

THOMPSON PLAINTIFFS' GLOSSARY

ACT	The Bipartisan Campaign Reform Act of 2002.
BCRA	The Bipartisan Campaign Reform Act of 2002 (McCain-Feingold [Senate] Shays-Meehan [House of Representatives]).
<u>BUCKLEY</u>	<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976), the case in which the constitutionality of the Federal Election Campaign Act of 1971, as amended in 1974, was challenged in the limitations it placed upon the donating and expenditure of monies in the political campaign process.
CR	The Congressional Record.
FEC	The Federal Election Commission.
FECA	The Federal Election Campaign Act of 1971 (amended in 1974)
GOTV	Get Out The Vote activity designed to educate and assist those citizens who would otherwise be unable to participate in the electoral process and get to the polls on election day.
HARD MONEY	Those contributions made by individuals in accordance with the federally mandated limit.
ISSUE ADVOCACY	Advertisements and media announcements that purport to deal with issues without express reference to a particular candidate
SOFT MONEY	Any political spending, specifically encompassing donations made by unions, corporations and wealthy individuals beyond the limits set by federal law, thought to influence the outcome of the election process.

STATEMENT OF ISSUES

1. Whether there is the need for reversal, amendment or special consideration to be given to Title I of the BCRA, prior to its enactment by the FEC, where, as promulgated, its provisions would cause hardship upon economically challenged candidates (vis-à-vis receiving donations from their constituents and raising money for themselves, and other candidates, PACs and organizations), thereby preventing them from having the same platform opportunities as their economically stable opponents, so as to protect their Constitutionally guaranteed right of equal protection of the laws.

2. Whether TITLE III of the BCRA unconstitutionally limits one's First, Fifth and Fourteenth Amendment guarantees of freedom of association and freedom of expression in its preclusion of minors to make monetary campaign contributions and should be struck down in its entirety.

**THOMPSON PLAINTIFFS
ARGUMENT: TITLE ONE**

**SECTION 101(a) OF THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002
IS UNCONSTITUTIONAL IN THAT IT DEPRIVES FEDERAL OFFICE
HOLDERS AND CANDIDATES FROM ECONOMICALLY CHALLENGED
DISTRICTS FROM OBTAINING AND SPENDING SOFT MONEY
CONTRIBUTIONS AS A PART OF THEIR CAMPAIGN ACTIVITIES.**

The framers of our Constitution, in its Preamble,¹ set forth a document for the people, of the people and by the people. That language implicitly promised a system of political equality wherein all citizens were included in the election process, as voters and/or candidates. Throughout the years however, repeated instances of discrimination necessitated promulgation of the Fifteenth Amendment, as a further attempt to prohibit unequal governmental treatment that curtailed some citizens' right to vote.² In some scenarios, the Amendment 'substantially conferred' the right to vote on certain previously denied classes of citizens.³ Yet instances of disparate treatment in voting rights continued, and after many years of systematic and continuous disenfranchisement of certain people as a class, the Voting Rights Act of 1965,⁴ whose purpose was to further secure to all citizens the right to vote, was enacted.

The fight for equal voting rights for all continues, however, as the assault on the 'one person, one vote' theme rears its *Medusa*-like head in the form of the Bipartisan Campaign Reform Act of 2002.⁵ The law is clear that the legislature has the power to prescribe reasonable qualifications to one's ability to vote and hold office,⁶ but

¹ U.S. CONST. Preamble. (See THOM Appendix Tab1-001)

² U.S. CONST. Amend. XV (See THOM Appendix Tab 1-003)

³ *Ex parte Yarborough*, 110 U.S. 665, 4 S. Ct. 159 (1884) substantially conferred the right to vote for Blacks despite state legislation granting voting rights to whites only. (See THOM Appendix Tab 2)

⁴ The Voting Rights Act of 1965, 42 USCS, sections 1973 et seq. (See THOM Appendix Tab 1-004).

⁵ Bipartisan Campaign Finance Act of 2002, H.R. 2356 (Pub.L.No.107-55, 116 Stat. 81 *et seq.*).

⁶ *Davis v. Benson*, 133 U.S. 333 (1890) (See THOM Appendix Tab 2).

the Fifteenth Amendment to the Constitution "... nullifies sophisticated as well as simple-minded modes of discrimination".⁷ Government promulgated qualifications for the voting privilege can only be sustained when they advocate compelling governmental interests.⁸

Indubitably, interference with the right to vote is an infringement of one's First Amendment rights of 'Free Speech and Association' and requires strict scrutiny⁹ in cases of alleged interference. Not only must restraints on voting be for a compelling governmental purpose, any restraints that are promulgated which effectively cause the unequal treatment of candidates so as to interfere with their right to have votes cast for them must be stricken.¹⁰ Indeed, since the election of political leaders has direct consequences on the lives of the citizens of these United States, it is only fair that they have a voice in determining who is elected into office.¹¹

In *Hadnott*,¹² it was held that the unequal treatment of candidates violates a voters right to cast an effective vote. Furthermore, impediments to candidates' access to the ballot because of race and/or wealth cannot stand the judicial test of strict scrutiny,¹³ which must be applied when said regulations are challenged. It is our assertion that the BCRA of 2002 impedes a candidate's access to the ballot and therefore cannot stand. Moreover, Congress, in its enactment of the legislation, appeared to have failed to consider such factors as race-neutral alternatives prior to its passage.

⁷ *Gomellion v. Lightfoot*, 364 U.S. 339 (1960)(See THOM Appendix Tab 2).

⁸ *Kramer v. Union Free School District*, 395 U.S. 621 (1969) (See THOM Appendix Tab 2).

⁹ *Evans v. Cornman*, 398U.S. 419 (1970)(See THOM Appendix Tab 2).

¹⁰ *Hadnott v. Amos*, 394 U.S. 358 (1969)(See THOM Appendix Tab 2).

¹¹ *Cf.* The Voting Rights Act of 1965 sets a sixth grade education as the qualification to vote and this standard was subsequently affirmed in *Katzenbach v. Morgan*, 384 U.S. 641 (1966 See THOM Appendix Tab 2).

¹² *Hadnott* at 360.

¹³ *In re Sherbrooke Sodding Co.*, 17 F. Supp 2d 1026 (D. Minn. 1998)(see THOM Appendix Tab 2).

In *In Re Sherbrooke Sodding Co.*,¹⁴ the Court's analysis of strict scrutiny involved two parts, a compelling government interest and the necessity for a narrow remedy by the law. The Court stated that "[t]his analysis considers several factors, ...including the necessity for the relief and the efficacy of alternative remedies..."¹⁵

The challenge we face today is that of undue influence, or the appearance thereof, caused by the contribution of large sums of money to political parties, candidates and officeholders purported to affect the outcome of elections or determine the fate of legislation, while at the same time upholding one's right to cast an effective vote by, *inter alia*, providing unfettered access to the ballot by financially challenged candidates from poor districts. The Federal Election Campaign Act of 1971 (FECA),¹⁶ as amended in 1974, placed limits on the amounts that a person or entity could contribute to political candidates, officeholders and political parties. The 1974 amendment to the FECA caused much controversy and was the subject of a law suit by Senator James Buckley¹⁷ and others seeking a declaratory and injunctive relief against enforcement of the amendments. Among the constitutional issues presented by the suit was whether limits on donations to federal candidates and officeholders were constitutional, and whether candidates for federal office were limited in the amount of money they could use from their personal wealth in their campaigns.

Despite arguments of violation of rights of free speech in the U.S. Appellate Court for the District of Columbia, the Court rendered its opinion upholding limits on donations, including instances where candidates used their personal funds in their

¹⁴ See *id.* at 1035.

¹⁵ *Id.* at 1035.

¹⁶ Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) ("FECA"),

¹⁷ *Buckley v. Valeo*, 424 U.S. 1 (1976)(See THOMPSON Appendix Tab 2).

campaigns. The case was appealed to the Supreme Court of the United States and the Court affirmed the findings of the Appellate Court except, *inter alia*, as to limitations on donations made by candidates to their own campaign. In the latter instance, the Court held that no limit could be placed on sums spent on one's campaign from his personal fortune. The Court distinguished the two situations on the basis that while both were a form of expression, the donation and spending of one's own funds was at the core of First Amendment rights while donations to another party did not reach the core of First Amendment rights and therefore the potential for undue influence on a federal candidate or officeholder was of such a federal interest which would support minor intrusions.

Following the decision in *Buckley*,¹⁸ monies were raised by parties and candidates for election activities which many claim were used to circumvent the hard limits on donations. Such monies were deemed "Soft Money", and were used for certain election activities such as voter registration, voter identification and get out the vote (GOTV) activities. These monies were also used to advocate, through the mass media, the election or defeat of candidates and in many instances were coordinated with or done with the full knowledge of the candidate. These announcements and ads were termed "Express Advocacy" and were the subject of regulation by the Federal Election Commission (FEC). The "Express Advocacy" ads thereafter turned into "Issue Advocacy" ads, which were ads solely to speak to the issues without expressly advocating the election or defeat of a particular candidate.

However, the blur between "express" and "issue" advocacy ads was of such magnitude as to make it virtually impossible for meaningful policing by the FEC. The

¹⁸ *Buckley*, 424 U.S. 1 (1976).

issues with 'soft money' became more problematic over the ensuing decades and reached a zenith in the mid-1990's. Efforts of reformists finally prevailed and in late 2001 the Bipartisan Campaign Reform Act (BCRA) was passed by Congress and thereafter signed into law by President George W. Bush in 2002.¹⁹

Subsequently, Senator Mitch McConnell and numerous other parties sued the Federal Election Commission (FEC), the Federal Communications Commission (FCC) and the Attorney General of the U.S. alleging constitutional violations of the BCRA.²⁰ All of the cases were consolidated and a three (3) judge panel²¹ was appointed to hear the matter at the U.S. District Court level.

The BCRA is a very complex law which seeks to eradicate the potential for undue influence in the political process by placing limits on soliciting, receiving, directing or spending funds by national political parties, federal officers and candidates. Unfortunately, the BCRA pays *too little attention* to the participation of all citizens to the political process and therefore has the effect of excluding some citizens from complete participation in the political process (emphasis added). As was stated by professor Jamin G. Raskin,²² the inability to contribute to the candidate of one's choice or for a candidate to be able to raise funds "... is every bit as exclusionary to poorer candidates and voters as the regime of high filing fee[s] and the poll tax".²³

A serious candidate must raise capital for a host of reasons. In the first instance he must have campaign staff to guide his campaign. He must have monies for

¹⁹ See *supra* note 16.

²⁰ *McConnell, et al. v. FEC, et al.*, Civ. Action No. 02-0582 (CKK, KLH, RJL) Consolidated Actions.

²¹ The Panel consists of Hon. Colleen Kollar-Kotelly, Hon. Karen LeCraft-Henderson and Hon. Richard J. Leon.

²² Professor Raskin is a Political Consultant, author and Law Professor at The American University in Washington, D.C.

²³ PUBLIC CAMPAIGN, THE COLOR OF MONEY: CAMPAIGN CONTRIBUTIONS AND RACE, 5, (1998) (See THOM Appendix Tab 2).

advertisements in the broadcast media and to educate the citizens in his district. Start up funds for a campaign are especially important to get the campaign started and thereafter to pay for broadcast time before being pre-empted by the opposition. All told, it is estimated that current campaign costs for a serious candidate for the House and Senate is now in excess of \$ 500,000.00.²⁴ The cost to educate economically challenged constituents is particularly high in jurisdictions where the right to vote and participate in the political process is a little more than four (4) decades old.²⁵ Indeed, the need for raising funds required for mounting an effective campaign for federal office caused the Congress to raise limits on hard money to \$2,000.00 to offset the money lost to political campaigns by abolishing the raising and spending of soft money. However, in poor districts where constituents could not give \$ 1,000.00—the limit before BCRA—the effect of this might well be that those able to give \$2,000.00 will have more influence on politicians and legislation than in the past while those who cannot give will be only further disenfranchised.

To be sure, in 1996 when the limit on individual donations was \$1,000.00, only 1/10 of 1% of the citizens in the United States gave that much money. This conclusion is clear from statistics found in a study of money in race and politics.²⁶ And while that publication deals with people of color²⁷ an extrapolation of that information can be used to reference economically challenged districts of all ethnic groups. (emphasis added).

The Court in *Buckley*,²⁸ in dealing with the issue of the limitation on hard money donations in the 1974 amendments to the FECA Act of 1971, stated that while the

²⁴ Statistical Findings on Campaign Funding, www.campaignfinance.com (See THOM Appendix Tab 3).

²⁵ The Voting Rights Act of 1965, *supra*.

²⁶ See *supra* note 23.

²⁷ People of color includes African-Americans, Latinos, Asians, Native Americans and others.

²⁸ *Buckley*, 424 U.S. 1 (1976).

prohibitions as to minor party candidates was troublesome, “....Absent record evidence of invidious discrimination... a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions.”²⁹ Yet it is true that a statute that is valid on its face may be discriminatory in its’ practical operation.

At the outset it should be noted that campaign spending by congressional candidates from January 1, 1995 to November 25, 1996 was markedly increased from 1992. Incumbents as a group spent \$330 million while challengers spent \$152 million, a whopping two to one spending margin. This resulted in a 95 per cent re-election rate for incumbents.³⁰ These statistics alone emphasize the advantages held by incumbents in fundraising and its translation into election victories. In comparing contribution and income figures for the 100 highest giving zip code areas in the United States with those of the top 100 people of color zip code areas, statistics found in *The Color of Money* are quite enlightening.³¹

From these findings, the great disparity in the participation rate of the moderate to high income districts compared to the low income districts is clearly evident. Total contributions and per capita contributions from the highest giving zip codes was more than two hundred times (210 and 271, respectively) than the similar figures from the top 100 people of color zip codes. The participation rate in comparing the two groups leaves much to be desired as the difference was 109 times favoring the 100 highest giving zip code areas. Per Capita income differed by a factor of 6, yet the per capita contribution from 26 top giving zip codes was 61 times the per capita income contribution for 2,492

²⁹ *Buckley* at 11.

³⁰ Public Citizen Report dated January 30, 1997 and found on the internet at <http://www.citizen.org/pressroom/release.cfm>.

³¹ See THOM Appendix Tab 4.

zip codes comprised of 50% + people of color (\$ 97.79 compared to \$ 1.60). As the per cent of people of color increase to 75% and 90%, the statistics get no better in terms of average participation rate and worse in terms of average per capita contribution, being \$115.59 to \$0.91 and \$86.72 to \$0.59, respectively. More poignantly, the 26 top giving zip codes was approximately 1/160th of the total population of the 2,492 zip codes comprised of 50%+ people of color (686,075 compared to 41,393,028) but gave the same amount of money! On a state by state basis, based on a total amount of \$200.00+ Federal Contributions by zip codes reveal a similar correlation exists when comparing high giving zip codes to zip codes with 50% or more of people of color. In the ten highest giving cities, zip codes with the highest concentration of people of color also reveal a low giving rate. Further substantiating evidence for the lack of ability to receive donations from districts with high percentages of people of color is drawn from other statistics in the Color of Money publication showing that per capita contribution in only one of the 100 zip codes exceeded \$ 2.00 and in 88 of the 100 zip codes per capital giving was \$ 0.00! Truly these figures suggest that the participation and contribution rate in the high people of color zip codes is woefully wanting and the same situation would be expected to exist in all poor districts.³²

Where the need to include citizens in the political process is to be balanced against the prevention of undue influence on candidates or officeholders, consideration must be given to leveling the playing field for all candidates and officeholders while at the same time curtailing the potential for undue influence. And while the limitations on candidates and officeholders are evenhanded as written, in practical effect the law

³² Wage disparities are common among people of color and poor people in general—they just do not have money to contribute to campaigns.

discriminates against grass roots activity, economically challenged candidates in economically challenged districts and the citizens therein. In a nation where only 1/10 of 1% of the citizenry contributes to political campaigns, it will be nigh impossible in the ensuing years to raise the money necessary to wage a significant campaign in an economically challenged district without being wealthy, obtaining donations from the national party or raising 'Soft Money'. Indeed, according to statistics³³ released on November 2, 2000, 59 incumbents were running unopposed, with no major party general opposition; 159 incumbents were running financially unopposed, facing challengers who had raised less than \$ 25,000 each through September 30; 137 incumbents were running in financially uncompetitive races, where incumbents had more than twice the campaign resources as their challengers; and where only 46 incumbent---11 percent---were running in financially competitive races, where challengers had at least half the campaign resources of the incumbent through September 30. Their figures also show that campaign funds from PAC's in the last election accounted for anywhere from 35 to 80 % of the funds raised. The higher end percentages were contributed to candidates in non-economically challenged candidates. While a challenger in an economically challenged district has difficulty raising funds to mount an effective campaign economically challenged incumbents in economically challenged districts also have difficulty raising funds necessary funding.

While there are advantages to being an incumbent in raising campaign funds, the difficulty of raising funds in an economically challenged district poses the same problem both incumbent and challenger. In a recent election in Alabama,³⁴ the incumbent from an

³³ Common Cause, November 2, 2000 (see THOM Appendix Tab 2).

³⁴ 2002Race in the 7th District in Alabama in which Representative Hilliard was defeated by his challenger.

economically challenged district raised less capital than his challenger. The challenger drew support from moderate and high income individuals from across the country. Indeed, most of his funding support from individuals came as contributions from individuals residing in high giving states³⁵ and as the result of friends vigorously encouraging their friends to give to the challenger. The challenger's appeal to individuals outside his district was not based on issues of primary importance to the economically challenged voters of the district in which the election took place. The incumbent, however, held true to his beliefs and campaigned on local issues of importance to his constituents. His ability to raise funds outside his district, therefore, did not attract a great deal of sympathy such that able givers outside the district vigorously recruited their friends to give.

In the instance cited the incumbent lost his congressional seat. Whether an economically challenged candidate is a challenger or an incumbent in an economically challenged district the goal, as stated by the *Buckley* majority " ...is to amass the resources necessary to reach the electorate"³⁶ Under the BCRA, campaign funds can be raised from individuals to the extent of \$2,000.00, from PAC's or from 'Soft Money' pursuant to the Millionaire's provision. In the economically challenged district, the economically challenged candidate can expect to raise the \$2,000.00 from few, if any, constituents. In the poorer districts, car washes, fish fries, and the sale spaghetti of dinners is the norm for fundraisers.³⁷ In most cases in these districts, events costing upward of \$20.00 are not likely to attract many participants.³⁸ To raise money necessary

³⁵ See THOM Appendix Tab 4.

³⁶ *Buckley* at 12.

³⁷ Hilliard Deposition at 53.

³⁸ Hilliard Deposition at 15.

to run a respectable campaign without compromising the beliefs of the economically challenged candidate is put to a severe test in economically challenged district. While there are no statistics at this point to provide information as to how many potential economically challenged candidates in economically challenged districts would be deterred from entering the political fray because of 'Hard Money' limitations under the new law, the need for substantial start up funding in a campaign would undoubtedly dissuade many would be candidates from entering the political race in such districts.

The disadvantage to an economically challenged potential candidate caused by the statistics in raising "Hard Money" in an economically challenged district is invidious discrimination against potential candidates and makes it much harder, if not impossible, for women, people of color and low-income people to run for office. Moreover, a race and wealth neutral alternative to depriving the economically challenged candidate in an economically challenged district from being saddled with undue influence from large givers or giving the appearance of undue influence, a "Pauper's" provision might be fashioned similar to the "Millionaires Provision." Such an alternative would work to allow the economically challenged candidate to supplement contributions of less than the hard money limit by more affluent sympathetic givers. That process might work as follows:

For example, if candidate A got 100 donations of \$100.00 dollars from his constituents, allowance would be made for other individuals to exceed the hard money donation limit so that an additional \$1,900 dollars could be contributed by another individual to the candidate or officeholder for each such donor. However, any such donor would still be limited to a two-year donation limit of \$37,500.00. Such a scheme would be in keeping

with the limits set by the BCRA and would better allow funds for campaign activities in the economically challenged district. Courts may not close their eyes on the Constitution and see only the law before them. Although the sublime intent of the BCRA Act of 2002 is to refine and amend the FECA, the Act as it relates to contributions to candidates does not pass the strict scrutiny test and should be enjoined from enforcement. To implement the provisions of the BCRA as it presently reads, would be to abridge the rights of every citizen of these United States, especially the poor and disenfranchised, and deprive both political candidates seeking office and their supporters of the very fundamental right to have their voices heard that the Thompson plaintiffs, as elected public officials, have sworn an oath to protect zealously.

CONCLUSION

For the foregoing reasons, the Thompson plaintiffs respectfully request that this Honorable Court grant judgment in their favor, either by the striking down of Title I of the BCRA, or in the alternative, by the revision of the Act to include a "Pauper's Provision" to allow hard and soft monies to be obtained and spent in the campaigns of economically challenged candidates.