

# MONEY TALKS, POLITICIANS LISTEN: THE CONSTITUTIONAL GROUNDS FOR CONTROLLING SOFT MONEY

JAMES C. WALD\*

*I have a friend who is the chief fundraiser for a philanthropy . . . and he has a very simple technique . . . . He has found that what many big shots love is what I call elephant bumping. I mean they like to go to places where other elephants are, because it reaffirms the fact that when they look around the room and they see all these other elephants that they must be an elephant too, or why would they be there? . . . So my friend always takes an elephant with him when he goes to call on another elephant. And the soliciting elephant, as my friend goes through his little pitch, nods and the receiving elephant listens attentively, and as long as the visiting elephant is appropriately large, my friend gets his money.<sup>1</sup>*

## INTRODUCTION

Contrary to popular belief, the elephant does not feed off of peanuts, at least while acting as the symbol of the Republican Party. It feeds off of dollars it gets from bumping with other elephants. Bumping for money is by no means unique to the elephant. Donkey bumping receives media coverage well beyond the pages of *National Geographic*. Political donkeys have been known to rent out the White House's Lincoln bedroom to major party donors<sup>2</sup> and use White House telephones to solicit contributors.<sup>3</sup>

Much of this bumping is done in the name of "soft money." Soft money refers to unlimited funds raised by party committees that cannot be used for the express purpose of influencing federal elections but may be used for a wide array of activities that indirectly benefit federal candidates.<sup>4</sup>

---

\* J.D. Candidate, University of Southern California Law School, 2003; B.A., University of California, Berkeley, 2000. I would like to thank my note advisor, Professor Erwin Chemerinsky, for all his help and guidance, Professor Raymond Wolfinger for helping me begin to develop my research as an undergraduate, and Professor Susan Estrich for allowing me to continue to explore this field. I would also like to thank the entire I.L.J. Board and staff for their hard work and commitment. This note is dedicated to my parents for encouraging me to live my dreams, to my grandparents for inspiring me, and to my sister for putting up with me and making me laugh.

<sup>1</sup> Warren E. Buffett, Michael D. Dingman, Harry J. Gray & Louis Lowenstein, *Hostile Takeovers and Junk Bond Financing: A Panel Discussion*, in KNIGHTS, RAIDERS, AND TARGETS: THE IMPACT OF THE HOSTILE TAKEOVER 14 (John C. Coffee, Jr., et al. eds., 1988).

<sup>2</sup> James Kuhnenn, *House Tinkering Dooms Election Finance Measure*, DENVER POST, July 13, 2001, at A1.

<sup>3</sup> *INS Management: Hearing of the Commerce, Justice, State, Judiciary and Related Agencies Subcomm. of the House Appropriations Comm.*, 105th Cong. (1997) [hereinafter *House Const. Hearings*] (Rep. Harold Rogers).

<sup>4</sup> *Campaign Finance Reform: Hearings Before the Senate Governmental Affairs Special Investigations Comm.*, 105th Cong. (1997) [hereinafter *Senate Investigation Hearings*] (verbatim)

This means that money may be limited when donated to a federal candidate, but money may not be limited when donated to a political party. Candidates may spend soft money on activities that benefit their campaigns, e.g., campaign ads. Political parties may spend soft money on activities that benefit themselves and their members, e.g., get-out-the-vote ads. Nevertheless, the result of both types of donations may be similar. Candidates are typically members of a political party and often benefit when other members of their party show up to vote. As a result, the soft money loophole allows wealthy individuals and corporations to give unlimited funds to political parties, while circumventing election laws that limit direct contributions to a candidate's campaign.<sup>5</sup>

Many wealthy individuals and corporations contribute soft money to political campaigns for one reason—to gain influence with the nation's top elected officials.<sup>6</sup> For example, Roger Tamraz, a suspect wanted in France and Lebanon for embezzlement and other financial crimes, gave \$300,000 in soft money to the Democratic National Committee ("DNC"). He gave the money not out of ideology, belief, or political conviction, but, as he candidly admitted, simply to buy an audience with the President of the United States.<sup>7</sup> At around the same time, the Republicans received \$500,000 from a corporation whose senior executive shared the same mindset: "There is no question—if you give a lot of money, you will get a lot of access. All you have to do [is] send the check."<sup>8</sup>

The recent Enron scandal is perhaps the most glaring example.<sup>9</sup> Just before news broke about Enron's financial troubles, the energy giant and its executives gave \$1,671,555 in soft money to the national parties during the 2000 election cycle.<sup>10</sup> In all, the energy company and its executives contributed \$3.5 million in soft money over the last decade.<sup>11</sup> Perhaps Enron's executives hoped to buy political access in a time of financial and legal turmoil. Whether innocent or improper, Enron's generosity certainly raises questions of impropriety with public officials. Perhaps former DNC fundraiser Johnny Chung is correct: the White House is "like a subway—you have to put in coins to open the gates."<sup>12</sup>

---

transcript) (statement of Anthony Corrado, Professor of Government, Colby College), available at 1997 WL 594062.

<sup>5</sup> *Regarding Soft Money and the Political Parties: Hearing Before the Senate Rules Comm.*, 106th Cong. (2000) [hereinafter *Senate Soft Money Hearings*] (testimony of Scott Harshbarger, President and CEO, Common Cause), available at 2000 WL 19302425.

<sup>6</sup> *Id.*

<sup>7</sup> Joseph Curl, *Freeh Quits FBI Post With 'Praise' for Bush; Director Had Feuded With Clinton*, WASH. TIMES, May 2, 2001, at A1, available at 2001 WL 4152374.

<sup>8</sup> *Senate Soft Money Hearings*, *supra* note 5 (statement of Scott Harshbarger, President and CEO, Common Cause, quoting a corporate senior executive).

<sup>9</sup> See Fred Wertheimer, *Enron Scandal Builds Support for Soft Money Ban*, Jan. 24, 2002, at <http://www.brookings.edu/dybdocroot/gs/cf/debate/Dem21V2No2.pdf>.

<sup>10</sup> *Id.*

<sup>11</sup> Nick Anderson, *Campaign Reform Bill Passes Congress: Bush Says He'll Sign*, L.A. TIMES, Mar. 21, 2002, at A1.

<sup>12</sup> See Debra J. Saunders, Editorial, *They Knew They'd Get Away with It*, S.F. CHRON., Feb. 23, 2001, at A25.

In response to these scandals, Congress closed the political system's gates to soft money on March 20, 2002, when it passed the Bipartisan Campaign Finance Act of 2001.<sup>13</sup> The Act places an outright ban on soft money<sup>14</sup> and became law with Bush's signature.<sup>15</sup> Prior to the law's enactment, opponents threatened to bring their complaints to the courts.<sup>16</sup> For instance, former Independent Counsel Kenneth Starr, best known for investigating and disclosing the details of President Clinton's affair with White House intern Monica Lewinsky, assembled a pro bono legal team to challenge the bill.<sup>17</sup> That challenge, or one like it, will likely reach the Supreme Court sometime next year.

Opponents of the Act emphasize the manifest constitutional impediments imposed on more restrictive campaign finance reforms.<sup>18</sup> Article I Section 4 and Article II Section 1 of the United States Constitution authorize Congress to regulate federal elections. These regulations, however, must conform to restraints imposed by the First Amendment. Money talks, according to the Supreme Court. Spending it on political campaigns is entitled to at least *some* free speech protection. "When you start moving around in this field, you better tread lightly."<sup>19</sup>

This Note analyzes whether proposals to limit soft money infringe on free speech protected by the First Amendment.<sup>20</sup> Opponents of reform argue that eliminating soft money is unconstitutional. This Note, however, argues that despite First Amendment concerns, legislation limiting soft

---

<sup>13</sup> See The Brookings Inst., *Senate Passes Campaign Finance Reform—Now on to the President's Desk*, Mar. 20, 2002, at [http://www.brookings.edu/dybdocroot/GS/CF/debate/house2002\\_hp.htm](http://www.brookings.edu/dybdocroot/GS/CF/debate/house2002_hp.htm). See also Anderson, *supra* note 11, at A22.

<sup>14</sup> See H.R. 2356, 107th Cong. (2002).

<sup>15</sup> Press Release, President Signs Campaign Finance Reform Act (Mar. 27, 2002), at [www.whitehouse.gov/news/releases/2002/03/20020327.html](http://www.whitehouse.gov/news/releases/2002/03/20020327.html).

<sup>16</sup> Anderson, *supra* note 11, at A22.

<sup>17</sup> See *id.*

<sup>18</sup> *Constitutional Issues Related to Campaign Finance Reform: Hearing Before the House Comm. on Admin.*, 106th Cong. (1999) (statement of testimony of Roger Pilon, Ph.D., J.D., Vice President for Legal Affairs; B. Kenneth Simon, Chair in Constitutional Studies, Cato Institute), available at 1999 WL 20010486.

<sup>19</sup> See 143 CONG. REC. S10010 (1997) (statement of Sen. McConnell). See also 143 CONG. REC. S10019 (1997) (statement of Sen. Ashcroft):

The first amendment of the U.S. Constitution is not something to be taken lightly. Free speech, political speech, is not something to be taken lightly, not something to be tampered with, not something to say, "Well, we'll allow you to have free speech so long as it doesn't matter, but when it gets to be important, when it is time for that speech, you lose it."

<sup>20</sup> See 143 CONG. REC. S10019 (1997) (statement of Sen. Ashcroft) ("[A]t the end of the day we get back to the Constitution"). See also 143 CONG. REC. S9997 (1997) (statement of Sen. Lott):

In the past, the Supreme Court has had to overturn patently unconstitutional campaign reform legislation. Let us do nothing now to force a repetition of that rebuke. As a Member of the House and Senate over the years, I have heard, "We can't worry about that; we don't know what they will do. Let's just do what we want to do and then we will see." I don't think that is very responsible. You can always argue what is constitutional and not constitutional, but free speech is pretty easy to discern, and it ought to be hard to limit.

money should survive constitutional muster.<sup>21</sup> Part I of this Note explains the soft money loophole's birth, growth, and effect on the existing campaign finance system. Part II discusses why soft money is a problem and explores pending legislation that seeks to contain it. Part III argues why the four major Supreme Court campaign finance cases of *Buckley v. Valeo*,<sup>22</sup> *Colorado Republican Federal Campaign Committee v. FEC (I and II)*,<sup>23</sup> and *Nixon v. Shrink Missouri Government PAC*<sup>24</sup> allow Congress the freedom to control soft money.

## I. THE SOFT MONEY LOOPHOLE

Soft money has significantly altered the structure of the modern campaign finance system. This section will discuss a brief history of the campaign finance system and its relation to the soft money loophole. Subsection A discusses the Federal Election Campaign Act. This legislation was passed prior to the birth of the soft money loophole and attempted to control increasing costs of political campaigns. Subsection B explores how the soft money loophole arose from interpretation of that Act. Subsection C explains how soft money has grown to become a major factor in funding modern campaigns. Finally, Subsection D demonstrates that the loophole has swallowed up the very laws from which it emerged.

### A. CAMPAIGN FINANCE BACKGROUND

Many federal campaign finance laws existed before creation of the soft money loophole. The most important was the Federal Election Campaign Act of 1971 ("FECA"), which attempted to control rising campaign costs and increase campaign fund disclosure.<sup>25</sup> Those concerns were increased in the wake of Watergate. In 1974 Congress passed a series of comprehensive amendments to FECA. According to the Supreme Court, these amendments represented by far the most comprehensive reform legislation passed by Congress concerning the election of the President, Vice-President, and members of Congress.<sup>26</sup> The amendments set strict limits on both political contributions and political spending by candidates and parties. For example, some of the limits provided that individuals may contribute no more than \$1,000 to a federal candidate per election (primary and general elections are considered separate elections), no more than \$5,000 to a political committee in any year, and no more than \$20,000 to

---

<sup>21</sup> This Note focuses on the constitutionality of regulating soft money, including the soft money ban envisaged in §101 of the Bipartisan Campaign Finance Reform Act. Other campaign finance issues that arise in other parts of the bill, while important in their own right, are not discussed in this Note (e.g., disclosure requirements, issue advocacy, increased penalties).

<sup>22</sup> 424 U.S. 1 (1976).

<sup>23</sup> *Colo. Republican I*, 518 U.S. 604 (1996); *Colo. Republican II*, 533 U.S. 431 (2001).

<sup>24</sup> 528 U.S. 377 (2000).

<sup>25</sup> See ANTHONY CORRADO, THOMAS E. MANN, DANIEL R. ORTIZ, TREVOR POTTER & FRANK J. SORAUF, A HISTORY OF CAMPAIGN FINANCE REFORM: A SOURCEBOOK 32 (1997).

<sup>26</sup> *Buckley*, 424 U.S. at 7.

the national committees of a political party in any year.<sup>27</sup> Further, individuals were limited to a yearly contribution total of \$25,000.<sup>28</sup> In *Buckley v. Valeo*, the Court held that these particular limits are constitutional.<sup>29</sup>

The 1974 limits created an incentive for the creation of the soft money loophole. After Watergate, the FECA amendments limited contributors in their ability to make direct contributions to political campaigns. It did not matter whether the intent of the contributor was corrupt or legitimate. Individuals, who previously were able to give unlimited amounts of money, were suddenly bound within the monetary cap, regardless of the means at their disposal or the strength of their political convictions. The fact that the 1974 amendments did not allow for inflation likely amplified tension. Each year, individual contributions had a slightly smaller impact on a campaign than compared to the year before. Over the years, these decreases in value added up. The tension between the 1974 monetary limits and those who sought to contribute more money to political activities eventually found release through the soft money loophole.

The Bipartisan Campaign Finance Reform Act of 2002 increases the FECA's limits that have been in place since 1974, in part to compensate for inflation, and also in part to compensate for the ban on soft money.<sup>30</sup> The Thompson-Feinstein Amendment to the Bipartisan Campaign Finance Reform Act raised individual contribution limits to candidates from \$1,000 to \$2,000 per election, increased permitted contributions to political committees from \$5,000 to \$10,000, and enlarged permitted contributions to national party committees from \$20,000 to \$25,000.<sup>31</sup> Further, the Amendment increased the individual aggregate limit from \$25,000 to \$37,500 per year.<sup>32</sup> Unlike its 1974 counterpart, these limits will increase with inflation every odd-numbered year.<sup>33</sup>

---

<sup>27</sup> *Colorado Republican II*, 533 U.S. at 442 n.7 (citing 2 U.S.C. §§ 431(11), 441a(a), 441a (a)(1)).

<sup>28</sup> *See id.* (citing 2 U.S.C. § 441a(a)(3)).

<sup>29</sup> *See Buckley*, 424 U.S. at 23–35, 39–51 (upholding the aforementioned 1974 FECA Amendment limits on contributions but striking down limits on expenditures as unconstitutional; stating that some unconstitutional limits included a \$1,000 limit on independent expenditures by individuals and groups “relative to a clearly identified candidate,” limits on expenditures by candidates from personal or family resources, and limits on overall campaign expenditures).

<sup>30</sup> *See generally* MCCAIN-FEINGOLD: SECTION-BY-SECTION ANALYSIS, at [http://www.brookings.edu/dybdocroot/gs/cf/debate/MF\\_summary.htm](http://www.brookings.edu/dybdocroot/gs/cf/debate/MF_summary.htm) (last visited Mar. 24, 2003) [hereinafter MCCAIN-FEINGOLD]. *See also* JOSEPH E. CANTOR & L. PAIGE WHITTAKER, CONGRESSIONAL RESEARCH SERVICE, CAMPAIGN FINANCE BILLS IN THE 107TH CONGRESS: COMPARISON OF S.27 (MCCAIN-FEINGOLD), H.R. 2356 (SHAYS-MEEHAN), AND CURRENT LAW, Feb. 20, 2002, available at [http://www.brookings.edu/dybdocroot/GS/CF/debate/house2002\\_hp.htm](http://www.brookings.edu/dybdocroot/GS/CF/debate/house2002_hp.htm).

<sup>31</sup> MCCAIN-FEINGOLD, *supra* note 30 (citing Bipartisan Campaign Reform Act of 2001 §§ 102, 308).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

## B. BIRTH OF THE SOFT MONEY LOOPHOLE

To enforce its various laws, the 1974 Amendments created the Federal Election Commission (“FEC”), a six-member, bipartisan committee created to administer, to seek complaints about, and to formulate policy regarding the federal election laws.<sup>34</sup> The FEC probably created the soft money loophole unintentionally.<sup>35</sup> An FEC ruling in 1978 allowed state parties to fund “mixed activities” that affected both federal and non-federal campaigns.<sup>36</sup> Mixed activities could be funded with both federal and non-federal funds.<sup>37</sup> The federal portion, hard money, fell under the FECA authority over contribution limits,<sup>38</sup> while the non-federal portion, soft money, evaded the Act’s scope.<sup>39</sup> The FEC reasoned that the FECA only covers funds intended to influence federal elections, not money related to state elections.<sup>40</sup> In 1979, Congress amended the FECA accordingly to comply with the FEC ruling.<sup>41</sup>

The resulting soft money loophole provides candidates, contributors, and political parties a means to evade federal contribution limits. Individuals, corporations, unions, and others contribute unlimited amounts of money to non-federal party accounts.<sup>42</sup> These non-federal party funds may only be used by national parties for party-building activities, voter registration, get-out-the-vote drives, and generic issue-oriented (rather than candidate-oriented) advertising. National party committees spend part of the soft money themselves and then transfer the bulk of it to state party accounts. State parties then spend the money on activities such as

<sup>34</sup> See 2 U.S.C. § 437(c)(b)(1).

<sup>35</sup> See CORRADO, MANN, ORTIZ, POTTER & SORAUF, *supra* note 25, at 17.

<sup>36</sup> See *Senate Investigation Hearings*, *supra* note 4 (testimony of Anthony Corrado, Professor of Government, Colby College).

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> See *Federal Election Comm’n, Advisory Op. 1978-10 (1978)* (FEC ruling established a system where parties maintain separate bank accounts for federal funds and non-federal funds). See also 11 C.F.R. 102.5 (1997) (federal account funds are permitted to affect federal elections, and are thus subject to the FECA; non-federal account funds or “soft money” is not subject to the FECA’s restrictions, although it is subject to the state campaign finance laws).

<sup>40</sup> See FEDERAL ELECTION COMMISSION, TWENTY YEAR REPORT 19 (1995).

<sup>41</sup> See BROOKS JACKSON, *BROKEN PROMISE: WHY THE FED. ELECTION COMM’N FAILED* 42 (1990) (stating that many commentators incorrectly believe that Congress created the soft money loophole with the 1979 FECA Amendments). See also Daniel M. Yarmish, Note, *The Constitutional Basis for a Ban on Soft Money*, 67 *FORDHAM L. REV.* 1257, 1265 n.88 (1998) (noticing that the origin of the soft money loophole is widely misunderstood); *Regarding Soft Money and the Investigation into Campaign Finance Practices of the 1996 Campaign: Hearings Before the Senate Governmental Affairs Comm.*, 105th Cong. (1997) [hereinafter *Campaign Finance Practices Hearings*] (testimony of Common Cause, submitted by Ann McBride, President, Common Cause; Donald J. Simon, Exec. V.P. and General Counsel, Common Cause (stating that the “soft money loophole was created, not by Congress, but by the Federal Election Commission”)). But see, e.g., *Campaign Finance Reform: Hearings Before the Senate Governmental Affairs Comm.*, 105th Cong. (1997) (testimony of Edward H. Crane, President and CEO, Cato Institute (“FECA was specifically amended in 1979 to allow for soft money contributions to the parties.”)).

<sup>42</sup> See Fred Wertheimer & Alexandra T. V. Edsall, *Response to Voting with Dollars: A New Paradigm for Campaign Finance*, 37 *U. RICH. L. REV.* 1111, 1135 (2003).

television advertising, voter registration drives, or get-out-the-vote drives, most aimed at electing their party slate to office.<sup>43</sup> For example, state parties may buy a television ad that espouses “Vote Democrat.” The ad does not directly tell voters to elect any particular candidate, yet the senatorial candidate supported by the Democratic Party will nevertheless benefit if the ad persuades voters to only vote for Democrats. While soft money is not subject to contribution limitations imposed by the FECA because it is not used to advocate for the election of any particular candidate, state party activities nevertheless benefit federal candidates.<sup>44</sup>

### C. GROWTH OF THE SOFT MONEY LOOPHOLE

Funds flowing through the soft money loophole are on the rise. National party committees, but not state or local parties, are required to disclose the amount and source of soft money donations to the FEC.<sup>45</sup> While the disclosures do not reveal how much is actually spent on candidates versus how much is spent on party-building activities, the numbers do indicate that the total amount of soft money is steadily increasing. By 1988, Democrats and Republicans raised a total of \$45 million in soft money.<sup>46</sup> In 1992, soft money totaled \$86 million.<sup>47</sup> In the 1993–94 cycle the total increased to \$102 million,<sup>48</sup> and it more than doubled in the 1995–96 cycle to \$262 million,<sup>49</sup> nearly doubled again in 1999–2000 to \$440 million,<sup>50</sup> and approached \$90 million in the first half of 2001 alone.<sup>51</sup> “The current campaign finance system has taken on the dynamic of the Cold War arms race, with both sides unwilling to relinquish real or perceived advantages that come from spending more and more money. . . .”<sup>52</sup>

It should be noted that the rise of soft money funds parallels an overall increase in campaign fund-raising and spending.<sup>53</sup> The resort to soft money

---

<sup>43</sup> See *Senate Investigation Hearings*, *supra* note 4 (testimony of Anthony Corrado, Professor of Government, Colby College).

<sup>44</sup> See Wertheimer & Edsall, *supra* note 42, at 1135.

<sup>45</sup> See *Campaign Finance Practices Hearings*, *supra* note 41.

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

<sup>48</sup> See CORRADO, MANN, ORTIZ, POTTER & SORAUF, *supra* note 25, at 14.

<sup>49</sup> See *Campaign Finance Practices Hearings*, *supra* note 41.

<sup>50</sup> Common Cause, *The Soft Money Laundromat, Top Soft Money Donors 1999–2000*, at <http://www.commoncause.org/laundromat/stat/topdonors99.htm> (last visited Apr. 2, 2003) (reporting that soft money totals for the 1999–2000 election cycle were \$215,697,208.00 for the Democrats and \$225,108,893.31 for the Republicans).

<sup>51</sup> Common Cause, *The Soft Money Laundromat, Top Soft Money Donors 2001*, at <http://www.commoncause.org/laundromat/stat/topdonors01.htm> (last visited Apr. 2, 2003) (reporting that soft money totals for the first half of 2001 were \$31,987,176.58 for the Democrats and \$57,866,955.57 for the Republicans).

<sup>52</sup> Sen. Russell D. Feingold, *Policy Essay, Representative Democracy Versus Corporate Democracy: How Soft Money Erodes the Principle of “One Person, One Vote,”* 35 HARV. J. ON LEGIS. 377, 377–78 (1998).

<sup>53</sup> See Press Release, Federal Election Commission, Congressional Fundraising and Spending up Again in 1996 (Apr. 14, 1997) at <http://www.fec.gov/press/canye96.htm>.

contributions is exactly what one would expect when people are prohibited from giving more directly.<sup>54</sup> However, the increase in soft money seems to be outpacing its hard money counterpart. Reformers are concerned that what began as a trickle of soft money has turned into a torrent, threatening to wash the FECA away.<sup>55</sup>

#### D. EFFECT OF THE SOFT MONEY LOOPHOLE

More than any other single factor, the explosive growth of soft money since 1978 has undermined the efficacy of the campaign finance laws enacted by Congress.<sup>56</sup> For example, a 1970 federal law prohibits corporations from contributing money to federal campaigns.<sup>57</sup> Similarly, a prohibition on contributions from labor unions dates back to 1943.<sup>58</sup> Yet, the creation of the soft money system re-introduces money that these laws intended to eliminate.<sup>59</sup>

The difference between money given to a party and money given to a candidate is no longer discernable. Parties continue to use soft money for voter registration and get-out-the-vote drives, as envisioned in the 1978 FEC advisory opinion.<sup>60</sup> Today, however, soft money funds are primarily used to pay for media advertisements that benefit specific candidates.<sup>61</sup> While direct advertisements for a candidate are limited by FECA, e.g., "Vote for Ms. Smith," issue advertisements are a permissible use of soft money funds according to *Buckley v. Valeo*, e.g., "Call Ms. Smith and tell her what you think of her Medicare plan."<sup>62</sup> According to a study of the 2000 election conducted by the Brennan Center of Justice at New York University School of Law, 37.8% of soft money funds were spent on sham issue advocacy aimed at promoting the party's federal candidates, compared to 8.5% for voter mobilization.<sup>63</sup> Remaining funds went to administration (18.1%), party salaries (14.3%), consultants (3.5%), and general mail (2.4%).<sup>64</sup> In fact, soft money comprised the single largest

---

<sup>54</sup> See *id.*

<sup>55</sup> See *House Const. Hearings*, *supra* note 3 (testimony of Donald J. Simon, Acting President, Common Cause). See also Feingold, *supra* note 52, at 380 ("just as floodwaters can wash away everything in their path, so has the flood of soft money overwhelmed our political process").

<sup>56</sup> Common Cause, *The Money Trail, Questions and Answers: Soft Money* (1996), at <http://www.commoncause.org> (no longer available on the site).

<sup>57</sup> See 2 U.S.C. § 441(b) (2000).

<sup>58</sup> See *id.*

<sup>59</sup> See Common Cause, *supra* notes 50–51.

<sup>60</sup> See Richard L. Hasen, *The Constitutionality of a Soft Money Ban after Colo. Republican II*, 1 ELECTION L.J. 5 (2002).

<sup>61</sup> See *id.*

<sup>62</sup> *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 44, n.52 (1976) (holding that while FECA limits do not apply to issue advocacy, FECA does limit money spent on advertisements calling for the express advocacy of a candidate)).

<sup>63</sup> Hasen, *supra* note 60, at 5 (citing CRAIG B. HOLMAN & LUKE P. MCLOUGHLIN, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FED. ELECTION (forthcoming 2001) (manuscript at 7) (noting not a single party advertisement was coded by researchers as a genuine issue ad, 96% mentioned a candidate, and almost 92% never even identified the name of a political party)).

<sup>64</sup> *Id.*

source of funding for party ads promoting the election or defeat of federal candidates in the 2000 elections.<sup>65</sup>

The soft money system has blurred the line between permissible and impermissible campaign finance activities, and with it, has eroded the very purpose of campaign finance reforms implemented nearly a generation ago.<sup>66</sup> Today, those laws are ineffective due to poor drafting, ambiguous language, intentional and unintentional loopholes, and because the FEC may not have the authority to deal with such problems.<sup>67</sup> “Unrestricted corporate contributions are back. Unregulated union contributions are back. And unlimited donations from wealthy individuals are back.”<sup>68</sup> Through the soft money loophole, contributors can evade these federal laws, rendering the FECA “virtually useless.”<sup>69</sup> Some political commentators may like this outcome. Part II, however, explains why soft money is a problem for our democracy.

## II. WHAT’S WRONG WITH SOFT MONEY?

Two basic political approaches to soft money reform dominate modern debate.<sup>70</sup> The first approach derives from the values of the First Amendment. It views citizens as possessing a right to make campaign contributions and expenditures as a form of speech and as freedom of association.<sup>71</sup> Thus, it opposes the Bipartisan Campaign Finance Reform Act’s soft money ban from both the individual and party perspective. The second, and contrary, approach is highly critical of the role of money in the electoral process.<sup>72</sup> Some members of this school of thought support the soft money ban envisioned by in the Bipartisan Campaign Finance Reform Act.<sup>73</sup> That is the approach taken by this Note.

### A. FIRST AMENDMENT AND POLICY CONCERNS CUTTING AGAINST A SOFT MONEY BAN

Not all jurists agree that the soft money ban proposed in the Bipartisan Campaign Finance Reform Act is constitutional. These jurists regard soft money donations as expression and speech protected under the First Amendment.<sup>74</sup> The argument goes something like this: Political speech is the primary object of First Amendment protection.<sup>75</sup> The Founders recognized that a democratic government depends upon the free exchange

---

<sup>65</sup> *Id.*

<sup>66</sup> 143 CONG. REC. S9998 (1997) (testimony of Sen. Tom Daschle).

<sup>67</sup> *Id.*

<sup>68</sup> See *Campaign Finance Practices Hearings*, *supra* note 41.

<sup>69</sup> 143 Cong. Rec. S10103 (Ms. Collins).

<sup>70</sup> George L. Priest, *Buying Democracy: A New Look at Campaign Finance “Reform,”* Address to the Am. Enters. Inst. (2000) (on file with author).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 378, 410–12 (2000) (Thomas, J., dissenting).

of political information.<sup>76</sup> During campaigns for elective office, this free exchange of information should receive even higher protection so that voters can effectively evaluate the merits and demerits of candidates and election issues.<sup>77</sup> Essential political speech about those issues is generated by political contributions.<sup>78</sup> Both speech and contributions provide the means for others to speak, and for people to speak themselves through the symbolic act of contributing.<sup>79</sup> As a result, limits on contributions that “place a direct and substantial limit on core speech, should be met with the utmost skepticism and should receive the strictest scrutiny.”<sup>80</sup> Therefore, a soft money ban and other limits on political contributions will pass strict scrutiny only if legislation is narrowly tailored to a compelling government interest.

However, the First Amendment argument has one main flaw. The Supreme Court held in *Buckley v. Valeo* that giving money so that others can speak on behalf of the contributor (a.k.a. “speech by proxy”) is not entitled to full First Amendment protection.<sup>81</sup> While speech of the person or association that transforms the contribution into political debate is fully protected, speech of contributors through donations is not.<sup>82</sup> This case will be discussed more thoroughly in Section III, but this much is clear thus far: *Buckley* presents a major stumbling block for opponents of the soft money ban. To strike down the Bipartisan Campaign Finance Act as unconstitutional, opponents will have to convince the Court to overrule or distinguish *Buckley*. Indeed, three Justices on the Court have already expressed a desire to strike down the *Buckley* framework in favor of a more unregulated system of campaign finance.<sup>83</sup> However, three others would only strike down *Buckley* in favor of a more regulated system of campaign finance, and the remaining three Justices seem inclined to adhere to *Buckley*, a case that the Supreme Court has reaffirmed on several occasions.<sup>84</sup>

In addition to First Amendment reservations, opponents of the Bipartisan Campaign Finance Reform Act may argue that several policy considerations also cut against soft money regulation. First, the ban may or may not significantly reduce the total amount of money raised and spent in campaigns. The volume of hard money donations will likely increase to fill

---

<sup>76</sup> *Id.* at 412.

<sup>77</sup> *See id.* (citing Madison, *Report on the Resolutions* (1799), in 6 WRITINGS OF JAMES MADISON 397 (G. Hunt ed., 1906)).

<sup>78</sup> *See Nixon*, 528 U.S. at 412.

<sup>79</sup> *See id.*

<sup>80</sup> *Id.*

<sup>81</sup> 424 U.S. 1, 21 (1986). *See also* California Medical Assn. v. Federal Election Comm’n, 453 U.S. 182, 196 (1981).

<sup>82</sup> *See Buckley*, 424 U.S. at 21 (holding that the limitation on the amount of money a person may give to a candidate or campaign organization involves little restraint on the contributor’s speech which derives merely from the symbolic act of contributing).

<sup>83</sup> Hasen, *supra* note 60, at 14.

<sup>84</sup> *See, e.g., Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 378, 386 (quoting *Buckley*, 424 U.S. at 19–21); *Colo. Republican I*, 518 U.S. 604, 614–15 (1996); Hasen, *supra* note 60, at 14.

the void of some of the banned soft money funds. Of course, because the size of hard money donations is strictly limited, this means funds will have to come from a wider array of sources.<sup>85</sup> For the average American, the consequence of cracking down on soft money will mean that voters should expect to receive far more mail or telephone calls seeking political donations.

Second, money spent on campaigns increases information, but perhaps cannot buy elections. The failed Michael Huffington and Steve Forbes campaigns that spent unprecedented amounts of money are two examples. “These arguments, however, remain chiefly empirical—to some extent, even anecdotal—in a field in which empirical demonstration and proof [are] extremely difficult.”<sup>86</sup>

Third, if money does indeed give a candidate an advantage in an election, a soft money ban will favor independently wealthy candidates who may spend large amounts of their own money without fear that other candidates will be able to raise matching soft money funds. The Bipartisan Campaign Finance Reform Act compensates for this concern. This allows for the tripling of hard money limits when a candidate spends more than \$350,000.<sup>87</sup>

Finally, if the government could actually limit contributions effectively, the result would be to redistribute power from those with money to those with other unregulated resource advantages, e.g., senior citizens with time on their hands, frequent voters, volunteers.<sup>88</sup> While some may favor redistribution, it is understandable that others might not.<sup>89</sup>

#### B. CORRUPTION AND POLICY CONCERNS FAVORING A SOFT MONEY BAN

On the other hand, reformers fear that the soft money loophole is corrupting our democratic system and believe that the ban is necessary. There are two principle senses in which money corrupts. First, a soft money contribution may affect the actual substance of decisions made by public officials.<sup>90</sup> The most obvious example is a bribe where a candidate accepts financial backing and, in return, promises to provide some government privilege directly to the contributor.<sup>91</sup> The existence of actual

---

<sup>85</sup> See H.R. 2356, 107th Cong. §315 (2002), available at <http://thomas.loc.gov>.

<sup>86</sup> Priest, *supra* note 70, at 6.

<sup>87</sup> See Anderson, *supra* note 11, at A22. Analysis of this provision is beyond the scope of this Note.

<sup>88</sup> Bruce Cain, *Can Campaign Finance Reform Create a More Ethical Political Process?*, 31 INST. OF GOVERNMENTAL STUD. PUB. AFF. REP. 316 (1990).

<sup>89</sup> *Id.*

<sup>90</sup> See *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (“Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns.”).

<sup>91</sup> See Priest, *supra* note 70, at 6.

corruption provides the most compelling grounds to argue for soft money regulation.<sup>92</sup>

The second, and less direct, effect is that soft money contributions can corrupt by drawing a candidate's attention toward matters of interest to the contributor, as opposed to the broader interests of the public.<sup>93</sup> Soft money may actually influence elected officials "to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaign."<sup>94</sup> Even less directly, money can buy access to the official and provide an opportunity for the contributor to persuade a legislator.<sup>95</sup> In either case, soft money can have the same potential corrupting effect as direct contributions, which the Supreme Court has recognized as a compelling government interest for regulation.<sup>96</sup>

A deeper analysis reveals that money may be corrupting on a societal level.<sup>97</sup> Even if money does not affect the decisions or views of candidates or elected officials, money has a corrupting effect on the political process.<sup>98</sup> Our democracy is structured to treat each citizen as morally and politically equal through the principle of one person/one vote.<sup>99</sup> Each qualified citizen may exercise this right to vote, regardless of the size of his or her bank account. Given that principle of equality, it is wrong to allow those citizens with greater financial resources to participate more actively in politics through unlimited soft money contributions than those citizens with fewer financial resources.<sup>100</sup> Holding elected office should not become a club for millionaires where a candidate either has an abundance of money or becomes indebted to a contributor.<sup>101</sup>

For these reasons, reformers argue that soft money has greatly contributed to the American people's loss of confidence in the political process. A 1997 *New York Times* poll found that 89% of Americans believe that this country's campaign finance system needs fundamental changes or a complete overhaul.<sup>102</sup> The poll also documented the growing frustration that citizens have with elected officials in Washington—75% of those polled said that they believed that many of their public officials make or change policy decisions as a result of the money they receive from major contributors.<sup>103</sup> Proponents of soft money regulation believe that such conduct is outrageous.

---

<sup>92</sup> See *id.*

<sup>93</sup> See *Federal Election Comm'n*, 470 U.S. at 497 ("Corruption is a subversion of the political process.").

<sup>94</sup> *Id.*

<sup>95</sup> See *id.*

<sup>96</sup> See *Buckley v. Valeo*, 424 U.S. 1, 25–26 (1976).

<sup>97</sup> See *Priest*, *supra* note 70, at 6.

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>100</sup> See *id.*

<sup>101</sup> See 143 CONG. REC. S9998 (1997) (testimony of Sen. Daschle).

<sup>102</sup> See *Senate Soft Money Hearings*, *supra* note 5 (statement of Scott Harshbarger, President and CEO, Common Cause).

<sup>103</sup> *Id.*

Only the most politically naïve could believe that this soft money is not given by the donors to curry favor with federal officials. Only the most gullible could believe that these contributions have no impact on the recipients and result in no favoritism to the donors. And only the most credulous could believe that this money is not spent to influence federal elections.<sup>104</sup>

### C. SOFT MONEY LIMITS UNDER RECENT LEGISLATION

In response to the public's growing frustration over the flow of soft money into federal elections, two rival campaign finance bills were introduced into Congress during the 2001–2002 legislative session. The first bill, the Open and Accountable Campaign Financing Act of 2001, placed a \$60,000 yearly cap on soft money contributions by individuals to national political party committees.<sup>105</sup> To compensate for diminished soft money funds, the bill tripled most hard money contributions to candidates, political action committees, and political parties.<sup>106</sup> Since this bill was a rival to the successful Bipartisan Campaign Finance Reform Act, it did not pass Congressional vote.

The second bill, the Bipartisan Campaign Finance Reform Act of 2001, known as the “Shays-Meehan Bill” in the House and the “McCain-Feingold Bill” in the Senate, completely eliminates federal soft money.<sup>107</sup> Under the bill, national parties and federal office holders cannot solicit, receive, or spend any funds not subject to the limitations, prohibitions, and reporting requirements of FECA.<sup>108</sup> All contributions now fall under the hard money requirements of current election laws.<sup>109</sup> Moreover, to prevent the loophole from simply migrating to state party fundraising, state, and local parties can no longer spend money on any activity that might affect a federal election.<sup>110</sup>

The Bipartisan Campaign Finance Reform Act endured a rocky battle in Congress since its inception in 1995. As of August 1998, many commentators believed that it would pass Congressional approval when the House voted 252–179 in favor of the Shays-Meehan Bill.<sup>111</sup> However, its senatorial counterpart, the McCain-Feingold Bill, fell to a Republican-led filibuster that same year.<sup>112</sup> When the Senate failed to act on the bill before

---

<sup>104</sup> See *House Const. Hearings*, *supra* note 3 (testimony of Donald J. Simon, Acting President, Common Cause).

<sup>105</sup> S. 22, 107th Cong. (2001), available at <http://thomas.loc.gov>.

<sup>106</sup> See *id.*

<sup>107</sup> Letter from Congressman Christopher Shays to author (Dec. 17, 1999) (on file with author) (explaining the Shays-Meehan Bill).

<sup>108</sup> See Bipartisan Campaign Reform Act, S. 25, 105th Cong. (1997). See also Feingold, *supra* note 52, at 211.

<sup>109</sup> See Feingold, *supra* note 52, at 211.

<sup>110</sup> See *id.* See also H.R. 2183, 105th Cong. 101 (1997).

<sup>111</sup> See Bipartisan Campaign Integrity Act, H.R. 2138, 105th Cong. (1997).

<sup>112</sup> C.Q. ALMANAC (1998) (despite the vote of 51–48 in favor of the bill, the 60 votes for cloture to kill the filibuster were not obtained).

the end of session, the Shays-Meehan bill, which already passed the House, died as well.<sup>113</sup>

Both the Shays-Meehan and McCain-Feingold bills were reintroduced in the 2001–2002 legislative session.<sup>114</sup> The House again passed the Shays-Meehan Bill in February of this year by a margin of 240–189.<sup>115</sup> This time, however, the Bipartisan Campaign Finance Reform survived as the McCain-Feingold Bill, passing the Senate by a vote of 60–40 and ending the seven-year battle in Congress.<sup>116</sup> The Act passed both chambers in the same form, and thereby bypassed a conference committee and went straight to President Bush's desk for final approval.<sup>117</sup> The President signed the bill into law on March 27, 2002.<sup>118</sup> The battle has now shifted to the courts.<sup>119</sup>

The Bipartisan Campaign Finance Reform Act will probably have two effects if it survives judicial review.<sup>120</sup> First, it will likely reduce the total amount of money in political campaigns.<sup>121</sup> Second, it will likely force candidates to spend more time campaigning for small-dollar donations from local constituents.<sup>122</sup> For these reasons, many reformers believe that some form of soft money regulation is inevitable.<sup>123</sup> Now that the Bipartisan Campaign Finance Reform Bill has become law, opponents will argue that Congress violated the Constitution.<sup>124</sup>

### III. A FIRST AMENDMENT ANALYSIS OF A SOFT MONEY REGULATION

All laws, soft money limits included, must accord with the U.S. Constitution. Opponents of the Bipartisan Campaign Finance Reform Act claim the Constitution raises several impediments to a soft money ban. Part A provides the Supreme Court's framework for interpreting campaign finance regulation within the meaning of the First Amendment, as shaped by four major cases. Part B applies the framework to regulations on soft money and concludes that restricting or closing the soft money loophole is constitutional.

---

<sup>113</sup> See Yarmish, *supra* note 41, at 1270.

<sup>114</sup> The Brookings Inst., *Campaign Finance Key Legislation*, at <http://www.brookings.edu/gs/cf/bills.htm> (last visited Mar. 25, 2002).

<sup>115</sup> The Brookings Institution, *supra* note 13. See Anderson, *supra* note 11.

<sup>116</sup> See *id.*

<sup>117</sup> See *id.* See also Bipartisan Campaign Finance Act of 2001, S. 27, 107th Cong., 1st Sess. (McCain-Feingold); Bipartisan Campaign Finance Act of 2001, H.R. 380, 107th Cong., 1st Sess. (Shays-Meehan).

<sup>118</sup> Press Release, President George W. Bush, President Signs Campaign Finance Reform Act (Mar. 27, 2002) at <http://www.whitehouse.gov/news/releases/2002/03/20020327.html>.

<sup>119</sup> See *supra* notes 15–16 and accompanying text.

<sup>120</sup> See 143 CONG. REC. S10001 (1997) (statement of Sen. McCain).

<sup>121</sup> See *id.*

<sup>122</sup> See *id.*

<sup>123</sup> *Campaign Finance Reform: Hearings Before the Comm. on House Oversight*, 105th Congress (1998) (testimony of Rep. Harold Ford, Jr.) available at 1998 WL 54216.

<sup>124</sup> See *supra* notes 15–16 and accompanying text.

## A. THE SUPREME COURT'S EFFECT ON THE CAMPAIGN FINANCE SYSTEM

Since 1976 the Supreme Court has attempted to divide the types of election spending that the federal government may prohibit from constitutionally protected spending. While this line is somewhat blurry, especially regarding soft money, a basic principle has emerged. *Contributions* made by individuals or groups to individual candidates or to political action committees may be limited, but independent *expenditures* by individuals, and expenditures by candidates from their own funds, may not be limited.<sup>125</sup> This sub-section explains the four major cases that developed this doctrine: *Buckley v. Valeo*,<sup>126</sup> *Colorado Republican Federal Campaign Committee v. FEC (I and II)*,<sup>127</sup> and *Nixon v. Shrink Missouri Government PAC*.<sup>128</sup>

1. *Buckley v. Valeo (1976)*

The first and most important of the campaign finance reform cases is *Buckley v. Valeo*, in which the Supreme Court upheld some, but not all, of Congress' 1974 FECA Amendments that regulated the financing of political campaigns.<sup>129</sup> In *Buckley*, the Court articulated a constitutional distinction between political contributions and expenditures.<sup>130</sup> It sustained contribution limits,<sup>131</sup> but found FECA's expenditure limits unconstitutional.<sup>132</sup>

Some basic constitutional principles underlie the Court's opinion—namely, the precept that restrictions on political contributions and expenditures infringe on the rights of speech and association. Because the Court is very suspicious of laws that limit free speech, it applies a heightened standard of judicial review when deciding if laws that limit speech are constitutional. The First Amendment provides that “Congress shall make *no law* . . . abridging the freedom of speech.”<sup>133</sup> A major purpose of the First Amendment is to protect the free discussion of governmental affairs, and political speech is among the most highly

---

<sup>125</sup> *Buckley v. Valeo*, 424 U.S. 1, 58–59 (1976).

<sup>126</sup> *See id.* at 1.

<sup>127</sup> *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n.*, 518 U.S. 604 (1996) (I); *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n.*, 533 U.S. 431 (2001) (II).

<sup>128</sup> 528 U.S. 377 (2000).

<sup>129</sup> *Buckley*, 424 U.S. *passim* (1976).

<sup>130</sup> *Id.* at 19–21.

<sup>131</sup> *See id.* at 7 (determining that FECA limited individual political contributions to \$1,000 to any single candidate per election, with a corollary \$25,000 limit on aggregate contributions by any individual in any year).

<sup>132</sup> These unconstitutional limitations on expenditures include a \$1,000-per-year limit on independent expenditures by individuals and groups on behalf of a “clearly identified” candidate, various limits on expenditures by a candidate from personal or family funds, and various limits on total campaign spending.

<sup>133</sup> *See Buckley*, 424 U.S. at 14. *See also* U.S. CONST. amend. I (emphasis supplied).

protected forms of free speech.<sup>134</sup> The government may not restrict the speech of some to enhance the relative voice of others.<sup>135</sup>

*Buckley* resolved the question of whether the FECA Amendment contribution and expenditure limits on free political speech unconstitutionally inhibited political speech, one of the most fundamental First Amendment activities.<sup>136</sup> The Court found that spending money in election campaigns is speech and, thus, it deserves the application of “closest scrutiny” to determine the constitutionality of limits on contributions and expenditures.<sup>137</sup> Close scrutiny is a two-prong standard of review that requires limits on free speech to be “closely drawn” to match a “sufficiently important” government interest.<sup>138</sup> Limits on contributions and expenditures, therefore, would not be constitutional unless such limits are both closely drawn and serve a sufficiently important government interest.

Despite such high scrutiny, the Court upheld campaign *contribution* restrictions.<sup>139</sup> Under the first prong of close scrutiny, the Court found the governmental interest supporting contribution limits to be powerful and overriding. The government had a sufficiently important interest in limiting both the actual and apparent corruption resulting from individual contributions sometimes made to secure political gain from a candidate.<sup>140</sup> Preventing corruption, or the appearance of corruption, remains the “single narrow exception to the rule that places limits on political activity, protected by the First Amendment.”<sup>141</sup>

The Court also found that contribution limits satisfied the second prong of close scrutiny because they are closely drawn to guard against corruption or the appearance of corruption, and lesser restrictive alternatives would be inadequate.<sup>142</sup> Contribution limits only marginally restrict the contributor’s ability to engage in free speech because someone other than the contributor transforms those contributions into political speech.<sup>143</sup> Monetary donations do not demonstrate why a contributor supports a candidate, so the amount of the contributor’s communication does not increase proportionately with the size of the contribution.<sup>144</sup> Political donations only express the “undifferentiated, symbolic act of contributing,” but that symbolism is largely independent of the dollar amount.<sup>145</sup> Therefore, contributions limits survive constitutional muster because they do not significantly restrict First

---

<sup>134</sup> See *Buckley*, 424 U.S. at 14.

<sup>135</sup> See *id.* See also Lillian R. BeVier, *Campaign Finance “Reform” Proposals: A First Amendment Analysis*, POLICY ANALYSIS NO. 282 (1997).

<sup>136</sup> See *Buckley*, 424 U.S. at 7–8.

<sup>137</sup> See *id.* at 14.

<sup>138</sup> See *id.*

<sup>139</sup> See *id.* at 58.

<sup>140</sup> *Id.* at 26–27.

<sup>141</sup> *Id.* at 25–26.

<sup>142</sup> See *id.* at 19, 38.

<sup>143</sup> *Id.* at 20–21.

<sup>144</sup> *Id.*

<sup>145</sup> See *id.*

Amendment-protected free speech, as limiting the dollar amount does not muffle the symbolic act of contributing.

By contrast, the Court found that the limitations on political expenditures by individuals acting independently from candidates imposed direct and substantial restraints on free speech and also limited political expression at the core of First Amendment freedoms.<sup>146</sup> Neither prong of the close scrutiny test was satisfied.<sup>147</sup> First, the governmental interest in preventing corruption or the appearance of corruption was not furthered by limits on political expenditures made independently from the candidate and his campaign.<sup>148</sup> Bribery risks occur only when a candidate accepts or coordinates funds directly with a donor, not when expenditures are made beyond the candidate's control.<sup>149</sup> Thus, spending controlled by, or coordinated with, a campaign should be treated as a contribution, not an expenditure.<sup>150</sup>

Second, expenditure limits cannot be closely drawn to eliminate corruption or the appearance of corruption. The expenditure limits in question only restricted advocacy for the election or defeat of a "clearly identified candidate."<sup>151</sup> So long as a candidate was not clearly identified, ads could still air supporting a candidate's view without expressly advocating that candidate's election.<sup>152</sup> Since the limits on independent expenditures were not closely drawn to the governmental interest in preventing corruption or the appearance of corruption, they failed the close scrutiny test. Therefore, the Court held that limits on independent expenditures unconstitutionally restrict protected free speech.

To date, *Buckley* provides the framework for all of the major campaign finance cases. "Any judicial consideration of the constitutionality of campaign finance reform legislation must begin and usually ends with the comprehensive decision in *Buckley*."<sup>153</sup>

However, the case has been criticized on many levels.<sup>154</sup> First, critics question the Court's treatment of spending money as speech, rather than conduct that communicates.<sup>155</sup> Spending money itself may facilitate speech and is a way of expressing support for a candidate, but it is arguably distinguishable from "pure" speech.<sup>156</sup> Thus, the critics argue that the

---

<sup>146</sup> *Id.* at 39.

<sup>147</sup> *See id.* at 45–47.

<sup>148</sup> *See id.*

<sup>149</sup> *See id.* at 47.

<sup>150</sup> *See id.* at 46.

<sup>151</sup> *Id.* at 45.

<sup>152</sup> *See id.*

<sup>153</sup> *Kruse v. City of Cincinnati*, 142 F.3d 907, 911 (6th Cir. 1998), *cert. denied*, 525 U.S. 1001 (1998).

<sup>154</sup> *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1120–21 (2001).

<sup>155</sup> *See id.* (citing J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L. J. 1001 (1976)).

<sup>156</sup> *See* CHEMERINSKY, *supra* note 154, at 1121.

Court should have applied a less stringent form of judicial review rather than strict scrutiny.<sup>157</sup>

Second, critics have questioned the Court's distinction between expenditure and contribution limits.<sup>158</sup> Contributors can influence elected officials, just as those who make expenditures on behalf of campaigns can influence elected officials.<sup>159</sup> Therefore, both situations raise questions of corruption, particularly when large amounts of money are involved.<sup>160</sup>

Third, some have criticized the Court "for giving inadequate weight to the value of equality . . . in political campaigns."<sup>161</sup> By allowing unlimited expenditures, perhaps the Court has permitted "the wealthy to drown out the voices of those with less money."<sup>162</sup> As a result, those with more money potentially have "much more influence in election campaigns and ultimately with elected officials."<sup>163</sup> Perhaps the principle of equality "is a compelling interest that justify[es] the expenditure limits that the Court invalidated."<sup>164</sup>

2. *Colorado Republican Federal Campaign Committee v. Federal Election Commission* ("Colorado Republican I," 1996) ("Colorado Republican II," 2001)

*Colorado Republican Federal Campaign Committee v. Federal Election Commission*<sup>165</sup> is probably the Supreme Court's most important campaign finance decision since *Buckley v. Valeo*—so much so that the case reached the Supreme Court on two different occasions. The first instance was in 1996, when *Colorado Republican I* posed the issue of whether the government could constitutionally limit the amount of money a political party spends on a candidate's campaign.

A political party can spend money for candidates in one of two ways. It can either coordinate expenditures with a candidate, or it can make expenditures independent of the candidate. A coordinated expenditure occurs when the candidate and party collaborate on how to best use collective campaign funds. For example, in a coordinated expenditure, the candidate may tell party officials to buy billboard space in the north part of town because that candidate has already paid for ads in the south. Conversely, an independent expenditure happens when a candidate and a party do not collaborate on spending campaign funds. In an independent expenditure, the party may buy billboard space in the northern part of a

---

<sup>157</sup> See *id.*

<sup>158</sup> See *id.* See also Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045 (1985).

<sup>159</sup> See CHEMERINSKY, *supra* note 154, at 1121.

<sup>160</sup> See *id.*

<sup>161</sup> *Id.* (citing Marlene Arnold Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 WIS. L. REV. 323, 336).

<sup>162</sup> CHEMERINSKY, *supra* note 154, at 1121.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> 518 U.S. 604 (1996).

voting district, unaware that the candidate just purchased ads covering the south.

*Colorado Republican I* did not address whether limits on coordinated expenditures were constitutional, but instead, limited its opinion to the constitutionality of limits on *independent* expenditures.<sup>166</sup> Answering this narrow question, the Court held that any limit on how a party spends its money independently of a congressional candidate is a violation of the party's right to free speech.<sup>167</sup> It reasoned that the Constitution grants individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures.<sup>168</sup> That same right cannot be denied to the political parties.<sup>169</sup> The case was remanded to determine whether limits placed on *coordinated* expenditures also violated the Constitution.<sup>170</sup>

In 2001, the case made its way back to the Supreme Court as *Colorado Republican II*. In the sequel, the Court finally answered the question it avoided in *Colorado Republican I*: whether parties had a right to spend unlimited sums *in coordination with* the parties' candidates.<sup>171</sup> In a 5–4 opinion, the *Colorado Republican II* Court held that the government may limit expenditures that a party coordinates with a candidate under an anti-corruption rationale. It reasoned that “[d]onors give to the part[ies] with the tacit understanding that the favored candidate will benefit” and that donors “use parties as conduits for contributions meant to place candidates under obligation.”<sup>172</sup> Coordinated expenditures that attempt to undermine contribution limits are neither pure contributions nor pure expenditures like those considered in *Buckley* and *Colorado Republican I*.<sup>173</sup> Nevertheless, Congress may choose to regulate coordinated expenditures as if they were contributions because coordinated expenditures have the ability to corrupt.<sup>174</sup> Since the FECA's limits on coordinated expenditures satisfied the anti-corruption rationale, the Court upheld the limits as constitutional.<sup>175</sup> Hence, coordinated expenditures may be considered contributions and not expenditures for the purpose of First Amendment analysis.

In *Colorado Republican I* and *II*, the Court only addressed hard money expenditures, not the soft money loophole.<sup>176</sup> Nevertheless, both cases

---

<sup>166</sup> See *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n* (I), 518 U.S. 604, 613–15 (1996) (holding that party expenditures that are uncoordinated with a candidate cannot be limited).

<sup>167</sup> See *id.* at 614–16.

<sup>168</sup> See *id.* at 618.

<sup>169</sup> See *id.*

<sup>170</sup> See *id.* at 623–26.

<sup>171</sup> Richard L. Hasen, *supra* note 60, at 9.

<sup>172</sup> *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n* (II), 533 U.S. 431, 453, 458 (2001).

<sup>173</sup> See *id.* at 464–65.

<sup>174</sup> *Id.*

<sup>175</sup> See Hasen, *supra* note 60, at 9.

<sup>176</sup> See *id.* at 608. See also 143 CONG. REC. S10002 (1997) (testimony of Ronald Dworkin, Prof. of Jurisprudence and Fellow of Univ. College at Oxford University; Frank H. Sommer, Prof. of Law, New York Univ. School of Law; John Norton Pomeroy Prof. of Law, New York Univ. School of Law;

appeared to indicate that government regulation of the loophole would be constitutional if soft money is considered a contribution.<sup>177</sup> *Colorado Republican I* and *II* both reaffirmed the fundamental contribution-expenditure distinction of *Buckley*.<sup>178</sup> Indeed, the Court “could understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits was a serious matter, might decide to change the statute’s limitations on contributions to political parties.”<sup>179</sup> Closely drawn contribution limits survive close scrutiny because they “directly and materially advance the Government’s interest in preventing exchanges of large financial contributions for political favors.”<sup>180</sup> The *Colorado Republican I* concurrence also indicated that soft money contribution limits would likely withstand close scrutiny: “Congress may have authority, consistent with the First Amendment, to restrict undifferentiated political party contributions [i.e., soft money contributions] which satisfy the constitutional criteria we discussed in *Buckley*, but that type of regulation is not at issue here.”<sup>181</sup>

Despite indicating that Congress may limit soft money contributions in the future, *Colorado Republican I* and *II* weaken campaign-finance limits today. Political parties may spend as much money as they want in their efforts to influence the outcome of an election, so long as their spending or message is not “coordinated” with the candidate. Presumably the rationale of the *Colorado* cases will apply to presidential campaigns as well, despite the fact that major party presidential candidates may accept federal matching funds.<sup>182</sup> In all federal elections, parties will be free to spend

---

Burt Neuborne, Legal Dir., Brennan Ctr. for Justice); *Constitutional Issues Raised by Reform of Campaign Finance: Before Senate Comm. on Governmental Operations*, 105th Cong. (1997) (testimony of Burt Neuborne, Legal Director, Brennan Ctr. for Justice) (“[*Colo. Republican I*] was an expenditure case, not an effort to limit contributions”).

<sup>177</sup> See *Colo. Republican I*, 518 U.S. at 614–15. Whether or not soft money donations are considered contributions or expenditures is addressed in Part B of this section.

<sup>178</sup> See *id.*; see also *Colo. Republican II*, 533 U.S. at 489.

<sup>179</sup> *Colo. Republican I*, 518 U.S. at 615.

<sup>180</sup> *Id.* at 617 (citing *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976)).

<sup>181</sup> See *id.* at 630 (Kennedy, J., concurring in part and dissenting in part).

<sup>182</sup> See CORRADO, MANN, ORTIZ, POTTER & SORAUF, *supra* note 25, at 12–16. Presidential elections are partially publicly funded. That is, once a major party presidential candidate meets certain requirements, the general election campaign may choose to receive full U.S. government funding from the Treasury accounts funded from the \$3 dollar voluntary taxpayer check-off. Presidential primaries are funded through a combination of public and private funding in *matching* funds—public funds that match up to \$250 of an individual’s contributions. To qualify for such matching funds, the candidate must demonstrate nationwide support through raising at least \$5,000 in individual contributions of up to \$250 each in at least twenty separate states. Candidates must also agree, among other things, to:

- Limit primary spending to an inflation-adjusted amount—approximately \$31 million in 1996
- Limit spending in each primary state to a specific amount (increasing with population); and
- Limit spending of personal funds to \$50,000

Once these requirements are met, the candidate can receive matching payments. See 11 C.F.R. § 9033.1.

Private contributions for presidential candidates are still limited as in other federal elections. Individuals may contribute up to \$1,000 to a presidential primary campaign committee, and qualified multicandidate Political Action Committees (PACs) can contribute up to \$5000. However,

unlimited amounts of money to back their candidate, so long as the party does not coordinate with the candidate. Thus, it is Congress' responsibility to limit the supply side, the monetary contributions, to the soft money loophole.

### 3. *Nixon v. Shrink Missouri Government PAC (2000)*

Finally, the recent campaign finance reform case of *Nixon v. Shrink Missouri Government PAC* reaffirmed and extended *Buckley's* authority over federal matters to comparable state regulation of contributions to state political candidates.<sup>183</sup> The Court recognized that speech expressed during the pursuit of political office is highly protected by the First Amendment. The Court, therefore, again applied the close scrutiny test when reviewing the constitutionality of monetary limits on state parties.<sup>184</sup>

Under the two-prong close scrutiny test, the Court re-affirmed the distinction between expenditures and contributions, holding that restrictions on expenditures of state parties pose direct restraints on speech, while restrictions on contributions to state parties do not.<sup>185</sup> Prevention of corruption or the appearance of corruption continues to satisfy the first prong of close scrutiny, providing a constitutionally sufficient justification behind campaign finance regulation.<sup>186</sup> Actual corruption may occur when "large contributions are given to secure a political quid pro quo from current or potential office holders."<sup>187</sup> Of almost equal concern to the

---

Congressional candidates do not enjoy the opportunity to receive federal matching funds in either primaries or general elections.

Once a candidate becomes the presidential nominee for a major party, he or she becomes eligible for a public grant (which was \$61.82 million per candidate in 1996). To receive these funds, however, the candidate must agree to spend no more than the grant received and must not accept private contributions. Additionally, the two major party national committees may each spend a voting-age population adjustment amount (\$12 million in 1996) in coordination with their presidential candidates. See 2 U.S.C. § 441a (d)(2). This amount is separate from any get-out-the-vote or generic party-building activities the parties conduct.

Presidential candidates are not required to accept public funds in either the primary or general elections. Candidates refusing such funds are permitted to spend as much of their own money in support of their own campaigns as they wish. As a result, a candidate refusing public funding would have no per-state spending limit or overall spending limit in the primary campaign, e.g., Steve Forbes in 1996, and no spending limit in the general election campaign, e.g., Ross Perot in 1992. Such a candidate could still accept private contributions in both the primary and general election campaigns, subject to the standard \$1,000 per election contribution limit for individuals.

<sup>183</sup> See 528 U.S. 377, 394–95 (2000).

<sup>184</sup> See *id.* at 386 (quoting *Buckley*, 424 U.S. at 15–16 (holding that free speech "has its fullest and most urgent application precisely to the conduct of campaigns for political office") (internal quotations omitted)).

<sup>185</sup> See *id.* (quoting *Buckley*, 424 U.S. at 19–21).

<sup>186</sup> See *id.* at 388 (quoting *Buckley*, 424 U.S. at 25–26). See also Fed. Election Comm'n v. Nat. Right to Work Comm., 459 U.S. 197, 208 (1982) (noting that Government interests in preventing corruption or the appearance of corruption "directly implicate 'the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process'" (quoting *United States v. Automobile Workers*, 352 U.S. 567, 570 (1957)); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788, n.26 (1978) ("The importance of the governmental interest in preventing [corruption] has never been doubted").

<sup>187</sup> *Nixon*, 528 U.S. at 388 (quoting *Buckley*, 424 U.S. at 26–27 (internal quotations omitted)).

Court is that the public may view large individual financial contributions as corrupting.<sup>188</sup> Congress has a sufficient governmental interest in combating erosion of public confidence in our representative democracy.<sup>189</sup>

Regulations that limit contributions to state parties also satisfy the second prong of close scrutiny. Similar to the federal contribution limits upheld in *Buckley*, state contribution limits are closely drawn to prevent actual corruption or the appearance of corruption. The Court has noted that many studies conflict about whether candidates are actually corrupted by political contributions.<sup>190</sup> It is difficult to know whether contributors donate funds because they share similar ideology with the candidate or whether the candidate receives funds and, consequently, votes in accordance with the contributor's ideology. Moreover, none of these studies likely has a significant impact on public perception. Nevertheless, the Court concluded that given the conflict among academic publications, "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters."<sup>191</sup> Contribution limits that are closely drawn to this anti-corruption rationale involve "little direct restraint on . . . political communication" because limits on the symbolic act of contributing do "not . . . infringe the contributor's freedom to discuss candidates and issues."<sup>192</sup> In sum, legislation closely drawn to prevent actual corruption or appearance of corruption serves as a sufficiently important reason for Congress to regulate political contributions, soft money included.

#### B. SUPREME COURT FRAMEWORK APPLIED TO A SOFT MONEY BAN

According to the four major campaign finance cases discussed above, Congress may regulate soft money if it is considered a contribution and not an expenditure. The first part of this subsection analyzes whether the two components of soft money transactions should be considered contributions or expenditures. Limits placed on either component would restrict the loophole for two reasons. First, soft money flows from individuals to political parties. These transactions are contributions and can be regulated. Second, parties give soft money to candidates. These transactions are also

---

<sup>188</sup> See *id.* at 388–89 (quoting *Buckley*, 424 U.S. at 27).

<sup>189</sup> See *id.* (quoting *Buckley*, 424 U.S. at 27 ("Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent'")).

<sup>190</sup> See Brief of Respondent at 41, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 378 (2000). See e.g., Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 58 (1997); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1067–68 (1995). But see Reply Brief of Respondent at 4–5, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 378 (2000); Frank J. Sorauf, *Inside Campaign Finance* 169 (1992); Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797 (1990); David B. Magleby & Candice J. Nelson, *THE MONEY CHASE* 78 (1990).

<sup>191</sup> *Nixon*, 528 U.S. at 394–95.

<sup>192</sup> See *id.* at 386–87 (quoting *Buckley*, 424 U.S. at 20–21).

contributions when given directly to a candidate from a party or spent in coordination with a candidate's campaign. However, when soft money is spent on the party itself or independently from the candidate's campaign, it is an expenditure protected by the First Amendment.

The second part of this subsection applies the Supreme Court's requirements of close scrutiny to regulation of soft money contributions. First, the regulation must further a sufficiently important government interest. Here, prevention of corruption or the appearance of corruption is sufficient. Second, that regulation must be closely drawn to match that government interest. The Court has upheld current hard money limits as closely drawn to match the government's interest in preventing corruption. All contributions will be subject to hard money limits as a result of a ban on soft money. A ban on soft money, therefore, will be considered closely drawn to the government interest in preventing corruption or the appearance of corruption. Since it satisfies both prongs of close scrutiny, a soft money ban will likely pass constitutional muster.

#### 1. *Soft Money: Contribution or Expenditure?*

Whether soft money is categorized as a contribution or as an expenditure will have manifest constitutional ramifications for legislation seeking to limit the loophole. According to the Court, expenditure limits are unconstitutional, yet Congress may constitutionally impose contribution limits.<sup>193</sup> Hence, if soft money donations to parties are, in effect, contributions to candidates' campaigns, then they can undoubtedly be limited.<sup>194</sup> To determine whether soft money transactions are contributions or expenditures, the two stages of the loophole are explored below.

##### a. *Individual Entities Contribute to a Political Party*

The first stage of the loophole occurs when individuals, corporations, and unions give soft money to the political party, often intending for the party to distribute their donation to a federal candidate. The Bipartisan Campaign Finance Reform Bill mandates that unlimited soft money funds given to the political party comply with hard money regulations that the Court has already upheld as constitutional.

Congress clearly possesses the power to limit the soft money loophole by restricting the source and size of contributions to political parties for use in connection with particular candidates in federal elections,<sup>195</sup> as evinced by *Buckley* and its progeny.<sup>196</sup> For example, *California Medical Association v. Federal Election Commission* holds that contributions to

---

<sup>193</sup> See *supra* notes 130–132 and accompanying text.

<sup>194</sup> See *id.*

<sup>195</sup> See 143 CONG. REC. S10002 (1997) (testimony of Ronald Dworkin, Prof. of Jurisprudence and Fellow of Univ. College at Oxford University; Frank H. Sommer, Prof. of Law, New York Univ. School of Law; John Norton Pomeroy Prof. of Law, New York Univ. School of Law; Burt Neuborne, Legal Dir., Brennan Ctr. for Justice).

<sup>196</sup> See *id.*

political committees can be restricted.<sup>197</sup> Further, the Court in *Federal Election Commission v. National Right to Work Committee* upheld a ban on the solicitation of contributions from the public by PACs.<sup>198</sup> Congress has already enacted various monetary limits for contributions to presidential and congressional candidates.<sup>199</sup> There should be no constitutional issue in extending similar limits to contributions to political parties for use in connection with federal elections.<sup>200</sup>

b. *Political Parties Both Contribute to Candidates and Expend Funds on Themselves*

Second, political parties often distribute soft money donations to candidates running for elected office. The soft money ban in the Bipartisan Campaign Finance Reform Act also affects this half of the loophole. Without soft money, parties would have much less funding to distribute to their candidates. The Court has consistently avoided categorizing whether donations from a party to a candidate are contributions or expenditures, and whether the government may limit those donations. In *Buckley*, the Court ignored distinct aspects of donations from a political party, despite addressing First Amendment issues for individual contributions.<sup>201</sup> The plurality in *Colorado Republican I* also declined to address the constitutionality of the FECA's limits on party spending.<sup>202</sup> It only held that the FECA's limits on coordinated expenditures could not constitutionally be applied to independent expenditures.<sup>203</sup> The plurality avoided any statement that parties enjoy a constitutionally preferred position with respect to soft money.

Although the holding of *Colorado Republican I* does not directly apply to soft money limits, the distinction it makes between candidates and parties is central to categorizing soft money as a contribution or an expenditure.<sup>204</sup> If a candidate and party were identical, then soft money

---

<sup>197</sup> See 453 U.S. 182, 196–99 (1981).

<sup>198</sup> See 459 U.S. 197, 205–09 (1982) (upholding a ban on the solicitation of contributions from the public by PACs).

<sup>199</sup> See *supra* note 182 and accompanying parenthetical.

<sup>200</sup> See 143 CONG. REC. S. 9994 (1997) (testimony of Ronald Dworkin, Prof. of Jurisprudence and Fellow of Univ. College at Oxford University; Frank H. Sommer, Prof. of Law, New York Univ. School of Law; John Norton Pomeroy Prof. of Law, New York Univ. School of Law; Burt Neuborne, Legal Dir., Brennan Ctr. for Justice).

<sup>201</sup> See *Buckley v. Valeo*, 424 U.S. 1, 58–59 nn.66–67 (1976); see also *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n (I)*, 518 U.S. 604, 646 (1996) (Thomas, J., concurring in the judgment and dissenting in part) (“We did not in that case consider the First Amendment status of FECA’s provisions dealing with political parties”).

<sup>202</sup> See *Colo. Republican I*, 518 U.S. at 625–26.

<sup>203</sup> See *id.* at 608.

<sup>204</sup> See RICHARD BRIFFAULT, CAMPAIGN FINANCE, THE PARTIES, AND THE COURT: A COMMENT ON *COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE V. FEDERAL ELECTIONS COMMISSION* 23 (1996), reprinted in Richard Briffault, *Campaign Finance, the Parties, and the Court: A Comment on Colorado Republican Federal Campaign Committee v. Federal Elections Commission*, 14 CONST. COMMENT. 91 (1997).

restrictions would limit a candidate's contribution to herself.<sup>205</sup> This is an expenditure that is considered core First Amendment speech under *Buckley* doctrine.<sup>206</sup> Nevertheless, the *Colorado Republican I* plurality rejected the argument that "a party and its candidate are identical" as set forth by the concurring opinion.<sup>207</sup>

However, party and candidate interests frequently intertwine.<sup>208</sup> For instance, political campaigns are largely candidate-focused and candidate-driven.<sup>209</sup> Parties back candidates and provide them with financial and logistical support.<sup>210</sup> For their part, candidates run on party lines, belong to parties, are often active in party organizations, and are frequently identified in terms of their party membership.<sup>211</sup> One reason why political parties give soft money to a candidate rather than spending such funds on the candidate's behalf is that the candidate is often his or her own best advocate.<sup>212</sup> Soft money enables parties, as well as individuals, to communicate their views about the elections to the voters.<sup>213</sup> Further, the principal agenda of a political party is the election of candidates bearing the party label since a party's fate in an election is "inextricably intertwined" with that of its candidates.<sup>214</sup> Under this rationale, when a party donates soft money to a candidate, the party is making a First Amendment protected expenditure on the party itself.

Although a party and its candidate certainly have a "unique relationship,"<sup>215</sup> the *Colorado Republican I* Court correctly recognized that each party's interest is not identical.<sup>216</sup> Party committees have such a major stake in the electoral success of their nominees that true independence is extremely unlikely.<sup>217</sup> Yet parties do not entirely depend on candidate campaigns to publicize their values.<sup>218</sup> Parties often spend money to voice positions separate from urging the election or defeat of specific candidates.<sup>219</sup> These distinctive interests include the concern of party bureaucrats and professionals in maintaining the party as an organization,

---

<sup>205</sup> See *id.*

<sup>206</sup> See *id.*

<sup>207</sup> See *Colo. Republican I*, 518 U.S. at 622–23.

<sup>208</sup> See *id.* at 630 (Kennedy, J., concurring in part and dissenting in part) ("We have a constitutional tradition of political parties and their candidates engaging in joint First Amendment activity; we also have a practical identity of interests between the two entities during an election").

<sup>209</sup> See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 415–16 (2000) (Thomas, J., dissenting).

<sup>210</sup> See *id.* at 416 (Thomas, J., dissenting).

<sup>211</sup> See *id.*

<sup>212</sup> See *id.* (quoting *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 261 (1986) ("Individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction")).

<sup>213</sup> See *id.* at 416–17.

<sup>214</sup> See *Colo. Republican I*, 518 U.S. at 631 (Kennedy, J. concurring in judgment and dissenting in part).

<sup>215</sup> See *id.* at 648 (Stevens, J. dissenting).

<sup>216</sup> See *id.* at 622–23 (plurality opinion).

<sup>217</sup> See Briffault, *supra* note 204, at 25.

<sup>218</sup> See *id.*

<sup>219</sup> See *id.*

get-out-the-vote drives, voter registration, and party platform promotion at a convention.<sup>220</sup> Restrictions on soft money contributions may limit the ability of party committees to advance those particular interests.<sup>221</sup> As the political speech of a political association, soft money used by the party to advocate for itself or for a candidate qualify as expenditures and, thus, cannot be constitutionally limited.<sup>222</sup>

When political parties receive contributions and then spend them in ways that affect the outcome of their candidates' campaigns, there should be no constitutional problem with applying *Buckley's* supply-side regulations to contributions to parties.<sup>223</sup> Some soft money is spent on party-building activities, but a substantial proportion goes toward electing candidates. The parties "spend soft money as an adjunct to federal campaigns and for the purpose of influencing federal elections. That is the reality."<sup>224</sup> This reality was exposed throughout the Investigation Hearings before the Senate Governmental Affairs Committee in 1997.<sup>225</sup> Moreover, some reformers argue that even non-federal soft money spending influences federal elections by permitting party committees to conserve federal funds that can later be spent to support federal candidates. For these reasons, Justices Stevens and Ginsburg might be correct that "all money spent by a political party to secure the election of its candidate for the office of United States Senator [and, presumably, any other federal candidate] should be considered a 'contribution' to his or her campaign" and, therefore, be subject to limitation.<sup>226</sup>

## 2. *Close Scrutiny Applied to Soft Money Limits*

All government regulation of political speech, whether of contributions or expenditures, must satisfy the Supreme Court's close scrutiny test announced in *Buckley*. Although this test applies equally to contribution and expenditure regulations, in practice the restrictions on contributions by

<sup>220</sup> See, e.g., 2 U.S.C. § 431(8)(B)(xii) (stating FECA permits unregulated soft money contributions to a party for certain activities, such as voter registration and get-out-the-vote drives).

<sup>221</sup> Briffault, *supra* note 204, at 25.

<sup>222</sup> See *Colo. Republican I*, 518 U.S. at 637 (Thomas, J. concurring in the judgment and dissenting in part) (stating that "if an individual cannot be subject to such limits, neither can political associations be limited in their ability to give as a means of furthering their members' viewpoints").

<sup>223</sup> See Yarmish, *supra* note 41, at 1276.

<sup>224</sup> See *Campaign Finance Practices Hearings*, *supra* note 41 (testimony of Ann McBride, President, Common Cause; Donald J. Simon, Exec. V. President and General Counsel, Common Cause).

<sup>225</sup> See *id.* (stating that in the 1996 presidential election, both major parties spent enormous amounts of soft money on advertising—ostensibly to build the party's image, but really reinforcing themes of candidate campaigns); see also *Senate Investigation Hearings*, *supra* note 4, at 589 (testimony of Burt Neuborne, Legal Dir., Brennan Ctr. for Justice (stating that investigative reports revealed that in the 1996 presidential elections the Clinton campaign used Democratic National Committee soft money funds to run advertisements supporting the President)); Albert R. Hunt, *Congress Must Investigate All the Fund-Raising Scams*, WALL ST. J., Jan. 2, 1997, at 7 (reporting that the White House closely supervised the soft money fund-raising effort and that the Dole campaign also used party soft money in its advertising efforts, including a \$15 million ad).

<sup>226</sup> See *Colo. Republican I*, 518 U.S. at 648 (Stevens, J., dissenting).

individuals and political committees do not violate the First Amendment so long as they are “closely drawn” to match a “sufficiently important” government interest, whereas restrictions on independent expenditures are constitutionally invalid.<sup>227</sup> Contribution limits that satisfy these close scrutiny requirements are deemed constitutional.

a. *Sufficient Government Interest: Corruption or the Appearance of Corruption*

The only sufficient government interest for placing limits on political activity is preventing “corruption or the appearance of corruption.”<sup>228</sup> It may be possible, however, for an anti-corruption rationale to fail to provide a sufficient government interest in banning soft money at either stage of the two-part loophole.<sup>229</sup> First, it may be difficult for an individual contribution to corrupt a party due to the party’s amorphous structure.<sup>230</sup> American political parties, generally speaking, have numerous members with a wide variety of interests, for the purpose of succeeding in majoritarian elections.<sup>231</sup> Therefore, the influence of any one person or the importance of any single issue within a political party is significantly diffused.

Second, it may be difficult for a party to corrupt or coerce its candidate. Political parties try to influence candidate issue stances and seek to influence the way officials vote on legislation. Perhaps the achievement of this aim does not subvert the political process.<sup>232</sup> For those who oppose soft money reform, a “heavy burden on First Amendment rights is not justified by the threat of corruption at which it is assertedly aimed.”<sup>233</sup>

It seems more accurate, however, that corruption or the appearance of corruption threatens the integrity of our democracy at both stages of the soft money loophole. First, large individual, union, or corporate contributions may corrupt political parties. As for individual contributions,

<sup>227</sup> See *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n* (II), 533 U.S. 431, 466 (2001) (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 378, 387–89 (2000); *Buckley v. Valeo*, 424 U.S. 1, 58–59 (1976)).

<sup>228</sup> See *Buckley*, 424 U.S. at 25–26.

<sup>229</sup> See *Colo. Republican I*, 518 U.S. at 631 (Thomas, J., concurring in the judgment and dissenting in part) (stating “the anti-corruption rationale that we have relied upon in sustaining other campaign finance laws is inapplicable where political parties are the subject of such regulation”). See also Kirk J. Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities*, 56 *FORDHAM L. REV.* 53, 105–06 (1987).

<sup>230</sup> See Nahra, *supra* note 229, at 97–98 (citing FRANK SORAUF, *PARTY POLITICS IN AMERICA* 15–18 (5th ed. 1984)).

<sup>231</sup> See Nahra, *supra* note 229 at 98.

<sup>232</sup> See *Colo. Republican I*, 518 U.S. at 646 (Thomas, J., concurring in the judgment and dissenting in part) (quoting *Federal Election Comm’n v. Nat’l Conservative Pol. Action Comm.*, 470 U.S. 480, 498 (1984)).

The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by [political groups] can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.

<sup>233</sup> See *Colo. Republican I*, 518 U.S. at 648.

only a relatively small number of wealthy donors contribute significant amounts of soft money. For example, approximately sixty contributors gave the Republican National Committee at least \$100,000 apiece in soft money in the 1991–92 campaign, while the Democrats received gifts of more than \$100,000 from seventy two donors.<sup>234</sup> No doubt, parties take special note of these large contributions, especially when they come from a particular industry, such as the tobacco industry. Between January 1, 1995 and June 30, 1996, well before the peak months of the 1996 presidential campaign, national Republican committees received \$1.6 million from Phillip Morris Co.; \$970,000 from RJR Nabisco; \$448,000 from U.S. Tobacco; \$400,000 from Brown and Williamson; and \$300,000 from the Tobacco Institute.<sup>235</sup> These large sums cannot be diffused in an amorphous party structure.

Second, by distributing soft money to the candidate, political parties can serve as a conduit for narrower and potentially corrupting interests.<sup>236</sup> A party maintains influence over candidates and elected officials “by virtue of its power to spend.”<sup>237</sup> It can use this influence by making soft money distributions contingent on compliance with donor demands. Building on the previous tobacco illustration, national Republican officials pressured state officeholders to be more attentive to tobacco industry interests after receiving large soft money contributions from that industry.<sup>238</sup> Albeit, party influence does not rise to the level of corruption unless such influence is improper or undue.<sup>239</sup> While the Court has never defined these terms, *Buckley* and *Nixon* clearly held that large contributions given to secure a political quid pro quo undermine the integrity of our representative democracy.<sup>240</sup> To the extent that large soft money contributions result in corruption or the appearance of corruption, Congress may regulate the loophole.<sup>241</sup>

---

<sup>234</sup> HERBERT E. ALEXANDER & ANTHONY CORRADO, FINANCING THE 1992 ELECTION 155 (1995).

<sup>235</sup> See Charles R. Babcock, *Top ‘Soft Money’ Contributors to Republican Party Committees: Jan. 1, 1995–Jan. 30, 1996*, WASH. POST, Aug. 14, 1996, at A19.

<sup>236</sup> See *Colo. Republican II*, 533 U.S. at 458; see also Briffault, *supra* note 204, at 27–28 (arguing that conduit corruption is at heart an issue with a strong empirical component, “but Justice Thomas’s opinion [in *Colorado Republican I*] reflects more armchair political science theorizing than any familiarity with campaign finance data”).

<sup>237</sup> See *Colo. Republican I*, 518 U.S. at 648 (Stevens, J., dissenting).

<sup>238</sup> See Briffault, *supra* note 204 (citing Noah, *GOP’s Chief Pushed Pro-Tobacco Bill at State Level, Arizona Lawmaker Says*, WALL ST. J., Feb. 20, 1996, at A20 (RNC National Chairman Haley Barbour phoned the Speaker of the Arizona House of Representatives to pressure him into supporting a pro-tobacco bill) and citing *Tobacco Ties*, WALL ST. J., March 1, 1996, at A1 (reporting that Barbour called Texas Governor George W. Bush’s office to check on status of a bill to restrict city anti-smoking ordinances)).

<sup>239</sup> See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 378, 389 (2000).

<sup>240</sup> See *id.* at 388 (quoting *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976) (internal quotations omitted)).

<sup>241</sup> See *id.* at 388–89 (quoting *Buckley*, 424 U.S. at 27).

b. *Closely Drawn: Can Limit Contributions, Not Expenditures*

Laws regulating political speech must be closely drawn to the prevention of corruption or the appearance of corruption. Anti-reformers argue that soft money limits are not closely drawn to that interest, citing the *Buckley* and *Colorado Republican I* opinions for support. These cases, however, do not prohibit soft money regulation. The result of a soft money ban would be to require all political contributions to comply with FECA's hard money limitations. Hard money limits have already been upheld as closely drawn in *Buckley* and *Nixon*.

Opponents of the Bipartisan Campaign Finance Reform Act may argue that a complete ban on soft money violates the First Amendment in two ways. First, they may argue that the ban impermissibly limits the voices of larger contributors so those smaller contributors can be heard. With one exception, the Court has never wavered in its view that government may not restrict the speech of some to enhance the relative voice of others.<sup>242</sup> That exception is *Austin v. Michigan Chamber of Commerce*, where the Court held that the government could restrict corporate funds from entering the political process to enhance the public's voice.<sup>243</sup> However, the soft money ban not only increases the voice of individuals over corporations, but also enhances the voice of individuals with smaller bank accounts over individuals with larger bank accounts.

Second, opponents will argue that the ban also violates the First Amendment by impermissibly enhancing the voice of incumbents over the voice of challengers.<sup>244</sup> Challengers often rely on soft money funding from political parties in order to launch their campaigns.<sup>245</sup> In addition, challengers not known to the public may face more difficulty in raising hard money funds when compared to incumbents who can capitalize on name recognition.<sup>246</sup> Further still, challengers often rely on last-minute attack ads that are often funded with soft money.<sup>247</sup> The soft money ban perhaps poses too low a contribution limit, significantly increasing the reputation-related and media-related advantages of incumbency, thereby insulating legislators from electoral challenge.<sup>248</sup>

Both the argument that the soft money ban impermissibly raises the voice of small contributors over large contributors and the argument that the soft money ban impermissibly raises the voice of incumbents over challengers share the same flaw. *Buckley* rejected "the concept that the government may restrict the speech of some elements in our society in

---

<sup>242</sup> See *Buckley*, 424 U.S. at 48–49; but see *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657–61 (1990).

<sup>243</sup> See *Austin*, 494 U.S. at 652.

<sup>244</sup> See *Buckley*, 424 U.S. at 48–49. But cf. *Austin*, 494 U.S. at 657–61.

<sup>245</sup> See Janet Hook, *Uphill Fight Becomes an Avalanche*, L.A. Times, Mar. 21, 2002, at A22.

<sup>246</sup> See *id.*

<sup>247</sup> See *id.*

<sup>248</sup> See e.g., *Nixon*, 528 U.S. at 404 (stating that "imposing too low a contribution limit, significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates legislators from effective electoral challenge").

order to enhance the relative voice of others.”<sup>249</sup> That comment, however, was made within the context of striking down an “expenditure ceiling.”<sup>250</sup> The Court actually permits the setting of contribution limits as a means of equalizing electoral debate. This follows the view that “*Buckley*’s holding seems to leave the political branches broad authority to enact laws regulating contributions that take the form of soft money.”<sup>251</sup>

Like *Buckley*, *Colorado Republican I* does not preclude soft money regulation.<sup>252</sup> In that case, the Court held that when a political party spends money not coordinated with its candidates, those *expenditures* could not be restricted. Anti-reformers incorrectly interpret this to mean that Congress may not limit *contributions* to political parties. “Any suggestion that *Colorado Republican I* casts doubt on the constitutionality of a soft money ban is flatly wrong.”<sup>253</sup> Only Justice Thomas’s dissent provides support for anti-reformers.<sup>254</sup> In arguing against *Buckley*’s constitutional distinction between contributions and expenditures, Justice Thomas contends that limits on both contributions and expenditures violate the First Amendment.<sup>255</sup> Moreover, only two other Justices—Kennedy and Scalia—endorse overruling *Buckley* in favor of a more unregulated system of campaign finance. In fact, the Court recently reaffirmed *Buckley*’s contribution-expenditure distinction by a solid six-vote majority in both *Nixon* and *Colorado Republican II*.<sup>256</sup>

A more relevant Supreme Court decision pertaining to soft money regulations is *Austin*, in which the Court held that Congress could prevent corporations from influencing the electoral process by forbidding both contributions and independent expenditures from general corporate treasuries.<sup>257</sup> It seems absurd that federal law, which gives Congress the power to prevent corporations from contributing money directly to a candidate and expenditures on behalf of a candidate, would withhold Congress’ power to prevent corporations from pouring unlimited funds into a candidate’s political party in order to buy preferred access to that candidate after the election.<sup>258</sup> Limiting the soft money loophole would better conform to standards set by the longstanding and constitutionally sound ban on corporate and union contributions in federal elections and the

<sup>249</sup> See *Buckley*, 424 U.S. at 48.

<sup>250</sup> See *id.*

<sup>251</sup> *Nixon*, 528 U.S. at 404 (Breyer, J., concurring).

<sup>252</sup> See e.g., *Constitutional Issues Raised by Reform of Campaign Finance: Before Senate Comm. on Governmental Operations*, 105th Cong. (1997) (testimony of Burt Neuborne, Legal Dir., Brennan Center for Justice); *id.* at 340 (testimony of Edward H. Crane, President, Cato Institute); *id.* at 601–02 (statement of Roger Pilon, Senior Fellow, Cato Inst.). Cf. Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. Legis. 179, 195–96 (1998).

<sup>253</sup> 143 CONG. REC. S1002, *supra* note 170.

<sup>254</sup> See Yarmish, *supra* note 41, at 1288–89.

<sup>255</sup> See *Colo. Republican I*, 518 U.S. at 640–44 (1996) (Thomas, J., concurring in part and dissenting in part).

<sup>256</sup> See The Brookings Inst., *Recent Developments in Campaign Finance Regulation*, at [http://www.brookings.edu/gs/cf/headlines/coloradoII\\_analysis.htm](http://www.brookings.edu/gs/cf/headlines/coloradoII_analysis.htm) (last visited Apr. 9, 2003).

<sup>257</sup> See *Austin*, 494 U.S. at 657–61.

<sup>258</sup> 143 CONG. REC. S10002 (1997).

federal laws that reduce the size of individual contributions to non-corrupting amounts.<sup>259</sup>

Limiting soft money would subject all contributions to the FECA's closely-drawn hard money requirements. Contribution limits do not stymie political speech, but protect the integrity of the electoral process—"the means through which a free society democratically translates political speech into concrete governmental action."<sup>260</sup> By limiting the size of the largest contributions, those with smaller financial resources can better influence the electoral process.<sup>261</sup> The legislators who impose these restrictions seek to build public confidence in the electoral process, broaden the base of a candidate's meaningful financial support, and thus encourage public participation and open discussion—a purpose of the First Amendment.<sup>262</sup> In this light, controlling the loophole permits all supporters to contribute similar amounts of money in an attempt to make the electoral process more democratic and more equitable. Therefore, under present case law, the soft money ban envisaged in the Bipartisan Campaign Finance Reform Act of 2001 (i.e. a requirement that all contributions to parties be subject to FECA's contribution limits) passes constitutional muster.<sup>263</sup>

#### IV. CONCLUSION

"The amount and influence of soft money flooding into our campaign system is inexorably increasing, causing an erosion of public confidence in the integrity of our government and electoral system."<sup>264</sup> Those who seek to preserve the soft money loophole argue that spending money on candidates and parties is political speech worthy of First Amendment protection. They claim that any law that limits soft money expenditures is unconstitutional. While the government may not limit political expenditures, it can limit political *contributions*, according to the Supreme Court in *Buckley*, *Colorado Republican I*, *Colorado Republican II*, and *Nixon*.

The soft money loophole facilitates political contributions through a two-step process. Banning either step would close the loophole. First, soft money flows from individuals to state parties. Laws that already cap an individual's hard money contributions to candidates could be extended to include individual contributions to political parties. Second, state parties distribute soft money funds in various ways. Soft money spent on the party itself or independently from the candidate's campaign is an expenditure protected by the First Amendment. All other soft money may be treated as a contribution and limited by the government.

---

<sup>259</sup> *Id.*

<sup>260</sup> *Nixon*, 528 U.S. at 401.

<sup>261</sup> *See id.*

<sup>262</sup> *See id.*

<sup>263</sup> *See* Yarmish, *supra* note 41, at 1289.

<sup>264</sup> *Id.*

Laws limiting soft money contributions must survive the Supreme Court's two-fold test of close scrutiny. First, the regulation must further a sufficient government interest. Prevention of corruption or the appearance of corruption is a sufficient interest to support a soft money ban. Second, that regulation must be closely drawn. At first glance, limiting or banning soft money may seem over-broad, but constraining soft money would subject all political contributions to hard money limits. The Supreme Court has consistently upheld these limits as closely drawn. Therefore, under current case law, a soft money ban as envisaged in the Bipartisan Campaign Finance Reform Act of 2001 will pass constitutional muster. The days of large soft money contribution are numbered. Political elephants and donkeys are simply going to have to start paying attention to the little critters in order to raise the big bucks.