The Constitutional Basis for a Ban on Soft Money

Daniel M. Yarmish
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A BAN ON SOFT MONEY

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"Judges and officers shalt thou make thee . . . . [They shall not] take
a gift; for a gift doth blind the eyes of the wise, and pervert the
words of the righteous."1

—Deuteronomy

INTRODUCTION

During President Clinton's 1996 re-election campaign, Democratic
fund-raiser Johnny Chung funneled nearly $100,000 to the Democrats
from a Chinese military officer named Liu Chao-ying.2 Ms. Liu was a
lieutenant colonel in China's military and a senior executive of a Chi-
inese aerospace company. Ms. Liu's father was General Liu Huaqing,
who was then China's top military commander and a member of the
Standing Committee of the Politburo of the Communist Party, the in-
nermost circle of leadership in China.3

Ms. Liu was a senior executive in charge of international trading for
the Hong Kong arm of the state-owned China Aerospace Corpora-
tion, a key part of China's military-industrial complex with interests in
satellite technology, missile sales, and rocket launches.4 The financial
viability of many of China Aerospace's ventures depended on Ameri-
can satellites.5

Early in 1996, President Clinton reversed Secretary of State Warren
Christopher's decision to preserve the sharp limits on China's ability
to launch American-made satellites aboard Chinese rockets.6 China
Aerospace could now launch American satellites aboard its rockets.7
In the summer of 1996, Mr. Chung arranged for Ms. Liu to go to two

* I wish to thank my parents for their continuous support and for always being
there for me.
2. See Jeff Gerth, Democrat Fund-Raiser Said to Detail China Tie, N.Y. Times,
May 15, 1998, at A1. Mr. Chung's testimony came after he agreed to cooperate with
federal investigators following his guilty plea in March 1998 to campaign-related bank
and tax fraud. See id.; see also Don Terry, Democratic Fund-Raiser Pleads Guilty to
Fraud and Conspiracy, N.Y. Times, Mar. 17, 1998, at A18 (reporting on Mr. Chung's
guilty plea).
3. See Gerth, supra note 2.
4. See id.
5. See id.
6. See Jeff Gerth & David E. Sanger, How Chinese Won Rights to Launch Satel-
7. See id. Although President Clinton's decision was announced several months
before the donations were made, the decision did not become effective until election
day. See id.
Democratic fund-raisers attended by President Clinton. Mr. Chung testified that a large part of the nearly $100,000 he gave to the Democrats that summer came from China's military by way of Ms. Liu. These contributions confirmed investigators' suspicions of a plan by the Chinese government to influence the 1996 Presidential election.

In addition to the allegations of Chinese influence, some have accused the Clinton administration of improperly favoring the American aerospace manufacturers who stood to gain from the decision. The decision allowed Loral Space and Communications to export satellites to be launched aboard Chinese rockets. Bernard L. Schwartz, Loral's chairman, was the largest individual contributor to the Democrats in 1997, donating about one million dollars since 1995. Moreover, Loral had lobbied the White House to allow the satellite launching in the weeks leading up to the decision. The appearance of a quid pro quo prompted calls for a thorough inquiry. The Clinton administration, however, insisted that the contributions did not influence foreign policy.

There are many such examples of real or perceived corruption in the 1996 presidential election campaign. The investigations follow-

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8. See Gerth, supra note 2.
9. See id.
10. See id. Investigation was prompted after American intelligence intercepted telephone conversations suggesting that China had been considering secretly influencing the election. See id. In June 1998, the chairman of the Senate Intelligence Committee, Senator Richard C. Shelby, said that closed session testimony revealed that the Chinese government had planned to influence the 1996 election, although it is unclear whether they had in fact influenced it. See David Johnston, Senator Says China Had Plan to Try to Influence Election, N.Y. Times, June 8, 1998, at A14. Senator Shelby's remarks were consistent with findings of the Senate Governmental Affairs Committee. See id.
12. See id.
14. See id.
15. See, e.g., Bennet, supra note 11 (reporting that Senator Joseph R. Biden, ranking minority member of the Senate Foreign Relations Committee, called for investigation of the possibility that campaign contributions were quid pro quo).
16. See, e.g., id. (quoting President Clinton as saying his decisions were made "because we thought they were in the interests of the American people"). The Wall Street Journal had this to say:

Given the overlay of legitimate debate, . . . it may be difficult to determine the precise role of political contributions from Ms. Liu and Mr. Schwartz. It is probably not provable, and may not even be strictly true, that the President of the United States deliberately sold missile technology for political contributions. . . . Our own reading of the President's mind is . . . this gives [Mr. Schwartz] what he wants and I'm paid up. . . . In the end, perhaps the satellite launch licenses were not a quid pro quo for Chinese military contributions, but . . . few people . . . are willing to dismiss this possibility.

17. See infra notes 216-25 and accompanying text.
ing the election revealed the collapse of effective campaign finance regulation and a systematic selling of access and influence to large donors. At the heart of these problems lies what has come to be known as soft money. Although contributions for the purpose of influencing federal elections are limited by law, soft money is not. Soft money simply refers to "the unlimited funds raised by party committees that cannot be used for the express purpose of influencing Federal elections, but may be used for a wide array of activities that can indirectly benefit Federal candidates." Recently, parties and candidates have taken full advantage of this loophole. 

Opponents of reform argue that eliminating soft money would be unconstitutional. This Note argues, however, that a soft money ban would indeed survive constitutional scrutiny. Part I of the Note provides an overview of the legal framework surrounding campaign finance. Specifically, this part looks at the 1974 amendments to the Federal Election Campaign Act and the effect of the subsequent constitutional challenge to those amendments in Buckley v. Valeo. Part II describes the nature of the soft money loophole and its consequences. This part also examines recent efforts to solve the soft money problem. Part III argues that a ban on soft money contributions is in fact constitutional. This part maintains that a soft money ban is within Supreme Court precedent establishing that the supply of money into the campaign system can be regulated. This part also suggests that a ban on very large soft money contributions would be constitutional, even if Buckley were overturned. Further, this part argues that, despite reform opponents' assertions to the contrary, the recent Supreme Court case of Colorado Republican Federal Campaign Committee v. Federal Election Commission did not speak to the constitutionality of a soft money ban.

I. OVERVIEW OF THE CAMPAIGN FINANCE LEGAL FRAMEWORK

In order to explore the constitutional implications of a major campaign finance reform proposal, it is first necessary to understand the legal framework of the campaign finance system. This part discusses the statutory basis of the present campaign finance system. This part

18. See infra notes 216-25 and accompanying text.
19. See infra notes 73-79, 85-86 and accompanying text.
20. See infra notes 87-113 and accompanying text.
22. See infra notes 120-26 and accompanying text.
23. See infra notes 149-55 and accompanying text.
also examines the impact that the Supreme Court has had in holding certain reforms to be unconstitutional.

A. The 1974 Amendments

The Federal Election Campaign Act of 1971 ("FECA" or "the Act")\(^\text{26}\) sought to restrict rising campaign costs and strengthen campaign reporting requirements.\(^\text{27}\) Thus, FECA consisted of spending limits and strict public disclosure procedures for federal campaigns.\(^\text{28}\) In the aftermath of the campaign abuses uncovered in the Watergate scandal, Congress passed a series of comprehensive amendments\(^\text{29}\) to FECA in 1974. The amendments were "by far the most comprehensive reform legislation passed by Congress concerning the election of the President, Vice-President and members of Congress."\(^\text{30}\) These new laws included strict limitations on political contributions and expenditures,\(^\text{31}\) optional public financing for presidential campaigns,\(^\text{32}\) and broad disclosure and reporting requirements.\(^\text{33}\)

The amendments set stringent limits on political contributions. For instance, individuals were not allowed to contribute more than $1000 per candidate in any primary or general election.\(^\text{34}\) Moreover, the aggregate of an individual's contributions to all federal candidates could not exceed $25,000.\(^\text{35}\) Political committees \(^\text{36}\)—including political action committees ("PACs")—could not contribute more than $5000 per election to a candidate.\(^\text{37}\) Other contribution restrictions included a limit of $1000 per year for independent expenditures made on behalf

\(^{28}\) See generally Congressional Quarterly, Inc., Congressional Campaign Finances: History, Facts, and Controversy 87-88 (1992) [hereinafter Campaign Finances] (discussing the original Act's major provisions); Corrado, supra note 27, at 52 (same).
\(^{30}\) Buckley, 519 F.2d at 831.
\(^{31}\) See infra notes 34-49 and accompanying text.
\(^{32}\) See infra notes 50-52 and accompanying text.
\(^{33}\) See infra notes 55-59 and accompanying text.
\(^{35}\) See id. § 608(b)(3) (repealed 1976).
\(^{36}\) A "political committee" includes any committee, club, association, or other group of persons that receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1000. See 2 U.S.C. § 431(4)(A) (1994).
of a candidate and a prohibition on cash donations greater than $100. The amendments also set strict limits on spending by congressional and presidential candidates. For instance, Senate candidates were allowed to spend up to $100,000—or eight cents times the state's voting-age population, if greater—in a primary election. Senate candidates could spend no more than $150,000—or twelve cents times the state's voting-age population, if greater—in a general election. Furthermore, House candidates in states with more than one congressional district could spend up to $70,000 in each primary or general election. In states with a single congressional district, however, House candidates were subject to the same limits as Senate candidates. Presidential candidates could spend no more than $10 million in a nomination campaign, and their expenditures in any one state's primary election were limited to twice the amount that a Senate candidate in that state could spend in a primary election. Presidential candidates were limited to expenditures of $20 million in a general election.

The amendments also limited the amount that party committees could spend on behalf of candidates. Such committees were not allowed to spend more than $20,000—or two cents times the state's voting-age population, if greater—for general election for Senate candidates. Party committees could spend no more than $10,000 per general election for House candidates in states with more than one congressional district. In states with one congressional district, party committee expenditures for House candidates were subject to the same limits as Senate candidates. For presidential candidates, national party committees were not permitted to spend more than two cents times the voting-age population of the United States.

Another major change made by the 1974 amendments was the creation of a voluntary program of public financing for presidential candidates. For general elections, major party candidates were eligible to receive the entire amount they were permitted to expend under the spending limit if they agreed to reject private contributions. For primary elections, presidential candidates could receive public funds on a
dollar-for-dollar basis for the first $250 contributed by individuals.\textsuperscript{51} A candidate could receive funds in this way up to half of the primary election spending limit.\textsuperscript{52}

In addition, the 1974 amendments established the Federal Election Commission ("FEC") to administer the election laws. The legislation established the FEC as a bipartisan committee of six voting members.\textsuperscript{53} The FEC was created to "administer, seek to obtain compliance with, and formulate policy with respect to" the federal election laws.\textsuperscript{54}

Finally, the amendments created strict disclosure and reporting requirements. Every candidate was required to have a single central campaign committee that would report all contributions and expenditures.\textsuperscript{55} In election years, campaign committees had to file a comprehensive report with the FEC on a quarterly basis, as well as shortly before and after an election.\textsuperscript{56} In non-election years, campaign committees were required to file a financial report at year-end.\textsuperscript{57} Candidates also had to disclose which banks were designated to receive and expend campaign funds.\textsuperscript{58} Additionally, candidates were required to report to the FEC, within forty-eight hours of receipt, contributions of $1000 or more received within twenty days of an election.\textsuperscript{59}

B. The Effect of Buckley v. Valeo

A challenge to the constitutionality of major provisions of the 1974 amendments resulted in the landmark Supreme Court decision of Buckley v. Valeo.\textsuperscript{60} Buckley substantially restricted Congress's power to regulate campaign finance and established the modern framework for campaign finance law.\textsuperscript{61}

Immediately after Congress passed the 1974 amendments, a diverse group of plaintiffs, including federal officeholders and candidates (such as Senator James Buckley of New York), the New York State Conservative Party, the Mississippi Republican Party, the Libertarian Party, the New York Civil Liberties Union, and others, filed suit in the

\textsuperscript{51} See id. § 9034(a). To be eligible to receive matching funds, presidential candidates had to satisfy the threshold requirement of raising at least $5000 in donations of $250 or less in 20 different states. See id. § 9033(b)(3).

\textsuperscript{52} See id. § 9034(b).

\textsuperscript{53} See 2 U.S.C. § 437c(a) (1994).

\textsuperscript{54} Id. § 437c(b)(1).

\textsuperscript{55} See id. § 432.

\textsuperscript{56} See id. § 434(a)(2)(A).

\textsuperscript{57} See id. § 434(a)(2)(B).


\textsuperscript{60} 424 U.S. 1 (1976) (per curiam).

\textsuperscript{61} "Any judicial consideration of the constitutionality of campaign finance reform legislation must begin and usually ends with the comprehensive decision in Buckley." Kruse v. City of Cincinnati, 142 F.3d 907, 911 (6th Cir. 1998), cert. denied, No. 98-454, 1998 WL 651027 (U.S. Nov. 16, 1998).
federal district court for the District of Columbia. The defendants included the FEC, the U.S. Attorney General, the U.S. Comptroller General, the Clerk of the House, and the Secretary of the Senate, Francis R. Valeo. The complaint challenged the new legislation as unconstitutional and sought declaratory and injunctive relief. The district court directed that the case be transmitted to the D.C. Circuit. On plenary review, the D.C. Circuit rejected the plaintiffs' constitutional claims and upheld the major provisions of the law.

On appeal to the Supreme Court, the plaintiffs argued that limitations on the use of money for political purposes constituted a restriction on political speech in violation of the First Amendment, because virtually all meaningful political communications in modern society involve the expenditure of money. The plaintiffs also advanced constitutional claims against the amendments' other provisions, including an argument that the reporting and disclosure requirements of the law impinged on the right to freedom of association.

The Court first observed that contribution and expenditure limits "operate in an area of the most fundamental First Amendment activities." The Court noted that "[t]he First Amendment affords the broadest protection" to discussion of public issues and debate on the qualifications of candidates. Using this high standard, the Court proceeded to analyze the Act's contribution and expenditure limits.

The Court upheld the contribution limits. First, according to the Court, limitations on contributions serve the compelling government interest of preventing corruption and the appearance of corruption. Second, the Court found that contribution limits are narrowly tailored to serve that interest because the limits do not greatly burden free speech. In other words, the "quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." In short, the Court held that limits on contributions are a relatively unrestrictive means by which to deal with the reality or appearance of corruption.

Hence, under Buckley, direct donations to a candidate's campaign can be limited, and the contribution limitations challenged in Buckley are still in place today. Individuals may contribute no more than

62. See Buckley, 424 U.S. at 7-8.
63. See id.
64. See id. at 8-9.
65. See id. at 9.
66. See id. at 10.
67. See id. at 11.
68. See id.
69. Id. at 14.
70. Id.
71. See id. at 26-27.
72. Id. at 21.
$1000 per election to a candidate, $20,000 to a national party, and $5000 to a PAC. The total contributions an individual may make in any election cycle is capped at $25,000. Political committees—including PACs and political parties—may contribute no more than $5000 to a candidate, $15,000 to a national party, and $5000 to another political committee.

In contrast, the Buckley Court held that limitations on expenditures are an unconstitutional restraint on political speech. The Court reasoned that, unlike contributions, expenditures do not present a sufficient danger of corruption. Moreover, according to the Court, expenditure limits represent a greater restriction on speech than contribution limits because:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. . . . [E]xpenditure limitations . . . represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.

Therefore, according to the Court, while contribution limits are a constitutionally acceptable restriction on free speech, expenditure limits are not.

The Court thus struck down the spending limits established for House and Senate candidates and the independent expenditure limits. In subsequent cases, the Court made clear that campaign expenditures would be given broad protection. Accordingly, there are now no restrictions on the amounts candidates may spend. Moreover, there

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74. See id. § 441a(a)(1)(B).
75. See id. § 441a(a)(1)(C).
76. See id. § 441a(a)(3).
77. See id. § 441a(a)(2)(A).
78. See id. § 441a(a)(2)(B).
79. See id. § 441a(a)(2)(C).
80. See Buckley v. Valeo, 424 U.S. 1, 143 (1976) (per curiam).
81. See id. at 46. The Court reasoned that the growing cost of election campaigns was not a sufficiently compelling government interest to justify restrictions on campaign spending. See id. at 57. But see, e.g., David Schultz, Revisiting Buckley v. Valeo: Eviscerating the Line Between Candidate Contributions and Independent Expenditures, 14 J.L. & Pol. 33, 88-90 (1998) (arguing that the rapid growth in independent expenditures since Buckley mandates a reconsideration of that decision).
82. Buckley, 424 U.S. at 19.
are no limitations on expenditures by individuals and committees that are not coordinated with candidates seeking office, i.e., independent expenditures. If, however, a spender coordinates the expenditure with a campaign, it is considered analogous to a contribution and, therefore, subject to limitation.84

Current campaign finance law includes other important restrictions not directly at issue in the Buckley case. For example, corporations are barred from donating money in connection with federal elections.85 Similarly, labor union contributions are illegal.86 Hence, the post-Buckley legal framework for contributions consists of source restrictions, such as the ban on money from corporations and unions, and amount restrictions, such as the limits on individual contributions. Recently, however, contributors have circumvented these restrictions through what has come to be known as soft money. The next part examines the soft money problem.

II. THE SOFT MONEY PROBLEM

The FECA source and amount restrictions technically cover all money raised and spent “in connection with” federal elections.87 Permissive FEC policy, however, effectively created an exception from these restrictions for money raised in connection with various activities that only influence federal elections indirectly.88 So long as the funds raised are used for what the FEC regards as a nonfederal election-related purpose, they are exempt from FECA’s source and amount restrictions, even though they often do in fact indirectly influ-

84. See 2 U.S.C. § 441a(d). The amount of coordinated expenditures allowed is based on the population of the state. See id. § 441a(d)(3)(A). In the case of House candidates for states with more than one representative, a fixed dollar amount is used. See id. § 441a(d)(3)(B).
85. See id. § 441b.
86. See id.
87. Id. § 441b(a).
88. The origin of the soft money loophole is widely misunderstood. See Brooks Jackson, Broken Promise: Why the Federal Election Commission Failed 42 (1990). Many commentators are of the view that Congress created the soft money problem with the 1979 amendments to FECA. See, e.g., Investigation Hearings, supra note 21, at 340 (testimony of Edward H. Crane, President and CEO, Cato Institute) (“FECA was specifically amended in 1979 to allow for soft money contributions to the parties.”). The amendments, however, specifically required that the money still be raised subject to the contribution limits of FECA. See infra note 107 and accompanying text. Hence, under the legislative framework, corporate and union money was still prohibited and the limits on individual contributions still applied. While the 1979 FECA amendments may have allowed more money, hard and soft, to be spent in presidential campaigns, they did not create an exemption from the source and amount restrictions. See Jackson, supra, at 42, 44-45; see also Investigation Hearings, supra note 21, at 263 (testimony of Common Cause, submitted by Ann McBride, President, and Donald J. Simon, Executive Vice President and General Counsel) (observing that the “soft money loophole was created, not by Congress, but by the Federal Election Commission”).
ence federal elections. As a result, it is now possible for federal candidates to use money from any source and in unlimited amounts. These unlimited "soft money" contributions were at the heart of much of the 1996 election scandals. This part examines the soft money problem and the efforts that have been made to solve it.

A. Origin and Nature of the Loophole

At first, the FEC maintained that all money raised and spent in connection with federal elections was subject to the source and amount restrictions of FECA. For instance, in 1976, political parties asked the FEC whether statewide voter registration drives could be paid for in part with contributions that are not subject to the FECA limitations. The parties argued that statewide voter registration drives benefit not only the presidential and congressional candidates, but all of the state candidates as well. As such, the parties argued that they should be permitted to use a mix of money: part subject to the strict limits of FECA, and part outside the limits of FECA, subject only to the significantly more lenient state rules. The FEC rejected this argument, ruling that regardless of whether state law permits the spending of such money, "corporate/union treasury funds may not be used to fund any portion of a registration or get-out-the-vote drive conducted by a political party."

In a 1978 Advisory Opinion, however, the FEC said for the first time that a political party can use funds barred from federal elections, including corporate or union funds, for activities that benefit both state and federal candidates. The money spent was to be allocated between a federal portion—hard money—which was subject to the FECA contribution limitations and a non-federal portion—soft money—which was not subject to the FECA contribution limitations. The FEC reasoned that because FECA covers only money that is spent for the purpose of influencing federal elections, it does not cover expenditures that relate to state elections.

89. See infra notes 182-85 and accompanying text.
90. See infra notes 216-25 and accompanying text.
92. See id.
93. See id.
94. Id.
96. See id. The FEC scheme contemplates a system in which parties maintain separate bank accounts for federal funds and non-federal funds. See 11 C.F.R. § 102.5 (1997). Funds from the federal account may be used to influence federal elections and are therefore subject to the FECA limitations. See id. The nonfederal or "soft money" account is not subject to the FECA limitations, although it is subject to state campaign finance laws. See Federal Election Comm'n, Twenty Year Report 19 (1995) [hereinafter FEC Report].
97. See FEC Report, supra note 96, at 19.
Following the 1976 presidential elections, the major parties complained to Congress that the FECA spending limits had chilled party grassroots activity. The parties argued that presidential candidates, faced with limited money under the new presidential campaign finance system, had to conserve their limited funds for television advertising. Moreover, the parties asserted, any independent expenditures might have been regarded as an illegal contribution, because presidential campaigns were to be financed entirely with public funds.

Congress responded to this lobbying by amending FECA to allow state and local parties to spend unlimited amounts in presidential campaigns for certain activities. These activities included voter registration campaigns, get-out-the-vote activities, and the production of campaign materials used in connection with volunteer activities, including bumper stickers, handbills, and yard signs. Such activities were excluded from the statutory definitions of campaign expenditures and contributions. Parties were thereby allowed to spend unlimited amounts on these activities. The statute specifically stated, however, that the money used for these activities had to be raised subject to the contribution limits of FECA.

Additionally, FEC regulations expanded the kinds of activities that could be allocated between hard and soft money. For instance, the FEC permits national parties to pay part of their general administrative expenses from soft money, because part of their activities are related to winning state elections. These expenses include rent, utilities, office supplies, and salaries. Furthermore, the direct costs of fund-raising programs or events in which federal and non-federal funds are collected can be partially paid for with soft money. The same applies to certain grass-roots campaign activities that are conducted in conjunction with non-federal election activities. These grass-roots activities include the production and distribution of slate cards and sample ballots, as well as voter registration and get-out-the-

98. See Campaign Finances, supra note 28, at 50.
99. Jackson, supra note 88, at 44.
100. See id.
103. See id.
104. See id. § 431(8)(B)(x).
105. See id. § 431(9)(B).
106. See id. § 431(8)(B).
109. See id.
110. See id. § 106.5(a)(2)(ii). Such direct fund-raising costs include disbursements for solicitation of funds and for planning and administration of fund-raising events. See id.
111. See id. § 106.5(a)(2)(iii).
vote drives conducted on behalf of the party's presidential and vice presidential nominee. Similarly, generic voter registration drives, generic get-out-the-vote drives, and any other activities that urge the general public to vote or support a particular party or issue, without mentioning a specific candidate, can be allocated between hard and soft money.

To be exempt from the constraints of FECA, soft money may not be used to influence federal elections. As a practical matter, however, soft money does in fact invariably influence federal elections. Under the soft money system, corporations and unions, otherwise barred from contributing to campaigns, are allowed to contribute unlimited sums to political parties. Similarly, individuals, otherwise subject to maximum contribution limitations, are also permitted to contribute unlimited amounts. Thus, through soft money, contributors can frustrate the legislative scheme of source and amount contribution restrictions. Indeed, the Senate Committee on Governmental Affairs found that "[t]he soft money loophole, though legal, led to a meltdown of the campaign finance system that was designed to keep corporate, union and large individual contributions from influencing the electoral process." The limits that FECA established have thus been rendered meaningless.

B. Recent Efforts to Solve the Problem

Over the last decade, candidates have taken full advantage of the soft money loophole. The increases in soft money contributions and expenditures have been staggering. Democrats spent over $121

112. See id.
113. See id. § 106.5(a)(2)(iv).
114. See supra notes 87, 95-97 and accompanying text; see also FEC Report, supra note 96, at 19 ("[O]nly funds from the federal account may be used to influence federal elections.").
115. See infra notes 182-85 and accompanying text.
116. See supra notes 85-86 and accompanying text.
117. See supra notes 73-76 and accompanying text.
120. The rise of soft money financing mirrors the parallel development of the overall escalation of campaign fund-raising and spending. For instance, in the 1995-96 election cycle, congressional candidates raised a total of $790.5 million, an increase of 7% over the $740.5 million raised in the 1993-94 election cycle and 20% over the $659.3 million raised in the 1991-92 cycle. See Federal Election Comm'n, Congressional Fund-raising and Spending Up Again in 1996 (visited Aug. 18, 1998) <http://www.fec.gov/press/canye96.html>. Congressional candidates spent a total of $765.3 million, a 5% increase over the $725.2 million raised in the 1993-94 election cycle and 12% over the $680.2 million raised in the 1991-92 cycle. See id.
121. As used in this and the next paragraph, the term "Democrats" refers to the Democratic National Committee, the Democratic Senatorial Campaign Committee,
million in soft money during the 1995-96 election cycle, more than double the amount they spent in the 1993-94 cycle. Republicans spent over $149 million in soft money, triple the amount they spent in the 1993-94 cycle. Democrats raised nearly $124 million in soft money contributions in the 1995-96 election cycle, while Republicans raised $138 million. The $262 million in soft money contributions raised in the 1995-96 cycle represents a threefold increase from the $86 million raised in the 1991-92 cycle.

Moreover, the level of soft money fund-raising continues to escalate. In only the first fifteen months of the 1997-98 election cycle, Democrats raised $42 million, a 6% increase over the same period in the 1995-96 cycle. Similarly, Republicans raised $58 million in the first fifteen months of the 1997-98 cycle, a 31% increase from the same period in the 1995-96 cycle.

Efforts have recently been made to put an end to the soft money problem. In the Senate, a key proposal of the McCain-Feingold bill was a ban on soft money: the bill provided that national party committees "shall not solicit or receive any contributions . . . or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of [FECA]." The bill also prohibited candidates for federal office, as well as federal officeholders, from soliciting or receiving funds in connection with a federal election unless the funds are subject to FECA. In addition, the bill provided that any expenditure by a state or local party committee during an election year for any activity that might affect a federal election—such as voter registration and get-out-the-vote drives—must be made from funds subject to FECA. The McCain-Feingold bill was killed by a Republican-led filibuster in 1998.

123. See id.
124. See id.
125. See id.
128. Id. § 211.
129. See id.
130. See id.
131. Although the vote was 51-48 in favor of the bill, the bill's proponents were unable to muster the 60 votes needed to stop a filibuster. See Alison Mitchell, Deadlock in Senate Blocks Campaign Finance Reform, All But Killing It for Year, N.Y. Times, Feb. 27, 1998, at A1.
In the House, H.R. 2183\(^{132}\) (the "Shays-Meehan bill"), which passed the House by a 252-179 vote in August 1998,\(^{133}\) would ban parties from soliciting soft money. To close potential loopholes, the bill prohibited interstate party transfers of soft money and provided that any outside entities that are maintained, financed, or controlled by parties, either directly or indirectly, are also subject to the soft money ban.\(^{134}\) In an effort to compensate parties for the loss of money,\(^{135}\) the proposal increased the annual limit on contributions to parties from $20,000\(^{136}\) to $25,000.\(^{137}\) The bill also contained expanded disclosure provisions.\(^{138}\) The bill died, however, when the Senate failed to act on it before the end of the session.

The battle for reform is taking place not only on the floor of Congress, but in another arena as well: the FEC. On May 20, 1997, the FEC received a Petition for Rulemaking from five members of Congress, asking the FEC to "modify its rules to help end or at least significantly lessen the influence of soft money."\(^{139}\) On June 5, 1997, the FEC received a Petition for Rulemaking from President Clinton, urging the FEC to "adopt new rules requiring that candidates for Federal office and national parties be permitted to raise and spend only 'hard money.'"\(^{140}\) In response to these petitions, the FEC issued alternative proposed rules, including a ban on soft money.\(^{141}\)

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134. See H.R. 2183 § 101.
136. See supra note 74 and accompanying text.
137. See H.R. 2183 § 102.
138. Organizations that spend in excess of $25,000 for radio and television advertisements bearing the name or likeness of a candidate for federal office must disclose to the FEC how much they spend on such advertisements. See id. § 301. Moreover, candidates that raise more than $50,000 must file electronically. See id. § 303.
141. See Federal Election Comm'n, FEC Seeks Comments on 'Soft Money' Proposed Rulemaking (visited Aug. 18, 1998) <http://www.fec.gov/press/softmone.html>. There are two major options in the FEC's notice of proposed rulemaking. The first option would make no changes to current rules; i.e., the status quo would remain. See id. The second option would prohibit the receipt and use of soft money by the national party committees and eliminate national party non-federal accounts. See id. Moreover, there are three variations to this second option, discussion of which is beyond the scope of this Note. See generally id. (listing the variations on the core soft money proposal).
Advocates of reform view the adoption in the House of the Shays-Meehan bill as a significant victory. Although the bill died after the Senate failed to act on it, and there is the specter of another Republican-led filibuster if a similar bill were to be introduced, it may be that "a ban on soft money . . . is inevitable." Even if a proposal similar to Shays-Meehan becomes law, however, it is equally inevitable that such a law would be challenged on constitutional grounds. The question of whether a ban on soft money contributions can withstand constitutional scrutiny is discussed below in part III.

III. Analysis of the Constitutionality of a Soft Money Ban

In Buckley v. Valeo, the Supreme Court set a high standard of scrutiny for any limitations on election-related giving or spending. The Buckley Court held that the prevention of real and perceived corruption was a compelling government interest that can enable restrictions on campaign financing to survive constitutional scrutiny.

In describing the corrupting influence contributions can have, the Court made clear that it was referring to the securing of a quid pro quo from the candidate. Indeed, the Court has held that preventing corruption or its appearance are the only justifications for limiting election-related contributions. For limits on soft money to be constitutional, therefore, soft money would have to pose a serious threat of quid pro quo corruption or its appearance.

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142. See generally Rogers, supra note 133 (discussing the House's adoption of the bill).
145. See Buckley v. Valeo, 424 U.S. 1, 39, 44-45 (1976) (per curiam); see also Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 251-52 (1986) (stating that constitutional analysis of a campaign finance regulation requires a determination as to whether the regulation is justified by a compelling state interest).
146. See Buckley, 424 U.S. at 26-29.
147. See id. The Court stated:
To the extent that large contributions are given to secure a political quid pro quo from current and potential officeholders, the integrity of our system of representative democracy is undermined. . . .
Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.
 Id. at 26-27.
Opponents of reform argue that only contributions for direct use in federal elections can be limited under the anti-corruption rationale. They assert that when soft money contributions to political parties are used by the parties to fund issue advocacy, the contributions cannot result in quid pro quo corruption. They point to the fact that soft money goes to parties, not to candidates. They further argue that limits on soft money contributions made to a party for the purpose of advocating political issues would restrain such advocacy. Because such expression is clearly within the rubric of protected speech under the First Amendment, they contend, a soft money ban would unconstitutionally impinge upon First Amendment rights.

Opponents of reform also point to the Supreme Court's recent decision in Colorado Republican Federal Campaign Committee v. Federal Election Commission as further support for their argument. That decision affirmed the right of political parties to make independent expenditures that influence federal elections. Because such party expenditures cannot be constitutionally restricted, reform opponents argue, restrictions on contributions to parties for such expenditures would unconstitutionally infringe upon First Amendment rights.

The analysis offered by reform opponents, however, ignores three key points. First, a soft money ban would be consistent with established Supreme Court precedent upholding limits on contributions. Second, aside from Supreme Court precedent, a ban on very large soft money contributions is justified because it satisfies strict scrutiny. Third, reform opponents have misconstrued the Supreme Court's decision in Colorado Republican. This part examines all of these points.

A. Regulating Soft Money Contributions to Political Parties in Light of Buckley and its Progeny

A soft money ban would bring all contributions, even those only partially allocable to federal elections, under the source and amount restrictions of FECA. Those and similar restrictions have been challenged numerous times in the courts and have been consistently upheld. Supreme Court precedent thus shows that contributions can be tightly regulated.

150. See Investigation Hearings, supra note 21, at 601; Smith, supra note 149, at 196-97.
151. See Investigation Hearings, supra note 21, at 601; Smith, supra note 149, at 195-99.
153. See sources cited infra note 255.
154. See infra notes 235-37 and accompanying text.
155. See sources cited infra note 255.
156. See infra notes 157-81 and accompanying text.
In *Buckley*, the Court drew a constitutional distinction between political contributions and expenditures.\(^{157}\) The Court upheld a $1000 contribution limit to a particular candidate and a $25,000 annual overall limit on individual contributions to all candidates. Simultaneously, the Court struck down provisions that limited candidates' rights to spend their own money\(^ {158}\) and provisions that limited the right of individuals to make independent expenditures.\(^ {159}\) In doing so, the Court established the rule that there is a constitutional difference between political contributions and expenditures, with limitation permitted on contributions and prohibited on expenditures.\(^ {160}\)

Cases subsequent to *Buckley* have reaffirmed the contribution-expenditure distinction. In a series of cases after *Buckley*, the Court examined various provisions of FECA, balancing the First Amendment interest in permitting candidates and their supporters to advance their political views against the compelling government interest in protecting the electoral system from corruption and the appearance of corruption.\(^ {161}\) In these cases, the Court held that certain provisions of FECA limiting expenditures were unconstitutional.\(^ {162}\) At the same time, the Court made clear that the government may constitutionally set limits on contributions.

For example, in *California Medical Ass'n v. Federal Election Commission*,\(^ {163}\) the Court upheld limits on contributions to political committees.\(^ {164}\) The California Medical Association had formed its own political action committee.\(^ {165}\) The FEC charged the Medical Association and its PAC with violating the FECA provisions that prohibited contributions of more than $5000 in any calendar year to any multi-candidate political committee.\(^ {166}\) The Medical Association argued that by contributing to another organization, it was allowing that or-


\(^{158}\) See id. at 51-54.

\(^{159}\) See id. at 39-51. That is, expenditures that are not coordinated with the candidate or the candidate's campaign.

\(^{160}\) See id. at 19-23, 58-59.


\(^{162}\) See, e.g., *Colorado Republican*, 518 U.S. at 615-19 (stating that limitations on independent expenditures by political parties are unconstitutional); *Massachusetts Citizens for Life*, 479 U.S. at 257-63 (holding that limitations on corporate independent expenditures were not justified where they do not serve the compelling interest of preventing corruption or appearance thereof); *National Conservative*, 470 U.S. at 497 (providing that limitations on independent expenditures by political committees are unconstitutional).


\(^{164}\) See id. at 193-99.

\(^{165}\) See id. at 185.

\(^{166}\) See id. at 185-86.
ganization—its PAC—to serve as a proxy for its speech.\textsuperscript{167} It argued that its decision to speak through another group, instead of on its own, should not subject it to lesser First Amendment protection.\textsuperscript{168}

The Supreme Court, however, rejected that argument. The Court held that the $5000 limit was a contribution limit and therefore constitutional under \textit{Buckley}.\textsuperscript{169} The Court found this limit permissible even though it effectively suppressed the Association's speech.\textsuperscript{170} The Court aptly pointed out that if it were to accept the Medical Association's argument, then groups could undermine FECA's contribution limits to candidates by contributing to another organization, which could then make expenditures that would assist the candidate.\textsuperscript{171} The Court thus upheld limits on contributions to political committees.\textsuperscript{172}

Significantly, the holding in \textit{California Medical Ass'n} directly undermines reform opponents' argument that the limitation of contributions made to a party for issue advocacy is an unconstitutional restraint on protected speech.\textsuperscript{173} The Court clearly stated that despite such concerns, contributions to political committees can in fact be restricted.\textsuperscript{174}

Other cases provide further support for a rule permitting limits on political contributions.\textsuperscript{175} In fact, it is clear that even expenditures can, in certain situations, be regulated. As \textit{Buckley} noted, expenditures that are coordinated with a candidate or a candidate's campaign, even though not directly contributed to the candidate, are "treated as contributions," and can therefore be regulated just as if they were direct contributions.\textsuperscript{176} The Supreme Court has recently reiterated that such coordinated expenditures can be regulated.\textsuperscript{177}

The Court has also upheld a ban on expenditures of corporate money in state elections, even if the expenditures are made independent of any candidate. In \textit{Austin v. Michigan Chamber of Commerce},\textsuperscript{178} the Court found that the state had a compelling interest in regulating independent expenditures by corporations,\textsuperscript{179} and that the regula-

\begin{itemize}
\item \textsuperscript{167} See \textit{id.} at 195-96.
\item \textsuperscript{168} See \textit{id.}
\item \textsuperscript{169} See \textit{id.} at 197-98.
\item \textsuperscript{170} See \textit{id.} at 196-97.
\item \textsuperscript{171} See \textit{id.} at 197-99.
\item \textsuperscript{172} See \textit{id.} at 196-97.
\item \textsuperscript{173} See \textit{supra} notes 149-55 and accompanying text.
\item \textsuperscript{174} See \textit{California Med. Ass'n}, 453 U.S. at 196-99.
\item \textsuperscript{175} See, e.g., \textit{Federal Election Comm'n v. National Right to Work Comm.}, 459 U.S. 197, 205-09 (1982) (upholding a ban on the solicitation of contributions from the public by PACs).
\item \textsuperscript{176} \textit{Buckley v. Valeo}, 424 U.S. 1, 46 & n.53 (1976) (per curiam).
\item \textsuperscript{177} See \textit{Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n}, 518 U.S. 604, 617 (1996). The "constitutionally significant fact" in that case was "the lack of coordination between the candidate and the source of the expenditure." \textit{Id.} For a discussion of this case, see \textit{infra} Part III.C.
\item \textsuperscript{178} 494 U.S. 652 (1990).
\item \textsuperscript{179} See \textit{id.} at 659-60.
\end{itemize}
tion—a ban on the use of corporate treasury funds in elections—was narrowly tailored.\(^{180}\) Further, the Court left open the possibility that preventing corruption or the appearance thereof might be a sufficient basis for regulating independent expenditures.\(^{181}\) \textit{Austin} shows that there is broad power to regulate the supply of corporate money into the campaign process, even if it takes the form of independent expenditures.

The Supreme Court has thus made clear that where the supply of money into the campaign process is concerned, Congress has broad power to regulate. Hence, if soft money contributions to parties are, in effect, contributions to candidates' campaigns, then they can undoubtedly be limited.

As a practical matter, soft money invariably influences federal elections. This is because while soft money is nominally spent by the parties, the expenditures are often controlled by or coordinated with the candidates to provide maximum assistance to the candidates' campaigns.\(^{182}\) As representatives of one pro-reform organization pointed out before the Senate Governmental Affairs Committee, the parties "spend soft money as an adjunct to federal campaigns and for the purpose of influencing federal elections. That is the reality."\(^{183}\) Thus, in the 1996 presidential elections, both major parties spent enormous amounts of soft money on advertising—ostensibly to build the party's

\(^{180}\) See id. at 660. The Court noted that the prohibition on the use of corporate treasury funds in elections was not an absolute ban on all corporate spending, because corporations could still spend money by way of a separate segregated fund. See id.

\(^{181}\) See id. at 659.

\(^{182}\) See \textit{Investigation Hearings, supra} note 21, at 264 (testimony of Common Cause, submitted by Ann McBride, President, and Donald J. Simon, Executive Vice President and General Counsel); id. at 589 (testimony of Burt Neuborne, Legal Director, Brennan Center for Justice). Indeed, investigative reports revealed that in the 1996 presidential elections, the Clinton re-election campaign used the Democratic National Committee ("DNC") to run advertisements, paid for with soft money, that supported the president. See Albert R. Hunt, \textit{Congress Must Investigate All the Fund-Raising Scams}, Wall St. J., Jan. 2, 1997, at 7. Moreover, the White House closely supervised the soft money fund-raising effort. Harold Ickes, former Deputy White House Chief of Staff, met with DNC finance officials in the White House on a weekly basis to report on fund-raising. At these meetings, Mr. Ickes learned how much money was in various political accounts and discussed the scheduling of fund-raising events. Moreover, Mr. Ickes frequently argued with DNC Chairman Donald Fowler over the allocation of the money. As DNC Chairman, Mr. Fowler's loyalties lay with the state parties. Mr. Ickes, on the other hand, urged a greater emphasis on the Clinton re-election effort. See Michael K. Frisby et al., \textit{Green Giant: How Clintonites Built Fund-Raising Machine of Breadth and Power}, Wall St. J., Feb. 7, 1997, at A1. In addition, the Dole campaign also used party soft money in its advertising efforts. See Hunt, supra (citing a $15 million ad campaign by the Dole campaign using Republican National Committee money).

\(^{183}\) \textit{Investigation Hearings, supra} note 21, at 264 (testimony of Common Cause, submitted by Ann McBride, President, and Donald J. Simon, Executive Vice President and General Counsel).
image—to reinforce the themes of the candidates' campaigns. Moreover, some argue that soft money spending, even for entirely nonfederal purposes, influences federal elections because it permits committees to conserve federal funds that can later be spent to support federal candidates.

Thus, because political parties receive contributions and then spend them in ways that affect the outcome of their candidates' campaigns, there should be no constitutional problem with applying Buckley's supply-side regulations to contributions to parties. Therefore, under present case law, a soft money ban—that is, a requirement that all contributions to parties be subject to FECA's contribution limits—would be constitutional.

B. A Ban of Large Soft Money Contributions is Justified Under Strict Scrutiny

Some argue that the contribution-expenditure distinction established by Buckley and its progeny should be abandoned. Indeed, numerous Supreme Court justices have questioned the validity of the distinction. Thus, the Court may one day revisit the distinction it created between contributions, which can be regulated, and expenditures, which cannot. It is important, therefore, to analyze the soft

184. See id. at 589 (testimony of Burt Neuborne, Legal Director, Brennan Center for Justice); Hunt, supra note 182.
185. See FEC Report, supra note 96, at 20.
187. In Buckley, three Justices disagreed with the expenditure-contribution distinction. See Buckley v. Valeo, 424 U.S. 1, 241 (1976) (per curiam) (Burger, C.J., concurring in part and dissenting in part); id. at 261 (White, J., concurring in part and dissenting in part); id. at 290 (Blackmun, J., concurring in part and dissenting in part).

188. See Investigation Hearings, supra note 21, at 599 (statement of Roger Pilon, Senior Fellow, Cato Institute); see also Editorial, supra note 186 (urging the Court to reconsider Buckley's holding). The Court, however, recently denied a petition for certiorari in which one of the questions was whether Buckley should be overruled. See City of Cincinnati v. Kruse, No. 98-454, 1998 WL 651027 (U.S. Nov. 16, 1998); Linda Greenhouse, Justices Reject Appeals in Two Cases Involving Limits on Political Money, N.Y. Times, Nov. 17, 1998, at A11. Twenty-six states' attorneys general filed amicus briefs in support of the petition. See id.
money constitutional problem not merely in terms of the expenditure-contribution distinction as established by Supreme Court precedent, but also in terms of the framework that would exist were *Buckley* to be overruled.

Significantly, both supporters of reform and those that oppose reform argue that the distinction is untenable. Supporters of reform argue that Congress may not only constitutionally regulate contributions, it can regulate expenditures as well, where such regulation is warranted by the compelling government interest of preventing corruption or its appearance. For instance, in *Buckley*, Justice White argued that because a would-be contributor can avoid the contribution limits by spending money on the same kind of campaign activity that a contribution would have been used for, there is no meaningful distinction between contributions and expenditures. Thus, according to Justice White, limits on both types of political disbursements—contributions and expenditures—are valid.

Justice White's opinion implicitly supports the constitutionality of a soft money ban, which is a regulation on contributions. This is because Justice White's argument presupposes that contributions may constitutionally be limited. Indeed, under his argument, expenditures may constitutionally be limited where there is a danger of corruption or its appearance.

Opponents of reform, on the other hand, argue that neither expenditures nor contributions may be constitutionally regulated unless the regulation passes strict scrutiny. For instance, in *Buckley*, Chief Justice Burger contended that the arguments used by the per curiam

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190. *See Buckley*, 424 U.S. at 261-62 (White, J., concurring in part and dissenting in part). Justice White's opinion is representative of the pro-reform argument for abandoning the contribution-expenditure distinction. See, e.g., Schultz, *supra* note 81, at 52 ("The line of debate . . . has generally followed the arguments made in . . . Justice White's dissent." (footnote omitted)).


opinion to strike down expenditure limits applied with equal force to contribution limits. Justice Burger asserted that contribution limits should be struck down because, like expenditures, contributions have significant communicative content. He asserted that contribution limits hamper political activity in the same way that expenditure limits do, and that in distinguishing between contributions and expenditures, the Court was engaging in "word games." Therefore, he maintained, neither may be limited.

Most recently, in Colorado Republican Federal Campaign Committee v. Federal Election Commission, Justice Thomas made essentially the same argument. Justice Thomas maintained that both contributions and expenditures are used for political speech. He argued that it is irrelevant whether that speech is spent independently or through a political candidate or organization. In other words, according to Justice Thomas, there is no reason to grant differing levels of constitutional protection depending on how one chooses to spend money to express his or her views. Instead, Justice Thomas urged, there should be a simple strict scrutiny test that would be applied to both contribution limits and expenditure limits.

To survive strict scrutiny, a restriction on certain types of contributions must serve a compelling government interest, and it must be narrowly tailored to advance that interest. Thus, if it can be shown that banning very large soft money contributions narrowly and directly advances the government interest in preventing the corruption—or ap-

194. See supra notes 80-82 and accompanying text.
195. See Buckley, 424 U.S. at 241-42 (Burger, C.J., concurring in part and dissenting in part). Justice Blackmun dissented as well, arguing that the contribution limits should be struck down because there was no "principled constitutional distinction" between contribution limits and expenditure limits. Id. at 290 (Blackmun, J., concurring in part and dissenting in part).
196. See id. at 244 (Burger, C.J., concurring in part and dissenting in part).
197. See id. (Burger, C.J., concurring in part and dissenting in part).
198. Id. (Burger, C.J., concurring in part and dissenting in part).
199. See id. at 241-42 (Burger, C.J., concurring in part and dissenting in part).
201. See id. at 635-44 (Thomas, J., concurring in part and dissenting in part). For further discussion of Justice Thomas's opinion, see infra notes 242-52 and accompanying text.
202. See Colorado Republican, 518 U.S. at 636 (Thomas, J., concurring in part and dissenting in part).
203. See id. (Thomas, J., concurring in part and dissenting in part).
204. See id. (Thomas, J., concurring in part and dissenting in part).
205. See id. at 640 (Thomas, J., concurring in part and dissenting in part).
206. See, e.g., id. (Thomas, J., concurring in part and dissenting in part) (arguing that limits on both contributions and expenditures should be subjected to the same high level of scrutiny); see also BeVier, supra note 186, at 1090 (same); J. Skelly Wright, Politics and the Constitution: Is Money Speech?, 85 Yale L.J. 1001, 1005-10 (1976) (arguing that limits on political spending—both contributions and expenditures—should be viewed as restrictions on conduct related to speech, and therefore must meet the O'Brien substantial interest test (citing United States v. O'Brien, 391 U.S. 367, 376-77 (1968))).
of corruption—caused by such contributions, that regulation would be constitutional.

The Supreme Court has explained that corruption means that "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors." Although there are strong indications that soft money contributions do, indeed, present a danger of quid pro quo corruption, fact alone may not enable a statute banning all soft money contributions to survive strict scrutiny. This is because small individual donors may very well contribute not in contemplation of a quid pro quo. Thus, if all soft money contributions are banned, Justice Thomas's assertion that "broad prophylactic caps" on expenditures and contributions are not narrowly tailored may arguably be accurate. On the other hand, a ban on very large soft money contributions—for instance, those in excess of $100,000—may be constitutional if it can be shown that such massive contributions are invariably corrupting or at least cause the appearance of corruption; a ban on such contributions would therefore be narrowly tailored to address the government's compelling interest.

Thus, although limits on all contributions to parties arguably may be viewed as unduly restrictive of free speech, a strong argument can be made that one category of such contributions can be limited because of the particularly distinct danger of quid pro quo corruption: the massive contributions to parties by very wealthy individuals and large corporations that have been the hallmark of soft money contributions.

It has been observed that "[s]oft money corrupts for a simple and obvious reason. Soft money donations are given in such huge

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208. At the very least, soft money contributions present a danger of the appearance of corruption. See FEC Report, supra note 96, at 20 (citing the argument that "the active role federal candidates and their associates play in raising large sums of soft money, at the very least, creates an appearance of undue influence by the contributors on the federal candidates involved"). Significantly, that argument was made prior to the 1996 election scandals.
209. Colorado Republican, 518 U.S. at 641 (Thomas, J., concurring in part and dissenting in part).
210. Justice Thomas's argument was directed at a regulation which "flatly bans all expenditures by all national and state party committees in excess of certain dollar limits, without any evidence that covered committees who exceed those limits are in fact engaging, or likely to engage, in bribery or anything resembling it." Id. at 642-43 (Thomas, J., concurring in part and dissenting in part). Presumably, his argument would have little force if it can be shown that very large individual and corporate contributors tend to contribute in contemplation of a quid pro quo. If such were shown, a regulation that limits individual and corporate contributions to, say, $100,000 would be constitutionally permissible.
amounts—$50,000, $100,000, or more—that the donors typically expect to receive something in return for any investment of this magnitude.”

The elected officials and political parties that solicit these contributions typically offer these donors something in return for their money. Usually, what is bought and sold with soft money is access to elected officials.

The Buckley Court cited the campaign abuses of the 1972 election in support of its finding that large contributions pose a danger of corruption. The Court noted that “[a]lthough the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.” In the same way, the abuses of the 1996 presidential election campaign should remove any doubt that large soft money contributions cause corruption, and certainly its appearance.

211. Investigation Hearings, supra note 21, at 265 (testimony of Common Cause, submitted by Ann McBride, President, and Donald J. Simon, Executive Vice President and General Counsel).


213. See id.


215. Id. In the appellate decision preceding the Supreme Court’s ruling in Buckley, the D.C. Circuit discussed some of the abuses uncovered after the 1972 elections. See Buckley v. Valeo, 519 F.2d 821, 839-40 & nn.36-38 (D.C. Cir. 1975) (per curiam), aff’d in part and rev’d in part, 424 U.S. 1 (1976) (per curiam). The court cited numerous examples of apparent corruption from large contributions to the 1972 Nixon re-election campaign. See id. The huge contributions from the dairy industry represent one key example. The dairy industry had pledged $2 million to Nixon fund-raisers to gain a meeting with White House officials to discuss price supports. See id. at 839 n.36 (citing Final Rep. of the Select Comm. on Presidential Campaign Activities, S. Rep. No. 93-981, 93d Cong., 2d Sess. (1974)). White House officials, including President Nixon, knew about the pledge. See id. After the meeting with dairy industry representatives, President Nixon decided to overrule the decision of the Secretary of Agriculture and increase price supports. See id. Immediately thereafter, but before the decision was made public two days later, the dairy industry representatives were informed, in a series of meetings and phone calls, of the likelihood of an imminent increase and of the desire that they reaffirm their $2 million pledge. See id.

Another example of corruption cited by the D.C. Circuit regarding the 1972 campaign was the apparent sale of ambassadorships to large contributors. Persons actively seeking ambassadorial appointments at the time of their contributions gave $3 million to the Nixon campaign. See id. at 840 n.38 (citing Final Rep. of the Select Comm. on Presidential Campaign Activities, S. Rep. No. 93-981, 93d Cong., 2d Sess. (1974)). President Nixon’s fund-raisers routinely informed those contributors that only the President could guarantee their nomination. See id. In addition, persons holding ambassadorial appointments from President Nixon contributed over $1.8 million. See id.
By bringing large donors and fund-raisers . . . into the White House on a regular basis, President Clinton and his top lieutenants mixed fund raising with governing in a manner without precedent in post-Watergate Washington. The size of the donations collected, the amount of time spent by the president raising money and the menu of perks available to donors appear to go beyond anything seen in the past.

Departing from past White House practice, Democratic money men were granted special meetings with the president inside the White House, where they could make their pleadings on specific policy matters. Large sums were often donated right around the time of some of these presidential audiences.\textsuperscript{216}

For example, news reports shortly after the 1996 election revealed that Democratic fund-raisers explicitly sold invitations to coffees at the White House with President Clinton in exchange for contributions.\textsuperscript{217} Indeed, some contributors later admitted that they were paying for

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\item Frisby et al., \textit{supra} note 182. President Clinton asserted that donors invited to the White House merely received nothing more than a "respectful hearing." \textit{Id.} Even assuming the truth of that assertion, it can scarcely be doubted that such donations create a substantial appearance of impropriety.
\item See Don Van Natta, Jr., \textit{Some Democratic Fund-Raisers Say They Sold Access to Clinton}, N.Y. Times, Feb. 26, 1997, at A1. For instance, a fund-raiser told executives at Nynex Corporation that they could attend a White House coffee if the corporation would contribute $100,000 to the Democrats. \textit{See id.} Two weeks after Nynex made partial payment, a senior Nynex executive attended a White House coffee. \textit{See id.} The DNC raised $27 million from 350 people who attended White House coffees. \textit{See id.} Moreover, it raised $3.1 million from people who made contributions within one week of attending a coffee, or 12\% of the soft money raised at the coffees. \textit{See id.}
\item Another disturbing example of a sale of access to the White House is the case of Pauline Kanchanalak, an Asian business consultant, who brought five clients to a private meeting with the President in 1996. See David Willman et al., \textit{What Clinton Knew: How a Push for New Fund-Raising Led to Foreign Access, Bad Money and Questionable Ties}, L.A. Times, Dec. 21, 1997, at A1. These clients were the heads of a Thai conglomerate that was the largest foreign investor in China. \textit{See id.} The subject of discussion at the meeting was United States policy toward China. \textit{See id.} On the very day of the meeting, Kanchanalak made an $85,000 soft money donation to the DNC. \textit{See id.} Additionally, a member of Kanchanalak's family contributed an additional $30,000. \textit{See id.} Kanchanalak donated a total of $253,500 to the DNC from 1994 to 1996. \textit{See id.} All of the money donated by Kanchanalak was returned when questions arose about the money's origins. \textit{See id.}
\item The selling of invitations to White House coffees was described by Ann McBride, president of Common Cause, as "a direct quid pro quo. Give the money, you get a meeting with the President." Van Natta, Jr., \textit{supra}.
\end{enumerate}
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access. Moreover, while access was clearly sold, policy itself may have also been influenced at the coffees.

Congressional investigators also uncovered evidence that money bought favorable policy decisions. Because it is very difficult to conclusively prove that a particular decision was made as a result of

218. For instance, Johnny Chung and his company contributed $366,000 to the DNC, and he visited the White House at least 49 times, often bringing foreign businessmen with him. See Willman, supra note 217. The money was later returned after questions were raised about Democratic fund-raising. See id. His donations included a $50,000 political contribution given directly to Hillary Rodham Clinton’s chief of staff on March 9, 1995. See Michael K. Frisby & Glenn R. Simpson, Hillary Clinton's Chief of Staff Accepted $50,000 DNC Donation at White House, Wall St. J., Mar. 6, 1997, at A16. Mr. Chung's lawyer told NBC News that “Mr. Chung was seeking some access [to the White House and Mrs. Clinton], and that there may well have been some implicit understandings or perhaps hopes on Mr. Chung's part that perhaps a donation might well facilitate his request.” Id. On the day he gave the check, Mr. Chung and six Chinese government officials had their photograph taken with Mrs. Clinton. See id. In fact, Mr. Chung admitted to what had been occurring as a result of the sale of White House influence for soft money donations: “I see the White House is like a subway: You have to put in coins to open the gates.” William C. Rempel & Alan C. Miller, First Lady’s Aide Solicited Check to DNC, Donor Says: Administration Denies Account by Torrance Businessman Johnny Chung, Who Gave $50,000 Contribution to Hillary Clinton’s Chief of Staff, L.A. Times, July 27, 1997, at A1.

219. For instance, Deborah J. Doxtator, chairwoman of the Oneida Tribe of Indians, attended a coffee on March 28, 1996, four months after the tribe contributed $10,000 to the DNC. See Van Natta, Jr., supra note 217. She said she spoke to the President about a 200-year land claim that the tribe had pending in New York State. See id. The President “listened with a very attentive ear and said he would look into it.” Id. The same day Ms. Doxtator attended the coffee, the tribe gave the DNC an additional $30,000. See id.

220. For example, the Senate Governmental Affairs Committee uncovered evidence that a casino license was denied by the Clinton administration to reward major contributors who opposed the casino project. See S. Rep. No. 105-167, at 3167-68 (1998). In that scenario, a group of Indian tribes opposed to a casino project of rival tribes hired a Democratic lobbyist, who approached President Clinton, Democratic Party Chairman Donald Fowler, and chief White House fund-raiser and then-Deputy Chief of Staff Harold Ickes on the matter. See id. at 3168-72. After Ickes's staff contacted Interior Secretary Bruce Babbitt, the Interior Department rejected the casino project, even though it had been approved by the department’s regional office. See id. at 3167. The victorious tribes were heavy contributors to the Democratic party and had supported the 1992 Clinton election campaign. See id. at 3171-72. Even more telling is the testimony of Paul Eckstein, the lawyer who represented the casino’s backers, in an affidavit filed in federal court and in a deposition to the Governmental Affairs Committee. Mr. Eckstein, an old friend of Mr. Babbitt’s, reported that in a meeting shortly before he blocked the casino, Mr. Babbitt referred to the tribes’ large donations and told him that the White House was pressuring him. See id. at 3167. The Committee stated:

There is strong circumstantial evidence that the Interior Department’s decision to deny the [casino license] was caused in large part by improper political considerations, including the promise of political contributions from opposition tribes. At a minimum, it is clear that the opposition tribes and their lobbyists activated the DNC and, to some extent, the White House, to take action on their behalf. Financial support—both past and future—was crucial to this effort.

Id. at 3168. See generally Editorial, Did Mr. Babbitt Buckle?, N.Y. Times, Oct. 25, 1997, at A10 (referring to Mr. Eckstein’s testimony as “startling evidence”).
contributions, the connection between contributions and winning favors from the government must often be inferred from circumstantial evidence. Even so, there have been a number of recent instances where there was evidence that decisions were made to curry favor with or reward large contributors. Moreover, fund-raisers are alleged to have offered opportunities to influence policy in exchange for campaign contributions.

The events of the 1996 election campaign illustrate the real and perceived dangers of corruption from large soft money contributions. Furthermore, it is important to note that "[m]ost of the soft money


222. For instance, two businessmen, Alan Leventhal and Fred Seigel, attended several coffees with President Clinton in 1995. See Frisby et al., supra note 182. They acted as hosts for several Democratic fund-raising events and collected $3 million for the Clinton campaign. See id. Mr. Leventhal, his family, and his companies donated a total of $185,000. See id. In the fall of 1996, the Department of Housing and Urban Development ("HUD") selected the company owned by Leventhal and Seigel, Energy Capital Partners, for a lucrative lending role in a $200 million housing program. See id. The deal included terms that were very favorable to Energy Capital. See id. For instance, in an unprecedented arrangement, HUD allowed Energy Capital to be repaid ahead of the government in the event that housing-development owners defaulted. See id. Interestingly enough, the federal notice outlining the loan program mentioned Energy Capital and Mr. Seigel by name. See id. Following the Wall Street Journal's expose, HUD officials cancelled the loan program. See Abramson, supra note 221.

There were many other recent instances where quid pro quo can be inferred from the circumstances. See, e.g., id. (discussing several such instances).

223. For instance, the Senate Governmental Affairs Committee heard testimony that the White House had a casino license denied to repay large contributors. See supra note 220. Another example is the case of Roger Tamraz, who made a $300,000 soft money donation to the DNC, and candidly admitted to the Governmental Affairs Committee that he made the donation, not out of ideology, but simply to buy an audience with the President. See Abramson, supra note 221. He sought to push for financing for an international pipeline project in which he was an investor. See id. Although Tamraz did not win government backing, he was able to meet with officials from the National Security Council and the Energy Department. See id. Another sensational example involved Senator Robert Packwood, whose diary candidly revealed that the tax benefit he obtained for a lobbyist was a quid pro quo for the lobbyist's contributions. See id.

224. For instance, President Clinton and dozens of bankruptcy lawyers and bankers attended a $10,000-a-plate fund-raising dinner held in 1996. See Don Van Natta, Jr., *A Fund-Raiser Tied Policy to Gifts, His Accusers Say*, N.Y. Times, Mar. 1, 1997, at A1. The dinner, hosted by Democratic fund-raiser William A. Brandt, Jr., raised $1 million for the DNC. See id. The fund-raiser was also attended by a bankruptcy lawyer whom President Clinton had named to lead a commission on how to revamp the nation's bankruptcy system, and whom Brandt referred to as the "guest of honor." See id. Subsequently, several of the lawyers and bankers alleged that Brandt had explicitly linked attendance at the dinner with a chance to influence federal bankruptcy policies. See id. Indeed, one guest said that Brandt was implying that if he didn't attend the dinner, it might result in the bankruptcy commission or the Clinton administration "not taking a favorable view toward our position." Id. According to the guest, the implication was a "quid pro quo for our attendance." Id.
contributions come from the tobacco interests, the communications industry and trial lawyers, not from shady Indonesians." Thus, there can be no doubt that large contributions to parties present a danger of quid pro quo corruption or at least the appearance of such corruption. Moreover, it is equally clear that limits on large contributions to political parties—for instance, those exceeding $100,000—narrowly and directly advances the compelling government interest of eliminating corruption or its appearance. Therefore, even if Buckley were to be overruled, these large contribution limits would still be constitutional.

C. The Implications of the Court’s Recent Decision in Colorado Republican Federal Campaign Committee v. Federal Election Commission for the Soft Money Debate

Opponents of reform argue that the recent Supreme Court decision in Colorado Republican Federal Campaign Committee v. Federal Election Commission casts doubt on the constitutionality of a soft money ban. This section discusses that case, analyzes it in the context of the soft money debate, and concludes that it is not relevant to determining the constitutionality of a soft money ban.

1. Discussion of the Case

Colorado Republican considered the extent to which the First Amendment allows Congress to regulate political party spending in connection with a candidate’s campaign. In 1986, the Colorado Republican Federal Campaign Committee ran a series of radio advertisements that attacked the likely Democratic candidate for the U.S. Senate prior to both the 1986 Democratic primary and the Republican convention. At the time the ads ran, the Republican nominee had not yet been determined, and there were three candidates seeking the Republican nomination. The FEC brought action against the party committee, arguing that the purchase of the advertisements violated the party spending limitations of FECA (“Party Expenditure Provision”). The district court entered summary judgment for the

225. Hunt, supra note 182.
227. See infra notes 255-56 and accompanying text.
228. See Colorado Republican, 518 U.S. at 612.
229. See id. at 613-14.
230. See id. at 612. FECA imposes a limitation upon party expenditures in a senatorial campaign equal to the greater of $20,000 or two cents multiplied by the voting age population of the state. See 2 U.S.C. § 441a(d)(3) (1994). This amount is adjusted for inflation. See id. § 441a(c).
party. The FEC appealed this decision and the Tenth Circuit reversed. The case then went to the Supreme Court.

In a plurality opinion, the Court concluded that the expenditure at issue was independent rather than coordinated, and that the Party Expenditure Provision of § 441a(d) was unconstitutional as applied to a political party's independent expenditures. The Supreme Court's decision did not address the issue that the Colorado Republican Party raised in its counterclaim—a facial challenge to the Party Expenditure Provision as it applies to coordinated expenditures.

The Court splintered four ways. Justice Breyer announced the plurality opinion of the Court, joined by Justices O'Connor and Souter. The plurality opinion simply held that the constitutional right under Buckley of individuals, candidates, and political committees to make unlimited independent expenditures extends to political parties. They noted that the facts clearly showed that the Republican party's expenditures were independent of any particular candidate's campaign. Therefore, they concluded, a straightforward application of Buckley barred limitation of these expenditures. The question of whether the First Amendment would prevent limiting party expenditures that were actually coordinated with a candidate was left unresolved.

Four Justices—Rehnquist, Scalia, Kennedy, and Thomas—agreed with the Colorado Republican Party that, due to the special role of political parties in the electoral system, the Constitution prohibits limitations on a party's coordinated expenditures as well as independent expenditures. Thus, in a concurring opinion, Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, stated that there was no substantive difference between party spending that is coordinated with a candidate and the candidate's own spending, because there is "a practical identity of interests" between political parties and their candidates during an election. They concluded that because Buckley...
ley prevented any limitation on a candidate's own spending, limitations may not be imposed on party spending either.\textsuperscript{241}

In a partial concurrence and dissent, Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, agreed with the Court's judgment that the Party Expenditure Provision could not constitutionally be applied to independent expenditures by political parties, and further concluded that limits on coordinated expenditures were unconstitutional as well.\textsuperscript{242} These Justices argued that in the context of party expenditures on behalf of candidates, the anti-corruption rationale loses its force.\textsuperscript{243} They noted the difficulty in maintaining that a party, by spending money on its own candidate's behalf, corrupts that candidate.\textsuperscript{244} They also observed that the very aim of political parties in our system is to influence candidates' stances and votes.\textsuperscript{245} When parties attempt to achieve that aim, it does not constitute corruption.\textsuperscript{246} Therefore, according to these Justices, FECA's limits on coordinated expenditures "are as unwarranted as the caps on independent expenditures."\textsuperscript{247}

In his own opinion, Justice Thomas went even further and argued that coordinated expenditures cannot be constitutionally limited not only because the anti-corruption rationale fails in the context of political parties, but because \textit{Buckley}'s fundamental distinction between contributions and expenditures is unsound and should be rejected.\textsuperscript{248} He asserted that there is too fine a line between spending money to support a candidate and giving money to the candidate to spend for the same purpose.\textsuperscript{249} Justice Thomas stated that there is no reason to afford different levels of First Amendment protection depending on how one chooses to spend money to express political views.\textsuperscript{250} Consequently, he urged that the expenditure-contribution distinction be abandoned and replaced with a strict scrutiny test to be applied to restrictions on both contributions and expenditures.\textsuperscript{251} Next, Justice Thomas stated that the Party Expenditure Provision does not pass such strict scrutiny because the spending limits applied to all party committees, whether or not the committees actually engaged in corruption, and so they were not narrowly tailored to the objective of

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\item\textsuperscript{241} See id. (Kennedy, J., concurring in part and dissenting in part).
\item\textsuperscript{242} See id. at 647-48 (Thomas, J., concurring in part and dissenting in part).
\item\textsuperscript{243} See id. at 644-48 (Thomas, J., concurring in part and dissenting in part).
\item\textsuperscript{244} See id. (Thomas, J., concurring in part and dissenting in part).
\item\textsuperscript{245} See id. at 646 (Thomas, J., concurring in part and dissenting in part).
\item\textsuperscript{246} See id. (Thomas, J., concurring in part and dissenting in part).
\item\textsuperscript{247} See id. at 647 (Thomas, J., concurring in part and dissenting in part).
\item\textsuperscript{248} See id. at 635-40 (Thomas, J., concurring in part and dissenting in part). In this portion of his opinion, Justice Thomas was not joined by Justices Rehnquist and Scalia.
\item\textsuperscript{249} See id. at 636 (Thomas, J., concurring in part and dissenting in part).
\item\textsuperscript{250} See id. at 638 (Thomas, J., concurring in part and dissenting in part).
\item\textsuperscript{251} See id. at 640 (Thomas, J., concurring in part and dissenting in part).
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preventing corruption.\textsuperscript{252} He thus concluded that the Party Expenditure Provision was unconstitutional.

Justice Stevens, joined by Justice Ginsburg, dissented and stated that all money spent by a political party to secure the election of a candidate for office can constitutionally be limited.\textsuperscript{253} They argued that such party expenditures can reasonably be presumed to be not truly independent and, therefore, Congress and the FEC could constitutionally regulate them as coordinated spending.\textsuperscript{254}

2. Analysis of the Case in the Context of the Soft Money Debate

Some have contended that \textit{Colorado Republican} argues against the constitutionality of a soft money ban.\textsuperscript{255} The argument goes as follows: The Court in \textit{Colorado Republican} held that where a political party spends money independent of its candidates, those expenditures cannot be restricted.\textsuperscript{256} Therefore, Congress may not limit contributions to parties for issue advocacy.

\textit{Colorado Republican}, however, speaks not to the constitutionality of limiting contributions, but only to the constitutionality of limiting party expenditures.\textsuperscript{257} The plurality opinion of Justice Breyer reiterated, in no uncertain terms, the fundamental contribution-expenditure distinction of \textit{Buckley}.\textsuperscript{258} Indeed, the Court specifically noted that "reasonable contribution limits directly and materially advance the Government's interest in preventing exchanges of large financial contributions for political favors."\textsuperscript{259}

Similarly, Chief Justice Rehnquist and Justices Scalia and Kennedy, in their concurring opinion, did not question the constitutionality of a soft money ban. They dealt only with the issue of whether limits on coordinated party expenditures are constitutional.\textsuperscript{260} They did not consider the question of whether Congress can constitutionally limit contributions. These Justices noted that "Congress may have authority, consistent with the First Amendment, to restrict undifferentiated political party contributions which satisfy the constitutional criteria we

\textsuperscript{252} See \textit{id.} at 642-43 (Thomas, J., concurring in part and dissenting in part).
\textsuperscript{253} See \textit{id.} at 648 (Stevens, J., dissenting).
\textsuperscript{254} See \textit{id.} at 648-50 (Stevens, J., dissenting).
\textsuperscript{255} See \textit{Investigation Hearings, supra} note 21, at 590 (testimony of Burt Neuborne, Legal Director, Brennan Center for Justice) (citing "[o]pponents of reform"); \textit{id.} at 340 (testimony of Edward H. Crane, President, Cato Institute); \textit{id.} at 601-02 (statement of Roger Pilon, Senior Fellow, Cato Institute); Smith, \textit{supra} note 149, at 195-96;
\textsuperscript{256} See \textit{supra} notes 235-37 and accompanying text.
\textsuperscript{257} See, e.g., \textit{Investigation Hearings, supra} note 21, at 590 (testimony of Burt Neuborne, Legal Director, Brennan Center for Justice) ("[Colorado Republican] was an expenditure case, not an effort to limit contributions.").
\textsuperscript{258} See \textit{Colorado Republican}, 518 U.S. at 614-15.
\textsuperscript{259} \textit{id.} at 615 (citing \textit{Buckley v. Valeo}, 424 U.S. 1, 26-27 (1976) (per curiam)).
\textsuperscript{260} See \textit{id.} at 626-31 (Kennedy, J., concurring in part and dissenting in part).
discussed in *Buckley*, but that type of regulation is not at issue here.\textsuperscript{261}

In addition, even if *Colorado Republican* shows that contributions to parties to support independent expenditures cannot be restricted, it can be argued that the holding applies only when there is no candidate on whose behalf the party is spending money.\textsuperscript{262} In *Colorado Republican*, the expenditures were made at a time when a candidate had not yet been selected.\textsuperscript{263} Because the party was operating without a candidate, there was reason to hold that the party should be treated as though it were making protected independent expenditures.\textsuperscript{264} It may be that the Court would have allowed regulation if a candidate had been chosen and the party had made expenditures on the candidate's behalf.\textsuperscript{265}

The only real support the soft money ban opponents can point to in this case is Justice Thomas's opinion. In arguing for the abandonment of *Buckley*'s constitutional distinction between contributions and expenditures, Justice Thomas stated that any limits on political contributions should be as impermissible under the First Amendment as are limits on political expenditures.\textsuperscript{266} This view, however, is the lone opinion of a single Justice. The eight other Justices, including Chief Justice Rehnquist and Justice Scalia, made note of the fact that the issue involved was that of expenditures by, not contributions to, political parties, and did not address whether contributions to parties may be regulated.\textsuperscript{267}

Finally, even if it were assumed that contributions to support issue advocacy cannot be limited, contributions to support express advocacy of a candidate could still be limited. Under the *Buckley* framework, spending for express advocacy of candidates can be regulated.\textsuperscript{268}

\textsuperscript{261} See *id.* at 630 (Kennedy, J., concurring in part and dissenting in part).
\textsuperscript{262} See *Investigation Hearings*, supra note 21, at 590 (testimony of Burt Neuborne, Legal Director, Brennan Center for Social Justice).
\textsuperscript{263} See supra notes 228-29 and accompanying text.
\textsuperscript{264} See *Investigation Hearings*, supra note 21, at 590 (testimony of Burt Neuborne, Legal Director, Brennan Center for Social Justice).
\textsuperscript{265} See *id.*
\textsuperscript{266} See *Colorado Republican*, 518 U.S. at 640-44 (Thomas, J., concurring in part and dissenting in part).
\textsuperscript{267} See supra note 259 and accompanying text (Justices O'Connor, Souter and Breyer): supra note 261 and accompanying text (Chief Justice Rehnquist and Justices Scalia and Kennedy); supra note 253 and accompanying text (Justices Stevens and Ginsburg).
\textsuperscript{268} See *Buckley v. Valeo*, 424 U.S. 1, 43-45 (1976) (per curiam). The *Buckley* Court held that a provision of FECA that limited expenditures advocating the election or defeat of a clearly identified candidate was constitutional to the extent that it applied to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'" *Id.* at 44 n.52. By contrast, the Court held that advertisements that did not use such express language cannot be regulated. See *id.* at 43-45.
Therefore, a limit on contributions that support such express advocacy would not be problematic.\textsuperscript{269}

**Conclusion**

The amount and influence of soft money flooding into our campaign system is inexorably increasing, causing an erosion of public confidence in the integrity of our government and electoral system. Legislation to end soft money is well within Supreme Court precedent establishing that the supply of money into the campaign system can be regulated to avoid corruption or its appearance. Moreover, the pernicious nature of very large soft money contributions provides additional justification for limiting such contributions. Putting an end to soft money is thus consistent with the First Amendment.

\textsuperscript{269} See Smith, supra note 149, at 182-83. It may not, however, be desirable to limit contributions that support express advocacy because such regulation would only serve to decrease the supply of funds for grass-roots election activities and such items as slate cards, buttons, and fliers. See id. at 199-200. The problem with soft money, on the other hand, is its use to fund issue advertisements which influence elections. See supra notes 182-85 and accompanying text. Hence, under this rationale, a soft money ban would not be effective against the real abuses such a ban should address.