The Potential Impact on Campaign Finance Regulation of *SpeechNow.org v. FEC*

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The decision of the U.S. Court of Appeals for the District of Columbia Circuit in *SpeechNow.org v. Federal Election Commission*[1] may augur a sea-change in the law governing campaign finance regulation. This article discusses the statutory and jurisprudential context in which the SpeechNow.org challenge to federal campaign finance laws developed; presents an overview of the decision of the Court of Appeals; and notes the potential implications of the decision for the future case law addressing the intersection of campaign finance law and the First Amendment.

I. The Conflict Between Campaign Finance Regulation and the First Amendment

The *SpeechNow.org* case raises issues that have been central to campaign finance litigation since the passage of the Federal Election Campaign Act of 1971 ("FECA"),[2] and more particularly since the passage of the Bipartisan Campaign Reform Act of 2002 ("BCRA"),[3] i.e., the morphing of money into speech; the nature of the interest that government must have in order to limit political speech; the question of applying strict or intermediate scrutiny as the constitutional standard of review; and the theoretical distinctions in the treatment of contributions and expenditures. In order to understand the significance of the *SpeechNow.org* decision on these issues, it is necessary to understand generally the background of campaign finance regulation, as well as a few of the seminal cases challenging those regulations on First Amendment grounds.

FECA imposed strict disclosure requirements on federal candidates, as well as on independent groups and political parties participating in federal elections. The 1972 election, marked by financing tactics many thought questionable, motivated Congress to amend FECA in 1974 by establishing strict limits on contributions by political parties and independent participants, including individuals and political action committees ("PACs"). Congress also created the Federal Election Commission ("FEC") as an independent enforcement agency that warehoused and made public disclosure reports. These reforms, enacted over a veto by President Gerald Ford, not only limited the amount an entity could contribute, but it also limited the amount that could be spent, including even the amounts that could be spent by a candidate out of his or her personal funds.

The spending limitations went too far. In 1976 the Supreme Court, in a *per curiam* opinion in *Buckley v. Valeo*,[4] upheld limits on campaign contributions by individuals but struck down provisions limiting campaign spending by candidates and by independent groups. The Court also struck down the provisions limiting the amount of money a candidate could spend on campaigns from purely personal funds.

Buckley confirmed the important idea that money equals speech, thereby bringing the use of money for political purposes within the protection of the First Amendment.[5] *Buckley* held that campaign finance limitations impinge on fundamental constitutional interests since the effect of limits is to regulate the political process.[6] The principal question, as framed by *Buckley* and as applied in subsequent campaign finance litigation, is whether a sufficient governmental interest exists to justify restricting application of the First Amendment.

In *Buckley* and in subsequent decisions, the Court has focused on three potential government interests that might justify campaign finance regulations: preventing corruption or its appearance; promoting parity in political speech by eliminating a supposed advantage enjoyed by the wealthy; and increasing the number of people able to run for office by controlling skyrocketing costs.[7] Of these, preventing corruption is the only one which has continued to be the touchstone supporting most regulation, and—as explained below—the only one currently held to be a valid government interest.

Buckley quickly disposed of the argument that creating equality in speech or campaigns is a valid constitutional consideration. The Court noted:

> [T]he mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise.[8]

The Court again explicitly rejected equalization of political opportunities as a justification in *Davis v. FEC*,[9] and it reiterated in *Citizens United v. FEC*[10] that the supposed chilling effect of great wealth is insufficient to justify a burden on First Amendment rights.

On the corruption interest, however, *Buckley* cited certain "deeply disturbing examples" in the 1972 election to find that quid pro quo corruption justified some regulation of political speech.[11] It further held that Congress could conclude that the avoidance of undue influence in politics is critical to fostering confidence in a representative government.[12]

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In applying the corruption rationale, *Buckley* drove a theoretical wedge between the treatment of contributions and expenditures in the world of campaign finance regulation. The Court concluded that, because any form of mass communication requires expenditure, limits on expenditures impose a substantial, rather than theoretical, restraint on both the amount and the diversity of political speech.[13] The Court found that limitations on expenditures violated rights of expression and of association, and that the government had no countervailing interest that would justify limitations on those First Amendment rights.

The justification advanced in support of the limitation on independent expenditures—the potential for corruption and the appearance of impropriety—was found in *Buckley* not to "satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression."[14] The Court held that limitations on campaign expenditures were subject to a high degree of constitutional scrutiny.[15]

The Court felt, by contrast, that limits on contributions did not constitute a substantial restraint on political expression because donating money to a campaign is a general expression of support that does not transmit the underlying basis for the support. It concluded that the act of contributing, but not the amount of the contribution, was the speech at issue, so there would be no direct restraint on political expression.[16] In addition, the Court relied on the contention that limiting donations does not limit speech since the actual communication is done by someone other than the donor.[17] The Court also noted that, because donors may also spend unlimited amounts independent of a campaign, this acts as a safety valve giving contributors an outlet for expression using amounts in excess of the limits.[18]

FECA limitations on the amounts that individuals could contribute to multicandidate PACs were subsequently upheld in *California Medical Ass'n v. FEC*.[19] CalMed sought to frame the limitation as a restriction on expenditures, arguing that the limitation limited the ability of the organization to make expenditures. The Court found the statute to be, "strictly speaking," a contribution limitation "qualitatively different from the contribution restrictions we upheld in *Buckley*."[20] The Court reasoned that, since contributions by an organization to a PAC are significantly different than independent expenditures made by individuals, the degree of constitutional protection should also be different. The Court concluded that, if the rights of an individual are not unconstitutionally limited by restrictions on the amount that can be given a candidate, then the amount a single entity can give to a multicandidate PAC can similarly be limited.[21]

In 1985, the $1,000 limitation on independent expenditures on behalf of presidential candidates fell based upon a lack of evidence that the expenditures tended to foster either corruption or the appearance of corruption. In *National Conservative Action Political Committee v. FEC* (*NCPAC*), the Supreme Court held that the limitation on its face violated rights to speak freely and to associate.[22] *NCPAC* differed from *California Medical*, according to the Court, because it dealt with limitations on expenditures by PACs rather than contributions.[23] The Court also concluded that NCPAC, a formally incorporated organization, was entitled to First Amendment protection for political activities, a position later strengthened in *Citizens United*.[24]

In more recent cases, the Court has treated independent expenditures and coordinated spending by political parties differently in twin cases arising out of Colorado. In *FEC v. Colorado Republican Federal Campaign Committee* (*Colorado I*),[25] limitations on independent expenditures made by the Colorado Republican Party in a Senatorial race were stricken because truly independent expenditures by parties do not foster corruption any more than independent expenditures by individuals. On the other hand, the Court upheld limitations on coordinated spending by political parties in *FEC v. Colorado Republican Federal Campaign Committee* (*Colorado II*).[26] Finding that contributions to political parties could be a way to avoid limitations on contributions to candidates, the Court concluded that there was little evidence that limitations frustrated the right of political parties to participate in elections.

In 2002, almost thirty years after *Buckley*, Congress ventured to impose new campaign finance limitations, this time extending restrictions to the use of soft money and to the communication of issue advocacy ads. BCRA restricted contributions to national political parties, limited "electioneering communications" or issue ads by independent groups shortly before elections, and established a new set of contribution limits for campaigns running against self-funded candidates.

BCRA was quickly challenged on constitutional grounds, but it was upheld in *McConnell v. FEC*.[27] In that case, the Supreme Court repeated the distinction between contributions and expenditures established in *Buckley*. The Court concluded that soft money could be restricted because the government's interest in "preventing 'both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption'" outweighed "limited burdens" imposed on the First Amendment.[28]

McConnell applied a "potential for corruption" test to the question of whether contributions to national parties could result in unreasonable access to lawmakers.[29] In so doing, *McConnell* strayed from *Buckley*'s emphasis on quid pro quo corruption. The Court gave significant judicial deference to Congress's purported "ability to weigh competing constitutional interests in an area in which it enjoys particular expertise."[30]

The years following *McConnell* saw changes in the Court's membership, including the ascension of John Roberts as Chief Justice. In one of its first campaign finance cases, *Randall v. Sorrell*,[31] the Roberts Court took a fractured stance on First Amendment issues. The case invalidated a Vermont statute that imposed severe limits on political contributions, campaign expenditures, and independent expenditures. A plurality of the Court found that *Buckley* prevented any limitations on campaign expenditures, and that limitations on campaign contributions, although constitutionally permissible as a general matter, could be so drastic as to violate First Amendment free speech principles. The plurality opinion

reaffirmed *Buckley* on *stare decisis* grounds. The opinions, as a whole, signaled that future changes in campaign finance jurisprudence could be expected.

This trend continued in 2007, when BCRA provisions preventing the use of corporate funds for independent political advertising in the sixty-day period before an election were found to be overly broad and to unduly restrict free speech rights. In *FEC v. Wisconsin Right to Life*,[32] the Court found that issue ads that do not expressly advocate for a candidate in an election could not be restricted as either an attempt to prevent corruption or limiting effects of large corporate expenditures. The Court clarified that *McConnell* did not hold that any ad intending to influence an election constituted express advocacy. The Court further created a test under which an ad is the functional equivalent of express advocacy only "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

In 2008, in *Davis v. FEC,*[33] the Court again addressed issues related to the intersection of campaign finance regulation and the First Amendment. The issue in that case was BCRA's "millionaire's amendment," which provided different contribution and disclosure rules if any candidate in an election spent $350,000 or more of his or her own money. This amendment clearly discriminated against candidates who chose to spend their own money. The Court concluded that the provision could not prevent actual or threatened corruption since there was little chance that a candidate could be corrupted by unlimited expenditure of his or her own funds. In addition, the Court reiterated that a desire to create parity between competing campaigns was insufficient to justify limiting First Amendment rights. Having found in *Randall* that setting too low a limit could be constitutionally infirm, the Court specifically said that there was no constitutional basis for attacking a restriction as too high.

II. The SpeechNow.org Challenge

In this context, the *SpeechNow.org* case represented the next logical step in the challenge to FECA and BCRA on First Amendment grounds. In effect, SpeechNow.org sought to challenge the requirement that individuals who band together to pool their resources to fund independent expenditures must register as a political committee and become subject to all the limitations and reporting requirements applicable to such committees.

A. Statutory Obligations and Limitations on Political Committees

Under federal law, a "political committee" is "any committee, club, association, or other group of persons" that receives contributions, or makes expenditures, of more than $1,000 in a year.[34] Any group which is designated as a "political committee" is subject to strict contribution limits. In particular, contributions to political committees are limited to $5,000 per calendar year, and individuals may not give more than $69,900 biennially to all political committees.[35] These limits, of course, severely restrict the ability of individuals to get together to pool resources and fund independent expenditures in connection with federal elections.

In addition to the contribution limits, a political committee is also required to comply with certain record-keeping and reporting requirements.[36] These requirements include appointing a treasurer; maintaining records for three years that include identifying information about contributors and details on expenditures; registering with the FEC; and filing regular disclosure reports providing details on the committee's finances and operations.[37]

B. The Establishment of SpeechNow.org to Challenge These Statutes

SpeechNow.org was established to create a test case on the validity of the political committee regulations as applied to groups of individuals who band together to fund independent expenditures. In order to accomplish this goal, David Keating, the other founders of SpeechNow.org, and their legal team made a number of well-thought-out tactical decisions designed to narrow the focus of their First Amendment challenge to the statute.

Keating established SpeechNow.org as an unincorporated section 527 political organization with a stated mission of "promot[ing] the First Amendment rights of free speech and freedom to assemble by expressly advocating for federal candidates whom it views as supporting those rights and against those whom it sees as insufficiently committed to those rights."[38] In order to "avoid any of the concerns the Supreme Court has raised about corruption,"[39] the organization's bylaws were drafted to permit contributions only from individuals, and to preclude SpeechNow.org from coordinating its expenditures with any candidates or political parties. In addition, the bylaws prohibited SpeechNow.org from accepting contributions from any of the entities which are prohibited from making contributions to federal candidates (corporations, unions, federal government contractors, etc.). SpeechNow.org also made it clear that it intended solely to make independent expenditures and would not contribute to candidates.[40]

SpeechNow.org was also established as an unincorporated association with a single purpose, and it noted that some of its solicitations would refer to particular candidates for federal office by name.[41] This fact allowed SpeechNow.org to assert that contributors necessarily intended for their contributions to be used to further SpeechNow.org's goals. As such, the government could not argue that it had an interest in protecting the interests of shareholders who might not agree with the organization's decision to support or oppose certain candidates.

The SpeechNow.org challenge to the statute was also an as-applied challenge, rather than a facial challenge. SpeechNow.org also included as plaintiffs in the case prospective contributors who wanted to give both more than $5,000 and less than $5,000 to the organization, which helped ensure that interests of the parties before the court squarely presented the constitutional question on which SpeechNow.org wanted a ruling.

C. SpeechNow.org Seeks an Advisory Opinion and Initiates Litigation

In November 2007, before litigating the issues, SpeechNow.org requested an advisory opinion from the FEC. The request presented three basic questions: (1) whether SpeechNow.org had to register as a political committee; (2) whether donations to SpeechNow.org are "contributions" subject to the federal contribution limit to political committees; and (3) whether an individual must count his donations to the group among the contributions applicable to his biennial aggregate contribution limit described in 2 U.S.C. § 441a(a)(3).[42]

At that time, however, the FEC lacked a quorum, and as such it could not issue an opinion. The FEC's general counsel did, however, issue a draft advisory opinion that concluded that SpeechNow.org would qualify as a "political committee" and thus would be subject to the contribution limits and reporting requirements applicable to such committees. In short, the FEC's general counsel concluded that Mr. Keating and other individuals would violate federal law if they contributed more than $5,000 per year to SpeechNow.org to fund purely independent expenditures.

With this draft advisory opinion in hand, SpeechNow.org filed a complaint and a motion for preliminary injunction. In its complaint, SpeechNow.org challenged the merits of the contribution limits and the administrative and continuous reporting requirements. In its motion for injunctive relief, and in order for SpeechNow.org to be able to participate fully in the 2008 elections, SpeechNow.org sought only to enjoin application of the contribution limits.

In its case before the district court, SpeechNow.org argued that, because the government has no legitimate interest in regulating independent expenditures—a basic premise of the Supreme Court decision in *Buckley v. Valeo*—the government also necessarily has no interest in regulating contributions made to committees which will use those funds solely to fund independent expenditures. In other words, SpeechNow.org attempted to extend *Buckley's* reasoning not just to independent expenditures, but also to contributions made to groups to fund those expenditures.

SpeechNow.org also argued that FECA improperly requires individuals to choose between their First Amendment rights of freedom of speech and freedom of association. In particular, it noted that while individuals are free to exercise their freedom of speech by making unlimited independent expenditures, and while they are also free to associate with other individuals to form political committees to make independent expenditures, under FECA they could not do both at the same time. If individuals associated together to form a group, then none of them could contribute more than $5,000 annually to fund the group's expenditures. SpeechNow.org argued forcefully that this infringed on each individual's First Amendment rights, as well as that of the group itself.

The district court denied the motion for injunctive relief on July 1, 2008. The court, applying a broad definition of "corruption," concluded that the government had a legitimate interest in regulating contributions made to political committees that make only independent expenditures. Applying an intermediate scrutiny standard of review, the court concluded that SpeechNow.org did not have a likelihood of success on the merits, and thus denied the motion for an injunction.

Unsurprisingly, SpeechNow.org appealed the district court's decision. Pursuant to 2 U.S.C. 437h, the district court also certified five issues to the court of appeals for resolution in the merits case.

D. The Supreme Court Decides Citizens United

While this appeal was pending, the Supreme Court issued its important opinion in *Citizens United*.[43] Inasmuch as that decision is the subject of another article in the same issue of this publication, it will not be discussed in detail here. It is necessary for present purposes, however, to note two of the key holdings issued by that decision.

First, the Court reaffirmed *Buckley*, holding that the only type of corruption that may give rise to a government interest in regulating speech is quid pro corruption. Second, the Court confirmed that, by definition, independent expenditures do not give rise to such corruption. As such, the Court ruled that Congress may not impose limitations on independent expenditures made by corporations, and invalidated BCRA provisions that restricted such expenditures.

E. SpeechNow.org*: The Court of Appeals Ruling*

The Supreme Court's reasoning in *Citizens United* of course had a major impact on the U.S. Court of Appeals for the District of Columbia in *SpeechNow.org*. *Citizens United* did not, however, squarely resolve the fundamental issue presented in *SpeechNow.org*, i.e., whether the fact that the government may not constitutionally limit independent expenditures also means that it may not limit contributions made solely to fund such expenditures.

In ruling on this question, the court of appeals extended the Supreme Court's *Citizens United* rationale in precisely the manner requested by SpeechNow.org. Specifically, the court ruled that, if the government has no legitimate anti-corruption interest in limiting independent expenditures, it can have no legitimate anti-corruption interest in limiting contributions made for the purpose of funding such expenditures. It thus held that the contribution limits on political committees are unconstitutional as applied to individual contributions to SpeechNow.org.

This ruling is particularly important for conceptual purposes, because the court effectively applied the *Buckley* and *Citizens United* reasoning on expenditures to contributions. In so doing, it effectively limited the validity of *Buckley's* analysis of the rationale on contribution limits to contributions made to candidates. This potentially has far-reaching implications, the full extent of which will not be known for some time.

The *SpeechNow.org* decision recognizes that using different constitutional standards to evaluate contributions and expenditures, as was done in *Buckley*, fails to address situations where accepting contributions and making expenditures are necessarily intertwined and are, indeed, part and parcel of the same act. Quite clearly, meaningful

expenditures cannot be made by a political organization unless significant contributions are made to it. In this case, as noted above, SpeechNow.org will be funded primarily by individuals actually speaking through the entity they have created, which is conceptually distinct from the situation discussed in *Buckley*, in which the Court concluded that the actual speech will be accomplished by someone other than the donor. In addition, while there may be various media available to the SpeechNow.org donors through which they can engage in political speech, a factor *Buckley* used to justify a restriction on contributions, most individual donors cannot use expensive television and other mass media without combining their resources.

The conceptual problems posed by applying different constitutional standards to contributions and expenditures was, in fact, anticipated by various Justices writing in *Buckley*. Chief Justice Burger, for example, asserted that contributions and expenditures were "two sides of the same First Amendment coin."[44] Justice Blackmun wrote that "I am not persuaded that the Court makes, or indeed is able to make, a principled constitutional distinction between the contribution limitations, on the one hand, and the expenditure limitations, on the other, that are involved here."[45] Justice White saw wisdom in controlling both contributions and expenditures, noting:

> [I]t would make little sense to me, and apparently made none to Congress, to limit the amounts an individual may give to a candidate or spend with his approval but fail to limit the amounts that could be spent on his behalf. Yet the Court permits the former while striking down the latter limitation.[46]

Related concerns have been expressed in more recent opinions, and by Justices with different philosophical approaches to the analysis of campaign finance regulation. For example, Justice Thomas, in a dissent joined by Justice Scalia, has challenged the notion that contributions should be afforded less constitutional protection than expenditures.[47] As he argued, "[C]ontributions to political campaigns generate essential political speech. And contribution caps, which place a direct and substantial limit on core speech, should be met with the utmost skepticism and should receive the strictest scrutiny."[48]

It remains to be seen what the full extent will be of the court of appeals reasoning and decision in *SpeechNow.org*, but the implications for campaign finance regulation are potentially far-reaching. For example, as a theoretical matter, the reasoning of the court of appeals would seem to undermine the validity of the soft money rules. In *SpeechNow.org*, the Court was dealing with independent expenditures, which are defined under federal law to exclude expenditures made by political parties. Nonetheless, the Court's basic reasoning—i.e., that if expenditures for a certain purpose may not be constitutionally limited, then contributions made to fund those expenditures also may not be constitutionally limited—would seem to have application in this context. Unless there is some federal quid pro quo corruption interest that justifies preventing unlimited party expenditures for redistricting, party building, and state and local elections, one would think there should be no limits on such expenditures. If there can be no limits on such expenditures, then under *SpeechNow.org* there would also seem to be no constitutional basis for limiting contributions made to political parties for that purpose.

This issue was recently addressed in *Republican National Committee v. FEC*.[49] In that case, the federal district court declined to strike down the soft money ban, holding that it did not have the authority to overturn the portion of *McConnell* which previously had upheld these restrictions. In a very recent decision, the Supreme Court summarily affirmed this decision. In so doing, however, three Justices indicated that they would have preferred to hear the appeal.

It remains to be seen whether this issue will be revisited in future cases. It does seem clear, however, that the reasoning of the court of appeals will be relied upon in other challenges to campaign finance regulations. This is particularly true given that the Solicitor General and the FEC have decided against asking the Supreme Court to review the court of appeals decision, meaning that the decision on the merits of the contribution issue will stand.[50]

As a practical matter, it is also clear that the decision will have an impact on the 2010 elections. The FEC issued two advisory opinions in July approving requests by the Club for Growth and the Commonsense Ten, a pro-Democratic group, for permission to raise unlimited funds and make unlimited expenditures in federal campaigns. Both groups agreed to disclose donors and spending. In addition, at least twenty-three groups have now informed the FEC that they intend to raise unlimited amounts and make unlimited expenditures in connection with the 2010 elections.[51]

F. SpeechNow.org*: The Court of Appeals Ruling on the Administrative and Reporting Requirements, and the Potential Implications on Anonymous Political Speech*

While invalidating the contribution limits as applied to SpeechNow.org, the court of appeals did conclude that SpeechNow.org must comply with the reporting and organization requirements required of political committees. As was also noted in *Buckley*, the court concluded that disclosure requirements fill a justifiable governmental interest of providing the electorate with information about sources and uses of political money; deterring actual and potential corruption by exposing large contributions to public review; and facilitating detection of violations of contribution restrictions.[52]

Disclosure requirements constrain speech to a lesser extent than do contribution and expenditure regulations. The Supreme Court has suggested that they do not prevent anyone from speaking.[53] In contrast to the strict scrutiny standard *Buckley* employed in evaluating disclosure requirements, subsequent decisions do not limit acceptable governmental interests to anti-corruption alone. Any sufficiently important governmental interest with a substantial relation to the disclosure requirement will suffice.[54] Reporting and disclosure requirements survived facial challenges in *Buckley* and *Citizens United*, and they survived the as-applied challenge in *SpeechNow.org*.

The Supreme Court has not yet addressed the question whether groups making independent expenditures have a

right to anonymous speech. In *McIntyre v. Ohio Elections Commission*, the Supreme Court struck down a law requiring that leaflets be signed by the author as inhibiting First Amendment rights.[55] Ohio asserted that it had an interest in preventing false, misleading or libelous statements. Justice Stevens, writing for the majority, analyzed the long history of anonymous political speech, concluding that neither the state's informational interest nor its desire to circumscribe fraud justify the restriction on speech.[56] Numerous courts have subsequently invalidated state statutes regulating anonymous speech.[57] Eight states have had statutes declared unenforceable by their attorney general.[58]

The question in a situation like *SpeechNow.org* is whether, even under the slightest standard, disclosure requirements for an organization engaged in independent expenditure is acceptable. The potential for corruption is virtually non-existent. The value to voters of information on SpeechNow.org is minimal. This is another area in which future campaign finance litigation can be expected. In the interim, the FEC has advised that it will undertake rule-making proceedings to address the reporting requirements in light of *Citizens United* and *SpeechNow.org*.

One final likely consequence of the decision is worth mentioning. Given that the court upheld the reporting requirements but abrogated the contribution limits, it seems fairly likely that the FEC will in coming months seek to require many more entities and organizations to register and file disclosure reports with the FEC on the ground that their "major purpose" is political campaign activity.

III. Conclusion

For a number of reasons, the *SpeechNow.org* decision represents an important development in campaign finance litigation. The case is one of many in which the provisions of BCRA have been gradually scaled back or invalidated on the ground that campaign finance reformers have, in their zeal to regulate campaign spending, gone too far in infringing on the ability of individuals and groups to exercise First Amendment rights. It remains to be seen whether the court's principal ruling that, if expenditures may not be limited, contributions to fund those expenditures may also not be limited, receives wider application in the campaign finance jurisprudence.

Endnotes

1 599 F.3d 686 (D.C. Cir. 2010).

2 Pub. L. 92-225, 86 Stat. 3, enacted February 7, 1972, 2 U.S.C. § 431 et seq.

3 Pub. L. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C.). BCRA is also known as McCain-Feingold, after its chief sponsors in the Senate. Ironically, the House version, H.R. 2356 introduced by Christopher Shays (R-CT), became law instead of the Senate bill.

4 424 U.S. 1 (1976).

5 *See, e.g.,* J. Skelley Wright, *Money and Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?* 82 Colum. L. Rev. 609 (1982).

6 424 U.S. at 23. The Court identified both the First and Fourteenth Amendments as sources of associational rights.

7 *Id.* at 26.

8 *Id.* at 57.

9 128 S. Ct. 2759, 2773 (2008).

10 130 S. Ct. 876, 902 (2010).

11 424 U.S. at 27.

12 *Id.* at 28.

13 *Id.* at 19.

14 *Id.* at 44-45. The Court used the same analysis to strike down limitations on use of personal funds. *Id.* at 52.

15 *Id.* at 19. *See also Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 387-88 (2000); *FEC v. Beaumont*, 539 U.S. 146 (2003).

16 424 U.S. at 21.

17 *Id.*

18 *Id.* at 44-45.

19 453 U.S. 182 (1981). In addition to a First Amendment challenge, CalMed asserted an equal protection violation based upon the Fifth Amendment. The Court found that differential treatment of individuals and organizations reflected congressional judgment based upon the different structures and goals of donors.

20 *Id.* at 195.

21 *Id.* at 197.

22 470 U.S. 480 (1985).

23 *Id.* at 495.

24 *Id.* at 496.

25 518 U.S. 604 (1996).

26 533 U.S. 431 (2001).

27 540 U.S. 93 (2003).

28 *Id.* at 94-95 (quoting *FEC v. National Right to Work Comm.*, 459 U.S.197, 208 (1982)).

29 "[L]arge soft-money donations to national party committees are likely to buy donors preferential access to federal officeholders no matter the ends to which their contributions are eventually put. . . . Congress had sufficient grounds to regulate the appearance of undue influence associated with this practice." *Id.* at 156.

30 *Id.* at 95.

31 548 U.S. 230 (2006).

32 551 U.S. 449 (2007).

33 128 S.Ct. 2759 (2008).

34 2 U.S.C. § 431(4).

35 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3).

36 2 U.S.C. §§ 432, 433, and 434(a).

37 *Id.*

38 *SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010).

39 Appellant's August 24, 2009 Brief at 4.

40 FECA defines an independent expenditure to be an expenditure "expressly advocating the election or defeat of a clearly identified candidate" that is "not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17).

41 Appellant's August 24, 2009 Brief at 7.

42 Appellant's August 24, 2009 Brief at 15.

43 Citizens United v. FEC, 130 S.Ct. 876 (2010).

44 Buckley v. Valeo, 424 U.S. 1, 241 (1976) (opinion of Burger, C.J.).

45 424 U.S. at 290 (opinion of Blackmun, J.).

46 *Id.* at 260-62 (opinion of White, J.).

47 Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 410 (Thomas, J., dissenting).

48 *Id.* at 412.

49 *See* Republican Nat'l Comm. v. FEC, 698 F. Supp. 2d 150 (D.D.C. 2010), *aff'd*, 130 S.Ct. 3544 (2010).

50 SpeechNow, caught by surprise by that decision, has filed a petition for certiorari to address lingering questions as to the reporting, disclosure, and registration rules.

51 The Center for Public Integrity, PaperTrail The Center Blog, MONEY & POLITICS: Despite Court Win After Citizens United, SpeechNow.Org Yet to Capitalize, http://www.publicintegrity.org/blog/entry/2386 (Sept. 7, 2010).

52 Buckley v. Valeo, 424 U.S. 1, 424 U.S. 1, 67-68 (1976).

53 McConnell v. FEC, 540 U.S. 93, 201 (2003).

54 Citizens United v. FEC, 130 S.Ct. 876, 914 (2010).

55 514 U.S. 334 (1995).

56 *Id.* at 349-351.

57 *See*, *e.g.*, *Shrink Mo. Gov't PAC v. Maupin*, 892 F. Supp. 1246 (E.D. Mo. 1995), *aff'd* , 71 F.3d 1422 (8th Cir. 1995); *Yes for Life PAC v. Webster*, 74 F. Supp.2d 37 (D. Me. 1999); *Stewart v. Taylor*, 953 F. Supp. 1047 (S.D. Ind. 1997); *West Virginians for Life, Inc. v. Smith*, 919 F. Supp. 954 (S.D. W. Va. 1996); *State v. Moses*, 655 So. 2d 779 (La. Ct. App. 1995).

58 *See*, *e.g.*, Op. Del. Att'y Gen. No. 95-FBO1 (Sept. 29, 1995); Op. Mich. Att'y Gen. No. 6895 (Apr. 8, 1996); Op. Minn. Att'y Gen. No. 82t (Aug. 27, 1997); Op. Neb. Att'y Gen. No. 95040 (May 16, 1995); Op. Neb. Att'y Gen. No. 95039 (May 15, 1995) Op. N.M. Att'y Gen. No. 97-01 (Jan. 3, 1997); Op. Tenn. Att'y Gen. No. 95-090 (Aug. 29, 1995); Op. Tex. Att'y Gen. No. JC-0243 (June 29, 2000).