

The Constitutionality of a Soft Money Ban after Colorado Republican II

RICHARD L. HASEN

INTRODUCTION

Congress has not enacted major campaign finance reform since 1974, when it passed amendments to the Federal Election Campaign Act (FECA).¹ After years of failed attempts to adopt a new regulatory scheme for federal campaign financing—or at least, to significantly tweak the existing scheme—Congress came closest to this goal in the first half of 2001. At the time this article goes to print, the future of these legislative efforts remains uncertain. The centerpiece of proposed legislation with the greatest chance of passage, known informally as the “McCain-Feingold bill” in the Senate and the “Shays-Meehan bill” in the House,² is a ban on soft money contributions to political parties. Soft money is money raised to influence the outcome of federal elections but not currently subject to FECA limitations.

This article explores whether a soft money ban would be constitutional in light of the Supreme Court’s most recent campaign finance case, *Federal Election Commission v. Colorado Republican Federal Campaign Committee (Colorado Republican II)*.³ In *Colorado Republican II*, the Supreme Court upheld a provision of the 1974 FECA amendments limiting the amount of so-called hard money that political parties could spend in coordination with candidates. Hard money is money raised to influence the outcome of federal elections that is subject to FECA limitations.

Colorado Republican II makes it very likely that the Supreme Court, as currently constituted, would uphold a soft money ban. However, if even one member of the 5-4 majority in *Colorado Republican II* leaves the Court, the ban’s constitutionality (and for that matter, the constitutionality of much existing campaign finance regulation) would be much more uncertain.

In the first part of this article, I review the legislative, judicial, and administrative developments that led to the emergence of soft money and briefly explore the role that soft money plays in the financing of federal elections. In the second part, I explain how the current Supreme Court likely would analyze whether a ban on soft money violates the First Amendment’s rights of free speech and association. In this part, I show that the Court has allowed campaign contribution limits to prevent corruption and the appearance of corruption. I then explain how *Colorado Republican II* strengthens the argument that a soft money ban is constitutional because the majority in the case recognized that parties sometimes serve

Richard L. Hasen is Professor and William M. Rains Fellow, Loyola Law School, and Co-Editor of the *Election Law Journal*. Thanks to Dan Lowenstein, Josh Rosenkranz, and Brenda Wright for useful comments and suggestions and to Michael Kim for research assistance.

¹ 86 Stat 3, as amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263. In addition to the 1979 amendments discussed below, see *infra* note 30 and accompanying text, the most significant piece of legislation since that time passed in 2000. It requires disclosure by a host of political groups organized under section 527 of the Internal Revenue Code. Pub. L. No. 106-230, 114 Stat. 477 (2000).

² See 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).

³ 121 S. Ct. 2351 (2001).

as conduits for corruption between wealthy donors, and candidates or elected officials.

Finally, I respond to two arguments that have been made against the constitutionality of a soft money ban. The first argument, made initially by Professor (and now FEC commissioner) Bradley Smith and later endorsed by the Washington state supreme court and a federal district court in Alaska, states that a soft money ban is unconstitutional because the money raised with soft money pays for political activities protected by the First Amendment. The second argument, by Senator Mitch McConnell, states that a soft money ban is unconstitutional because it singles out national political parties for discriminatory treatment. Neither of these arguments is well taken, especially following *Colorado Republican II*.

THE ORIGINS AND DEVELOPMENT OF SOFT MONEY

The basic campaign finance regime of Buckley

Understanding the origin of soft money requires a look back in time to 1974, when Congress passed the sweeping FECA amendments in light of Watergate, and to 1976, when the Supreme Court in *Buckley v. Valeo*⁴ upheld parts of the FECA against constitutional challenge but struck down other parts as violating the First Amendment.

In brief,⁵ *Buckley* upheld various contribution limits contained in the 1974 FECA amendments, including a \$1,000 limit on individual contributions to federal candidates.⁶ It also struck down expenditure limits, including a \$1,000 limit on independent expenditures relative to a clearly identified candidate.⁷ Independent expenditures are those made to support or oppose a candidate for federal office without any cooperation or coordination with any candidate.

Although recognizing that any law regulating campaign financing was subject to the “exacting scrutiny required by the First Amendment,”⁸ the Court mandated divergent treatment of contributions and expenditures for two reasons. First, the Court held that campaign expenditures were core political speech,

but a limit on the *amount* of campaign contributions only marginally restricted a contributor’s ability to send a message of support for a candidate.⁹ Thus, expenditures were entitled to greater constitutional protection than contributions.

Second, the *Buckley* Court recognized only the interests in prevention of corruption and the appearance of corruption as justifying infringement on First Amendment rights.¹⁰ The Court held that large contributions raise the problem of corruption “[t]o the extent that large contributions are given to secure political *quid pro quos* from current and potential officeholders”¹¹ But truly independent expenditures do not raise the same danger of corruption because a *quid pro quo* is more difficult if a politician and spender cannot communicate about the expenditure.¹² Although various members of the Court since have questioned the distinction between contributions and expenditures,¹³ the Court has never disavowed the distinction.

Before the Court in *Buckley* struck down the law limiting to \$1,000 expenditures “relative to a clearly identified candidate,” it first considered whether such a law as applied to indi-

⁴ 424 U.S. 1 (1976).

⁵ For a comprehensive look at campaign finance issues in light of *Buckley*, see DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW—CASES AND MATERIALS* 705–1080 (2d ed. 2001).

⁶ *Buckley*, 424 U.S. at 23–35.

⁷ *Id.* at 39–51.

⁸ *Id.* at 16.

⁹ *Id.* at 21.

¹⁰ See *Federal Election Comm’n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496–497 (1985) (“reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”)

¹¹ *Buckley*, 424 U.S. at 26–27.

¹² *Id.* at 46–47. The Court also remarked that expenditure limits could be circumvented easily, meaning that such limits would serve “no substantial societal interest.” *Id.* at 45.

¹³ See, e.g., *Federal Election Comm’n v. National Conservative Political Action Comm.*, 470 U.S. 480, 518–19 (1985) (Marshall, J., dissenting); *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 678 (1990) (Stevens, J., concurring). Chief Justice Burger made the same point in his concurring and dissenting opinion in *Buckley* itself. 424 U.S. at 241 (“For me contributions and expenditures are two sides of the same First Amendment coin.”).

viduals and certain organizations¹⁴ was unconstitutionally vague. A similar vagueness problem arose from the FECA's requirement that "[e]very person . . . who makes contributions or expenditures . . . for the purpose of . . . influencing the nomination or election of candidates for federal office"¹⁵ must disclose the source of such contributions and expenditures. In order to save both statutes from unconstitutional vagueness, the Court construed them as reaching only "communications that in express terms advocate the election or defeat of a clearly identified candidate."¹⁶ The Court explained that such express advocacy required explicit words "of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [or] 'reject.'"¹⁷ So construed, the Court still struck down the spending limits as violating the First Amendment,¹⁸ but it upheld the disclosure requirements.¹⁹

The upshot of this part of *Buckley* is that advertisements intended to influence the outcome of an election, but lacking words of express advocacy, are unregulated by the FECA. Such advertisements have come to be referred to as "issue advocacy," even though the only issue at stake in many of these advertisements is the election or defeat of a candidate. Thus, an advertisement lacking express advocacy but criticizing Senator Jones in the weeks before the election is not subject to disclosure under the FECA, may be paid for with corporate or union funds (while express advocacy cannot under the FECA²⁰), and is subject to no FECA contribution limits. The conduct escapes the FECA because the advertisement ends with something like, "Call Jones and tell her what you think of her Medicare plan" rather than "Defeat Jones."

Party contribution limits and the rise of soft money

The FECA contains special provisions applicable to national political party organizations, such as the Democratic National Committee and Republican National Committee. An individual may contribute up to \$20,000 to a national party committee annually.²¹ A political action committee may contribute up to

\$15,000 annually to a party committee.²² These are hard money contributions. Corporations and labor unions are barred from contributing any hard money to the parties, just as they are barred from giving directly to candidates or spending any money on independent expenditures supporting or opposing candidates for federal office.²³ Corporations and labor unions may, however, form separate political committees to make contributions and expenditures, subject to various regulations such as limits on who may be solicited to contribute to them.²⁴

In addition to facing limitations on the amounts and sources of money they may accept, party organizations also are limited in the amounts that they may *contribute to* federal candidates: as political committees, the parties are limited to \$5,000 to each House candidate at each stage of the election process.²⁵ The FECA also limited the amount that a party could *spend* on behalf of individual candidates (under a formula indexed to inflation).²⁶ In *Colorado Republican Federal Campaign Committee v. Federal Election Commission*²⁷ (*Colorado Republican I*), the Court held that any expenditures by the parties made *independent of* a candidate for federal office were constitutionally protected and could not be limited by Congress. The Court rejected the argument of the Federal Election

¹⁴ See *infra* notes 98–99 and accompanying text (discussing different treatment for candidates and "major purpose" political committees).

¹⁵ *Buckley*, 424 U.S. at 77 (citing section 434(e) of FECA).

¹⁶ *Id.* at 44; see also *id.* at 80 (construing the term "expenditure" to have the same meaning in Section 434(e) as the Court earlier construed it in Section 608(e) of FECA).

¹⁷ *Id.* at 44 n.52.

¹⁸ *Id.* at 48–49.

¹⁹ *Id.* at 80–81.

²⁰ 2 U.S.C. § 441b(a).

²¹ 2 U.S.C. § 441a(a)(1)(B). This amount is subject to an annual \$25,000 aggregate limit on contributions to federal candidates and national party organizations. *Id.*, § 441a(a)(3).

²² 2 U.S.C. § 441a(a)(2)(B).

²³ 2 U.S.C. § 441b(a).

²⁴ 2 U.S.C. § 441b(b)(2)(c).

²⁵ 2 U.S.C. § 441a(a)(2)(A). In addition, no more than \$17,500 may be contributed to a Senate candidate by the Republican or Democratic Senatorial Campaign committee, or the national committee of a political party, or any combination of such committees. *Id.*, § 441a(h).

²⁶ 2 U.S.C. § 441a(d)(3).

²⁷ 518 U.S. 604 (1996).

Commission (FEC) that the parties and candidates had such intertwined interests that party spending should be *presumed* to be coordinated with the party's candidates.²⁸ Such coordinated expenditures would be treated as contributions under the law.²⁹

Since their adoption in 1974, the FECA provisions raised a number of questions about party activities. For example, should get-out-the-vote programs and generic party advertising be subject to the limits? Congress responded to some of these concerns in 1979 by exempting certain grassroots political activities from the FECA spending limits applicable to political parties. As Corrado explains, "[t]he 1979 revision thus did not create 'soft money'; it simply exempted any federal monies (hard dollars) a party committee might *spend* on certain activities from being considered a contribution to a candidate under the law."³⁰

Another question raised by the FECA was how to accommodate the federal and non-federal roles of national party organizations. Should a corporate contribution to a national party organization to be used for party candidates in *state* elections be allowed under the FECA (assuming that such contributions were allowed under the applicable state's law)? What of contributions that would be used to benefit the parties' federal and state candidates, such as a voter registration drive?

In a 1978 advisory opinion,³¹ the FEC allowed the use of corporate contributions to a party to pay for a share of a voter registration drive benefiting the party's state and federal candidates. The FEC said that this practice was permissible so long as the party "allocated" costs to reflect the federal and nonfederal benefits of the registration drive.³² The party had to pay for activity benefiting its federal candidates with money raised under the FECA limits (hard money), but it could pay for activity benefiting nonfederal candidates with money not subject to the limits. Soft money was born in the allocation of funds to these "nonfederal" activities. The money was "soft" in that it was not subject to the FECA's limits.

The explosion of soft money

From these humble beginnings, soft money has exploded on the national political scene.

The FEC eventually established preset formulas for the allocation of hard and soft money dollars in political campaigns,³³ and the use of the money became routine. Soft money spending by the two major parties has risen from \$86.1 million in 1992 (or \$105.7 million adjusted for inflation to 2000) to \$487.6 million in 2000. It is rising both in absolute terms and, at least for Democrats, relative to hard money spending.³⁴

Soft money is raised in large denominations, frequently exceeding \$100,000, often from corporations or labor unions—entities that are prohibited from giving hard money donations. Just since January 1, 2001 (*after* the end of the 2000 campaign season) through October 2001, Democrats raised over \$38 million in soft money and Republicans over \$65 million.³⁵ In this period, a total of 185 organizations gave at least \$100,000 in soft money; these figures treat organizations and individuals associated with the organizations as a single entity. Unions were among the largest givers to the Democrats (\$687,166 from the Service Employees International Union and \$750,000 from AFSCME), although corporations donated as well (AT&T, the largest soft money corporate donor so far in this election cycle to Democrats, gave \$375,000). Corporate interests dominated Republican giving, with Anchor Gaming and Marriott International each having given over \$700,000, and Philip Morris close behind with over \$600,000.

Individuals also give soft money, although few individuals outpace corporate and labor giving. Most of the individuals give on behalf

²⁸ *Id.* at 619 (principal opinion).

²⁹ See 2 U.S.C. § 431(17) (defining an independent expenditure as one made "without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.")

³⁰ Anthony Corrado, *Party Soft Money*, in CAMPAIGN FINANCE REFORM: A SOURCEBOOK 167, 170 (Anthony Corrado et al. eds., Brookings Institution Press, 1997).

³¹ Op. Fed. Election Comm'n 1978-10.

³² Corrado, *supra* note 29, at 172-75.

³³ See 11 C.F.R. § 106.5

³⁴ LOWENSTEIN & HASEN, *supra* note 4, at 912-13.

³⁵ The statistics in this paragraph and the next are based upon my review of Federal Election Commission data contained on the website of the Center for Responsive Politics at www.opensecrets.org, visited November 16, 2001.

of their organizations; the \$750,000 in soft money from Anchor Gaming came from three individual contributions of \$250,000 each by the corporation's chair, Stanley E. Fulton. Individual soft money donations do not count against an individual's \$20,000 hard money contribution limit to political parties or the \$25,000 aggregate annual limit of hard money contributions by an individual.

Parties use soft money for many purposes, including voter registration and get-out-the-vote drives, as suggested from its origins in the 1978 advisory opinion. But soft money has expanded well beyond that, and today soft money is used primarily to pay for media advertisements benefiting specific federal candidates. These advertisements are those so-called issue advertisements ("Call Jones and tell her what you think of her Medicare plan"), not generic party advertising ("Vote Democratic!" or "Vote Republican!"). As explained above,³⁶ *Buckley* construed the FECA as not applying to such issue advocacy. Soft money could not be used to pay for identical advertisements if such advertisements included words of express advocacy because such activity would be treated as "federal" activity.

According to a study of the 2000 election conducted by the Brennan Center for Justice at NYU School of Law, 37.8% of soft money funds went to pay for such sham issue advocacy aimed at promoting the party's federal candidates,³⁷ compared to 8.5% of funds going to pay for voter mobilization.³⁸ The same study found that "soft money in the 2000 elections comprised the single largest source of funding for party ads promoting the election or defeat of federal candidates."³⁹

What do donors get in exchange for soft money? At the least, donors appear to get access to elected officials. President Clinton gained notoriety in 1996 for holding a series of "White House coffees" for large soft money donors.⁴⁰ Soft money donors at the \$100,000 level in the Republican Party become members of "Team 100." According to the Republican National Committee's website:

Members of TEAM 100 participate in national and regional meetings with the Republican leadership throughout the year. International Business Missions are fea-

tured once every 2–4 years. TEAM 100 members receive complimentary tickets to the RNC Annual Gala and will enjoy VIP status at the Republican National Convention and Inaugural activities.⁴¹

A SOFT MONEY BAN AND COLORADO REPUBLICAN II: A CONSTITUTIONAL ANALYSIS

In this part, I consider the constitutionality of a federal law banning soft money. First, I analyze the issue as it appeared before the Supreme Court released its recent opinion in *Colorado Republican II*. Second, I discuss how the case strengthens the argument that a soft money ban is constitutional. Third, I respond to two arguments claiming that a soft money ban is unconstitutional despite *Colorado Republican II*.

Constitutionality of a soft money ban before Colorado Republican II

The case for the constitutionality of a soft money ban before *Colorado Republican II* was relatively straightforward (or at least as straightforward as one could imagine given the twists and turns of the Supreme Court's post-*Buckley* campaign finance jurisprudence). The question is whether such a ban would violate an individual's right to free speech or free association under the First Amendment.

A soft money ban would prevent anyone—individuals, organizations, corporations, and

³⁶ See *supra* note 17 and accompanying text.

³⁷ CRAIG B. HOLMAN AND LUKE P. MCLOUGHLIN, *BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTION* (forthcoming 2001) (manuscript at 7) (noting that not a single party advertisement was coded by researchers as a genuine issue ad, that 96% of them mentioned a candidate, and that almost 92% of them never even identified the name of a political party).

³⁸ *Id.* (Figure 7.8). The remaining funds went to Administration (18.1%), Consultants (3.5%), Fundraising (15.4%), General Mail (2.4%), and Party Salaries (14.3%).

³⁹ *Id.* (manuscript at 6).

⁴⁰ For a searchable database of donors who attended White House coffees, see the Center for Responsive Politics website at www.opensecrets.org/whitehouse/index_1996.htm, visited Oct. 17, 2001.

⁴¹ See RNC Finance Committee Members' Site, Team 100, at www.fncfc.org/public/team100.htm, visited Oct. 17, 2001.

unions—from giving unlimited campaign contributions to political parties. With such a ban in place, individuals and political committees (PACs) could continue to give hard money contributions to political parties, subject to the annual FECA limits.⁴² Corporations and unions would be banned from contributing to parties, although their affiliated PACs could make hard money donations subject to the FECA limits. The parties could use donations of hard money to pay for all kinds of activities, including those that had been paid for with soft money.

The case for a ban on soft money contributions from individuals and PACs is the easiest case. Individuals and PACs still would be allowed to contribute to political parties in generous amounts (currently \$20,000 for individuals and \$15,000 for PACs⁴³). Thus, for individuals and PACs, a ban on soft money contributions is akin to a *lower contribution limit* than would exist in the absence of such a ban.

The Court has said that it will review challenges to the *amount* of a contribution limit with great deference to the legislative body imposing the limit. In *Buckley*, the Court, in upholding the \$1,000 individual limit on contributions to federal candidates, noted that it lacked a “scalpel” to probe whether, for example, a \$2,000 contribution limit would be as effective as a \$1,000 limit.⁴⁴ The Court also noted that a limit on the *amount* of a contribution only marginally affected the First Amendment right of contributors.⁴⁵

More recently, in *Nixon v. Shrink Missouri Government PAC*,⁴⁶ the Court made it even easier for a legislative body to impose very low contribution limits. It did so by relaxing the standard of review in contribution cases, expanding the definition of corruption, and lowering the evidentiary standard to support the government’s claim that contribution limits are necessary to prevent corruption and the appearance of corruption.⁴⁷ In the case, the Court rejected a challenge to Missouri’s low contribution limits for state officials. It explained that the test for the constitutionality of a particular contribution limit is whether “the contribution limitation [is] so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.”⁴⁸ Under

Shrink Missouri’s test, there is little question that a \$15,000 or \$20,000 contribution limitation on PACs or individuals respectively would be upheld as constitutional.

One might counter my argument by claiming that a ban on soft money is not merely a lower contribution limit; rather, the claim goes, the ban would prevent an individual from giving unlimited amounts of money to a party *for purposes other than express advocacy*. The claim fails because an individual still could give to a party for these purposes, subject to existing contribution limits. Moreover, the same rationale that applies to limiting hard money contributions applies to limiting soft money contributions; the contributions create an appearance of corruption and might foster real corruption as well.

The case for the constitutionality of a ban on corporate and labor contributions of soft money is less straightforward than the individual case, because corporations and labor unions would be prohibited from making *any* campaign contributions to the political parties. Thus, one cannot argue that the ban is equivalent to a simple contribution limitation. Nonetheless, the Supreme Court has shown itself very willing to allow targeted regulations that single out corporations (and perhaps to a lesser extent, labor unions⁴⁹) for special treatment in the financing of candidate elections.⁵⁰ These precedents strongly suggest that a soft money ban would be constitutional as applied to these entities.

Limits on corporate contributions to candidates began in 1907, and Congress extended the prohibition to labor unions in the World War II period.⁵¹ As noted above, corporations and

⁴² See *supra* notes 21–22 and accompanying text.

⁴³ See *id.*

⁴⁴ *Buckley*, 424 U.S. at 30.

⁴⁵ *Id.* at 21.

⁴⁶ 528 U.S. 377 (2000).

⁴⁷ I make this point in great detail in Richard L. Hasen, *Shrink Missouri, Campaign Finance, and “The Thing that Wouldn’t Leave,”* 17 CONST. COMM. 483, 488–97 (2001).

⁴⁸ *Shrink Missouri*, 528 U.S. at 397.

⁴⁹ See *infra* note 61 and accompanying text.

⁵⁰ See generally LOWENSTEIN & HASEN, *supra* note 4, at 819–70.

⁵¹ See generally ROBERT E. MUTCH, *CAMPAIGNS, CONGRESS, AND COURTS* (1988).

unions are prohibited from contributing to candidates or political parties in federal elections, and are prohibited even from engaging in independent expenditure campaigns in favor of or opposing candidates for federal office.

The Court has upheld special regulation of corporations in candidate elections in two significant cases. In *Federal Election Commission v. National Right to Work Committee (NRWC)*,⁵² the Court upheld a provision of the FECA that limited a corporation without shareholders who wished to solicit funds for its political action committee to solicitations of "members." The Court upheld the regulation based upon the government's interest in ensuring that "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization [are] not . . . converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions."⁵³

In addition, the NRWC Court accepted the government's interest in protecting "individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed."⁵⁴ The Court professed considerable deference to Congress that the potential for influence from corporations and labor unions demanded such regulation.⁵⁵

The Court also upheld a law targeted at corporations in *Austin v. Michigan Chamber of Commerce*.⁵⁶ In *Austin*, the Court upheld a Michigan law modeled on the FECA that prohibited corporations from making *independent expenditures* (except through a separate PAC) supporting or opposing any candidate in election for state office. The case marked the first and so far the *only* time that the Court has upheld a limitation on independent expenditures, which *Buckley* held generally may not be limited.⁵⁷

The *Austin* Court held that the Michigan regulation was justified by a concern with what it called a "different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."⁵⁸

NRWC and *Austin* came forward with very different rationales for campaign finance regulations targeted at corporations.⁵⁹ Nonetheless, both cases stand firmly for the principle that corporations' spending in candidate campaigns may be regulated,⁶⁰ and regulated more strictly than individuals or other organizations. The case for regulation of labor unions, at least under *Austin*, is less clear than the corporate case, given that labor unions do not amass capital in the same way as corporations.⁶¹ But there is a long history of parity in treatment between the two types of entities, and likely a restriction upheld against corporations would be upheld against unions as well.

Under the reasoning of these cases, a ban on soft money imposed on corporations and unions appears constitutional. Although the burden falls more severely on corporations and labor unions than on individuals and PACs, Congress could constitutionally target such

⁵² 459 U.S. 197 (1982).

⁵³ *Id.* at 207.

⁵⁴ *Id.* at 208.

⁵⁵ *Id.* at 209.

⁵⁶ 494 U.S. 652 (1990).

⁵⁷ See *supra* note 12 and accompanying text.

⁵⁸ *Austin*, 494 U.S. at 660. Many have argued that this interest is more of an equality concern than a concern about "corruption." See *id.* at 684-85 (Scalia, J., dissenting); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 40-42 (1996). But see Adam Winkler, *Beyond Bellotti*, 32 LOYOLA L.A. L. REV. 133, 136 (1998) (arguing that the Court's concern about "other people's money" drives its decision in *Austin*).

⁵⁹ In fact, *Austin's* rationale was presaged in *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 257 (1986) ("Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace."); see also Marlene Arnold Nicholson, *Basic Principles or Theoretical Tangles: Analyzing the Constitutionality of Government Regulation of Campaign Finance*, 38 CASE WESTERN RES. L. REV. 589, 599 (1988).

⁶⁰ But cf. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (striking down law preventing corporation from making expenditures to influence the outcome of a ballot measure campaign).

⁶¹ Compare *Michigan State AFL-CIO v. Miller*, 891 F. Supp. 1210 (E.D. Mich. 1995), *rev'd on other grounds*, 103 F.3d 1240 (6th Cir. 1997) (upholding prohibition on union independent expenditures in candidate campaigns) with *United Auto Workers Local Union 1112 v. Philomena*, 700 N.E.2d 936, 953 (Oh. App. 1998) (holding that unions cannot be subject to same regulations as corporations).

regulations because of the enhanced danger of corruption caused by corporate or labor union contributions.

Thus, even before *Colorado Republican II*, a strong case existed for the constitutionality of a soft money ban.⁶² As to individuals and associations, such a ban would be merely a contribution limit; as to corporations and unions, it would be another permissible targeted regulation in candidate elections.

The strongest argument against this analysis viewed parties as constitutionally special entities that must be given special rights for campaign finance purposes.⁶³ The argument was not simply that parties are not candidates and therefore that concerns about corruption or the appearance of corruption stemming from contributions to parties are misplaced.⁶⁴ It was that parties serve important functions in American politics and that far from corrupting the process, contributions to parties, including soft money contributions, served to strengthen the political process against corruption by focusing political power in large diffuse parties rather than in small, single interest groups.⁶⁵

This argument received a sizable boost when the Court decided *Colorado Republican I*. As noted above, the case held that parties have the same right as any other group or individual to make unlimited *independent expenditures*, rejecting the FEC's argument that all party expenditures favoring a party's candidate should be presumed to be coordinated with the candidate and therefore treated as contributions to the candidate that may be limited.

In the course of discussing the issues raised by the case, the principal opinion in *Colorado Republican I* (authored by Justice Breyer and joined by Justices O'Connor and Souter) noted that the limits on party expenditures did not arise out of any special concern for corruption on the part of parties. "In fact, rather than indicating a special fear of the corruptive influence of political parties, the legislative history demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections..."⁶⁶ In dictum, the principal opinion also noted that the opportunity for corruption posed by soft money was "attenuated" because such "contributions may not be used to influ-

ence a federal campaign, except when used in the limited, party-building activities specifically designated in the statute."⁶⁷

In addition to these statements in the principal opinion, an opinion by Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, expressly rejected "transplant[ing] the reasoning of cases upholding ordinary contribution limitations to a case involving FECA's restrictions on political party spending."⁶⁸ Along similar lines, Justice Thomas, speaking for himself, Chief Justice Rehnquist and Justice Scalia, argued that within the *Buckley* framework, the "anti-corruption rationale loses its force" when applied to political parties.⁶⁹

American political parties, generally speaking, have numerous members with a wide variety of interests, features necessary for success in majoritarian elections. Consequently, the influence of any one person or the importance of any single issue within a political party is significantly diffused. For this reason . . . campaign funds donated by parties are considered to be some of "the cleanest money in politics . . ." And, as long as the Court continues to permit Congress to subject indi-

⁶² Indeed, in 1997, 126 constitutional law scholars, led by Professors Ronald Dworkin and Burt Neuborne, signed a letter endorsing the view that a soft money ban would be constitutional. The letter is available at www.brennan-center.org/resources/downloads/softmoney.pdf, visited October 17, 2001.

⁶³ Another argument focused on the *uses* for which parties put soft money.

⁶⁴ Such an argument failed back in 1981 when the Supreme Court upheld a provision of the FECA limiting the amount an individual or unincorporated association could give to a PAC. *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981) (plurality opinion). The Court rejected the association's argument that because it was making payments only to a PAC and not directly to a candidate, the danger of corruption was not present.

⁶⁵ See, e.g., Diana Dwyre, *Spinning Straw Into Gold: Soft Money and U.S. House Elections*, 21 LEG. STUD. Q. 409, 420 (1996).

⁶⁶ *Colorado Republican I*, 518 U.S. at 618 (principal opinion).

⁶⁷ *Id.* at 616.

⁶⁸ *Id.* at 629 (opn. of Kennedy, J., concurring in part and dissenting in part).

⁶⁹ *Id.* at 646 (opn. of Thomas, J., concurring in part and dissenting in part).

viduals to limits on the amount they can give to parties, and those limits are uniform as to all donors, . . . there is little risk that an individual donor could use a party as a conduit for bribing candidates.⁷⁰

Given these statements in *Colorado Republican I*, there was much speculation that the Court was on its way toward crafting special campaign finance rules for political parties, rules that would subject parties to much less regulation than other entities.⁷¹ The emergence of such rules could have led the Court to strike down a soft money ban, although the result did not necessarily follow. For example, Justice Thomas rejected the idea that parties receiving hard money donations could serve as conduits for corruption from rich contributors to candidates for office, because the rules imposed uniform limits on all donors, making it difficult for any donor to stand out. Of course, soft money is not subject to any contribution limits, and therefore it could be possible for a donor willing to make a sizable donation to stand out. Nonetheless, *Colorado Republican I* led to questions about the constitutionality of a soft money ban. Much of this concern, however, was put to rest last term when the Court decided *Colorado Republican II*.

The significance of Colorado Republican II

As already noted, *Colorado Republican II* answered the question (that had been ducked by the principal opinion in *Colorado Republican I*) whether parties had a right to spend unlimited sums *in coordination with* the parties' candidates. The FECA treats a coordinated expenditure as a contribution⁷² and limits the amount of coordinated expenditures that a party may make with a party's candidate.⁷³ So the question posed by the case, in essence, was whether the parties might constitutionally be subject to limits on how much they may contribute to candidates.⁷⁴

The Court, in a 5-4 opinion, upheld the FECA provision limiting expenditures that the party coordinates with the candidate.⁷⁵ In so holding, the Court rejected any party exceptionalism and particularly the thesis that parties cannot serve as conduits for corruption. Indeed, the

Court embraced the notion that parties can serve as conduits for corruption: "[W]hether they like it or not, [parties] act as agents for spending on behalf of those who seek to produce obligated officeholders."⁷⁶

As support for this empirical position, the Court apparently did its own web-surfing to the FEC's website to look at the pattern of PAC giving to candidates. It noted, for example, that PACs sometimes contribute to two competing candidates in the same election.⁷⁷ The Court further noted that the efficiency of parties in coordinating their spending with candidates makes them an attractive target for conduit corruption: it "places the party in a position to be used to circumvent contribution limits that apply to individuals and PACs, and thereby to exacerbate the threat of corruption and apparent corruption that those contribution limits are aimed at reducing."⁷⁸ The Court detailed the practice of the Democratic National Committee of tracking donations received by the party at least in part according to which candidate the contributor hoped to benefit.⁷⁹

The holding of *Colorado Republican II* does not itself answer the question whether a ban on soft money is constitutional. The case concerned the question of contributions from the party *to candidates*. Soft money, however, concerns contributions from individuals, associations, corporations, and unions *to the parties*.

Nevertheless, the case is highly significant in determining the constitutionality of banning soft money. A soft money ban would be

⁷⁰ *Id.* at 647.

⁷¹ See, e.g., Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620 (2000).

⁷² 2 U.S.C. § 441a(a)(7)(B)(i).

⁷³ *Id.*, §441a(d)(3).

⁷⁴ The dissent did not see the issue in this way, proposing that there are gradations of coordination between a party and a candidate, some of which should be treated as contributions and some of which should be treated as independent expenditures. *Colorado Republican II*, 121 S. Ct. at 2372-73 (Thomas, J., dissenting).

⁷⁵ Together, *Colorado Republican I* and *II* had the perverse result of encouraging parties to act independently of their candidates. But that issue is beyond the scope of this article.

⁷⁶ *Colorado Republican II*, 121 S. Ct. at 2364.

⁷⁷ *Id.* at 2364 n.13.

⁷⁸ *Id.* at 2365.

⁷⁹ *Id.* at 2367-68.

premised on its goal of preventing corruption and the appearance of corruption. The main open question before *Colorado Republican II* was whether the Court would craft new rules that gave parties special constitutional protections in campaign financing such as a right to raise unlimited contributions. *Colorado Republican II* appears to close that door. The Court took the fact of the parties' special role in American democracy and turned that argument against the parties: such an exceptional role, the Court posited, means that parties pose a special danger of serving as conduits for corruption and creating the appearance of corruption.

The Court reached this conclusion about corruption after a rather casual empirical examination of the FEC's website listing hard money contributions to parties. Those contributions are limited to \$20,000 per year for individuals and \$15,000 for PACs. One could imagine what the Court would say if it looked at the FEC's list of six-figure soft money donations from large corporations, unions, and wealthy individuals. It easily could conclude that conduit corruption is rampant, or at least may appear to the public to be rampant, in the case of soft money.

The Court could also take notice, as it did in the *Shrink Missouri* case,⁸⁰ of press reports suggesting an appearance of corruption created by the giving of large campaign contributions. The reports linking soft money contributions to access to government officials or to special treatment are legion. For example, a recent *New York Times* article on the airline industry bailout following the September 11 terrorist attacks discussed the lobbying efforts of the board members of the major airlines. It noted that American Airlines' board members alone "gave \$148,200 to Republicans in the last presidential election, while the boards of four other airlines . . . gave a total of \$719,569 in soft money donations to both parties." After noting additional payments by airline executives and PACs to the Bush inauguration and to various parties, the article stated that one reason the airline executives "were well received [was that] since 1998, the industry had given over \$7.4 million to Republican candidates and committees, and \$4.6 million to Democrats."⁸¹

I am not claiming that these figures alone prove, in any social science sense, that soft

money donations are corrupting or even that they lead to the appearance of corruption. But the Court in *Shrink Missouri* and *Colorado Republican II* has shown that the amount of evidence it requires to prove corruption or the appearance of corruption *in a legal sense* is minimal. The evidence certainly raises an inference of impropriety, and that appears to be enough for the Court. The *Colorado Republican II* majority likely would believe that Congress could justly conclude that banning soft money would serve the government's interest in preventing corruption and the appearance of corruption. Indeed, given the staggering dollar amounts of these donations, even a few dissenting members might be persuaded by the argument.

What remains of *Colorado Republican I* is the dictum noting that the opportunity for corruption posed by soft money is "attenuated" because such "contributions may not be used to influence a federal campaign, except when used in the limited, party-building activities specifically designated in the statute."⁸² It is hard to see how that dictum survives in *Colorado Republican II*, where the Court refused to "ignore reality."⁸³ The Court called the party's characterization of its role myopic, "a refusal to see how the power of money actually works in the political structure."⁸⁴

Indeed, reading the two *Colorado Republican* cases side by side shows an amazing contrast. The first case was careful, narrow, and legally technical. The second case shows a growing effort by the Court (and perhaps most by Justices Breyer and Souter, for whom *Colorado Republican I* was their first campaign finance case on the Court) to understand the way money actually works in federal campaigns. With such an understanding, the new Court likely would see soft money's great potential for corruption, because party soft money is raised in huge chunks, often from corporations or labor unions, to fund sham issue advocacy. It is not merely money for "party building," and the Court likely would not "ignore" this "reality."

⁸⁰ 528 U.S. at 393–94.

⁸¹ Leslie Wayne and Michael Moss, *Bailout for Airlines Showed the Weight of a Mighty Lobby*, *NEW YORK TIMES*, Oct. 10, 2001, at A1, B10 (nat'l ed.).

⁸² *Colorado Republican I*, 518 U.S. at 616.

⁸³ *Colorado Republican II*, 121 S. Ct. at 2363.

⁸⁴ *Id.*

Two potential arguments against the constitutionality of a soft money ban

Focus on output: do uses of soft money render a ban on soft money contributions unconstitutional? Writing before the Supreme Court decided *Colorado Republican II*, then-Professor (now FEC Commissioner) Bradley A. Smith argued that “[t]o the extent that soft money is used for issue advocacy, it cannot be limited without an enormous change in several related lines of First Amendment jurisprudence.”⁸⁵ Smith further explained his view that it is constitutionally impermissible to limit what a party *spends* on issue advocacy because such speech is entitled to absolute First Amendment protection,⁸⁶ and that any limit on soft money contributions to parties to pay for issue advocacy would not be justified by an interest in preventing corruption. First, Smith argued, there was no evidence that parties serve as conduits for corruption.⁸⁷ Second, issue advocacy spending is like spending in a ballot measure election, which the Supreme Court said in the *Bellotti*⁸⁸ case may not be limited, even against corporations.⁸⁹

Echoing Smith, two courts have held state soft money bans unconstitutional. In *Washington State Republican Party v. Washington State Public Disclosure Commission*,⁹⁰ the Washington state supreme court struck down a state law that limited contributions to parties to pay for issue advocacy.⁹¹ The court held that contributions to parties used for issue advocacy did not pose a risk of corruption, even if those contributions were large, organizational contributions. “Contributions received by a political party and expended for issue advocacy are not the sort of contributions which *Buckley* held could be limited.”⁹² The court specifically rejected the idea that parties could be conduits for corruption.⁹³

In *Jacobus v. State of Alaska*,⁹⁴ a federal district court relied upon the *Washington State Republican Party* case in striking down an Alaska law barring corporate contributions of soft money to parties. According to the court, “corporations still have First Amendment rights to engage in activities in which the threat of corruption is absent such as when corporations are engaged in constitutionally protected activities (i.e., soft money activities such as issue advo-

cacy), or contributing to political parties for similar constitutionally protected activities . . .”

Both cases were decided before the United States Supreme Court decided *Colorado Republican II*. *Jacobus* is currently on appeal to the United States Court of Appeal for the Ninth Circuit.⁹⁵

Smith’s analysis and the similar analyses of the two courts are at odds with the Supreme Court’s analysis in *Colorado Republican II*. In the first place, these opinions discount the possibility that parties could serve as conduits for corruption between candidates and donors, whereas the Supreme Court explicitly recognized that parties can and do serve that role. With that constitutional fact established, it is difficult to see how any of Smith’s or the lower courts’ reasoning survives.

Second, the analyses’ focus on output is puzzling. Figure 1 illustrates the relationship among the soft money contributions, the parties, and the purpose for which the contribution is spent. The analyses argue that if the output or expenditure of the party is for a constitutionally protected purpose, the source of the contribution is irrelevant.

That has never been the mode of analysis

⁸⁵ Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. LEGIS. 179, 199 (1998). Smith concedes that a soft money ban limiting expenditures for express advocacy would be constitutional. *See Id.* The problem with this argument is that soft money may not be used to pay for express advocacy in the first place.

⁸⁶ *Id.* at 196.

⁸⁷ *Id.* at 197.

⁸⁸ *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

⁸⁹ Smith, *supra* note 85, at 198.

⁹⁰ 4 P.3d 808 (Wash. 2000).

⁹¹ *Id.* at 824.

⁹² *Id.* at 824.

⁹³ *Id.* at 825–26 (contrasting parties with multicandidate PACs as discussed in the California Medical Association case).

⁹⁴ Order, *Jacobus v. State of Alaska*, Case No. A97-0272 CV (JKS) at 5 (D. Alaska, June 6, 2001); see also Order, *Jacobus v. State of Alaska*, Case No. A97-0272 CV (JKS) at 14 (D. Alaska, April 10, 2001) (“if used for non-candidate nominating or electing purposes, donations to a political party cannot constitutionally be restricted”).

⁹⁵ *Jacobus v. Alaska*, 2001 U.S. Dis. LEXIS 12905 (D. Alaska 2001), appeal docketed, No. 01-35666 (9th Cir. 2001). Both the Brennan Center for Justice at NYU School of Law and National Voting Rights Institute have filed amicus briefs in the case arguing that a soft money ban is constitutional following *Colorado Republican II*.

large individual,
PAC, corporate, → political party → issue advocacy
or labor soft money
contributions

FIG. 1. Output model. The party as cleanser.

used by the Supreme Court in campaign finance cases. Consider this example. In the 1998 election, only 4% of federal candidate-sponsored advertisements contained words of express advocacy.⁹⁶ Suppose a Senator running for reelection set up two separate funds. One fund would pay for that small amount of express advocacy with hard money. The other would pay for the 96% of advertising that would not contain express advocacy with large donations from corporations and labor unions. Pushing the analyses to their logical conclusion, they suggest that Congress could not regulate contributions to the second fund because the output is constitutionally protected speech.

The Court has not analyzed campaign contribution limits by focusing on output. Instead, the Court has focused on the relationship between the contribution and contributor and the potential for corruption. A \$1 million donation to a Senator's reelection campaign from General Motors or the AFL-CIO to pay for such advertising would raise a danger of corruption and the appearance of corruption, regardless of the uses for which the Senator spends the money. Thus, Congress could ban such contributions to the Senator.⁹⁷

Accordingly, the only question with the constitutionality of a soft money ban is whether the party can serve as a conduit for such corruption, as illustrated in Figure 2, not whether

large individual,
PAC, corporate, → political party → candidate
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contributions

FIG. 2. Corruption model. The party as conduit.

the uses for which the party spends the money are constitutionally protected. In *Colorado Republican II*, the Court said that a party *can* serve a corrupting role, and that such potential provides ample constitutional justification to impose limits on party contributions.

One objection to this line of argument might be that parties should be treated differently than candidates who engage in issue advocacy. Yet the Court in *Buckley* held it constitutional to require disclosure of all expenditures, whether express advocacy or issue advocacy, by candidates *and* political committees whose "major purpose is the nomination or election of a candidate..."⁹⁸ A party, no doubt, is such a major purpose organization. It is only individuals and groups who are neither candidates nor major purpose organizations for whom the express advocacy/issue advocacy distinction is relevant.⁹⁹

Third and finally, the analyses suggest that because it would be unconstitutional to bar corporations and others from engaging in independent spending funding direct issue advo-

⁹⁶ Jonathan S. Krasno and Daniel E. Seltz, *Buying Time: Television Advertising in the 1998 Congressional Elections* 9 (2000).

⁹⁷ Both the Jacobus district court opinion and the Smith article relied upon *Citizens Against Rent Control v. City of Berkeley (CARC)*, 454 U.S. 290 (1985) in making the output argument. See Order, *Jacobus v. State of Alaska*, Case No. A97-0272 CV (JKS), at 6, 8, 9 (D. Alaska April 10, 2001); Smith, *supra* note 85, at 198. In *CARC*, the Supreme Court struck down a law limiting contributions to ballot measure campaigns on grounds that there is no possibility of corruption in such an election. Jacobus and Smith analogize ballot measure campaigns to sham issue advocacy in candidate elections. See also John C. Eastman, *Strictly Scrutinizing Campaign Finance Restrictions (and the Courts that Judge Them)*, 50 *Cath. U. L. Rev.* 13 (2000). Of course, *CARC's* reasoning does not apply to sham issue advocacy in candidate elections, where the possibility of corruption (and the appearance of corruption) is ever present.

⁹⁸ *Buckley*, 424 U.S. at 79.

⁹⁹ See Brief of Amicus Curiae National Voting Rights Institute in Support of Appellants State of Alaska and the Alaska Public Offices Commission Urging Reversal of the Judgment Below, *State of Alaska v. Jacobus*, No. 01-35666, United States Court of Appeals for the Ninth Circuit, at 23-24; *North Carolina Right to Live v. Leake*, 108 F. Supp.2d 498, 505 (E.D.N.C. 2000). (Major purpose groups "were held [in *Buckley*] to be so clearly involved in electioneering that disclosure requirements may be applied to them on this basis alone without raising the concern that pure issue advocacy will be chilled or diminished.")

cacy, it is unconstitutional to prevent such entities from making contributions to other entities to fund such advocacy. Not so. In the first place, there is a strong argument to be made that corporations and labor unions could be banned constitutionally from making independent expenditures funding issue advocacy intended to influence the outcome of federal elections.¹⁰⁰ But even putting that issue to one side, the argument ignores the distinction the Court has drawn since *Buckley* between contributions and expenditures. *Buckley's* core holding is that one has a constitutional right to promote a candidate through a direct independent expenditure but no such right to contribute unlimited sums to another entity to engage in the same promotion of the candidate.

In sum, the output argument of Smith and the two courts was not strong to begin with. Its strength lay in the rejection of parties as conduits for corruption. But *Colorado Republican II* put that argument to rest.

Would a soft money ban unconstitutionally discriminate against political parties? Senator Mitch McConnell recently published an op-ed in the congressionally oriented newspaper *Roll Call* in which he disputed my claim¹⁰¹ and that of others that *Colorado Republican II* would make the constitutionality of a soft money ban more likely.¹⁰² According to McConnell, the case stands for the principle that parties are entitled to exactly the same rights—“no more, no less”¹⁰³—than other individuals and organizations participating in the political process. “Yet McCain-Feingold’s party soft-money ban applies to just six of the thousands of federally registered political committees.”¹⁰⁴ Accordingly, McConnell argued, the law would be unconstitutional because it would “discriminate” against the political parties.

It is unclear whether McConnell’s argument would be one grounded in the First Amendment or the Equal Protection component of the Fifth Amendment’s due process clause. Either way, the argument is weak. The Court has upheld targeted regulations in the past as applied to corporations. In *NRWC*, for example, the Court said that “careful legislative adjustment of the federal electoral laws, in a ‘cautious advance, step by step’ to account for the par-

ticular legal and economic attributes of corporations and labor organizations warrants considerable deference.”¹⁰⁵ The Court concluded that the government interest in preventing both corruption and the appearance of corruption and the appearance of corruption might be “accomplished by treating unions, corporations, and similar organizations differently from individuals.”¹⁰⁶

Similarly, in the *Austin* case, the Court rejected challenges (on both First Amendment and equal protection grounds) to a law prohibiting corporations, but not media corporations or labor unions, from making independent expenditures in candidate campaigns.¹⁰⁷

Targeted regulations aimed at solving special problems with corruption easily could be extended to the case of political parties. The current Court likely would give considerable deference to Congressional findings that parties, because of their close relationship with candidates, pose a heightened risk of serving as conduits for corruption from large donors. As noted above, the parties sit in a unique position to deliver access and to raise money and track it to benefit specific candidates. Such a finding would serve as a valid basis for Congress to again move in cautious advance to prevent corruption and its appearance.

Colorado Republican II does not compel absolute equal treatment in the campaign finance

¹⁰⁰ See Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 Minn. L. Rev. 1773 (2001).

¹⁰¹ See, e.g., Richard L. Hasen, *High Court Decision is Really Good News for Campaign Reformers*, ROLL CALL, Jun. 28, 2001.

¹⁰² Mitch McConnell, *Campaign Reformers Gained No Ground with Court ‘Victory,’* ROLL CALL, Jun. 28, 2001.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *NRWC*, 459 U.S. at 209.

¹⁰⁶ *Id.* at 210–11.

¹⁰⁷ *Austin*, 494 U.S. at 664–668. Lower courts have upheld regulations targeted at other entities, such as lobbyists, key employees of casinos, and liquor licensees. See *North Carolina Right to Life v. Bartlett*, 168 F.2d 705 (4th Cir. 1999), *cert. denied* 528 U.S. 1153 (2000) (lobbyists); *Petition of Soto*, 565 A.2d 1099 (N.J. Super. 1989), *cert. denied* 110 S. Ct. 3216 (1990) (casino employees); *Schiller Park Colonial Inn v. Berz*, 349 N.E.2d 61 (Ill. 1976) (liquor licensees); *but see Penn v. state*, 751 So.2d 823 (La. 1999), *cert. denied* 120 S. Ct. 1262 (2000) (disagreeing with *Soto*).

laws targeting party organizations and others. If it did, the more generous contribution limits of individuals and PACs to parties and from parties to candidates would be constitutionally suspect. The case instead stands for the proposition that Congress may regulate parties to counter the legitimate concern that parties may serve as conduits for corruption.

CONCLUSION

Colorado Republican II ended the best argument against the constitutionality of a ban on soft money: that contributions to parties cannot be corrupting or lead to the appearance of corruption. Following the case, members of Congress can vote confident in their ability to pass a soft money ban that will be upheld before the current Supreme Court.

The danger on the horizon for a soft money ban is a change in Supreme Court personnel. As I have illustrated elsewhere,¹⁰⁸ three Justices on the Court wish to strike down the *Buckley* framework to have an essentially unregulated

system of campaign finance (except, perhaps, for disclosure laws). Three Justices wish to strike down the *Buckley* framework to allow for a more regulated system of campaign finance. That leaves three Justices in the middle—Chief Justice Rehnquist, Justice O'Connor, and Justice Souter—who seem inclined to adhere to *Buckley*.

Colorado Republican II was a 5-4 decision, with the Chief Justice siding with those dissenters, stating that, even under *Buckley*, parties should have special constitutional protections. These other justices want to overrule *Buckley* altogether. Thus, a change in just one or two justices appointed by President Bush might spell not only the end of any soft money ban passed by Congress, but also of most campaign finance regulation.

Address reprint requests to:

Richard L. Hasen
Loyola Law School
919 South Albany Street
Los Angeles, CA 90015-1211

E-mail: rick.hasen@lls.edu

¹⁰⁸ Hasen, *supra* note 46, at 504.