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Introduction

Warren Buffett, investment magnate and Chief Executive Officer of Berkshire Hathaway, wrote an editorial in The New York Times that said political contributions, as investments, were far undervalued.\(^1\) Buffett wrote that a campaign contribution could buy a great deal of political influence: “As a fund-raising senator once jokingly said to me, ‘Warren, contribute $10 million and you can get the colors of the American flag changed.’”\(^2\)

For almost a century, Congress has been enacting campaign finance legislation in an effort to eradicate the perceived corruption that flows from large campaign contributions.\(^3\) Its most recent attempt was the Bipartisan Campaign Reform Act (BCRA) of 2002, which addressed two major sources of contention in campaign funding: (1) The ease with which candidates could circumvent spending limits through “soft money” donations; and (2) The prevalence of televised “issue advertisements” purchased with “soft money,” and the misleading effects of these

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\(^2\) Id.
\(^3\) McConnell v. FEC, 540 U.S. 938, 115 (2003).
advertisements on the voting public.\textsuperscript{4}

Immediately after the BCRA became law, its constitutionality was challenged in \textit{McConnell v. Federal Election Commission}.\textsuperscript{5} The Supreme Court upheld all the major provisions of the BCRA.\textsuperscript{6} In its analysis of the BCRA, however, the Supreme Court shifts between two definitions of corruption.\textsuperscript{7} The first definition describes a system in which donors can purchase political influence by making large campaign contributions.\textsuperscript{8} The second definition of corruption turns on little more than the appearance of impropriety: It describes a campaign finance system in which large contributions merely “facilitate[] access to public officials.”\textsuperscript{9} While this allows wealthy donors unequal access to representatives, some claim that it results in no unfair influence over the legislative process.\textsuperscript{10}

Even opponents of campaign spending limits would agree that Congress has every reason to regulate a campaign finance system that has fallen prey to the first form of corruption: A system that would permit a donor to change the colors of the flag for

\textsuperscript{4} Id. at 123.
\textsuperscript{5} Id. at 132.
\textsuperscript{6} Id. at 132-133.
\textsuperscript{7} See id. at 143.
\textsuperscript{8} Id. at 143.
\textsuperscript{9} Id. at 119.
\textsuperscript{10} See id. at 119.
$10 million. But some claim that the second form of corruption— one in which $10 million buys nothing more than a meeting with congressmen— does not necessarily entail actual political impropriety.

In *McConnell*, the Court analyzes the campaign finance practices regulated by the BCRA, and attempts to determine whether those practices are evidence of actual political corruption. Throughout the decision, the Court shifts its definition of corruption as it upholds the various provisions of the BCRA. While it presents many examples of the second definition of corruption, the Court is unable to provide hard evidence that donors were able to buy political influence before Congress enacted the BCRA.

The Court is able to embrace both definitions of corruption, however, by stating that it wants to eradicate both “corruption and the appearance of corruption” in politics. While granting donors unequal access does not necessarily influence politicians’ legislative decisions, it gives rise to the appearance that they are being swayed by contributors. Thus, by broadly defining corruption and aiming to eradicate both corruption and the appearance of corruption, the Court easily counters the challenges to the BCRA raised in *McConnell*.

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12 *McConnell*, 540 U.S. at 142.
The research presented in this Article indicates that, although the Court used shifting definition of corruption in *McConnell*, the decision was necessary to eradicate campaign spending abuses. While some research has shown that donations do not necessarily buy political access, there is no doubt that the pre-BCRA campaign finance system raised the appearance of corruption. Statements from Congressmen, lobbyists, and reports from independent research groups raise a strong inference that the pre-BCRA system of campaign finance regulation did not sufficiently curb corruption.

The pre-BCRA campaign finance laws permitted campaign spending practices that resulted in the appearance of corruption. Opponents of campaign spending limits argue that the mere appearance of corruption does not warrant the strict BCRA regulations. The research presented in this Article, however, suggests that appearances should not be discounted. Taking into account the appearance of corruption that pervaded campaign spending before the BCRA, and the evidence presented in this Article, it is clear that the BCRA was necessary to halt corruption in campaign finance.

This Article will examine four main empirical claims the Court makes in *McConnell*: (1) Wealthy campaign donors are able to “buy” greater access to politicians with campaign contributions; (2) Limits on freedom to associate within party
committees are necessary in order to prevent campaign finance abuses; (3) Reductions in campaign funding will not inhibit political campaigns; and (4) Those who purchase campaign advertisements must be identified, so voters are not misled by the advertisements’ messages. The first two claims are diagnostic, and they identify problems with the pre-BCRA political system. The final two claims are predictive, and they examine the BCRA’s potential to reform campaign finance. Analyzing these four claims will provide insight into the Court’s beliefs about money’s corruptive effect on politics, and the BCRA’s role in remedying that corruption.

The first empirical claim discussed in this Article is that wealthy individuals have more access to, and thus greater influence over, elected representatives.\(^\text{13}\) The research presented indicates that wealthy donors are able to purchase “face time” with representatives, providing opportunities to discuss favored issues that most citizens cannot afford. Thus, this claim fits into the Court’s second definition of corruption. But while the Court worries that donors were able to influence legislation through large campaign contributions, some studies have indicated that this is not necessarily the case.\(^\text{14}\) Anecdotal evidence from Congressmen and independent

\(^{13}\) Id. at 175.
\(^{14}\) Michael Bailey, Do Campaign Contributions Lead to Policies that Favor the Wealthy? An Examination of Taxing and Spending in the American States 16
research has shown, however, that politicians are often unable to maintain impartiality, much less the appearance of impartiality, after receiving large donations. Therefore, the BCRA’s contribution limits are indeed necessary to prevent corruption in campaign finance.

The second claim explores the Court’s reasons for upholding limits on “soft money” donations, which allowed donors to circumvent campaign contribution limits prior to the BCRA.\textsuperscript{15} Wealthy donors who had reached their limit on “hard money” donations used “soft money” to make large, unregulated contributions to campaigns.\textsuperscript{16} These donations increased their access to, and possibly their influence over, elected representatives. Thus, “soft money” donations appear to constitute corruption by both of the Court’s definitions.\textsuperscript{17}

But this section also gives rise to some of the greatest uncertainties about the future effects of reform. The BCRA’s “soft money” restrictions limit political party committees’ freedom to associate; and the potential effects of the BCRA on intraparty collaboration are still unknown. This Article presents different predictions about potential effects of this regulation on political parties, and explains why the Court was

\textsuperscript{15} McConnell, 540 U.S. at 122.
\textsuperscript{16} Id.
\textsuperscript{17} See id. at 119; see also Buckley v. Valeo, 424 U.S. 1, 47 (1976).
so strongly divided on this issue in McConnell.\textsuperscript{18}

In its effort to eradicate corruption, Congress reduced the amount of money political parties can raise and spend during election cycles.\textsuperscript{19} The third claim analyzed in this Article explores whether parties will be able to effectively advocate with reduced campaign funding. While the two major parties should be similarly affected by this legislation, minor parties may face additional barriers to entry into the political marketplace, especially considering their pre-BCRA difficulties with fundraising.\textsuperscript{20} This Article will explore the BCRA’s impact on minor parties, and discuss whether candidates will be deterred from entering future elections by fundraising concerns.

The final claim presented in this Article is the assertion that those who pay for televised election advertisements must identify themselves, lest voters be misled.\textsuperscript{21} The Court’s analysis focuses on the tension between the McConnell holding and prior holdings on anonymous political speech. This claim contrasts the so-called “issue advertisements” regulated by the BCRA with cases involving political pamphleteering, which the Court has afforded full First Amendment protection. In its discussion of this claim, the Court introduces another aspect to

\textsuperscript{18} See McConnell, 540 U.S. at 161.
\textsuperscript{19} Id. at 122.
\textsuperscript{20} See, e.g., Theresa Amato, Participating in Power: A View From the Nader Campaign, 13 Stan. L. & Pol’y Rev. 143, 144 (2002).
\textsuperscript{21} McConnell, 540 U.S. at 197.
its definition of corruption: It holds that advertisements intended to trick voters are corrupt. This Article presents evidence that “issue advertisements” are intended to mislead voters, not inform them of issues, and that the limits imposed by the BCRA are justified. In sum, the following analysis of the claims in McConnell supports the Court’s finding that the BCRA effectively curbs campaign finance corruption. By aiming to eradicate both the appearance of corruption and actual dollars-for-votes corruption through the BCRA, Congress took an important step in changing the way political campaigns are conducted.
Background

A: The Federal Election Campaign Act of 1971

The Bipartisan Campaign Reform Act of 2002 (BCRA) comprised a series of amendments to the Federal Election Campaign Act of 1971 (FECA), the Communication acts of 1934, and other portions of the United States Code.\(^\text{22}\) It is the most recent attempt by Congress to “to purge national politics of what was conceived to be the pernicious influence of ‘big money’ campaign contributions.”\(^\text{23}\)

Modern campaign finance reform became a national priority when, in 1972, Congress passed the FECA in an effort to limit the effect of big contributors on politicians.\(^\text{24}\) In order to increase public awareness of the individuals and corporations who were donating significant funds to campaigns, the FECA required greater disclosure of campaign contributions and prohibited contributions made in another person’s name.\(^\text{25}\)

To limit the amount of money businesses could donate to elections, the FECA also prohibited corporations and unions from

\(^{22}\) Id. at 114.


\(^{24}\) See McConnell, 540 U.S. at 114.

\(^{25}\) 86 Stat. 3 (1972). Under this Act, disclosure was required of all contributions exceeding $100 and all expenditures by candidates and political committees whose spending exceeded $1,000 per year. 86 Stat. 3 (1972).
using general treasury funds for political contributions and expenditures.\textsuperscript{26} Under the FECA, businesses were required to donate through segregated funds known as political action committees, which had specific disclosure requirements.\textsuperscript{27}

Just two years later, Congress amended the FECA in order to close loopholes candidates used to exceed the FECA’s spending limits.\textsuperscript{28} The 1974 amendments prevented the formation of unlimited political committees for fundraising purposes, which allowed candidates to circumvent limits on individual committee’s receipts and disbursements.\textsuperscript{29} The 1974 amendments also introduced contribution limits: Individuals were permitted to donate up to $1,000 to a single candidate, not to exceed $25,000 in an election cycle. Finally, the 1974 amendments imposed ceilings on how much candidates could spend on national conventions; they required reporting and disclosure of contributions exceeding certain limits; and established the Federal Election Commission to enforce the FECA and future campaign finance legislation.\textsuperscript{30}

\textsuperscript{26} McConnell, 540 U.S. at 118.
\textsuperscript{27} Id. at 118.
\textsuperscript{28} Id. at 118-119.
\textsuperscript{29} Id. at 118.
\textsuperscript{30} Id. at 118-119.
B: Buckley v. Valeo’s Challenge to the FECA

The amendments to the FECA were challenged in the 1974 case *Buckley v. Valeo.* In its decision, the Court struck down limits on individual expenditures, which were used to fund political communication. But in an effort to reduce the effects of large contributions on federal campaigns, the Court upheld limits on contributions to national party committees, or “hard money” contributions. Donors easily circumvented these restrictions after *Buckley,* however, by making large soft money contributions to state and local political parties, which were then used to influence federal elections.

Individuals and corporations who had reached the permissible limits on hard money donations were permitted to donate unlimited amounts of soft money to state and local parties, which were “unaffected by FECA’s requirements and prohibitions.” The FEC held that political parties “could fund mixed-purpose activities – including get-out-the-vote drives and generic party advertising – in part with soft money.”

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32 This communication largely comprises televised campaign advertisements. *Id.* at 19.
33 *Id.* at 19.
34 *McConnell,* 540 U.S. at 122.
35 *Id.*
C: Post-Buckley campaign spending abuses and the Bipartisan Campaign Reform Act

This decision, however, created a soft money loophole that allowed contributors to fund limitless "issue advertisements," so long as they did not "expressly" advocate for or against a certain candidate.\(^{37}\) To help political parties determine which advertisements were ‘issue advertisements” and which were “express advertisements,” the FEC devised a “bright-line” test that, in the view of many critics, opened the floodgates for abuse. It held that advertisements using the words “vote for,” “vote against,” or “elect” constituted express advocacy and could only be funded with hard money.\(^{38}\) All other electioneering communications could be funded with “soft money.”\(^{39}\) With such a narrow definition of “express advocacy,” political parties easily circumvented the hard money restrictions, and funded much of their campaign advertising with soft money.\(^{40}\)

In 1998, the Senate Committee on Governmental Affairs issued a report on campaign finance abuses after investigating

\(^{37}\) Id. at 126.
\(^{38}\) Id.
\(^{39}\) See id.
\(^{40}\) See id. at 126-127. “Little difference existed, for example, between an ad that urged viewers to "vote against Jane Doe" and one that condemned Jane Doe's record on a particular issue before exhorting viewers to "call Jane Doe and tell her what you think.” Id.
spending in the 1996 election. \textsuperscript{41} The Committee concluded that the "soft money loophole" had led to a "meltdown" of the campaign finance system that had been intended "to keep corporate, union and large individual contributions from influencing the electoral process." \textsuperscript{42} Instead, the Committee found that big donors had contributed exponentially increasing amounts of soft money as the FEC permitted more liberal use of these funds. \textsuperscript{43} Thus, when the BCRA was passed in 2002 in an effort to remedy campaign finance abuses, it was no surprise that the crux of the bill focused on soft money and the issue advertisements soft money was used to fund.

Title I of the BCRA prohibits national parties, their committees and their agents from raising, spending, receiving or directing any soft money. \textsuperscript{44} "In short, [the BCRA] takes national parties out of the soft-money business." \textsuperscript{45} The BCRA also imposed greater restrictions on campaign advertisements, including disclosure and reporting requirements for electioneering communications. \textsuperscript{46} These restrictions were intended to "shed the

\textsuperscript{41} Id. at 129.
\textsuperscript{42} Id. at 130.
\textsuperscript{43} Id. at 123. "Of the two major parties' total spending, soft money accounted for 5% ($21.6 million) in 1984, 11% ($45 million) in 1988, 16% ($80 million) in 1992, 30% ($272 million) in 1996, and 42% ($498 million) in 2000." Id.
\textsuperscript{44} 2 U.S.C. § 441i(a) (Supp. II). 2 U.S.C.S. § 441i(a).
\textsuperscript{45} McConnell, 540 U.S. at 143.
\textsuperscript{46} Id. at 224-225.
light of publicity” on campaign financing and help voters make better-informed decisions in elections.⁴⁷

Immediately after the BCRA’s passage, the Act was challenged for potential infringements on constitutional rights, including freedom of speech and association.⁴⁸ The Plaintiffs in *McConnell* claimed that the restrictions imposed by the BCRA violated their rights to freedom of speech and association.⁴⁹ The Court, however, held the BCRA’s restrictions on soft money donations and issue advertisements were justified in order to prevent “actual and apparent corruption of federal candidates and officeholders.”⁵⁰ The following analysis will explore the Court’s claims in *McConnell*, in an effort to determine the extent to which large campaign contributions have a corrupting effect on politics.

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⁴⁷ See id. at 231; see also Buckley v. Valeo, 424 U.S. 1, 81 (1976).
⁴⁸ *McConnell*, 540 U.S. at 140.
⁴⁹ Id. at 159.
⁵⁰ Id. at 143.
Analysis

Does money have a corrupting influence on politics?

A: Large campaign contributions may allow donors to "buy" legislative influence.

The major assumption underlying the McConnell decision is that money has a corrupting effect on politics, and that by regulating campaign spending, Congress can halt corruption, or the appearance of corruption, in election cycles. The Court found that, by upholding the provisions of the BCRA, it was bolstering Congress's "fully legitimate interest in maintaining the integrity of federal officeholders and preventing corruption of federal electoral processes through the [Bipartisan Campaign Reform Act]." 51

In McConnell, the Court operates under the belief that the "political potentialities of wealth" have "untoward consequences on the democratic process." 52 The Court quotes former Senator John Bankhead, who asserted that "money is the chief source of corruption. We all know that large contributions to political campaigns . . . put the political party under obligation to the

51 Id. at 187.
large contributors.”53 Throughout McConnell, the Court defines a campaign corruption in two ways: The first definition of corruption describes a system that permits donors to purchase political influence with campaign contributions.54 The second definition of corruption describes a campaign finance system in which large contributions merely “facilitate[] access to public officials.”55

Throughout McConnell, the Court shifts between both definitions of corruption while it analyzes the challenges to the BCRA. For the purposes of this Article, both definitions of corruption are sufficient to indicate the presence of campaign spending abuses. While defining corruption as purchasing access to officials does not carry the same weight as a definition that includes bought influence, the research presented indicates that it is nearly impossible to separate access from influence. By defining corruption as both access and influence, the Court recognizes the impracticability of embracing a narrow definition.

There is no doubt that candidates must raise a significant amount of money to run a campaign with any hope of success.56

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53 86 Cong. Rec. 2720 (1940).
54 McConnell, 540 U.S. at 143.
55 Id. at 119.
The New York bar association, in its report on campaign finance reform, stated that:

Money buys all the things crucial for a modern election campaign—broadcast and radio air time; the printing and mailing of campaign literature; transportation costs; the services of campaign professionals for crafting the campaign message, conducting polls, and producing campaign advertisements; the salaries of campaign workers; the rent for campaign offices; the costs of data-processing equipment and computer time; even the expenses incurred in raising the funds necessary to pay for the other campaign expenditures. These services are unlikely to be provided by volunteers. They require money.\(^{57}\)

Given the crucial role money plays in all aspects of running a successful campaign, there are enormous incentives for politicians to raise as much as possible, and by any means necessary.\(^{58}\) This is particularly true for first-time candidates, or those challenging incumbents whose names are already familiar to the voting public: Without money, these candidates would have no shot at elected office.\(^{59}\)

The dissent in *McConnell* disagrees that quid-pro-quo political relationships—including the relationships that exist between campaign contributors and the politicians they support—necessarily raise an inference of corruption.\(^{60}\) Congressmen are constantly making quid-pro-quo agreements with their colleagues, promising to support legislation in exchange for their

\(^{57}\) Id.

\(^{58}\) See id.

\(^{59}\) See *McConnell*, 540 U.S. at 185.

\(^{60}\) Id. at 297.
colleagues’ support of their own pet projects.  

Justice Kennedy states that voters also exercise quid-pro-quo influence over candidates:

> It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.

But the majority’s holding is based on the premise that there is an important difference between the support that one “buys” with a vote and the support that is bought with a large campaign contribution.

The obvious difference between a quid-pro-quo vote and a quid-pro-quo campaign contribution is that all eligible Americans can vote, while not all Americans can make significant campaign contributions. And while both voters and campaign donors can express dissatisfaction with a candidate by withdrawing their support – either ideologically or monetarily – there is overwhelming evidence that politicians are more responsive to requests from donors than they are from voters. Senator Barry Goldwater (R-AZ) once said: "As far as the general public is concerned it is not, 'We the People,' but political action committees and moneyed interests who are setting the nation's political agenda and are influencing the position of

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61 Id.
62 Id.
63 See id.
candidates on the important issues of the day.”

The Court noted that campaign contributors often give money to both parties’ candidates, so they have a supporter in Congress regardless of who wins the election. This example of “bet-hedging” shows that many corporate and individual donors are more interested in buying friends – and influence – than supporting candidates whose ideologies they share. It implicates a system that encourages buying as many friends as possible. While buying friends in politics is not inherently corrupt, the Court is concerned that donors who give to both parties’ candidates are merely trying to buy legislative support, no matter who wins the election.

The value of these “friendships” cannot be underestimated. Contributors who participate in the Republican National Committee major donor program are promised special access to high-ranking party officials, including elected representatives. These programs, called “Team 100” and the “Republican Eagles” require large, sustained donations from participants. During the 1996 election cycle, Team 100 asked for an initial contribution of $100,000, and then $25,000 per

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65 McConnell, 540 U.S. at 124-125. “Moreover, the largest corporate donors often made substantial contributions to both parties. Such practices corroborate evidence indicating that many corporate contributions were motivated by a desire for access to candidates and a fear of being placed at a disadvantage in the legislative process relative to other contributors, rather than by ideological support for the candidates and parties.” Id.
66 Id. at 130.
year for the next three years. Republican Eagles paid less: $15,000 per year in annual contributions. While the donation schedule is aggressive, the RNC delivered on its promise. The committee’s chairman “personally escorted a donor on appointments that ‘turned out to be very significant in legislation affecting public utility holding companies’ and made the donor ‘a hero in his industry.’” In this instance, sustained donations guaranteed a donor access to political officeholders, as well as influence over legislation. Candid admissions such as these -- that money can buy both friendship and legislative support -- are perhaps the strongest evidence that the BCRA’s campaign spending limitations are necessary.

B: While arguably necessary, individual spending limits affect ideological donors’ abilities to contribute to campaigns in ways they find meaningful.

It is unfair to imply that all donors are trying to buy influence. There are plenty of campaign contributors who are not seeking special access or requesting legislative support for their causes.  

67 Id.  
68 Id. at 130-31.  
69 See New York City Bar Association Report, supra note 59.
Campaign Finance Reform, after studying corruption in campaign contributions, found that “ideological” donations are not “intended to corrupt [and do not] have a corrupting influence.” Limiting the contributions these donors can make simply deprives them of the opportunity to show their ideological support through campaign donations.

The Court, however, has held that limitations on ideological contributions (or, donations from contributors who say there are not interested in buying influence or legislative support), do not appreciably restrict donors’ freedom of expression. The Court held in Buckley that the “quantity of communication by the contributor does not increase perceptibly with the size of the contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.” The Court found that contribution size is a “rough index of the intensity of the contributor’s support for the candidate,” and that limiting monetary contributions does nothing to discourage contributors from discussing political issues and candidates with friends, coworkers, and so forth.

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70 Id. The New York City Bar Association defined a corrupt contribution as one given with the intent to influence legislation. Id.
71 Id.
72 See McConnell, 540 U.S. at 135.
73 Buckley v. Valeo, 44 U.S. 1, 21 (1976).
74 Id. “A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor’s freedom to discuss candidates and issues.” Id.
The Court’s decision could also be influenced by the small amount of campaign donations that are attributed to ideological contributors. An independent research study indicated that only 4.7 percent of donations to the Republican and Democratic parties in the 2006 Election Cycle were given by ideological donors, whereas 75.1 percent of contributions were given by businesses.\textsuperscript{75} It appears that most ideological support takes place outside of the realm of campaign contributions, and that caps on individual donations have a relatively small effect on ideological expression.\textsuperscript{76}

In its holding on individual contribution limits, the Court leaves ideological donors little choice in how they can express their support for favored candidates. The Court’s rationale in Buckley (and echoed in McConnell) is that ideological supporters can back candidates without using money, such as by volunteering at a campaign headquarters or by displaying political signs in their yards.\textsuperscript{77} But because money has such a great influence on politicians’ ability to run their campaigns, it is easy to see why supporters believe a large monetary donation is worth more.

\textsuperscript{75} Congressional Races: The Big Picture, http://opensecrets.org/overview/ (follow “20006 elections” hyperlink) (last visited Nov. 21, 2006).
\textsuperscript{76} This is especially true when considering that just one-fourth of one percent of the American population donates to campaigns, and that those donors mostly represent a rich minority of Americans. See Bailey, supra note 16, at 16; see also Overton, supra note 16, at 85.
\textsuperscript{77} See Buckley, 44 U.S. at 21.
than a few days’ of volunteering with a campaign.\textsuperscript{78} Even without concerns about being personally silenced, the Plaintiffs in \textit{McConnell} have valid concerns about their ability to contribute to campaigns in ways they find meaningful.

The research presented in this section indicates that some – if not the majority of – campaign contributors donate with the intent of influencing legislation. Considering the Court’s dual definitions of corruption, however, these donations should not be limited unless they result in undue access to, or influence over, politicians. Thus, it is necessary to further study the empirical claims in the \textit{McConnell} decision in order to determine if the regulations imposed by the BCRA are justified.

\textsuperscript{78} See New York City Bar Association Report, \textit{supra} note 59.
Claim I: Wealthy campaign contributors can “buy” access to elected officials, thus, they have opportunities to influence legislation that most citizens cannot afford.

Barry Goldwater, a former senator from Arizona, once wrote that, for a representative government to be successful:

Elections will be controlled by the citizenry at large, not by those who give the most money. Electors must believe their vote counts. Elected officials must owe their allegiance to the people, not to their own wealth or to the wealth of interest groups who speak only for the selfish fringes of the whole community.\(^79\)

The \textit{McConnell} decision is based on the claim that, without spending limits, politicians are tempted to legislate on behalf of the moneyed few who make large campaign contributions, to the detriment of their constituents who cannot express their support through visible contributions.\(^80\)

In \textit{McConnell}, the Court stated that big businesses and unions are able to buy greater access, or special favors, from candidates.\(^81\) If this is the case, the wealthy minority donating to campaigns are doing more than helping candidates disseminate


\(^{80}\) \textit{McConnell v. FEC}, 540 U.S. 93, 175 (2003).

\(^{81}\) See id.
their political platforms, as proponents of eliminating contribution limits claim.\footnote{New York City Bar Association Report, supra note 59.} If it is, in fact, possible to “buy” influence, then wealthy individuals, by making campaign contributions, can have significant influence over legislation once a favored candidate lands in office.

**A: Does a “wealth bias” exist in politics?**

Some scholars argue corruption is rampant, and that “our elected representatives are so indebted to the special-interest donors on whom they depend for their political existence that they are losing their ability to provide their best judgment in representing the citizens who elected them.”\footnote{Fred Wertheimer & Susan Weiss Manes, Campaign Finance Reform: A Key to Restoring the Health of Our Democracy, 94 Colum. L. Rev. 1126, 1127 (1994).} This is precisely the behavior the Court lamented in *McConnell*: Congressmen who allocated the majority of their private meeting time for special interest donors, where they were “pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way.”\footnote{*McConnell*, 540 U.S. at 151.} During the 1996 election cycle, the Republican National Committee had a formal incentive structure for major donors.\footnote{Id.} It offered incrementally greater access to elected officials.
based on the size of a donor’s contribution.\textsuperscript{86} The “highest level [of access to officeholders] and most personal access is offered to the largest soft money donors.”\textsuperscript{87}

Often, campaign contributors are subtle in the way they assert their influence. The New York Bar Association found that large contributors rarely engage in “outright vote buying, or of donors using a large donation, or the threat to withhold a future donation, to get a member of Congress to change her or his position on an issue.”\textsuperscript{88} Instead of quid-pro-quO, dollars-for-votes influence, campaign contributions often allow a contributor “an extra opportunity to make one's case, to be heard during negotiations while a bill is in committee, to influence a member of Congress to make one bill rather than another an agenda priority, or to affect the precise wording of a bill or amendment. Without changing votes, campaign contributions can affect what bills become law.”\textsuperscript{89}

Considering the legislative benefits that campaign contributions can secure, some corporations consider such donations a “cost of doing business.”\textsuperscript{90} This creates an atmosphere where political contributions become another opportunity for businessmen to one-up their competitors.

\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} New York City Bar Association Report, supra note 59.
\textsuperscript{89} Id.
Politicians can easily exploit donors’ desire to secure more political influence than their competitors. “Every request from an elected official who influences legislation or regulatory activity is an implicit demand. The contributor fears the consequences of failing to respond. He fears that his competitors may gain an advantage if they are more generous than he.” 91

Multiple studies, however, have indicated that money does not necessarily purchase increased influence. 92 Professor Michael Bailey at Georgetown University found that political contributions have little to no effect on the election outcomes. 93 Studies analyzing contribution’s effects on roll-call voting indicate that campaign contributions do not effect how congressmen vote on major issues, although they may effect voting on minor issues. 94 Although Bailey cites studies that show the ineffectiveness of campaign contributions in assuring increased influence, he acknowledges the inconsistency between those results and donors actions. He writes: “If money has no effect, why is so much contributed?” 95 The perceived effects of money in politics may have created a political climate where wealthy donors would rather hedge their bets with a large

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91 Id.
93 Id.
94 Id. at 16-17.
95 Id. at 6.
donation than forego an opportunity to influence legislation.

In a country where people are increasingly disillusioned with the government and unsure that their needs are being represented, the Court is right to be concerned with the appearance of corruption in the political process. Before the BCRA, scholars claimed that “the current campaign finance system lies at the heart of the public’s disillusionment.” Americans are aware of the huge financial burdens placed on political candidates, and people who cannot donate believe they have no real opportunity to influence the political process. Aside from fueling a negative perception of politics, “this public mistrust of government discourages citizen participation and leads individuals to believe they have no voice in government.”

Statistics show that most campaign contributors do not represent the voice of the majority of constituents. Wealthy campaign contributors compose the vast majority of campaign donors, although they are a small minority of the American population. A 1996 study showed that individual contributions are donated by one-fourth of one percent of the population. These donors are 99 percent white, 76 percent male, and 40 percent are older than 61. In a year when the median

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96 Wertheimer & Weiss Manes, supra note 86, at 1130.
97 Id.
98 Id. at 1130–31.
99 Id. at 1131.
100 Bailey, supra note 16, at 4; Overton, supra note 16, at 85–86.
household income was around $35,000, 78 percent of campaign contributors earned more than $100,000 per year, and 38 percent earned more than $250,000 per year.\(^{101}\) Finally, the majority of financial contributions come from businesses. In the 2006 election cycle, businesses donated 75.1% of all campaign contributions. Thus, if campaign contributions influence legislators, the interests being represented are those of a small, rich minority.

B: Campaign contributions influence Congressmen’s’ political decision-making.

The assertion that wealthy individual and business donors give money to influence legislation is backed by anecdotal evidence from donors themselves. Robert Rozen, a partner at Ernst & Young, candidly stated the extent to which campaign donations induce a sense of obligation in politicians.

You are doing a favor for somebody by making a large donation and they appreciate it. Ordinarily, people feel inclined to reciprocate favors. Do a bigger favor for someone - that is, write a larger check - and they feel even more compelled to reciprocate. . . . People do have understandings.\(^{102}\)

\(^{101}\) Bailey, supra note 16, at 4.  
But referring to campaign contributions as "favors" to be repaid ignores the essential difference between politics and private industry, where such behavior is both permitted and encouraged. Public officials are charged with representing their constituents, not with building stronger relationships with donors. There is ample evidence of cases where big donors’ pet issues have received more attention than issues that are important to constituents who do not donate. Former Senator Dale Bumpers (D-Ark.), said "Every Senator knows I speak the truth when I say bill after bill after bill has been defeated in this body because of campaign money."¹⁰³

Former Senator Paul Douglas (D-IL.) discussed the problems that arise under a system where political campaigns are funded by large, visible donations by wealthy contributors. The greatest risk, Douglas said, is that politicians’ loyalties will subtly shift “from the community to those who have been doing him favors.”¹⁰⁴ This shift in priorities is often slow and undetected.¹⁰⁵ “Throughout this whole process the official will claim – and may indeed believe – that there is no causal connection between the favors he has received and the decisions which he makes.”¹⁰⁶

¹⁰⁴ Wertheimer & Weiss Manes, supra note 86, at 1129 (citing Paul H. Douglas, Ethics in Government 44 (1952)).
¹⁰⁵ See id.
¹⁰⁶ Id.
This is possibly the strongest support for the BCRA’s strict limits on donations. If politicians are unable to perceive when they are being manipulated, even the most pragmatic representative could be subconsciously supporting legislation that helps big donors. Limiting campaign contributions would get politicians back on track and allow them to focus on the people who voted them into office — not only those who helped pay for their campaigns.

The BCRA addresses two major shortcomings in the current system of campaign finance: (1) Its spending limits prevent donors from making large, visible contributions and conditioning elected representatives — knowingly or unknowingly — to prioritize the needs of contributors over those of constituents; and (2) It helped restore public confidence in the government by scaling back the appearance of corruption, and by showing Congress’s commitment to remedying campaign finance abuses.

Claim II: The BCRA’s limits on freedom to associate are necessary to prevent campaign spending abuses.
In order to close the soft-money loophole, the BCRA prohibited parties from transferring soft money from state and local committees to federal committees.\textsuperscript{107} In the years before the BCRA, state and local parties often fielded large soft-money contributions on behalf of federal candidates and used those funds to campaign for that candidate.\textsuperscript{108} Abuses of the system before the BCRA were rampant: Colorado Congressman Wayne Allard wrote to a contributor in 1996 that the contributor was “at the limit of what you can directly donate to my campaign, but you can further help my campaign by assisting the Colorado Republican Party.”\textsuperscript{109} Former New Hampshire Senator Warren Rudman said that, unless state and local parties were prevented from using soft money donations to campaign for federal officials, “the same incentives to raise money will exist, the large contributions . . . will be made; the federal candidates who benefit from state party use of funds will know exactly whom their benefactors are and the same degree of beholdenness will arise.”\textsuperscript{110}

The Levin Amendment was a relatively complicated addition

\textsuperscript{107} 2 U.S.C. § 441i(a)(1)(Supp. II)
\textsuperscript{108} McConnell v. FEC, 540 U.S. 93, 165 (2003).
\textsuperscript{109} FEC v. Colorado Republican Federal Campaign Committee, 533 U.S. 431, 458 (2001). This letter was an attempt to subvert the limits on how much a single donor could contribute to a single candidate by funneling money to the candidate’s state political party. The money donated to the state would later be used to help Allard’s campaign. \textit{Id.}
\textsuperscript{110} McConnell, 540 U.S. at 165.
to the BCRA that provided a limited exception to the Act’s soft money ban.\textsuperscript{111} The amendment allowed state and local parties limited use of soft money contributions to fund “generic” party advertising and voting activities.\textsuperscript{112} These activities included voter registration and get-out-the-vote campaigns, and they had to be funded through a combination of Levin funds and hard money.\textsuperscript{113} Because of the emphasis on “generic” party activities, Levin funds could not be used for any campaign activities referring to a clearly identified candidate for federal office; and they could only be used to fund broadcast communications if the ads referred to a candidate for state or local office.\textsuperscript{114} Corporations and unions were permitted to donate Levin funds to political parties, and donations were capped at $10,000 per source.\textsuperscript{115} Election activities paid for with these donations must be funded partly with Levin monies, and parties must use hard money to make up the difference in budget.\textsuperscript{116}

In addition to the $10,000 per-contributor cap, Levin funds are subject to a number of restrictions, which fueled the Plaintiff’s challenge in \textit{McConnell}. Federal officeholders, national party committees, and officers, employees and “agents”

\begin{itemize}
\item \textsuperscript{111} 2 U.S.C. § 441i
\item \textsuperscript{112} \textit{McConnell}, 540 U.S. at 201.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} 2 U.S.C. § 441i(b)(2)(B)(i)-(ii).
\item \textsuperscript{115} 2 U.S.C. § 441i(b)(2)(B)(i)-(ii).
\end{itemize}
of national party committees cannot raise Levin funds.\textsuperscript{117} State parties cannot raise Levin funds for other state parties -- directly or through joint fundraising -- and state parties can’t transfer Levin funds to other state parties.\textsuperscript{118} Lastly, national parties could not transfer hard money to state and local parties to help fund that portion of Levin-funded activities.\textsuperscript{119} The Court’s justification for upholding this restriction is that it prevented big donors from giving multiple $10,000 donations to a number of state and local committees, which could later be transferred to their committee of choice.\textsuperscript{120} Without the Levin Amendment’s restrictions, the Court feared that, “[d]onors could make large, visible contributions at fundraisers, which would provide ready means for corrupting federal officeholders.”\textsuperscript{121}

The Court held that the restrictions on the “use, transfer, and raising of Levin funds are justifiable anticircumvention measures.”\textsuperscript{122} The amendment, however, drew criticism on the grounds that it infringed on parties freedom to associate, because it prevented them from sharing funds with other state party offices.\textsuperscript{123} But by upholding the Levin Amendment restrictions, the Court seems to ignore the underlying reasons

\begin{itemize}
  \item \textsuperscript{117} 2 U.S.C. § 441i(b)(2)(B)(iv).
  \item \textsuperscript{118}  Id.
  \item \textsuperscript{119}  Id.
  \item \textsuperscript{120} McConnell v. FEC, 540 U.S. 93, 171-72 (2003).
  \item \textsuperscript{121}  Id. at 172. In this sense, corrupting means buying access to federal officeholders.
  \item \textsuperscript{122}  Id.
  \item \textsuperscript{123}  See id.
\end{itemize}
for allowing state and local parties to raise Levin funds at all.

Since the BCRA almost completely curtailed political parties' ability to raise and spend soft money, allowing Levin funds at all is a noteworthy concession. Congress seems to make this concession because Levin contributions fund the “core activities of a party – the recruitment and mobilization of voters.”

These activities are a far cry from the infamous “issue ads” that were purchased with soft money after *Buckley*.

Few would argue that Congress was wrong to regulate smear campaigns deceivingly dubbed “issue advertisements.” But the restrictions against transferring Levin funds between party committees, and between federal and state or local parties reach further than necessary to prevent abuse.

Because the amendment included strict rules about what

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124 Bauer, supra note 121, at 200.

125 *McConnell*, 540 U.S. at 185. “The proliferation of ... issue ads has driven the soft-money explosion. Parties have sought out every possible way to fund and produce these ads with soft money.” Issue advertisements arose after the Court in *Buckley* limited election expenditures that were used to fund “express advocacy” advertisements, which were determined to be advertisements that used specific wording such as “vote for” or “vote against.” Id. No such limits were placed on soft money, which was used to fund “issue advertisements.” Id. at 191-93.

126 An example of “issue ad” abuse is an advertisement run in Montana by the group “Citizens for Reform” during the 1996 state congressional race. The ad attacked candidate Bill Yellowtail, and stated: “Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order ... but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments--then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.” (5 1998 Senate Report 6305). The McConnell court stated that: “The notion that this advertisement was designed purely to discuss the issue of family values strains credulity.” *McConnell*, 540 U.S. at 194.
Levin monies can be used to fund, local and state parties are simply prohibited from saturating the airwaves with issue advertisements that directly address specific Federal candidates, like those circulated after Buckley. The BCRA’s limits on raising and transferring Levin funds essentially cuts at parties’ ability to fund their most important activities: get-out-the-vote campaigns and voter registration drives. Generic voter activity is essential to a political party’s sustainability, and, unlike issue advertisements, the aim of these activities is not to discredit the opposing party. Because parties had come to rely on soft money funds for these activities, the restrictions in the Levin Amendment struck a severe blow. For parties who were “operating within the confines of the law as then interpreted and enforced,” a major source of funding dried up overnight.

By upholding the restrictions on fundraising and transferring money between state and federal parties, the Court’s holding in McConnell also signaled a change in the permissible limits on freedom to associate. Before Buckley, the Court had held that freedom of association was an

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127 See Bauer, supra note 121, at 202.
128 See Bauer, supra note 121, at 200. “So however much the rise of soft money might be lamented, there could be no question that this form of financing had become important to parties, and not only for the financing of the infamous issue ads. Other core party-type activities--such as voter registration and get-out-the-vote activities--were significantly limited.” Id.
129 Id.
130 Id. at 199.
“inseparable aspect of the ‘liberty’ associated with the Due Process Clause” and that the strictest level of scrutiny applied when association was limited.\textsuperscript{131} In McConnell, however, the Court held that “not every minor restriction on parties’ otherwise unrestrained ability to associate is of constitutional dimension.”\textsuperscript{132} This is a significant shift from counting associational rights among the fundamental liberties guaranteed under the Fourteenth Amendment.\textsuperscript{133} The Court justified its decision by finding that the Levin Amendment restricted financial contributions instead of political activities, and the those restrictions were a “modest” infringement on associational rights.\textsuperscript{134}

The Court’s answer to the Plaintiffs’ “reasonable concern[s] about the associational burdens imposed by these intra-party restrictions” is based on little more than prejudicial predictions about electioneering activities.\textsuperscript{135} The Court states:

The political parties' evidence regarding the impact of the BCRA on their revenues is "speculative and not based on any analysis." 251 F. Supp. 2d, at 524. If the history of campaign finance regulation discussed above proves anything, it is that political parties are extraordinarily flexible in adapting to new restrictions on their fundraising abilities.\textsuperscript{136}

\textsuperscript{131} NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958).
\textsuperscript{132} McConnell v. FEC, 540 U.S. 93, 171 (2003).
\textsuperscript{133} See NAACP, 357 U.S. at 460 (1958).
\textsuperscript{134} McConnell, 540 U.S at 172.
\textsuperscript{135} Bauer, supra note 21, at 202.
\textsuperscript{136} McConnell, 540 U.S. at 173.
While that all may be true, the Court could have just as easily found that the Plaintiffs were speculating correctly and that associational barriers will prove difficult to overcome. Instead, it assumed that allowing more association between state and local parties would invite corruption and denied the claim.137

The Court rightly noted that state and local parties could “avoid these associational burdens altogether by forgoing the Levin Amendment option and electing to pay for federal election activities entirely with hard money.”138 While this is correct, the Court also assumed that state and local parties fundamentally change the way they raise and allocate their funds at a moments’ notice. This holding “advanced the notion that an associational burden is not unconstitutional, so long as there is an alternative means, however much more circuitous or costly, to engage in the same activities.”139

Thus, in McConnell, the court upheld the Levin Amendment without fully exploring the associational burdens that the restrictions contained in the amendment would case to state and local parties. The Court assumes that state and local parties

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137 See Bauer, supra note 21, at 203. “There was no way for the Congress or the Court to know that corruption would pursue this route, but if Congress is given leeway for predictions, little justification for the anti-circumvention measure - little, that is, beyond speculation - is required.” Id.
138 McConnell, 540 U.S. at 171.
139 Bauer, supra note 121, at 201.
will have no problem “dedicat[ing] all ‘homegrown’ hard money to their Levin activities,” without any chance to supplement their generic campaign activities with funds from other committees or federal party offices.\textsuperscript{140} Whether this will have serious ramifications for voter registration and turn out in the future remains to be seen. The McConnell dissent already raised major concerns with the amendment, which the majority opinion dismissed as unfounded. Specifically, that national party officials could open themselves up to criminal liability for “mere involvement” in something as simple as a state ballot initiative.\textsuperscript{141}

Opponents of the Levin Amendment say that it restricts parties’ right to associate, because it places barriers on the amount of funds they can transfer between state party committees, as well as between state and federal party committees. By restricting the party committees’ access to the funds raised by their ideological allies in other states, some argue that the constitutional right to associate is implicated. This claim touches on the larger debate about whether transferring money constitutes association. While answering this question is outside of the scope of this Article, there is no question that the limits imposed by the Levin Amendment

\textsuperscript{140} McConnell, 540 U.S. at 172-73.
\textsuperscript{141} Id. at 161.
severely restrict political parties’ access to the resources of their ideological allies.

When viewed in light of the BCRA’s overarching goal of eradicating corruption in campaign finance, the restrictions imposed by the Levin Amendment appear necessary to curb the abuse of soft money transfers between state and national party offices that were used to circumvent contribution limitations. To soften the blow on freedom to associate, the Court left its holding on the Levin Amendment open to “as-applied challenges.”142 This holding allowed the Court to curb a major source of campaign corruption while at the same time protecting political parties’ cherished constitutional rights.

Claim III: Parties will be able to effectively advocate with reduced campaign funding.

While McConnell restricted the flow of soft money to political parties, the Court expressed no concern that the decision would unduly limit parties’ ability to disseminate campaign messages. The Court credited political parties as being “extraordinarily flexible in adapting to new restrictions

142 McConnell, 540 U.S. at 173.
on their fundraising abilities." The Court found that the pertinent question in evaluating campaign finance reform is not how much money political parties have at their disposal during campaigns. Instead, it said that campaign finance reform becomes problematic if it is "so radical in effect as to ... drive the sound of [the recipient’s] voice below the level of notice." 

Since the FECA was passed, Supreme Court Justices have disagreed about the role money should play in campaigns. In his concurring opinion in *Nixon v. Shrink Missouri Government PAC*, a 2000 case upholding limits on campaign finance contributions, Justice Stevens argued that popular candidates would fare as well without large campaign contributions. He said that money can only buy what great leaders inspire with their words.

Stevens’ view is in direct opposition to the holding in *Buckley v. Valeo*, where the Court found that "virtually every means of communicating ideas in today's mass society requires the expenditure of money." And from the Court’s many examples of the ways political parties use campaign donations to fund

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143 Id.
144 Id. (quoting *Nixon v. Shrink Missouri Gov. PAC*, 528 U.S. 377, 397 (2000)).
145 "Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results." *Shrink Missouri*, 528 U.S. at 398.
electioneering communications and voter education activities, there is no indication that restricting money will do anything but restrict parties’ ability to reach the public.\textsuperscript{147} Additionally, limiting soft-money donations disproportionately impacts minor parties, which are not eligible for the same amount of public funds as major party candidates. Adding additional barriers to the fundraising abilities of parties like the Green Party or Independent Party further limits their ability to be realistic election contenders.

Spending limits prohibit these parties from concentrating their resources, creating roadblocks to ballot access and recognition as an established political party.\textsuperscript{148} For instance, BCRA restrictions on the transfer of soft money between state and local party committees will prevent minor party candidates from amassing their contributions and spending them in a key state or district. The challenges posed by the BCRA only add to the difficulties minor party candidates face in securing adequate campaign financing.\textsuperscript{149}

Eligible minor party candidates may run their campaigns with the help of public funding, a system that was first

\textsuperscript{147} See McConnell, 540 U.S. at 162.
\textsuperscript{149} See Richard Briffault, Reforming Campaign Finance Reform: A Review of Voting with Dollars, 91 Cal. L. Rev. 643, 671 (2003); See also Buckley, 424 U.S. at 98.
administered by the FEC in 1976.¹⁵⁰ After the FEC determines a candidate’s eligibility, the commission decides how much public money that candidate is entitled to receive.¹⁵¹ As a rule, candidates from minor parties are not eligible to receive the same amount of public campaign funding as the two major parties, because they are unable to command the necessary number of popular votes.¹⁵² While this government support helps get some minor party candidates’ campaigns off the ground, they need significant additional funding in order to be election contenders. The Court has stated in past opinions, however, that allowing them to do so would “not only make it easy to raid the United States Treasury, it would also artificially foster the proliferation of splinter parties.”¹⁵³

Theresa Amato, Ralph Nader’s campaign manager in the 2000 presidential election, described the challenges of running a minor party campaign: Amato said that Nader was “dismissed by the corporate press and unable to afford the grossly overpriced

¹⁵¹ Id. For primary elections, candidates are entitled to receive matching funds from the government, for up to $250 of an individual’s total contributions to an eligible candidate. Funds are also available for candidates to pay off campaign debts, even if the candidate is no longer actively campaigning. “In general elections, minor and new party candidates may supplement public funds with private contributions and may exempt some fundraising costs from their expenditure limit; they are otherwise subject to the same spending limit and other requirements that apply to major party candidates.” Id.
Nader, an extremely popular minor party candidate, was able to creatively use the Internet to drum up support and organize “superrallies.” His success in reaching voters is the exception rather than the rule for minor party candidates.\(^{155}\)

While there is no doubt that soft money limitations fall hardest on minor party candidates, one of the BCRA’s aims is to prevent the disproportionate impact of these minorities. Congress has no obligation to assist minor party candidates at the expense of campaign finance reform. And while it remains to be seen whether the BCRA will discourage minor party candidates from running for office, the overall positive effects of the BCRA easily outweigh the concerns about driving minor party candidates’ voices “below the level of notice.”\(^{156}\)

Claim IV: The individuals and interests groups who fund electioneering communications must be identified, lest they misrepresent their true interests to the voting public.

\(^{154}\) Theresa Amato, supra note 22, at 144.

\(^{155}\) Id.

In *McConnell*, the Court stressed that the people and interest groups behind electioneering communications must be identified in order for the public to make informed election decisions. The Court was critical of groups that “hide behind misleading names like ‘The Coalition–Americans Working for Real Change’ (funded by business organizations opposed to organized labor), [and] ‘Republicans for Clean Air’ (funded by brothers Charles and Sam Wyly).” Since these groups are free to run as many ads as they can afford during election cycles, there is a risk that a small, rich minority can have undue influence on the voting public. In *McConnell*, the Court held that allowing individuals and interest groups to mask their true identities “ignores the . . . First Amendment interests of individual citizens seeking to make informed decisions in the marketplace.” The Court also upheld the provision of the BCRA that required “certain communications ‘authorized’ by a candidate or his political committee [to] clearly identify the candidate or committee or, if not so authorized, identify the payor and announce the lack of authorization.” The court justified its decision by stating that the government had an important interest in “‘shed[ding] the light of publicity’ on

157 *Id.* at 197.
158 *Id.*
campaign financing."

There is some tension, however, between the McConnell decision and prior holdings on anonymous speech. In the case of McIntyre v. Ohio Elections Commission, the Court held it was unnecessary for the author of a pamphlet to identify herself.\textsuperscript{161} The petitioner in that case challenged a fine imposed by the Ohio Elections Commission after she distributed anonymous leaflets opposing a proposed school tax levy. The Court found that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."\textsuperscript{162} While the pamphlet discussed in McIntyre reaches fewer people than the televised advertisements described in McConnell, both cases deal with political speech - the category that the First Amendment affords the fullest protection.

The Court has held that anonymous communication has historically given a voice to groups who would otherwise be silenced.\textsuperscript{163} In Talley v. California, the Court stated: "Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and

\textsuperscript{160} Buckley v. Valeo, 424 U.S. 1, 81 (1976).
\textsuperscript{162} Id. at 342.
\textsuperscript{163} See Talley v. California, 362 U.S. 60, 64 (1960).
laws either anonymously or not at all.”¹⁶⁴ The Court has also found that requiring authors of pamphlets to identify themselves is unconstitutional because fear of retaliation “might deter perfectly peaceful discussions of public matters of importance.”¹⁶⁵

The political benefits of permitting anonymous discourse are evident in a number of areas, most notably printed communications. Leaked documents, such as the Pentagon Papers, and anonymous tips called in to reporters, have helped keep politicians accountable for their actions.¹⁶⁶ Thus, to find that televised advertisements must honestly reflect their financial backers, the Court must have determined that there is a fundamental difference between the communications restricted in the BCRA and the other areas where anonymous communications are permitted.

The Court has noted that, in the realm of political speech, a speaker’s identity can mean as much as his message.¹⁶⁷ The Court noted that “the most effective advocates have sometimes opted for anonymity.”¹⁶⁸ For instance, The Federalist Papers, perhaps the most influential political documents written in the

¹⁶⁴ Id.; see also NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958).
¹⁶⁵ Talley, 362 U.S. at 65.
¹⁶⁷ See City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994). (finding that a speaker’s identity “is an important component of many attempts to persuade.”)
U.S., were published anonymously.\textsuperscript{169}

There is, however, a difference between the distribution of an anonymous pamphlet and a national television advertisement whose backers cloak their identities with misleading names, such as the pharmaceutical industry-funded group that ran ads under the name “Citizens for a Better Medicare” did.\textsuperscript{170} Since many people look to ideological allies when deciding which candidates to support, an advertisement that appears to be paid for by citizens interested in improving Medicare could easily mislead an elderly voter who considers protecting Medicare a top priority.\textsuperscript{171} \textit{In McIntyre}, there was no question what the author disseminating the pamphlet believed, however, issue advertisements are designed to carefully cloak the true believes of their backers.

The BCRA’s disclosure requirements protect citizens from forming ideological “allies” who are actually ideological opposites.\textsuperscript{172} The advertisements described in McConnell differ from the pamphlets in McIntyre because the McIntyre pamphlets were printed to unite and mobilize people with similar


\textsuperscript{170} McConnell v. FEC, 540 U.S. 93, 197 (2003).

\textsuperscript{171} See id.

\textsuperscript{172} See id.
ideologies.¹⁷³ The advertisements run by “Citizens for a Better Medicare” were intended to trick voters into believing that the pharmaceutical companies paying for the ads shared their political interests.

The First Amendment implications of this decision are clear: The provisions of the BCRA that require special interests to disclose which advertisements they fund goes against precedent that said anonymous speech was protected by the Constitution.¹⁷⁴ The Court, however, prioritizes citizens’ rights to make informed voting decision over special interests’ freedom of speech. By requiring disclosure only from individuals and interest groups who fund issue advertisements, the BCRA provides voters with a great deal of information while limiting the First Amendment implications of its decisions to a relatively small class of campaign contributors.

Conclusion

The research presented in this Article proves that McConnell court took an important step toward eliminating "actual and apparent corruption of federal candidates and officeholders." The Court's decision in McConnell was far from airtight, however: It relied on a vague definition of corruption that it tailored to fit its analysis of different sections of the BCRA. Nevertheless, having unpacked and weighed the merit of the four underlying claims in McConnell, it seems that the Court's conclusions that money has a corrupting effect on politics and that the pre-BCRA system was in great need of reform were on target. Close analysis of the campaign finance system suggests that politicians and donors alike were badly in need of the type of bright line rules established in McConnell, and that Court's decision to uphold the Act was largely necessary to curb campaign finance abuses.

To briefly summarize the above analysis and conclusions:

I Money has a corrupting influence on politics.

Before the BCRA, wealthy donors would make large, soft money contributions to campaigns in hopes of gaining access to party officials. While there is not conclusive evidence that such contributions allowed donors to influence legislation, the pre-BCRA system of campaign finance nevertheless gave rise to
serious concerns about both actual and perceived corruption in politics. Thus, the Court was right to uphold the BCRA’s restrictive campaign finance regulations in an effort to eliminate actual and apparent campaign finance corruption.

II Limiting the amount wealthy donors can give to candidates will help curb corruption, or the appearance of corruption, in politics.

While some studies indicate that large donations may not influence legislation, there is conclusive evidence that such donations create a sense of beholdenness in elected officials.175 Thus, the BCRA’s restrictions on soft money donations should curb wealthy contributors’ influence over politicians. While the Act may not entirely eliminate the corruptive effects of campaign contributions, it will certainly help eliminate the appearance of corruption in politics, fulfilling one of the Court’s aims in McConnell.

The research presented in this Article also indicates that the soft money limitations imposed by the BCRA will adversely affect pure ideological donors. These donors wish to represent the strength of their support to candidates through their contributions, but do not seek special access to elected

175 See Bailey, supra note 16, at 16; see also Overton, supra note 16, 85-86; see also McConnell, 540 U.S. at 175.
officials. The BCRA’s impact on ideological donors is unfortunate, but it is a necessary side effect of Congress’s effort to create a more equitable system of campaign finance.

III The restrictions on freedom to associate imposed by the BCRA are necessary to prevent campaign spending abuses, however, these restrictions may affect parties’ abilities to conduct “generic” campaign activities.

The BCRA’s restrictions on soft money contributions may affect local and state party committees’ abilities to conduct “generic” campaign activities, including get-out-the-vote campaigns and voter registration drives. Evidence presented in this Article, however, shows that these limits are necessary in order to eliminate campaign finance abuses and prevent contributors from “buying” access to elected officials. While the Court focused its analysis on the BCRA’s potential to eliminate political corruption, it remains to be seen if the BCRA’s soft money limitations will negatively impact constituents who previously benefited from voter registration drives or get-out-the-vote campaigns.

IV The BCRA’s campaign finance restrictions may impose disproportionate burdens on minor party candidates.

While candidates from the two major parties will have
little trouble continuing to wage successful campaigns under the BCRA, minor parties may face greater challenges in reaching the public. When Congress limited soft money donations in the BCRA, it made illegal a campaign fundraising practice that parties had previously relied upon to raise a significant portion of their campaign funds. Since minor parties already face great difficulties in disseminating their political platforms, the BCRA’s fundraising restrictions may prove too burdensome to bear. While the Court has stated that it does not want to “artificially” support multiple splinter parties, it does not necessarily follow that these parties should have to surmount major obstacles in order to disseminate their views to the voting public.

V Those who purchase election advertisements must be truthfully identified, so voters are not misled by the advertisements’ messages.

This Article discusses the tension between prior holdings that permit anonymous political speech and the McConnell decision, which required purchasers of campaign advertisements to truthfully identify themselves. The research presented here indicates that these limits are necessary to help voters make informed election decisions. Unlike other forms of political speech, electioneering communications were often used to trick
voters, instead of informing them of issues.

In sum, this Article sheds light on a campaign finance system in which money spoke too loudly; a system badly in need of bright line rules to help politicians and donors alike tell right from wrong. The BCRA and McConnell show an important commitment to creating a system of campaign finance where the voices of the many are not drowned out by those of the moneyed few.