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JUSTICE BREYER’S PARTY

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Justice Breyer’s Party

Allison R. Hayward*

In the wake of recent decisions, we may be seeing an emerging desire on the part of key Justices on the Supreme Court to grant legislators greater discretion in the regulation of “outside” special interests than in the regulation of parties and candidates. While they may have tempting sentimental or idiosyncratic reasons for favoring one type of entity over another, such favoritism can have damaging unintended consequences. It also neglects the Court’s duty to police regulatory overreaching by Congress.

After a review of the role parties and other groups play in politics, and some history, this essay then summarizes how federal law regulates parties, and the effect this has in particular on the important work done by state and local parties. It then looks at the regulation of so-called 527s, as well as some recent reform proposals for them. With this patchwork as background, it then takes a critical look at Justice Breyer’s recent pronouncements, in his opinions, his questions at oral argument, and his scholarly writing. This essay contends that Breyer’s approach to the regulation of groups – ultimately favoring parties over other forms of political organization -- inadequately protects political liberty overall, and extends deference to Congress in areas warranting closer judicial scrutiny.

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Some Perspective on Political Group Activity and Its Regulation

American politics is more than a dance among voters and candidates on election day. Private groups and associations, including parties and interest groups, are important to democracy. Political groups have an incentive to seek out and register new voters. Groups are also instrumental for judging which candidates to support. As newspapers become less influential, people rely more heavily on broadcast news programs, which tend not to cover local or regional politics very well.\(^1\) Political parties and interest groups allow voters to sift through the noise and decide whom to support.

Some groups join together specifically to provide an alternative source for news and opinion – websites and blogs are modern examples. Groups also offer a way to sort out who should run for office and provide early leadership training. Associations allow people to combine forces and change governmental policies. It is an easy matter for officeholders to neglect the preferences of an unorganized mass of constituents. It is a much more complicated matter to ignore a group.

It gets even more complicated for neglectful incumbents when fed-up constituents become potential volunteers or donors to a challenger’s campaign. The ability to join

\(^1\) Thirty-nine percent of registered voters said they received “most” of their news about the 2004 presidential campaign from newspapers when asked to name two sources. Television was the top response at 78%. Lee Rainie, Michael Cornfield & John Horrigan, *The Internet and Campaign 2004, (Summary)*, in PEW INTERNET AND AMERICAN LIFE PROJECT (2005), available at http://www.pewinternet.org/pdfs/PIP_2004_Campaign.pdf.
together to donate to candidates and causes is very important for a responsive political system.

Alexis de Tocqueville noted in 1840 that “the most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together.” But Tocqueville also believed that the ease with which Americans could form effective associations could be easily damaged by regulation:

When some types of association are forbidden and others allowed, it is hard to tell in advance the difference between the former and the latter. Being in doubt, people steer clear of them altogether, and in some vague way public opinion tends to consider any association whatsoever as a rash and almost illicit enterprise.  

Incumbent officeholders are hardly disinterested in this area. Politicians have a love-hate relationship with groups. They need them for support – no one gets elected alone – but groups make demands and express views that make a politician’s life harder. The tension between politicians and groups is inevitable, unavoidable, and part of self-governance. Keeping the tension is a good thing. “Curing” it is not a worthy goal, yet just that impulse can prompt support for some short-sighted “reform” proposals among politicians.

3 Id. at 522.
Animated by these interests, federal regulation has pushed politics toward greater centralization and federalization. The debate over “centralization” first arose after the Hatch Act Amendments of 1939 imposed a $3 million spending limit upon multi-state political committees. In response, political committees proliferated – that is, activists would set up independent committees to work on behalf of a candidate or party, and get another limit to exploit. Before enactment, major parties had discouraged independent groups, because they made it more difficult to plan campaign and fundraising strategy. But the Hatch Act limits made proliferation popular. The result was to decentralize parties and campaigns, but not to reduce campaign expenditures.⁴

The proposed legislative fix for proliferation was to require candidate approval of all expenditures on behalf of a candidate. “Horizontal centralization,” would unite all responsibility, and all spending in a candidate’s race, under the candidate.⁵ One proponent stated the argument on behalf of this solution thus:

The candidate, now tragically all too often just a mere member of the crew of a campaign ship, piloted by others, on a course set by others, could now perhaps become the captain of his own ship . . . his name, his integrity and

his policies have been largely at the mercy of those technically organized on his behalf, but in practice organized too often in their own behalf.\textsuperscript{6}

Centralization found its way into the 1971 Federal Election Campaign Act (FECA).\textsuperscript{7} If an individual or group spent funds to speak out about a candidate, they would first need the candidate’s permission. The law gave a candidate censorship authority over much the political speech that might otherwise take place in a campaign.\textsuperscript{8} In fact, a federal court ultimately found unconstitutional FECA’s centralization requirements.\textsuperscript{9} In rejecting the law, the court noted that it gave candidates “potential veto power over attempts to communicate public views . . . and in so doing may dampen the free and robust ventilation of opinion.”\textsuperscript{10}

Today, the fundraising restrictions in federal law encourage proliferation of non-“committee” entities. The contemporary debate about outside groups focuses on “527s.” These groups are named after the section of the tax code exempting political organizations from federal taxation. “Centralization” sentiments remain alive and well,

\textsuperscript{6} \textit{Id.} at 638.
\textsuperscript{8} A 1951 Florida centralization law was found to be constitutional as a proper exercise of the state’s police power. Elston E. Roady, \textit{Florida’s New Campaign Expense Law and the 1952 Democratic Gubernatorial Primaries}, 48 AM. POL. SCI. REV. 468 (1954) (citing \textit{Smith v. Ervin}, 64 So. 2d 166 (Fla. 1953)).
\textsuperscript{10} \textit{Id.} at 1053. That decision was vacated in light of the 1974 Amendments to FECA, which eliminated the certification requirement.
too. Senator John McCain, predicting that a “527” law he sponsored in 2005 would receive approval in the Senate, observed with candor:

I believe we will get overwhelming support. The candidates have no control over the campaign. In other words, sometimes these outside organizations hurt the candidate as well as help. One thing the candidate likes to do is have control over the message, and that’s not the case with the 527s.¹¹

(Emphasis added). Candidates assert that these groups make unfair attacks and damage the tone of the campaign. One candidate for Congress in 2004 stated that outside groups “caused havoc because candidates have no control over what’s put on the air.” These groups and their ads revealed “too much money and too many outside influences.”¹² Said another candidate in 2006: “The so-called 527 groups have entirely too much influence on our elections, even though they have no constitutional right to vote . . . we must eliminate their influence and excessive interference in our free elections.”¹³

There is an incumbent-protection element to some of this sentiment. Justice Scalia, in his dissent to the Court’s decision in McConnell v. FEC, collected a handful of comments

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¹³ Karen L. Michel, Gubernatorial, 8th Congressional Candidates Back Regulating Issue-ad Groups, GREEN BAY PRESS-GAZETTE, Sept. 20, 2006 at 2A.
made by Members on the floor, demonstrating that Congress intended provisions on
electioneering communications by groups to stop “attack ads” against officeholders.14

These arguments for centralization and control betray an attitude that campaigns and
election are the property of candidates. One might better view campaigns as the way the
community sorts out whom to choose as a representative. Candidates are but one player
in the debate, and should no more be entitled to “control” the campaign than any of the
other players, including “outside” groups. Yet when members of Congress regulate
political activity by parties and groups, their instincts lead them to enact laws that
centralize politics within candidate campaigns, and broaden the reach of federal law.

Parties and Burdens of Federal Regulation

The most distinctively political association is the political party. “Political parties
function as connecting organs joining government to the rest of society. . . . As such,
political parties provide complex and sensitive channels through which varied interests
express themselves and seek representation in government.”15

In recent times, parties have been widely criticized as conduits for illegal or excessive
contributions. The Senate Special Investigation into the 1996 election, headed by Senator
Fred Thompson (R-TN) publicized a number of incidents involving parties and illegal
fundraising from foreign nationals, as well as their raising, directing and spending of

14 540 U.S. at 260.
nonfederal “soft” money for advertising and organizing.\textsuperscript{16} The investigation’s findings were cited to support the Bipartisan Campaign Reform Act (BCRA), both before Congress and during subsequent litigation.\textsuperscript{17}

Party committees span a spectrum of size and sophistication. At one end are the national party committees.\textsuperscript{18} The two major parties also have House and the Senate party committees.\textsuperscript{19} The House and Senate committees are managed by the party’s Hill leadership, while the national committee is usually influenced by the White House (if the party has the presidency) or vestiges of a once or future White House (for the party out of power).\textsuperscript{20} The regulatory effects on the national committees are different than the effects on state and local groups.

With BCRA, federal law restricts how national committee staff and federal officeholders and candidates can participate in nonfederal elections. They are forbidden to raise money for state and local candidates or committees (unless even here they follow the rules

\textsuperscript{16} See Senate Gov’t Affairs Comm., Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. REP. NO. 105-167 (1997); \textsc{Life after Reform} 26-30 (Michael Malbin, ed. 2003).
\textsuperscript{17} McConnell v. FEC, 540 U.S. at 129-132.
\textsuperscript{18} National party committees may not take money from corporations, unions, or foreign nationals, can accept $26,700 per individual per year (adjusted for inflation) and $15,000 per PAC per year. 2 U.S.C. §§ 441(a); 441b(a); 441e; 441i(a). They may contribute $5,000 per candidate per election, $5,000 per year to a PAC and share a $37,300 (adjusted) limit to Senate candidates with the party’s Senate campaign committee. 2 U.S.C. §§ 441(a)(2) and 441a(h).
\textsuperscript{19} They function under the same limits, and are not deemed affiliated with the main committees, so one donor could give $26,700 per year to each and not violate the party’s limits (there is a separate overall limit applied \textit{to donors}, however).
\textsuperscript{20} These national committees share a coordinated expenditure limit – these are expenditures, often for advertising, that the committee can coordinate with a candidate, separate from the $5,000 contribution limit. 2 U.S.C. § 441a(d).
applicable to federal recipients) or to coordinate projects that use nonfederal dollars.\textsuperscript{21} Since federal law governs “solicitation” and “direction” of funds, regulators at the Federal Election Commission are asked to rule upon what federal candidates can even say at state and local events.\textsuperscript{22} For members of Congress -- and their challengers -- who run from relatively small districts, local politics is important. Local involvement is part of the way their constituency keeps in touch with them, evaluates them, holds them accountable, and finds their replacement.

Unlike the national committees, state and local committees can accept money outside the federal limits and restrictions – to the extent their state law allows. For example, under Virginia law Virginia parties may accept contributions from corporations.\textsuperscript{23} Those funds must be kept separate from money raised under the federal rules, and cannot be used for federal election activity (broadly construed).\textsuperscript{24} So federal law imposes restrictions on how the state and local committees can use any state-legal money they might raise. Otherwise it is feared that national parties would “use” their sister state and local committees to circumvent the restrictions imposed on national parties.\textsuperscript{25} When raising or spending federal funds, moreover, the state and local committees of a party presumptively share one federal limit for a given donor. So, all the

\textsuperscript{22} FEC Advisory Op. 2003-03 (Congressman allowed to solicit nonfederal funds only if he follows limits and restrictions of federal law).
\textsuperscript{23} See Code of Virginia § 24.2-945.1.
\textsuperscript{24} 2 U.S.C. § 441i(b)(1).
\textsuperscript{25} See McConnell, 540 U.S. at 165-66.
party committees in a particular state – combined - can accept from any individual donor no more than $10,000. And they face a $5,000 combined limit when giving money to candidates.26

Federal law also restricts how state or local parties pay for their own activities. Traditional party functions like identifying party supporters, registering them, getting them to the polls, advertising, direct mail, billboards, and flyers now must be funded with money raised under the federal rules (either in the form of regular “hard” money or Levin funds, of which more later) if done in connection with an election where a federal candidate (even just a Congressman) is on the ballot.27 Party expenditures made in coordination with candidates are subject to additional limits – creating an incentive for parties to declare their independence and communicate separately. Confusion over the exact contours of “coordination” has suppressed party activity.28

State and local parties may also use special soft-money funds29 (called “Levin funds” after the Senator who sponsored the special provision) for some of these purposes. Levin funds are not subject to a shared limit among state and local parties, but federal law

26 See 11 C.F.R. § 110.3(b)(3).
27 2 U.S.C. §§ 431(20) (definition of “federal election activity”); 441i(b)(1) (requiring federal funds for “federal election activity”). The FEC allowed a local party to use nonfederal funds to convey its endorsement of city candidates in a municipal election being held the same date as a federal primary – so long as communications were not made immediately before the election and were not individualized. FEC Advisory Op. 2006-19.
29 2 U.S.C. § 441i(b)(2).
prohibits all transfers. Experience indicates that the Levin fund rules are so complex few parties in the 2004 election could take advantage of them. Alternatively, local parties in 2004 could just avoid participating in the “federal” election. This was the tack reportedly taken by leaders of the Delaware County, Pennsylvania Republican Party. After learning that their local party’s spending for the Bush-Cheney ticket could be the illegal use of “soft money,” they concluded that they shouldn’t spend money on activities mentioning any federal candidates.

Preliminary statistics for 2006 reaffirm that Levin funds, ostensibly intended to ease the blow from BCRA, remain beyond the mastery of most state or local parties.

Uncertainty can breed opportunity for some. National parties then step in with their staff, attorneys and consultants, and with the ability to transfer precious federal hard dollars to the state or local party committee to fund it all. The effect has been to accelerate

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31 “To avoid breaking the law and to maximize spending flexibility, state and local parties federalized their operations as much as possible. In practice, this meant they raised and spent mostly hard money” Ray La Raja, State and Local Political Parties, in THE ELECTION AFTER REFORM 60-61 (Michael J. Malbin, ed. 2006); Bauer, supra note 28 at 109-10.
33 Only 28 out of 100 state major party committees have Levin accounts, and nine of these report no receipts as of September 29, 2006. Only one third-party state committee, the New York State Working Families Party (which supports Democratic Party candidates for office, see http://workingfamiliesparty.org/WFPendorsements2006.html) has a Levin account. There are 35 county-level Levin accounts nationally, twenty-eight of which report no receipts. Statistics provided by Bob Biersack, Federal Election Commission, on file with author.
34 La Raja, supra note 31, at 73.
trends toward centralization and incumbent control, among others. Centralization and federalization of party activity might occur anyway, as political organizations increasingly transcend state borders, especially with Internet activity providing a cheap and universal mode of communication and fundraising. There may be no objection if centralization and federalization occurs naturally, but one should care if our federal laws force the development along.

Centralization may not be healthy for politics. When political strategy is centered in the national committee, it will reflect the interests of incumbents and the permanent party apparatus in Washington. For the most part, these people care about incumbent power, and control of Congress and the White House. They will place emphasis on state involvement if the state is an important factor in the Electoral College or in acquiring and keeping seats in the House and the Senate. Centralization and federalization favor incumbents, entrenched interests within parties, and the status quo, increasing their institutional resistance to grassroots rival influences. This is an ironic result for “reform.”

Congress possesses a conflict of interest here – and appears to act on it when possible. Courts should not trust Members to regulate political parties with a disinterested even hand, especially regarding state and local activity over which they can generally expect to have less control. Greater judicial scrutiny, not deference, is justified.

The 527s – “Shadow Parties”?

35 Bauer, supra note 28, at 107, 111.
A relatively recent entrant onto the political scene are 527s - those groups that are sufficiently political to be exempt from tax as political organizations, but not so directly involved in federal (or state) politics to require registration as a federal political committee (or PAC). They claim this status because the tax rules and the campaign finance rules are not coterminous – they are groups that the IRS deems “political” and so get the tax exemption on their receipts, but don’t qualify as political committees under state or federal law.

It might not have been that way. As enacted, under these laws groups would become PACs once they raised or spent $1,000 “for the purpose of influencing” federal elections. In turn, the tax exemption hinged upon a group’s “influencing or attempting to influence” certain nominations or elections. Since both tests hinge on the term “influencing” it was expected that they would be applied consistently. If that had been the case, committees that qualified for a tax exemption because they were influencing federal elections would also be obliged to register and report as political committees, and follow those contribution limits and prohibitions.

When the Supreme Court considered the constitutionality of the campaign finance law in Buckley v. Valeo, it concluded that “for the purpose of influencing” was too vague, and so

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39 That was the understanding at enactment. See S. Rep. 93-1357, as reprinted in 1974 U.S.C.C.A.N. 7478, 7502-06.
the law could be applied only to “expenditures” containing solicitations for contributions or “express advocacy.” Moreover, even if a group raised or spent $1,000, *Buckley* and precedents following it suggest that it would be unconstitutional to require a group to register as a political committee unless its *major purpose* was the election or defeat of candidates for federal office. A gap formed between the IRS tax exemption standard and the FEC registration and fundraising rules.

That gap has become a source of opportunity for politically motivated donors and activists. If properly organized, certain groups may take corporate and union money, and money from individuals that exceed the contributions limits for PACs, engage in “political” activities with those funds that avoid classification as a “contribution” or “expenditure” – and retain the political tax exemption while avoiding regulation as a political committee. In 2000, Congress enacted IRS reporting provisions to require “527s” to report their donors of $200 or more.

These groups have focused on direct contact with members, recruitment, voter registration, and typically *critical* advertising. While the concentration on registration and voting suggests that the groups are evolving into some new “shadow” political party, they are much narrower in focus that parties, and suffer among each other some rivalry

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41 *Buckley*, 424 U.S. at 79; Massachusetts Citizens for Life v. FEC. 479 U.S. 238 (1986).
for donors and for the attention of the public.\footnote{See John M. Broder, Democrats Form New Group for Fund-Raising and Ads, N.Y. TIMES, Sept. 14, 2006 at 23 (complaints from Democratic Party officials about independent fundraising and voter identification activity).} Their supporters, politically charged unions, individuals, and privately held firms, tend to be more activist and polarized than the broader base for party funding.\footnote{Stephen R. Weissman & Ruth Hassan, BCRA and the 527 Groups, in THE ELECTION AFTER REFORM 90-91 (Michael Malbin, ed. 2006); Robert Boatright, Michael J. Malbin, Mark J. Rozell, & Clyde Wilcox, Interest Groups and Advocacy Organizations After BCRA, in THE ELECTION AFTER REFORM, supra, at 120.} Moreover, many of the most activist groups form only for a specific election cycle, so they do not develop the reputation and accountability that parties acquire.\footnote{Thomas B. Edsall, FEC Adopts Hands-Off Stance on 527 Spending, WASH. POST, June 1, 2006 at A04 (“ACT and the Media Fund effectively folded when Soros and some other Democratic heavy-hitters withdrew support.”); Broder, supra note 44 (reporting that 2004 Media Fund organizer Harold Ickes founded “September Fund” for 2006 campaign); Josh Gerstein, 527 Groups use Legal Loopholes to Influence Elections, N.Y. SUN, Sept. 18, 2006 at 6 (describing Lantern Project and other groups formed specifically for 2006 campaigns). But some 527 groups remain active over several cycles. See Broder, supra (noting that MoveOn.org and Club for Growth remain active).}

Those qualities are consistent with the practice of similar groups historically – even before there was the IRS-FEC “527 gap.” During the 1918 campaign, temperance and prohibition were hot topics, and the Anti-Saloon League spent $100,000 on advertisements, as well as meetings, mail and personal calls on voters.\footnote{LOUISE OVERACKER, MONEY IN ELECTIONS 47 (1932) (1974 reprint).} The League insisted its activities were “educational, scientific and charitable” and thus they were not required to register as a political committee or disclose donors’ identities.\footnote{Id. at 259.} The Methodist Board of Temperance similarly refused to file reports, arguing that “the criticism on the opinions of a political candidate in regard to a moral concern can not
legitimately be called participation in politics.”  The same position was taken by the National Committee to Uphold Constitutional Government in 1940, while admitting during congressional hearings that their activities aided Willkie over Roosevelt. McGraw-Hill ran advertising in the closing days of the 1956 campaign favorably comparing Republicans to Democrats on economics, on the advice of counsel that this was part of a continuing “educational” campaign.

Similar activity is found throughout the 20\(^{th}\) century, engaged in by issue groups, corporations, and unions, and funded by a variety of benefactors. So they should be understood as something more than just a contemporary manifestation of a regulatory loophole. Historically, reformers were not blind to the political effects of these activities, and urged that their financial activity be publicized. Now, however, the recommended solution is different. Having achieved disclosure in 2000, reform interests now want to make groups who engage in them into federal PACs, applying the full campaign finance regime upon them.

At present, “527 reform” has several key features. These groups would generally need to fund advertising or other communications with money raised under federal PAC rules, thus could not use corporate or labor funding. The reforms would spare groups that exclusively support or oppose state or local candidates, ballot measures, judicial

\(^{49}\) Id. at 262.
\(^{50}\) Louise Overacker, Campaign Finance in the Presidential Election of 1940, 35 Am. Pol. Sci. R. 701, 712 (1941) (citing testimony before the Gillette Committee).
\(^{51}\) Heard, supra note 15, at 132.
\(^{52}\) PERRY BELMONT, RETURN TO SECRET PARTY FUNDS xii – xxi (1927).
appointments, and the like. But if a political group is organized around a partisan issue or collection of issues with mixed activities at the state and federal levels, the proposed reforms regulate them like federal PACs. Yet the reforms specifically exclude from regulation social welfare (501(c) (4)) and charitable (501(c) (3)) tax exempt entities.

The net result would be to sweep even more political organizations within federal campaign finance regulation, and under the ultimate management of Congress. More groups would compete with parties, candidates, and PACs for “hard” dollars. Some will not find it worth the bother, others will persist but with reduced activities, and still others will move their activities into the relatively unscathed 501(c) arena. Under current law, 501(c)(4) groups face no source limits and do not disclose their donors, so anything that encourages activity to move to this form of organization will result in less public information about political activity.

If 527 reform prevails, it will subject independent groups to PAC requirements that are more stringent than the party rules. The law could be moving toward a system that prefers party activity over other groups’ activity. Justice Breyer’s emerging analysis in this area would seem to concur. Unlike the respect Tocqueville showed for the fragility, and the importance, of political association, Breyer would apply fact intensive and seemingly ad hoc standards to pick and choose among political groups.

A group will not be found to meet the “exclusivity” requirement if it makes more than $1,000 for communications supporting or opposing federal candidates, or for multistate voter drives, but can spend funds for drives referencing only nonfederal candidates, if no federal candidate or officeholder materially participates in the group, and the group makes no contributions to federal candidates. S. 2349, § 1002(b) (adding FECA § 301(27)(D)).
Justice Breyer’s Party

The question of how to regulate political activity is a perennial one before the Court. There is broad agreement that the Court’s precedents and analysis in this area is at best complicated and seemingly incoherent. Individual Justices recognize the problem, but would solve it in incompatible ways. Is there a conceptual vision that could both attract a majority on the Court and bring coherence to this area?

Justice Stephen Breyer emerged as a key theorist along this vein in the 2005-06 Term. Justice Breyer had made a project of rethinking the Court’s First Amendment jurisprudence, and he defends his vision as a pursuit of judicial modesty. In Breyer’s *Randall v. Sorrell* plurality opinion, he set forth a new multi-part analysis leading to the ultimate conclusion that Vermont’s contribution limits were too low. Breyer’s opinion

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56 Justices Scalia and Thomas would rework the Court’s jurisprudence to focus on the speech elements in all political activity, subjecting regulations of corporations, unions, expenditures and contributions to strict scrutiny. See *Randall v. Sorrell*, 125 S. Ct. 2479, 2502 (2006) (Thomas, J., dissenting); *FEC v. Beaumont*, 539 U.S. 146, 164-65 (Thomas, J., dissenting). By contrast, Justices Souter, Stevens and Ginsberg would defer to legislative judgment. See, e.g., *Randall* 126 S. Ct. at 2506-11 (Stevens, J., dissenting); 2511-14 (Souter, J., dissenting, joined by Ginsberg, J.); *Shrink Missouri*, 528 U.S. 377, 399 (Stevens, J., concurring);

57 *STEPHEN BREYER, ACTIVE LIBERTY* 5 (2005). Others have observed that his desire to evaluate proportionality, and his avoidance of rules, provides the Court with greater discretion and power. Lillian BeVier, *The First Amendment on the Tracks: Should Justice Breyer be at the Switch?* 89 MINN L. REV. 1280, 1313 (2005).

overall held political party activity apart, and in high regard. To summarize, Breyer stated that contribution limits should be closely examined when a regulatory system showed certain danger signs. Among the many danger signs Breyer saw was the fact that the Vermont law applied equally to political parties, whereas in other jurisdictions with low contribution limits the legislatures chose to provide a higher contribution limits for party contributions.\(^{59}\)

On finding “danger signs,” Justice Breyer then identified five factors to find the Vermont limits unconstitutional. Breyer noted that the low party contribution limits disproportionately burdened challengers since parties are an important source of funding for challengers.\(^{60}\) His second factor also cited the low party limits, the fact that affiliated party committees are subject to one collective limit, and burdens on party coordinated activity, as a disproportionate burden on the freedom of association.\(^{61}\) While the remaining factors related to nonparty activity, overall for Breyer the unconstitutionality of the low Vermont limits arose in large part from their burden on political parties.

By contrast, the Court’s perfunctory opinion in *Wisconsin Right to Life* this term\(^{62}\) did not offer an opportunity for any Justice to say much. At issue there was the ability of a nonprofit corporation to use broadcast advertising to “lobby” an officeholder (who is

\(^{59}\) *Id.* at 2493-94.  
\(^{60}\) *Id.* at 2495.  
\(^{61}\) *Id.* at 2496-97. Although the plurality opinion takes great pains to cast its analysis as dictated by the *Buckley v. Valeo* precedent, Breyer acknowledges that (at least here) that the opinion departs from *Buckley’s* conclusion that contribution limits place a marginal restriction on associational liberties. *Id.* at 2496 (citing *Buckley v. Valeo*, 424 U.S. 1, 20-22 (1976)).  
\(^{62}\) 126 S. Ct. 1016 (2006)(per curiam)
simultaneously running for reelection) about a legislative issue. Assuming Breyer’s views will be important as this case winds its way back to the Court, one might consider his questions during oral argument in Wisconsin. His reactions during Wisconsin’s oral argument showed little of the solicitude for activities of “outside” nonprofits that he showed parties in Randall. For example, he dismissed the Wisconsin group’s desire to run grassroots lobbying advertisements naming incumbent members of Congress as “familiar music” that had already been settled by the Court. He also made comments favoring greater regulation of groups organized as tax-exempt 527 committees.

Breyer’s apparent concern for burdens on parties over other forms of association may seem ironic on the heels of the McConnell v. FEC decision. In McConnell, the Court found constitutional almost every contested provision of the Bipartisan Campaign Reform Act of 2002 (BCRA or McCain-Feingold). Title I of BCRA regulated parties, as discussed above, by barring national parties from raising, using or directing nonfederal or “soft” money, and severely limited what state and local party committees could do with money raised under local (rather than federal) rules and regulations. The majority in McConnell (which Breyer joined) responded unsympathetically to arguments that BCRA would harm parties, in particular state and local parties. “If the history of campaign finance regulation discussed above proves anything, it is that political parties are

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64 Id. at 44.
extraordinarily flexible in adapting to new restrictions on their fundraising abilities” noted the Stevens/O’Conner authored McConnell opinion.66

During oral argument in McConnell, Breyer’s questions focused on interest group activity, not parties. He seemed to believe that the aspects of BCRA barring incorporated interest groups (as well as labor unions) from funding certain independent “electioneering” advertisements, posed no undue burden so long as these groups were permitted to form PACs.67 By contrast, in an important pre-McConnell plurality decision authored by Breyer, Colorado Republican, Breyer, joined by O’Conner and Souter, concluded that a provision of federal law limiting parties’ ability to make independent expenditures was unconstitutional.68

Admittedly, Breyer articulates a general appreciation for the speech rights of groups in his book Active Liberty69 (although in the more specific analysis in that book Breyer discusses only contribution limits, neglecting to focus on the more troublesome topic of expenditure limits and the corporate and labor prohibitions applied to interest groups). Yet he ends the relevant passage with the vague observation that courts should sometimes defer to legislative judgment “insofar as that judgment concerns matters (particularly empirical matters) about which the legislature is comparatively expert” yet “not defer when [courts] evaluate the risk that reform legislation will defeat the participatory self-

66 Id. at 173.
67 Transcript, McConnell v. FEC (Sept. 8, 2003) at 111-18.
69 “[A]ctive liberty is particularly at risk when law restricts speech directly related to the shaping of public opinion, for example speech that takes place in areas related to politics and policy-making by elected officials.” Breyer, supra note 57, at 42.
government objective itself.”

Given this, and his record on the Court, one can surmise that Breyer’s view of “participatory self-government” has a place for parties, but not for other interest groups.

The Court’s muddled middle, which in campaign finance matters includes Justice Breyer as its theorist, has failed to appreciate the important place all political organizations have in democracy, and the conflict of interests legislators possess when regulating them. Treating some forms of political activism – parties, for example – as more “important” to “participatory self-government” than others is imprudently ambitious. Implicitly a judge holding such a view is claiming to understand the proper balance to strike among different forms of political organization.

**Is There a Better Way?**

Parties and outside groups are both important players in a healthy democracy. To the extent that recent regulations have burdened parties and distorted the activities of non-party interest groups, Congress should roll back such regulations. Unfortunately, it isn’t likely that this will happen. Organized pro-regulation interests hold sway with influential members of Congress as well as major media organizations. Furthermore, incumbent members of the House and Senate have their own reasons for wanting to thwart robust criticism by independent groups and local party committees, over which they exercise relatively less authority than national parties. Since there are good reasons to think

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70 *Id.* at 49.
Congress does not come to this process with clean hands, the Court should not defer to “legislative expertise” on these questions.

Genuine reform in this area would begin by recognizing that present federal campaign finance regulations centralize and federalize party activity, and that this is not a healthy development. Current law also drives a wedge between national and local party organizations, and burden grassroots party activity with federal requirements. The national parties, and the incumbent lawmakers who know and love them, have different, not necessarily superior, political priorities than their local counterparts. Even if they overcome their biases, and decide to care about local races, the law places impediments on their ability to work with state and local politicians who are using nonfederal funds, since the parties or their agents may not “solicit” or “direct” soft money.71 Washington-based staff loses the local perspective, and local parties active in election are pushed to compete with Washington for hard money.

State and local parties in particular would benefit if at least some of the impediments the federal law presently places on funding voter registration, communication and organization were relieved, so that local parties could use local resources for those kinds of activities rather than being drawn into the federal money race. Eliminating these funding restrictions would simplify the management of state and local parties, too. At present these groups, with the highest staff turnover and the fewest professional

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71 2 U.S.C. § 441i(a)(1), see also 11 C.F.R §§ 300.2(b)(definition of agent); 300.2(m) & (n) (definitions of “solicit” and “direct”).
resources, also have the most complicated compliance position of any in the campaign finance system.

Unfortunately, to the extent leaders in Congress have entertained revisiting the party regulations, modest “reforms” designed to help parties -- such as one proposal to eliminate the contribution limits from congressional leadership PACs (held typically by incumbent Members of Congress) to the national committees -- could exacerbate the centralization of parties in Washington. 72

Turning to other groups, if 527 “reform” is even necessary, it is not obvious that extending the political committee rules to this class is the best approach. Recall that the reason there is a “527” classification is because of a gap between the campaign finance regulations and the tax code. A better approach might be to revise the tax code, narrowing the classification of groups entitled to the tax exemption. 73 That could be done by revising the definition of exempt purpose so that it is more closely aligned with the definitions of “contribution” or “expenditure” that make a group a “political committee.” This would preserve favorable tax treatment of political committees, and encourage groups to adapt themselves to those rules and regulations. It would avoid adding another complex web of restrictions and thresholds like those contained in current 527 reform proposals.

Groups that didn’t meet the standard for the exemption could still operate; only they would not longer be exempt from federal taxes, principally income and gift taxes.\textsuperscript{74} (Remember that donors have already paid income tax on the money they donate – there is no individual tax deduction for political contributions). A full exploration of the consequences of this proposal is beyond the scope of this article. Nevertheless, it would seem fruitful to explore legislation that makes consistent the tax and campaign finance thresholds for regulation, if only to simplify the laws in the area, reduce the likelihood of unintentional violations, and remedy the inevitable chill on participation that comes from legal complexity.

Admittedly such legislative action is unlikely, since it would not serve to enhance incumbent control over grassroots activity. Courts must do better to preserve Constitutional political liberties. When Congress acts in this area, the courts should not stand by passively observing the interference. If political association is protected by the First Amendment – and either a “negative” or “active” view of liberty should hold it is – judges and Justices should take seriously their role to police incursions on political liberty by a self-interested power-maximizing Congress. It is heartening that Justice Breyer, as an influential member of the Court, views parties with the regard he does. For greater clarity and consistency, he and his colleagues could consider extending due regard, and a closer examination of Congressional regulation, to other political groups.

\textsuperscript{74} Section 527 provides the exemption from income tax, and 26 U.S.C. § 2501(a)(5) exempts political organizations from gift tax.