First Amendment issues from the perspective of first principles.

While existing precedents can be both instructive and persuasive, they cannot casually be relied upon either to save or to strike particular aspects of McCain-Feingold. Rather, McCain-Feingold, like the precedents themselves, will stand or fall according to the persuasiveness of the principles invoked on either side of the argument.

This paper is intended to serve as a starting point for supporting and in some instances challenging current precedent in order to provide the First Amendment the respect it is due. While, as a practical and constitutional matter, the Supreme Court will have the final say on what the Constitution means, there is ample opportunity for research and reasoning before that resolution, and such efforts may well help inform the choices made by lawmakers and, if necessary, by the Supreme Court when called to review new campaign finance legislation.

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

[2] McCain-Feingold has been chosen for this constitutional analysis because it has passed the full Senate and moved to the House. Most of the commentary in this paper applies equally to all similar proposals (and to some current law), whatever their origin or designation.

[3] *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971); *see also Buckley*, 424 U.S. at 15 (same); *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377, 386 (2000) (same).

[4] *Buckley*, 424 U.S. at 48. The Court since *Buckley*, however, has drawn a distinction between so-called "express advocacy" of the election or defeat of a candidate and all other speech that might refer or relate to candidates or issues but that stops short of using phrases such as "vote for" or "vote against" a candidate. *Buckley*, 424 U.S. at 43, 44 n. 52. From a First Amendment perspective, this supposed distinction has nothing to do with the value of the speech or the degree of scrutiny restrictions on such speech ought to receive. The distinction exists not because of any logical difference between express and other forms of advocacy, but rather for the sake of providing a bright – if arbitrary – line distinguishing election-related advocacy from other advocacy, and thus avoiding the vagueness of restrictions on speech "relative to" a candidate. *Id*. at 41-44. And even with such a clarifying distinction, the Court in *Buckley* correctly invalidated restrictions on independent expenditures containing express advocacy. The distinction remains relevant – still to avoid vagueness – only for the purposes of certain disclosure requirements and for restrictions on corporate and union speech, the latter of which arguably raise different government interests not present with individual speech.

[5] *NAACP* v. *Alabama*, 376 U.S. 449, 460-61 (1958).

[6] *Id*. at 462.

[7] *Buckley*, 424 U.S. at 19 (footnote omitted).

[8] *Id*. at 17 & n. 17.

[9] *Id.* at 21.

[10] *Nixon*, 528 U.S. at 386; *see also id.* ("similar difference between expenditure and contribution limitations in their impacts on the association right").

[11] *Buckley*, 424 U.S. at 22 (citation omitted).

[12] *Id.* at U.S. at 241, 244 (Burger, C.J., concurring in part and dissenting in part). Then-Chief Justice Burger also correctly pointed out that the speech-by-proxy distinction between contributions and expenditures was a complete falsehood in the case of coordinated or "authorized" expenditures, which are counted and restricted as contributions despite involving the *direct* speech of the person

making the expenditure. 424 U.S. at 243 & n. 8 (Burger, C.J., concurring in part and dissenting in part). Whether or not such coordinated expenditures implicate a stronger government interest, they most certainly do not involve a diminished First Amendment interest for the individual and in fact squarely highlight the individual's associational interest in coordinating with a candidate or campaign committee of like mind.

[13] *Nixon*, 528 U.S. at 413 (Thomas, J., dissenting) (citation and internal quotation marks omitted).

[14] *Id*. at 414-15.

[15] *Id.* at 423-24 (Thomas, J., dissenting).

[16] *Buckley*, 424 U.S. at 27.

[17] *Id*. (citing *CSC* v. *Letter Carriers*, 413 U.S. 548, 565 (1973)).

[18] *Id*. (internal quotation marks omitted).

[19] S. 27 (ES), at 3-12.

[20] *Id*. at 8-10.

[21] *Colorado Republican Federal Campaign Comm*. v. *FEC*, 518 U.S. 604, 615-16 (1996); *see also Eu* v. *San Francisco County Democratic Central Comm*., 489 U.S. 214 (1989).

[22] And even assuming some inherent coordination between a political party and a candidate of that party – an assumption expressly rejected in *Colorado Republican*, 518 U.S. at 621-22 – such coordination does not diminish the constitutional value of the speech by the party. At most it simply increases the value of that speech to the candidate. But to say that a candidate is "corrupted" by the valued speech of his chosen associates is constitutionally untenable. The influence of valuable speech is not improper under a constitution that views speech as the protected means of influencing both government and the public. If anything, the coordination of party speech and candidate speech is the archetype of political association whereby persons seek to enhance the effectiveness of their own speech through combination and coordination with others of like mind. Calling coordinated speech a "contribution" adds nothing to the analysis and highlights the problem with regulating even monetary contributions used for generating speech.

[23] Well-regarded, influential, or wealthy people may well have a substantial influence on public opinion and may well influence the election of public officials. But that is an entirely proper aspect of our constitutional democracy. The notion of equalizing the quantity and quality of speech on each side of all issues by restricting the speech of those with greater ability or determination to spread their message is contrary to the very core of the First Amendment and has been rightly and roundly rejected by the Supreme Court. *Buckley*, 424 U.S. at 48-49.

[24] S. 27 (ES) at 15, 18.

[25] *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 695 (1990) (Scalia, J., dissenting).

[26] S. 27 (ES) at 22.

[27] *Id*. at 15-20; *see also id.* at 14 (itemization of contributions to political parties above $200 per year).

[28] *See NAACP* v. *Alabama*, 376 U.S. at 462; *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995).

[29] *McIntyre*, 514 U.S. at 348.

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