

**THE AMERICAN CONSTITUTION SOCIETY
D.C. LAW CHAPTER**

McCONNELL v. FEC
And
THE FUTURE OF AMERICAN CAMPAIGN FINANCE LAW

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Opening Remarks

Leslie A. Nickel
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Jason Rylander
American Constitution Society
Spencer Overton
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Panelists' Remarks

Robert Bauer
Perkins Coie
Sheila O'Connell
EMILY's List
Laurence Gold
AFL-CIO
Randolph Moss
Wilmer, Cutler & Pickering

Audience Questions

MS. NICKEL: Good afternoon, everyone. Welcome to Arnold & Porter. My name is Leslie Nickel. I'm a partner in our Legislative and Public Policy Group and also a member of our Political Law Compliance Team. Several of our members are here today on the theory that you can never have too many lawyers in the room when you're discussing federal campaign finance law.

We're delighted to have you here today. We're particularly delighted that the American Constitution Society has decided to sponsor this event. They've put together an illustrious panel of very talented and smart people. I can't think of anybody better to lead us through a discussion of what is in store for us over the next few election cycles as a result of the enactment of BCRA and also the recent Supreme Court decision, the McConnell case. So without further ado, I'll turn this over to Jason Rylander of the American Constitution Society. Thanks.

MR. RYLANDER: I'm Jason Rylander. I'm a member of the D.C. Chapter of the American Constitution Society and I want to say on behalf of the Society and all of us who are involved in putting this together, thank you to Arnold & Porter for being so gracious to give us this space on such short notice. Putting an event like this together in just a week when normally we have weeks, if not a month, to plan for ACS lunches was a challenge. And I want to especially also thank Matt Nosanchuk who helped coordinate this with me and the ACS staff for all their logistical support. It's my pleasure to introduce our moderator today, Spencer Overton.

Spencer Overton teaches law at George Washington University Law School where his scholarly interests include: property, campaign finance, voting rights and race. He's widely published in academic press. Among his more recent articles include: Some are More Equal: Race Exclusion in Campaign Finance, in the Texas Law Review, and Racial Disparities in the Political Function of Property in the UCLA Law Review.

Professor Overton formerly taught at the University of California Davis. And before that was the Charles Hamilton Houston Fellow at Harvard Law School where he co-taught a course on law and the political process with Professor Lannie Guinier. He also serves as a director of the National Voting Rights Institute and the Fannie Lou Hamer Project and is on the National Governing Board of Common Cause.

Prior to joining academia, Professor Overton practiced law in the Washington, D.C., office of Debevoise & Plimpton, where he worked on several widely noted cases. He's a graduate of Hampton University and Harvard Law School, and served as a law clerk to the Honorable Damon J. Keith, U.S. Court of Appeals for the Sixth Circuit.

Without further ado, Professor Overton will introduce our distinguished panelists. And welcome to this ACS lunch.

PROFESSOR OVERTON: Thank you, very much, Jason, and to everyone who had a role in pulling this together. So we know the basics but let me just quickly cover them.

Last Wednesday the court issued an opinion in *McConnell versus FEC*. The court upheld almost all of the law's provisions, not all of them but most of them.

To provide an oversimplified summary, and I'm sure it will be unsimplified by our panel here, the court largely upheld the ban on soft money, which was a major provision. It also upheld the limits on corporate and union spending on political ads broadcast just before elections. It also upheld several disclosure provisions.

The court struck down the ban on contributions by children. It also struck down a provision that would have required political parties to choose between coordinated spending or independent spending on behalf of a candidate. Even though the opinion is 300 pages when we look at everything together, it seems to boil down to three rules.

First, congress, for the most part but not always, but congress for the most part can limit political contributions. Second, congress can limit political spending by corporations, unions and nonprofits that receive funding from corporations and unions. Three, congress can require disclosure.

So today we'll talk to our illustrious panel about the court's decision, about unanswered questions in the aftermath of the decision, about new opportunity and challenges facing progressive politics and also about future reforms that might improve the political process.

We've got Bob Bauer from the law firm of Perkins Coie; Sheila O'Connell from EMILY's List; Laurence Gold from the AFL-CIO. And Randy Moss from Wilmer, Cutler will join us in the next few minutes. And I'll give more details about our panelists just before they give their opening statements.

So here's what we're going to do today. We're going to go through opening statements of about 10 minutes per person, 10 minutes or less. I will certainly wave and flag the panelists here. After each opening statement we'll have a little exchange, a little back-and-forth. I'll ask one or two questions of the panelists and we'll have that exchange for two or three minutes. And then we'll move to the next panelist and I'll read the next panelist's bio.

So we're going to start today with Bob Bauer, who is the chair of the Political Law Group at Perkins Coie. He specializes in election law and white collar crime. In 1999 he served as counsel to the democratic leader in the trial of President William Jefferson Clinton. And he has also served as general counsel to the Bill Bradley for President Committee in 1999 and 2000. He is also the author of several books and articles on campaign finance.

And I've really enjoyed getting to know him at various conferences over the past few months. I really get a lot out of our exchange and I'm sure that we will get a lot out of his comments today.

Bob .

MR. BAUER: Thank you. We agreed that we weren't going to re-litigate the case that has just been litigated and decided by the Supreme Court. I do want to say, however, that in case anybody is looking for the detection of bias, if it's not already known to you, I'm not an enthusiastic admirer of this statute. I did, however, congratulate all of the lawyers I knew who litigated on the other side because a victory is a victory. And I would have taken a five-four on my side as well.

I do not also believe, by the way, knowing the general direction of thinking of this group, I don't believe this sort of reform really had much to do whatsoever with promoting progressive politics. As a matter of fact, I think that we will find over the next couple of cycles that it's positively inimical to progressive political organizing. And we're starting to see some of the effects now.

On the other hand, there is always the possibility, however distant, that I could be wrong about all that.

(Chorus of Laughter)

MR. BAUER: I did want to, however, put a little historical perspective on this decision as well as perhaps introduce to you a little bit of my bias.

I'm not terribly offended by aggressive raucous out in the open politics.

This decision suggests that the source of a great deal of evil in our politics and some of the chaos and some of the dysfunction is money.

Before money became the essential preoccupation of those who were concerned about the conduct of American politics there were, in fact, other preoccupations. And I simply wanted to bring you back to the period of time in American history when state legislators elected United States senators prior to the enactment of the 17th Amendment.

And then, of course, any bribery that took place wasn't obviously publicly disclosed in the fashion that it is today on IRS and FEC reports. It was much more of the type of bribery that we're all familiar with.

But there were other forms of dysfunction, which I just can't resist bringing to your attention so that you don't feel too bad about the political process in the wake of some of the rhetoric you've heard about the way it functions today and even some of the language in the majority's opinion in *McConnell versus FEC*.

I simply want to remind you of the way in which politics generally in some fashion takes on to the eyes of those who don't love its unseemly aspects. This is the attempt of the Missouri legislator to elect a senator in 1905 before adjournment.

It was not uncommon that legislator simply couldn't agree so they adjourned without electing legislators. And they didn't send senators to the United States Senate because they simply couldn't agree on one.

In this particular election the following took place. It was, by the way, referred to as "a riot."

"Lest the hour of adjournment should come before the election was secured an attempt was made to stop the clock on the wall of the assembly chamber. Democrats tried to prevent it being tampered with. And when certain republicans brought forward a ladder, it was seized and thrown out of the window.

"A fistfight followed in which many were involved. Desks were torn from the floor and a fusillade of books began. The glass of the clock front was broken but the pendulum still persisted in swinging until in the midst of a yelling mob one member began throwing ink bottles at the clock and finally succeeded in breaking the pendulum."

(Chorus of Laughter)

MR. BAUER: Those of you who recall the republicans keeping the roll call open for the Medicare Bill understand this kind of politics.

In any event, I'm not, as I said, an enthusiastic admirer but I would like to look ahead here very, very briefly within the time constraints that Professor Overton set for us and simply say the following: This decision is straightforward in one respect in the sense that most of the major provisions of this statute were upheld by the court.

The majority is a fragile one. I suspect that you will find that over the course of the next several years in a number of "as applies challenges" that are going to start filtering up through the system that it may be that this five-four decision is even more fragile than the mere difference of one vote would suggest. It isn't obvious to me that the last shot has been fired over this statute by any stretch of the imagination.

Also it's clearly clear we're going to have a continuing argument about what constitutes an interpretation of the law and what constitutes circumvention of the law. There is going to be a great deal of anxiety on the part of those who promoted the law that any interpretation/adjustment to the law could well be, if not in and of itself, a circumvention, the first step along the short or long road toward circumvention.

And you're going to hear increasingly a great deal of confusing dialogue in the political process about whether particular groups are complying or not complying with the law advancing or not advancing acceptable propositions about that law.

This law is terribly complicated. Those of you who read Scalia's dissent will note in the last paragraph that he concludes that it is terribly complicated.

I have found that even those of us who labor in this field for extended periods of time have to periodically check with each other to recall precisely on a fine point what the law, in fact, provides. Those of you who doubt me ought to take a look at some of the recent advisory opinions issued by the Federal Election Commission.

The advisory opinion issued, for example, to Representative Flake to help him understand how the soft money fund raising prohibitions apply to his work on behalf of a ballot initiative activity in the State of Arizona; or to Eric Canter a congressman from Virginia who wanted to know from the commission the way in which BCRA restricted his ability to raise soft money for state and local candidates.

All of this, of course, shifts considerable attention to the Federal Election Commission. Those of you who read the majority opinion -- and Larry and I were talking before. We keep on rereading it, thinking that perhaps somebody will come and wake us up.

The majority opinion will find at a particular point in the opinion the Justices who wrote it, O'Connor and Stevens, note that there is a particular ambiguous provision of the statute that prohibits state and local candidates from funding public communications or issue advertising if the advertising is deemed to promote, support, oppose or attack a federal candidate. Which is by the way, distinguishable from an endorsement ad, which is different.

The challenges to the statute had said that the language promotes, support, oppose or attack was ambiguous. How would we ever know whether an advertisement did or did not promote, oppose, support or attack? And the justices of the Supreme Court, in what I think is a significant footnote, said, "It's not clear to us what it means, but if you have any doubt at a particular case you should ask the Federal Election Commission. Because the statute provides an advisory opinion procedure for the clarification of uncertain points of law."

So you have in the court a ratification of the notion, which is certainly true today under the statute prior to BCRA, but I think becomes even more significant now that those who wish to conduct their political activity with absolute certainty, particularly with respect to soft money activity, that their activities do not violate the law, ought to ask the federal government first whether it's okay.

In a recent application of this principle a state candidate who wished to air an ad in which he was endorsed by a federal candidate asked the commission whether, in fact, the federal candidate could endorse the state candidate in a state candidate paid ad without it appearing to be an improper use of soft money for the benefit of the federal candidate.

The commission ultimately sanctioned the ad. It permitted the ad to take place on the grounds that it was not a benefit to the federal candidate, it was a benefit to the state candidate and therefore it was not an improper use of soft money. But the General Counsel's Office insisted on seeing the text of the advertisement, they wanted to see the ad.

So the ad precisely, as it was supposed to be broadcast, had to be submitted to the agency for review. You're going to see a great deal more of this. And you're going to see that there are circumstances in which those who do not choose, perhaps because they believe they know what they're doing or they're adequately advised by counsel, but those who do not choose to put any activity about which there is any question before the government for approval will be criticized for precisely those reasons.

And years ago I did litigate a case against the FEC in which they sought to have a significantly steeper penalty imposed by the court precisely because on the disputed issue my client had not chosen first to ask the commission its opinion about what it should do.

I think all of us can recognize whatever we think about the motivations behind the statute, that this is a significant change in the way we work the federal government into the conduct of politics, at least in so far as it involves the expenditure of money.

The last two points I would make, I think we are going to the current regulatory structure that cannot support this statute. So either the statute will collapse or the regulatory structure will have to be completely revamped. But I don't believe this statute with the demands that it makes can be implemented under the current regulatory regime.

As you know, there are reform organizations which have proposed to replace the current Federal Election Commission with a much different enforcement agency that would have a single call it -- call him or her a single election law enforcement administrator at the helm, who would have a term of 10 years and who would be empowered under the statute to appoint the general counsel of the agency.

I think under the proposal, but somebody could correct me if I'm wrong, the general counsel would have to be confirmed by the senate. But, in any event, that may be the answer; that may not be the answer. I'm slightly spooked by that idea. But I don't think the FEC, as it's currently structured, is going to be able to do what this statute requires the federal government to do to effectively enforce with credibility this law.

The last point I would make is, and this goes to my first point about the last shot not having been fired, this court opinion leaves open a host of potential as applied challenges to this statute; a host, which could significantly change the voting posture of the court on various aspects of this statute.

Now, I don't think it's likely we'll see them either occur immediately or progress through the courts very quickly but I think we can anticipate it.

PROFESSOR OVERTON: Now, Bob, just to –

MR. BAUER: Was I within my time limit?

PROFESSOR OVERTON: You were great.

MR. BAUER: Thanks.

PROFESSOR OVERTON: You were a model of the panelists.

MR. BAUER: Thank you, very much.

PROFESSOR OVERTON: I hope the other panelists follow your lead.

(Chorus of Laughter)

MR. BAUER: Okay.

PROFESSOR OVERTON: Now the question I have for you is this. I would agree with you, clarity is important and I would agree that the support/oppose is not clear to every person on the street, as the court says it is, in terms of the majority. I guess you started off, though, with this notion that progressive politics is probably going to suffer, right?

What do you say to the argument that, Hey, the parties can still collect \$25,000 a year from an individual, that a lot of people like Greg Moore at the NAACP Voter Fund and the progressive majority and all these other groups that are kind of led by women and minorities, et cetera, that these folks are suddenly relevant? That in the past often they had to go to the party and kind of beg for money to, for example, get out the Black vote? That money was often used for television as opposed to GO T.V.

There's another argument that labor unions are even more relevant now in terms of getting out the vote than they were before.

So isn't this just a reordering of power within progressive circles that kind of distributes power among different groups as opposed to consolidating it with the three major parties on each side -- three major committees on each side?

MR. BAUER: Well, let me answer that briefly because it's part of a very, very long discussion we could have and an energetic one and just make the following two points.

First of all, it all depends, of course, in part on how you take parties to be. And I don't think parties are an anti-progressive force. At least I don't think the Democratic Party is an anti-progressive force.

I think that we lose something when we are unable to incorporate progressive political agendas within the power and the capacity of the two-party system. But here is the more significant second point I would make.

And that is, you are already seeing it. And this is what this sort of effort spawns; an attack on precisely the activity that you just outlined.

The attack now has spread from the party process simply in a few weeks -- in a few days, as a matter of fact, since the Supreme Court decision was announced. The attack has now spread precisely to the independent group.

George Soro shouldn't be participating in spending the kind of money he should. The reform community is about to go to the Federal Election Commission, take an extremely aggressive position against corporate and union spending of a kind that we've never seen before.

I'm not talking about corporate and union spending within the 30- and 60-day period defined under the Electioneering Communication Provision, just simply generally corporate and union spending by giving contributions to organizations that might be engaged in non-party political action. You have to understand this reform movement, in my judgment, is a multi-phase effort and the parties were merely one phase along the way.

Over time what you're going to find is what I most fear, which is that the money will continue to be in the possession and available for expenditure by those who would not be considered part of the progressive circle. And I think you'll see, as you're seeing now, that the progressive community is, quite frankly, very much on the defensive on financing issues.

I think the last few attacks on the independent groups that you've seen out of the republican congress and the reform community underscore the point.

PROFESSOR OVERTON: Okay. Thank you. Let's move on here in terms of our bios. What we're going to do next is move to Sheila can be next; okay?

MS. O'CONNELL: Yes.

PROFESSOR OVERTON: So Sheila O'Connell is the senior advisor to EMILY's List. It's an organization dedicated to electing pro-choice democratic women to office. Ms. O'Connell is currently coordinating aspects of EMILY's List 10 year strategic political plan. Perhaps that's been revised a little bit --

MS. O'CONNELL: A little bit.

PROFESSOR OVERTON: -- in the last week. EMILY's List is the largest political action committee in the United States. In 2002 its 73,000 members contributed \$9.7 million for U.S. House, U.S. Senate and governors' races. Members of EMILY's List also contributed more than eight million dollars to mobilize women in key states in 2002.

Ms. O'Connell served as political director of EMILY's List during the 2000 and 2002 election cycles. As political director she oversaw all aspects of EMILY's List's political programs, including EMILY's List's ten million dollar women vote program candidate services pooling and research and staff and candidate training.

So thank you for being here.

MS. O'CONNELL: Thank you. I would actually open by just repeating a couple of things that you said because it sort of speaks to where EMILY's List is in wake of this loss.

We are the largest PAC in the country but we are only a PAC. We raise federal and we raise non-federal money to support our federal and non-federal candidates. We have sort of dealing with potential -- and how we raise our money for our candidates is through the bundling process.

Where once you've joined EMILY's List you agree to make a contribution to the organization and to make two separate contributions to candidates throughout the election cycle and you decide who those candidates are that you want to support.

You send the money to us. We essentially collect it all together and then send it on to the candidate. And that is what gets to over nine million dollars for our candidates last cycle.

So over the last decade or so, every time a piece of campaign finance reform legislation has appeared in the house or in the senate we've been mindful and watchful of any attempts that have been made to try to make bundling an illegal

process. So when this law a year and a half ago first started circulating our immediate concern was, "Are they going to do anything with bundling?"

And, as a matter of fact, they didn't touch bundling in this law. And they really didn't have anything to say about PACs and how PACs operate in the political system. So we actually, interestingly, leave this ruling as an external piece with no impact on EMILY's List. We will continue to raise money from our members for our candidates. We'll continue to raise and will continue to spend federal and non-federal money. So we are largely untouched in this reform.

I also want to say that in many regards EMILY's List is in a good position after this law because we are built on small, individual donors. We have a small donor network, the 73,000 people who write checks to us and our candidates. The average contribution to candidates is \$93, so we're in a good position to keep spending and raising money.

But my concern with this law and my view of this law is very much through the eyes of what does it take to get a pro-choice democratic woman elected to congress. And it is, as Bob said at the end of his comments, we are outspent in all of our elections, we are outflanked in every regard.

So for women candidates and minority candidates I think this law makes it even more difficult for them to try to beat incumbents, to try to win an open seat. And I'll actually speak briefly to those two things.

For a nontraditional, sort of nontraditional party candidate to run in the democratic primary you are always, even with a democratic primary, being outspent. So the increase in limits to the candidates, which is by and large a good thing, actually when you sort of compare what happens with some of these democratic primaries in general elections, our women candidates are going to be so outspent in democratic primaries now because they're really running these campaigns on small, small, small donor contributions.

When they get into the general election -- I took all of our candidates last cycle and reran the numbers how many -- given the increase in limits just looking at \$1,000 contributors going up to \$2,000 limit.

One race in particular, a big contested race in Indiana last year was Jill Long Thompson and Chris Chocola, he outspent her like this in a very tough race that she lost. Under these new campaign limits he outspent her like this just with the increase in the \$1,000 contribution limit.

So that means that if I were dealing with that fact alone without the rest of this law being passed, we would really be trying to figure out with state parties how we could be amplifying the activities of state parties to do just general organizing and party building activities.

This law has made it so extremely difficult for state parties to do basic party building functions that I think for a lot of our democratic candidates -- in particular I can speak to the women.

For our women candidates I'm concerned about what it means for them when they start to actually put their election campaign together on the ground, that they're going to be outspent even more and out-organized even more. Because the money behind these elections is not currently on our side; it's against us. So we're going to have a problem in trying to win more seats for democratic women and candidates.

So I'm actually going to leave it at that, because I think as a complete and total political hack and operative here that the balance of my remarks will come in our discussion about some of the implications and the practices of this law.

PROFESSOR OVERTON: Let me ask you just a question, Sheila.

MS. O'CONNELL: Yes.

PROFESSOR OVERTON: And Randy Moss has just joined us. We're just doing our opening statements here.

Sheila, I would agree with you in terms of this increase. As you all probably know, BCRA increased the hard money limits from \$1,000 to \$2,000. That obviously advantages certain people who can give that and who can raise money from people who can give up to \$2,000. So I would agree with you there.

But I guess a question here again is, recognizing that the parties can collect up to \$25,000 from an individual, right, from several individuals, right, an individual can give up to \$25,000, is it going to be that difficult for parties to support pro-choice women and minority candidates?

Do we have this false choice of, "Hey, women and minorities you either have a party, right, where there is all these big contributors and soft money and they're kind of running the party and a couple of your candidates get elected; or we just won't use party money to support your candidates here"?

Isn't that a kind of a false choice? Isn't \$25,000 per individual enough to support pro-choice women and also minority candidates?

MS. O'CONNELL: I think in some states it's probably adequate; in most states it's not. The activities that -- what a political party does in a state to get ready for election day, to turn out votes, to register, to get election day workers ready is a pretty expensive prospect. So a lot of it is scaling back on some of those activities.

So my concern comes from who are they going to scale back on. The top of the ticket will dominate. The presidential and the senate and the gubernatorial races will dominate. But for some of those congressional and some of those lower ballot tickets, that funding decision will be made and they will be made with the priority of the presidential race on the top.

PROFESSOR OVERTON: But why does that have to be done through the party system? Why can't that be done through outside groups that focus on issues as opposed to, let's say, political power and being on top?

There is an argument, right, that, "Hey, those folks are running the parties and we're incumbents"? They're more interested in power than progressive issues.

There is a strong argument that these issue groups might focus on what really matters in terms of issues like pro-choice and other issues more so than the parties, which might compromise just in order to stay in political power.

MS. O'CONNELL: I'm going to try to get this right, Bob, so if I blow it –

(Simultaneous Speech)

MS. O'CONNELL: A lot of this is actually dictated by the types of money that can be spent. So when EMILY's List goes out and does issue-based conversations with voters, when we go out and do issue advocacy campaigns, we can't use -- we're prohibited to use the word vote, elect, indicate what day the election is taking place as long as we're using any soft money.

Those expenditures, when you're talking about voting and electing, have to be paid for 100 percent with hard federal money. Those are expensive expenditures to do a big get out the vote mail program, to do a big persuasion television campaign through the state party is expensive. And the fact of the matter those activities now have to be paid for with all hard money.

Most organizations are not sitting on enough -- most issue-based progressive organizations right now are not sitting on enough hard money to pay for those activities. They're sitting on 501(c)(3), 501(c)(4) soft money.

I can't send that money to say so on -- what's the date of our elections? November 5. "On November 5 go vote for Patty Murray." I can't say that unless I'm spending it with all hard money. There are not that many groups who are sitting on that kind of money who can say that.

PROFESSOR OVERTON: My understanding, though, has been that maybe, let's say, not that much, and tell me if I'm wrong, communication uses words like "vote for," that a lot of advocacy uses other words that aren't necessarily like it so-called express advocacy.

MR. BAUER: There's communication that doesn't use it?

PROFESSOR OVERTON: Right.

MR. BAUER: Yes, that's true.

PROFESSOR OVERTON: Right.

MR. BAUER: But what Sheila is saying is that you're now involved in a sort of complex world in which the decision you make about what message is appropriate dictates the resources that are available to you. And there are certain drives that require a certain explicitness of appeal that have to be funded with very restricted resources that, as Sheila says, are not available in abundance to progressive groups.

PROFESSOR OVERTON: Okay. Thank you, very much.

So let us move on to Larry Gold, who has been the associate general counsel of the AFL-CIO since 1996. He represents the AFL before the FEC and the IRS. He provides counseling on legislative and governmental affairs and testifies before committees in both houses of congress. Prior to his tenure at the AFL, Mr. Gold was a partner at the law firm of Connerton, Ray & Simon.

MR. GOLD: Thanks, Spencer. Let me make a few observations and pick up on some things that were just said and start with, I guess, two points. One of which is that I'm truly, as Bob is, very disheartened by this decision for me personally, not just because I was involved in the case, but really because of the result particularly on the broadcast ban.

The disposition of the issue advocacy for so-called electionary communication issue and also the short shrift that the Supreme Court gave to First Amendment considerations in what I think is an evolution from Buckley, that the court did not really acknowledge and I'll talk about that in a minute.

But the other thing that has disheartened me, I guess, over the last few years -- including in the context of the development of this legislation and its aftermath and also a lot of the discussion that Bob referred to that's occurred in the past week about independent organizations and what's next and further changes in the law, further interpretations -- is really how democrats and the progressive community very unfortunately were the driving forces behind this legislation and driving forces behind a view of politics, which I think truly undercuts your basic consideration of free speech, is somewhat fearful of

speech and opportunities for individuals to band together in organizations and be active in the political process and has been remarkably agreeable to the notion that the government through one vehicle or another should be rationing who can say what in what circumstances and should be able to punish certain political activities, including activities that have nothing to do with the transfer of cash from one pocket to another with criminal enforcement.

Bob alluded to or described the fact that you have had at least one advisory opinion asking the FEC for permission, really, in order to broadcast an advertisement by a political candidate.

There is no question in my view that this decision empowers the FEC, at least with respect to public reaction to it and the likely seriousness in the middle of an election year with which people are going to attribute its pronouncements and that to me is very troubling.

The court -- the basic approach the court took, I think Spencer referred to this, in evaluating this law was, I think, remarkable in that it deferred to congress in an area of real First Amendment concerns. A deference that it does not apply and has not historically applied, I think, in most other areas that implicate First Amendment values and interest.

The court over and over again said that congress in one of its phrases, "vastly superior knowledge about the political system" and therefore it should essentially defer to congress' judgments as to how money can be spent and who can say what in what circumstances.

When you sit back and think about it for a minute, that is truly the court telling incumbents or saying that incumbent members of congress have the power and broad discretion in order to legislate their own political fortunes and who can spend money and how their own elections are going to be functioned.

To my view the court should be at least deferential to congress in the First Amendment area when it is actually legislating something of such extreme self-interest, but that's not the case.

Already just in the last week there has been a lot of discussion by those in support of this law, so-called reformers. Because I will not concede the reform mantle to people who call themselves reformers and I think I consider myself a reformer. I have views about what the laws should be. But regardless from what is ordinarily referred to as the reform community, I have heard suggestions about very aggressive interpretations of current law, suggestions of what congress might do further.

I think we should all take pause at the notion that in this case a republican congress and president who have pretty much the power to legislate might take its cue from the Supreme Court and further amend BCRA in ways that haven't been even described yet in order to root out corruption or the appearance of corruption or to do something about circumvention of the law, which are the other kinds of talismanic notions that the court used in order to justify its result.

Let me talk about circumvention for a moment because I think this is truly maybe at the core of it.

Anything that congress does to legislate further in this area can be viewed in one sense as an effort to, quote, "circumvent" another law that proscribed or limited some other activity. And as Justice Thomas, who is not somebody that I'm used to quoting, I think aptly referred -- said in his dissent, I'm paraphrasing, the notion of circumvention is really an endless cycle. Anything that is done that is not proscribed can be viewed and will be viewed, I think as Bob said, as a circumvention of the law.

And in the reformers' view, so-called reformers' view, that's what it is; it's circumvention. It is not expression of political activity. It is not exercise of First Amendment rights.

I think that the First Amendment should be viewed as the basis for it, not as a loophole through which people crawl or somehow in a shadowy fashion exercise their rights around specific prohibition in the law. So there is a certain, in my view, Alice in Wonderland view of the entire notion of political activity that unfortunately underlies a lot of the support for these regulations.

Getting back to a point I made a few minutes ago about Buckley.

In Buckley one of the questions before the court that gave rise to the distinction between express advocacy and issue advocacy, that is, explicit words in support or opposition to the election or defeat of a specific candidate and all else, one of the notions that Buckley, I think, adopted and embraced very forcefully is the notion that there's a lot of speech that can be interpreted in different ways, there's a lot of speech that has mixed elements to it. The discussion of candidates, the discussion of issues inevitably is combined with each other. Elections themselves prompt issues and the like.

And therefore if you're going to talk about regulation of that, essentially you have to err on the side of letting speech flow and not restricting speech.

I think the ethos of the McConnell decision is to the contrary in its discussion of express and issue advocacy where it very casually swept away this distinction. It said that in justifying those electionary communications restrictions, the ban on the 30- and 60-day broadcasts, that because in its view or somebody's view these broadcasts, which all we need to do is refer to candidates, they don't even have to be about elections or candidacies or anything like that because these elections in the court's view were the functional equivalent of express advocacy then they could be regulated. In this case they could be banned.

There is no limiting principle on the face of this court's decision that I see that cabins congress or a state legislature and their 50 states that could take cues from this and do things legislatively in order to cabin their ability to try to regulate further and say, "Well, you know, if the functional equivalent of express advocacy is beyond broadcast and beyond 30 and 60 days." And I think that's -- I don't know that that's where the court's going to go. I don't know if that's where legislatures are going to go.

But absent a more considered and explained rationale by the Supreme Court, and, in my view, its failure to address with what they deserved, arguments about overbreadth and the like brought not just by AFL-CIO but many other plaintiffs in this case, I think we're in for a lot of litigation and uncertainty.

I think also one problem with the law, which is a consequence of both its complexity and in this area perhaps the ambiguities of it, is to chill. It's just to chill political activity.

If people are confronting a system where they have a 91-page statute and 100s of pages of regulations and interpretations and they hear, as they do, unfortunately, I think, a drumbeat about how so much activity and so much involvement by people in politics and banding together is somehow sinister or corrupt or that there are institutions that are inherently suspect and now the attacks on independent organizations, that is, non-candidate, non-party committees and the like, I think and I know from my own experience that it creates a real pall on people doing something, contributing money and the like.

They feel they got to check with lawyers. They don't know what the rules are. They're being attacked regularly for doing things. I just don't understand why we want to be heading in that direction or sort of maintaining this sort of view.

The only people who are really empowered, I think, in the end by this are individuals, wealthy individuals who can -- whose money is somehow pure by the system.

A good example, if Bill Gates decided to expend his fortune on mostly political activity, independent expenditures advocating the election or defeat of candidates and the like, there is nothing in the law that bars him to do so. I'm not saying that there even should be.

But the fact is Microsoft can't spend a dollar to do a lot that Bill Gates can do. And yet through the mere mechanism of the fact that at some point, I'm not sure how it's done, salary, stock options or whatever, \$50 billion of corporate earnings at Microsoft were transferred from that account to Bill Gates account. Somehow in our political system that \$50 billion in his pocket is pure money. It's hard money. It's good. It's virtuous. And there is nothing wrong under the law with it influencing others and being spent for political purposes.

But when individuals gather together, whether it's in labor organizations or a nonprofit group or a corporation, and see that its interests are affected or has something to say about politics that money is somehow dirty and limited and anything that's done in order to do what is still lawful is viewed as a circumvention of the law or shadowy or as the next kind of expression or activity to legislate out of existence, I view it as a very dangerous notion.

I think I'll end with that.

PROFESSOR OVERTON: All right. Thank you, Larry.

Larry, I've got a couple of questions for you, a couple of brief questions. I'll start with the first one.

The first is this. You talk about the deference to congress and I agree with you about entrenchment concerns. But I would argue that two of the provisions that were upheld here were not put forth by reformers or at least progressive reformers.

The increase from 1,000 to 2,000 and the millionaires amendment, those were both kind of, to me, the most entrenching aspects of this law and it didn't involve restriction; it involved increase, more money because incumbents are more likely to raise larger contributions.

I agree with you in terms of being concerned about entrenchment and the court being concerned about entrenchment and that this court should have been more concerned about it across the board in terms of everything. But doesn't any assessment of corruption involve a political judgment, a political theory of what corruption is, circumvention, et cetera? And do we want those judgments made by courts, by judges?

I mean, there is an argument that they're unelected, that they're not accountable to people, that they've got limited experience in terms of politics.

A lot of people would look at Buckley v. Valeo and say, "Hey, the decisions made in Buckley created the problems we have now." The fact that the court didn't defer was so firm in terms of certain things because it eliminated spending limits. The Bill Gates problem that you just mentioned arises.

Because the court in Buckley v. Valeo talked about express advocacy, we've got this problem in terms of the electioneering provisions. Shouldn't we, the argument goes, look to congress for political questions and isn't this just too political and sticky for the court to get into in terms of making fine-tuned judgments about this regulation or that regulation? If a court comes in and strikes down half of the provisions, don't we end up with kind of a Frankenstein Monster type of scenario like we did after Buckley v. Valeo?

MR. GOLD: I guess I look at it this way. The two provisions you mentioned, the doubling of the individual hard money contribution limits to candidates and the so-called millionaires provision, which is in a nutshell -- it's hard to put this in a nutshell because it's remarkably complex.

If federal candidates self-fund at certain thresholds, then their challengers are relieved of the \$2,000 limit up to -- in the senate side, up to \$12,000 per contributor. Those are two very truly self-interested provisions --

PROFESSOR OVERTON: Right. I agree.

MR. GOLD: -- that congress enacted on the backs of the statute as original proposed McCain and Feingold and the self-styled reformers. I think that just underscores my point that congress itself should not be accorded great efforts in this field.

I think the court's view -- there is no question that the court -- if our predicate for why a court should or should not be able to rebuke congressional legislation is that they should have some kind of experience or something in the field, well, then, obviously no court really has that. I mean, it's just happenstance who the nine individuals are in the Supreme Court.

My view in the understanding of the court's role is, in a sense, that's irrelevant as a legal matter. And their job is to uphold the Constitution.

Their job from Marbury versus Madison is to review congressional enactments and make sure they conform with the Constitution and protect the Constitution and the people from overreaching by congress.

So I am not at all troubled by a court that would look at a congressional statute, especially in this area, and do rather aggressive things to cut it back, if necessary, in order to maintain those principles.

If the result is, as it was after Buckley, that you have a statute that is partly upheld and partly not upheld and so when you look at it, it doesn't reflect the will of the congress, then it's up to the congress to resolve it. It is not the court's function, in my view, to rewrite a statute so it makes sense.

In my view, it's the court's function to review the statute against the First Amendment and make particular decisions and then leave it to the legislative branch if it chooses to repair it, to fix it, to adjust to it, what have you, that's the role.

A lot of the commentary --

PROFESSOR OVERTON: But isn't there --

MR. GOLD: One last point. One last point.

A lot of the commentary about this decision is, is that it was pragmatic rather than constitutional. And to my mind that's exactly -- if that's the case, that's exactly what's wrong with it.

I don't think this court's role is to be effectively a super-legislature in this or any other area. I think ironically you could look at this case as an instance of both judicial abdication to a point in the sense of the deference, what I view is the excessive deference to congress and judicial activism.

In that it seem to me, reading the phraseology in the decision that this court -- really the majority -- the five justices in the majority really did like this law. They liked it a lot and they said so. And that's indicated by, I think, appropriating sort of nonobjective terminology used by the advocates of it, such as sham issue ads referring to the progression of congressional legislation over the years as improving the statute. Now, that's a value judgment.

I don't think a court -- it's not a legal judgment, I would say, if something improves a law or not. It may change it, it may revise it, it may restrict it, it may expand it but it doesn't necessarily approve it or make it worse.

PROFESSOR OVERTON: Let me move on to a second question, although I think some would say that a judge who doesn't like the law and strikes it down is also making a political decision as well.

But the second question is this. Are the unions going to play more of a leadership role in the reform community? I think that there is this group of so-called -- they would consider themselves traditional conventional reformers, Democracy 21, et cetera. And they kind of have the connections to McCain and Feingold and to the editorial pages and they drive it. There are a whole host of outside progressive reformers who had problems with this bill and they feel that it doesn't empower average working folk.

I really look back and look at, let's say, the unions in terms of immigration. In the past unions were kind of skeptical of immigration rights and rights for immigrants. But now unions are the leaders in terms of protecting immigrant rights and protecting workers rights around the world. And they looked at it as something -- they're leaders now on that issue.

And I guess the question is are the unions going to kind of get into this reform debate as we go forward with the presidential funding system and others and really kind of stake out a position that -- a working family's position as opposed to, let's say, just being anti-restriction, anti-regulation, "don't restrict the unions" kind of defensive from a litigation standpoint but affirmative in terms of pro-working families, pro -- a pro-plan?

MR. GOLD: I think your premise actually is incorrect in the sense that unions coordinated in this regard by the AFL-CIO have been very active and clear about what their campaign finance reform position has been for years now -- since years before 2001 when it became apparent that there was actually going to be some further legislation here.

The AFL-CIO and the labor movement have stood for a number of propositions in this bill very clearly. And we were very active, largely unsuccessfully, in the legislative process in both houses trying to advance our position on how campaign finance laws ought to be structured.

The key principles of which are public funding -- extending public funding to congressional candidates; secondly, requiring some broadcast time -- free or reduced broadcast time for candidates; third, absences of restrictions on independent speech, such as the so-called Electioneering Communications Provisions. We have actually -- and we have favored contribution limits.

So we have a -- "we" being the labor movement, has had a position clearly expressed and articulated, we try to advance it.

And I think what your question indicates is that there hasn't been an elite audience for our view in the sense of editorial pages and the like and it's always very easy to pigeonhole anybody who challenges any aspect of BCRA as anti-reform or as somehow wholesale standing for the free flow of corrupting money to politician's pockets and that's just not the case.

PROFESSOR OVERTON: Well, I appreciate that and I hope we can continue to talk about this and continue to work on those issues because you make some important points in terms of reform.

So let's move on to Randy Moss, who is a partner at Wilmer, Cutler & Pickering. He has represented John McCain and other intervener defendants in *McConnell v. FEC*. You also remember that his firm orchestrated the win for the University of Michigan in the Grutter affirmative action case.

Mr. Moss served as assistant attorney general for the Office of Legal Counsel in the U.S. Department of Justice. In that position he was the government official responsible for advising the White House, the attorney general and the executive branch agencies on some of the most difficult and important legal questions of our day.

Mr. Moss.

MR. MOSS: Thank, you. I apologize for coming in late and missing some of the earlier remarks. But I did want to respond to one of the things that Larry just said.

He said that the only people, in his view, who are empowered by BCRA are wealthy individuals and I think that has it completely upside down.

The people who are empowered by BCRA are the average citizen, people who can't afford to spend \$100,000 to buy access to members of congress, the people of the community who are utterly disillusioned.

Larry, I think, referred to the decision as being disillusioning. I think that we're living through a time with this enormous disillusionment in our government in which people's reaction often tends to be to the BCRA debate, "Yeah, yeah, I know people spend hundreds of thousands -- millions of dollars to buy access to our government, that's just how it works." That's really sad and BCRA, I think, makes a big step in at least preventing kind of the continuing erosion of public confidence in our system of government.

When one thinks about BCRA, it is undoubtedly the case that there are very important First Amendment issues at stake, but there is also the functioning of our government, the functioning of our democracy at stake.

And I haven't heard a word since I've been here, at least today, about those countervailing interests, which motivated the Supreme Court's decision in the case and the notion that there is value in actually having a democracy that's based on principle and the views of the public and not based on who has made the largest campaign contributions.

I just think that it is utterly preposterous to conclude that that wasn't the case under the pre-BCRA world. And those who are unhappy with the decision in the case -- and Larry has referred to kind of a deference to congress. The deference to congress was on propositions that I just feel that if Larry wants to disagree with them he might --

I just find it preposterous to believe that when corporations are out there giving \$250,000, even a million dollars to the Republican Party and giving a million dollars to the Democratic Party that they're not doing that to buy access and to buy influence in Washington.

The case presented in evidentiary record was just overwhelming of what the Supreme Court referred to as "the pernicious influence of money." To my mind the case actually presented an extremely stark choice.

This was not a case where there was sort of a middle road to go down. And I think the reason that we were successful in the case was because it did present this very stark choice. The choice the court faced was -- well, let me back up for a second.

Justice Scalia at the oral argument -- his first question, I believe, to the government was reading from the First Amendment. And in order to kind of sustain the position that BCRA was unconstitutional, I think, is kind of apparent from some of the questioning at oral argument but is also apparent when you read the opinions. To hold that BCRA is unconstitutional required overruling substantial precedent and really taking a step back to initial First Amendment premises and saying, "We've gotten this wrong for years."

But the result of that approach, the result of saying that BCRA was unconstitutional was really to say "That we were going to live in a country in which we just have to accept the fact -- it's unfortunate but you just have to accept the fact that money buys access, that money buys influence. There are greater values at stake here and we're just going to have to sit back and accept the fact that democracy is not perfect and that the person with the largest checkbook can get their legislation passed on the Hill." I think congress faced that -- that the court faced that choice.

I think the interesting question, to my mind, is not what consequences are of the Supreme Court's decision in the *McConnell* case. Because I think the actual consequences of the Supreme Court's decision in the *McConnell* case is really just to return the country to where it was not terribly long ago, to return it to the place it was in before the soft money loophole was discovered and exploited to massive extents and to bring the country back to a place in time before which these -- I won't call them "sham issue ads" in deference to Larry, but so-called issue ads, as they were reportedly. Not about

election, but that every person around this table if you looked at these ads would say, "These are undoubtedly about elections. And anyone who says they're not about elections is just lying to you."

That putting it back to a place in which those ads were funded in a way that congress had said for decades they should be funded. And all BCRA does is return the country to that state of affairs. And all the court did in the McConnell decision was to affirm a return to that state of affairs.

To my mind it really would have been a very significant ruling, immensely significant ruling had the court come out the other way. If, for example, the court had struck down the soft money ban on constitutional grounds, it would have been nothing that congress could have done about that. And we would just have to live in a country in which, like a lot of countries in the world, people just simply shrug their shoulders and say, "Yeah, money buys influence. And that's just the way it is."

And that would have been the result had the court struck down Title I of the bill. There was no choice and I think that the critical votes in the case recognized that and they said, "What do I want my legacy to be in this country? Do I want my legacy to be one in which I was the person who cast the deciding vote to open our political process up in a manner mandated by the Constitution to the pernicious influence of money?"

Why don't I leave it with that.

PROFESSOR OVERTON: You had 20 more minutes since there were three –

(Chorus of Laughter)

PROFESSOR OVERTON: I've got a couple of questions for you. You talk about overruling precedent and we wouldn't want to do that and I would agree with you in terms of precedent, for the most part.

But here is my problem, here is the issue: Unions. Court hadn't ruled on unions in the past. Court in Austin focused on restricting corporate spending because of the aggregation of wealth. Unions are different from corporations.

Now, I understand that there is this political argument: "Well, unions support democrats and corporations support republicans and therefore we got to restrict them both and that may be the job of congress."

But in terms of the court, the court shouldn't focus on those political concerns, they should say, "Well, hey, we had this past case where the court in the past said, 'You can't restrict PAC spending because if you do that basically restricts the ability of people who give small amounts to that PAC.'" Right, it says that in a past case?

MR. MOSS: Right.

PROFESSOR OVERTON: And isn't a restriction on union spending the same thing? Basically we've got people from -- working people from all over the country giving small amounts to unions that fund unions. And isn't a restriction on union spending the same thing and brings up the same constitutional problems? And isn't that, let's say, arguably the real tragedy of this opinion? This is the first time the court moved in that direction and explicitly stated that.

MR. MOSS: I think you're right that it's the first time the court has explicitly stated that. Of course it's been the case since the 1940s that it has been illegal in this country for unions to spend the direct union treasury funds on federal elections or contributions.

PROFESSOR OVERTON: So congress has restricted it since the '40s but the court hasn't really passed on the constitutionality of that?

MR. MOSS: Well, I think there were a number of decisions along the way where the court certainly had the opportunity to pass upon it, pass upon it and didn't accept it.

And I think that the reason that the court ended up in the end treating unions the same way as corporations was two reasons: Both are entities that enjoy a status created by either state or federal law in which there are sort of benefits to that status that come along with the burden of the status.

But then in addition with respect to both corporations and unions, they're free to form their own political action committees where people can voluntarily decide, "Yes, I would like to participate in this political cause. I very much like what the AFL PAC does and I want to contribute to that PAC." And the union members are entitled to do so and, in fact, contributed many millions of dollars to do that in a voluntary way in which their money is then used on that political speech.

PROFESSOR OVERTON: Bob.

MR. BAUER: I actually wasn't at all mean to your position before you got here.

MR. MOSS: Now you're going to be?

MR. BAUER: No.

(Chorus of Laughter)

MR. BAUER: But now I'm really annoyed. No.

(Chorus of Laughter)

MR. BAUER: I just want to make a couple of really quick points in response to what you said, Randy.

First of all, I think it's very striking that the rationale that you've advanced for the decision -- and you won. You should have the glow of victory over you and I take nothing away from that. Everybody -- as Al Gore learned, five-four decisions do mean something in this country.

You would advance a rationale for this statute that is, in fact, not the rationale that the court used. You made an equality argument here. You said the reason this decision is so important is because the average person can know that money will not talk more loudly than the pocketbook that the average citizen possesses. The court went out of its way not to endorse an equality argument.

And, in fact, what it did, which is I think what makes the court not a sterling example of constitutional jurisprudence, is it stayed with this extraordinarily eroded, incredible corruption argument. It basically said, "Well, yes, it's true, nobody got bribed." And this evidentiary record that you have characterized as overwhelming didn't turn up one evidence of what the court calls "vote switching," not one.

But there are a variety of ways in which money produces illicit political influence and, after all, people with money can manipulate the legislative calendar and it's all quite insidious and undetectable. And so it's still corruption and furthermore persuades people that there's corruption. That's not an equality argument; that is an argument strained, and I think as incredible as it is, an argument that is being made under the corruption rationale of the Buckley case.

Now, I think, in fact -- and this is what is the worm in the apple of the reform movement in my judgment.

That what the reform movement is trying to do is advance an equality argument and I'm all in favor of that debate, no problem with it. People want to argue -- and, frankly, there might be a progressive argument for this.

I personally am a very strong advocate for public financing. I think that is something we ought to experiment -- not entirely certain it will work, but we ought to experiment with it.

But if the reform community wants to say, "We're advancing an argument here that we ought to reverse Buckley on the issue of equality and have a system in which it, in fact, is okay to suppress wealthy spending, to therefore raise up the ability of average citizens or even their perception of their ability to influence the political process," I think that's a reasonable argument. That's not what we've had.

We've had a continuous series of years here with name calling, corruption and outrageous and insidious and disgusting and corporations raping government and so forth --

(Simultaneous Speech)

MR. MOSS: Pernicious, you forgot pernicious.

(Chorus of Laughter)

MR. BAUER: You were very strong on pernicious. I don't want to take that away from you.

And so it really, in fact, is a decision that is fundamentally at its heart, in my judgment, dishonest. Just as I believe -- I'm not sure "dishonest" in the sense that they thought they were being dishonest but certainly not credible, in my judgment.

And I think that that is going to come back and haunt all of us because it is this corruption argument that's also giving rise now to this endless preoccupation with people not simply interpreting the law but circumventing it, getting around it. I mean this entire odor of corruption, which has been manufactured to support that case, is what is driving American perceptions of the political process now to some extent.

The last point I want to make to you, as a historical matter I could not disagree with you more, able counsel that you obviously are, I could not disagree with you more that the American public in watching the flow of money in the political process in recent years have become horribly disillusioned. There is no evidence for that at all.

In fact, in the 1960s Frank Sorauf who, in fact, is a supporter of campaign finance reform, wrote a book about the American party system published by Little, Brown in which he talks about the fact, quite correctly, the American public has been, is now and always will be intensely suspicious that somebody else is managing the levers of power and they're not.

That was true during the colonial period, it was true during the gilded age, it was true during the progressive period, it was true during the New Deal, during the great society, during the new frontier and it's true today.

There is nothing you are going to do to persuade the average American observer of politics that the fix isn't in. And the notion that BCRA is going to turn them all into starry-eyed admirers of the American dream is hard for me to accept.

PROFESSOR OVERTON: Bob, let me do this --

MR. BAUER: But congratulations, you won.

(Chorus of Laughter)

PROFESSOR OVERTON: I'm going to let you respond. Let me just ask a question that is really, I think, maybe putting into question form Bob's soliloquy.

MR. MOSS: I've already got three points to respond to. You're not giving me more, are you?

(Chorus of Laughter)

PROFESSOR OVERTON: What are the limits of corruption now? What are the limits of circumvention here? What are the limits of the appearance of corruption? These are all state interests that are put forth to restrict spending and contributions and what's the limit of those kinds of nebulous concepts at this point? Doesn't this just give congress a license to do what is necessary to prevent circumvention of another law? Where does this stop?

MR. MOSS: Let me -- I've got a number of points to respond to there.

First with respect to the equality point, that's not the point I actually was intending to make. I mean, maybe that there is actually a good equality argument to be made. But the point that I was really intending to make was a form of the corruption argument.

And in that members of the public, whether they're spending money or not, have a right to have their elected officials do what is in their best interest as the people who put them into office.

And that the fact that someone comes in oftentimes from an entirely different congressional district with a large check, shouldn't be influencing the vote of that member of congress or any decisions of that member of congress but it ought to be the interest of the public that that member represents, which leads me into the next point with respect to vote switching.

I think it is true that there was not any evidence in the record of someone saying, "Oh, thank you for that campaign contribution. I will now switch my vote." If that were the case, of course you wouldn't need campaign finance laws at all, bribery statute would be sufficient, you just put that official in jail.

But we are sitting in Washington here -- and Bob may be amazed and we may have equal amazement here, but I would love to kind of take my own poll in this room here.

If people in this room actually believe that the legislative process is not influenced by whether there's a committee hearing, whether a bill ever finds its way to the floor, when it finds its way to the floor when it's scheduled for a vote -- decisions that are well short of vote switching -- We have testimony from this case from members of congress that there was no tobacco legislation, that there was no tort reform because of the money that was involved in this case.

I mean, I just think -- maybe everyone just has a different reaction to this. But it is startling to me to kind of accept the proposition that corporations were spending a million dollars on the republicans and a million dollars on the democrats and were giving away their shareholders' money and they were doing it for some reason other than the fact that they thought it was necessary in order to have their voice heard in Washington, in order to get the meeting with the member of congress to make their presentation to the member of congress.

When someone shows up from the member's district and says, "I've got a great idea for a piece of legislation. I would like to sit down with the member and talk about it," presumably that person doesn't get a meeting.

Someone writes a check for a million dollars to the Republican Party and shows up and says, "I would like to talk to you about what I think is a great piece of legislation," they get a meeting, they get consideration of it and that is a form of corruption of the process.

If one accepts the view that the only -- that congress' power to act is limited to bribery or something near bribery where you can show vote switching, then, in fact, you're accepting the proposition that we're just going to live in a country in which people are able to use their money to convince members of congress to take action that affects the ultimate legislative process in ways that aren't necessarily what the member of congress thinks is right.

Which leads me to the final point I would like to say in response, with respect, to the public perceptions.

We actually introduced polling evidence in the case in which we demonstrated that the public, in fact, did think that large soft money donations influence what members did. In fact, over 70 percent of the public believed that members of congress at times would vote against what they thought was right and what their constituents wanted because of money and large soft money contributions. And even more telling than that was the polling that was done of corporate America, the people who are actually writing these checks for 100s of thousands of dollars.

Those people said, "Yes, we are writing these checks because we think we have to do this in order to be heard in the process. If we don't do this we will be at a disadvantage in the process."

PROFESSOR OVERTON: So what's the limits of the circumvention?

MR. MOSS: Well, I do think that it's a question that gets back to the issue of deference. And I do think that it is an area in which congress, as the body that really makes the law, is entitled to substantial deference. And I think the limit is that congress should have complete authority if it concludes that money is being given in a way that influences the decisions that are being made in the legislative process and not just the final vote on the floor, that congress should have the authority to act.

PROFESSOR OVERTON: So 60 percent of Americans give money because they, let's say, oppose the war in Iraq -- let's say, 60 percent of Americans, over 100 million people?

MR. MOSS: Right.

PROFESSOR OVERTON: Then you're saying that congress should be able to restrict that because that may change congress' view on Iraq here? What's the limit if it's about access and sale of access? We can sell access to people who give \$1,000 or \$2,000 -- I mean, you understand my point? That if you start moving down this kind of slippery slope, pretty soon members of congress don't have to listen to people, to citizens.

MR. MOSS: Well, they don't have to listen with their checkbooks. I mean, I think if you have 10s of millions of Americans that are opposed to the war in Iraq, one would hope that that would influence the views of members of congress. The question is whether their checkbooks influence. And I think the limit with respect to contributions is what the Supreme Court said in McConnell, but also previously said whether the limits on contributions are so severe that they, in fact, squelch the ability of the recipients of the contributions to be able to speak.

We're in a system in which there is over a billion dollars raised in hard money so we're not even close to that world.

PROFESSOR OVERTON: Let's hear from Larry and then I want to open it up in terms of audience participation.

MR. GOLD: A few points. With respect to that poll, which was purchased by the defendants in this case and introduced, I believe one of the plaintiffs asked some of the very same questions about perception of spending and contributions and asked the question with respect to hard money, all the -- you know the \$2,000 limit, the limits that were appropriate for the parties. And they elicited essentially the same degree of suspicion among the polled community about how this is -- you know, "that's likely to be corrupting" or "I'm suspicious about that."

You know, there is a lot of cynicism and very healthy skepticism about authority that pervades our society. I think that's essential to the democratic process. But enabling judicial interpretation for polls about appearances -- about perceptions or appearances of corruption to justify statutes that actually limit political activity, I'm sorry, I do believe is dangerous.

Randy, I think, referred to my comments as "preposterous," which, unfortunately, is in keeping somewhat with the hysterical tone that the so-called reform committee has used for years about this to intimidate those who opposed their version of reform. And I say that with all due respect to him because he's a fine lawyer.

But my remarks were really not directed, I thought I made clear, with respect to the soft money side of this case about which I think there is fair room for disagreement. And I don't want to be interpreted as supporting the court's -- supporting BCRA's thorough, going regulation of prohibition there but with respect to the independent political and speech activity of individuals and groups.

That's where -- none of these concerns about corruption and the like and undue influence, I think, have such bearing that they ought to justify restrictions. And that is one of the core aspects of this decision.

And I still -- I have rarely never seen a satisfactory explanation as to why it is improper and unlawful to the point -- that it should be unlawful to the point of criminality for independent organizations separately and apart from candidates, separately and apart from parties to spend their own money to say -- really to say anything they want but certainly to say something in a non-express advocacy realm.

Just one final point because you asked about unions.

In fact, unions are distinct from corporation -- democratic organizations. They have to be democratic in the sense of having election of officers by secret ballot by federal law and that's how they operate. And the notion that they cannot decide to spend their money to do broadcasts and that sort of thing at particular times and to equate them with corporations in that regard, I think, is an unfortunate comparison.

One last point. Randy said that anybody who says that these issue ads are not about elections are quote, "liars," unquote.

Well, I suppose I could take that personally because, as I told the court in this case and as we demonstrated in our -- the AFL-CIO has, for example, a long history -- long, relatively speaking, at least since 1995, of investing a great deal in broadcast advertising, commenting about legislation and issues; in many instances dealing with particular legislation, urgent legislation that suddenly appeared that had to be dealt with. And the most effective way to do was to broadcast an ad in a senator's or representative's district and to put public pressure on that individual to vote for or against the bill.

There is, in fact, I think it is very fair to say, a continuum of advertising that has occurred in the past, in the past 10 years or so that refers to members of congress. Some of what I think absolutely everybody would say, this is the only -- this is clearly -- and it's all impressionistic.

I think that there would be near unanimity that some of these ads were intended to advance or retard the fortunes of a particular candidate. There would also, I think, have to be near unanimity, except among the self-styled reformers who never concede anything, that some of these ads including many of the ones that the AFL-CIO ran had nothing to do with elections and had an urgent legislative purpose. And then there is a great deal of stuff in the middle that partakes of both.

PROFESSOR OVERTON: Larry, I just want to make sure that we can let these people who spent two hours with us

MR. GOLD: One last point about it. The fact that an ad might be, quote, "about an election" in a certain sense does not make it illegitimate. It is entirely legitimate in my view for a union or a corporation or individual to broadcast something or communicate something in some other means -- a forum precisely in an order to influence the issues that are discussed in elections or to raise issues and force everybody to address them. And that electoral motive, if you will, should not justify its prohibition.

PROFESSOR OVERTON: Right. Randy, you've got one minute and that's it. We've got to open this up.

MR. MOSS: One minute, in which it's in the nature of a concession or an apology.

If I in any way suggested that you're a liar, that certainly was not my intent. And I don't disagree with you, with the proposition that there are some ads out there that are clearly about issues.

My point was that the vast majority of these ads that are purportedly not about elections, really are about elections. I did not intend any offense or any name calling.

PROFESSOR OVERTON: Again, this is just good spirited, friendly discussion, debate.

(Simultaneous Speech)

AUDIENCE MEMBER: My question is for Randy. The other three speakers spoke as to whether or not this particular legislation will benefit some of the progressive causes, which are represented at that end of the table.

MR. MOSS: Right.

AUDIENCE MEMBER: And you're in a kind of opposition because here you have three people who represent important progressive causes saying this is going to be to our detriment.

MR. MOSS: Right.

AUDIENCE MEMBER: And constitutional issues aside, which obviously are of great import, what is your view on that? And I think a lot of the conventional wisdom is that it's to the detriment of the democrats and potentially to progressive causes generally.

MR. MOSS: I am not involved in politics in a way that kind of really has any -- it's really as a lawyer. I think that's what I have heard and, in fact, the democrats at least in the short term are going to be hurt more by this than the republicans.

Although I think there are some progressive groups out there that perhaps benefit by what was done, but I would have to defer the specs on how it's actually going to affect particular groups.

PROFESSOR OVERTON: I think there are arguments that could be made that those people who are progressive and very powerful might be hurt, but maybe the weaker, progressive folk who don't have status within the party or the infrastructure, et cetera, may be benefited, in some way an argument could be made.

Matt.

MR. NOSANCHUK: I guess this is a question for -- well, for anyone on the panel or maybe Bob.

Is that at the end of the day after the 2004 election, is the -- the question that comes to my mind is -- as I struggle between these two positions and I think I may not be unique in that regard, is the amount of money that is going to be spent in the next election cycle going to be less or is it going to be more? Is the pie going to be bigger or is it going to be smaller? How is -- So basically my assumption is that there will be as much, if not more, money spent in the next election; it's just going to be spent in different ways. I'm curious to know how is it going to be spent.

I mean, the NRA says it's going to buy a television station. You know, is it going to be that kind of circumvention? What are we going to see in the next year if I'm right that as much or more money will be spent?

MR. BAUER: Well, I think you're going to see and it's a long -- I don't want to take up time from other panelists here. I think you're going to see an awful lot of spending. You'll always see a lot of spending if people perceive that the stakes are high. And even, frankly, given the perceived costs and requirements of modern campaigning, even when the stakes are not perceived to be as high as I think next year they will be, you'll always see a significant amount of spending.

I don't believe that over the long run this statute will significantly depress political spending. It will divert it into other channels; some of them will be conceded to be legal, some of them will be claimed to be illegal.

I also believe, by the way, that we will not see how the spending level settles out at the end of this cycle, it's. Going to take two or three, four cycles before we see what the regulated landscape looks like.

AUDIENCE MEMBER: I have a question. You mentioned that unions and corporations are treated the same in the law and what got swept up with corporations are also nonprofits and the vast majority are exempt under federal and state decree, which requires them to remain completely nonpartisan during elections.

But BCRA does nothing to protect these groups, so that while important legislative events are moving forward in the fall or in the spring when a primary might be taking place or a group who may or may not be a challenger for a congressional seat or someone suddenly finds out it could be a federal crime to mention the name of a public official on the air because BCRA doesn't even limit the elections communications prohibition to ads.

MR. BAUER: So you know the FEC has taken (c)(3)s out of the electionary communication prohibition?

AUDIENCE MEMBER: I know, but they could take -- the FEC exempted them but it's not part of the law and the sponsors of the law are challenging that exemption in court so that there is still no safety net in the long run.

Could you comment on what could justify these kind of restrictions on --

PROFESSOR OVERTON: Any comment here?

MR. BAUER: I'm certainly not testifying. So maybe Randy can.

MR. MOSS: I want to say the carve-out that is in the law is the one that the Supreme Court has recognized for what are referred to as MCFL organizations. Where if an organization is a nonprofit, even if it's a corporation, and it doesn't receive anything more than from a very diminished -- this amount of corporate contributions and is formed for advocacy purposes, it is exempt under the statute itself, at least as interpreted by the Supreme Court and is conceded by all the parties in the case.

MR. GOLD: But that doesn't help the (c)(3)s, many of which do rely on corporate or union contributions for their funding.

MR. MOSS: Right. Well, that -- I'm sorry. Go ahead.

MR. GOLD: And the fact that the FEC, as Bob said, decided to exempt them in a regulatory nature where there is no such exemption on the face of the statute and backers of the law are challenging that, the MCFL exemption doesn't save them; they're swept up with everybody else.

MR. MOSS: And the purpose of that, of course, is to keep the unions and again corporations from laundering through the (c)(3)s.

AUDIENCE MEMBER: But the IRS restrictions accomplish --

MR. GOLD: No (c)(3) in its right mind is going to engage in partisan political activity or be party to some kind of laundering scheme, none of which was ever demonstrated on this record, by the way, in order to risk losing its tax exemption for the purpose of some particular legislative objective; or for the opportunity, heaven forbid, to broadcast something that referred to a federal office holder.

PROFESSOR OVERTON: Larry, I agree with you, I think, on the union spending. And I might agree with you in terms of the nonprofits if we, let's say, said that nonprofits have to accept union and corporate money into a segregated account that they can't use for political activity.

But would you -- based on what you said before, do you think corporations should be able to spend as much as they want to on politics?

Let's just say that the restriction on labor spending is unconstitutional. From a constitutional standpoint, do you believe that corporations, that GM should be able to spend as much as it wants to on politics?

MR. GOLD: When you say "on politics," I think that's –

PROFESSOR OVERTON: On express advocacy, on commercials, on "vote for George Bush" or any other kind of federal election activity, should corporations be able to spend as much as they want to?

MR. GOLD: I believe that any source of funds, any institution, corporate or union, nonprofit group, what have you, ought to be able to spend its money in the public sphere, again, uncoordinated with candidates and parties, not transfers of cash to express its views on elections, politics, legislation, public policy, whatever. I do believe that.

I think as a constitutional matter we're still dealing with and sifting through this decision. But I do believe as a constitutional matter –

PROFESSOR OVERTON: So Halliburton should be able to –

MR. GOLD: -- unions have a better argument here, certainly. But I don't oppose disclosure at all. I think that disclosure is -- if people are concerned about if the source is disclosed, I think at some point we do have to trust people to make decisions themselves and to evaluate the speakers and what they're saying and take that into account of their decisions and not defend them against speech.

MS. O'CONNELL: If Halliburton is going to go on the air, which I would of course welcome, I would want them to identify themselves as "paid for by Halliburton," but that's never what you see. It's paid for by friends of this and America's future and –

MR. MOSS: Republicans for Clean Air.

MS. O'CONNELL: Yes. One of my favorites.

So if citizens are going to be at home and turning the television sets on and seeing this barrage of advertising, they should know who is paying for it.

PROFESSOR OVERTON: Jason.

MR. RYLANDER: Two questions. First talking about empowering the grass roots is part of what reformer goals were.

If you work with a local political party, how are you now impacted by BCRA in terms of doing the things that local political parties do, which might be, say, printing a sample ballot for all your candidates, one of which out of 10 might be a federal candidate? Or doing a messenger, which touts all of your candidates and party activity sometime in September before the election?

Are you now required to do all of that with hard money, with Levin money or some other kind of money when traditionally you would have done those get out the vote and things like that with soft money, which in many cases is less restricted than federal?

MR. BAUER: You can explain to your local party committee chair that he cannot raise Levin money with the assistance of any federal candidates or local or national party committees or take any transfers or raise any money jointly with other committees to raise the money for Levin activities.

Which by the way, get out the vote, voter registration, other activities as defined under the statute, that if he wants to conduct certain activities on an all hard basis, that's fine. But there is a certain threshold beyond which registration becomes required.

If he wants to conduct the activities as Levin activities, he can do so but there are, as I said, restrictions of raising the money and also restrictions on when that activity can be conducted. And if it's both exempt activity and it's also Levin activity, then the threshold is different.

The reason I'm saying this is not because I'm making it up, but because, as I said early on, it's gotten immensely complicated. And as you -- what activity they engage in and how they understand what they're doing will affect what money they can use, who can help them raise it and when they have to register a report with the Federal Election Commission.

One of the things I said, Randy, before you walked in is I don't believe that the Federal Election Commission as it's currently organized can handle this. It doesn't have the credibility to enforce the statute. It's not set up in such a way that –

MR. MOSS: Some of my clients would agree with you on that one.

MR. BAUER: Right, but for somewhat different reasons, even than the ones that you have in mine.

Because among other things, this is an agency, by the way, that doesn't even afford the people who come before it meaningful due process rights, as you're well aware. I mean, the fact of the matter is you can't get a hearing in an enforcement action before the FEC. You can never communicate directly with the commissioner under the ex parte rules.

If you're going to dramatically expand the field of regulation, then you have to look differently about what rights people have before the government that's attempting to enforce the law against them.

So the answer is there is significant effects on local party committees and that it's going to be very difficult for them to find the resources and the wherewithal to sort out what they are or even be willing to risk doing certain things that expose them to liability under the statute.

PROFESSOR OVERTON: Bob, question.

MR. BAUER: Yes.

PROFESSOR OVERTON: What's the maximum amount that a party needs to accept from one particular individual before it's concerned about these questions in these things?

MR. BAUER: Well, it depends on what kind of money they're raising and spending and for what purposes. But the registration threshold depending on that is either \$1,000 or \$5,000 so it's not very high.

MR. MOSS: But the issue -- subject to state law, there is no federal restriction on how much an individual can contribute to a state or local party. The questions really then relate to whether the monies can be treated as Levin money or not and how it's spent.

And I guess the only thing that I would add -- I mean, I don't disagree with Bob, this is a very complicated set of rules. But the truth of the matter is that they were pretty darn complicated before BCRA as well and there were allocation rules that applied. And, you know, even with respect to sample ballot that has the get out the vote effort, that was always subject to federal regulations under the FEC's allocation scheme even before BCRA.

MR. RYLANDER: Last question. Can Republicans for Clean Air still run ads? And what's the likely growth in 5.7 spending on both sides?

MR. BAUER: They can raise the ads. They can't spend corporate or union money on those ads within 30 days of the primary and 60 days of the general. But within those 30- and 60-day periods, they can use corporate and union money to finance mail and phone banking activity attacking a candidate.

And any other time of the year outside the 30- and 60-day period, they can run the same kinds of ads that would run, for example, in your hypothetical against John McCain in New York in 2000.

MR. MOSS: But the Wyly brothers would have to identify themselves now.

MR. MOONEY: I have a question about kind of the basis of the court's opinion being mostly on corporations and unions.

What are the possible next steps for groups that are going to try and go beyond the law or go around the laws to create unincorporated associations? And, frankly, this ruling is not going to affect them at all.

I would like to hear what folks have to say about that and kind of the role of this corruption, whether we agree or disagree on does it exist or not. And what are the next steps for groups that are interested in doing that and the so-called reform communities response to that.

Nobody? Well --

(Chorus of Laughter)

MS. O'CONNELL: One thing I would say, and it sort of reflects the comment that Bob made earlier about will there be more or less money spent in this election cycle and how that's going to take a couple of cycles to sort of look at that, is that I think there is a fair amount of confusion with donors right now about who want to be -- who want to make -- get involved with these elections and do something but don't quite understand where to put it yet.

So I think it's a challenge for some 527s to be out there trying to exist in a world when people are very confused about what they can and can't do.

PROFESSOR OVERTON: Sure. The only reason that I want to follow up a little bit on that is because I think it's very important, which is, I think, this whole MCFL creating 527s that doesn't accept corporate money, union money and can accept contributions.

And I think also (c)(3)s that might focus on voter mobilization, that doesn't necessarily mean voter mobilization in the City of Detroit, right, which is predominately Black? It's nonpartisan but obviously we know how those people are going to vote. So I think there are some different things that can be done.

What's also interesting here is that candidates can solicit for 501(c)s whose main purpose is not federal election activity but does a little bit. And also they can solicit up to \$20,000 for 501(c)s whose purposes are federal election activity.

So I frankly think that there is some opportunity for young, bright folks to really kind of move ahead and do some things that haven't been done before in terms of innovation. I think it's being done right now on the progressive side. There are some challenges but I guess my point is there is some opportunities for folks.

MR. RICHMAN: I have a question for Bob.

In terms of the Supreme Court's opinion and what it did to the aspects of the Federal Election Campaign Act that already existed that weren't impacted by BCRA in terms of its constitutional analysis, do you think that the FEC may be inclined to react to that and revisiting some of the existing laws in terms of whether some of these 527s are triggering the definition of a political committee and contributions, or whether something like the ad that just got run in Iowa that was against Dean was, in fact, expenditure in connection with an election such that it should have been dealt with through the existing FECA structure?

Do you think that the commission is likely to wrestle with those kinds of issues now?

MR. BAUER: Yes. I think you're going to find the commission considerably -- again, now bear in mind it's a three/three commission. And there are some commissioners who have a very skeptical view of the law, one of whom actually has written an entire book saying the pre-BCRA campaign finance structure is fundamentally unconstitutional.

On the other hand, what you're finding at the staff level, at least -- and I think it's going to affect some of the commissioners, is a remarkable degree and have already expressed assertiveness in the wake of McConnell. I mean, all of a sudden the phone booth has opened up and instead of Clark Kent walking out, out comes the Federal Election Commission with a big "S" on its shirt.

I was in a discussion the other day with -- literally two days ago with a general counsel's representative in a case that had nothing to do with BCRA and my negotiating party on the other end of the FEC was citing the McConnell case to me. "Well, in the wake of McConnell."

I said, "What did McConnell have to do with it?" Well, it has a psychological impact on the agency. They've suddenly had this sort of enormous sort of -- I don't think this is an adjective, but viagral experience as a result of McConnell.

And the other thing that you'll find, I think, is that the reform community and others who comment on what the FEC does are prodding the agency to take on just the issues that you referred to, which in the past specifically because of the court's dismissal of the express advocacy/non-express advocacy distinction in the context of electioneering communication, particularly because of that, has given the FEC staff the feeling that perhaps these are issues that they can relitigate, obstacles that they can clear away when they look to see whether certain committees ought to be brought within the ambit of regulation.

So I think you will see a more assertive regulatory posture, at least at the general counsel's level, and I think it will have an affect on the commission as a whole.

MR. GOLD: On the other hand, I think that's right but there is a statute that they are bound to interpret. And they cannot -- nobody can amend the statute but congress. Which goes back to my earlier point that there could be -- we could see efforts to make some changes in this law on the strength of the fact that the court is being so deferential to congress to do it.

But with respect to the question you raised, for example, of a group now that would broadcast an ad, I believe, outside of a 30-day period, maybe within a 30-day period -- I think the ad you're referring to is outside of the 30-day period.

MR. RICHMAN: But the language of the statute is very broad. It just says a political committee is someone that accepts a contribution and the FEC has regulations that say that an expenditure doesn't have to be express advocacy. There's a part B that some courts struck down in some circuits that now look at --

MR. BAUER: You're talking about GOPAC. If you recall the FEC tried for years to litigate Newt Gingrich's political committee GOPAC and, as you recall, one of the things that he did was he said, "Well, I'm raising soft money. I'm raising soft money to encourage state and local officials who will become the farm team for the recruitment of strong congressional candidates."

And the FEC looked at that and other indicia of interest in federal elections and said, "GOPAC should be a registered political committee. It doesn't matter that its public communications don't include express advocacy."

I think the FEC would be inclined -- and, again, I think at the general counsel's level. I think they'll be inclined to be looking at issues like that again and I believe that McConnell puts a certain amount of wind at their back.

PROFESSOR OVERTON: Let's conclude by looking at the future. This is really a question for Sheila and Larry, which is:

As we talk about reforming this presidential system, that Bush, Dean and Kerry have opted out of, what does the AFL-CIO think needs to be done? What does EMILY's List think needs to be done? Certainly regulatory details aren't necessarily -- but in terms of big principles and where we need to go with reforming the presidential system, what's your thoughts in terms of what we need to do?

MS. O'CONNELL: I would like to say as an organization we're not all involved in the presidential campaign. So we have not -- we have a lot of informal discussions about what it means that Dean has rejected public financing and how will that -- so what that means next summer when the spending days are thin --

PROFESSOR OVERTON: There may be a pro-choice woman on the ballot in 2008 for the presidency.

MS. O'CONNELL: That's correct. We are hopeful.

MR. GOLD: The AFL-CIO, I think, for 30 years or more has supported public financing at the presidential level, certainly. So clearly the presidential public financing system, which hasn't been changed in many years, ought to be changed. There is a bill that I don't think the AFL-CIO has taken a position on it. My own personal view is it's largely salutary but we need to look at the details. But I think that system ought to be strengthened in ways that catch up with just how politics has changed over the years.

PROFESSOR OVERTON: Well, thank you all very, very much.

(Chorus of Applause)

(Whereupon, at 2:02 p.m. the meeting was concluded.)