NOTES

CAMPAIGN FINANCE REFORM AFTER *COLORADO REPUBLICAN II*: THE CONSTITUTIONALITY OF THE CAMPAIGN REFORM ACT'S SOFT MONEY BAN

I. INTRODUCTION

In the wake of the successful enactment of the Bipartisan Campaign Reform Act of 2002 ("Campaign Reform Act" or "Act"), Congress remains divided over implementing campaign finance reform.[1] The Campaign Reform Act, originating with the McCain-Feingold bill in the Senate[2] and the Shays-Meehan bill in the House,[3] overcame entrenched political opposition, buoyed by the publicity of Senator John McCain's presidential campaign run and the Enron scandal.[4] Shortly after President George W. Bush reluctantly signed the bill into law, Senator Mitch McConnell filed a suit challenging the Act's constitutionality.[5] Anticipating constitutional challenges, the Act expressly authorizes an expedited appellate review process, which will enable McConnell's challenge to reach the Supreme Court more quickly.[6]

This challenge to the Campaign Reform Act will go before a Supreme Court that is also divided on the issue of campaign finance reform. In the Court's most recent campaign finance decision, *Federal Election Commission v. Colorado*

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[1] *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (amending 2 U.S.C. § 431 et seq. (2000)); *see also* Thomas B. Edsall, *Lawmakers Embracing 'Stealth PAC' Advantage: Committees Allow Relatively Unregulated Fundraising*, WASH. POST, Apr. 11, 2002, at A4 (reporting that the House attempted to pass a bill relaxing campaign finance disclosure requirements shortly after the enactment of the Campaign Reform Act).

[2] Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong. (2001).

[3] Bipartisan Campaign Finance Reform Act of 2001, H.R. 2356, 107th Cong. (2001).

[4] *See* Alison Mitchell, *House Backs Broad Change in Financing of Campaigns: Fast Senate Action Sought*, N.Y. TIMES, Feb. 15, 2002, at A1.

[5] David E. Rosenbaum, *Foes of New Campaign Law Bring Two Suits Against It*, N.Y. TIMES, Mar. 28, 2002, at A22.

[6] *See id.*

Republican Federal Campaign Committee ("*Colorado Republican II*"), the Court narrowly approved governmental restrictions on party coordinated expenditures.[7] This 5-4 decision continued the Court's ideological split over campaign finance.[8] In *Colorado Republican II*, the Court reaffirmed, but also recharacterized, its commitment to the oft-maligned *Buckley v. Valeo*[9] and the two-tiered contribution/expenditure approach to campaign finance.[10] *Colorado Republican II* has paved the way for the Court to approve the Campaign Reform Act's soft money ban by expansively interpreting two of *Buckley's* exceptions to strict First Amendment protection of campaign financing: campaign contributions and anti-corruption interests.[11]

Shaped by courts, legislatures, and regulatory commissions, the current body of federal campaign finance law reflects an erosion of compromises made between the proponents and opponents of such laws.[12] Congress' subordination to the Supreme Court's central role in campaign finance legislation originated with the defining campaign finance case, *Buckley v. Valeo*.[13] In *Buckley*, the Supreme Court reviewed the constitutionality of the Federal Election Campaign Act ("FECA"),[14] Congress' first attempt to comprehensively regulate campaign

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[7] *See* 533 U.S. 431 (2001); Charles Lane, *Court Tests Likely for Shays-Meehan: 'Issue Ad' Rules Viewed as Vulnerable*, WASH. POST, Feb. 16, 2002, at A4 (noting that supporters for reform argue that the logic of *Colorado Republican II* may support the legality of a soft money ban).

[8] *See* Adam Clymer, *Justices Uphold Curbs on Coordinated Political Spending*, N.Y. TIMES, June 26, 2001, at A15 (summarizing the split between the majority and the dissent in *Colorado Republican II*).

[9] 424 U.S. 1 (1976); *see* Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 380 (2000) (reflecting the Court's division with six justices signing dissenting and concurring opinions ranging from Justice Stevens' position that money is property rather than speech to Justice Thomas' position that all campaign financing is strictly protected political speech); *see* Richard Briffault, Nixon v. Shrink Missouri Gov't PAC: *The Beginning of the End of the Buckley Era?*, 85 MINN. L. REV. 1729, 1751-56 (2001).

[10] *See Colorado Republican II*, 533 U.S. at 438-43 (qualifying the simplicity of the *Buckley* distinction between contributing and spending).

[11] *See id.* at 464-65 (finding that the *Buckley* distinction between pure contributions and pure expenditures was inappropriate because coordinated expenditures invite corruption into campaigns).

[12] *See* Kenneth P. Doyle, *Flood of Money, Erosion of Legal Limits Set Scene for Campaign Finance Debate*, 69 U.S.L.W. 2451 (2001) (reporting increasing amounts of money in politics as the rules established by the political parties, the Federal Election Commission, the courts, and Congress erode).

[13] 424 U.S. 1; *see* Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1290, 1394-95 (1994) (describing the broad constitutional contours and uncertainties of *Buckley*, the "most important" and "most vilified" campaign finance reform case).

[14] Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-55 (2000)).

financing.[15] By finding certain provisions of FECA in violation of the Constitution and other provisions permissible, *Buckley* shaped the scope of future Congressional regulatory and reform efforts.[16]

The resilience of *Buckley* stems from its "compromise" position in the debate between free expression and political equality.[17] On one hand, campaign money spent directly on public communication is considered a component of political debate and, therefore, requires First Amendment protection.[18] On the other hand, campaign spending is also considered a form of participation in the democratic electoral process, analogous to voting, and can be subject to "one person, one vote" restraints.[19] Thus, restraining campaign financing, when viewed as a form of political expression, violates First Amendment liberties, but such restrictions are necessary for equal access to the electoral process when campaign financing is regarded as a means of voting.[20] The *Buckley* Court endorsed the political speech aspect of campaign contributions[21] and, though less clearly, also endorsed an equal access aspect by endorsing the prevention of a legislator's corruption or unequal responsiveness to wealthy contributors.[22]

Buckley and its progeny continue to constrain the campaign finance combination of money, politicians, and the democratic process.[23] Post-*Buckley* providers of campaign financing have responded to the constitutionally constrained scope of campaign finance regulations by diverting money into unregulated channels.[24] The problem of massive, unlimited soft money contributions has persisted as hard money contributions and has become

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[15] *See Buckley*, 424 U.S. at 6.

[16] *See* Kruse v. City of Cincinnati, 142 F.3d 907, 911 (6th Cir. 1998) ("Any judicial consideration of the constitutionality of campaign finance reform legislation must begin and usually ends with the comprehensive decision in *Buckley*.").

[17] *See* Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 667 (1997) (arguing that *Buckley's* inconsistencies arise from a compromise between two traditions: equality in democratic elections and liberty in political speech).

[18] *Id.*

[19] *Id.*

[20] *See id.*

[21] *See Buckley*, 424 U.S. at 19 (finding that expensive communication methods, such as television and radio, are necessary for effective political campaign speech).

[22] *See id.* at 26-27 (finding it constitutionally sufficient to limit the corrupting influence of wealth upon the system of representative democracy).

[23] *See* Dana Milbank, *Tactics & Theatrics Color "Decision Day,"* WASH. POST, Feb. 14, 2002, at A1 (reporting that the high stakes campaign finance vote would "determine the survival of the parties, freedom of speech, the fate of democracy and, not least, their own reelections").

[24] *See* Senator Russell D. Feingold, *Representative Democracy Versus Corporate Democracy: How Soft Money Erodes the Principle of "One Person, One Vote,"* 35 HARV. J. ON LEGIS. 377, 380 (1998) (stating that soft money was created by "the evolution of party fundraising strategies in response to Federal Election Commission advisory opinion").

increasingly monitored and limited.[25] Congress' soft money ban must eventually confront *Buckley* and its progeny's mixed protections favoring free speech and fighting corruption.[26]

This Note contends that, in light of the circumvention theory refined in *Colorado Republican II*,[27] the Campaign Reform Act's soft money ban should be found constitutional. Part II of the Note provides an overview of the constitutional doctrines that emerged from *Buckley v. Valeo*. Part III describes the subsequent development of campaign finance statutes and regulatory policy, the soft money loopholes that emerged in the wake of FECA regulations of hard money, and the Campaign Reform Act's modest efforts to stem soft money's circumvention of finance regulations. Part IV describes post-*Buckley* decisions and their relevance to a broad approach to anti-corruption theory. Part V describes the Court's most recent decision, *Colorado Republican II*. Part VI argues that the Campaign Reform Act's soft money ban may ultimately survive constitutional scrutiny by means of *Colorado Republican II*'s anti-corruption theory: corruption via the circumvention of valid limits upon contributions.

II. THE *BUCKLEY* DOCTRINE: DIFFERENTIATING BETWEEN CONTRIBUTIONS AND EXPENDITURES AND BETWEEN PREVENTING CORRUPTION AND FOSTERING EQUALITY

Although a future Court may eventually overturn the much-criticized *Buckley* decision, the current Supreme Court will likely judge the Campaign Reform Act's soft money ban according to the standards of *Buckley* and its progeny.[28] In *Buckley*, the Court established a two-tiered contribution/expenditure approach to campaign finance reform that partially invalidated FECA.[29] Appellants in *Buckley*, consisting of federal political candidates, potential contributors, political parties, and political action committees ("PACs"), challenged FECA's limits upon campaign financing and its reporting and disclosure provisions as violations of First Amendment rights to free speech and association.[30]

The *Buckley* Court held that the First Amendment protects political campaign spending as a component of political expression and association.[31] The Court then distinguished types of campaign finance regulations subject to less rigorous First Amendment scrutiny.[32] These distinctions carved out a constitutional role for

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[25] *See* Sunstein, *supra* note 13, at 1407-09.

[26] *See* Lane, *supra* note 7.

[27] 533 U.S. at 459-60 (defining circumvention theory as the corrupting incentive to forego regulated campaign fundraising methods via available unregulated methods).

[28] *See, e.g., Buckley*, 424 U.S. 1; Lane, *supra* note 7.

[29] *See Buckley*, 424 U.S. at 30, 58; *see also* Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-55 (2000)).

[30] *Buckley*, 424 U.S. at 11.

[31] *See id.* at 14-15.

[32] *See id.* at 28 (permitting contribution limits because they address the "actuality and potential for corruption" without drastically limiting political expression and association);

campaign finance reform but limited such efforts with a patchwork of constitutional protections.[33]

The Court, invoking mass media realities, concluded that money spent in political campaigns was a necessary component of political speech.[34] "The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech."[35] The Court then withdrew the First Amendment's stringent protection from three types of political monetary speech: contributions, express advocacy expenditures, and spending resulting in corruption or the appearance of corruption.[36]

The Court distinguished contributions from expenditures.[37] Contributions are payments made to a candidate, who will transform those payments into direct political speech to the electorate.[38] Expenditures are the funds directly spent on political speech made before the electorate.[39]

Buckley held that FECA's regulation of campaign contributions was generally permissible but that the expenditure limitations were unconstitutional.[40] Expenditures are at the core of First Amendment freedoms of expression and association because they facilitate and effectively amplify direct communication with the electorate.[41] Contributions, on the other hand, are a lesser form of political expression because they express the contributor's support for a candidate without providing specific or direct input into the campaign's public dialogue.[42]

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id. at 80-82 (permitting disclosure requirements for independent contributions and expenditures for communications expressly advocating the election or defeat of an identified candidate because they serve an important public information interest in political campaigns and are minimally intrusive upon association rights).

[33] *See id.* at 143 (concluding that the contribution limits and disclosure requirements are constitutional but limits upon expenditures are unconstitutional).

[34] *See id.* at 19 ("[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money."); *id.* at 288 (Marshall, J., concurring in part and dissenting in part) ("One of the points on which all members of the Court agree is that money is essential for effective communication in a political campaign.").

[35] *Buckley*, 424 U.S. at 19.

[36] *See id.* at 23, 27, 80; Briffault, *supra* note 9, at 1732-33.

[37] *See Buckley*, 424 U.S. at 23 (summarizing the first, and therefore predominant, distinction within the Act as between expenditures and contributions).

[38] *See id.* at 21. *Cf.* 2 U.S.C. § 431(8)(A)(i)(2000) (defining contribution as including "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal Office").

[39] *See Buckley*, 424 U.S. at 19. *Cf.* 2 U.S.C. § 431(9)(A)(i)(2000) (defining expenditure as including "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office").

[40] *See Buckley*, 424 U.S. at 30, 58.

[41] *See id.* at 19, 22, 39.

[42] *See id.* at 21.

The Court also distinguished the government's interest in preventing corruption from its interest in ensuring political equality.[43] In the shadow of Watergate, the Court approved the prevention of corruption and even the appearance of corruption as justification for regulating campaign contributions.[44] While the Court thus condemned the improper influence of the wealthy upon a representative democracy, the Court rejected the more naked justification of ensuring political equality.[45] The Court stated that "[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[46]

Finally, the Court distinguished disclosure requirements for campaign-related expenditures from non-campaign-related expenditures.[47] The Court held that the government could only require disclosure of independent expenditures for communications with "express words of advocacy," such as "vote for" and "Smith for Congress."[48] This type of communication has come to be known as "express advocacy."[49] All other political communications whose content is not expressly campaign-related is now known as "issue advocacy."[50] The Court reasoned that the government's interest in regulating campaigns does not specifically justify its interference with the general advocacy of issues.[51] Thus, issue advocacy is wholly protected political speech.[52]

III. FEDERAL STATUTORY LAW AND POLICIES: FECA, THE FEDERAL ELECTION COMMISSION, AND THE DEVELOPMENT OF SOFT MONEY LOOPHOLES

The Campaign Reform Act's soft money ban attempts to repair a major breach in the existing body of campaign finance law. In the past decade, both legal scholars and legislators have developed a variety of proposals in favor of a soft money ban. Within the last seven years, sponsors in Congress have made several attempts to enact a law banning soft money.[53] Senators McCain and Feingold sponsored their campaign finance bill repeatedly, first introducing it in 1996.[54]

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[43] *See id.* at 47-49.

[44] *See id.* at 26-27 (referring to "the deeply disturbing examples surfacing after the 1972 election" when approving the anti-corruption purpose of limiting the improper influence of wealth).

[45] *See Buckley*, 424 U.S. at 48-49.

[46] *Id.*

[47] *See id.* at 80.

[48] *See id.* at 44 n.52.

[49] *See* Scott E. Thomas & Jeffrey H. Bowman, *Is Soft Money Here to Stay Under the "Magic Words" Doctrine?*, 10 STAN. L. & POL'Y REV. 33, 34 (1998).

[50] *See* Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. LEGIS. 179, 185-86 (1998).

[51] *See Buckley*, 424 U.S. at 43-44.

[52] *See id.*

[53] Mitchell, *supra* note 4.

[54] Feingold, *supra* note 24, at 383 n.17.

The current Campaign Reform Act is the product of the 2001 McCain-Feingold bill, paralleled in the House by the Shays-Meehan bill.[55] To regulate campaign financing more effectively and to deter the unregulated rerouting of campaign money, the Act reaches many activities, including soft money contributions. The Act bans soft money contributions to national political party committees by subjecting all contributions to FECA's hard money restrictions.[56] The Act also prohibits federal officeholders and candidates from soliciting, receiving, transferring, or spending soft money.[57]

Many other federal campaign finance restrictions are found in FECA and the regulatory policies of the Federal Election Commission ("FEC"). Although *Buckley* invalidated FECA's limits on campaign spending by candidates and independent expenditures by party committees on behalf of their candidates, the Court sustained other provisions as constitutional.[58] Individual contributions to a particular federal candidate may not exceed $1,000 per election year.[59] An individual's contribution to a national political party committee is limited to $20,000 per year,[60] and contributions to any other political committee are limited to $5,000 per year.[61] An individual's total contributions for the year may not exceed $25,000.[62] Political committees, including PACs, may not contribute more than $5,000 per election to a candidate,[63] not more than $15,000 to a national political party,[64] and not more than $5,000 to any other political committee in a calendar year.[65] This regulated form of campaign funding is known as "hard money."[66]

"Soft money," in contrast, describes contributions to political parties from wealthy individuals in amounts greater than that allowed by FECA or from sources otherwise prohibited from making federal campaign contributions, such as corporations and labor unions.[67] The soft money loophole developed as

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[55] *See* Pub. L. No. 107-155, 116 Stat. 81 (2002).

[56] 2 U.S.C. § 441i(a) (2000).

[57] *Id.* § 441i(e).

[58] *See Buckley*, 424 U.S. at 143.

[59] 2 U.S.C. § 441a(a)(1)(A).

[60] *Id.* § 441a(a)(1)(B).

[61] *Id.* § 441a(a)(1)(C).

[62] *Id.* § 441a(a)(3).

[63] *Id.* § 441a(a)(2)(A).

[64] 2 U.S.C. § 441a(a)(2)(B).

[65] *Id.* § 441a(a)(2)(C).

[66] JOSEPH E. CANTOR, SOFT & HARD MONEY IN CONTEMPORARY ELECTIONS: WHAT FEDERAL LAW DOES & DOES NOT REGULATE (CRS Report 97-91, 2001), *available at* http://www.cnie.org/nle/crsreports/government/gov-35.cfm.

[67] *See* 2 U.S.C. § 441b(a) (prohibiting corporations and labor unions from making contributions or expenditures "in connection with any election to any political office"). Unlike the individual contribution limits enacted in the FECA amendments of 1974, corporations were barred from making campaign contributions by the Tillman Act of 1907, ch. 420, 34 Stat. 846, and labor unions were barred by the Smith-Connally Act within the

Congress and the FEC responded to complaints from political parties that FECA-limited campaign contributions were necessarily focused upon television advertising to the detriment of voter registration drives and other grassroots activities.[68] In 1979, Congress amended FECA to allow state and local parties to spend unlimited amounts on certain activities, such as voter registration campaigns and the production of campaign materials for volunteer grassroots activities.[69]

The FEC, in a series of opinions, also designated activities whose cost could be divided between hard and soft money because those activities benefited both state candidates unregulated by FECA and federal candidates.[70] Thus, soft money could partially pay for administrative expenses like rent and salaries for parties working to win both state and federal elections,[71] fund-raising events collecting federal and state funds,[72] and grassroots activities such as voter registration drives.[73]

In the 2000 election cycle, the Republican and Democratic parties raised $1.2 billion, which included about $500 million of soft money.[74] The soft money total was nearly double the amount, $262 million, raised in the 1996 election cycle.[75] This, in turn, was three times more soft money than the $86 million raised in the 1992 election cycle.[76] When other categories of funding are added, such as funding for issue ads and PAC funding not directly given to candidates, spending for the 2000 federal campaign is estimated at nearly $4 billion.[77] In comparison, a total of $2.8 billion was spent in the 1996 federal campaign cycle.[78] Soft money is the only category of party funding that has grown since the last election.[79]

War Labor Disputes Act, ch. 144, 57 Stat. 163 (1943).

[68] *See* Daniel M. Yarmish, Note, *The Constitutional Basis for a Ban on Soft Money*, 67 FORDHAM L. REV. 1257, 1267 (1998).

[69] *See* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1354 (1980) (codified as amended at 2 U.S.C. §§ 431(8)(B), (9)(B) (listing what the broad contribution and expenditure definitions do not include)).

[70] *See* 1978-10 Op. Federal Election Comm'n.

[71] 11 C.F.R. § 106.5(a)(2)(i) (2002).

[72] *Id.* § 106.5(a)(2)(ii).

[73] *Id.* § 106.5(a)(2)(iii).

[74] *See* Federal Election Commission, *FEC Reports Increase in Party Fundraising for 2000* (May 15, 2001), *available at* http://www.fec.gov/press/051501partyfund/051501partyfund.html; *see also* Doyle, *supra* note 12, at 2451.

[75] *See id.*

[76] *See* Federal Election Commission, *National Party Non-Federal Activity 1992-1996*, *available at* http://www.fec.gov/finance/softsum.htm (last modified Mar. 18, 1997) (tabulating total Democratic & Republican receipts of non-federal, or soft, money); *see also* Yarmish, *supra* note 68, at 1269.

[77] *See* Doyle, *supra* note 12.

[78] *See id.*

[79] *See id.*

The growth of issue ads in the past decade has fueled the growth of soft money solicitation and spending. According to *Buckley*, issue advocacy is strictly protected political speech.[80] Beginning with the elections of 1992, political action groups began to aggressively use such advocacy to influence elections.[81] According to one study of the 2000 election, media advertising was the largest single use for soft money (almost forty percent) while only 8.5% of soft money went to mobilizing voters.[82] Consequently, the intertwined problems of issue ads and soft money are thus the main focus of reform in the Campaign Reform Act.[83]

IV. POST-*BUCKLEY* DECISIONS AND THE HALTING DEVELOPMENT OF THE ANTI-CORRUPTION JUSTIFICATION FOR CAMPAIGN FINANCE RESTRAINTS

Until recently, Supreme Court cases subsequent to *Buckley* did little to shift the balance between free speech and equal access created with the contribution/expenditure distinction and corruption justification. Post-*Buckley* cases have, however, narrowly addressed the unique status of groups central to the soft money problem: corporations, political parties, and PACs.[84] The threat of corruption or the appearance of corruption, central to an argument for a soft money ban, was only given practical scope in *Nixon v. Shrink Missouri Government PAC*.[85]

The Court's disfavor of the corrosive influence of concentrated corporate wealth has been muted by its hands-off approach in the absence of a direct contribution to the candidate. The Court protects corporate and PAC spending for political speech because the value of speech "does not depend on the identity of its source, whether corporation, association, union, or individual."[86] The Court, however, has also indicated that the unique legal and economic characteristics of corporations contribute to the appearance of corruption by the

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[80] *See Buckley*, 424 U.S. at 43-44.

[81] *See* Smith, *supra* note 50, at 183.

[82] Press Release, Brennan Center for Justice, Need for Campaign Finance Reform More Urgent Than Ever, According to New Study by the Brennan Center for Justice (Feb. 4, 2002), *available at* http://www.brennancenter.org/presscenter/pressrelease_2002_0204.html (summarizing key findings of the new study on campaign advertising on television, *Buying Time 2000*).

[83] *See* Lane, *supra* note 7; Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

[84] *See, e.g.*, FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986) (addressing FECA restrictions upon corporate campaign expenditures); Cal. Med. Ass'n v. FEC, 453 U.S. 182 (1981) (addressing contributions to political action committees); Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996) ("*Colorado Republican I*") (affirming political party's freedom to make unlimited independent campaign expenditures).

[85] *See* 528 U.S. 377 (2000).

[86] First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 (1978) (rejecting a ban on corporate issue advocacy regarding a voter referendum).

amassing of large contributions.[87]

In another divided message, the Court found that the evasion of contribution limits justifies regulations, but that there is no threat of corruption if the money does not go directly to the candidate.[88] The Court invalidated a regulatory limit on a PAC's spending to promote a candidate when the money did not directly support the candidate.[89] Nonetheless, the Court upheld a limit on the amount of money an individual may give a PAC because the limit was necessary to prevent the evasion of contribution limits.[90] In another case concerning donor evasion of contribution limits, *Colorado Republican I*, the Court considered and rejected a "circumvention" theory of corruption.[91]

In *Shrink Missouri*, the Court applied a less exacting standard to a state's limits on contributions to candidates and opened the door to greater regulation of campaign financing in order to prevent corruption.[92] Respondents, a PAC, contended that the state failed to show empirical evidence of corruption or the perception of corruption among Missouri voters.[93] The Court rejected this claim and clarified that the *Buckley* standards do not speak to what evidence "may be necessary as a minimum."[94]

The *Shrink Missouri* Court focused on the government's interest in preventing corruption or the appearance of corruption. While the Court rejected "mere conjecture" of corruption, they relied upon a state senator's affidavit, newspaper articles, and scandals reported in Eighth Circuit opinions to support the government's claim of corruption.[95] Furthermore, a statewide vote in favor of campaign finance law indicated a widespread public perception of corruption.[96] With this limited amount of proof, the Court found that "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."[97]

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[87] *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 660 (1990) (upholding a state ban on independent expenditures of corporate money in state elections); *Mass. Citizens for Life*, 479 U.S. at 258 (sustaining FECA restrictions upon corporate campaign expenditures because of the corrosive influence of concentrated corporate wealth unrelated to the extent of public support for the corporation's political ideas).

[88] *See* Sunstein, *supra* note 13, at 1396-97.

[89] FEC v. Nat'l Conservative PAC, 470 U.S. 480 (1985) (invalidating a $1,000 limit on the money that a PAC gives to promote the election of a candidate).

[90] *Cal. Med. Ass'n*, 453 U.S. at 198 (upholding a $5,000 limit on an organization's contribution to a political action committee).

[91] *Colorado Republican I*, 518 U.S. at 617 (considering and rejecting the risk of contributors seeking to avoid contribution limits by donating to the national party).

[92] *See* 528 U.S. 377.

[93] *Id.* at 390-91.

[94] *Id.* at 391.

[95] *See id.* at 393-394.

[96] *See id.* at 394.

[97] *Shrink Missouri*, 528 U.S. at 395.

The *Shrink Missouri* Court also acknowledged that very little protection is afforded to campaign contributions.[98] Reviewing the *Buckley* distinction between contributions and expenditures, the Court held that government limits upon contributions "left communications significantly unimpaired."[99] Even if a contribution limit significantly interfered with First Amendment rights, the government regulation could survive if it was "closely drawn" to maintain a "sufficiently important interest."[100] Only "dramatically adverse effects" upon political association and the suppression of political advocacy would demonstrate the significant impairment of campaign funding necessary to invalidate a limitation on contributions.[101]

Contrary to its holding, *Shrink Missouri* also illustrated the Court's dissatisfaction with *Buckley* in four separate opinions signed by six Justices.[102] Justice Stevens suggested that campaign money constituted property, rather than speech, thus did not fall within the ambit of the First Amendment.[103] Justices Breyer and Ginsburg viewed legitimate government interests as encompassing more than merely the prevention of corruption and supported electoral integrity and fairness as justifications for campaign finance regulation.[104] Justice Kennedy viewed *Buckley* as a failed compromise resulting in more dangerous campaign spending evasions than those addressed in *Buckley*.[105] Justices Thomas and Scalia viewed both contributions and expenditures as protected by the strictest First Amendment scrutiny.[106]

V. *COLORADO REPUBLICAN II*: EXPANDING THE ANTI-CORRUPTION INTEREST AND BLURRING *BUCKLEY*'S DEFINITIONS

Against this backdrop of inconsistent post-*Buckley* cases, *Colorado Republican II* is significant simply for its consistency with *Shrink Missouri*'s concepts of campaign contribution limitations and the strength of corruption theory. The *Colorado Republican II* Court, moreover, provided a blueprint for defending the constitutionality of a soft money ban.

In *Colorado Republican II*, the Court addressed a campaign finance hybrid of contribution and expenditure.[107] The Court held that the government's restrictions on party coordinated expenditures, defined as contributions under FECA, were

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[98] *See id.* at 387-89.

[99] *Id.* at 387.

[100] *Id.* at 388-389.

[101] *Id.* at 395-396.

[102] *See Shrink Missouri*, 528 U.S. at 380 (listing the Justices filing or joining concurring and dissenting opinions).

[103] *See id.* at 398 (Stevens, J., concurring).

[104] *See id.* at 401-402 (Breyer, J., concurring).

[105] *See id.* at 406-407 (Kennedy, J., dissenting).

[106] *See id.* at 412 (Thomas, J., dissenting).

[107] 533 U.S. at 464 (finding no significant functional difference between a coordinated expenditure and a direct contribution).

constitutional.[108] The government interest that justified the restrictions consisted of preventing corruption in the form of disguised contributions by parties placed in a position to circumvent contribution limits with coordinated expenditures.[109] The Court rejected the Colorado Republican Party's claim of special political protection under the First Amendment because, while parties function to elect candidates, they are also the instruments of contributors.[110]

The coordinated party expenditures at issue in *Colorado Republican II* were not easily classified under *Buckley's* contribution/expenditure distinction.[111] FECA defines contributions functionally, not formally, by including "expenditures made by any person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents."[112] Thus, the government asserted that coordinated expenditures constituted contributions in a functional sense and, moreover, that they induced circumvention of contribution limits.[113] The Colorado Republican Party disputed this assertion by claiming unique First Amendment protection for its political role.[114]

The Court upheld the government's position based on their corruption justification. The government argued that unlimited coordinated spending would "aggravate the use of a party to funnel money to a candidate from individuals and nonparty groups, who would thus bypass the contribution limits that *Buckley* upheld."[115] The Court found sufficient evidence of a serious threat of abuse from unlimited coordinated party spending in the current practice of "tallying" by parties under the disputed law.[116] Unlimited coordinated party expenditures would give candidates a strong incentive to promote circumvention to their affluent patrons to reduce the time-consuming process of campaign fundraising.[117] Thus, the Court found that the government sufficiently demonstrated the threat of corruption by circumvention of accepted campaign finance regulations.[118]

The Court also rejected the political party's claim of special First Amendment status deriving from their coordinated relationship with their candidates and unique purpose to elect candidates.[119] The Court reasoned that unlimited

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[108] *See id.* at 465.

[109] *See id.* at 446-47 (reviewing and accepting the government's circumvention rationale).

[110] *See id.* at 447, 452.

[111] *See id.* at 440-43.

[112] 2 U.S.C. § 441a(7)(B)(i) (2000).

[113] *Colorado Republican II*, 533 U.S. at 446-47.

[114] *Id.* at 445.

[115] *Id.* at 447.

[116] *See id.* at 459-60.

[117] *See id.* at 460.

[118] *See Colorado Republican II*, 533 U.S. at 461 (finding that "this evidence rules out denying the potential for corruption by circumvention").

[119] *See id.* at 449.

coordinated spending is not necessary for political parties to function because parties have operated under the Act's coordinating spending limitations for the past thirty years.[120] Furthermore, political parties ultimately function as more than election platforms for candidates because, "whether they like it or not, they act as agents for spending on behalf of those who seek to produce obligated officeholders."[121]

Colorado Republican II did not trigger the wide divergence of viewpoints found in *Shrink Missouri*. Three dissenting Justices continued to call for the overruling of *Buckley* because of its "tepid protection" of the core political speech implicated by campaign spending.[122] Justice Thomas' dissent, furthermore, argued that political parties' unique unity of interest with their candidates necessarily resulted in coordinated expenditures.[123] He also argued that the Court erroneously relied upon speculation concerning an alternate circumvention theory of corruption when the government failed to advance evidence of corruption or even the appearance of corruption.[124]

VI. THE CONSTITUTIONALITY OF A SOFT MONEY BAN IN LIGHT OF *COLORADO REPUBLICAN II*

With the *Buckley* blueprint, legislatures and courts have struggled for the last twenty-five years to effectively regulate the influence of money upon politicians while simultaneously respecting the role of money in facilitating the "rights of individual citizens and candidates to engage in political debate and discussion."[125] Despite these attempts, skyrocketing campaign spending, accompanied by fundraising scandals such as Enron, continue to permeate the political system and fuel the perception and reality of corrupting influences upon our public officials.[126] *Colorado Republican II* may provide a basis for the Court to uphold Congress's latest effort to limit soft money.[127]

The post-*Buckley* test for the constitutionality of campaign finance regulations, such as a soft money ban, may be broken down into three parts. First, the court determines how to categorize the campaign financing at issue, whether as a contribution, an expenditure, or otherwise.[128] Second, if the campaign money

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[120] *See id.*

[121] *Id.* at 452.

[122] *Id.* at 465-66 (Thomas, J., dissenting) (while Chief Justice Rehnquist joined the dissent, he did not support overruling *Buckley*).

[123] *Colorado Republican II*, 533 U.S. at 469 (Thomas, J., dissenting).

[124] *See id.* at 479-80 (Thomas, J., dissenting).

[125] *Buckley*, 424 U.S. at 58.

[126] *See* Doyle, *supra* note 12, at 2451; Adam Clymer, *Free Speech & Enron Play in Debate Over Soft Money*, N.Y. TIMES, Feb. 13, 2002, at A26.

[127] *See* Lane, *supra* note 7 (reporting that the soft money ban is an open legal issue and listing legal arguments for and against it).

[128] *See Colorado Republican II*, 533 U.S. at 446-47 (accepting the government's arguments that coordinated spending should be treated like contributions); *id.* at 464

falls within a regulated category, then the acceptable justification — typically, preventing corruption or the appearance of corruption in government — must closely fit the parties and finances regulated.[129] Third, the evidence must be sufficient to prove the government's justification for their regulation of the campaign money — typically, proof of the risk of corruption.[130]

For each element of this test, *Colorado Republican II* lays the groundwork for Supreme Court approval of the Campaign Reform Act's soft money ban. First, the *Colorado Republican II* Court defined campaign contributions in a manner favorable to categorizing soft money as such.[131] Secondly, the Court defined the nature of corrupting influences and the function of political parties in a manner favorable to a corruption justification for a soft money ban.[132] Finally, the Court viewed the evidentiary standard for proof of corruption in a manner favorable to proving the risks of soft money in court.[133] In fact, some of the evidence used to support the corrupting influence of coordinated party expenditures in *Colorado Republican II* could also support a soft money ban.[134]

A. Redefining Soft Money within Buckley's *Functional Categories*

Soft money, by one definition, is simply campaign money that the federal government cannot regulate.[135] The issue for courts is whether the unregulated status of such money is constitutionally required. The Campaign Reform Act's soft money ban prohibits soft money contributions to national party committees and restricts soft money expenditures.[136] Senator Mitch McConnell, an opponent

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(stating that the choice here is not between a pure contribution and a pure expenditure). If the money is an expenditure, then the courts must next determine whether the money funds express advocacy or issue advocacy.

[129] *See id.* at 456 (applying contribution standard requiring "closely drawn" regulations to match "sufficiently important" government interests); *Shrink Missouri Gov't PAC*, 528 U.S. at 387-88.

[130] *See Colorado Republican II*, 533 U.S. at 456 (finding that the remaining issue is whether adequate evidentiary grounds exist to sustain the applied standard).

[131] *See id.* at 464 (considering that the coordinated expenditures were "tailor-made to undermine contribution limits" when categorizing the financing).

[132] *See id.* at 460 (describing incentives to circumvent contribution limits through party conduits).

[133] *See id.* at 458-61 (finding sufficient proof in a political party's tallying system and quotes from candidates, fundraisers, and party directors).

[134] *See id.* at 458 (stating that donors, limited in the amount of their direct contributions, give to the party with the understanding that a targeted candidate will benefit).

[135] *See* CANTOR, *supra* note 66, at 1 ("Money that is outside the federal regulatory framework, but raised and spent in a manner suggesting possible intent to affect federal elections, is known as soft money.").

[136] 2 U.S.C. § 441i (2000); Neil A. Lewis, *Coming Next, Landmark Ruling in Campaign Money Fight*, N.Y. TIMES, Mar. 23, 2002, at A13 (reporting that the core of the bill consists of a soft money ban and a broadcast commercial restriction).

of the Campaign Reform Act, dismissed the significance of *Colorado Republican II*, stating that supporters of the McCain-Feingold bill "can take no comfort" in the decision because "the *Colorado* case was about federally restricted hard money while McCain-Feingold would ban nonfederal soft money."[137]

The Court could arguably define soft money donations to political parties as campaign contributions. Contributions are defined in FECA as money or valuables given "for the purpose of influencing any election for Federal office."[138] According to *Buckley*, contributions are more commonly understood to be "[f]unds provided to a candidate or political party or campaign committee either directly or indirectly through an intermediary."[139] In *Colorado Republican II*, the Colorado Republican Federal Campaign Committee argued that "financial support of candidates is essential to the nature of political parties as we know them,"[140] and the Court agreed that "in reality, political parties are dominant players, second only to the candidates themselves, in federal elections."[141] Thus, the soft money raised by the national political parties, though limited to "party-building" activities, also supports the financing and influencing of elections and may be properly subject to campaign contribution limitations.

Furthermore, *Colorado Republican II* reiterated that campaign finances are subject to functional, rather than formal, categorizations.[142] According to such a functional approach, the Court treated coordinated party expenditures as contributions to "[prevent] attempts to circumvent the Act through [spending] amounting to disguised contributions."[143] Soft money donors may similarly circumvent campaign spending limits by "us[ing] parties as conduits for contributions meant to place candidates under obligation."[144] Thus, under the functional approach, soft money contributions to political parties are "disguised contributions" to candidates.

Colorado Republican II has shed less light on the legality of limiting soft money spent on issue advocacy.[145] At present, national political parties and candidates may spend such funds on party-building activities, trade or transfer their soft money to state or local parties, or spend their soft money on issue advocacy advertisements.[146] Party-building expenditures, including the transfers between national and local parties, have sheltered the explosive growth of soft

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[137] Clymer, *supra* note 8.

[138] 2 U.S.C. § 431(8)(A)(i).

[139] 424 U.S. at 24 n.24.

[140] *Colorado Republican II*, 533 U.S. at 445.

[141] *Id.* at 450.

[142] *See id.* at 443.

[143] *Id.* (citing *Buckley*, 424 U.S. at 47).

[144] *See id.* at 452.

[145] *See* Lane, *supra* note 7 (reporting that the most constitutionally vulnerable part of the Shays-Meehan bill is the issue ads regulation).

[146] *See* CANTOR, *supra* note 66, at 6 (listing common forms of soft money in the *Hard Versus Soft Money* chart).

money contributions and may, therefore, be distinguished from other independent expenditures "as more likely to serve or be seen as instruments of corruption."[147] Also, political party allocation and spending of soft money serves functionally as a "disguised contribution" to the campaigns of candidates.[148] Limits upon soft money spending for issue advocacy, however, may be a more sheltered use of money because such expenditures are not expressly related to a political candidate according to the "magic words" doctrine of express advocacy.[149]

B. The Circumvention Theory with Party Conduits Corrupting Candidates May Justify Restraints Upon Financing to Close Soft Money Loopholes

The circumvention theory of corruption, as applied to political parties in *Colorado Republican II*, presents a highly analogous justification for a future soft money ban. The Court adopted a corruption theory of circumvention to explain the government's "sufficiently important interest" in restricting coordinated expenditures by political parties serving as conduits for donors seeking obligated officeholders.[150] Similarly, donors are using soft money to circumvent campaign finance regulations and political parties collecting soft money are serving as conduits for donors seeking grateful officeholders.

Under the standard employed in *Buckley* and its progeny, the government must demonstrate that the challenged financing gives rise to corruption and that a campaign finance law regulating such money is "closely drawn" to curb such corruption.[151] However, this close scrutiny is not strict, and *Colorado Republican II* demonstrates how the Court may use this standard to approve a regulatory measure.[152] By employing the circumvention theory of corruption, the Court evaded the strict tailoring requirements because "circumvention is obviously very hard to trace" and, therefore, difficult to regulate narrowly.[153]

The circumvention theory posits that circumventing valid contribution limits unacceptably raises the risk of corruption and the appearance of corruption.[154]

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[147] *Colorado Republican II*, 533 U.S. at 444 (summarizing *Colorado Republican I*'s protection of independent party expenditures).

[148] Brennan Center Press Release, *supra* note 82 (indicating that the largest portion of soft money goes to advertising aimed at electing or defeating specific candidates).

[149] *See* Thomas & Bowman, *supra* note 49, at 44.

[150] *Colorado Republican II*, 533 U.S. at 456 (agreeing that circumvention is a valid theory of corruption).

[151] *See id.*; *Shrink Missouri Gov't PAC*, 528 U.S. at 387-88.

[152] *See Colorado Republican II*, 533 U.S. at 456 (finding that the close scrutiny standard is met if the spending raises the risk of the appearance of corruption through circumvention of valid contribution limits).

[153] *Id.* at 462.

[154] *See id.* at 460 ("Indeed, if a political candidate could be assured that donations through a party could result in funds passed through to him for spending on virtually identical items as his own campaign funds, a candidate enjoying the patronage of affluent contributors would have a strong incentive not merely to direct donors to his party, but to

Like any shortcut on a difficult path, the availability of unregulated campaign financing provides corrupting incentives to forgo the more time-consuming regulated campaign fundraising.[155] While *Colorado Republican II* predicted the increased incentive to circumvent contribution limits if coordinated expenditures were freed from FECA regulations, the circumvention of contribution limits is already a well-established consequence of unregulated soft money donations to political parties.[156]

In *Colorado Republican II*, political parties served as key conduits for the potential flood of campaign donations diverted from regulated routes into the promise of unregulated coordinated expenditures.[157] The Court recognized the informal understandings that had developed between donors and party committees, who may not "earmark"[158] the contributions toward particular candidates but do, in fact, "tally" funds or otherwise insure that the intended candidate is funded.[159] Such implicit understandings between political parties and donors are difficult to identify, much less regulate on a closely tailored basis.[160] Similarly, earmarking rules provide no deterrence to soft money donations that are offered with the understanding that favored candidates will benefit. In the circumvention process of soft money financing, political parties are not the intended beneficiaries of "party-building" contributions but, rather, the conduits for the exchanges of power between holders of wealth and holders of political office.

C. A Sufficient Quantum of Evidence is Available to Establish Soft Money's Threat of Corruption

Finally, *Colorado Republican II* approved a modest record of evidence as sufficient to establish the threat of corruption by circumvention.[161] Because closer

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promote circumvention as a step toward reducing the number of donors requiring time-consuming cultivation.").

[155] *See id.*

[156] *See* Doyle, *supra* note 12, at 2451.

[157] *See* 533 U.S. at 452.

[158] 2 U.S.C. § 441a(a)(8) (2000) (providing that donations that "are in any way earmarked or otherwise directed through an intermediary or conduit to [a] candidate" are treated as contributions to the candidate).

[159] *Colorado Republican II*, 533 U.S. at 458 ("What a realist would expect to occur has occurred. Donors give to the party with the tacit understanding that the favored candidate will benefit."); *id.* at 459 (referencing the "tallying" method used in the Democratic Party).

[160] *See id.* at 459 (providing that "the understanding between donor and party may involve no definite commitment and may be tacit on the donor's part"); *id.* at 462 (rejecting the Party's demand for a more closely tailored response to the corruption threat from practices like tallying because "circumvention is obviously very hard to trace").

[161] *See id.* at 480 (Thomas, J., dissenting) (describing government's proof as "weak speculation ungrounded in any evidence").

constitutional scrutiny is imposed upon campaign finance regulations, some "quantum of empirical evidence [is] needed to satisfy heightened judicial scrutiny of legislative judgments."[162] The primary source of evidence in *Colorado Republican II* was the Democratic Party's practice of tallying, a practice which would also support a circumvention theory for soft money fundraising.[163] The only other evidence cited by the Court was opinion testimony by a political party committee executive, a Senate candidate, and the candidate's financial advisor.[164] Here, too, proponents of a soft money ban could easily match and surpass this type of evidence by using recent testimony from congressional officeholders addressing the merits and effects of the Campaign Reform Act.[165]

VII. CONCLUSION

Lawyers and lobbyists have readily devised ways to defeat the moderating effect of regulatory restraints on campaign financing because *Buckley*'s formal definitions have constrained the law's responsiveness to such evasions.[166] The Bipartisan Campaign Reform Act of 2002 attempts to narrow some loopholes through which money has poured in the last decade.[167] The question is whether the Supreme Court will permit the Campaign Reform Act's redefinition of two key terms in campaign finance reform: soft money and issue advocacy.[168]

Colorado Republican II lays the groundwork for the Court's approval of the Campaign Reform Act's soft money ban.[169] By favoring a functional rather than a formalistic approach to *Buckley*'s key definitions, the Court may favor redefining soft money because, like coordinated expenditures, soft money is "tailor-made to undermine contribution limits."[170] Furthermore, by expanding the anti-corruption justification to apply the circumvention theory, the Court has adjustedthe balance between protecting money-facilitated political speech and prohibiting the

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[162] *Shrink Missouri Gov't PAC*, 528 U.S. at 391.

[163] *See Colorado Republican II*, 533 U.S. at 459.

[164] *Id.* at 458.

[165] *See* E.J. Dionne, Jr., Editorial, *Hastert Confirms It: Money Rules,* WASH. POST, Feb. 8, 2002, at A31 (reporting that House Speaker Hastert told his colleagues that a soft money ban could cause his party to lose their majority in the House); *Excerpts From House Debate on the Shays-Meehan Campaign Finance Bill,* N.Y. TIMES, Feb. 14, 2002, at A30 (quoting Representative Greenwood listing Enron's large donations to both political parties and calling this corruption of the democratic process).

[166] *See, e.g.*, Edsall, *supra* note 1.

[167] *See id.* (reporting that the Campaign Reform Act bans the soft money that has poured into the national parties in recent years but Senator McCain expects that lobbyists will succeed to some degree in creating new loopholes).

[168] *See* Rosenbaum, *supra* note 5.

[169] *See* Clymer, *supra* note 8 (reporting that advocates of a soft money ban welcomed *Colorado Republican II* and contended that the Court's reasoning would legitimize their legislation); Lane, *supra* note 7.

[170] *See Colorado Republican II*, 533 U.S. at 464 (referring to coordinated expenditures).

substitution of large financial donors for voting constituents.[171] Thus, the circumvention theory may justify a soft money ban and support further efforts to stem corruption.

The Campaign Reform Act was enacted, in large part, because of big campaign donors, such as Enron, perceived as having corrupted congressmen as well as business leaders.[172] Similarly, *Colorado Republican II* reflects the Court's response to public perception of an era, beginning with Watergate, of big money corrupting the democratic process.[173] While the constitutional balance has thus shifted toward greater support of campaign finance regulations, the free flow of money remains essential to political campaigns.[174] Thus, while *Colorado Republican II* did not upset *Buckley*'s ill-favored compromise between free speech and equal access, the decision provides a means through which the Court may approve a soft money ban.

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[171] *See id.* at 462 (adopting a new measure for corruption because "circumvention is obviously very hard to trace" and, thus, difficult to narrowly regulate).

[172] *See* Alison Mitchell, *Enron's Woes Revive Debate on Campaigns*, N.Y. TIMES, Jan. 22, 2002, at A16 (reporting that the campaign finance bill had stalled in the House but the Enron debacle was gathering the bill additional backers); Clymer, *supra* note 8 (quoting supporters of the House bill who argued that big money, symbolized by Enron, was "casting a cloud over the White House and the Capitol").

[173] *See Colorado Republican II*, 533 U.S. at 450 (criticizing the Party's "refusal to see how money actually works in the political structure"); *id.* at 458 (stating that the flow of larger donations with expectations of influence upon candidates was "what a realist would expect to occur").

[174] *See* Buckley, 424 U.S. at 19.