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-- James Bopp, Jr. and Richard E. Coleson (April 23, 2002)

Fatal Flaws in the Bipartisan Campaign Reform Act of 2002

By James Bopp Jr. and Richard E. Coleson*

Early on March 27, 2002, without fanfare, President George W. Bush signed the Bipartisan Campaign Reform Act of 2002 (BCRA) into law. In a printed statement, he applauded the increased contribution limits and enhanced public disclosure measures, but expressed serious doubts about the constitutionality of other provisions, asserting his confidence that the federal courts would properly resolve questionable issues.[1] The same day, U.S. Senator Mitch McConnell (R-Ky.) filed a complaint challenging the full spectrum of flaws in BCRA[2] and stating his intention to add plaintiffs with standing to raise all counts.[3]

This article will deal with some of those flaws, focusing especially on the topics of issue advocacy and association. Part I discusses the bright-line express advocacy test created by the U.S. Supreme Court to protect issue advocacy and how BCRA flouts the holdings of the court and the First Amendment guarantees of free expression and association. Part II deals with the court's declarations on what constitutes coordination with a candidate and how BCRA scorns these holdings. Part III deals with the court's declarations on the essential, noncorrupting role played by political parties and how BCRA disregards these holdings and the Tenth Amendment's reservation of states' rights in our federalist system. Part IV deals with some remaining flaws, such as vagueness and equal protection,

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[1]The president's signing statement is available at Stanford Law School's Internet site on campaign finance materials at <http://lawschool.stanford.edu/library/campaignfinance/> (visited April 2, 2002) (hereinafter "Campaign Finance Materials"). Also available there are the text of BCRA, complaints, docket, legislative history, articles, cases, statements, and links.

[2]The complaint is available at Campaign Finance Materials, *supra* note 1, as is a more limited complaint filed by the National Rifle Association.

[3]Senator McConnell had earlier (March 21) held a press conference and issued a press release presenting his 'dream team,' including First Amendment expert Floyd Abrams; former federal judge, solicitor general, and independent counsel Kenneth Starr; election law expert and litigator James Bopp Jr., general counsel for the James Madison Center for Free Speech; election lawyer Bobby R. Burchfield; election lawyer Jan Baran; and dean of the Stanford University Law School, Kathleen M. Sullivan

raised in the McConnell complaint. As shall be seen, BCRA is an incumbent-protective, news-media-empowering federal usurpation masquerading as "reform" at the expense of the will, rights, and power of the people.

I. The Law Assaults the Rights to Free Association and Expression.

In America, average citizens associate in issue advocacy corporations, labor unions, and political parties to participate effectively in the political process by pooling resources to amplify their voices to advocate issues of public concern, lobby for legislation, and directly promote the election of candidates. The wealthy and powerful have no such associational need, but citizen groups are a vital populist tool for maintaining the equality envisioned in the Declaration of Independence.

These advocacy groups speak out on the vital issues of the day that are important to them in the marketplace of ideas -- on such issues as the environment, disability rights, civil rights, gun control, abortion, assisted suicide, tax policy, foreign policy, and free trade. They publish voting records, voter guides, and advertisements about where officials stand on these vital issues. If such liberty of association for free expression seems like the vital functioning of a democratic republic, it is. It is called issue advocacy. This free expression on vital political issues of the day is at the very core of the grand experiment called "America."

Yet self-styled "reformers" sought to deprive the people of the foundational rights of free association and expression guaranteed by the First Amendment, and they have now succeeded in imposing BCRA on the people. The law unabashedly seeks to eliminate issue advocacy by pulling down the twin pillars of free expression and association. But before turning to the specifics of BCRA's assault on free expression and association, it is important to understand these freedoms better.

A. Free Association Is Vital to Our Democratic Republic and Powerfully Protected by the First Amendment.

Authentic grassroots citizen groups are not part of the problem this nation faces, but part of the solution. Americans have been from the beginning a nation of joiners, as Alexis de Tocqueville observed nearly two centuries ago, and such associationalism is part of the genius of America: "Americans of all ages, all conditions, and all dispositions constantly form associations."[4] He elaborated on the necessity of associations in words that seem targeted at current campaign finance "reform" efforts, but were written in 1840:

> Among democratic nations it is only by association that the resistance of the people to the government can ever display itself; hence the latter always looks with ill favor on those associations which are not in its power; and it is well worthy of remark that among democratic nations the people themselves often entertain against these very associations a secret feeling of fear and jealousy, which prevents the citizens from defending the institutions of which they stand so much in need. The power and duration of these small private bodies in the midst of the weakness and instability of the whole community astonish and alarm the people, and the free use which each association makes of its natural powers is almost regarded as a dangerous privilege.[5]

The author continued with a warning of the danger if incumbent government officials are permitted to control the people's associations:

> Among all European nations there are some kinds of associations or companies which cannot be formed until the state has examined their bylaws and authorized

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[4] ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 106 (Phillips Bradley, ed., Vintage Books ed. 1990) (1840) (chap. V, para. 2).

[5] *Id.* at 311-12 (chap. V, para. 31).

> their existence. In several others attempts are made to extend this rule to all associations; the consequences of such a policy, if it were successful, may easily be foreseen.
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> If once the sovereign has a general right of authorizing associations of all kinds upon certain conditions, he would not be long without claiming the right of superintending and managing them, in order to prevent them from departing from the rules laid down by himself. In this manner the state, after having reduced all who are desirous of forming associations into dependence, would proceed to reduce into the same condition all who belong to associations already formed; that is to say, almost all men who are now in existence.[6]

Tocqueville highlighted the vital importance of associations in democracies as bulwarks against the dangers of majoritarianism,[7] despotism,[8] and conspiracies.[9] He concluded that free association is an inalienable right and issued a warning seemingly targeted directly at campaign finance "reformers":

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures, and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. *No legislator can attack it without impairing the foundations of society*.[10]

The right to associate and the ability of average citizens to thereby affect public policy are so essential to our democratic republic that the U.S. Supreme Court has recognized free association as a fundamental right with powerful constitutional protection. The liberty of association, as of political speech, is a First Amendment right, and "the constitutional guarantee [of the First Amendment] has its *fullest and most urgent application* precisely to the conduct of *campaigns for political office*."[11] The right was articulated well in *NAACP v. Alabama*,[12] when the Supreme Court rejected Alabama's attempt to compel disclosure of the membership list of the National Association for the Advancement of Colored People. The unanimous Court strongly affirmed constitutional protection for free political association:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to *political*, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.[13]

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[6] *Id.* at 312 (chap. V, paras. 32-33).

[7] ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 194 (Phillips Bradley, ed., Vintage Books ed. 1990) (1835) (chap. XII, para. 13).

[8] *Id.* at 195 (chap. XII, para. 14).

[9] *Id.* (chap. XII, para. 16).

[10] *Id.* at 196 (chap XII, para. 17) (emphasis added).

[11] Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (per curiam) (emphasis added).

[12] 357 U.S. 449 (1958).

[13] *Id.* at 460-61 (citations omitted) (emphasis added).

The court held that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[14]

In the seminal *Buckley v. Valeo* decision, the court reaffirmed the constitutional protection for association: "[E]ffective advocacy of both *public* and private points of view, particularly controversial ones, is undeniably enhanced by group association. [Consequently,] the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of *political* beliefs and ideas."[15] The court reiterated that "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[16] This highest level of constitutional protection flows from the essential function of associations in allowing effective participation in our democratic republic. Organizations, from political action committees (PACs) to ideological corporations to labor unions to political parties, exist to permit "amplified individual speech."[17]

B. A High Wall Separates Unfettered Issue Advocacy from Express Advocacy, Even Though Issue Advocacy Affects Elections.

Political issue advocacy affects elections. Television advertisements criticizing California Governor Gray Davis for electric power "gray-outs" may cause voters to reject his reelection bid. Voter guides published by the National Abortion and Reproductive Rights Action League (NARAL) or the National Right to Life Committee (NRLC) may be carried into the voting booth and used to select candidates favoring or opposing abortion rights. Campaign finance "reformers" decry this fact and call for regulation of issue advocacy. They consider issue ads a loophole needing closure by strict laws.

But the First Amendment is not a loophole.[18] It needs no reform. Liberty requires protection for the freedoms of expression and association that are the bedrock of our republic -- *especially* in the context of political debate and election campaigns. In *Buckley*,[19] the United States Supreme Court recognized that the First Amendment mandates protection of issue advocacy *even though it affects elections*, belying the claim of some "reformers" that the Court was not sufficiently farsighted to see the effect that issue advocacy would eventually have in influencing elections:

> Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other

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[14] *Id.* at 462.

[15] *Buckley*, 424 U.S. at 15 (emphasis added).

[16] *Id.* at 24. When only an associational interest is involved, as with limits on cash contributions to candidates, the government need only demonstrate that the "contribution regulation was 'closely drawn' to match a 'sufficiently important interest.'" Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 387-88 (2000). However, when speech is limited, the statute is subject to strict scrutiny, requiring the government to demonstrate that the regulation is narrowly tailored to advance a compelling governmental interest, *Buckley*, 424 U.S. at 64-65, the standard employed for expressive association. Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984); Boy Scouts of America v. Dale, 120 S. Ct. 2446, 2456-57 (2001).

[17] Democratic Party v. National Conservative PAC, 578 F. Supp. 797, 820 (E.D. Pa. 1983).

[18] *Cf.* James Bopp Jr. & Richard E. Coleson, *The First Amendment Is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 U. WEST L.A. L. REV. 1 (1997) (setting out a "primer on protected political expression," articulating the "express advocacy" and "major purpose" tests, tracing the history of failed FEC efforts to regulate issue advocacy, and offering proposals for speech-enhancing campaign reform). *See also* Wanda Franz & James Bopp Jr., *The Nine Myths of Campaign Finance Reform*, 9 STAN. L. & POL'Y REV. 63 (1998). Congressional testimony on campaign finance reform and other materials by James Bopp Jr. are also available at the <www.jamesmadisoncenter.org>, the web cite of the James Madison Center for Free Speech, which Mr. Bopp serves as General Counsel.

[19] 424 U.S. 1 (1976) (per curiam).

> official conduct. Discussions of those issues, as well as more positive efforts to influence public opinion on them, tend naturally and inexorably to *exert some influence on voting* at elections.[20]

This liberty is fully protected, the court declared, explicitly endorsing the use of issue advocacy to influence elections by promoting candidates and their views: "So 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.*"[21] And for those who argue that the "express advocacy" test was ill considered by the Supreme Court, review of *Buckley* belies that claim also. The court reiterated the "express advocacy" test in eight different passages throughout its opinion.[22]

The fact that issue advocacy affects election campaigns makes it *less*, not *more*, subject to regulation because, as the Supreme Court has declared: "the constitutional guarantee [of free expression] has its fullest and most urgent application precisely to the conduct of campaigns for political office."[23] This is so because free expression is both vital in its own right and essential to representative government.[24] "In a republic where the people [not their legislators] are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those elected will inevitably shape the course that we follow as a nation."[25]

The Supreme Court clearly articulated in the seminal *Buckley v. Valeo*[26] decision why protecting the people's free expression right required a high wall of separation between issue and express advocacy. Faced with constitutional questions regarding the post-Watergate amendments to the Federal Election Campaign Act (FECA), the court struggled with the question of what speech could be constitutionally subject to government regulation. This act was written broadly, subjecting to regulation any expenditures[27] on speech that were made "relative to a clearly identified candidate"[28] or "for the purpose of . . . influencing" the nomination or election of candidates for public office.[29]

The court recognized that the difference between issue and candidate advocacy often dissipates in the real world:

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[20] *Id.* at 43 n.50 (citation omitted) (emphasis added).

[21] *Id.* at 45 (emphasis added).

[22] *Id.* at 43, 44, 44 n.52, 45 (twice), 80 (thrice).

[23] *Id.* at 15 (citation omitted).

[24] *See* FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 257 n.10 (1986) ("*MCFL*").

[25] *Buckley*, 424 U.S. at 14-15.

[26] 424 U.S. 1.

[27] The fact that campaign finance laws regulate the spending of money on speech, rather than the speech itself, does not change the constitutional analysis. As *Buckley* explained,

> 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.

Id. at 18-19. Thus, "[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.* at 19 n.18.

[28] Section 608(e)(1) limited expenditures by individuals and groups "relative to a clearly identified candidate" to $1,000 per year.

[29] Section 431(e) and (f) defined the terms "contribution" and "expenditure" for the purposes of FECA's disclosure requirements in then Section 434(e).

> [T]he distinction between discussion of issues and candidates and advocacy of the election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.[30]

The dilemma was whether to allow regulation of issue advocacy, because it might influence an election, or to protect issue advocacy, because it is vital to the conduct of our representative democracy -- including its important influence on elections. The court recognized that "a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates."[31] The court declared advocacy of public and political issues an unfettered liberty:

> Discussion of *public issues and debate on the qualifications of candidates* [is] integral to the operation of the system of government established by our Constitution. The First Amendment affords the *broadest protection* to such *political expression* in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[32]

To keep this political issue advocacy liberty unfettered, the court erected a high wall to protect it. The wall was the "express advocacy" test, which limited government regulation to communications that in "explicit words" "expressly advocate the election or defeat of a clearly identified candidate."[33] The court narrowed application of FECA's contribution and expenditure disclosure provisions to "express advocacy" to prevent both unconstitutional vagueness and overbreadth.[34]

The *Buckley* court considered whether the interest in preventing actual or apparent corruption of candidates -- found sufficiently compelling to justify contribution limits -- justified regulating political issue advocacy. The court determined that issue advocacy could not be regulated *even though* it could potentially be abused to obtain improper benefits from candidates.[35]

To fully protect issue advocacy, the court's express advocacy test focused on the words actually spoken by the speaker, requiring that they be words like "vote for" or "elect,"[36] not on the *intent* of the speaker or whether the *effect* of the message would be to influence an election:

> [W]hether words intended and designed to fall short of invitation [to vote for or against a candidate] would miss the mark is a question both of *intent* and of *effect*. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy,

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[30] *Buckley*, 424 U.S. at 42-3.

[31] *Id.* (citation omitted).

[32] *Id.* at 14 (citation omitted) (emphasis added).

[33] *Id.* at 43, 44. To ensure that there was not any confusion about the meaning of "express advocacy," the court gave examples of such "express terms" -- "'vote for,' 'elect,' 'support,' 'cast your ballot for,' Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52.

[34] *Id.* at 80; *see also* Bopp & Coleson, *supra* note 18, at 11-15.

[35] *Buckley*, 424 U.S. at 45.

[36] *Id.* at 44 n.52. The express advocacy test is not a "magic words" test, i.e., so long as the words used in *Buckley*'s footnote 52 are avoided, political speakers avoid regulation. Footnote 52 creates an "express words of advocacy test": "This construction would restrict the application of § 608(e)(1) to communications containing *express words of advocacy* of election or defeat, *such as* 'vote for' . . . ." (Emphasis added.).

> and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
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> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.[37]

A decade later the court reaffirmed the high wall separating unfettered political or public issue advocacy from regulatable express advocacy in *FEC v. Massachusetts Citizens for Life*.[38]

The lower federal courts and state courts that have been faced with restrictions on issue advocacy have faithfully adhered to the express advocacy test according to its plain terms.[39]State cases recognizing constitutional protection of unfettered issue advocacy include: Osterberg v. Peca, 12 S.W.3d 31 (Tex. 2000); Washington State Republican Party v. Washington State Public Disclosure Comm'n, 4 P.3d 808 (Wash. 2000); Alaska v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999); Brownsburg Area Patrons Affecting Change v. Baldwin, 714 N.E. 2d 135 (Ind. 1999); Elections Bd. v.

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[37]*Id.* at 43 (citation omitted) (emphasis added). While "reformers" often espouse the view that the express advocacy test was intended only to fix the vagueness problem, which this passage addresses, they ignore the court's confirmation that the express advocacy limitation was also imposed on the FECA "to avoid problems of overbreadth." *MCFL*, 479 U.S. at 248 (citing *Buckley*, 424 U.S. at 80).

[38]479 U.S. at 249 (1986) ("We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition in §441b"; "finding of express advocacy depend[s] upon the use of language such as 'vote for,' 'elect,' 'support,' etc.") (citations omitted). *MCFL* adds another stream of reason and authority to the protection of issue advocacy, holding that nonprofit ideological corporations (common issue advocacy groups) that do not serve as conduits for business corporation contributions cannot even be prohibited from making independent expenditures (i.e., expenditures expressly advocating a candidate's election or defeat). *A fortiori* they cannot be banned from issue advocacy.

[39]Lower federal court cases recognizing constitutional protection for unfettered issue advocacy include: Virginia Society for Human Life v. FEC, 263 F.3d 379 (4th Cir. 2001); Lamar v. Florida Right to Life, 238 F.3d 1288 (11th Cir. 2001) (affirming Florida Right to Life v. Mortham, 1999 WL 33204523 (M.D. Fla. 1999)); Citizens for Responsible Gov't State Political Action Comm. v. Davidson, 236 F.3d 1174 (10th Cir. 2000); Perry v. Bartlett, 231 F.3d 155 (4th Cir. 2000); Vermont Right to Life Comm. v. Sorrell, 216 F.3d 264 (2d Cir. 2000); Iowa Right to Life Comm. v. Williams, 187 F.3d 963 (8th Cir. 1999); North Carolina Right To Life v. Bartlett, 168 F.3d 705 (4th Cir. 1999); Virginia Soc'y For Human Life v. Caldwell, 152 F. 3d 268 (4th Cir. 1998); Brownsburg Area Patrons Affecting Change v. Baldwin, 137 F.3d 503 (7th Cir. 1998); FEC v. Christian Action Network, 110 F.3d 1049 (4th Cir. 1997) (*CAN II*); Maine Right To Life Comm. v. FEC, 98 F.3d 1 (1st Cir. 1996) (per curiam); FEC v. Christian Action Network, 92 F.3d 1178 (4th Cir. 1996) (*CAN I*); Faucher v. FEC, 928 F.2d 468 (1st Cir. 1991); FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987) (*Furgatch* contains broader dicta, but the Fourth Circuit summarized the narrower holding as "where political communications . . . include an explicit directive to voters to take some [unclear] course of action, . . . 'context' . . . may be considered in determining whether the action urged is the election or defeat of a . . . candidate . . . ." *CAN II*, 110 F.3d at 1054.) ; FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 53 (2d Cir. 1980) (en banc); Oklahomans for Life v. Luton, No. CIV-00-1163, slip. op. (W.D. Okla. May 25, 2001); North Carolina Right to Life v. Leake, No. 99-CV-798, slip. op. (E.D. N.C. Oct. 24, 2000); FEC v. Christian Coalition, 52 F. Supp. 2d 45 (D.D.C. 1999); Kansans for Life v. Gaede, 38 F. Supp. 2d 928 (D. Kan. 1999); Right to Life of Mich. v. Miller, 23 F. Supp. 2d 766 (W.D. Mich 1998); Planned Parenthood Affiliates of Mich. v. Miller, 21 F. Supp. 2d 740 (E.D. Mich. 1998); Right To Life of Dutchess County v. FEC, 6 F. Supp. 2d 248 (S.D. N.Y. 1998); Clifton v. FEC, 927 F. Supp. 493 (D. Me. 1996), *aff'd on other grounds*, 114 F.3d 1309 (1st Cir. 1997); West Virginians For Life v. Smith, 919 F. Supp. 954 (S.D. W. Va. 1996); FEC v. Survival Educ. Fund, 1994 WL 9658, (S.D. N.Y. Jan. 12, 1994), *aff'd in part and rev'd in part on other grounds*, 65 F.3d 285 (2d Cir. 1995); FEC v. Colorado Republican Fed. Campaign Comm., 839 F. Supp. 1448 (D. Colo. 1993), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded on other grounds*, 518 U.S. 604 (1996); FEC v. NOW, 713 F. Supp. 428 (1989); FEC v. AFSCME, 471 F. Supp. 315 (D. D.C. 1979).

Wisconsin Mfr. & Commerce, 597 N.W.2d 721 (Wisc. 1999); Doe v. Mortham, 708 So. 2d 929 (Fla. 1998); Virginia Soc'y for Human Life v. Caldwell, 500 S.E.2d 814 (Va. 1998); State v. Proto, 526 A.2d 1297 (Conn. 1987); Klepper v. Christian Coalition, 259 A.D.2d 926 (N.Y. App. Div. 1999).

The weight of authority is heavy. The express advocacy test means exactly what it says -- political issue advocacy is protected, and campaign finance statutes regulating more than explicit words expressly advocating the election or defeat of clearly identified candidates are "impermissibly broad"[40] under the First Amendment.

C. BCRA Ignores these First Amendment Guarantees of Free Association and Expression.

In several ways, BCRA directly contradicts these Supreme Court holdings. The first has to do with the definition of an "electioneering communication," which is banned for corporations (with a flawed exception) and labor unions and subject to disclosure requirements.

1. "Electioneering Communication" -- Express Advocacy Test

The act bans corporations and labor unions from engaging in an "electioneering communication," defined as:

> any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office . . . 60 days before a general, special, or runoff election for the office sought by the candidate; or . . . 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and . . . 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.[41]

Plainly, this 60-day gag rule ignores the express advocacy test and encompasses issue advocacy. As discussed above, corporations and unions have an absolute right to broadcast targeted ads that mention candidates' positions on public issues on the eve of elections.[42] And "name or likeness" communication bans have already been found unconstitutional. In Michigan, the secretary of state promulgated a materially-identical rule that banned corporate and labor union communications made within 45 days of an election that merely contained the "name or likeness of a candidate." Two traditional adversaries, Right To Life of Michigan and Planned Parenthood, challenged the rule in separate federal courts and had the rule declared unconstitutional.[43] Likewise, the Second Circuit struck down a "notice of expenditure" statute that defined "mass media activities" as "includ[ing] the name or likeness of a candidate for office" and required reporting if such occurred "within 30 days of a primary or general election."[44] Similarly, the Fourth Circuit struck down a statute requiring reporting of expenditures for communications "if the printed material or advertisement names a candidate.[45]

The Bipartisan Campaign Reform Act provides an alternative definition of "electioneering communication" in the likely event the first is declared unconstitutional, but it explicitly eschews the

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[40]*Buckley*, 424 U.S. at 80.

[41]BCRA §201(a).

[42]*Buckley*, 424 U.S. at 43-44; *MCFL*, 479 U.S. at 248-49.

[43]Right To Life of Michigan, Inc. v. Miller, 23 F. Supp. 2d 766 (W.D. Mich. 1998); Planned Parenthood Affiliates of Michigan, Inc. v. Miller, 21 F. Supp. 2d 740 (E.D. Mich. 1998).

[44]Vermont Right to Life v. Sorrell, 221 F.3d 376, 380 (2d Cir. 2000).

[45]Perry v. Bartlett, 231 F.3d 155, 159 (4th Cir. 2000).

very words of the express advocacy test the Supreme Court mandated to prevent vagueness and overbreadth:

> any broadcast . . . communication which 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) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.[46]

This year-round incursion into protected issue advocacy territory would sweep in virtually any sort of commentary on the voting records or positions on issues of politicians. Disgruntled candidates would complain to the FEC if they think commentary is negative, and if it is positive, their opponents would file the complaint. On contentious social issues, value judgments on a candidate's view would be difficult to state without triggering a possible complaint under BCRA's standards of "promotes or supports" or "attacks or opposes," even when modified by such vague terms as "suggestive of," "plausible," and "exhortation," which are terms of subjective judgment, and therefore beyond the scope of the objective criteria that the Supreme Court mandated in this crucial First Amendment area. With BCRA's new expanded penalties, the language is too ambiguous and too far into the protected territory of issue advocacy for the Supreme Court to sustain.

Therefore, either definition of "electioneering communication" is an unconstitutionally overbroad infringement of free expression and association under the First Amendment, and the vague language violates the due process guarantee of the Fifth Amendment. And because BCRA bans corporations and unions from "electioneering communications" but permits it for other persons, it violates the equal protection guarantee of the Fifth Amendment.

2. "Electioneering Communication" -- Quasi-PAC

The act's ban on corporations making an "electioneering communication" does not apply to nonprofit corporations (under 26 U.S.C. §501(c)(4)) or political organizations (under 26 U.S.C. §527), but only if they set up "a segregated account to which only individuals can contribute money designated for such expenditures" (i.e., a "quasi-PAC"),[47] and even this exception does not apply if the communication is "*targeted*," i.e., broadcast to voters for the named candidate.[48] But this exception is a nullity -- except as applicable to candidates for president or vice president -- since the definition of "electioneering communication" ends with the proviso that "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."[49] In other words, BCRA allows certain corporations to engage in "targeted" activity, but only if it is not "targeted."

With respect to "electioneering communications" about the president and vice president, the nonprofit corporation would then have to report within 24 hours of any disbursement for an "electioneering communication," who made the disbursement, who keeps the books, where the business is located, "[t]he amount of each disbursement of more than $200 during the period covered," to whom these $200+ disbursements were made, the associated election(s) and candidate(s), and the names and addresses of all those contributing "an aggregate amount of $1,000 or more to that account during the period."[50]

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[46]BCRA §201(a).

[47]BCRA §203.

[48]BCRA §204 (emphasis added).

[49]BCRA §201(a) (emphasis added).

[50]BCRA §201.

This goes well beyond just reporting the "electioneering communication" expense. The act imposes PAC-type record keeping and reporting requirements along with a prohibition on receiving any corporate or labor union contributions. These quasi-PAC burdens are all imposed on a nonprofit corporation engaging in *issue advocacy*. The Supreme Court in *Massachusetts Citizens for Life* noted that FECA's requirement of a "separate segregated fund" (a PAC) for corporations wanting to engage in "independent expenditures" (express advocacy) posed significantly more burdensome requirements than the organization would have were it not incorporated and decided that this burden was too great for MCFL-type organizations.[51] Justice O'Connor noted in her concurrence in *MCFL*, the "significant burden" beyond "disclosure requirements" resulting from the "additional organizational restraints" imposed by requiring that independent expenditures be made through a PAC, because it "requires . . . a more formalized structure and significantly reduces or eliminates the sources of funding for groups . . . with few or no 'members.'"[52] In *MCFL*, the court held that PAC reporting requirements could not be imposed on MCFL-type, nonprofit, ideological corporations.[53] If MCFL-type corporations cannot be required to assume PAC reporting requirements for *express* advocacy, then MCFL-type organizations cannot be required to assume these quasi-PAC requirements to do *issue* advocacy.

The donor disclosure mandate imposes a substantial burden on freedom of expression and association because it exposes contributors to harassment and intimidation by ideological foes. The Supreme Court in *Buckley* held that such burdens could not be applied to issue-oriented groups because disclosure of private associations is an unconstitutional burden.[54]

It is also unconstitutional to ban the quasi-PACs from receiving money from corporations and labor unions because corporations and labor unions can themselves engage in issue advocacy, so that there is no compelling interest in limiting contributions to individuals.[55]

A §527 corporation is already required to register and file numerous detailed reports disclosing its receipts and disbursements, so that requiring such an already fully disclosed entity to create a quasi-PAC that must file additional reports and be subject to a ban on corporate contributions is a duplicative burden that is both unduly onerous and unrelated to any legitimate governmental interest.

Therefore, this quasi-PAC exception for §501(c)(4) and §527 corporations creates an unconstitutional burden on First Amendment free expression and association. And because BCRA creates no exception for other corporations, such as nonprofits organized under § 501(c)(3), that are similarly situated with respect to engaging in issue advocacy, the act violates the equal protection guarantee of the Fifth Amendment.

3. "Electioneering Communication" -- *MCFL* Exemption

In addition to holding that the government lacks a compelling interest in regulating *issue* advocacy, the Supreme Court has held that certain MCFL-type, nonprofit, ideological corporations pose an insufficient threat to the electoral process to permit their regulation in the same manner as other corporations, so that they cannot even be prohibited from express advocacy in the form of independent expenditures.[56] Many nonprofit corporations organized under §501(c)(4), §501(c)(3), and §527 qualify

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[51] 479 U.S. at 253.

[52] *Id.* at 266 (O'Connor, J., concurring).

[53] *Id.* at 263-65.

[54] 424 U.S. 1, 42-45 (1976). *See also* NAACP v. Alabama, 357 U.S. 449 (mandated disclosure of contributors violates privacy of donors and inhibits free association); Boy Scouts of America v. Dale, 530 U.S. 640 (2000) ("expressive association" protected by First Amendment).

[55] *See*, *e.g.*, First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

[56] *MCFL*, 479 U.S. at 263.

as MCFL-type corporations. If these MCFL-type corporations can even do *express* advocacy without the burden of PAC requirements, then *a fortiori* they cannot be saddled with quasi-PAC burdens for engaging in *issue* advocacy. Therefore, the quasi-PAC requirement for §501(c)(4), §501(c)(3), and §527 corporations is an unconstitutional burden on First Amendment rights of free expression and association.

4. "Electioneering Communication" -- Major Purpose Test

In *Buckley*, the Supreme Court established the bright-line "major purpose" test, holding that, while government may require reporting of an "independent expenditure," it may not require an organization that makes an independent expenditure to register and report other disbursements and donors as if it were a political action committee unless the "major purpose" of the organization is the election or nomination of candidates for public office.[57]

BCRA attempts to bypass the major purpose test with its quasi-PAC requirement by pulling out an activity of an organization otherwise protected from PAC burdens by the major purpose test and subjecting that activity to quasi-PAC burdens. Because BCRA seeks to evade the major purpose test, the quasi-PAC requirement for §501(c)(4) or § 527 corporations is an unconstitutional burden on First Amendment rights of free expression and association.

II. The Act Scorns the High Court's Holdings on Coordination.

BCRA also tries to sweep more expenditures into the source-and-amount restrictions of the Federal Election Campaign Act by employing the concept of coordination.[58]

A. "Coordinated Expenditures" -- Express Advocacy Test

Another consequence of the unconstitutional definition of "electioneering communication" is that it is applied by BCRA[59] to 2 U.S.C. §441a, with the result that BCRA now considers *issue* advocacy communications that are coordinated with a candidate (or party or committee) to be contributions subject to contribution limits. Because government only has a compelling interest in regulating *express* advocacy, this provision of BCRA is an unconstitutional burden on First Amendment free expression and association.

B. "Coordinated Expenditures" -- Creating "Coordination"

The act mandates the Federal Election Commission "to promulgate new regulations on coordinated communications" that "shall not require agreement or formal collaboration to establish coordination." BCRA §214. This would make expenditures on issue advocacy into contributions and therefore subject to the contribution limits of 2 U.S.C. §441a and the ban on corporate or labor union contributions of 2 U.S.C. §441b.

This provision of BCRA attempts to create coordination where none exists. There are only three possibilities relating to communication about an organization's planned "general public political communication" (as used in the FEC's current regulation at 11 C.F.R. § 100.23(e)(1)) to a candidate (or party or committee): (1) the organization communicates nothing to the candidate about the planned "general public political communication"; (2) the organization communicates with the candidate about the planned "general public political communication"; or (3) the organization and the candidate agree, collaborate, and become joint venturers in the planned "general public political communication," i.e.,

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[57] *Buckley*, 424 U.S. at 79.

[58] *See generally* James Bopp Jr. & Heidi K. Abegg, *The Developing Constitutional Standards for "Coordinated Expenditures": Has the Federal Election Commission Finally Found a Way to Regulate Issue Advocacy?*, 1 ELECTION L.J. 209 (2002).

[59] BCRA §202.

they coordinate the communication. This third approach is constitutionally required for there to be coordination as the United States District Court for the District of Columbia (the court mandated by BCRA to hear challenges to it) held in *FEC v. Christian Coalition*[60]: [A communication] becomes 'coordinated' where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) 'volume' (e.g., number of copies of printed materials or frequency of media spots). 'Substantial discussion' or 'negotiation' is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners.[61]

Therefore, *any* regulations the IRS might promulgate under BCRA's mandate would be unconstitutional because the mandate violates the First Amendment rights of expression and association, and, consequently, §214 of BCRA is unconstitutional.

III. The Act Assaults Political Parties and Federalism Without Warrant.

In Title I, BCRA targets a "Reduction of Special Interest Influence." This is primarily an assault on political parties. It bans parties from using "soft money," i.e., funds not raised under the source-and-amount restrictions of FECA. It requires state, district, and local political party committees to pay for "federal election activity" (voter identification, voter registration, get-out-the-vote, and party promotion activities) only with hard money (money raised subject to FECA limits).

BCRA carves out a narrow exception for certain voter identification, voter registration, and get-out-the-vote activity, for which state, district, and local political party committees may use funds that are not raised subject to FECA's restrictions, provided the funds used for the state share of such activities are raised in amounts of $10,000 or less, segregated, and reported. BCRA bans federal officeholders and candidates from participating in raising or spending any soft money funds for "federal election activity." It bars state candidates from funding communications promoting or supporting candidates for federal office, even if the communications do not expressly advocate the election or defeat of the candidate.

BCRA reflects Congress's woeful ignorance of -- or outright disdain for -- the constitutionally protected role political parties play in our democratic republic. With its misguided goal of eliminating soft money, BCRA has two dramatic adverse effects on political party activity: it imposes federal election law limits on state and local political party activities, and it dramatically limits the issue advocacy, legislative, and organizational activities of political parties. These effects are neither desirable nor constitutional. The Supreme Court has said "[w]e are not aware of any special dangers of corruption associated with political parties . . . ."[62] That assertion is backed both by the case law and by the overwhelming political science evidence of how political parties operate.

Haley Barbour, the former chairman of the Republican National Committee, defined a political party as "an association of like-minded people who debate issues, who attempt to influence government policy, and who work together to elect like-minded people to local, State and Federal office."[63] Political

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[60] 52 F. Supp. 2d 45, 92 (D.D.C. 1999).

[61] *See also* Colorado Republican Federal Campaign Comm. v. FEC, 518 U.S. 604 (1996) (Breyer, J., plurality opinion) (holding that there must be "actual coordination as a matter of fact," *id.* at 617, and listing the many things that did *not* constitute coordination but would be beyond BCRA's designation of "agreement or formal collaboration," *id.* at 619-23).

[62] *Id.* at 616.

[63] *Campaign Finance Reform Legislation: The Role of Political Parties: Hearing Before the House Oversight Comm.*, 104th Cong. 10-11 (1995).

parties are, first, associations of people; they are not simply repositories for campaign contributions, or "super-PACs." Second, political parties have a legitimate role in debating issues, promoting ideas, and formulating public policy. Third, national parties have significant local and state components; they are "national," not "federal," committees. National parties exist for the purpose of electing federal and state candidates *and* for affecting federal and state public policy. National parties have considerable, constitutionally protected interests in participating in state and local elections.

In *FEC v. Colorado Republican Federal Campaign Committee*,[64] the U.S. Supreme Court held that political parties are essentially just like every other group, so that they logically can do the same things other groups can do, e.g., organizing themselves along similar lines as ideological corporations by setting up an educational fund and a PAC. In the case, two theories had been advanced: (1) that parties were unique and so could do unlimited coordinated expenditures[65] and (2) that parties were just like any other group.[66] The court embraced the latter position.[67] The logic of parties being treated like any other group is that they are not just candidate-election organizations and they have the rights of any other group, especially amplifying the voices of members in issue advocacy. The court plainly said as much: "Parties thus perform functions more complex than simply electing candidates" and "[i]t is the accepted understanding that a party combines its members' power to speak by aggregating contributions and broadcasting messages more widely than individual contributors generally could afford to do . . . ."[68] Thus, there is no constitutional warrant for depriving them of soft money for such activity.

In many contexts, the Supreme Court has also recognized the constitutionally significant role played by political parties in our democratic republic, undercutting any asserted interest in restricting them, as BCRA attempts. In 2000, the High Court struck down California's blanket primary law because it unconstitutionally interfered with political parties' protected political association. As Justice Scalia wrote for seven justices: "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself."[69] As Justice O'Connor has recognized:

> There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government. The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change.[70]

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[64]533 U.S. 431 (2001).

[65]*Id.* at 445 ("The Party's argument that its coordinated spending, like its independent spending should be left free from restriction under the *Buckley* line of cases boils down to this: because a party's most important speech is aimed at electing candidates and is itself expressed through those candidates, any limit on party support for a candidate imposes a unique First Amendment burden.").

[66]*Id.* at 445-47.

[67]*Id.* at 447.

[68]*Id.* at 451-53.

[69]California Democratic Party v. Jones, 530 U.S. 567, 574 (2000).

[70]Davis v. Bandemer, 478 U.S. 109, 144-45 (1986) (O'Connor, J., concurring). *See also*, Eu v. San Francisco Democratic Central Committee, 489 U.S. 214, 244 (1989); Republican Party of Connecticut v. Tashjian, 479 U.S. 208, 214-15 (1986); Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107, 121-22 (1981); Cusins v. Wigoda, 419 U.S. 477, 487-88 (1975); Storer v. Brown, 415 U.S. 724, 728-29 (1974); Gaffney v. Cummings, 412 U.S. 735, 754 (1973); Williams v. Rhodes, 393 U.S. 23, 30 (1968).

Of course, "measured change" is not often the goal of incumbent politicians before most elections. This realization goes a long way toward explaining why the incumbent politicians in Congress favor reducing the impact political parties traditionally have in mobilizing voters to support challengers in competitive races. Political scientists have long recognized that political parties are the most influential institution in the electoral process for creating greater turnover in legislatures.[71] Indeed, *increasing* the role of political parties is the practical formula for improving many of the ills BCRA purports to address.[72]

In 1976 a bipartisan group of more than 300 professional political scientists and political practitioners formed the Committee for Party Renewal. In 1984, the committee issued *Principles of Strong Party Organization*,[73] which, based on the consensus views of these political scientists, advocated that:

(1) *Political parties should govern themselves. . . .*

(2) *Political parties should use caucuses and conventions to draft platforms and endorse candidates. . . .*

(3) *Political party organization should be open and broadly based at the local level. . . .*

(4) *Political parties should advance a public agenda. . . .*

(5) *Political parties should endorse candidates for public office. . . .*

(6) *Political parties should be effective campaign organizations. . . .*

(7) *Political parties should be a major financier of candidate campaigns. . . .*

(8) *Political parties should be the principal instruments of governance. . . .*

(9) *Political parties should maintain regular internal communications. . . .*

(10) *Election law should encourage strong political parties. . . .*

BCRA violates these principles, weakening political parties to the detriment of the republic. Thus, BCRA is irrational and unconstitutional for not being rationally related to any legitimate governmental interest.

And there is another fundamental reason why BCRA is flawed for attempting to regulate the activities of state and local political parties -- federalism. When "[w]e the People of the United States" ceded power to the federal government, we expressly specified in the Tenth Amendment that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People." State and local political parties have long been

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[71]MICHAEL J. MALBIN & THOMAS L. GAIS, THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES 145-158 (1998) ("Political parties . . . consistently gave disproportionately to candidates who were in close races, especially challengers and open-seat candidates. Party spending, therefore, seems to be an important vehicle for satisfying one of the two major goals of campaign finance reform: encouraging electoral competition." *Id*. at 158.).

[72]Anthony Gierzynski & David A. Breaux, *The Role of Parties in Legislative Campaign Financing*, 15 THE AMERICAN REVIEW OF POLITICS 171-189 (1994) ("Increasing the party role would reduce the gap between incumbent revenues and challenger revenues.") Furthermore, "a larger role for parties in financing elections would result in more equitable distribution of campaign money and a greater level of competition in legislative campaigns." *Id*. at 172.

[73]COMMITTEE FOR PARTY RENEWAL, THE PRINCIPLES OF STRONG PARTY ORGANIZATION (1984). This document is available on the website (<http://www.apsanet.org>) of the American Political Science Association at <http://www.apsanet.org/~pop/strong_party.htm> (visited Oct. 11, 2001).

governed by state and local law, not federal law. BCRA's effort to control state and local political parties is a power-grab without constitutional authority.

IV. BCRA Assaults Other Constitutional Freedoms.

While other constitutional flaws will not be fully developed in this article, the claims concerning them may be seen in Sen. McConnell's complaint.[74] Some of these are highlighted next.

A. Broadcasting Records -- Free Expression & Association

BCRA amends the Federal Communications Act of 1934 (47 U.S.C. §315) to require licensees to collect and disclose records of requests to broadcast, inter alia, communications "relating to any political matter of national importance," including a candidate, an election, or "a national legislative issue of public importance."[75] The communicator must disclose, and the licensee must make available to the public, inter alia, the name, address, and phone number of a contact person for the communicator "and a list of the chief executive officers or members of the executive committee of the board of directors." This restriction is overbroad for sweeping in protected issue advocacy, which may not be regulated, and implicates privacy concerns of expressive associations and their members.[76] Therefore, this provision violates First Amendment free expression and association rights

B. Broadcasting Records -- Vagueness

BCRA requires licensees to collect and disclose records of requests to broadcast, inter alia, communications "relating to any political matter of national importance," including a candidate, an election, or "a national legislative issue of public importance."[77] The phrases "relating to any political matter of national importance" and "a national legislative issue of public importance" are unconstitutionally vague. Therefore, these provisions violate Fifth Amendment due process rights.

C. Contracts as Expenditures

BCRA treats the making of a contract to make a disbursement as a disbursement for purposes of requiring disclosure of disbursements for "electioneering communications."[78] It treats the making of a contract to make a disbursement as a disbursement for purposes of the quasi-PAC exception to the prohibition of corporate and labor union disbursements for "electioneering communications."[79] It also requires broadcasters to report "request[s] to purchase broadcast time."[80]

The first two of these provisions are void for vagueness because they make it impossible to know when an "electioneering communication" has occurred because they are contrary to the definition of "electioneering communication,"[81] which requires a "communication" to exist before an "electioneering communication" can exist. If a corporation merely reserves radio time, without even submitting any script, no "electioneering communication" has occurred.

All three provisions are irrational and unrelated to any governmental interest, compelling or legitimate, and particularly the interest in telling voters "where political campaign money comes from

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[74]The complaint is available at Campaign Finance Materials, *supra* note 1.

[75]BCRA § 504.

[76]*See Buckley*,424 U.S. at 42-45; *NAACP v. Alabama*, 357 U.S. 449 (mandated disclosure of contributors violates privacy of donors and inhibits free association).

[77]BCRA § 504.

[78]BCRA § 201.

[79]BCRA §203.

[80]BCRA §504.

[81]BCRA §201.

and how it is spent by the candidate," recognized by the U.S. Supreme Court in *Buckley v. Valeo*.[82] Such information is better made available through reporting when actual communication occurs -- when there will be content to the communication -- and not meaningless reporting that some corporation bought air time. These requirements constitute an early-warning harassment opportunity for opposing factions that wish to harass, intimidate, and interfere with contractual relations.

Therefore, the first two provisions are unconstitutionally vague, in violation of the due process guarantee of the Fifth Amendment, and all of these provisions are unconstitutional burdens on First Amendment rights of free expression and association.

D. Contracts as Independent Expenditures

Similarly, BCRA treats the making of a contract to facilitate making an "independent expenditure" as if it were an "independent expenditure" for purposes of requiring disclosure of disbursements for "independent expenditures."[83] This provision is void for vagueness because it makes it impossible to know when an "independent expenditure" has occurred due to the contrary definition of "independent expenditure," which requires "expressly advocating,"[84] i.e., a "communication"[85]) to exist before an "independent expenditure" can exist.

This provision is irrational and unrelated to any governmental interest, compelling or legitimate, and particularly the interest in telling voters "where political campaign money comes from and how it is spent by the candidate," recognized by the U. S. Supreme Court in *Buckley*,[86] because such information is better made available through reporting when actual communication occurs; then there will be content to the communication and not meaningless reporting that some corporation bought air time, hired a printer, purchased printing stock, or contracted with a telemarketing firm for undetermined use in some anticipated but yet unknown political hot spot. This requirement also constitutes an early-warning harassment opportunity for opposing factions that wish to harass, intimidate, and interfere with contractual relations.

Therefore, this provision is unconstitutionally vague, in violation of the due process guarantee of the Fifth Amendment and is an unconstitutional burden on First Amendment rights of free expression and association.

Conclusion

Issue advocacy in the context of electoral politics enjoys absolute First Amendment protection. The Supreme Court has defined only a narrow scope of nonissue advocacy that can be regulated -- only explicit words expressly advocating the election or defeat of a clearly identified candidate. Congress cannot eviscerate this bright-line test with a no-advocacy, no-reference test. Political parties are not excluded from this protection and cannot be constitutionally forbidden from receiving and expending soft money. Nor is there a need to, because by their nature, political parties are incapable of corrupting their own candidates.

Congress cannot take away the constitutional right to engage in unfettered issue advocacy and unlimited independent expenditures by simply defining coordination to exist where it in fact does not. Legislatively created labels cannot obviate the freedom of speech. As the Supreme Court declared in *Buckley*: "In the free society ordained by our Constitution it is not the government, but the people --

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[82] 424 U.S. at 66 (internal quotation marks and citation omitted).

[83] BCRA §212.

[84] 2 U.S.C. § 431(17).

[85] 11 C.F.R. §100.16.

[86] 424 U.S. at 66 (internal quotation marks and citation omitted).

individually as citizens and candidates and collectively as associations and political committees -- who must retain control over the quantity and range of debate on public issues in a political campaign."[87]

BCRA would virtually destroy the ability of citizen groups to participate in our republic, thereby trampling on freedom of speech and association with respect to the most vital issues of our day. Fortunately, the federal courts have shown greater solicitude for the Constitution and the workings of our republic, along with less respect for the incumbent-protection urges of members of Congress, and may be relied upon to promptly bury such alleged "reform."

The First Amendment is not a loophole to be plugged by unconstitutional legislation in misguided efforts to "reform" campaign finance. Free political speech was the first and is the best campaign finance reform, and it is the very core of what James Madison drafted and the framers adopted when they guaranteed the people that "Congress shall make no law . . . abridging the freedom of speech."[88] The First Amendment needs no reform.

[87] *Id.* at 57.

[88] U.S. CONST. amend. I.