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Soft Money and Slippery Slopes

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THE ARTICLES IN THIS SECTION provide forceful advocacy for the Bipartisan Campaign Reform Act (BCRA) as desirable policy falling within the bounds of the Constitution. Much to my surprise and chagrin, I find myself in much less disagreement than I expected with the authors' assessment of the constitutionality under current law of the proposals for campaign finance reform. Our disagreement emerges more from their support for the BCRA and their position as to where the Court's jurisprudence in campaign finance should go, rather than where it is. Restraining impulses to write about the policy implications of such reform or about how to rewrite *Buckley v. Valeo*, I offer some thoughts on the authors' assessment of the constitutionality of the various sections of the BCRA.

By way of introduction, I should note three interrelated concepts that may chart the course for the Court's adjudication of the current proposals. The three concepts, which I discuss in greater detail throughout this response, might be summarized as (1) the right to give an earmarked contribution; (2) the state's interest in avoiding "conduit corruption"; (3) and the limits of the "anti-evasion" rationale. The first concept, the right to give an earmarked contribution, centers around the question whether the constitutionality of a restriction on contributions depends on how the recipient of such contributions will spend them. The question forces one to consider whether actual or apparent "corruption" depends merely on the transfer of funds from contributor to recipient or whether it necessarily involves an assumption as to how such funds will be used. For example, does a party's potential use of soft money for genuine issue advocacy or other protected activity mean a ban on soft money contributions is unconstitutional? Because a recipient might use contributions for activities that can be regulated (such as electioneering or transferring money to candidates) or for activities that the First Amendment clearly protects (such as running a television ad that says "abortion is murder"), does a contribution limit's forcing of a tradeoff between such activities make it unconstitutional? Although the current precedent does not provide a clear answer, the trend in the case law suggests that no right to give an earmarked contribution exists. Because the Court's definition of corruption focuses only on the risk that the direct or indirect recipient of a contribution might feel beholden to the contributor, the particular use of the contributed funds would appear irrelevant. Corruption happens when money changes hands, not when the recipient spends it.

The concept of "conduit corruption" and the "anti-evasion" justification will be doing most of the heavy lifting when it comes to deciding the constitutionality of the BCRA. After all, the central purpose behind the BCRA is to plug up various loopholes in FECA's regime that *Buckley* punctured, FEC regulations sculpted, or entrepreneurial politicians discovered. Because the Court has upheld and reaffirmed FECA's limits on direct contributions to candidates, attention in the current reforms turns to more circuitous avenues of influence, such as using political parties or PACs as conduits for contributions aimed at influencing candidates. If the state's interest in combating corruption justifies limits on direct contributions, the reformer argues, it should also justify closing off

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avenues of influence that serve as passthroughs for contributions to candidates. As I note later in this response, the conduit corruption argument should not be taken too far, because it cannot simultaneously justify limiting contributions flowing into and out of the conduit. The narrower the conduit is at one end (from the party to the candidate, for example), the less powerful the conduit corruption justification will be for regulating the flow of money at the other end (from the contributor to the party, for example), and vice versa.

The anti-evasion rationale represents the general category of which conduit corruption may be a subset. The rationale justifies regulation of all forms of expenditures and contributions that help evade the limits and source restrictions for contributions to candidates. Thus, to the degree corporate expenditures on electioneering ads represent *de facto* contributions to the candidates, the argument goes, the state may regulate such expenditures in its fight against the corrupting potential of corporate wealth on the electoral process. Similarly with regard to parties, the reformers justify regulating contributions and expenditures by state and local parties as necessary to preventing evasion of the campaign finance restrictions on the national party. Because every actor in the campaign finance system searches for new ways to achieve political goals that remain constant despite changes in the legal regime, reformers justify each additional restriction as necessary for the effective operation of the regulatory machinery as a whole.

Before addressing the arguments made in each article of this symposium, I should be clear and succinct as to which sections of the BCRA I consider most constitutionally problematic. The restrictions on corporate and union contributions to the national political parties and restrictions on corporate and union electioneering expenditures, which together represent the core of the BCRA, seem consistent with Supreme Court precedent that recognizes unique state interests in regulating participation by such entities in the electoral process. However, the soft money ban now elevates the constitutional significance of FECA's individual contribution limits to the national parties, which have never before been challenged. With the soft money avenue closed, parties will be more reliant on individual contributions and individuals will only be able to give money to parties wtihin the hard money limits. Although those limits will likely be upheld as necessary to combat conduit corruption, the BCRA presents new constitutional problems concerning the rights of parties to gain sufficient amounts of money to perform their critical functions and the rights of individuals to associate with their party by supporting it with large contributions. Similar problems arise with the BCRA's restrictions on contributions to state parties, which are unconstitutional insofar as they intrude on the ability of state parties to mobilize voters and otherwise participate actively in state elections. The expenditure restrictions placed on PACs are unconstitutional insofar as they apply to ideological, non-profit PACs, such as the Massachusetts Citizens for Life. Finally, the restrictions on electioneering advertisements are overbroad, but one should expect the Court to provide a limiting construction akin to the magic words test established by *Buckley*.

THE BAN ON SOFT MONEY CONTRIBUTIONS TO NATIONAL PARTIES

As Professor Briffault explains in his article,[2] the ban on corporate soft money contributions to national parties fits within the Court's current jurisprudence established in *Colorado Republican I and II*, *California Medical Association*, and *Austin*.[3] Whatever its inconsistencies, the doctrine that the decisive plurality of the Court appears to favor has the following relevant components: (1) corporate contributions of any size to candidates pose a unique threat of cor-

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[2] Richard Briffault, *Soft Money Reform and the Constitution*, 1 Election L.J. 343 (2002). The other symposium pieces discussed below are: Thomas W. Joo, *Corporate Governance and the Constitutionality of Campaign Finance Reform*, 1 Election L.J. 363 (2002); Frank Askin, *Of Bright Lines and Fuzzy Arguments: McCain-Feingold Tries to Rein in Sham Issue Advocacy*, 1 Election L.J. 375 (2002); and Glenn J. Moramarco, *Magic Words and the Myth of Certainty*, 1 Election L.J. 389 (2002).

[3] Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996) (*Colorado Republican I*); Colorado Republican Federal Campaign Committee v. FEC, 533 U.S. 431 (2001) (*Colorado Republican II*); California Medical Ass'n v. FEC, 453 U.S. 182 (1981); Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

ruption (*Austin*); (2) a state may restrict contributions to an organization based on the fear that the organization will be used as a means of evading limits on contributions to candidates (*California Medical Association*); (3) a political party is like other organizations in that its contributions to candidates have the potential for corruption but its independent expenditures are constitutionally protected (*Colorado Republican I and II*). When added together, these precedents produce the sum that the state can regulate corporate contributions to political parties because they pose a unique threat of corruption given parties' potential as conduits for otherwise illegal contributions to candidates.

I might even go further than Briffault and suggest that the potential for contributions to be used for purposes besides electioneering (*e.g.*, issue advocacy, voter mobilization, party building, or even feeding the hungry) will not bear on the constitutionality of the corporate soft money ban to national parties. So long as the teeth of the anti-evasion rationale remain sharp, corporate contributions to political parties can be regulated as if they were going directly to the candidate. Moreover, as I note in greater detail below, *Austin* exists as the solitary Supreme Court case upholding a limit (indeed, even a ban) on independent expenditures. The unique corruption threat the Court has recognized as arising from corporate contributions and even independent expenditures appears to have left corporations (and unions) with only one form of protected financial participation in electoral politics, namely the creation of corporate (or union) PACs that can then receive contributions from designated individuals.

As compared to proposed changes in corporate and union electioneering, less attention has been paid, both here and in the larger public debate, to the implications of the BCRA for individual and PAC contributions to parties. The effect of the soft money ban is to limit individual contributions to the national political parties to $25,000 and PAC contributions to $15,000 per year—similar to the FECA limits in place had soft money never emerged. Although we have lived for almost thirty years under similar restrictions, no court (to my knowledge) has considered their constitutionality. Only a small number of individuals and PACs currently push up against the contribution limits to political parties, but the availability of the soft money outlet has made those contribution limits largely irrelevant. With soft money contributions removed as an option, the contribution limits are now "real." The new restrictions may force the Court to confront the basic question whether the anti-corruption rationale justifies limiting individuals' ability to associate with the national party organizations through large contributions.

The argument that a limit on individual contributions to parties is unconstitutional flows from a recognition that political parties do more than merely support candidates: They promote their legislative agenda, run both issue ads and election-related ads, motivate and register voters, hold town hall meetings etc. To the degree a political party is an organization with functions other than contributing money to candidates and contributions allow it to perform these vital First Amendment-protected activities, the limit on contributions to political parties may indirectly impede the party's right of expression and directly constrain the contributors' right of association. Moreover, as the line of cases granting political parties almost complete autonomy from state laws that interfere with decisions as to their membership or primary electorate suggest,[4] the court views the associational interests of the parties with their membership as analogous to those of a boy scout troop or a Saint Patrick's Day parade.[5]

The argument in favor of upholding the limits focuses on the parties' ability to act as conduits for corruption and, as Briffault notes, the possibility that a contribution to the political party could itself pose the same danger of cor-

[4] *See* California Democratic Party v. Jones, 530 U.S. 567 (2000); Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986); Democratic Party of the U.S. v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107 (1981). Buckley itself suggested that contributions are like joining a party. *See* Buckley v. Valeo, 414 U.S. 1, 22 (1976) ("Making a contribution, like joining a political party, serves to affiliate a person with a candidate.").

[5] *See generally* Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 NYU L. Rev. 750 (2001) (describing and criticizing the current party autonomy caselaw).

ruption as would a contribution to a candidate. As noted above, the conduit corruption argument (or anti-evasion rationale, more generally) gains strength from the Court's opinions in *Colorado Republican II* and *California Medical Association*. Those cases together support the proposition that a state can regulate contributions to organizations, including parties, in order to regulate the redirected flow of money from individual contributor to candidate. But as Briffault notes, there is an additional argument here, never considered by the Court, regarding the *corruption of parties* by individual contributions. Because party leaders can deliver policy goods (*i.e.*, *quos* for the contributors' *quid*) with sometimes even greater reliability and efficiency than can candidates, contributions to political parties pose the same risk of corruption and its appearance as do direct contributions. Indeed, Justice Kennedy's invocation in *Colorado Republican I* of the "practical identity of interests" between parties and their candidates adds further support to the argument that parties can be corrupted by individual contributions.[6]

There are so many moving parts to this debate that it is difficult to isolate the essential elements for constitutional adjudication. To begin with the anti-evasion rationale, it is important to understand how and to what degree the restriction on individual contributions to political parties prevents them from acting as conduits for contributions to candidates. The Court's decision in *Colorado Republican II* upheld limits on party coordinated expenditures (and therefore implicitly on the separate contribution limits) to candidates.[7] Therefore, the limits validated by the Court set a ceiling for each federal race as to how much potential evasion of the individual limits or conduit corruption could occur. No matter how much money an individual gives to a party, FECA's race-specific limits on party-coordinated expenditures and contributions set bounds on the potential corrupting influence on a candidate. Contributions to the party made with the intent to evade the individual contribution limits compete with each other, in a sense, to reach the candidate through the party conduit. This is a long-winded way of saying that the Court's decision in *Colorado Republican II* narrowing the channel at the back end of the contributor-party-candidate stream makes the narrowing at the front end (that is, when the contributor gives to the political party) less justifiable under the anti-evasion rationale.[8] If one pays attention only to the potential diversion of an individual's contribution through the party to a candidate, then the possibility of conduit corruption so as to evade the individual contribution limits is available only to a limited number of contributors.

Another example might help prove the point. In a state where FECA tells the national party that it can funnel only $100,000 to its Senate candidate, for example, the *total* amount of evasion or conduit corruption of a single candidate through the national party will only amount to $100,000. In such a state, the BCRA has the effect of limiting the maximum amount of conduit corruption to a single candidate in a year to $25,000 given by four contributors—effectively replacing the $1000 contribution limits for candidates with the $25,000 for parties, but doing so for only a limited number of contributors. If the individual contribution limits to political parties were found unconstitutional, the amount of potential conduit corruption

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[6] *Colorado Republican I*, 518 U.S. at 629–30.

[7] The limits upheld in *Colorado Republican II*, which vary based on the particular candidate who benefits from the party's coordinated expenditure, are found in 2 U.S.C. § 441a(d)(3):

> The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—
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> (A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—
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> (i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or
>
> (ii) $20,000; and
>
> (B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

In addition to coordinated expenditures parties can also contribute to candidates: $5000 per election for House candidates and $17,500 for Senate.

[8] As Briffault notes, Justice Thomas made a similar argument in *Colorado Republican II*, suggesting that the proper way to eliminate conduit contribution was to attack it at the source—*i.e.*, when the contributor gives to the party.

would still be limited by the $100,000 limit on party contributions to the candidate and the fact that all conduit contributions would need to compete with each other to get to the candidate.

Where the reformers might draw their best argument in support of the limits on contributions to parties comes from *Buckley*'s language upholding FECA's aggregate contribution limits. FECA originally limited individual contributions to an aggregate of $25,000 per year (the comparable figure for the BCRA is $57,500 per two-year election cycle): in other words, individuals could contribute $25,000 to candidates and political parties and they could apportion those funds in any way they saw fit. Such a regulation necessarily curtailed the contributors' freedom to associate with a large number of candidates or to intensify their connection with a party by writing a check in excess of $25,000. Finding the aggregate limits necessary to prevent evasion of the individual contribution limits, the *Buckley* Court upheld the restrictions:

> The overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.[9]

Although *Buckley* never explicitly upheld limits on contributions to the parties, insofar as those limits serve the same anti-evasion goals as the aggregate contribution limits, they appear to be constitutional.

The more interesting question appears to be whether the Court will uphold a ban on soft money based on the state's interest in preventing corruption of the parties themselves. Briffault urges the Court to do so because the merging of the national party organizations with the parties-in-government presents the same risk of actual and apparent corruption from individual donations as is present with contributions to the candidates themselves. Party leaders, who, after all, are usually elected officials, have the same or greater capability than candidates to deliver policy goods to eager contributors, the argument goes. At the very least, reformers maintain, when money changes hands between a contributor and the head of the Democratic Congressional Campaign Committee, for example, an appearance of corruption arises (especially if it's a really big check).

Fitting this argument into current law presents some problems. *Colorado Republican I* and *II* stand for the proposition that political parties are just like PACs in that their contributions to candidates present a danger of corruption but their independent expenditures do not. Therefore, the state can regulate party contributions to candidates but not independent expenditures used to explicitly further the election of a candidate. If parties were identical to PACs, then the limits on contributions to them are justifiable, if at all, under the anti-evasion rationale—PACs being an instrument of influence, rather than a recipient of it. In the case of receiving contributions, however, reformers argue that PACs and parties differ: Parties and their leaders have a unique capacity to enact policy and dole out official favors.

The first, perhaps nit-picky, point in response is that some PACs are also led by elected officials (leadership PACs, for example); parties are not unique when it comes to their solicitors being able to deliver policy goods.[10] Second, the more we view parties as collections of governmental officials susceptible of corruption (*i.e.*, as both corrupted and corruptors), the less the distinction in *Colorado Republican II*, that justifies limiting parties' abil-

[9] *Buckley*, 424 U.S. at 38. Incidentally, the BCRA would raise the individual aggregate contribution limit to $30,000.

[10] Although, as Briffault notes, the BCRA would prevent elected officials from soliciting soft funds for any organization, including PACs.

ity to give money to candidates, makes sense. If parties are more like collections of government officials rather than nongovernmental agents of influence, then they do not pose the same risk of corruption as other nongovernmental entities, such as PACs, corporations or individual contributors. Finally, as the corruption justification begins to capture more than the favors that the recipient candidate can perform alone (*i.e.*, a vote in exchange for a dollar), money begins to look more like traditional forms of influence. In appreciation for what a contributor gives to the party rather than to the official, a leader of that party then wields influence to pay the contributor back. To be sure, the corruption formula—political favor in exchange for contribution—still holds, but the official performing the favor is doing so not for his own good, but for the good of the party. Of course, the incentives of a party leader and his party are almost perfectly aligned—the rising tide of party wealth and success lifts the party leader's boat higher than the rest of the party. However, as the motives of the leader in soliciting contributions become more other-regarding—to benefit candidates and the party as a whole rather than himself—the corruption, as traditionally understood, becomes more attenuated.

THE REGULATION OF CONTRIBUTIONS TO AND SPENDING BY STATE PARTIES

Both in his previous writings[12] and in his piece in this symposium, Briffault has drawn readers' attention to perhaps the central, but often underplayed, constitutional question concerning recent proposals for campaign finance reform: their effect on state and local parties. The campaign finance debate is as much about federalism as it is the First Amendment. If the United States did not have its overlapping system of elections at multiple levels of government, the campaign finance beast might be easier to tame. Federalism creates both an avenue of evasion for federally imposed limits and the risk that federal law might intrude excessively on state elections and the associations involved in them. Therefore, regulation of state and local parties is essential to federal campaign finance reform, but also the most constitutionally problematic component of it.

The BCRA's restrictions on state parties will test the limits of the anti-evasion rationale and the concept of conduit contribution. No one can argue with Briffault's empirical and predictive contention that money flows to the state parties once the law narrows the channel for contributions to federal parties and candidates. A federal soft money ban will do little to stem the flow of money into federal elections so long as state parties can spend similar funds (*i.e.*, corporate and union contributions, and large individual contributions) on races for the House, Senate and Presidency. At the same time, reform measures aimed at state parties in their capacity as conduits for otherwise prohibited or regulated federal election activity threaten to undermine both the generic and state-specific functions of the party. Recognizing that danger, the BCRA does not ban soft money to the state parties; rather, it limits corporations, unions and individuals to $10,000 contributions. Moreover, these limits only apply to the state parties when it puts on its "federal election hat" by using soft money for activities that might affect federal elections.

By broadly defining what it considers to be federal election activity, the BCRA intrudes on at least some constitutionally protected activities of state and local parties. Briffault agrees that the provision limiting state party "generic campaign activity" is unconstitutionally broad, but he finds the restrictions regarding express advocacy[13] and voter registration constitutional because of the state party's closely aligned interests with the federal candidates it supports. I see problems with all three[14] aspects

[11] 528 U.S. 377, 389 (2000).

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

[13] I should note here that the express advocacy provision for political parties is a bit more specific than the same provision for corporations. In addition to the similar requirement that the party ad "refer to a clearly identified candidate," the section also requires that the ad promote, support, attack or oppose the candidate.

[14] Actually, the BCRA contains a fourth restriction on state parties not discussed here. It requires all employees who spend at least 25% of their time in a month on activities in connection with a federal election to be paid from money subject to the statutory limits.

of the regulations of state parties, but once again, the problem may turn on how we characterize the regulation: Is it a limit on contributions to parties or is it in effect, a limit on expenditures? As Briffault points out, when one views the express advocacy regulations as expenditure limitations, they are clearly unconstitutional under either *Colorado Republican I* or *MCFL*. The state cannot regulate the amount of express advocacy or other expenditures of a noncorporate entity no matter how closely aligned its interests are with the candidate's. But the BCRA does not directly forbid or limit the state parties in their performance of these activities. It merely restricts the sources for funds that could be used for them. In effect, it forces a certain schizophrenia on the state parties, saying to them: your personality that is involved in federal election activity can only use these funds (*i.e.*, those gathered within limits), but your personality concerned with other activities can use as much money from any source that you want.

Of course, this legal splitting of the party personality is not completely new. FECA itself restricted state parties in their federal election activities insofar as it limited their contributions to federal candidates. However, the BCRA threatens state parties with a nervous breakdown—making even their state-specific activities subject to federal regulation.

When Congress regulates state parties in their state election capacity, it treads close to the limits of its powers[15] and into the parties' protected freedom of association. Perhaps a worst-case constitutional scenario can help prove the point. Because it applies to any election in which a "candidate for Federal office appears on the ballot," the BCRA would regulate party financing of get-out-the-vote drives, party and candidate promotional activities, or any other "generic campaign activity" *even in a state party's own primary election*.[16] In such elections, where the Court has found the First Amendment associational interests of the party to be at their peak,[17] the proposed reforms place party organizations at a competitive disadvantage to rich candidates, interest groups and even corporations. For example, an interest group that wants its preferred candidate to win the party's nomination can spend any funds it wants to mobilize its membership, while the state party that wants to mobilize its die-hard partisans can do so only with money under the federal limits.[18] The same argument holds for campaigns related to initiatives or referendums. Suppose the NRA mobilized its membership for a pro-gun initiative in a state election or George Soros heavily backed a ballot measure on medical marijuana. In such instances, the state political parties wishing to mobilize their electorate would only be

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[15] Space considerations prevent a detailed discussion of the limits on federal powers over state elections and how those limits affect the constitutionality of the BCRA. In short, Article I, section 4 of the Constitution gives Congress the power to make or alter state regulations as to the "times, places, and manner of holding elections for Senators and Representatives." In a fractured opinion in Oregon v. Mitchell, 400 U.S. 112 (1970), the Court struck down a federal law that prescribed a voting age for state elections. Justice Black's opinion announcing the judgment of the Court explained, "[n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices." *Id.* at 125. Regulation of state party activity in state elections can be justified, if at all, only as an indispensable component of the regime of regulation of federal elections. Defenders of the BCRA will need to prove that regulating state parties in their state capacity is necessary for the effective functioning of the federal limits. The only other possible source of federal power over state elections would come from the enforcement clauses of the Fourteenth and Fifteenth Amendments. In recent years, the Court has read those clauses quite restrictively. *See* City of Boerne v. Flores, 521 U.S. 507 (1997); United States v. Morrison, 529 U.S. 598 (2000).

[16] I suppose the bill would also restrict parties in voter registration efforts if one views a party primary as a "regularly scheduled federal election", which is probably how a court would view the issue.

[17] *See, e.g.*, Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989) (striking down California law that prohibited party endorsements of candidates and regulated party's internal organization); California Democratic Party v. Jones, 530 U.S. 567 (2000) (upholding parties' right to exclude non-members from its primary electorate); Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) (protecting party's right to include non-members in its primary electorate). For a discussion of the party autonomy cases, see Persily, *supra* note 5.

[18] Of course, the party can spend unlimited soft money on ads specifically for the candidate in the state election and transfer soft money to that candidate. Ironically, the BCRA's effect in this instance is to force parties to engage more on express advocacy and direct transfers to candidates and less on voter mobilization.

able to do so within the federally prescribed limits while the interest groups and individuals could spend as much money as they wish. Even in the typical case of an election involving both state and federal races, a party that wants to add new voters to its membership, or even yell at the top of its collective lungs "the Republican Party is the party for the future" must do so with the FEC looking over its shoulder to make sure only certain amounts of certain funds were used for particular associational or expressive activities.

The point of these examples is to demonstrate the sweeping and possibly perverse effects of a regulation intended to get at the federal half of the state party's split personality. The soft money contribution and spending regulations will undermine state party activity in a sphere where states have exercised near complete sovereignty and the federal government has traditionally kept clear. However, one can only speculate how intrusive such regulations will be in effect, and even those of us who worry about the BCRA's restrictions on state parties should not overstate the constitutional case against reform. As admitted above, the new law does not ban soft money for state parties, it only limits it. Moreover, the parties and candidates at both the state and federal level may adapt to the new regulations, either by secretly pushing[19] their soft dollars toward interest groups that can achieve their goals for them, or spending money on the many equally effective activities besides voter mobilization and the like, that can be used to influence an election.

ISSUE ADVOCACY AND MAGIC WORDS

The greatest contribution of Frank Askin and Glenn Moramarco's articles is that they remove misconceptions about the law before and after the passage of the BCRA. Those unfamiliar with the post-*Buckley* precedent will learn from Moramarco that the magic words test is neither magic nor a test. The Supreme Court in *MCFL* and the Ninth Circuit in *Furgatch* both departed from a rigid adherence to the enumerated words in *Buckley*'s footnote 52, giving reformers some hope that a more expansive definition of express advocacy might also withstand constitutional scrutiny. Professor Askin clarifies what the BCRA's express advocacy restrictions will and will not do. Except for groups covered by the patently unconstitutional Wellstone amendment,[20] the BCRA's express advocacy restriction applies only to corporation and union expenditures from nonsegregated funds on preelection broadcasts that "refer[] to a clearly identified candidate."[21] Both articles suggest that the BCRA's restrictions on corporate and union express advocacy can be upheld as narrowly tailored toward furthering the state's interests in combating corporations' unique potential for corruption.

Drawing support from the Brennan Center study, *Buying Time*,[22] which demonstrated how

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[19] By secretly, I do not mean they would transfer funds in violation of the law. I only mean to suggest that interest groups, along the lines of Massachusetts Citizens for Life, would spring up and become repositories for funds and expenditures prohibited to the parties.

[20] A lively disagreement exists among legal commentators as to which groups the Wellstone Amendment regulates. *See* Campaign Finance Institute, *eGuide Update Page: Electioneering Provisions* (visited March 14, 2002), *at* www.cfinst.org/eguide/update/electioneering.html. If it regulates spending by organizations that do not accept money from corporations or unions, as I think it does, then it is patently unconstitutional under FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) ("MCFL"). If it only regulates organizations that accept a large share of corporate or union money, then it is constitutional under *Austin*. Recall that *Austin* involved the Michigan Chamber of Commerce, a non-profit group that received most of its money from corporations, not a for-profit corporation itself. Professor Askin suggests that "overruling *MCFL* is a distinct possibility." Askin, at 386. I see no evidence to support that assessment. In fact, the Court's decision in *Colorado Republican I*, upholding a party's unlimited expenditures on behalf of its nominee, reaffirms *MCFL* and casts further doubt on the constitutionality of state regulations of any independent expenditures by entities other than corporations. (For space reasons I do not discuss the proposal's disclosure provisions applied to noncorporate groups. I imagine, as with FECA, the Court may find the disclosure provisions unconstitutional as applied to some groups. *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 95–102 (1982); *Buckley*, 424 U.S. at 70–75.)

[21] As Briffault notes, the BCRA contains an alternative definition of express advocacy in case the Court strikes the first one down. Derived from *Furgatch*, the provision would regulate broadcasts that promote, support, attack or oppose a candidate "without regard to whether the communication advocates a vote for or against a candidate" and "is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate."

[22] Craig B. Holman & Luke P. McLoughlin, Buying Time 2000: Television Advertising in the 2000 Federal Elections (2001). The book follows on an earlier edition covering the 1998 elections: Jonathan Krasno & Daniel Seltz, Buying Time: Television Advertising in the 1998 Congressional Elections (2000).

easily the magic words test can be evaded, all the articles find *Buckley*'s definition of express advocacy to have been a failure. As an empirical matter, no one can disagree that corporations, parties, interest groups and candidates themselves have found easy ways to communicate messages of endorsement or opposition without using magic words. The undergraduate students coding the advertisements for *Buying Time*, like the voters who probably watched them, could discern which candidate the ad favored or opposed. Two possible lessons could be drawn from this. The first, implied by the authors in this volume, is that evidence of evasion easily ascertained by watching current advertisements suggests the need, capability and constitutionality of reform. The second, which I draw, is that actors in the campaign finance system will push up as far as possible against any legal limit in order to achieve their goals. As the limits change, the goals and (barring elaborate election-related speech codes) even the capability of achieving them will remain constant. The two lessons do not wholly contradict each other, but their differences illuminate how new restrictions will affect corporate electioneering.

Given the authors' parade of advertisements that expressly advocate without use of magic words, it is worth exploring how corporations might change their ads to communicate the same messages under the BCRA. This exploration serves two, somewhat contradictory, purposes: (1) it suggests how the BCRA might be evaded; and (2) it demonstrates that the operative language defining electioneering communication is vague and in need of further clarification akin to the magic words test. The following advertisements do not refer to the candidate by using his name or image,[23] but nevertheless make clear their support or opposition. I will leave it to the reader's imagination to supply the suggestive music and noncandidate images that would accompany these messages:

- "Vote Democrat for Congress. It's time for a change."[24]
- "He freed Willie Horton and turned Boston Harbor into a cesspool. Now he wants to be our President?"[25]
- "'No new taxes'?!? We need a President we can trust."
- "Where is Chandra Levy? Only one man knows. We need a new member of Congress."
- "Dodged the draft, never inhaled, 'didn't have sexual relations with that woman,' doesn't know what the definition of 'is' is—it's time for a change."
- "Lockbox? That's where we should put him, not the White House."
- "Just because a man's got a father who was President doesn't make him qualified."
- "Our congressman is a crook. We need to get rid of him."[26]
- "Senator, you're no Jack Kennedy."

One can also easily imagine party or candidate ad campaigns, paid for with hard money, that establish themes, slogans or images in the minds of viewers that are easily transferable to other ads that merely subtract references to the candidate. For example, imagine that after the Reagan campaign ran its "Morning in America" ad, corporate-sponsored ads continued to repeat the slogan and play the familiar accompanying music. Or after Jesse Helms ran his famous ad with a black hand snatching a job offer from a white hand, imagine a corporation sponsoring an ad that merely repeated that image over and over without mentioning the name of Harvey Gantt (Helms's opponent). Or after the airing of LBJ's Daisy ad, imagine another ad ran saying "don't let him kill Daisy"

[23] I should note that the BCRA does not define what "refers to" means. Based on current FEC practices, many have thought it means using a candidate's name or image. But just as with the magic words test, the courts could interpret it to mean something completely at odds with the "common sense" definition.

[24] As mentioned above, this ad, if paid for by a state party would be regulated as generic election activity or perhaps a move to get out the vote, but is a totally protected form of expression for a corporation under the BCRA.

[25] The use of pronouns or the title of the office held by the candidate might plausibly be read to "refer" to a candidate, but that's a matter of interpretation and a step down the slippery slope *Buckley*'s footnote 52 wanted to avoid.

[26] This ad is the one that most view as approaching closest to or perhaps crossing over the line of "referring to" a candidate. I do not think the answer is absolutely clear, however. Based on the history of interpretation of the relevant FECA provisions, one could easily envision a court interpreting "refers to a clearly identified candidate" to mean mentions his/her name.

and kept the picture of the little girl overshadowed by a nuclear explosion. One might also be able to play an audio recording of the candidate's voice and superimpose various images to communicate a message of express advocacy or opposition. Now that the BCRA has become law, I suspect that in three years we will have another study describing how a team of undergraduate students could easily discern express advocacy that otherwise complies with the law.

The hypothetical ads above have engendered passionate criticism from those who read earlier drafts of this response. Inadvertently proving my point, the criticisms contradict each other. Some have said that the ads clearly refer to candidates and would be covered under the proposed law: the candidate supported or opposed by the ad is "so obvious," those critics say. Others have said the ads would not be regulated, and they would be ineffective because the average voter would not be able to put the pieces together linking the candidate to the ad. In the typical House race, this latter set of critics asks, how many voters could really identify their congressman with such indirect messages of attack or support? It is hard to provide a general answer to that question; admittedly, most of the ads presented above draw on knowledge about presidents so the average reader can understand how an ad can support or oppose a candidate without (arguably) referring to him or her. However, I would not underestimate the ingenuity of politicians seeking to push the envelope of what "refers to" means. Nor would I overestimate the ability of the FEC or the courts to provide a clear definition of "refers to" that both eliminates vagueness concerns and does not regress into something akin to the magic words test.

To put this last point another way, just because a team of students can discern issue ads from electioneering doesn't mean the FEC can. Electioneering is quite like pornography in that all of us know it when we see it. But also like pornography, legally prescribed rules for express advocacy will often sweep too broadly and capture protected expression. The magic words test, like any clear test for express advocacy, serves purposes beyond establishing certainty or avoiding a sweep of protected expression. Such tests rein in those who implement the relevant speech code.[27] As it monitors communications during the heat of an election, the FEC is involved in the most sensitive political job imaginable. Often quite quickly, it must decide whether a particular communication runs afoul of the applicable rules and whether enforcement proceedings should occur. Bias, randomness, and political motivation can potentially infect any decision to punish a given entity for its expression. Clear rules that do not give the enforcer or judges much leeway ensure that what constitutes express advocacy will not depend on the speaker.

Although the express advocacy provisions of the BCRA are the ones that ruffle the feathers of most civil libertarians involved in the campaign finance debate, I am not overly concerned. As in *Buckley*, the Court will probably adopt a limiting construction for express advocacy akin to the magic words test. That test emerged from FECA's language regarding expenditures "relative to a clearly identified candidate" in a federal election. Alongside the temporal limitation, the BCRA's wording—"refers to a clearly identified candidate"—is more definite than FECA's but hardly presents the bright line rule the authors in this volume suggest. Which, if any, of the ads above that do not use the name or image of a candidate "refers" to the candidate? Reasonable people, as well as unreasonable enforcement officials, can disagree.

REGULATING CORPORATE SPEECH AND CONTRIBUTIONS

An alternative way to interpret many of the reform efforts just discussed is to view them

[27] Indeed, even on this dimension, the magic words test could be described as a failure. As Moramarco notes, courts have repeatedly drubbed the FEC for its expansive and vague definition of express advocacy. *See* Virginia Society for Human Life, Inc. v. FEC, 263 F.3d 379 (4th Cir. 2001); FEC v. Christian Action Network, 110 F. 3d 1049 (4th Cir. 1997); Maine Right to Life Committee, Inc. v. FEC, 98 F.3d 1 (1st Cir. 1996); Right to Life of Dutchess County, Inc. v. FEC, 6 F. Supp. 2d 248 (S.D.N.Y. 1998). In fact, the Fourth Circuit panel hearing Christian Action Network went so far as to punish the FEC and award the defendants attorney's fees. *Christian Action Network*, 110 F. 3d at 1064.

not as regulations of political parties or of the means of election-related influence, but as measures designed to chase corporate and union money into other mouseholes besides soft money contributions and so-called sham issue advocacy. As Professor Joo points out, the reigning precedents here, *Belotti* and *Austin*, are in tension with each other, and the fate of current reform proposals may depend on which wins the day. *Austin*, decided in 1990, is much more recent[28] and applies to the relevant issues of candidate-related, as opposed to initiative, spending and contributions. Joo's conclusion, therefore, is well-founded, even if his reasoning as to why corporate political activity should be amenable to unique regulation is not.

The only Supreme Court case upholding a restriction on independent expenditures, *Austin* recognized a unique corruption threat posed by corporate contributions and expenditures: "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[29] The key factors that taint corporate money are the privileges garnered through the "unique state-conferred corporate structure that facilitates the amassing of large treasuries,"[30] such as "limited liability, perpetual life and favorable treatment of the accumulation and distribution of assets."[31] In addition to criticizing *Austin*'s logic,[32] Professor Joo would add to these justifications the unique corruption threat posed by corporate profit seeking, protection of shareholders who do not authorize corporate expenditures on politics, and the absence of expressive value in corporate communications. I view each of these proposed additions to *Austin*'s rule as problematic.

First, Joo argues that corporations' profit motive makes their participation qualitatively different (and dangerous) from other actors, such as individuals and PACs. Their contributions are likely to be larger and their demand for material benefits in return more pronounced. The average size of corporate contributions seems to me to be an irrelevant point: large contributions from corporations do not justify regulating corporations; at most they justify regulating large contributions. I would agree that the average voter might view corporate contributions as appearing more corrupt, but does a one million-dollar contribution from an individual really pose less of a corruption threat than one from a corporation? Think of it this way: if Kenneth Lay gave one million dollars in soft money to the Republican Party, would it have less of a corrupting effect than a one million dollar contribution from Enron? Moreover, does a one million-dollar contribution or expenditure from the NRA not buy the same influence as one paid for by Smith & Wesson? The existence of the corporate profit motive suggests only that contributions and expenditures will be targeted to favor the passage of policies favorable to the corporation's economic interests. Even assuming the lack of an identical motive for individuals and PACs (a point I am unwilling to concede as universally valid), the ideological

[28] The Court decided *Bellotti* in 1978. By my count, members of the original *Austin* majority still on the Court include Chief Justice Rehnquist and Justice Stevens. Based on their positions in *Shrink Missouri* and *Colorado Republican I and II*, I do not see any reason to believe why Justices Souter, Breyer, and Ginsburg would not go along with the logic of *Austin*. Justices Scalia, Kennedy and O'Connor, who dissented in *Austin*, would now be joined by Justice Thomas in finding the restraints on corporate spending as violations of the First Amendment. I do not see any support for Joo's argument that *Shrink Missouri Gov't PAC* somehow calls *Austin* into question because it does not mention the special state interest in restraining corporate contributions and expenditures. The plaintiff in that case, as its name suggests, was a PAC, not a corporation, so the Court did not have occasion to comment on the special case of corporations. Joo is also incorrect that the case involved soft money. The case was a straightforward PAC-to-candidate contribution case. Moreover, Montana v. Argenbright 226 F. 3d 1050 (9th Cir. 2000), the other case Joo mentions, involved a restriction on expenditures on referendums, so *Bellotti*, not *Austin*, was the applicable precedent.

[29] Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990).

[30] *Id.*

[31] *Id.* at 658–59.

[32] Joo argues that *Austin*'s special advantages argument is inapposite to cases involving federal election regulation because corporations are products of state law, not federal law. I am not sure I understand this point. The federal interest in regulating corporations derives from their unique position in the economic system, not the level of government that confers those advantages. Under *Austin*, the law—whether state or federal—can regulate corporations because of their inherently "unfair" advantages in amassing wealth and because of the disconnect between public support and a corporation's political ideas.

motives of PACs and individuals can be equally conducive to corrupting contributions. The relevant question when it comes to corruption, as the Court has conceived it, is whether the money contributed or spent will result in actions by elected officials, such as votes on bills, in their official capacity. The source of the money does not change the mechanics of a *quid pro quo* arrangement.

Joo's second justification actually contradicts his first. With some support from earlier Supreme Court opinions,[33] he argues that states must protect shareholders from the use of their money for political purposes with which they disagree. But if the driving force behind corporate contributions is to add to corporate profits as he first suggests, then the shareholders' disagreement with such a policy is no different than their disagreement with other ordinary business judgments. Indeed, one might argue that corporate managers have an *obligation* to their shareholders to use their political influence in such a way as to attain favorable policies for the corporation. When corporations attempt to use their influence to maximize the profits of the corporation, they are acting in the interest of their shareholders as well.

Even in those cases where the corporation supports candidates for reasons other than economic self-interest (*e.g.*, the case of Domino's Pizza money going to pro-life candidates), I do not find the shareholder protection argument persuasive. Admitting that corporate democracy or shareholder lawsuits will not solve this problem, I do not understand why the mere fact that many shareholders will suffer negative economic effects makes sale of corporate stock an insufficient exit option. Of course, there are often severe tax consequences from selling shares, and many of us have no idea where our pension money is invested. However, so long as the buyers of stock know the risk that some of their money might be transferred to an unpalatable candidate or party, just as it might be spent on an ideological cause or charity, the sale of undesirable stock (like the decision not to buy it) remains the omnipresent check on managerial behavior. Indeed, the shareholder protection argument proves too much. It represents a justification for state regulation of all corporate expenditures unrelated to profit maximization, not control over corporate political activity, which Joo admits often serves the corporation's economic interests.

The final justification for singling out corporations is that their speech somehow is less expressive than that of other actors in the political system. On this point, I disagree with both Joo's underlying assessment of First Amendment jurisprudence and his application of his theory to this particular case. First he notes the typical values furthered by the First Amendment: expression and information. I have never been sure where nude dancing, privately reading pornography, or commercial speech fit within these categories, but suffice it to say, there is plenty of First Amendment protected activity that skirts the edge of these values as traditionally defined.

Even on its own terms the idea that corporate expenditures are not expression is hard to understand, however. No one doubts that listeners receive a message when corporations buy an ad saying "Vote for Smith." Does the fact that a corporation rather than an individual, party, or PAC paid for the ad somehow drain it of its expressive quality? The *Bellotti* Court did not think so.[34] Even conceding the point that corporate expression does not accurately represent shareholder views or that sometimes it does not deserve to be protected like other forms of speech, it still *expresses* a message. At the very least a corporate ad expresses the views of the managers that sanction

[33] The shareholder protection argument was rejected in *Bellotti* as a sufficient justification for a law banning expenditures on referendums. However, in FEC v. National Right to Work Committee, 459 U.S. 197, 208 (1982), the Court sustained a segregated fund restriction that furthered the purpose of protecting "individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed."

[34] *See* First National Bank v. Bellotti, 435 U.S. 765, 776 (1978) ("The proper question therefore is not whether corporations 'have' First Amendment rights. . . . Instead, the question must be whether [the law] abridges expression that the First Amendment was meant to protect."); *id.* at 777 ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual").

it, as Joo mentions in a footnote. Even if we view them as stealing shareholder money to pay for it, those developing the ads still express a viewpoint.

Once again I think this argument proves too much. It would suggest that the whole doctrine of commercial speech is untenable. According to Joo's definition, very little corporate speech would be protected by the First Amendment. To be sure, the standard for commercial expression differs from that for other types of expression, but Joo's speaker-specific test would turn the entire jurisprudence of commercial speech on its head. Normally, courts that find commercial speech as less entitled to protection do so *because* of its commercial content (a type of corporate speech that Joo would perversely accord the highest level protection), not because the corporate speaker is less capable of expression.[35] Indeed, once corporate speech becomes political, I would argue, it moves closer to the core of the First Amendment, not away from it.

As mentioned earlier, none of my disagreements here should cast doubt on the security of *Austin*'s holding that states can regulate corporate election-related speech. But I would be particularly surprised and dismayed if the Court went further to find that corporate speakers' motives and organization somehow made their speech expressionless. Indeed, one can only wonder how this standard would apply to the New York Times Corporation's daily speech activities. Not expression?

One aspect of the current reforms not discussed here is the application of similar restrictions to labor unions. Joo's argument as to shareholder consent seems even more applicable to unions, whose members often do not have a choice as to which political direction their dues may go and can less easily exit their organization than can a stockholder. Indeed, the Court has recognized union members' constitutional right to withhold that portion of their dues used for political purposes.[36] It is worth noting that *Austin*'s justifications for constraining corporate independent expenditures fit only uncomfortably when applied to labor unions. To be sure, labor unions enjoy state-conferred advantages through the National Labor Relations Act, for example, but are they really instruments of immense wealth aggregation comparable to corporations? Space considerations here prevent a detailed treatment of the issue, but Dan Lowenstein has asked similar questions in another article.[37] The application of the corporate corruption argument to unions appears to derive more from extremely rough notions of political fairness than any coherent theory about what makes a source of political expression open to greater regulation under the First Amendment. I read the Court's treatment of unions as a makeweight to balance the exception for corporations. The Court's position is not unlike that of Congress in the end: If you can regulate the speech of organizations controlled by corporate management, you ought to be able to do the same for organizations of employees.

CONCLUSION

The BCRA represents the most sweeping changes since FECA and the Voting Rights Act in the way this country will organize elections. Those who drafted the law were particularly careful to tailor the restrictions to existing Supreme Court precedent. So long as the Court continues to view corporations and unions as largely unprotected entities for purposes of electioneering, the most significant part of the proposed reforms will likely emerge from the Court unscathed. Those who defend the current system predict that the reforms will merely shift political money away from accountable entities like parties and candidates and toward unaccountable interest groups and continued attempts at sham issue advocacy. They worry that the war on actual and apparent corruption will have the effect of removing parties as agents of effective electoral competition and interest group mediation.

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[35] *See id.* at 783 n.20 ("Until recently, the 'purely commercial' nature of an advertisement was thought to undermine and even negate its entitlement to the sanctuary of the First Amendment."); *id.* (citing cases).

[36] *See* Communication Workers of America v. Beck, 487 U.S. 735 (1988).

[37] *See* Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 CAPITAL U. L. REV. 381, 385–86 n.21 (1992).

I share those fears. Nevertheless, both supporters and opponents of the reforms should control their arrogance in predicting the likely losers, winners and effects on the system. Parties have been particularly resilient institutions in the face of multiple reforms over the past century, and they will likely devise new ways of achieving the same influence they have under the current system. Likewise, supporters should not assume that the channels of influence—from corporations to parties and candidates or from parties to candidates—will radically change. Restricting the sources and means of campaign financing does not decrease by one cent the amount of money necessary to run a campaign or reduce the zeal and ingenuity of the relevant actors to find the funds necessary. Indeed, the process of campaign regulation is always a work-in-progress: chasing money from one location and mode of activity to another in hopes that the transaction costs will translate into some larger societal benefit from a system less beholden to certain interests. The Constitution sets boundaries on the cat and mouse game that the government plays with political money, however. We will soon see whether the Court, as referee, views this newest series of reforms as falling out of bounds.

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