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CAMPAIGN FINANCE, THE PARTIES AND THE COURT: A COMMENT ON *COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE v. FEDERAL ELECTIONS COMMISSION*

*Richard Briffault**

Last term, in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*,[1] the Supreme Court considered a direct attack on the constitutionality of the Federal Election Campaign Act's ("FECA") limits on political party expenditures. *Colorado Republican* was the Court's first campaign finance case in six years and the first in which the four Justices appointed by Presidents Bush and Clinton had an opportunity to participate. *Colorado Republican* was also the first case in the twenty-year regime of *Buckley v. Valeo*[2] concerned with the constitutionality of restrictions on parties.[3] Coming at a time of rising public concern, increased legislative activity, and continued academic ferment over campaign finance, *Colorado Republican* offered the promise of clarifying the current Court's approach to campaign finance regulation, marking out the contours of the

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1. 116 S. Ct. 2309 (1996).
2. 424 U.S. 1 (1976).
3. *Buckley* addressed only one issue concerning parties—the claim that FECA discriminated, in violation of the Fifth Amendment's Due Process Clause, against independent candidates and parties without national committees because the Act authorized additional spending for political party national committees. The Court determined that, as a portion of the *Buckley* decision invalidated the limits on aggregate campaign expenditures and independent expenditures, it had eliminated the basis for the discrimination claim. 424 U.S. at 58-59 and nn.66, 67. The Court did not consider any First Amendment challenge to limits on party spending.

In *Federal Elections Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 28-29 (1981), the Court considered the statutory question of whether FECA barred an "agency agreement," that is, a state party's designation of a national party committee as the state party's agent for making expenditures allowed by the Act. In *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 88 (1982), the Court considered the constitutionality of the application of disclosure requirements to a minor party that had been subject to government harassment.

rights of parties in the campaign finance context, and assessing the implications of judicial doctrine for potential legislative changes.

The Court, however, failed to resolve the central issue in the case. Instead, it fragmented into four opinions, none of which commanded the votes of more than three Justices.[4] A seven-member majority rejected the effort of the Federal Elections Commission ("FEC") to enforce FECA in the case before it, but the three Justices who joined the pivotal opinion authored by Justice Breyer limited their views—and, thus, the holding of the Court—to the facts of the case and declined to reach the broader issue of the constitutionality of limits on party involvement in campaign finance. The six Justices who did reach the issue were sharply divided. Moreover, one Justice directly, and two others implicitly, challenged *Buckley v. Valeo*'s basic approach to campaign finance regulation—although their different opinions embraced decidedly different perspectives.

Colorado Republican illustrates nicely the conceptual difficulties built into the Court's campaign finance doctrine. *Buckley*'s central concerns have proven difficult to apply in practice or justify in theory, and the Court has vacillated with respect to the degree of deference to be given to the judgment of the political branches concerning whether campaign practices present dangers that may be the basis for regulation.

Moreover, political party spending is particularly difficult to fit into the Court's conceptual framework because party activities bridge *Buckley*'s basic doctrinal categories. Many academics have urged a more party-centered approach to campaign finance—the Committee for Party Renewal filed an amicus brief in the case—claiming it would reduce the influence of special interests on the political process. However, so long as parties themselves receive their funds from private individuals and organizations, it is questionable whether a party-centered system would do much to ameliorate special interest influence. Moreover, judicial establishment of an unlimited party spending right could have broader effects on the campaign finance laws.

Part I of this comment briefly summarizes the facts, statutory framework, and procedural history of *Colorado Republican.* Part II reviews the *Buckley* doctrine. Parts III and IV examine and appraise the Court's multiple opinions. Finally, Parts V and VI consider the implications of constitutional protection of party

4. In a sense there were five opinions, since Justice Thomas's opinion was joined in part, but only in part, by two other Justices.

spending for the campaign finance laws, and the implications of *Colorado Republican* for the future of campaign finance doctrine.

I. BACKGROUND: THE FACTS, THE STATUTE, AND THE PROCEDURAL HISTORY

Colorado Republican was ten years in the making. In January 1986, then-Representative Tim Wirth declared his candidacy for the Democratic nomination for the Senate seat being vacated by Gary Hart that fall.[5] Shortly thereafter, Wirth began to run ads outlining his position on a number of issues. In April and May 1986, the Colorado Republican Party paid for three radio ads and two pamphlets criticizing Wirth's voting record, mentioning that he was running for the Senate, and charging Wirth with misrepresenting his record in his ads. The anti-Wirth radio ad which became the subject of the FEC's enforcement action against the Colorado Republican Party included the following statements:

> "I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment."
>
> "Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts."[6]

The state party committee paid $15,000 to run the ad. At the time it was aired, three Republicans were seeking their party's nomination, although two withdrew before the Republican state convention in June. Wirth and his Republican opponent, Rep. Ken Kramer, were not officially nominated until their party primaries in August.

In June 1986, the Colorado Democratic Party filed a complaint with the FEC alleging that the Republican anti-Wirth expenditures violated the spending limits FECA imposes on party committees.[7] In January 1989, the FEC determined there was

5. Wirth won the election, served out his six-year term, and declined to seek another term, all before the district court in this case reached a decision. The case then took three more years to wend its way to the Supreme Court.

6. *FEC v. Colorado Republican Fed. Camp. Comm.*, 59 F.3d 1015, 1018 n.1 (10th Cir. 1995).

7. The Democrats also alleged that the Republicans violated FECA's reporting requirements in listing the costs of the anti-Wirth program as operating expenses and not as expenditures with respect to an election for federal office.

probable cause to believe the Republicans had violated FECA and, when settlement negotiations failed, instituted a civil enforcement action. The Republicans responded by arguing that the expenditures in question were not subject to the FECA limits, and that the FECA limits are unconstitutional.

FECA provides two avenues for parties to spend money on behalf of candidates for federal office. First, parties, like all other political committees, may contribute up to $5000 to a candidate "with respect to any election for Federal office."[8] Second, parties may make "coordinated expenditures" on behalf of their candidates. FECA ordinarily treats expenditures made "in cooperation, consultation, or concert, with" a candidate as contributions subject to contribution limits even if the "donor" did not actually give the money *to* a candidate.[9] FECA, however, provides a special exception for party committee spending "in connection with the general election campaign of candidates"[10] for Congress. In a Senate election, a party committee may spend up to two cents times the voting age population of the state in which the race occurs, or $20,000 adjusted for inflation from a 1974 base, in coordination with the party's Senate candidate's campaign.[11]

On the other hand, the FEC has determined that parties may not make "independent expenditures," that is, expenditures not in "cooperation, consultation, or concert" with a candidate. FECA, as amended in 1974, had imposed dollar ceilings on independent expenditures by individuals and political committees, but the Supreme Court in *Buckley* held such limits unconstitutional. The FEC subsequently deemed parties incapable of making expenditures truly independent of their own candidates' campaigns,[12] and adopted a regulation forbidding national and state party committees from making "independent expenditures in connection with the general election campaign[s]" for federal office.[13]

At the time of the 1986 election, the limit on coordinated party spending for the Senate race in Colorado was $103,000,

8. 2 U.S.C. § 441a(a)(2)(A) (1994).
9. 2 U.S.C. § 441a(a)(7)(B)(i) (1994).
10. 2 U.S.C. § 441a(d)(1) (1994).
11. 2 U.S.C. § 441a(d)(3)(A) (1994). This limit also applies to House of Representatives races in any state entitled to only one Representative. For other elections to the House, the ceiling is $10,000 adjusted for inflation from a 1974 base. 2 U.S.C. § 441a(d)(3)(B) (1994).
12. See FEC Adv. Op'n 1985-14, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶5819 at 11,185 n.4 (5/30/85); FEC Adv. Op'n 1984-15, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5766 at 11,070 n. 2 (5/31/84).
13. 11 C.F.R. § 110.7(b)(4) (1996).

which would have been more than enough to cover the anti-Wirth ad. However, the Colorado state party, like most state Republican parties, had assigned to the National Republican Senatorial Committee ("NRSC") its coordinated spending authority. As a result, the anti-Wirth ad violated FECA—if the spending limit applied, and was constitutional.

In the lower courts, much of the *Colorado Republican* litigation focused on the question of the applicability of the FECA limits to the anti-Wirth ad. FECA's coordinated spending ceiling and reporting requirements apply only to expenditures "in connection with" a federal election. But the notion of spending "in connection with" an election campaign is inherently fuzzy and potentially sweeping. Communications concerning the performance of public officials or the wisdom of pending legislation can certainly affect the electoral fortunes of candidates, so campaign finance regulations could logically apply to a wide range of communications concerning politics and government. Such a broad reading could chill free and unfettered discussion of public issues. The Supreme Court thus determined that the First Amendment requires statutes regulating spending "in connection with" elections to be read narrowly and limited to spending expressly advocating the election or defeat of a clearly identified candidate.[14]

Although the Colorado Republicans' ad clearly identified Tim Wirth, it did not literally urge Wirth's defeat or the election of a Republican. The district court concluded that the ad "[a]t best . . . contains an indirect plea for action" which fell short of the "express advocacy" required to avoid infringing on constitutionally protected discussion of public issues.[15] The FECA limit thus did not apply to the anti-Wirth ad, and the court dismissed the FEC's suit.

The Tenth Circuit Court of Appeals reversed. The appellate court agreed with the district court that the anti-Wirth ad was not express advocacy "within the narrow definition" of prior Supreme Court cases.[16] But, after extended analysis,[17] the court deferred to the FEC's determination that limits on coordinated

14. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 42-43 (1976); *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), 479 U.S. 238, 248-50. The discussion in *Buckley* concerned a provision of FECA that *Buckley* ultimately invalidated. *MCFL* considered the restriction on expenditures by corporations and unions. Neither case directly addressed the meaning of the "in connection with" language in the context of party coordinated spending.

15. *FEC v. Colorado Republican Fed. Camp. Comm.*, 839 F. Supp. 1448, 1455-56 (D. Colo. 1993).

16. *FEC v. Colorado Republican Fed. Camp. Comm.*, 59 F.3d 1015, 1023 n.10 (10th Cir. 1995).

17. Id. at 1019-23.

party spending could be constitutionally applied to spending with an "electioneering message" concerning a clearly identified candidate. The court found that the Republican ad did have an electioneering message with respect to Wirth and, thus, that the FECA limit applied. Since the state Republicans had transferred their statutory spending authority to the NRSC, their expenditures violated the FECA ceiling on coordinated party spending. The court then briefly considered and rejected the Republican claim that the FECA limit was unconstitutional.

II. THE *BUCKLEY* DOCTRINE AND PARTY SPENDING

A. Basic Elements of *Buckley*

In both the Tenth Circuit and the Supreme Court, the analysis of the constitutionality of the FECA spending limits was framed by *Buckley v. Valeo*. Although "one of the most vilified Supreme Court decisions of the post-World War II era,"[18] *Buckley* has for two decades dominated judicial review of campaign finance regulations.

Buckley has three major elements. First, the Court determined that campaign finance regulations impinge on the core First Amendment concerns of political expression and association. Without quite concluding that "money is speech," the Court found that money is essential for the dissemination of political messages and that contributing money "enables like-minded persons to pool their resources in furtherance of common political goals."[19] As a result, government regulation of campaign finances would be subject to "the exacting scrutiny required by the First Amendment."[20]

Second, and more controversially, the Court determined that the sole justification for limiting political spending is the prevention of corruption and the appearance of corruption. The Court rejected the argument that restrictions could be used to promote equality of political influence among individuals or groups or to equalize candidates' resources.[21] As the Court "famously or notoriously"[22] asserted: "the concept that government may restrict the speech of some elements of our society in order

18. Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 Colum. L. Rev. 1390, 1394 (1994).
19. 424 U.S. at 22. See also id. at 65-66.
20. Id. at 16.
21. Id. at 48-49, 56-57. The Court also rejected the argument that the government could restrict spending in order to limit the cost of political campaigns. Id. at 57.
22. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum. L. Rev. 1369, 1369 (1994).

to enhance the relative voice of others is wholly foreign to the First Amendment."[23]

Third, the Court drew an operational distinction between expenditures—that is, spending by candidates, organizations and individuals on direct communications with voters—and contributions—that is, payments by an individual or group *to* a candidate, which the candidate uses to fund political communication with the voters. Expenditures were held to be core political speech and not to raise a danger of the corruption of candidates. As a result, *Buckley* invalidated FECA's restrictions on expenditures by candidates and independent committees.

Contributions, by contrast, were given less protection. Unlike an expenditure, a contribution does not entail an expression of political views: "A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." The expressive component of a contribution "rests solely on the undifferentiated, symbolic act of contributing." In contrast, the *size* of the contribution "does not increase perceptibly" the quantity of the contributor's communication. "While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor."[24]

Moreover, contributions do raise the spectre of corruption: "To the extent that large contributions are given to secure a political *quid pro quo* from current and potential officeholders, the integrity of our system of representative government is undermined."[25] Congress—and state and local governments regulating campaigns for state and local offices—could thus impose dollar limits on the size of contributions.

B. Problems with Applying *Buckley*

Although the *Buckley* framework appears straightforward, the Court has had great difficulty with campaign finance cases.[26]

23. 424 U.S. at 48-49.
24. Id. at 21.
25. Id. at 26-27.
26. The *Buckley* decision commanded a 6-2 majority, although three members of the court dissented from portions of the per curiam opinion. The next major campaign finance case, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) drew four dissents. The critical opinion in *California Med. Ass'n v. FEC*, 453 U.S. 182 (1981) was joined only by a plurality. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) drew one dissent and three concurring Justices who endorsed a narrower rationale than Chief

The Court has run into three problems: (i) applying the contribution/expenditure distinction; (ii) determining the meaning of corruption; and (iii) deciding the degree of deference to be accorded to Congress or state and local elected officials—and the extent of consideration given to empirical evidence presented by litigants defending campaign finance restrictions—in determining whether the kinds of dangers which the Court has indicated may be the basis of regulation actually exist in a particular case.

(1) Drawing the Contribution/Expenditure Line: The contribution/expenditure distinction so central to the analysis in *Buckley* and later cases has proven difficult to apply. Some campaign practices—a candidate's donation of personal funds to her own campaign, or expenditures by groups not connected with a candidate expressly advocating the election or defeat of a clearly identified candidate—are arguably both contributions and expenditures. The candidate's donation to her own campaign is in form a contribution, yet it funds the candidate's own speech so it resembles an expenditure.[27] Independent expenditures are formally expenditures but raise the possibility that a candidate who benefits from an independent committee's support will feel an obligation to the spender comparable to that created by a contribution.[28]

Other practices—such as a contribution to a political organization or intermediary for election-related purposes—are arguably neither contributions nor expenditures within the *Buckley* analysis. A contribution to an intermediary is plainly not an expenditure, but, given the lack of a direct tie between donor and candidate, it may not present the vice *Buckley* found in contributions.[29]

Justice Burger's opinion for the Court. *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1984) drew two dissents. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) and *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) were marked by 5-4 and 6-3 splits and multiple opinions. Of the major constitutional cases, only *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) produced a unanimous Court.

27. *Buckley* treated a candidate's contribution of personal funds to her own campaign as an expenditure for First Amendment purposes. 424 U.S. at 51-54. Justice Marshall, who joined all other aspects of *Buckley*, dissented from this point. Id. at 286-87.

28. The Court has held that independent expenditures undertaken without "prearrangement and coordination" with a candidate are to be treated as expenditures for First Amendment purposes. Id. at 39-51. Accord, *National Conservative PAC*, 470 U.S. at 497-501. But see id. at 502, 510-11 (White, J., dissenting); 518-21 (Marshall, J., dissenting). But cf. *Austin*, 494 U.S. at 668-69 (upholding prohibition on spending by corporations).

29. See, e.g., *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *FEC v. Nat'l Right to Work Committee*, 459 U.S. 197 (1982).

And proposals to impose limits on the total amount of contributions candidates can receive from particular categories of donors, such as political action committees,[30] or to impose very low contribution limits,[31] point up the constitutionally troublesome fact that all expenditures, except those funded by a candidate's personal wealth, ultimately derive from contributions.

The difficulty of applying the contribution/expenditure distinction is closely connected to the distinction's shaky justification. It might be easier to draw the line if the Court had been more persuasive in explaining why the line ought to be drawn. The Court's effort to establish that contributions are a lower order of speech than expenditures (assuming that both are constitutionally protected speech) seems increasingly tenuous. For candidates, in the absence of public funding, contribution limits necessarily curtail the expenditures of all but the wealthiest, self-funding candidates, or force them to shift their activities from actually communicating with voters to prospecting among donors for funds,[32] thus reducing the amount of public political speech. For donors, a contribution is a device for pooling individual views and enabling them to be amplified by a candidate—who can be a "great communicator"—thus providing more effective dissemination of those views than if the donor had spent an identical sum on expenditures to speak to the voters directly.

Contribution limits are particularly problematic from the perspective of freedom of association. Contributions may be only indirect speech—"speech by proxy"[33]—but they are a direct form of association. If speech is infringed by spending limits, then freedom of association ought to be comparably infringed by contribution ceilings that limit the amount of support an individual can give to a campaign. Indeed, in cases since *Buckley* the Court has given greater weight to freedom of association in reviewing campaign regulations.[34] Increasingly, the justification for the con-

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30. Cf. *Gard v. Wisconsin State Elec. Bd.*, 456 N.W.2d 809, 812, 829 (Wis.), cert. den. 498 U.S. 982 (1990) (sustaining absolute dollar cap on funding a candidate may receive from all committees, including PACs and party committees).

31. See, e.g., *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995) (invalidating low contribution limit); *National Black Police Ass'n v. D.C. Bd. of Elec. and Ethics*, 924 F. Supp. 270 (D.D.C. 1996) (same).

32. For a forceful argument concerning the constitutional significance of the diversion of officeholders' time to fundraising, see Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281 (1994).

33. *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 196 (1981) (plurality opinion).

34. See, e.g., *Citizens Against Rent Control*, 454 U.S. at 295-99; *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 251-56 (plurality opinion); id. at 265-66 (O'Connor, J., concurring).

tribution limits, and for the contribution/expenditure distinction, appears to rely less on the lower status of contributions than on the greater dangers contributions are said to pose for the political process.

(2) The Meaning of Corruption: Preventing corruption and the appearance of corruption "are the only legitimate and compelling government interests thus far identified for restricting campaign finances."[35] The Court, however, has never actually defined what it means by "corruption or the appearance of corruption." "Corruption" is sometimes equated with "improper influence" or "undue influence" over officeholders—without analysis of the distinction between proper and improper influences. Typically, the Court has given the notion of corruption a narrow reading, akin to bribery. As then-Justice Rehnquist asserted in *FEC v. National Conservative Political Action Committee ("NCPAC")*, "[t]he hallmark of corruption is the financial *quid pro quo*: dollars for political favors."[36] In this vision, the corruption concern is triggered only by the exchange of favors or the possibility of (and the appearance of the possibility of) the exchange of favors between donors and elected officials.

If corruption means exchange of favors, then the contribution/expenditure distinction may be sound in principle—contributions raise the possibility of the exchange of favors, whereas direct communications to the voters by candidates or interest groups do not involve such exchanges. But gross inequalities in spending by candidates, interest groups, or other political organizations that do not involve quid pro quos are not considered corrupting and thus cannot be barred by restrictions on spending. With corruption as quid pro quo, moreover, some hard cases, such as the issue of a candidate's use of personal wealth, become easy since the candidate cannot corrupt herself.

On other occasions, however, the Court has suggested that "corruption" may be read more broadly to include the spending of large sums of money that have an "undue influence on the outcome" of an election and thereby undermine "the confidence of the people in the democratic process and the integrity of government."[37] If corruption includes the influence that large sums of money can have on the outcome of an election—whether be-

35. *National Conservative PAC*, 470 U.S. at 496-97.

36. Id. at 497.

37. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978). See also *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 301 (1981) (Marshall, J., concurring); id at 302-03 (Blackmun, J., and O'Connor, J., concurring).

cause such influence is itself corrupting[38] or because it jeopardizes "voter confidence in government"[39]—then expenditures can be as corrupting as contributions and expenditures could be limited in the name of preventing corruption and the appearance of corruption.

Prior to 1990 the Court had never found evidence that the potential to engage in unlimited spending posed a threat to voter confidence in government adequate to justify a spending restriction, but in that year *Austin v. Michigan Chamber of Commerce*[40] upheld a state law restricting corporate political expenditures by finding that the state could justify the law as necessary to control "the corrosive and distorting effects of immense aggregations of wealth" which could "unfairly influence elections when . . . deployed in the form of independent expenditures."[41] If undue influence on the electoral process—and not just undue influence over elected officials, which is the sole focus of the quid pro quo model—could become a basis for campaign finance restrictions, then both the practical ability and the normative rationale for distinguishing between contributions and expenditures for First Amendment purposes would be substantially eroded.

To be sure, central to *Austin* and other cases dealing with limits on corporate political activity was the Court's assertion that corporations pose a unique danger of corruption. Corporations enjoy a "unique state-conferred corporate structure"[42] that enables them to accumulate large sums of money. These financial resources reflect the success of the corporation's commercial activities and not the extent of support for its political ideas. Limits on corporations are justifiable "to ensure 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'."[43]

Austin's attempt to limit its concern with large campaign war chests to corporations is unpersuasive. In *First National Bank of*

38. Cf. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659-60 (1990) (referring to the "corrosive and distorting effects of immense aggregations of wealth" and asserting that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions").

39. *Citizens Against Rent Control*, 454 U.S. at 302 (Blackmun, J., and O'Connor, J., concurring).

40. 494 U.S. 652 (1990).

41. Id. at 660.

42. Id. at 659-60.

43. *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 207 (1982).

Boston v. Bellotti,[44] its first case dealing with corporate political spending, the Court emphasized that the touchstone for analysis was "[t]he inherent worth of the speech in terms of its capacity for informing the public . . . not . . . the identity of its source, whether corporation, association, union, or individual."[45] The corporate status of the speaker, then, ought to be irrelevant to an assessment of the basis for regulating the speech. It is hard to see why state-granted advantages make corporate speech more corrupting. Moreover, as Justice Scalia pointed out in his *Austin* dissent, corporations are not alone in receiving special advantages from the state.[46] Nor are corporations unique in their capacity to divert wealth obtained in the economic marketplace to political purposes. Other business associations—as well as billionaire individuals who benefit from inheritance laws or obtain their wealth from investments in corporations—may build up campaign war chests "that have little or no correlation to the public's support for the[ir] . . . political ideas."[47]

Nonetheless, whatever the logical difficulties of limiting *Austin*'s more expansive notion of "corruption" to corporations, that is what the Court asserted it did. As a result, "quid pro quo" remains the dominant model of "corruption," and the "undue influence over electoral outcomes" definition of corruption has been limited to cases involving corporations. Still, *Austin*—the last campaign finance case prior to *Colorado Republican*—opened up the possibility of a broader meaning of corruption, including a concern with the kinds of inequalities *Buckley* dismissed. And, as Archibald Cox observed, "[o]nce loosed, the idea of Equality is not easily cabined."[48]

(3) Degree of Deference to Elected Decisionmakers: The constitutionality of the regulation of independent expenditures is an empirical question as well as a normative one. Even if the mean-

44. 435 U.S. 765 (1978)

45. Id. at 777. *Bellotti* differed from *Austin* in one important respect. *Bellotti* involved corporate spending in a referendum election, whereas *Austin* addressed independent corporate spending in a candidate election. That difference would have significance if "corruption" were limited to the danger of quid pro quos, since the Court has determined that referenda and other ballot questions do not present the danger of an exchange of favors between special interests and officeholders. Id. at 790. However, *Austin*'s expansion of "corruption" to include "undue influence" over election outcomes eliminates the significance of that difference. If *Austin* really is a "corporations" case, it is in direct tension with *Bellotti*.

46. *Austin*, 494 U.S. at 680.

47. Id. at 652. See Ashdown, *Controlling Campaign Spending and the 'New Corruption': Waiting for the Court*, 44 Vand. L. Rev. 767, 783-84 (1991).

48. Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91, 91 (1966).

ing of corruption were clear, and even if it were limited to the quid pro quo model, it would still be debatable whether the danger of corruption is present in a particular setting.

Thus, a legislature might conclude that expenditures by independent committees supporting or opposing particular candidates might raise the prospect of quid pro quo corruption. Similarly, even if an individual's contribution to a political action committee or other political organization raises no question of the individual corrupting the organization, a legislature might conclude that there was sufficient danger that donors might use such intermediaries as conduits for the exchange of favors with the candidates who receive contributions from the intermediary, so that contributions by individuals to political organizations that do not run candidates for office ought to be regulated. In addition, a legislature has to make the very basic decision of how large (or, perhaps, how small) a contribution raises the danger of corruption.

The Court thus has to decide how much deference to give to the elected decisionmakers in determining whether a particular campaign practice presents a danger of corruption. But the Court's standard of deference has ranged widely. In *Buckley* the Court deferred to Congress concerning the level of limits on individual donations to candidates, and the overall limit on individual contributions to political committees in a calendar year. Sustaining FECA's low reporting and recordkeeping thresholds, *Buckley* stated "we cannot require Congress to establish that it has chosen the highest reasonable threshold." That "line" was "best left . . . to congressional discretion" and was upheld because it was not "wholly without rationality"[49]—a remarkably relaxed standard given the Court's finding that the reporting and disclosure rules implicate fundamental rights and are subject to "exacting scrutiny."[50] Similarly, the Court has also deferred to a Congressional judgment that contributions to intermediary organizations could be regulated because of the danger that those organizations might serve as conduits linking their donors to candidates.[51]

On the other hand, the Court has repeatedly rejected Congressional judgments that expenditures by independent committees raise dangers of corruption. Relying on its own armchair empiricism, *Buckley* found that because of the "absence of prear-

49. 424 U.S. at 83.
50. Id. at 64.
51. *California Med. Ass'n v. FEC*, 453 U.S. 182, 197-98, 201 (1981).

rangement and coordination," such expenditures "may well provide little assistance" to a candidate's campaign and, thus, alleviate the danger of a quid pro quo. A decade later *NCPAC* reaffirmed this position, notwithstanding evidence that independent committees had played an important role in the 1980 presidential race, largely in support of Ronald Reagan.

Critics of independent spending had urged that candidates and independent committees had found ways to use the independent committees to bolster candidates even in the absence of formal "prearrangement and coordination," and that organizers of the pro-Reagan independent committees had received appointments in the Reagan Administration.[52] But *NCPAC* found that on the record before it "an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more,"[53] even though the trial court excluded most of the evidence of corruption proferred by the FEC—a decision which the Supreme Court sustained.[54] Thus, a strong evidentiary burden is placed on those who would regulate independent expenditures—with the Court unwilling to look at much of the evidence.

In the corporations cases the Court's vacillation has been acute. In different cases, it has dismissed out of hand the argument that corporations present any danger of undue influence;[55] deferred to a Congressional or state legislative judgment that corporations in general present unique dangers, without requiring that regulation be limited to corporations that actually amass the wealth necessary to fund a war chest that poses a danger of undue influence;[56] and upheld regulation in principle but required Congress to target only those corporations whose war chests are divorced from political support.[57]

Outside the corporate context, the Court's rule appears to be: As contributions in general raise the danger of corruption, Congress may regulate them without showing that a particular type of contribution raises any danger, but as expenditures in general raise little danger of corruption, Congress must meet an exacting burden of demonstrating that a particular expenditure raises the danger of corruption. The stringency of review thus

52. See, e.g., Elizabeth Drew, *Politics and Money* 136-41 (Macmillan, 1983); Herbert E. Alexander, *Financing the 1980 Election* 142 (Lexington Books, 1983).

53. 470 U.S. at 498.

54. Id. at 499-500.

55. See, e.g., *Bellotti*, 435 U.S. at 789.

56. *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982).

57. See, e.g., *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

seems to turn on the Court's own antecedent judgment of the relative degree of danger a practice presents, even though legislative findings or empirical evidence are supposed to be the *basis* of the Court's determination of whether a danger justifying regulation is present.

C. Implications for FECA Limits on Party Spending

The FECA limit on party spending potentially raises—and intertwines—all three questions that have plagued the application of *Buckley*. Party spending blurs the expenditure/contribution distinction. It is formally an expenditure, but given the close ties between parties and their candidates, party spending could plausibly be treated as a contribution. FECA and the FEC treat party spending like contributions and impose dollar limits. Should the judgment of the political branches receive deference, or should the Court engage in its own non-deferential assessment of the dangers posed by party spending?

Does party committee spending pose a danger of the corruption of candidates? Does the close relationship between a party and its candidate that makes the contribution/expenditure distinction so difficult to apply undermine the concern with party corruption of a candidate—or does it just make the concern stronger? What would corruption mean in this context? Can party committee spending be regulated because of the danger that the party will be a conduit for interest group or wealthy individual donations? Can party spending committees be regulated to prevent one party from having an undue influence over the election? What weight should be given to the judgment of Congress or the FEC that party spending presents some danger of corruption?

The *Colorado Republican* Court failed to reach a consensus on any of these issues, leaving the extent of deference to Congress, the categorization of party-spending within the *Buckley* framework, the meaning of corruption in the party-candidate context, and the constitutionality of the regulation of party spending outside the particular facts of the anti-Wirth ad, unresolved.

III. THE FRAGMENTED *COLORADO REPUBLICAN* COURT

Colorado Republican produced four opinions, none of which garnered the support of more than three Justices. Four Justices, in two opinions joined by three Justices apiece—with two Justices joining both opinions—were willing to strike down FECA's limits on party spending coordinated with candidates. Two Justices voted to validate FECA's limits and to enforce the FEC's suit against the Colorado Republican Party. Three Justices determined that the FECA restriction could not be constitutionally applied against the anti-Wirth ad campaign but declined to consider the broader question of the constitutionality of limits on party spending. Moreover, none of the opinions considered the question that had divided the lower courts in this and other cases—whether FECA's limits can be applied to speech that falls short of express advocacy but contains an "electioneering message."

A. The Plurality Opinion

Justice Breyer, joined by Justices O'Connor and Souter, determined that the FECA limit on coordinated expenditures could not be applied to the anti-Wirth ad because the Colorado Republican Party had not, in fact, coordinated the ads with any Republican candidate. The Colorado Republican spending was, thus, truly independent spending and, like the independent spending of "individuals, candidates and ordinary political committees" could not be subject to limitation.[58]

First, the plurality found that the anti-Wirth spending was not in fact coordinated with any Republican candidate. The ads were aired at a time when there were three Republicans contending for the Senate nomination so there was no general election candidate. Moreover, the impetus for the ad had come from the state party chairman, who had "arranged for the development of the script at his own initiative." Work on the script was limited to state party staff; the senate contenders and their staffs were not involved.[59]

Second, the plurality rejected the FEC's argument that party committees are incapable of making expenditures independent of their party's candidates, since the FEC failed to provide any empirical support, either in its advisory opinions or in its arguments before the Court, for this assertion.[60] Moreover, the statute itself did not clearly preclude a finding that some party spending could be independent.

58. *Colorado Republican Fed. Campaign Comm. v. FEC*, 116 S. Ct. 2309, 2317 (1996).
59. Id. at 2315.
60. Id. at 2318.

Finally, Justice Breyer concluded that the government presented no evidence that independent spending by parties presents any greater dangers of corruption than the independent spending of other political committees or individuals. Once again, "the absence of prearrangement and coordination" was said to "alleviate" the danger of a quid pro quo.[61] Comparing independent spending by party committees and individuals, "the constitutionally significant fact, present equally in both instances, is the lack of coordination between the candidate and the source of the expenditure."[62]

Having determined that FECA's limits on coordinated expenditures could not constitutionally be applied to an expenditure that was independent-in-fact, the plurality declined to reach the general question of the constitutionality of FECA's limits on party spending. Indeed, the plurality avoided any statement that parties enjoy a constitutionally preferred position with respect to campaign finance. The plurality rejected the argument, embraced by one of the concurrences, that "a party and its candidate are identical,"[63] and, in stressing the significance of the independence of the anti-Wirth spending in avoiding the danger of corruption, it implicitly rejected the contention of the other concurrence that parties are incapable of corrupting their candidates.[64] Indeed, the plurality commented that parties "share relevant features with many PACs."[65]

The Breyer opinion managed to block the application of the FECA limit to the anti-Wirth ad while doing minimal damage to the overall structure of FECA and avoiding the tensions in the *Buckley* framework. The plurality minimized the significance of its lack of deference to the political branches by noting that the FEC had failed to do the homework necessary to prove that "independent" party spending is impossible in fact, and that Congress's authorization of party coordinated expenditures up to a statutory ceiling did not preclude a finding that some party expenditures could be truly independent.

Thus, although the idea of "independent" party spending creates a hole in FECA it appears to reflect the plurality's effort to adhere to *Buckley*'s contribution/expenditure distinction. Party committees were presumed to be like other political committees—some party spending might be coordinated with candi-

61. Id. at 2316.
62. Id. at 2317.
63. Id. at 2319.
64. Id. at 2316.
65. Id. at 2320.

dates and some might be independent. Indeed, noting that coordinated party expenditures "share some of the constitutionally relevant features" of both expenditures and contributions, the plurality gave the very inability of party spending to fit neatly into *Buckley*'s conceptual boxes as a reason for not addressing the Republicans' broader challenge to the constitutionality of the limits on party spending.[66]

B. THE CONCURRING OPINIONS

Four Justices in two overlapping groups of three concurred in the judgment but dissented from the plurality's reasoning: they would have completely invalidated FECA's ceiling on coordinated party spending. Justice Kennedy's opinion rejected the idea of party independence from candidates, but concluded that, whether or not coordinated with their candidates, party spending ought to be treated as constitutionally protected expenditures. Justice Thomas's opinion urged that since party spending presents only a minimal danger of corruption there is no constitutional basis for its limitation.

Justice Kennedy's opinion explicitly rejected the plurality's emphasis on the independence of the Colorado Republicans' spending. Instead, joined by Chief Justice Rehnquist and Justice Scalia, Justice Kennedy stressed the "practical identity of interests between the two entities [parties and their candidates] during an election" and the "tradition of political parties and their candidates engaging in joint First Amendment activity."[67] Rather than look to independence-in-fact of a particular expenditure, he concluded that a party's "fate in an election is inextricably intertwined with that of its candidates."[68]

Justice Kennedy acknowledged that party spending would generally function as a contribution to a candidate, but found that such spending also represents the party's speech on its own behalf since "in the context of particular elections, candidates are necessary to make the party's message known and effective, and vice versa."[69] As the political speech of a political association, party spending, even spending coordinated with the candidate a party supports, could not constitutionally be limited.

Justice Thomas's opinion, also joined by Chief Justice Rehnquist and Justice Scalia, took a slightly different tack. Justice

66. Id.
67. Id. at 2323.
68. Id.
69. Id. at 2322.

Thomas ridiculed the assertion that there was any danger of corruption in a party supporting its own candidate. Justice Thomas considered two possible sources of corruption: the influence of the party itself on the candidate, and the influence of a party's donors. Justice Thomas denied that party influence per se could ever be considered corruptive. "The very aim of a political party is to influence its candidate's stance on issues." If a party succeeds "that is not corruption; that is successful advocacy of ideas in the political marketplace and representative government in a party system."[70]

As for any danger that coordinated party spending might provide an opportunity for donors to the party to exert undue influence over the party's nominee, Justice Thomas noted that the "numerous members with a wide variety of interests" found in parties makes it unlikely that any one person or interest group could use a party to exact a quid pro quo from a candidate. The influence of particular interests would be "significantly diffused" by other interests. Further, there is "little risk" that a party could be used by wealthy donors as a conduit for corrupting candidates so long as the Court "continues to permit Congress to subject individuals to limits on the amount they can give to parties"[71]—although in another part of his opinion, not joined by any other Justice, Justice Thomas urged that contribution caps be held unconstitutional.[72]

C. The Dissent

Justice Stevens, joined by Justice Ginsburg, dissented in a brief opinion.[73] The dissent agreed with Justice Kennedy that a party and its candidate have "a unique relationship" which precludes Justice Breyer's finding of independence. The dissenting Justices, however, concluded that Congress could constitutionally limit party spending.

Disagreeing with Justice Thomas, Justice Stevens found that party coordinated spending could be corrupting—or, rather, that Congress could find it so—first, because it could give a party, "or the persons who control the party" influence "over the candidate by virtue of its power to spend," and, second, because of the danger of conduit corruption.[74]

70. Id. at 2331.
71. Id.
72. Id. at 2329.
73. Id. at 2332.
74. Id.

In addition, Justice Stevens asserted that limits on party spending were justified by the government's "important interest in levelling the electoral playing field by constraining the cost of federal campaigns."[75]

IV. ANALYSIS: PLACING PARTIES IN THE *BUCKLEY* FRAMEWORK

A. INDEPENDENCE-IN-FACT?

Despite its clever use of the idea of independence-in-fact to avoid addressing the constitutional challenge raised by the Colorado Republican Party, the plurality opinion causes considerable problems on its own. First, it is highly fact-dependent, without making clear exactly the facts on which it depends. The anti-Wirth ad campaign occurred before the party had nominated a candidate, indeed, while the nomination was still contested by several candidates. Is that essential, or can a party engage in independent spending on behalf of the likely nominee—including an incumbent—or even for the actual nominee, provided that formal contact between the candidate and the party committee is avoided?

And exactly what formal contact has to be avoided? Justice Breyer's opinion emphasized the lack of coordination with respect to the advertising campaign itself.[76] Can a party committee that provides a candidate with computer services, polling data, assistance in training staff, fundraising and even funds,[77] engage in an "independent" media campaign on the candidate's behalf if it avoids direct contact with the candidate and the candidate's committee with respect to advertising strategy?

Second, to the extent that party committees take care to minimize their actual cooperation with candidates, the plurality opinion could have the potentially perverse consequence—perverse, that is, from the perspective of those who have called for a more party-centered campaign finance system as a way of promoting party accountability in government—of driving parties away from their candidates. The modern trend in Congressional campaigns has been for party committees, especially the Republican and Democratic campaign committees, to take a greater role

75. Id.
76. Id. at 2315.
77. For a description of the kinds of services party committees now provide their candidates, see Larry J. Sabato, *The Party's Just Begun: Shaping Political Parties for America's Future* 75-81 (Scott, Foresman, 1988); Paul S. Herrnson, *Party Campaigning in the 1980s* 47-83 (Harvard U. Press, 1988).

in recruiting candidates, assisting candidates with their campaigns, and, especially, helping candidates with communications, including the development of issue positions and the actual production of advertising.[78] One result has been a "greater nationalization of campaign themes,"[79] which may be a step toward greater party cohesion with respect to major issues.

The plurality's approach could force parties to choose between providing financial support to their candidates and working with those candidates on their campaign agendas. Thus, greater independent party spending might actually reinforce, rather than undermine, the candidate-centered campaigns that party government advocates have criticized.

Third, *Colorado Republican* will make it difficult for the FEC to enforce the ceiling on coordinated expenditures that the plurality was careful to avoid upsetting. As journalists and scholars who have examined "independent" spending by non-party political committees have observed, "[t]here are all manners of ways in which people running 'independent' campaigns can run them in tandem with the candidates" without formal consultation.[80] The prospects for tacit cooperation are far greater in the candidate-party context given the likelihood of ongoing ties between parties and their candidates, the involvement of many candidates in their parties, and the stakes parties have in the success of their candidates. The FEC, which has never been known for its timely or vigorous enforcement of the campaign finance laws,[81] is poorly situated to police the relationships between candidates and committees, or to carry the heavy burden of proving that independence-in-fact has been compromised in a particular case.

Although the FEC may have erred in concluding that independence-in-fact is never possible, it seems likely that it is relatively rare. The presumption of coordination may have been an administratively useful prophylactic rule for enforcing the statutory ban on coordinated expenditures.[82] By forcing the FEC to

78. See, e.g., Herrnson, *Party Campaigning in the 1980s* at 60-65 (cited in note 77).

79. Id. at 64.

80. See Drew, *Politics and Money* at 136-41 (cited in note 52); Alexander, *Financing the 1980 Election* at 142 (cited in note 52).

81. At least part of the FEC's difficulties derive from the weak institutional structure imposed by Congress. See Brooks Jackson, *Broken Promise: Why the Federal Election Commission Failed* (Priority Press, 1990).

82. The plurality in *Colorado Republican* noted that "[t]he Commission has not claimed . . . that, administratively speaking, it is more difficult to separate a political party's 'independent' from its 'coordinated' expenditures than, say, those of a PAC," 116 S. Ct. at 2318, but as the Colorado Republican Party had not argued that its spending was "independent" and not "coordinated" spending, it is not clear why the FEC would have thought it necessary to defend its position that all party spending is coordinated spending.

make the case not simply that party spending occurred but that the party committee actually cooperated with a candidate, the plurality may have invalidated the FECA limit in practice even as it strained to avoid doing so in theory.

Finally, the whole notion of party "independent" spending seems formalistic and naive. Seeing the trees but not the forest, the plurality's tight focus on the absence of party-candidate discussion of a particular ad misses the web of relationships that link parties to their candidates' campaigns. Parties back candidates and provide them with financial and logistical support. Candidates run on party lines, belong to parties, are often active in party organizations, and are frequently identified in terms of their party affiliation. Party committees, in turn, define their mission as the election of candidates bearing the party label. The protection of independent spending enables groups or individuals with independent agendas—that is, concerns other than the outcome of elections—to communicate their views with respect to elections to the voters. But the principal agenda of a political party committee is the election of the party's candidates.[83] The Colorado Republican Party's ad campaign was intended to weaken Tim Wirth and to elect a Republican—any Republican who might be nominated—not to further nonpartisan ideological or economic goals.

In finding that parties could engage in independent spending, Justice Breyer sought to assure parties parity with PACs, other political committees, and individuals. But given their ongoing ties to candidates, and their focus on electing candidates, parties are not quite comparable to these other participants in the political process. That does not mean that they should receive less constitutional protection or more protection; it means simply that the effort to treat parties just like these other political actors is unpersuasive.

As the other *Colorado Republican* opinions demonstrate, however, it is not easy to determine exactly what rights parties ought to enjoy, or to situate that determination within the *Buckley* doctrine.

B. Party-Candidate Identity?

Central to Justice Kennedy's opinion is the claim that parties have a distinctive relationship with candidates which provides

83. See, e.g., Gerald M. Pomper, *Passions and Interests: Political Party Concepts of American Democracy* 3-4 (U. Press of Kansas, 1992) ("Parties are unique in their nominal unity and electoral focus.").

parties with a constitutional right to engage in unlimited campaign spending. Although the notion of a distinctive relationship seems right—and the failure to acknowledge that relationship is the Achilles' heel of the plurality opinion—it is not obvious why the result is unlimited party spending.

Initially, Justice Kennedy's opinion somewhat exaggerates the distinction between party committees and other political committees in terms of the relationship between committees and candidates. As the rise of "generic" party advertising indicates, parties are not entirely dependent on candidate campaigns to get their message across. Parties can and do spend money to voice party positions apart from urging the election or defeat of specific candidates. On the other hand, non-party committees might believe that the most effective way to get their message across is by supporting the campaign of a particular candidate. Certainly, if a candidate has embraced a controversial position on a particular issue—such as gun control, health care, or abortion—organizations sharing that issue position might assert "a practical identity of interests" between themselves and the candidate during the pendency of the campaign.

The real difference between parties and other committees is the structural inability of parties to pursue their goals with respect to candidate elections independently of their candidates' campaigns. Other political committees can mount independent campaigns. Given the web of ties between candidates and parties, it would be "impractical and imprudent," if not impossible, for parties to mount independent campaigns.[84]

But that does not mean that limits on coordinated spending "stifle" a party's voice. If, as Justice Kennedy contends, there is a "practical identity" between party and candidate, then presumably the party's message is being advanced by its nominee. As long as the party's candidate—its designated representative in the election—has a right of unlimited spending, then the FECA limits on coordinated spending cannot limit the communication of the party's message, since the candidate's spending will convey that message to the voters.

Ironically, the real problem with the FECA limits may derive not from party-candidate identity but from the existence of some differences between party and candidate interests. Party committees have such a major stake in the electoral success of their nominees that true independence is extremely unlikely, yet

84. 116 S. Ct. at 2323.

party committees may also have their own distinctive interests—such as the concern of party bureaucrats and professionals in maintaining the party as an organization—not represented by the candidate. Restrictions on party coordinated spending may limit the ability of party committees to advance those particular interests.

The constitutionality of the FECA limits then turns on the central *Buckley* questions of whether coordinated party spending presents dangers of corruption or the appearance of corruption—which also entails consideration of the degree of deference due to the political branches in making that judgment. Justice Kennedy's opinion failed to address the question of corruption. Whether party spending can corrupt was, however, the focus of the Justice Thomas's concurrence and Justice Stevens's dissent.

C. Party-Candidate Corruption?

(1) Conduit Corruption:[85] Justice Thomas appears to be on shaky ground in his quick dismissal of the dangers of conduit corruption. Clever party manipulation of the provision added to FECA in 1979 exempting money for state and local level volunteer activity and voter registration and get-out-the-vote drives from the Act's contribution and expenditure limitations[86]—so-called "soft money"—has eroded the significance of FECA's limits on donations to party committees.[87] Although the law permitting soft money contributions restricts their use, the funds support party-building activities and free up federally regulated contributions for use in candidates' campaigns.[88] Thus, both candidates and parties benefit from large soft money contributions.

A relatively small number of "high rollers" play an important role in party fund-raising. More than sixty contributors gave the Republican National Committee at least $100,000 apiece in

85. After the submission of this Comment, a major campaign finance scandal involving the activities of the Democratic National Committee surfaced during the final weeks of the 1996 presidential campaign. This scandal confirms the significance of the conduit corruption concern raised in this section. Although the discussion in text gives more attention to the activities of the Republican National Committee, the activities of DNC fundraisers in 1996 amply demonstrates that conduit corruption is a serious danger for both parties. Further analysis of the fundraising activities of the major parties in the 1996 election is beyond the scope of this Comment.

86. See 2 U.S.C. § 431(8)(B)(v), (x), (xi), (xii) (1994); 2 U.S.C.§ 431(9)(B)(iv), (viii), (ix) (1994).

87. The literature on "soft money" is legion. For a description of the history of soft money and its role in the 1992 election, see Herbert E. Alexander and Anthony Corrado, *Financing the 1992 Election* 147-75 (M.E. Sharpe, 1995).

88. Brooks Jackson, *Honest Graft: Big Money and the American Political Process* 146 (Knopf, 1988).

soft money in the 1991-92 campaign, while the Democrats received gifts of more than $100,000 from seventy-two donors, including nearly $400,000 from the steelworkers union and nearly $350,000 from the National Education Association.[89] Some interests loom large in the financing of particular parties. For example, between January 1, 1995 and June 30, 1996—that is, well before the peak months of the 1996 presidential campaign—national Republican committees received $1.6 million from Philip Morris Co., $970,000 from RJR Nabisco, $448,000 from US Tobacco, $400,000 from Brown & Williamson Tobacco Co., and $300,000 from the Tobacco Institute.[90] These are pretty large sums to be "diffused"—and there is at least anecdotal evidence of national Republican officials seeking to make state officeholders more attentive to the tobacco industry's interests.[91] Moreover, the parties have taken steps to promote direct contact, at meals, private meetings, and policy retreats, between their major financial backers and elected officeholders.[92]

As the soft money gifts suggest, a broad-based party can serve as a conduit for more narrow interests. Like Justice Thomas, many advocates of a more party-centered campaign finance system have argued that an expanded party role would dilute the influence of big special interest donors.[93] The growing role of special interest contributions in party finances, however, casts doubt on this sunny scenario. Removing limits on party spending without providing for public funding would almost certainly increase the parties' incentives to pursue large contributions, and concomitantly increase the prospects of special

89. See Alexander and Corrado, *Financing the 1992 Elections* at 153-56 (cited in note 87).

90. *Top "Soft Money" Contributors to Republican Party Committees*, Wash. Post, Aug. 14, 1996, at A19.

91. See, e.g., Timothy Noah, *GOP's Chief Pushed Pro-tobacco Bill at State Level, Arizona Lawmaker Says*, Wall St. J., Feb. 20, 1996, at A20 (RNC National Chairman Haley Barbour phoned the Speaker of the Arizona House of Representatives to pressure him into supporting a pro-tobacco bill); *Tobacco Ties*, Wall St. J., March 1, 1996, at A1 (reporting that Haley Barbour called Texas Governor Bush's office to check on status of bill to restrict city anti-smoking ordinances).

92. See Jackson, *Honest Graft: Big Money and the American Political Process* 9-10, 98-99 (cited in note 88); Sabato, *The Party's Just Begun: Shaping Political Parties for America's Future* at 77 (cited in note 77); Herrnson, *Party Campaigning in the 1980s* at 35-36 (cited in note 77).

93. See, e.g., Kirk J. Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns, and Opportunities*, 56 Fordham L. Rev. 53 (1987); Clarisa Long, *Shouting Down the Voice of the People: Political Parties, Powerful PACs, and Concerns About Corruption*, 46 Stan. L. Rev. 1161 (1994).

interests pursuing their agendas, and securing quid pro quos, through donations to the parties.[94]

Conduit corruption is at heart an issue with a strong empirical component, but Justice Thomas's opinion reflects more armchair political science theorizing than any familiarity with campaign finance data. On the other hand, Justice Stevens' opinion does little more than state that the possibility of conduit corruption is enough to justify the FECA limits. If, as the *Buckley* doctrine provides, party contributions are a form of constitutionally protected speech, then there ought to be at least some assessment of the seriousness of the corruption danger as a part of the determination whether constitutionally protected speech may be curtailed. Even deference to Congress is not the same as abdication.

The conduit corruption issue nicely displays the importance of questions about deference and empirical justification when courts consider the constitutionality of campaign finance limits. The gap between Justice Thomas and Justice Stevens demonstrates anew how the Court has been unable to resolve this central question. Unfortunately, the Court's difficulties seem to stem not from reasonable disagreements about how to assess disputed evidence but from an apparent unwillingness to deal seriously with empirical evidence and legislative justifications at all. As the Thomas and Stevens opinions reveal, the Court's two principal approaches have been either to disregard empirical evidence or not to require any. Surely, there is a middle position between complete dismissal of Congress' judgment[95] and evidence that might support its action, and failure even to require that evidence be presented and defended.

(2) Party Influence Corruption: Justice Thomas's denial that party influence per se can be corrupting would appear to have a more substantial foundation than his summary rejection of conduit corruption. Party committee spending on behalf of candidates is far more likely to be an instance of money used to advance shared candidate-donor interests in order to persuade

94. Brooks Jackson contended that Rep. Tony Coelho's efforts to strengthen Congressional Democrats' finances in the 1980s "actually encouraged House Democrats to become more reliant on special interest money. The [Democratic Congressional] campaign committee gets its own funds increasingly from lobbyists, PACs, and businessmen . . . ." Jackson, *Honest Graft: Big Money and the American Political Process* at 296 (cited in note 88).

95. According to Justice Thomas, "[t]here is good reason to think that campaign reform is an especially inappropriate area for judicial deference to legislative judgment." 116 S. Ct. at 2330 n.9.

voters than of money to influence a candidate to adopt or change a position.

Nevertheless, candidate and party committee interests can diverge. In those circumstances, Justice Stevens may well be correct in asserting that "by virtue of its power to spend" the party may be able to exert "influence . . . over the candidate."[96] The Progressive Era laws that shifted control over nominations from party committees and conventions to primaries constituted an effort to reduce the influence of party organizations over party candidates, presumably reflecting the notion that candidates (and elected officials) would embrace different positions on issues of public importance if they were less beholden to party officials.[97] Moreover, there is also evidence that contemporary party committees may attempt to leverage their control over coordinated spending to influence candidates—for example, to "persuade" candidates to hire the committees' preferred consultants or accept the committees' strategic advice with respect to their campaigns.[98]

Still, the preeminent goal of party committees is the election of party candidates, rather than influencing the issue positions of elected officials. Party committees will back only their own party's candidates, whereas many other political committees, particularly non-ideological political committees, will often offer some support to both major party candidates in a race, as a means of ensuring an opportunity to influence whoever wins the election.

Moreover, even if Justice Stevens is right that unlimited coordinated spending would provide the opportunity for greater party influence over candidates, influence is not the same as corruption. The real question is whether such party influence would be "improper" or "undue." As the cases from *Buckley* to *Austin* demonstrate, the Court has never determined what makes influence undue, other than to indicate that large sums of money given to a candidate or spent in coordination with the candidate can be a source of improper influence. But the distinction between money given to influence a candidate and money given to

96. 116 S. Ct. at 2332.

97. See, e.g., Jo Freeman, *Political Party Contributions and Expenditures Under the Federal Election Campaign Act: Anomalies and Unfinished Business*, 4 Pace L. Rev. 267, 290 (1984) ("Historically, there certainly has been a belief that parties were capable of corruption. Most of the state laws regulating parties passed at the turn of the century were intended to eliminate perceived corruption.").

98. See Herrnson, *Party Campaigning in the 1980s* at 57, 59 (cited in note 77).

help a candidate who is receptive to the donor's views or is otherwise politically aligned with the donor is often elusive.

Underlying Justice Thomas's concurrence is the assumption that a party cannot "unduly" influence its candidates. Apparently the more influence a party has over its candidates the better. That is also the position embraced by the party-responsibility school. The more influence a party committee has over its candidates, presumably, the greater cohesion there will be among the party's officeholders, the more the party label will mean something in government and to the electorate, and the more the voters can look to party as a means of establishing government accountability. There is considerable scholarly support for a party-centered campaign finance system as a step toward creating a more "responsible" two-party system, with attendant benefits for government performance and responsiveness.[99]

But despite Justice Thomas's reference to "representative government in a party system," the United States has a long tradition of candidate-centered elections coexisting with its party system.[100] Parties are nowhere mentioned in the constitution. For most of this century, party committees have not controlled party nominations. Candidates have historically organized, conducted, and financed their own campaigns. Candidates' campaigns often emphasize a candidate's independence from party offices and even from other elected officials of their own party. The limit on party coordinated spending grows out of and is consistent with this tradition.

In essence, the question of whether party committee coordinated spending raises a danger of parties corrupting candidates is really a question of how much or how little potential for influence parties ought to be allowed to have over their candidates' campaigns—and whether Congress or the Court should decide this. Certainly, elected officials seem to be in a much better position to consider and combine the multiple and often conflicting values of candidate autonomy, party responsibility, voter participation, and the potential for parties to serve as conduits for special interest influence. Elected officials are more likely to understand the impact of the campaign finance laws on the polit-

99. See, e.g., Sabato, *The Party's Just Begun: Shaping Political Parties for America's Future* at 185-88, 212-23 (cited in note 77).

100. See, e.g., Leon Epstein, *Political Parties in the American Mold* 5 (U. of Wisconsin Press, 1986) (American "political culture" is one "in which voters choose individuals, not merely parties, to represent them in executive and legislative offices").

ical process and the interaction of party spending with other campaign finance laws and governance generally.[101]

Certainly there is no reason to believe that elected officials are likely to be hostile to party interests. Some independent committees may be composed of political outsiders, but party committees are the ultimate political insiders. The vast majority of elected federal and state officials are elected on party lines and nearly all carry major party labels. All of the members of the extremely important national party congressional campaign finance committees are members of Congress,[102] and Congress has deliberated various bills that would expand the parties' role. As Republican party committees have generally outpaced their Democratic counterparts in raising money,[103] Republicans in Congress have tended to make lifting the limits on donations to parties and spending by parties a component of their campaign finance legislative agenda.[104]

Party committees have not done badly under FECA. The Act allows individuals to give national party committees $20,000 in a calendar year, and it allows political committees to give national party committees $15,000 per year, whereas the limits on individual and committee donations to candidates are $1,000, and $5,000, respectively, per candidate per election.[105] The soft money exemption added in 1979 has enabled the parties to raise tens of millions of dollars for party-building activities.[106] Most

101. This includes the balance of political forces between the parties. Given the Republicans' traditionally greater success in raising funds, any change in the rules governing the party role has partisan implications as well. From a partisan perspective, *Colorado Republican* is a victory for Republicans in general, as well as for the Colorado Republican Party. Of course, had either of the concurring opinions won the approval of a majority of the Court, the Republicans' victory would have been even more substantial.

102. Herrnson, *Party Campaigning in the 1980s* at 40 (cited in note 77); David B. Magleby and Candice J. Nelson, *The Money Chase: Congressional Campaign Finance Reform* 100-01 (Brookings Institution, 1990).

103. See, e.g., John H. Aldrich, *Why Parties? The Origin and Transformation of Political Parties in America* 256-58 (U. of Chicago Press, 1995); Epstein, *Political Parties in the American Mold* 216-23 (cited in note 100); Magleby and Nelson, *The Money Chase: Congressional Campaign Finance Reform* at 102-12 (cited in note 102); Sabato, *The Party's Just Begun: Shaping Political Parties for America's Future* at 75-81 (cited in note 77).

104. See, e.g., Herbert E. Alexander and Monica Bauer, *Financing the 1988 Election* 117-18 (Westview Press, 1991) (discussing Republican campaign finance reform proposals); see also id. at 136 (noting partisan effects of Democratic proposals to tighten up on soft money).

105. 2 U.S.C. § 441a(a) (1994).

106. See, e.g., Alexander and Corrado, *Financing the 1992 Election* at 158 (cited in note 87) (noting that "both parties appear to be increasingly incorporating soft money into their overall financial schemes"). Early estimates indicate that the Democratic and Republican party committees each raised about $100 million in soft money in the 1995-96 election cycle. See Peter H. Stone, *The Green Wave*, 28 Nat'l J. 2410 (Nov. 9, 1996).

scholars of the political parties have determined that the national parties have enjoyed greater influence with respect to the finances of their candidates' congressional campaigns since FECA's enactment than at any other time in their history.[107]

Given the existence of campaign finance laws that limit both donations to candidates and the financial activities of non-party political committees, the concurring Justices' determination that parties have an unlimited right to engage in coordinated spending could, if embraced by a Court majority, provide an impetus for a more party-centered campaign finance system. This might, as party-responsibility advocates contend, promote party cohesion and government accountability. A party-centered system might very well be a good idea. But it would be a major departure from past and present practice. And it is hard to believe that the decision whether to have a party-centered or candidate-centered system is a question of constitutional law, to be decided by the Supreme Court, rather than a preeminently political question to be decided by Congress.

V. IMPLICATIONS OF A RIGHT OF UNLIMITED PARTY COORDINATED SPENDING FOR THE CAMPAIGN FINANCE LAWS

Colorado Republican came within one vote of eliminating limits on party spending in connection with congressional campaigns. The plurality's focus on the asserted independence-in-fact of the anti-Wirth ad campaign is unlikely to provide a stable resolution of the question of party spending, and the question of the constitutionality of limits on party spending is likely to recur. Moreover, that question has broad implications for the overall structure of campaign finance regulation as well as for proposed reforms.

Striking the limits on party spending may be like pulling on a loose thread and causing a whole sleeve to unravel. Justice Thomas's presumption that parties are incapable of corrupting their candidates would appear to eliminate the basis for restrictions on party contributions to candidates. Justice Kennedy's opinion sought to leave open the constitutionality of restrictions on "undifferentiated political party contributions,"[108] but his notion of the "practical identity" of party and candidate implicitly invalidates restrictions on party contributions to candidates,

107. See, e.g., Epstein, *Political Parties in the American Mold* at 217-18 (cited in note 100).
108. 116 S. Ct. at 2323.

too—assuming parties would still want to make contributions if they enjoyed the right of unlimited coordinated expenditure. Thus, under either approach, invalidating the limit on coordinated spending is likely to result in the elimination on any limits on party financial support for candidates.

Further, Justice Thomas's opinion suggests the basis for an attack on the limits on contributions to parties. In cases dealing with contributions to political committees, the Court has given great weight to the corruptive potential of contributions *by* an organization in order to justify restrictions on contributions *to* the organization. Thus, *Citizens Against Rent Control v. City of Berkeley*[109] invalidated an ordinance restricting contributions to committees that support or oppose ballot measures, reasoning that since spending by a ballot measure committee raises no possibility of corruption (since there was no candidate to corrupt) there was no constitutional basis for limiting contributions to the committee. But in *California Medical Ass'n v. FEC*, and *FEC v. National Right to Work Committee* the Court relied on the anti-corruption rationale to uphold limits on contributions to PACs that gave funds to candidates.[110]

Given Justice Thomas's reliance on the statutory limits on contributions to parties to rebut the argument that party expenditures raise the risk of conduit corruption, my argument that the logic of Thomas's position would undermine the limits on donations to parties may be something of a speculative stretch. Nevertheless, if the Court were to buy the argument that there is nothing corrupting in a party's influence over its candidates and that party size and diversity mitigate the danger of conduit corruption, then the anti-corruption rationale for limiting contributions to parties would be discredited. Although the growth of soft money has eroded the effect of FECA's limits on donations to parties, acceptance of Justice Thomas's argument might make it impossible to close the soft money loophole, and would also, of course, have implications for state laws that impose limits on contributions to state parties in connection with state campaigns.

A right of unlimited party spending could also knock out the spending limits in the presidential public funding system, and, similarly, jeopardize state public funding laws for state elections and proposals to use public funds to limit the use of private funds. *Buckley* invalidated limits on campaign expenditures but held that Congress could condition the grant of public funds on a

109. 454 U.S. 290, 297 (1981).
110. See *Cal Med*, 453 U.S. at 197-99, 201; *NRWC*, 459 U.S. at 207-10.

candidate's acceptance of spending limits.[111] The limit on publicly-funded candidate spending has also applied to spending by the candidate's party. The rise of soft money has dramatically expanded the amount of private funds available to publicly-funded presidential candidates. Nevertheless, the statutory restrictions on party spending in support of presidential candidates make presidential elections primarily publicly funded and assure a measure of parity between the major party candidates.

Could those restrictions survive a holding that party expenditures are constitutionally protected? If, as Justice Kennedy contends, "candidates are necessary to make the party's message known and effective" and limits on party spending "constrain[ ] the party in advocating its most essential positions and pursuing its most basic goals,"[112] then how can party spending on behalf of its leading speaker—its presidential candidate—be limited?[113] Under *Buckley* a presidential candidate can waive his or her own right to unlimited spending in order to receive party funds, but would a candidate's waiver bind party committees?

In *NCPAC*, the Court held that a candidate's acceptance of spending limits as a condition for public funding did not bind independent committees, which remain entitled to spend unlimited sums in support of that candidate. Notwithstanding Justice Kennedy's rhetoric about the "practical identity" of candidates and parties, presidential candidates do not control their party committees—certainly not the state committees or the congressional finance committees which might want to spend in support of the presidential candidate in order to have an effect on the fortunes of party candidates further down the ballot. If, as Justice Kennedy put it, parties "exist to advance their members' shared political beliefs,"[114] it may not be possible for one candidate to waive the speech rights of the many people affiliated with the party.

A right of unlimited party coordinated spending thus might make it impossible to limit candidate spending even as a condition for the receipt of public funds. It is possible that only parties could waive party spending rights. This might mean that any at-

111. 424 U.S. at 57 n.65. See also *Republican Nat'l Comm. v. Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y. 1980), aff'd 445 U.S. 955 (1980).

112. 116 S. Ct. at 2322-23.

113. Indeed, even the plurality threatens public funding since party committees, such as state party committees, that avoid direct contact with the presidential candidates could be "independent-in-fact" and presumably could engage in unlimited spending on behalf of the party's presidential candidate. Under the concurrences, party committees might be able to work with their presidential candidate directly.

114. Id. at 2322.

tempt to use the public funding system to enforce spending limits might require offering public funding to the parties rather than (or in addition to) the candidates. This would certainly serve to promote greater party responsibility in government, and might even be a good idea, but it would be a sharp departure from existing practice if public funding of parties were to become necessary to impose spending limits on candidates.[115]

VI. IMPLICATIONS OF *COLORADO REPUBLICAN* FOR *BUCKLEY v. VALEO*

Colorado Republican was a hard case, as the multiple opinions suggest. The Court's difficulty may have been attributable in part to the constitutionally ambiguous status of parties. In other cases, the Court has treated parties both as quasi-state actors, subject to constitutional requirements, and as the epitome of the private political associations shielded by the First Amendment from state regulation. Indeed, earlier this past term, the Court fragmented along lines similar to those in *Colorado Republican* when it considered whether the Voting Rights Act could be applied to a change in a state party's convention rules.[116]

Moreover, party spending poses a particularly hard issue for the *Buckley* framework. *Buckley*'s contribution/expenditure distinction and its concern with corruption implicitly assume a separation between candidates and their financial backers, and the possibility that financial support will be a source of improper influence on candidates. But parties are composed of both candidates and contributors to their campaigns. Party committees support candidates primarily to advance their shared interests rather than to influence them. Parties thus straddle the candidate-contributor gap intrinsic to the *Buckley* model.

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115. It is possible that in the existing presidential public funding system, the provision of public funds for the national party conventions could provide the basis for the party waiver of the right of unlimited coordinated spending. However, if the parties were able to raise and spend unlimited amounts of money in the presidential election they might choose to forgo public funds for the convention. Despite the public funding law, large donors currently play a significant role in financing the party conventions. See Phil Kuntz and Michael K. Frisby, *For Big Contributors, Convention's Business Isn't at the Podium*, Wall St. J., Aug. 13, 1996 at A1.

Nor, given the traditionally decentralized structure of the major parties, is it clear that the party national committee's agreement to limit spending in exchange for convention funds would bind state party committees.

116. See *Morse v. Republican Party of Virginia*, 116 S. Ct. 1186 (1996). As in *Colorado Republican*, the principal groupings on the Court were Justices Stevens and Ginsburg in an opinion by Justice Stevens; Justices Breyer, O'Connor and Souter in an opinion by Justice Breyer; and Justices Kennedy, Thomas and Scalia, and Chief Justice Rehnquist in multiple overlapping opinions.

Colorado Republican may also be indicative of deeper difficulties in the Court's approach to campaign finance regulation. *Buckley* assumes a distinction between expressions of support for political ideas and positions and efforts to influence candidates—the former are treated as constitutionally protected from restriction while the latter are treated as problematic and subject to regulation. Yet the distinction between support for ideas and efforts to influence candidates is often elusive. Money given to support a candidate who shares the donor's beliefs or issue-positions may influence the candidate to continue to adhere to that position, while money given to influence a candidate usually goes to candidates who have signaled at least some openness to supporting the donor's position.

Moreover, *Buckley* is focused entirely on the question of the influence of campaign money on candidates and officeholders; the Court firmly ruled out consideration of the influence of campaign money or of disparities in resources available for political activity on the conduct or outcomes of elections as a factor in constitutional analysis. Concerns about the influence of money, and especially of unequal sums of money, on election outcomes has been a prime factor driving campaign finance regulation. Even the Court, *Buckley* notwithstanding, has not been entirely immune to these concerns, as *Austin*'s focus on corporate campaign war chests demonstrates—although *Austin* wrapped its concern over unequal spending in the open-ended language of corruption.

Dissatisfaction with *Buckley* led one *Colorado Republican* Justice explicitly and two others implicitly to break away from the *Buckley* framework. Justice Thomas, in the portion of his opinion not joined by any other Justice, rejected the contribution/expenditure distinction, and urged that restrictions on contributions, as well as limitations on expenditures, be subject to strict scrutiny. In his view, bribery laws and disclosure requirements are adequate to prevent corruption.[117] Conversely, one of the reasons Justice Stevens, joined by Justice Ginsburg, gave for sustaining the FECA limits is the government's "important interest in leveling the electoral playing field by constraining the cost of federal campaigns."[118] This is flatly inconsistent with *Buckley*'s rejection of any government interest in limiting the cost of cam-

117. 116 S. Ct. at 2325-29.
118. Id. at 2332.

paigns as a justification for limiting campaign finances.[119] Moreover, the dissent's citation to Justice White's *Buckley* dissent, its skepticism that increased campaign spending necessarily promotes the "informed debate protected by the First Amendment," and its willingness to "accord special deference" to Congress's "wisdom and experience" concerning campaign finance suggest that Justices Stevens and Ginsburg may have rejected the *Buckley* doctrine generally.

Colorado Republican's difficulties in applying the *Buckley* framework and the rejection of the *Buckley* approach by three members of the Court indicate the troubled state of the current doctrinal approach to campaign finance regulation. Nonetheless, it may be a little premature to toll *Buckley*'s death knell. Chief Justice Burger and Justice White dissented from basic elements of *Buckley* twenty years ago and Justice Marshall subsequently came to reject the contribution/expenditure distinction[120] so the doctrine has survived the opposition of three sitting Justices before.

Moreover, given the different directions in which the Thomas and Stevens opinions pull, the Court seems far from a consensus on a model that would replace *Buckley*. *Austin* hinted at a greater acceptance of egalitarian arguments for campaign limits, but with the replacement of *Austin*'s author, Justice Marshall, by Justice Thomas, *Austin* itself may be hanging by a thread and may be more of a special "corporations" case now than ever before.[121] At the same time, no other member of the *Colorado Republican* Court endorsed Justice Thomas's extreme hostility to campaign finance regulation. The plurality's fact-specific decision may indicate a concern by those three Justices to minimize judicial disruption of Congress' campaign finance handiwork. Judicially mandated deregulation of campaign finance seems even

119. Indeed, one of the reasons the plurality rejected the danger of corruption as a basis for restricting party independent spending is its determination that Congress adopted the FECA ceiling not to control corruption "but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending." Id. at 2317.

120. *National Conservative PAC*, 470 U.S. at 518.

121. *Austin* was decided by a vote of 6-3. The six Justices in the majority were Justice Marshall, Chief Justice Rehnquist, and Justices Brennan, White, Blackmun and Stevens. Justices Kennedy, O'Connor and Scalia dissented. The replacement of Justice Marshall by Justice Thomas reduces support for *Austin*'s broad reading of corruption from six to five. Chief Justice Rehnquist has consistently supported the *Buckley* framework, but has equally consistently made a special exception to permit restrictions on corporations. There is no evidence that any of the *Austin* dissenters have become more receptive to arguments that governments may justify spending restrictions to limit the impact of campaign war chests on the electorate.

less probable than judicial endorsement of egalitarian restrictions.

For all its problems, then, *Buckley* continues to shape judicial consideration of campaign finance regulation. *Buckley*'s internal tensions will make the doctrine difficult to apply and the evolution of case law difficult to predict. Campaign finance cases are likely to remain an arena of conflict within the Court, much as *Buckley*'s limited focus on quid pro quo corruption will continue to be a source of conflict between the Court and campaign finance reformers.