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THE POLITICAL PARTIES AND CAMPAIGN FINANCE REFORM

Richard Briffault

The major political parties present a central, and particularly nettlesome, difficulty for federal campaign finance regulation. In the last decade, party campaign finance practices have blown large, and widening, holes in the campaign finance system created by Congress in the Federal Election Campaign Act (“FECA”)¹, and modified and sustained by the Supreme Court in *Buckley v Valeo*.² Through the development of soft money,³ the parties have enabled donors to avoid FECA’s contribution limits, its ban on the use of corporate and union treasury funds in federal elections, and the spending limits imposed on presidential candidates who choose to accept public funding. Through the exploitation of so-called issue advocacy advertising,⁴ the parties have been able to channel millions of dollars otherwise prohibited by FECA into the heart of federal election campaigns. The Supreme Court’s 1996 determination that parties may engage in independent spending in support of party candidates⁵ has provided the parties with yet another

¹ Federal Election Campaign Act of 1971, as amended in 1974, codified at 2 U.S.C. §§43-455. The laws providing for the public funding of presidential candidates are technically distinct from FECA. See Presidential Campaign Fund Act, codified at 26 U.S.C. §§9001-9012, Presidential Primary Matching Payment Account Act, codified at 26 U.S.C. §§9031-9042. I will, however, be referring to FECA as a shorthand for the federal campaign finance laws generally, including the presidential public funding laws.

² 424 U.S. 1 (1976).

³ Soft money is explained more fully at text at notes 25-36, *infra*.

⁴ The concept of issue advocacy is explained at text at notes 37-49, *infra*.

⁵ *Colorado Republican Fed. Campaign Comm. v FEC*, 518 U.S. 604 (1996).

opening to evade the basic structure of FECA, although the greater opportunities offered by the combination of soft money and issue advocacy have, for the moment at least, muted the role of party independent spending.

These party finance techniques are not simply instances of clever adaptation to the FECA-*Buckley* regime – although the gaming of the system by donors and politicians and the failure of Congress over the last two decades to respond to campaign finance innovations are part of the story. Rather, these party practices grow out of fault lines central to the constitutional law of campaign finance. As a result, closing the loopholes exploited by the parties presents difficult constitutional questions. Nevertheless, as I will indicate in this article, new rules that would curb the party activities that are eroding the campaign finance laws can be adopted consistent with the principles enunciated in *Buckley*. Indeed, such laws are essential to address a fundamental concern of the FECA-*Buckley* regime -- the prevention of the undue influence of private wealth, and the appearance of such influence, on government decision-making.

This Article considers the place of the major political parties in our campaign finance system -- the role the parties currently play, the constitutional doctrines that must be considered in regulating the parties, and the reasons for regulating party activities currently beyond the scope of FECA, and some legislative proposals for bringing party campaign finance practices into closer compliance with the values that inform our campaign finance laws. Part I analyzes how FECA affects the parties, and how, in turn the major party campaign finance innovations emerged outside of FECA and are now eroding the federal campaign finance laws.

Part II considers the application of the *Buckley* doctrine to the parties. *Buckley* sharply distinguishes between contributions to a candidate and independent support for a candidate, and

between the discussion of political issues and efforts to elect candidates. *Buckley's* lines are harder to draw and make less sense in the party context, than when applied to other politically active organizations. Indeed, parties are particularly well-positioned to take advantage of these aspects of the *Buckley* doctrine to get around FECA's restrictions. More deeply, *Buckley* provides that the only basis for limiting campaign finance activities is to prevent corruption and the appearance of corruption, but many political scientists and several members of the Supreme Court have argued that party campaign finance activities raise little danger of corruption. If they are right, then all present and proposed rules limiting party money rest on a shaky constitutional foundation.

I will argue that party activities do, indeed, raise dangers of corruption within *Buckley's* meaning. Indeed, I will suggest that, due to the close structural connection between parties and their candidates and the overarching concern of the major parties with winning elections and wielding power in government, the parties should be constitutionally more easy -- not more difficult -- to regulate than other politically active organizations. The doctrinal distinctions *Buckley* draws can and should be interpreted differently in the party context so as to include more party activities within the scope of campaign finance regulation.

In Part III, I will present and defend proposals for dealing with the three most pressing party threats to the campaign finance system: independent expenditures, soft money, and issue advocacy. These proposals seek to harmonize the rights of parties to engage in constitutionally protected political activity, and the benefits of party participation in federal elections, with the goal of restoring the integrity of the campaign finance system. These proposals should not be seen as anti-party. The parties play a positive role in our political system. Indeed, I will suggest

that once party money is brought back under FECA, increasing money the parties are allowed to spend in support of their candidates would actually be desirable. But unlimited contributions to, and unlimited spending by, the parties jeopardize the anti-corruption values at the heart of campaign finance law. Unless party money is subject to effective limits, campaign finance reform is doomed to failure.

I. Party Money Under, and Outside of, FECA

A. FECA and the Parties ⁶

FECA limits donations to parties by individuals and political action committees (“PACs”). It provides that a person⁷ may contribute up to \$20,000 per calendar year to the national committees of a political party, and up to \$5000 per calendar year to a state party committee for activities in connection with federal elections.⁸ A PAC can contribute up to \$15,000 per calendar

⁶ In text, I discuss FECA’s limits on contributions to parties, and on party support of candidates. The Act also imposes reporting and disclosure requirements on the parties, and makes the parties whose presidential candidates qualify for public funding eligible for funds to defray the costs of their presidential nominating conventions. Some commentators found that the reporting requirements have had a real impact on party participation in federal elections. They have suggested that FECA’s rules contributed to the centralization of party activity from the local to the state level and, at least until the parties became more familiar with FECA, tended to discourage state party involvement in federal races. See, e.g., Xandra Kayden, *The Nationalizing of the Party System* 262-65 in Michael J. Malbin ed., *PARTIES, INTEREST GROUPS, AND CAMPAIGN FINANCE LAWS* (1980); Paul S. Herrnson, *PARTY CAMPAIGNING IN THE 1980S* 28-29 (1988).

⁷ Under FECA, “person” includes “an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons” other than the federal government. 2 U.S.C. § 431 (11). FECA imposes additional restrictions on corporations and unions. See 2 U.S.C. § 441b.

⁸ 2 U.S.C. § 441a(a)(1)(B),(C). The limit on contributions to a state party committee also includes contributions to any local party committee within that state.

year to the national committees of a party, and \$5000 per calendar year to a state party committee for federal election activity.⁹ Corporations and labor unions are prohibited from making any contributions to party activities in support of federal candidates, but they may sponsor PACs that can give to party committees, subject to the dollar limits applicable to PAC contributions.¹⁰ FECA's limits on donations to parties generally track the Act's limits on donations to and by PACs, except that the limits on donations to parties are higher than the limits on donations to other political committees.

FECA's limits on party support for candidates are also modeled on the Act's limits on PAC contributions to candidates, although once again FECA treats parties more generously than it treats PACs. Like PACs,¹¹ party committees -- including the national committee, the Senate campaign committee, the House campaign committee, and the state party committee -- are each permitted by FECA to donate up to \$5000 to a federal candidate per election.¹²

The Act imposes much lower limits on individual contributions to candidates and PACs. A person can contribute no more than \$1000 per election to a federal candidate, and no more than \$5000 per calendar year to a PAC. 2 U.S.C. § 441a(a)(1)(A), 2(A). Total election-related contributions by an individual to candidates, PACs, and party committees may not exceed \$25,000 in any calendar year. 2 U.S.C. §441a(a)(3).

⁹ 2 U.S.C. § 441a(a)(2)(B),(C). A PAC may not contribute more than \$5000 per election to a federal candidate, nor more than \$5000 per calendar year to another PAC. 2 U.S.C. § 441a(2)(A), (C). There is no annual limit on aggregate PAC contributions to candidates, party committees and other PACs.

¹⁰ 2 U.S.C. § 441b(a).

¹¹ 2 U.S.C. § 441a(a)(2)(A).

¹² FECA treats primary, runoff, and general elections as different elections. 2 U.S.C. § 431 (1)(A). Thus, in a typical election cycle in which a candidate contests both a primary and a general election, the limit on PAC and party committee donations to a candidate is \$10,000. Similarly, the \$1000 cap on individual donations to a candidate is \$2000 per election cycle. As a

FECA, however, offers the parties two special opportunities, unavailable to PACs, to provide candidates with financial support. First, the parties may engage in “coordinated expenditures.” FECA treats money that is not given to a candidate but spent by an individual or organization in coordination with a candidate as though it were a contribution to that candidate, subject to the Act’s contribution ceiling.¹³ However, FECA authorizes party committees – and only party committees – to engage in coordinated expenditures with candidates that do not count against the contribution caps. Party coordinated expenditures are subject to dollar limits, but these limits are much higher than the Act’s limits on contributions and they are adjusted for inflation.¹⁴ In addition, a state party committee may designate a national party committee -- such as the

rule, parties do not contribute to candidates in contested primaries. *See* Paul S. Herrnson, *National Party Organizations at the Century’s End* 65 in L. SANDY MAISEL, ED., *THE PARTIES RESPOND: CHANGES IN AMERICAN PARTIES AND CAMPAIGNS* (3d ed. 1998).

There is one special rule which permits a party national committee, its Senate campaign committee, or the two together to contribute \$17,500 to a Senate candidate per campaign, e.g., primary and general election together. 2 U.S.C. § 441a(h).

¹³ 2 U.S.C. §441a(a)(7)(B)(i).

¹⁴ The limits for Senate and presidential races are also based on voting age population (“VAP”). A party national committee may spend 2 cents per VAP, inflation-adjusted from a 1974 base, in support of the party’s Presidential ticket. 2 U.S.C. § 441a(d)(2). Under this formula, each of the two major national parties will be able to spend \$13.3 million in coordinated spending in support of its presidential ticket in 2000. FEC Release, “If the Presidential Election Were Held in 1999,” July 7, 1999, <http://www.fec.gov/press/spend99.htm>. The national and state parties may also each spend the greater of \$20,000 in 1974 dollars, or 2 cents in 1974 prices times state VAP in coordinated expenditures in connection party Senate candidates, or House of Representatives candidates in a state which has only one House seat. 2 U.S.C. § 441a(d)(3)(A). The coordinated spending limit for party spending in support of other House candidates is \$10,000, inflation-adjusted from a 1974 base. 2 U.S.C. § 441a(d)(3)(B). In 1998, limits on party coordinated spending for Senate candidates ranged from \$130,200 in Alaska to \$3,035,874 in California. The limit in House races was \$32,550 in most states, and \$65,100 in states with only one congressional district. FEC Release, “FEC Announces 1998 Party Spending Limits: Amounts Range from \$130,200 to \$3 Million,” March 6, 1998, <http://www.fec.gov/press/441ad.htm>.

Senate campaign committee for Senate elections or the House campaign committee for elections to the House of Representatives -- as its “agent” for coordinated spending.¹⁵ As the national committees are more successful at fundraising, such agency agreements make it easier for the parties to engage in the maximum coordinated spending permitted by law, and they effectively double the national committee’s coordinated expenditure ceiling. Coordinated expenditures are a far more important form of party campaign activity than direct contributions to candidates. In the last three election cycles, national Republican and Democratic contributions to congressional candidates totaled \$14.7 million, but aggregate coordinated expenditures by the parties came to \$129.4 million.¹⁶

Second, state party committees may undertake, without limitation, certain “grass-roots” spending in support of federal candidates. These expenditures include payments for campaign materials used in connection with volunteer activities on behalf of party nominees, and for voter registration and get-out-the-vote drives.¹⁷ Grass-roots spending must be funded by contributions

¹⁵ See, e.g., FRANK J. SORAUF, *INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES* 227 (1992). The Supreme Court upheld the transfer of such spending authority in *FEC v Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981).

¹⁶ Federal Election Commission, “FEC Reports on Political Party Activity for 1997-98,” April 9, 1999, <http://www.fec.gov/press/ptyye98.htm>.

These figures may understate the value of coordinated expenditures. Most coordinated expenditures consist of in-kind services: the provision of polling data, mailing lists, assistance with fundraising, campaign management, opposition research, and preparation and placement of advertising. These services are often obtained from consultants who provide them to the parties, as repeat participants in the political process, as a discount, so that their value to the candidate is likely to exceed the cost to the party. See ANTHONY GIERZYNSKI, *LEGISLATIVE PARTY CAMPAIGN COMMITTEES IN THE AMERICAN STATES* 53-54 (1992); Herrnson, *supra*, at 73 (party in-kind campaign services “are worth many times more than their reported value”).

¹⁷ 2 U.S.C. §431(8)(B)(xi),(xii),(9)(B)(viii),(ix).

that comply with FECA's dollar caps and source prohibitions, but there is no ceiling on the amount state parties can spend on these activities. Although nominally a spending opportunity for states parties, the grass-roots exemptions strongly benefit the national parties, which typically raise the funds for grass-roots spending and then transfer them to state and local parties, with directions concerning how they are to be used to aid federal candidates.

The parties, particularly the national party committees, have done well under FECA. They raise far more money than they ever did before, and they are playing a growing role in the financing of federal election campaigns. The Act's limits on donations to candidates, coupled with the sharp rise in campaign costs, place a premium on intermediary organizations like PACs and party committees that can help candidates obtain funds and defray some of their campaign costs. Although initially PACs were the preeminent beneficiaries of FECA, over the course of the 1980s the national parties emerged as important financial participants in federal elections. For the first time, the national party committees built up a mass financial base, accumulating large aggregates of money through relatively small donations from a large number of donors.¹⁸ Due to their fundraising prowess, the party congressional campaign committees ("CCC's") -- which are composed of members of Congress organized by party and chamber -- are now significant players in congressional races. They provided candidates with money, aid them in raising funds from PACs and individual donors, and are involved in candidate recruitment, campaign management,

¹⁸ See, e.g., Herrnson, *National Party Organizations*, in Maisel, *supra*, at 59 (the national party organizations raise most of their hard money in the form of direct mail contributions under \$100); LEON EPSTEIN, *POLITICAL PARTIES IN THE AMERICAN MOLD* 276-78 (1986) (contrasting historic dependence of the parties on a small number of very large donors with the post-FECA development of a mass financial base).

the production and placement of candidate ads, and the mobilization of voters.¹⁹

In recent years, the party campaign finance role has been further expanded and reshaped by three new mechanisms developed outside the strictures of FECA: party independent expenditures; soft money; and party issue advocacy. These devices, however, pose direct challenges to FECA's contribution and spending restrictions.

B. The Growing Role of Party Money Outside of FECA

(1) Party Independent Expenditures: *Buckley v. Valeo*²⁰ invalidated the FECA provision that would have capped the amount of money an individual or group could spend independently of a candidate in support of that candidate or against her opponent, thus permitting individuals and PACs to spend unlimited amounts of money on so-called "independent expenditures." In the first two decades following *Buckley* it was widely assumed that party electoral spending is necessarily coordinated with candidates, and, thus, that parties could not take advantage of the Supreme Court's protection of independent expenditures.²¹ In 1996, however, in *Colorado*

¹⁹ The rising financial and campaign role of the CCC's under FECA is examined in ROBIN KOLODNY: PURSUING MAJORITIES: CONGRESSIONAL CAMPAIGN COMMITTEES IN AMERICAN POLITICS 124-55 (1998) and PAUL S. HERRNSON, PARTY CAMPAIGNING IN THE 1980s 30-83 (1988).

²⁰ 424 U.S. 1 (1976).

²¹ Kirk J. Nagra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities*, 56 FORDHAM L. REV. 53, 97 (1987); David Adamany, *Political Parties in the 1980s* 72-73, in Michael J. Malbin, ed., MONEY AND POLITICS IN THE UNITED STATES: FINANCING ELECTIONS IN THE 1980s (1984); F. Christopher Arterton, *Political Money and Party Strength* 116 in Joel L. Fleishman, ed., THE FUTURE OF AMERICAN POLITICAL PARTIES: THE CHALLENGE OF GOVERNANCE (1982). Accord, *FEC v Democratic Sen. Camp. Comm.*, 454 U.S. 27, 28 n.1 (1981) ("Party committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates").

Republican Federal Campaign Committee v Federal Election Commission,²² a Supreme Court plurality determined that a party may engage in independent spending, and that such party spending is entitled to the same constitutional protection from limitation that extends to independent spending by PACs or individuals.

Colorado Republican provided the parties with a major opportunity to avoid FECA's limits on party spending in congressional races. In the months immediately following *Colorado Republican*, the national Republican Party put together a \$10 million independent expenditure program, primarily supporting the party's Senate candidates.²³ The Democrats lagged with a more modest \$1.5 million program. In 1998, however, the role of party independent spending declined. The Democrats again committed \$1.5 million (or about 7% of their combined total of contributions to and spending in support of candidates) to independent expenditures, but Republican party spending dropped to under \$300,000.²⁴ The parties' apparent disinterest in exploiting the opportunities for independent spending appears to be attributable to the emergence of another, more attractive means of providing unlimited support for party candidates -- the use of party soft money to finance so-called "issue advocacy."²⁵

(2) Soft Money: Party contributions to candidates, party coordinated expenditures with

²² 518 U.S. 604 (1996).

²³ This compares with \$34.7 million in contributions to and coordinated expenditures with candidates in 1996. See "FEC Reports on Political Party Activity for 1997-98," *supra*.

²⁴ *Id.*

²⁵ See Paul S. Herrnson and Diana Dwyre, *Party Issue Advocacy in Congressional Election Campaigns*, 90, in John C. Green & Daniel M. Shea, *THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES* (3d ed. 1999).

candidates, party grass-roots expenditures, and even the party independent expenditures unleashed in *Colorado Republican* all involve so-called “hard money,” that is, money that complies with the dollar limits and source prohibitions of FECA. Money for those activities must abide by FECA’s restrictions because those activities involve express support of the election or defeat of federal candidates and, thus, fall within the Act’s definitions of “contributions” and “expenditures.” But increasingly party participation in federal elections is financed by so-called “soft money,” that is, money that does not comply with FECA. This includes individual or PAC donations in excess of the Act’s dollar limits, and corporate or union donations forbidden by FECA. “Soft money” funds activities that affect federal elections but, due to statutory definition, administrative action, or judicial decisions, technically fall outside FECA’s scope.

Soft money emerged out of the complications of political federalism. FECA regulates only federal elections, but federal and state elections typically occur concurrently, with candidates for federal and state offices appearing on one state ballot. Party committees can and do undertake campaign efforts that assist their federal and state candidates simultaneously. Spending on federal candidates must satisfy FECA, but aid to state candidates is subject only to state law. Many state campaign finance laws are less restrictive than FECA: Some permit corporations or unions to support candidates; some do not limit individual or PAC donations.²⁶

In the late 1970s, some state party committees began to press the FEC to allow them to use funds that do not comply with FECA to finance part of the cost of campaign efforts that help

²⁶ In 1996, fifteen states placed no limits on individual contributions and eighteen states placed no limits on PAC contributions. Some states with contribution ceilings use higher limits than FECA. Eight states had no limits on corporate contributions and twelve states had no limits on union contributions. Michael J. Malbin & Thomas L. Gais, *THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES* 16-17 (1999).

the party ticket as a whole, including both federal and state candidates. The FEC in 1978 determined that a state party could use funds impermissible under FECA to defray the nonfederal portion of administrative overhead and of the costs of some activities -- such as voter registration and voter mobilization -- that directly benefit both federal and state candidates.²⁷ In 1979, the FEC decided that national party committees could also set up accounts for the deposit and disbursement of funds otherwise barred by FECA to pay for spending in support of the nonfederal portion of the combined federal-state ticket.²⁸ Soft money was born.

Soft money grew during the 1980s, rising from \$19 million in 1980 to \$45 million in 1988.²⁹ Soft money was used to build the infrastructure of the national parties -- to hire staff, acquire office space, develop direct mail capability, run polling and issues research operations, acquire data processing equipment, and create and improve facilities for mass media communications -- on the theory that since some portion of these activities is aimed at state and local elections, a portion of the cost could be defrayed by nonfederal money. The national parties also transferred millions of dollars in soft money to state parties to build their infrastructures, and especially to fund shared voter mobilization programs such as direct mail campaigns and phone bank operations intended to bring voters to the polls.

In 1990, the FEC responded to years of prodding by campaign finance reformers and the

²⁷ FEC Adv. Op'n 1978-10. Earlier FEC rulings had provided that only hard money could be used to cover the costs of state party voter registration and get-out-the-vote drives intended to benefit both state and federal candidates. See FEC Adv. Op'n 1976-72; FEC Adv. Op'n 1976-83.

²⁸ FEC Adv. Op'n 1979-17.

²⁹ Prior to 1990, the FEC did not require the parties to report on their soft money accounts, so the numbers in text are only estimates. See Herbert E. Alexander & Monica Bauer, FINANCING THE 1988 ELECTION 37 (1991).

courts, and issued rules, which became effective in 1991, requiring party committees to report their soft money receipts, expenditures, and transfers, and regulating the allocation of expenses for shared activities between federal and nonfederal accounts.³⁰ The rules limited the ability of party committees to shelter some funds for shared expenses in nonfederal accounts, but “[t]he general effect of the guidelines was . . . to give party organizations a clearer sense of how to spend soft money legally, and, at least in some instances, to permit them . . . to pay a greater share of their costs with soft money than they had been before.”³¹

Soft money exploded in the 1990s. In 1991-92, the two national parties raised \$86 million in soft money, or double the amount for 1987-88. Soft money accounted for approximately 17% of total national party receipts in the 1992 election cycle.³² By 1995-96, national party soft money receipts had trebled to \$263.5 million, and accounted for 30% of total national party income. In 1997-98, the soft money share of national party income rose to 33% although actual party soft money receipts declined to \$224.4 million with the cyclical drop in fund-raising from a presidential to a nonpresidential election.³³ National party soft money receipts in 1997-98, however, were nearly five times the \$45 million in soft money receipts in 1993-94, the prior

³⁰ 11 C.F.R. § 106.5.

³¹ Anthony Corrado, *Party Soft Money* 175 in Anthony Corrado, et al, CAMPAIGN FINANCE REFORM: A SOURCEBOOK (1997). Even the FEC has acknowledged “there are . . . indications that the allocation rules themselves may have increased the amount of soft money raised by the national party committees.” FEC, Proposed Rules, “Prohibited and Excessive Contribution; ‘Soft Money,’” 63 Fed. Reg. 37722, 37724, July 13, 1998.

³² FEC, “Political Party Fundraising Continues to Climb,” January 26, 1999, <http://www.fec.gov/press/pty3098.htm>.

³³ FEC, “FEC Reports on Political Party Activity for 1997-98,” April 9, 1999, <http://www.fec.gov/press/ptyye98.htm> (visited 10/25/99).

nonpresidential election, and more than treble the 10% soft money share of party receipts in 1993-94.³⁴ The 1997-98 election marked the first time in which soft money played a critical role in congressional elections; in previous years, the primary use of soft money had been to enable presidential candidates participating in the public funding system to evade the spending limits that are a condition for the provision of public funds. Preliminary figures for the 1999-2000 election cycle indicate the dollar volume of soft money is continuing to grow.³⁵

The growth in soft money and its expansion into congressional races reflects two developments. First, there is now a substantial number of donors of very large soft money contributions. In 1997-1998, there were 390 individuals or organizations -- including business corporations, labor unions, Indian tribes, and ideological groups -- that gave \$100,000 or more to the soft money accounts of the national political parties. This number of \$100,000+ donors reflected a 113% increase from 1993-94, the prior nonpresidential election cycle. Twenty-six donors gave \$500,000 or more; the top four donors gave more than \$1 million each. Corporate contributions -- prohibited by FECA -- dominated the soft money growth, with 218 corporations giving more than \$100,000 in 1997-98, and sixteen corporations giving more than \$500,000 in that period. In the prior nonpresidential election cycle, only 96 corporations broke the \$100,000

³⁴ The data on party hard money receipts in 1993-94 comes from "FEC Reports on Political Party Activity for 1997-98," supra. The data on soft money for that year is from FEC Info/Public Disclosure, Inc., "Soft Money Summary (issued 12/28/98)," <http://www.tray.com/fecinfo/smrpt.htm> (visited 11/17/99).

³⁵ FEC, "FEC Releases Fundraising Figures of Major Political Parties -- Large Gain in 'Soft Money' Contributions," September 22, 1999 (Republicans raised 42% more in soft money during the first six months of 1999, compared to the first six months of 1997, and Democrats raised 93% more in the first half of 1999, compared to the first half of 1997. By contrast, party hard money receipts were up only 16% compared to 1997).

mark, and only four gave more than \$250,000. Thirty-five trade associations also gave \$100,000 or more in soft money in 1997-98. Wealthy individuals or couples provided most of the other large soft money donations, with 114 individuals or husband-and-wife pairs giving \$100,000 or more, 26 individuals or couples giving \$250,000 or more, and four giving \$500,000 or more.³⁶

Second, the parties have discovered a major new use for soft money – to finance so-called “issue advocacy” advertising. The concept of issue advocacy grew out of the Supreme Court’s effort in *Buckley* to prevent FECA from unconstitutionally curtailing the discussion of political ideas and issues. The Court construed FECA to apply only to “expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate.”³⁷ Such expenditures is known in campaign finance jargon as “express advocacy;” all other political communications are called “issue advocacy,” although many so-called “issue ads” do not discuss issues at all.³⁸ Influenced by a footnote in *Buckley*, most of the lower federal courts that have considered whether a particular ad constitutes express or issue advocacy have applied the so-called “magic words” test, limiting the definition of express advocacy -- and the scope of FECA regulation -- to communications that literally ask voters to “vote for,” “elect,” “cast your ballot for,” “vote against,” or “defeat” a candidate.³⁹ Ads that effectively advocate or oppose the cause of

³⁶ FEC Info/Public Disclosure, Inc., “Soft Money Summary (issued 12/28/98),” <http://www.tray.com/fecinfo/smrpt.htm> (visited 11/17/99).

³⁷ 424 U.S. at 44, 79-80.

³⁸ See Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 Tex. L. Rev. 1751, 1751 (1999) (discussing issue advertisement that focused on candidate’s personal character not issues).

³⁹ See *id.* at 1754-59.

a candidate but do not use the magic words avoid FECA's restrictions and requirements.⁴⁰

Unlike soft money, issue ads until the mid-1990s were largely initially the province of nonparty groups, particularly ideological organizations. In 1995, the Federal Election Commission ("FEC") determined that the Republican National Committee ("RNC") could use soft money to defray part of the costs of advertising that combined discussion of issues with criticism of President Clinton by name.⁴¹ In the 1996 elections, both parties extensively utilized issue ads. The Democratic National Committee ("DNC") undertook a multimillion dollar advertising program to trumpet the accomplishments of the Clinton administration and criticize the Republican Congress without explicitly calling for the election or defeat of particular candidates. So, too, the RNC spent millions to pay for issue ads in support of the Dole campaign. These party issue ads effectively eviscerated the presidential public funding spending limits.⁴²

One early study estimated that the parties spent \$68 million on issue ads in the 1996 election cycle,⁴³ thereby accounting for nearly half of all issue ad spending in that election. Another scholar recently estimated major party issue ad spending in 1995-96 at nearly \$110 million.⁴⁴ In the 1997-98 election cycle party issue ad spending was between \$90 million and \$110

⁴⁰ See *id.* at 1759-60.

⁴¹ FEC Adv. Op'n 1995-25.

⁴² See Robert Biersack & Melanie Haskell, *Spitting on the Umpire: Political Parties, the Federal Election Campaign Act, and the 1996 Campaigns*, in Green, *supra*, at 177.

⁴³ Deborah Beck, et al, ISSUE ADVOCACY ADVERTISING DURING THE 1996 CAMPAIGN 3, 34, 55 (1997).

⁴⁴ See Paul S. Herrnson, *Financing the 1996 Congressional Elections*, in Green, *supra*, at 122 (DNC and the Democratic congressional committees spent \$60 million on issue ads in 1995-96, while the RNC and Republican congressional committees spent \$49 million).

million.⁴⁵ Party issue ad spending is now comparable to, and possibly greater than, the total of party spending in donations to candidates, coordinated spending, and independent spending.⁴⁶

With their exploitation of issue advocacy, the parties have vastly expanded their ability to use soft money. No longer limited to building infrastructure or to efforts ostensibly aimed at nonfederal candidates, soft money can now be deployed directly to pay for ads that aid their federal candidates. Rapidly growing soft money collections -- increasingly solicited by federal officials, led by President Clinton -- and the expansive new use for soft money dramatically reinforced each other over the last two election cycles.

The FEC's 1995 advisory opinion imposed one important limit on the use of soft money to fund issue advocacy: The opinion provided that party issue advocacy costs are subject to the FEC regulations that provide for the allocation of mixed federal-nonfederal activity between hard and soft money. Under these rules, national party issue advocacy spending must be funded 60% by hard money and 40% by soft money in nonpresidential election years, and 65% by hard money and 35% by soft money in presidential election years.⁴⁷ For state parties, the hard/soft allocation is

⁴⁵ Jeffrey D. Stanger & Douglas G. Rivlin, *ISSUE ADVOCACY ADVERTISING DURING THE 1997-1998 ELECTION CYCLE 2-4* (1998).

⁴⁶ Party coordinated and independent expenditures in the 1996 presidential election came to \$19.2 million. See Anthony Corrado, *Financing the 1996 Presidential General Election*, in Green, *supra*, at 75. Party contributions to candidates, coordinated expenditures, and independent expenditures in the 1996 congressional elections came to \$70.9 million. See Biersack & Haskell, *supra*, in *id.* at 163. Total party contributions to, coordinated expenditures with, and independent expenditures concerning federal candidates in 1997-98 came to \$40.8 million. See FEC, "Political Party Fundraising Continues to Climb," January 26, 1999, <http://www/fec/gov/press/pty3098.htm> (visited 9/17/99).

⁴⁷ 11 C.F.R. § 106.5(b)(2).

based on the federal share of the total number of federal and state offices on the state ballot.⁴⁸ In 1998, however, two party committees sued the FEC, asserting that issue advocacy is entirely beyond the scope of FECA, so that any limit on the use of soft money to fund issue advocacy is unconstitutional. The parties failed to obtain injunctive relief in time for the 1998 elections,⁴⁹ but the suit is still pending. If the party committees prevail, party issue advocacy is likely to surge, and with it, the demand for party soft money.

II. Party Money and the *Buckley* Doctrine

A. Constitutional Challenges to Regulating Party Money

Together party independent spending, party soft money, and party issue advocacy have undermined many of the basic elements of FECA – the dollar and source limits on campaign contributions, the limits on party support for candidates, and the spending limits on coordinated expenditures that are built into the presidential public funding system. These same practices would be equally subversive of any public funding program Congress might adopt for congressional elections, and of state-level public funding initiatives for state elections.

⁴⁸As there are typically far more state than federal offices up for election in any given state, the state parties may fund most of their issue advocacy spending with soft money. To take advantage of this, the national party committees transferred tens of millions of dollars of soft money to the state parties, so that the latter could use their greater soft money allocation to pay for issue ads and other shared federal-nonfederal expenses. See Jill Abramson & Leslie Wayne, “Democrats Used the State Parties to Bypass Limits,” *N.Y. Times*, Oct. 2, 1997, at A1; Robert Biersack & Melanie Haskell, *Spitting on the Umpire: Political Parties, the Federal Election Campaign Act, and the 1996 Campaigns*, in Green, *supra*, at 179-181.

⁴⁹ *Republican National Committee v FEC*, 1998 U.S. App. LEXIS 28505, D.C. Cir., Nov. 6, 1998 (affirming district court order denying preliminary injunction against application of FEC soft money allocation regulation to party issue advocacy expenditures).

It is uncertain whether these practices may be effectively curtailed consistent with the *Buckley* doctrine. The distinction between coordinated spending – which is treated as a contribution and may be subject to limitation – and independent spending -- which is immune from limitation -- is a central element of *Buckley*.⁵⁰ Moreover, in *Colorado Republican* a Supreme Court plurality specifically determined that parties are capable of independent spending and that such party spending is entitled to the same constitutional protection as independent spending by individuals or PACs.⁵¹ The line between express advocacy and issue advocacy, is central to *Buckley*,⁵² and there is nothing in the Court’s campaign finance cases indicating that party issue ads are less protected than the issue ads of other organizations.⁵³

At first blush, any constitutional challenge to the imposition of limits on soft money would appear unlikely to succeed. Soft money involves contributions to the parties, rather than spending by the parties, and a central element of *Buckley*, most recently reconfirmed by *Nixon v Shrink*

⁵⁰ 424 U.S. at 46-47.

⁵¹ 518 U.S. at 613-23.

⁵² 424 U.S. at 41-44, 76-80. See also *FEC v Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248-50 (1986).

⁵³ The ads in *Colorado Republican* was arguably issue advocacy since they criticized a candidate’s record but did not expressly call for his defeat. Indeed, the district court held that the ads were not express advocacy. *FEC v Colorado Republican Fed. Camp. Comm.*, 839 F. Supp. 1448, 1455 (D. Colo. 1993). The Tenth Circuit held that the ad contained an “electioneering message” within the meaning of an FEC advisory opinion that provided that such messages by parties are subject to FECA’s limits on coordinated spending. *FEC v Colorado Republican Fed. Camp. Comm.*, 59 F.3d 1015, 1021-22 (10th Cir. 1995). The circuit court suggested that the concept of express advocacy could be interpreted more broadly when applied to party speech, but its opinion also assumed that parties are incapable of engaging in independent expenditures. The latter assumption was, of course, reversed by the Supreme Court. The Supreme Court did not discuss whether the *Colorado Republican* ad might be issue advocacy.

Missouri Government PAC,⁵⁴ is that contributions present special dangers of corruption that warrant limitation. Moreover, the principal providers of soft money are corporations and the Court has specifically upheld bans on the use of corporate treasury funds in candidate elections.⁵⁵

The constitutionality of limits on soft money, however, is open to attack. First, Professor Bradley A. Smith has argued that soft money used to fund issue advocacy is constitutionally exempt from limitation since issue advocacy is, by definition, political speech immune from regulation.⁵⁶ Second, going beyond issue advocacy, the case for limiting soft money donations to the parties assumes there is something corrupting about party spending. In *Citizens Against Rent Control v City of Berkeley*,⁵⁷ the Court held unconstitutional an ordinance restricting donations to committees that support or oppose ballot propositions because the Court had previously determined that spending on ballot propositions raised no possibility of corruption (as there was no candidate to corrupt). If party spending cannot corrupt, contributions to parties may not be limited. In fact, several members of the Supreme Court in *Colorado Republican* have denied that party support for candidates presents a danger of corruption within the meaning of *Buckley*. Instead of joining the plurality and protecting the party ads in that case as independent expenditures, Chief Justice Rehnquist and Justices Kennedy, Scalia and Thomas would have

⁵⁴ 120 S.Ct. 897 (2000).

⁵⁵ See *Austin v Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *FEC v National Right to Work Committee*, 459 U.S. 197 (1982).

⁵⁶ Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition of a Soft Money Ban*, 24 J. LEGIS. 179, 196-99 (1998). In February 2000, President Clinton nominated Professor Smith to be a member of the Federal Election Commission.

⁵⁷ 454 U.S. 290 (1981).

invalidated FECA's limits on party coordinated expenditures.⁵⁸ On remand, a district judge did exactly that.⁵⁹ Although these opinions focused on the coordinated spending limits, they would logically apply to the limits on party contributions to candidates – since both FECA and *Buckley* treat coordinated expenditures and contributions as legally equivalent – and, ultimately, perhaps to the limits on contributions to the parties.

Strikingly, the constitutional challenges to limits on party money flow from diametrically opposing visions of the parties and of the relationships among parties, candidates, and PACs.

On the one hand, the defense of party independent spending and party issue advocacy assumes a sharp separation of the parties from their candidates. If a party committee functioned as a candidate's campaign organization, then all spending by that committee, whether or not technically coordinated with a candidate would be considered coordinated spending. Similarly, if a party committee was an arm of the candidate's campaign organization then all its advertising, even the ads without the magic words of express advocacy would be express advocacy for constitutional purposes much as all expenditures by a candidate are considered to be express advocacy even if the candidate's ads do not say "vote for me" or "vote against my opponent." Strong constitutional protection of such activity assumes that parties are sharply distinct from their candidates, and, instead, are very much like all other campaign intermediaries. In short, the argument against limits on party independent spending and party issue advocacy assumes that

⁵⁸ 518 U.S. at 626-31 (opinion of Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, concurring in the judgment and dissenting in part); 644-48 (opinion of Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, concurring in the judgment and dissenting in part).

⁵⁹ *FEC v Colorado Republican Fed. Camp. Comm.*, 41 F.Supp.2d 1197 (D. Colo. 1999).

parties are like PACs, and are entitled to the same protections afforded to PACs.

On the other hand, the challenge to the constitutionality of limits on direct party support for candidates – and, the implicit challenge to limits on donations to parties – assumes that parties are quite different from other campaign finance intermediaries. The differences between PACs and parties are said to eliminate the possibility that party participation in campaigns present a danger of corruption.

Both critiques of limiting party money cannot be right. Indeed, I believe both are wrong. Although, as noted in Part I, FECA to some extent models its regulation of parties on its treatment of PACs, the major political parties are not PACs. Mechanically applying to the parties constitutional distinctions developed with PACs in mind makes little sense and is a recipe for wholesale evasion of the campaign finance laws. Moreover, party money does present dangers of corruption. Party fundraising practices link up private donors, party committees, and candidates and officeholders in ways that directly implicate the anti-corruption concerns that *Buckley* placed at the center of our campaign finance regime.

B. The Constitutionality of Curbing Party Money

(1) Party Spending and the Limits of the PAC Model: The principal decision illustrating the parties-as-PACs model is the plurality opinion of Justice Breyer, joined by Justices O'Connor and Souter, in *Colorado Republican*, which found that party committee spending, like PAC spending, can be subject to limits only if it is in fact coordinated with a candidate's campaign.⁶⁰

⁶⁰ 518 U.S. at 613-23.

Relying on earlier cases that had invalidated limits on independent expenditures by PACs,⁶¹ the plurality could “not see how a provision that limits a political party’s independent expenditures can escape their controlling effect.”⁶²

But the reasons for constitutional protection for PAC or individual spending are not implicated by spending by party committees. First, individuals and organizations participating in a campaign may have interests other than, or in addition to, the election of the candidate they are backing or the defeat of the candidate they are attacking. They may wish to use their expenditures to highlight an issue in order to send a message -- or to use the voters to send a message -- on that issue. It may be as important to them to make the election a referendum on abortion, or to emphasize that their opposition to a candidate stems from her position on term limits, as to express a position on which candidate should be elected. Their critical issues may include matters candidates prefer to ignore. Indeed, by airing certain messages an independent committee’s advertising may be at odds with the campaign strategy of the very candidate it is backing.

The major parties, by contrast, do not have an electoral agenda other than election of their candidates. “The defining mission focus of political parties in the contemporary era is to elect candidates to office.”⁶³ Major party advertising expressly advocating the election or defeat of a candidate -- which is the type of advertising funded by independent spending -- is not intended to

⁶¹ See *id.* at 615 (citing *Buckley* and *FEC v National Conservative Political Action Comm.*, 470 U.S. 480 (1985) (“*NCPAC*”).

⁶² *Id.*

⁶³ William Crotty, *Political Parties in the 1996 Election: The Party as Team or the Candidates as Superstars?*, 203 *in* Maisel, *supra*. See also Paul S. Herrnson, *PARTY CAMPAIGNING IN THE 1980S* 8 (1988) (“the principal aim of American political parties has always been to elect candidates to public office”).

raise issues that differ from those advanced by the party's candidates, or to elect candidates with a particular policy mandate. Its goal is, simply, to elect candidates affiliated with the party.

Second, *Buckley* found, and *FEC v National Conservative Political Action Committee* (“*NCPAC*”)⁶⁴ reiterated, that independent expenditures raise little danger of a candidate-financial supporter quid pro quo, which is the constitutional basis for the power to restrict contributions, because the “absence of prearrangement and coordination undermines the value of the expenditure to the candidate.”⁶⁵ This might be true for an independent expenditure by an individual or interest group that is institutionally distinct from the candidate. In the absence of an ongoing relationship between candidate and independent supporter, the supporter's advertising could hit the wrong themes, or be redundant rather than supplement candidate spending. But there will typically be preexisting ties between the party organization and the candidate who holds the party's nomination, between the party staff and the campaign staff, or between the consultants retained by the party and by the candidate. Even where such ties are lacking the party organization's history of involvement with candidates seeking office means its spending is likely to be quite valuable to the candidate even without formal coordination with the candidate.

Party committees frequently aid candidates in hiring campaign managers, consultants, media and pollsters, so that parties and their committees often engage the services of the same political professionals. Party committees provide their candidates with issue and opposition research and poll and focus group data, and they assist candidates with their fundraising.⁶⁶ Party

⁶⁴ 470 U.S. 480 (1985).

⁶⁵ 424 U.S. at 47, 470 U.S. at 498.

⁶⁶ See, e.g., Herrnson, *Financing 1996 Congressional Elections* in Green, *supra*, at 100.

committees and candidates share pollsters, campaign strategists, and media consultants, and campaign professionals shuttle back and forth among party committees, candidate committees, and consulting firms. Even when they do not sit down to discuss the placement or content of a specific ad, parties and their candidates are structurally integrated, not independent.⁶⁷

The ability of parties to combine a close structural relationship with a candidate while maintaining the notional independence of a particular advertising campaign is nicely illustrated by the recent federal district court decision in *Republican Party of Minnesota v Pauly*.⁶⁸ The Minnesota Republican Party provided state candidates with “‘meaningful and helpful’ service and ‘direct support;” kept in “‘close contact’ with ‘elected officials and statewide campaigns,” “‘work[ed] directly with Republican candidates on issue research,’ ‘develop[ed] campaign plans,’ and ‘manage[d] the scheduling of candidate and party activity.’” On “‘numerous occasions” candidates who had been endorsed by the party attended party fundraisers, and the party encouraged its candidates to attend biweekly “‘coordinating meetings” at party headquarters. The party also made direct contributions to its candidates.⁶⁹ But when the party took out its own advertising in support of its nominees, the party officials responsible for the ads avoided direct contact with the candidates. As a result, the party’s ads were considered to be independent expenditures, not subject to limitation. Although the district court found the “record in this case is replete with examples of cooperation,” there was no evidence of “‘actual coordination” of the

⁶⁷ See Jonathan Bernstein and Raymond J. LaRaja, *Independent Expenditures and Partisanship in House Elections* (Paper prepared for delivery at 1999 Annual Meeting of the American Political Science Association, Sept. 2-5, 1999).

⁶⁸ 63 F. Supp.2d 1008 (D. Minn. 1999).

⁶⁹ *Id.* at 1012.

particular expenditures in question with candidates.⁷⁰

Certainly, parties are organizationally distinct from their candidates, and it is technically possible, as *Colorado Republican* suggested, for a party committee to support a candidate by engaging in spending that is not coordinated with the candidate's campaign. But the party's relationship to its candidate is far different from that between a PAC and a candidate it is backing. The party includes its candidate. The candidate is typically a member of the party, has been active in the party, and, once nominated, ultimately bears the party label, uses the party's place on the ballot, and necessarily benefits from the loyalty and support of party activists. Candidates are far more tightly linked to their parties than they are to other politically active organizations that may engage in independent spending.

But, as *Pauly* reveals, the notion of party independent spending is disconnected from the actual relationships among parties and candidates. Given the structural integration shared institutional interests of parties and candidates, the notion of independent party spending makes little sense. Certainly, the notion of independence should be construed far more narrowly, and the presumption of coordination should be far stronger, when party spending is at issue.

Similar concerns are implicated by the application of the express advocacy/issue advocacy distinction to the parties. As previously noted, the express advocacy/issue advocacy distinction grows out of the Court's recognition that some doctrinal means is needed to permit regulation of election-related spending while preserving the fundamental First Amendment norm of immunizing non-election-related political speech from regulation. The line the Court drew between express advocacy and all other political speech reflects the desire for a test that is both crisp -- thereby

⁷⁰ *Id.* at 1017.

avoiding vagueness and the chilling effect that can result from vague regulation -- and narrow, thus, minimizing any interference with other political speech.

The particular distinction the Court adopted between “express advocacy” and other speech may make sense with respect to individuals and groups, such as PACs, that participate in politics in order to advance certain issue agendas, protect certain organizations, or affect public policy. For them, election-related activity may be only one of a number of techniques -- including legislative lobbying, the use of op-eds and the dissemination of think tank research to opinion leaders, advertising aimed at influencing public opinion more generally, or grass-roots level organizing concerning their issues – for affecting the political process. Some narrow definition of election-related speech is necessary to protect these other forms of political speech and activity, which can have indirect effects on elections, from the constraints of FECA. The narrow express advocacy test enables them to link the discussion of political issues and policy goals with references to particular elected officials and candidates without fearing that they will be subject to the reporting requirements and contribution and spending rules of FECA.

But the major political parties, particularly the national and congressional campaign committees, are quite different from other politically active groups. Party committee spending is aimed almost exclusively at the election of party candidates to office and thereby holding or winning power. This is not to say that the major parties have no interest in ideology at all, or that they do not have the same right as other organizations to discuss issues. The two great national parties were founded for ideological reasons, and contemporary party activists often have strong ideological bents. No doubt many people who choose to become active in party organizations do so in the belief that by helping their party to win power they are advancing their own views on

policy issues. Party spending that is exclusively about issues is entitled to the same constitutional protection that applies to spending on politics by other groups or individuals. But most party spending is aimed at electing party candidates. When PACs and other politically active groups combine discussions of issues and candidates, it may not be clear whether they are doing so to advance their issues agenda or elect candidates, but when parties couple issue discussions with references to candidates their goal is almost certainly the election of their candidates.

Indeed, in the last two election cycles, the content of party issue advertising was often indistinguishable from party express advocacy ads and from the candidates' own ads. "Some of the Democratic Party issue ads that helped Bill Clinton in 1995 used the same film clips and some of the same voiceovers as the Clinton campaign ads – indeed, they were distinguishable only by their failure to call explicitly for the president's reelection."⁷¹ Some ads that appeared in 1996 were run both as "express" ads paid for by the presidential campaigns and as "issue" ads paid for by party committees. "With the exception of a 'tag' line, these ads were exactly the same."⁷² A content analysis of party issue ads and candidate ads in one 1996 Senate race found that the ads were quite similar. Both candidate and party issue ads contained discussions of campaign issues, with "only small differences in the extent to which candidate ads and party ads highlight issues."⁷³ Both candidate and party issue ads avoided use of the "magic words" of express advocacy and,

⁷¹ Joe & Wilcox in Green, *supra*, at 61.

⁷² Biersack & Haskell, *supra*, in *id.* at 177.

⁷³ Paul S. Herrnson & Diana Dwyre, *Party Issue Advocacy in Congressional Election Campaigns*, in Green & Shea, *supra*, at 98.

instead made only subtle or indirect references, if any references at all, to the upcoming election.⁷⁴

Both candidate and party issue ads used the same visual and audio production techniques. Party ads used “slow-motion, black-and-white, blurry footage,” and “grainy and fearful images” of candidates of the other party, and sought to link those candidates visually with undesirable groups, like criminals or gang members. “The use of such a technique by the parties in issue advocacy ads gives those ads a distinctly campaign-like flavor, further confirming their intent to influence the outcome of an election rather than merely to educate voters about some policy issue.”⁷⁵

Party issue ad spending is, in practice, not a means for politically active, independent citizens to increase the discussion of issues in public life, but rather an integral part of candidate-election strategies. Both Democratic and Republican parties, working with their candidates, use issue advocacy to avoid the spending limits on publicly funded presidential candidates and on coordinated expenditures for Congressional candidates, and to spend money obtained in contributions that violate FECA’s restrictions. In reports released in the fall of 1998, FEC auditors found that the DNC and the Clinton-Gore ’96 campaign had worked together on the

⁷⁴ Id. at 94-96. Both candidates and parties appear to have absorbed a central lesson of modern advertising, that indirect appeals can be far more effective than direct exhortation to buy a product. As Justice Ann Walsh Bradley of the Wisconsin Supreme Court recently observed, “Few advertisements will directly say ‘Buy Nike rather than Reebok’ or ‘Drink Maxwell House coffee.’ Be they in the print or electronic media, advertisements normally do not include a call for action or use ‘magic words’ to relay their message. Yet every reader, listener, or viewer knows that ‘Less filling, tastes great’ is an unambiguous exhortation to purchase a particular type of Miller beer. And ‘They’re Gr-r-reat’ is Tony the Tiger’s unambiguous appeal to buy a box of sugar-coated corn flakes.” *Elections Board of Wisconsin v Wisconsin Manufacturers & Commerce*, 597 N.W.2d 721, 742-43 (Wisc. 1999).

⁷⁵ Herrnson & Dwyre, *supra*, at 99.

production and placement of television ads paid for by the DNC, and that the party and the candidates' committee shared a standard form memorandum for authorization of production and purchase of air time for media advertising: "One section of this memorandum states 'The cost will be allocate a ___% for the DNC and ___% for Clinton-Gore '96.' The next line states 'attorneys to determine.'" ⁷⁶ The FEC general counsel found that it was "difficult to distinguish between the activities of the DNC and the [Clinton] Primary Committee with respect to the creation and publication of the media advertisements at issue." ⁷⁷ FEC auditors also found that the RNC paid more than \$18 million directly and through Republican state committees on behalf of the Dole campaign for ads that were aired between April and August 1996 – a period in which Dole was bumping up against the spending ceiling he had accepted as a condition for receiving public funding. ⁷⁸ In 1998, party issue ads "reinforced the themes and messages of their candidates." When skillfully done, issue ads demonstrated "seamless party/candidate communication" on such topics as taxes, drugs, and education. "This consistency assisted voters [to] remember the candidate's agenda." ⁷⁹

To be sure, some advertising broadcast or published by party committees can be just about

⁷⁶ See FEDERAL ELECTION COMM'N, REPORT OF THE AUDIT DIVISION ON CLINTON-GORE '96 PRIMARY COMMITTEE, INC. 24 (1998).

⁷⁷ Id. at 108.

⁷⁸ See FEDERAL ELECTION COMM'N, REPORT OF THE AUDIT DIVISION ON THE DOLE FOR PRESIDENT COMMITTEE, INC. (PRIMARY) 16, 34-36, 46 (1998).

⁷⁹ David Magleby & Marianne Holt, *Party Money in 1998 Congressional Elections*, in DAVID B. MAGLEBY & MARIANNE HOLT, *OUTSIDE MONEY: SOFT MONEY AND ISSUE ADS IN COMPETITIVE 1998 CONGRESSIONAL ELECTIONS*, A REPORT OF A GRANT FUNDED BY THE PEW CHARITABLE TRUSTS (1999) at 19.

issues. Such speech must be protected from governmental regulation. But, as with the coordinated/independent distinction, the intensive focus of party spending on election campaigns and the close, ongoing institutional connection between party candidates and party campaign committees suggests that in the party context, *Buckley*'s goal of protecting issue speech may be vindicated with an election-related/issue speech distinction that defines election-related speech more broadly than would be constitutionally acceptable for speech by PACs or politically active individuals. Such a shift is necessary if the other goals of campaign finance law – restrictions on large donations, the prohibition on corporate and union contributions, the spending ceilings that are part of public funding – are to be protected from the issue advocacy end-run around FECA.

(2) Parties and Corruption: The Contributor-Party-Candidate Relationship: Potentially, the far more serious constitutional objection to regulating party money is the claim that parties do not present any danger of corruption. Under the view of parties-as-PACs, party coordinated expenditures could be limited and express advocacy would have to be funded by hard money. But if party money presents no danger of corruption, there would be no basis for limiting either donations to parties or the financial support provided by parties to their candidates.

The argument that parties are not corrupting has two components. The first is that due to the tight ties linking a party to its candidates -- the very ties that distinguish parties from PACs and make the notion of party independent spending so implausible -- parties can not have a corrupting influence on their candidates. This argument is theoretically shaky, but may be right in practice. The second recognizes that parties get their money from private donors who may attempt to channel money through the parties to candidates in order to evade FECA's limits on direct donations to candidates, but arguments that due to the variety of interests in a party and the

large number of donors to the party, any corruptive potential is diluted away. This argument is attractive in theory but is seriously undermined by current campaign finance practices.

(a) Party Influence Over Candidates: A strong version of the argument that a party is incapable of corrupting its candidates was articulated by Justice Kennedy in his *Colorado Republican* separate opinion. Justice Kennedy claimed there is “a practical identity of interests” between party and candidate such that party spending in support of a candidate, including spending that is coordinated with the candidate, “is indistinguishable from expenditures by the candidate or his campaign committee.”⁸⁰ Limiting party support for its candidate would be like limiting the candidate’s own campaign spending – which *Buckley* held to be unconstitutional.⁸¹ As “[t]he party’s form of organization and the fact that its fate in an election is inextricably intertwined with that of its candidates,”⁸² a party could no more corrupt its candidates than it could corrupt itself. Limiting party support for candidates, then, would also be like limiting a candidate’s ability to use her personal wealth to fund her campaign. *Buckley*, however, invalidated the FECA provision that would have limited candidates’ use of personal funds precisely because the latter presented no danger of corruption.⁸³

A less extreme version of this argument was advanced by Justice Thomas, writing for himself, Chief Justice Rehnquist and Justice Scalia, in their separate opinion in *Colorado*

⁸⁰ *Colorado Republican*, supra, 518 U.S. at 630 (Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, concurring in the judgment and dissenting in part).

⁸¹ See *id.* (citing *Buckley*’s invalidation of FECA’s limits on candidate’s campaign expenditures, 424 U.S. at 54-59).

⁸² *Id.*

⁸³ 424 U.S. at 53.

Republican. Justice Thomas who argued that even if a party committee uses its funds to influence a candidate there is nothing wrong – nothing “corrupting” -- about that. “The very aim of a political party is to influence its candidate’s stance on issues and, if the candidate takes office or is reelected, his votes.” A party’s exercise of influence over its candidates and officeholders is not “subversion of the political process” but “successful advocacy of ideas in the political marketplace and representative government in a party system.”⁸⁴

Other judges have expressly similar views about the positive effects of party influence on candidates. In 1981, a unanimous Supreme Court, in upholding the validity of party agency agreements, observed approvingly that such agreements could lead to a more effective use of party resources in support of party candidates, which “may encourage candidate loyalty and responsiveness to the party.”⁸⁵ In striking FECA’s caps on coordinated spending in the *Colorado Republican* remand, Judge Nottingham concluded that party use of coordinated expenditures to influence candidates could not be viewed as “an attempt to exert improper influence.”⁸⁶

Many political scientists also emphasize the benefits of greater party influence over candidates. They argued that greater party cohesion could facilitate concerted action across the separate branches of government and make the party labels on candidates more meaningful to the voters. This would make it easier for voters to judge the record of the party in power, compare the programs of competing parties, and cast ballots based on policies rather than candidate personalities. Indeed, a group of distinguished political scientists, writing as the Committee for

⁸⁴ 518 U.S. at 646.

⁸⁵ *FEC v Democratic Sen. Campaign Comm.*, 454 U.S. 27, 42 (1981).

⁸⁶ *FEC v Colorado Rep. Fed. Camp. Comm.*, 41 F. Supp.2d 1197, 1212 (D. Colo. 1999).

Party Renewal, submitted an amicus brief in *Colorado Republican* urging that “political party support is not corruptive.”⁸⁷

The argument that parties, by definition, cannot corrupt their candidates is debatable in theory. Certainly, Justice Kennedy notwithstanding, parties and candidates are not literally identical. Party committees and candidates can differ over campaign strategies and policy issues. Party committees, like other campaign donors could seek to leverage their funds to induce a candidate to take certain positions on pending legislative issues, to harmonize her campaign with national party themes, or even to hire certain campaign professionals. Party committees might try to do this in order to attract more contributions and other forms of support for the party from PACs, individuals, and politically active ideological or special interest groups. A national party committee is concerned with a wide range of elections across the country, and with the securing of power at the national level, rather than with any one candidate’s particular fate, so that the party and the candidate in a particular could have divergent interests.

Nor are party efforts to influence candidate issue positions necessarily normatively desirable. There is a longstanding tradition in our political culture that looks at party organizations and party bosses with skepticism, if not fear. From Madison’s condemnation of faction, to the Progressive Era drive to use the primary to break the hold of party machines,⁸⁸ to contemporary public sentiments, caught in opinion polling, which indicate a preference for voting the candidate

⁸⁷ *Colorado Republican*, Amicus Brief for Committee for Party Renewal, 1996 WL 75770 at *16.

⁸⁸ See, e.g., Epstein, *supra*, at 155-56 (describing the direct primary as the “institutionalized means” of pursuing politics in “a civic culture that is broadly hostile to party organizational control”).

and not the party,⁸⁹ there is a strong commitment in the American system to the independence of candidates and officeholders from party control. Justice Stevens, in his *Colorado Republican* dissent, adverted to this when he voiced concern that “the party -- or the persons who control the party -- will abuse the influence it has over the candidate by virtue of its power to spend.”⁹⁰ The emergence of candidate-centered politics in the twentieth century is at least in part a reflection of this popular sentiment and of institutional arrangements, such as the direct primary and the primary open to nonparty voters, intended to implement that sentiment.

Still, in practice, those who argue that party money does not present a serious danger of undue party influence over candidates may be right. Studies of party campaign committees have found that the parties strive not to influence or control their candidates but to serve them and thereby help to elect them.⁹¹ A national party committee typically has “little interest in ideological

⁸⁹ See Martin P. Wattenberg, *THE RISE OF CANDIDATE-CENTERED POLITICS: PRESIDENTIAL ELECTIONS OF THE 1980S* 34 (1991) (“most pervasive is the belief that one should vote for the candidate, not the party”). See also *State v Alaska Civil Liberties Union*, 978 P.2d 597, 626 (Ak. 1999) (“The natural tendency of successful candidates who receive unlimited contributions from a party would be to reduce independent consideration of issues and adhere to positions taken by the party itself.”).

⁹⁰ 518 U.S. at 648. Justice Stevens was joined by Justice Ginsburg. See also *FEC v National Rep. Sen. Comm.*, 761 F. Supp. 813, 821-22 & n.12 (D.D.C. 1991) (it is “entirely plausible” that spending limits on party committees “serve[] the anti-corruption purposes identified by Congress and approved by the Supreme Court in *Buckley*;” “Congress, by setting contribution limits from the parties to candidates has apparently concluded that too much responsiveness to the parties, if obtained by unrestricted contributions, is undesirable.”); rev’d on other grounds, 966 F.2d 1471 (D.C. Cir. 1992).

⁹¹ See, e.g., John H. Aldrich, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 269-74 (1995) (describing the “rise of the party in service to its candidates”); John F. Bibby, *State Party Organizations: Coping and Adapting to Candidate-Centered Politics and Nationalization*, in Maisel, *supra*, at 24.

According to Frank Sorauf, “the party as funder rarely, if ever, asks questions of program

'litmus tests' and instead provides assistance to candidates based on their chance of winning. Candidate assistance is apportioned according to fulfillment by the candidates of nonpolicy criteria, such as individual fund-raising levels and favorable polling numbers."⁹² This candidate-election focus of party organizations is connected to some of the central characteristics of contemporary politics: the relative weakness of partisanship within the electorate, the closeness of interparty conflict, and the increased salience of party within government.

With party loyalty in the electorate declining, partisan control of the Presidency and Congress up for grabs, and the determination of party control having a major impact on elected officials, party organizations -- particularly the Senate and House campaign committees that are actually composed of elected officials -- are constrained to make winning, rather than ideological purity their primary if not exclusive goal.⁹³ Congressional party committees participate in elections to protect or gain seats for their party in their legislative chamber so that the party can control the organization of the chamber and the benefits over the control of committee

or issue commitment of those it helps; the question is electability, not loyalty to party programs or issue positions." Sorauf, *supra*, at 241.

⁹² Robert G. Boatright, *"You Don't Know Me, but Here I Am": Congressional Candidates and Party Strength*, 323 in Green & Shea, *supra*.

A study of state legislative campaign committees ("LCCs"), too, found "there is little evidence to suggest LCC resources are used as a reward or punishment for legislative behavior. DANIEL M. SHEA, *TRANSFORMING DEMOCRACY: LEGISLATIVE CAMPAIGN COMMITTEES AND POLITICAL PARTIES* 29 (1995). Accord, GIERZYNSKI, *supra*, at 122 ("there is not attempt to increase party cohesion by distributing resources on the bases of party loyalty or ideology").

⁹³ This is nicely illustrated by the strategic advice the National Republican Campaign Committee gave to a Republican Congressional candidate in 1990 to vote against Republican President Bush's tax plan, and the assistance it gave to the House candidate in preparing ads that highlighted the candidate's opposition to his own party's president. See Kolodny, *supra*, at 185.

assignments and the legislative agenda that such control brings. Their interest in legislative power binds them far more tightly to their candidates than ideological affinity or voting records links ideological groups to the candidates they back. Ideological groups can try to use their power to grant or withhold funds to influence officeholder actions. But with the success of party committees closely tied up with the election of party candidates, it is unlikely -- as studies of party committees show -- that these committees will use their funds to advance any goal other than the electoral success of their candidates.

To be sure, if the current limits on party spending were invalidated -- or the growing role of party spending outside of FECA were to render the statutory limits completely irrelevant⁹⁴ -- the potential for party organizations to exert influence over party officeholders might grow.⁹⁵ But at the moment, the danger that party officials will use their control over party campaign treasuries to unduly influence party officeholders does not, by itself, seem sufficiently serious to justify limits on party support for candidates.

(b) Dilution or Concentration? Private Contributors, the Parties, and the Candidates: Party

⁹⁴ Cf. Phil Kuntz, *Judge's Doubts on Corporate-Contribution Ban Pose Latest Test for Weakened Campaign Laws*, WALL ST. J., January 13, 2000, at A24 (federal district court judge suggests that ban on corporate contributions is unconstitutional because unregulated soft money donations by corporations to parties has “‘essentially rendered the contributions and spending limits . . . meaningless’”).

⁹⁵ See, e.g., Frank J. Sorauf, *What Buckley Wrought?* in E. JOSHUA ROSENKRANTZ, ed., *IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS* 32 (1999).

In fact, many of the studies of state legislative campaign committees (“LCC’s”) that found that these organizations focus almost exclusively on electability, not ideology or party loyalty, involved LCCs in states in which there are no limits on party contributions to state legislative candidates. In 1996, in 31 states, there were no limits on party contributions to candidates for the lower house of the state legislature. See Malbin & Gais, *supra*, at 17-19.

committees raise their money from private donors. With relatively tight limits on direct donations by individuals and PACs to candidates, donors could give money to the parties to circumvent those limits, or to supplement the money that is given under the limits. The party could, in effect, serve as a conduit for passing along contributions from private donors to candidates.

In *California Medical Association (“CalMed”) v FEC*,⁹⁶ the Supreme Court upheld FECA’s limits on donations by a parent organization to its own PAC on just this theory. Surely, there could be no stronger instance of donor-recipient identity, and no weaker case for donor-recipient corruption, as under FECA, a parent organization is allowed to set policy for its PAC. But the Court reasoned that although an organization’s donation to its own PAC presents no danger of corruption in itself, if contributions by the organization to the PAC were unlimited the organization might in effect give through its PAC in order to circumvent the limits on the organization’s direct contributions to its candidate. Thus, contributions by an organization to its PAC can be limited in order to “protect the integrity of the contribution limits” on donations to candidates.⁹⁷ Similarly, the prevention of such “conduit corruption” provides a constitutional foundation for limiting both party support for candidates and private donor support for parties.

In their *Colorado Republican* amicus brief, the political scientists in the Committee for Party Renewal, however, denied that unlimited party spending presented a danger of conduit corruption. As they put it: “Parties are too large and too diverse to be controlled by any special

⁹⁶ 453 U.S. 182 (1981).

⁹⁷ 453 U.S. 182, 197-98 (1981)(plurality opinion). See also *id.* at 202-04 (concurring opinion of Justice Blackmun).

interest. The old rule of sanitary engineers applies: the solution to pollution is dilution.”⁹⁸ Justice Thomas, in his *Colorado Republican* opinion, agreed that American political parties have “numerous members with a wide variety of interests” so that “the influence of any one person or the importance of any single issue within a political party is significantly diffused,” and “there is little risk that an individual donor could use a party as a conduit for bribing candidates.”⁹⁹ Judge Nottingham, in his opinion in the *Colorado Republican* remand reached a similar conclusion, finding “contributor-to-party-to-candidate pressure” to be “an unlikely avenue of corruption.”¹⁰⁰

By contrast, two state supreme court and one federal district court decisions have relied on the possibility of conduit corruption in upholding the constitutionality of state laws limiting party donations to candidates in state races.¹⁰¹ The Wisconsin Supreme Court looked to the legislative history of the state’s campaign finance law, which discussed the danger that PACs could evade the limits on their donations to candidates by using the parties as conduits for PAC

⁹⁸ Amicus brief, *supra*, at 16.

⁹⁹ 518 U.S. at 647.

¹⁰⁰ 41 F. Supp.2d at 1211.

Judge Nottingham defined corruption narrowly as a literal exchange of dollars for legislative votes, and rejected the idea that corruption could include more indirect influences of campaign contributions on legislative decision-making. See *id.* at 1209-11. There is evidence, however, that campaign contributions have their primary impact on legislative participation in committees. Contributions make it more likely members will work actively to support the interests of donors, as by proposing and supporting amendments, opposing hostile amendments, or participating in a committee mark-up. See Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 Am. Pol. Sci. Rev. 797 (1990). Such action may as valuable to donors as votes on the floor of Congress.

¹⁰¹ See *Gard v Wisconsin State Elections Bd.*, 456 N.W.2d 809, 821-24 (Wis. 1990); *State v Alaska Civil Liberties Union*, *supra*, 978 P.2d at 626; *Citizens for Responsible Government State Political Action v Buckley*, 60 F.Supp.2d 1066, 1079-82 (D. Colo. 1999).

funds. The Alaska Supreme Court cited an affidavit from a former governor of the state who stated “that pass-throughs (donations to a party that are earmarked for a candidate for a candidate) under the pre-reform system ‘made a mockery of contribution limits and turned political parties into money launderers.’”¹⁰² A federal district court in Colorado upheld that state’s restriction on party spending in support of candidates because of evidence that the state’s Republican party had been used as a conduit for PAC contributions to candidates.¹⁰³

Certainly, the national party committees have the capacity to launder donations. Prior to the enactment of FECA, the CCC’s typically operated as money conduits, funneling large donations from particular contributors to specified candidates.¹⁰⁴ To be sure, contemporary party committees appear to be much more active and sophisticated in soliciting funds and determining how those funds will be spent. For the most part, parties do not literally just hand over money received from particular donors to specified candidate.¹⁰⁵ Party committees can and do make their own independent strategic judgments concerning the most important races, from the party’s

¹⁰² Alaska Civil Liberties Union, 978 P.2d at 626. The Alaska Supreme Court also upheld limits imposed by the state legislature on contributions to the parties. See *id.* at 625.

¹⁰³ Citizens for Responsible Government, *supra*, 60 F. Supp.2d at 1080-81. The court also found that limits on contributions to the parties “are an appropriate means by which to protect the integrity of the entire system of campaign contributions” but determined that the specific dollar contribution limit in the Colorado law was lower than could be justified by the purpose of preventing corruption. See *id.* at 1088-89.

¹⁰⁴ See Kolodny, *supra*, at 79, 86, 90, 94, 97; Brooks Jackson, HONEST GRAFT: BIG MONEY AND THE AMERICAN POLITICAL PROCESS 56 (1988). See also Shea, *supra*, at 25.

¹⁰⁵ Such a direct pass-along of donations is illegal under 2 U.S.C. §441a(a)(8) which provides that contributions by an individual or a PAC which “are in any way earmarked or otherwise directed through an intermediary or conduit” to a candidate “shall be treated as contributions from such person to such a candidate.”

perspective, for deploying campaign money. But the rise of soft money, the enormous disparity between FECA's limits on individual and PAC donations to candidates and the much larger sums given in soft money, and the role of federal officeholders in soliciting soft money contributions to the parties suggest that donor-to-party-to-candidate conduit corruption is a real possibility.

Small donors may have little influence over how the parties use their donations, but a substantial portion of hard money donations to the parties consists of very large gifts. In 1996, 86% of the hard money in excess of \$200 given by individuals to the national party consisted of gifts of more than \$1000; 46% came in donations of more than \$10,000. Large gifts were a substantial, albeit slightly smaller share of donations to the national Republican party: Donations in excess of \$1000 amounted to 52% of hard money individual donations of \$200 or more, while donations in excess of \$10,000 amounted to 15% of hard money individual donations.¹⁰⁶

Soft money provides donors with even greater opportunities to reach candidates through the parties. In 1997-98, there were almost 25,000 donors who gave \$200 or more to the national parties' soft money accounts.¹⁰⁷ Their contributions came to \$176 million, or about 80% of total party soft money. Of these, just 700 donors (or 3% of those giving \$200 or more) provided 40% of the aggregate amount provided by the \$200+ donors, averaging about \$97,000 each. As previously noted, the top 390 donors each contributed \$100,000 or more -- many contributed far more than that. This is well above FECA's \$1000 per election limit on individual donations to

¹⁰⁶ Biersack & Haskell, *supra*, at 161.

¹⁰⁷ See FEC Info/Public Disclosure, Inc., "Soft Money Summary (issued 12/28/98)," <http://www.tray.com/fecinfo/smrpt.htm> (visited 11/17/99). FECA requires parties to itemize by name of donor and the size of donation only those donations at or above \$200. Consequently, there is far more information about these donations than about donations under \$200.

candidates and the Act's \$5000 per election limit on PAC donations to candidates. When all donations from a particular sector or industry are aggregated, the sums in questions can be enormous.¹⁰⁸ Surely, such large donors can be expected to have some say over how their contributions are spent, and can influence party giving and spending decisions¹⁰⁹

Moreover, party fund-raising practices establish close links between officeholders and potential donors to the parties. Federal officials are directly involved in soliciting contributions for the party committees' soft money accounts.¹¹⁰ President Clinton and Vice President Gore were prominently involved in raising money for the Democratic party's soft money operations, and Bob Dole raised soft money in connection with his 1996 presidential bid. Democrats offered their \$50,000+ donors intimate dinners with the President, small-group coffees in the White House Map Room, and over-night stays in the Lincoln Bedroom.¹¹¹ Republicans provided members of their Team 100 – those who gave \$100,000 – with a three-day opportunity to golf with Senate Majority Leader Lott, Speaker Gingrich, and then-House Appropriations Committee Chair (and

¹⁰⁸ See Jeffrey Taylor, *GOP to Get 'Soft Money' Tobacco Aid*, WALL ST. J., January 7, 2000, at A16 (tobacco company executives say industry will donate "at least \$7 million" toward the 2000 elections "mostly in unregulated 'soft money' contributions to Republican Party committees").

¹⁰⁹ Cf. Wesley Joe & Clyde Wilcox, *Financing the 1996 Presidential Nominations: The Last Regulated Campaign?* in id. at 62 ("When individuals give \$1000 to a presidential candidate they cannot expect much in return, but a contribution of \$500,000 or an industrywide contribution of \$4 million is perhaps a different matter.").

¹¹⁰FEC, Proposed Rules, "Prohibited and Excessive Contribution; 'Soft Money'", 63 Fed. Reg. 37722, 37728, July 13, 1998.

¹¹¹ Alison Mitchell, "The Making of a Money Machine: How Clinton Built His War Chest," New York Times, December 27, 1996.

briefly Speaker-designate) Livingston at The Breakers at Palm Beach.¹¹² In 1995-96, “[d]inners, weekend outings, and regular events were regularly used by both major parties to give major donors a sense that they are close to power.”¹¹³ The DNC raised \$27 million from the 350 people invited to attend the celebrated White House coffees with President Clinton; \$3.1 million came from people who made their contributions within a week of attending the coffee.¹¹⁴ In the current Congress, as the Wall Street Journal recently reported, “cash-for-access confabs on pending bills are business as usual in Washington.”¹¹⁵

Certainly, parties are aware of which candidates, which dinners or other events, or which fundraising appeals highlighting particular candidates, drew contributions from which donors. Funds raised for the Democratic Party by Hillary Rodham Clinton, for example, are likely to be spent by the party in coordination with, or issue advocacy for, her New York Senate race even if the money is not specifically marked for her campaign.¹¹⁶

Finally, fundraising for party committees does not simply provide donors with special

¹¹² Katharine Q. Seelye, “GOP’s Reward for Top Donors: 3 Days With Party Leaders,” *New York Times*, February 20, 1997.

¹¹³ Biersack & Haskell, *supra*, at 173.

¹¹⁴ See Daniel M. Yarmish, *The Constitutional Basis for a Ban on Soft Money*, 67 *Fordham L. Rev.* 1257, 1281 n. 217 (1998).

¹¹⁵ Phil Kuntz, “Cash-for-Access Policy Forums on Bills Are Common, Controversial in Senate,” *Wall St. Journal*, January 25, 2000, at A20.

¹¹⁶ See, e.g., Susan B. Glasser, “Clinton Taps Big Donors For Special N.Y. Account,” *Washington Post*, January 4, 2000 at A1 (without committing to donors to the Democratic Party that funds raised by Hillary Rodham Clinton will be used in her New York Senate race, “at least some of the contributors clearly believe their checks effectively amount to a quid pro quo. They give money to the DSCC [Democratic Senate Campaign Committee], which puts it back into the New York race.”)

access to specific federal candidates, but directly connects large donors with the federal government itself. Political scientists conventionally distinguish among the “party-in-electorate,” the “party-as-organization,” and the “party-in-government.”¹¹⁷ Under this division, the “party-as-organization” provides financial, staff and other resources for party candidates, while the “party-in-government,” organizes the executive branch and Congress, provides legislative leadership, determines the composition and control of committees, and ultimately, shapes the legislative agenda, the policy-making process and the decisions and votes of those who hold elective office. Under the current campaign finance system, however, the “party-as-organization” and the “party-in-government” are increasingly merged. Members of Congress constitute and control the CCC’s that play the leading role in providing party money and campaign services to congressional candidates. The President typically controls his party’s national committee, and once a favorite has emerged for the presidential nomination of the other party, that candidate and his party’s national committee typically work closely together. As a result, large donations to the party organization are effectively donations not just to specific candidates but to the party-in-government’s leadership, who use that money to protect or expand their power in government, by spending in congressional races and the presidential election.

The danger, then, is not simply that party committees will channel private money to particular candidates, but that party leaders are providing large party donors with direct access to the leaders of the government – who happen to be the party leaders themselves. Party committees do not so much dilute and “cleanse” private interest money as centralize it and focus it on the President and the congressional leadership. This can make it easier for large private interests to

¹¹⁷ See, e.g., Aldrich, *supra*, at 10.

influence the legislative process. Instead of donors having to reach out to multiple individual members of Congress, contributions to party campaign committees place donors in direct contact with the legislators who dominate the legislative process.¹¹⁸ There is now the potential for large donors to “corrupt” the parties, and, thus, to “corrupt” the government itself since the party leaders for party-fundraising purposes are increasingly the leaders of government themselves.

Given the web of relations linking major donors, party committees, and elected officials, large donations to the parties and spending by the parties in support of their candidates clearly implicates *Buckley*’s concern with quid pro quo corruption. The evidence from the states, the very large size of soft money contributions, and the role of the president and leading members of Congress in fundraising for the parties all suggest that conduit corruption is a danger in practice as well as in theory. Certainly there is evidence sufficient under the standard recently articulated in *Nixon v Shrink Missouri Government PAC*,¹¹⁹ to support both limits on donations to the parties and direct party support for candidates.

III. Reforming the Party Money Rules

The parties are eroding the basic elements of our campaign finance system. Due to the combination of party issue advocacy and independent spending, limits on party spending in support of candidates are effectively nonexistent. This undermines the spending limits that are a

¹¹⁸ See, e.g., Sorauf, *If Buckley Fell*, supra, at 31 (party committees offer donors “longer-run personal relationships with important, even leading policy-makers. Above all, they offer access to a whole cohort of party candidates and incumbents rather than access merely to a single candidate or incumbent”).

¹¹⁹ 120 S. Ct. 897, 905-08 (2000).

central feature of publicly funded presidential elections, and that would probably be a part of any system for the public funding of congressional elections. The parties' circumvention of FECA's limits on their spending in congressional elections also enables large donors to effectively avoid FECA's contribution limits. The rise of soft money, and its growing use in paying for party issue advocacy, has substantially undermined the restrictions on the ability of wealthy donors, corporations and unions to participate financially in federal elections. Campaign finance reform cannot survive unless the loopholes developed or exploited by the parties are plugged.

This can be done, consistent with the *Buckley* doctrine, provided the differences between parties and other political organizations are taken into account in interpreting *Buckley*. The structural and functional differences between parties and PACs should lead to a broader reading of coordination and express advocacy when party spending concerning party candidates is at stake. So, too, the nexus of large donors, party committees and the parties-in-government adequately justifies limits on all donations to the parties, and on party support for candidates.

Reforming the party money rules, however, should not consist solely of the imposition of new restrictions on the parties. Party money also plays a positive role in the campaign finance system. Parties devote a substantial portion of their funds to promoting political participation, including voter registration and get-out-the-vote drives. Far more than PACs and wealthy individuals, party committees give their money to challengers, thereby promoting the value of electoral competition. And party money reflects a broader range of groups and concerns than money provided by single-issue organizations or special interest PACs. As a result, once FECA is amended to subject all party money involved in federal election campaigns to regulation, it would be consistent with democratic values of participation, electoral competition, and public-regarding

government decision-making, to expand the authorized financing role of the parties.

Congress should take steps, along the lines laid out in this section, to ensure that all party money used in federal elections is hard money, subject to contribution and spending limits. Once that is accomplished some of the hard limits, particularly those dealing with party spending, ought to be raised to take account of the positive role parties can play in the electoral process.

A. Independent Spending

As I suggested in Part II, *Colorado Republican*'s protection for party independent spending reflects a view that parties are little different from PACs and ignores the ongoing structural relationships and shared electoral goals of candidates and their parties. Assuming that *Colorado Republican* remains good law, and that its conclusions that parties are capable of engaging in independent spending and that, when they do so, their spending is constitutionally protected from limitation, remain good law, the key goal of campaign finance reform ought to be the redefinition of "independence" in the party context.

Currently, whether spending is independent or coordinated with a candidate turns on the relationship between the candidate and the spender with respect to specific communications. Spending is deemed coordinated only when the candidate or her agents exercised control over, or engaged in "substantial discussion or negotiation between the campaign and the spender" over a communication's (1) contents; (2) timing; (3) location, mode, or intended audience . . . or (4) 'volume' (e.g., number of copies of printed materials or frequency of media spots)."¹²⁰

Such a standard may make sense with respect to spending by PACs and individuals. PACs and political activists are structurally distinct from the candidates they are backing, and they have

¹²⁰ FEC v. Christian Coalition, 52 F. Supp.2d 45, 92 (D.D.C. 1999).

goals other than the election of candidates. PACs and candidates lack ongoing organizational relationships so that effective coordination may require close interactions concerning particular communications. Moreover, PAC speech – even PAC speech expressly calling for the election of a candidate -- may reflect an alternative or additional goal of getting a particular issue before the electorate and making that issue central to the campaign. As a result, requiring collaboration concerning a particular message as a precondition to a finding of coordination protects the PAC’s interests in speaking independently.

Parties, however, are in quite a different relationship to their candidates. There are so many ongoing and longstanding ties between candidates and parties that coordination may be easily accomplished without formal contacts concerning a particular ad. As the FEC has noted,

“party committees are in regular contact with their candidates, help develop candidate messages and campaign strategy, and routinely share overlapping consultants, pollsters, fundraisers, and other campaign agents. . . . These consultations, discussions, and arrangements involve face-to-face meetings, telephone conversations, and exchanges of paper and electronic mail on a regular basis, sometimes daily, and take place at both the staff level and higher levels.”¹²¹

More importantly, once a party has embraced a candidate, their electoral goals are the same -- the election of that candidate. Parties do not seek to interject new issues into the campaign; they seek to help their candidates win so that the party can hold or retain power in government. Consequently, the central issue in determining whether party spending is independent or coordinated should be not whether the particular communication is independent or coordinated, but whether the party has firmly allied itself with the candidate it is supporting. .

I would argue that a party has so committed itself to a candidate (i) once it has nominated

¹²¹ FEC Proposed Rules on Independent Expenditures and Party Committee Expenditure Limitations, 62 Fed. Reg. 24367, 24369-70 (May 5, 1997).

the candidate or (ii) made a direct contribution to, or a coordinated expenditure with, a candidate. This accepts the constitutional point of the *Colorado Republican* plurality that a party organization may engage in election-related spending before it commits itself to a particular candidate, and that such spending should enjoy the protections available to independent expenditures. But this proposal -- which would be implemented by an amendment to FECA spelling out the definition of coordinated expenditure -- recognizes the real world facts that once a party has tied itself to a candidate, the party and the candidate are organizationally intertwined and they share the exact same electoral agenda, the election of the candidate.¹²²

B. Party Issue Advocacy

Party issue advocacy is an even greater threat to the campaign finance laws than party independent spending since not only is issue advocacy exempt from spending limits but issue ads may be paid for with soft money, thus, providing wealthy individuals, corporations, and unions to participate directly in financing campaign ads.¹²³ Thus, controlling party issue advocacy ought to be the most pressing issue for campaign finance reform.

¹²² The proposal is at odds with *Minnesota Republican Party v Pauly*, supra, which invalidated a Minnesota law that provided that party spending in support of a nominee is presumptively coordinated with the candidate. *Pauly* is mistaken and should not be followed.

The Shays-Meehan bill passed by the House of Representatives in 1998 and 1999 includes a more limited proposal, providing that once a party has nominated a candidate it can make either independent or coordinated spending for that candidate but not both. See 106th Congress, H.R. 417, § 205. That proposal would allow a party to engage in unlimited spending on behalf of a nominee, as well as to engaged in both coordinated and independent spending for the candidate prior to formal nomination. This does not adequately limit party spending.

¹²³ Issue ads are also exempt from FECA's reporting and disclosure requirements. That may be less important for the national political party committees which are independently subject to reporting and disclosure requirements, but it does allow issue spending by nonparty groups to avoid disclosure.

My approach to party issue advocacy is essentially the same as my approach to party independent spending. The Constitution requires that Congress draw some bright, objective line between election-related speech, which may be subject to regulation, and non-election-related political speech, which is immune from regulation. That line must accurately distinguish between election-related and non-election-related speech. Parties as well as PACs and individuals are capable of engaging in non-election-related speech, and when they do so they should receive the full protection the Constitution. But the placement of that line – the determination of which communications are election-related, or express advocacy, and which are non-election-related, or issue advocacy – is necessarily affected by the identity of the speaker.

As I noted in Part II, non-party organizations and individuals have significant goals other than winning elections. Indeed, for them even winning elections is likely to be a means to the end of advancing certain policy goals, rather than an end in itself. When they engage in speech that mingles references to elected officials or candidates and issues, it is quite possible that their aim is to influence official decision-making or even the discussion of issues in the electoral context, rather than the election itself. Although the presumption that speech includes references to candidates that fall short of the “magic words” of express advocacy is about issues rather than elections as the timing of the speech grows closer and closer to election day,¹²⁴ it is still consistent with a view that would provide the broadest possible protection for the political communications of what are primarily non-electoral actors.

Parties are quite different. Their preeminent concern of parties is winning elections, and thereby winning political power. When party communications combine references to issues with

¹²⁴ See Issue Advocacy, *supra*, 77 Tex. L. Rev. at 1782-87.

references to a candidate, they are using the issues to advance the candidate and win the election; they are not using the candidate to advance the issues.

To be sure, not all party speech need be election related. Party activists, including party elected officials, are interested in issues, and it is possible for party committees to spend money whose sole purpose and likely effect is to influence public thinking about issues. And party speech that is truly about issues is entitled to the same constitutional protection as the issue speech of other organizations. The question, then, is -- in light of the distinctive electoral focus of the major political parties and the evidence presented in Part II of how parties have come to use speech currently defined as issue advocacy to advance their electoral agendas -- where to place the elections/politics line when party spending is at stake.

All communications by the committees of the major political parties that clearly identify by name or likeness a candidate for federal office ought to be treated as express advocacy. This approach is consistent with the First Amendment goal of avoiding vague regulation: The “clearly identified candidate” test provides a bright, objective line for distinguishing one set of communications from another. Parties that want to disseminate messages concerning issues as long as their messages avoid referring to clearly identified candidates. But the test also reflects the evidence that party communications that mention candidates -- even those that eschew the “magic words” -- are really part of the party’s campaign to promote the election or defeat of the candidates mentioned. This test would protect true party issue advocacy, but it would define such issue advocacy in a way that corresponds to the distinctive institutional function of political party committees, to the balance of electoral and issue goals in spending by the major parties, and to the ways parties have used advertising that is clearly election-related but outside the current definition

of express advocacy as integral parts of their election campaigns.

In effect, this approach links up party speech to candidate speech. All expenditures by a candidate are subject to FECA's hard money requirements – and an expenditure by a publicly funded candidate is subject to spending limits – whether or not the candidate expenditures, include candidate ads, contain express advocacy. The mere fact that the spending is incurred, and the message broadcast by, a candidate is enough to establish that it is election-related.¹²⁵ Parties are not quite candidates, and they may have goals other than the election of a candidate. But at the point when a party communication clearly refers to a federal candidate, it can be safely assumed that the party is working to elect or defeat that candidate. Once it has clearly invoked the name of likeness of a candidate, the party has crossed the line from the discussion of issues generally into participation. Any such speech would have to be hard money funded.¹²⁶

This recommendation goes much further than the other principal proposals for regulating issue ads,¹²⁷ but its tight focus on party ads justifies its broader definition of express advocacy.

¹²⁵ *Buckley v Valeo*, supra, 424 U.S. at 79.

¹²⁶ Consistent with the distinction between coordinated and independent spending, party spending that refers to a candidate would still be independent, and exempt from FECA's spending limits, if the party had not nominated the candidate (or, where the speech is critical of the candidate, had not nominated her opponent) or contributed to the candidate (or her opponent).

¹²⁷ The Shays-Meehan bill, which has twice passed the House of Representatives would widen the definition of express advocacy to include communications that (i) express “unmistakable and unambiguous support for or opposition to one or more clearly identified candidates when taken as a whole and with limited reference to external events, such as proximity to an election;” or (ii) refer to a clearly identified candidate and are aired on television or radio within sixty days of an election in a state in which the candidate is running. 106th Congress, H.R. 417, §201; 105th Cong., H.R. 3526, §201. The FEC, by regulation, has adopted the “unmistakable and unambiguous support” test, 11 C.F.R. § 100.22(b), but that regulation has been invalidated in the courts. See *Maine Right to Life Comm., Inc. v FEC*, 914 F. Supp. 8 (D. Me. 1996), aff'd 98 F.3d 1 (1st Cir. 1996); *Right to Life of Dutchess County, Inc. v FEC*, 6 F.

Party issue ads are far more dangerous to the campaign finance system because, as the activities of the 1996 presidential election demonstrate, these ads link up unlimited corporate, union, and individual soft money donations directly fundraising by elected officials and to candidates' campaigns, and they directly undermine the limits on spending by publicly funded candidates. By the same token, because leading federal officials are centrally involved in the fundraising that pays for issue advocacy, and because issue advocacy has become such an integral part of candidates' campaigns, it is much easier to justify stringent regulation of party issue ads than it would be for issue ads of non-party organizations or individuals.

C. Soft Money

The constitutional case for eliminating soft money contributions is relatively straightforward. As a form of contribution, soft money can be regulated if it presents a danger of corruption or the appearance of corruption. Given the very large number of very large soft money donations by individuals, corporations, unions and other organizations, and the direct involvement of federal officials in raising soft money, the corruption danger posed by soft money is manifest. The current, administratively created exemption for soft money is based on the theory that soft money is used for nonfederal purposes, but over the last two decades soft money has been spent largely to influence federal elections. In 1996, roughly one-quarter of all national party soft money expenditures was undertaken by the four party Congressional campaign committees.¹²⁸ These are

Supp.2d 248 (S.D.N.Y. 1998). See also *Kansans for Life v Gaede*, 38 F. Supp. 2d 928 (D. Kan. 1999) (enjoining Kansas Governmental Ethics Commission from enforcing a definition of express advocacy that is broader than an explicit call for a vote for or against a candidate). See also *Issue Advocacy*, supra, 77 Tex. L. Rev. at 1780-87 (reviewing proposal for regulating issue advocacy).

¹²⁸ See Biersack & Haskell, *Spitting on the Umpire*, in Green, supra, at 172.

organizations composed of members of Congress whose sole raison d’etre is the election of federal candidates. How is it possible for any of that money to be considered nonfederal in any meaningful sense? The remainder of the national party soft money spending was undertaken by the Democratic and Republican National Committees which, in presidential election years, are heavily focused on the winning that election.¹²⁹ Soft money spending by state parties, in turn, is also usually controlled by the national committees that are the sources of state party soft money funds.¹³⁰

Soft money, like hard money, is used to fund federal election activity. To be sure some soft money is used to fund activities, such as voter registration and partisan voter mobilization drives, that truly benefit both federal and nonfederal candidates. Even then the nonfederal component also benefits federal candidates, since allowing any soft money to be used for such activities frees up hard money that would otherwise have been used to fund those activities and allows the parties to spend more on direct contributions to candidates or coordinated expenditures involving express advocacy that legally must be hard-money financed. Moreover, soft money fundraising creates a web of relationships between large donors and federal candidates and officials that clearly raise the potential for quid pro quos and the appearance of undue influence.

Professor Bradley Smith has argued assert that since party issue advocacy expenditures are constitutionally protected from limitation, it would be unconstitutional to limit soft money

¹²⁹ See Crotty, *Political Parties*, in Maisel, *supra*, at 212. (In 1996 the DNC “worked interchangeably with the White House as an extension of the President’s campaign.”)

¹³⁰ See, e.g., Bibby, *State Party Organizations*, in Maisel, *supra*, at 43-44.

contributions to the parties that are used to fund party issue advocacy.¹³¹ I have just argued that in the party context express advocacy may be more expansively defined so as to cover most of what is now currently considered to be issue advocacy. If so, such advocacy would have to be hard-money funded. Even if I am mistaken, and party spending that currently falls under the rubric of issue advocacy is immune from limitation, soft money restrictions, including restrictions on soft money that would be used to fund issue advocacy, ought nevertheless to be constitutional.

Buckley held that even though expenditures by candidates may not be limited because they present no danger of corruption, the contributions that finance those expenditures may be regulated when they present dangers of quid pro quos that undermine the integrity of the political process.¹³² So, too, even if so-called issue advocacy expenditures undertaken by the parties are immune from restriction, limits on contributions to the parties used to fund issue advocacy are unconstitutional if they are necessary to ameliorate the danger that such contributions may corrupt the political process. Given the corruption dangers implicit in the process by which the soft money used to fund party issue advocacy is raised, restrictions on soft money would be constitutionally valid.

Thus, FECA ought to be amended to provide that all money raised by federal officials and candidates for their own campaigns or for their parties, all money raised by national party committees, and money raised by state parties to be used in connection with federal election activity ought to be hard money, that is, money that complies with the dollar limits and source

¹³¹ See Smith, *supra*, 24 J. LEGIS. at 196-99.

¹³² 424 U.S. at 23-35.

prohibitions of FECA.¹³³ Such a measure is necessary to restore the integrity of the campaign finance laws, and would surely be constitutional.

D. Raising the Hard Money Limits

The goal of bringing all party money under FECA is not anti-party but pro-campaign finance regulation. It does not assume that party participation in campaign financing is a bad thing. Instead, it proceeds from the finding that party committees, because of their close connections to both donors and candidates, occupy an uniquely strategic position in the campaign finance system so that the failure to limit the parties will lead to the collapse of the system. Once the parties are effectively brought under regulation, there is much to be said for an expanded party role. Indeed, with its higher limits on donations to the national parties and its provisions for party coordinated expenditures and grass-roots expenditures does give the parties there is much to be said for a large, FECA already accords the parties a relatively privileged position.

Parties differ from PACs in at least three ways which would support a more prominent position for the parties in funding campaigns. First, compared to PACs and individual donors, parties are far more likely to give to challengers. A central problem of our campaign finance system is its failure to provide challengers with adequate funding. According to a recent study of congressional elections by the Committee for Economic Development, “[t]he majority of House challengers now raise and spend so little that they cannot wage a viable campaign.” Indeed, 60%

¹³³ This is the essence of the Shays-Meehan bill, H.R. 417, *supra*, at § 323(a), (b), (e). Shays-Meehan would allow state parties to continue to use money that does not comply with FECA to pay for the nonfederal share of their administrative and overhead expenses, as determined by the FEC, and it would permit federal officeholders to raise nonfederal money when they are running for state office. See *id.* at § 323(b)(B) (v), (e)(2) These exceptions seem both reasonable and consistent with the basic thrust of assuring the money used in federal elections complies with the restrictions of federal election law.

of House incumbents “either had no significant opposition or outspent their opponents by a margin of ten to one or more.”¹³⁴ In 1998, the average House incumbent outspent the average House challenger by 2.4 to 1.¹³⁵ PACs and large individual donors contribute to the fiscal edge of incumbency. Most PACs and large individual donors make contributions in order to obtain or secure access to elected officials “who are in a position to influence regulations, a appropriations, or treaties that effect the environment in which the PAC’s industry or workforce operates. These groups consider campaign contributions an important tool for reaffirming or strengthening their relationships with influential lawmakers.”¹³⁶ PACs and individuals that follow access strategies overwhelmingly favor incumbents with their contributions.¹³⁷

Parties, by contrast, are more likely to give to promising challengers.¹³⁸ Party committees use their money strategically to maximize their chances of winning control of Congress. That will frequently dictate sending money to a promising challenger rather than reinforcing the overloaded warchest of an incumbent facing only weak opposition.¹³⁹

Second, parties devote a considerable portion of their spending to grass-roots activity,

¹³⁴COMMITTEE FOR ECONOMIC DEVELOPMENT, INVESTING IN THE PEOPLE’S BUSINESS: A BUSINESS PROPOSAL FOR CAMPAIGN FINANCE REFORM, A Statement by the Research and Policy Committee of the Committee for Economic Development 17 (1999).

¹³⁵ Id. See also Herrnson in Green, *supra*, at 119 (in 1996, average House incumbent outspent average House challenger by 2.7 to 1). The imbalance in Senate races was less dramatic, with incumbents outspending challengers by about 1.5 to 1. See *id.* at 120, CED Report at 18.

¹³⁶ Herrnson, *supra*, at 105.

¹³⁷ See *id.* at 109-11 (in 1996, 88% of contributions of corporate PACs in House elections went to incumbents; 62% of large individual hard money donations went to incumbents).

¹³⁸ See *id.* at 102-04 (1999); MALBIN & GAIS, *supra*, at 145-52.

¹³⁹ Party committees will also give heavily to incumbents facing serious opposition.

such as voter registration and voter mobilization.¹⁴⁰ Party spending, thus, can promote citizen participation. The party label is an important cue for voters, providing general information about candidate orientations over a range of policy issues. An enhanced party campaign presence could improve voter understanding of the candidates and the quality of voter decisions.

Finally, as the scholars and justices who argue that parties dilute special interest money¹⁴¹ have noted, parties are relatively broad-based organizations, so a substantial party role can mitigate the politically balkanizing effects of advocacy by special interest groups.¹⁴² Parties will be less effective at muting the voices of their special interest constituents when a handful of very large donors play a preeminent role in financing party activities, but there is much to be said for the dilution argument if the size of donations to the parties is capped.

Thus, a comprehensive campaign finance reform package ought to include some increase in the levels of party support for party candidates as well as the elimination of soft money and of opportunities for unlimited party spending. Reforming donations to the parties to bar corporate, union and large individual contributions would ameliorate the corruption dangers posed by party spending. Raising permitted party spending levels would then increase the opportunities for parties to support challengers, promote political participation, and reduce the dependence of candidates on funds provided by narrowly-focused special interest groups. Such a combination of

¹⁴⁰ See Smith, *supra*, 24 J. LEGIS. at 199-200. See also Stephen Ansolobehere & James M. Snyder, *Soft Money, Hard Money, Strong Parties*, 100 Colum. L. Rev. xxx, xxx (contending that party spending increases increases turnout).

¹⁴¹ See text at notes 98-100, *supra*.

¹⁴² See, e.g., DARRELL M. WEST & BURDETT A. LOOMIS, *THE SOUND OF MONEY: HOW POLITICAL INTERESTS GET WHAT THEY WANTED* 211 (1999)

tight controls on soft money and effective enforcement of spending limits with an increase in the dollar level at which the limits are set could make soft money and spending restrictions more politically palatable while resulting in a better campaign finance system than soft money and spending controls alone.

At present, parties provide only a modest portion -- around ten percent -- of the hard money funds spent by congressional candidates, which is far less than the shares provided by wealthy individuals or PACs.¹⁴³ The case for increasing FECA's spending levels is reinforced by the rapidly increasing costs of congressional elections. FECA's limits on party direct contributions to candidates were set in 1974, and have not been adjusted for inflation. The limits on coordinated contributions have been adjusted for inflation, but the rate of increase in congressional campaign costs in the period between 1976 and 1996 was more than treble the rate of inflation.¹⁴⁴ Indeed, it is reasonable to conclude that one of the reasons for the rise in soft money is that, in the absence of public funding it is increasingly difficult for congressional candidates to raise the money they now need while complying with FECA's unindexed contribution limits and inadequately indexed coordinated spending limits.¹⁴⁵

Consequently, once soft money is eliminated and all money contributed to party committees for federal election purposes is subject to FECA's contribution limits and prohibitions,

¹⁴³ See Herrnson in Green, *supra*, at 119-20.

¹⁴⁴ See Sorauf, *What Buckley Wrought*, *supra*, at 52.

¹⁴⁵ The importance of soft money in presidential elections is also directly traceable to the inadequate levels of presidential public funding. The initial public funding allotment was set too low, and the subsequent adjustments have been inadequate to keep pace with rising campaign costs. See Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PENN. L. REV. 563, 580 (1999).

it would be a sensible campaign finance policy to raise the limits on party contributions to, and coordinated expenditures to candidates. The contribution limits should at least be trebled to take into account the increase in the cost of living over the past quarter-century and indexed henceforth. The coordinated expenditure limits, which have been rising with inflation, could be doubled to take into account the difference between the inflation rate and the more rapid increase in campaign costs.¹⁴⁶

E. Conclusion: Campaign Finance Reform and Party Reform

Bringing the parties back under FECA -- which is essential for the integrity of the campaign finance laws -- should not be seen as anti-party. Once the principle that the parties are fully subject to campaign finance regulation is fully established, and the dangers that large donors will use the parties to subvert the campaign finance laws is ameliorated, the actual limits on the parties could be relaxed to take into account the positive role the parties play in the political process. Moreover, some restrictions on party campaign finance activity may be in the best interest of the parties. The current system, dominated by soft money and soft-money financed issue advocacy, empowers large donors and centralizes party finances and power within the parties in Washington. When party leaders can raise huge sums at White House coffees or Speakers' Club retreats, they necessarily become more sensitive to their interests of their big donors, and less attentive to their less well-heeled party supporters. When state party

¹⁴⁶ Even if soft money is eliminated, limits on party spending outside the public funding context would remain appropriate. FECA's hard money limits allow PACs and individuals to make far larger contributions to party committees than to candidates, so that unlimited party spending would still allow party donors to evade the limits on donations to candidates. Moreover, the Republican Party has consistently done better than the Democrats in raising hard money. Eliminating the limits on hard money spending could unbalance the two-party system.

organizations rely on soft money transfers from the national parties, they, too, may become less attentive to their ordinary members and less focused on activities that build the party from the bottom up. The soft money system subtly transforms the parties from grass-roots clubs to Capitol Hill organizations. Controlling large donations to the parties could make the parties more and participatory, and more accountable to their local activists and voters.

In other words regulation of party campaign finance activity should not be seen as an infringement on party rights or an interference with party interests, but as a means of making the parties more faithful to their capacity to promote electoral competition, grass-roots political activity, and broad-based approaches to the problems of governance.