

THE BIPARTISAN CAMPAIGN REFORM ACT, POLITICAL PARTIES, AND THE FIRST AMENDMENT: LESSONS FROM MISSOURI

D. BRUCE LA PIERRE*

Campaign contribution limits—including the much celebrated prohibition of “soft money” contributions to national political parties and restrictions on the use of soft money by state parties—are a centerpiece of the Bipartisan Campaign Reform Act of 2002 (BCRA).¹ Congress put this statute on a fast track to the Supreme Court. There is, unfortunately, little reason to believe that the Court will either take a hard look at claims that “big money” corrupts the democratic process or measure carefully the effects of these contribution limits on political parties. Although the Court subjects limits on campaign expenditures to “strict scrutiny,” any scrutiny of contribution limits is more apparent than real. In *Shrink Missouri Government PAC v. Nixon (Shrink Missouri)*² and *FEC v. Colorado Republican Federal Campaign Committee (Colorado II)*,³ the Supreme Court tipped the First Amendment balance in favor of government regulation and against political speech and association.

The Eighth Circuit’s recent decision upholding Missouri limits on campaign contributions made by state political parties to their candidates demonstrates how heavily the scales are weighted in favor of regulation.⁴ In the 2002 Missouri general elections, the state limit on a political party’s cash contributions to a candidate for statewide office was \$11,675 and the

* Professor of Law, Washington University, St. Louis, Missouri. A.B. 1969, Princeton University; J.D. 1973, Columbia University.

The author has been counsel in several campaign finance cases. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000); *Shrink Mo. Gov’t PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996). Most recently, he was counsel for the Missouri Republican Party (MRP) in a case challenging state law restrictions on the amount of financial support provided by political parties to their candidates. *Mo. Republican Party v. Lamb*, 227 F.3d 1070 (8th Cir. 2000), *pet. for certiorari granted, judgment vacated, and remanded*, 533 U.S. 945 (2001), *on remand*, 270 F.3d 567 (8th Cir.), *cert. denied*, 122 S. Ct. 2329 (2002). This Article draws on testimony and evidence submitted by the State of Missouri and the MRP in the party contribution limits case. The Article, nonetheless, states the opinions and analysis of the author, and it does not purport to present the views of either the MRP or its officials, candidates, and officeholders.

1. Bipartisan Campaign Reform Act of 2002 (BCRA), Public Law 107-155, 116 Stat. 81 (Mar. 27, 2002). Most provisions of this Act went into effect on Nov. 6, 2002. BCRA § 402 is codified at 2 U.S.C. § 431 (2000 & Supp. 2002).

2. 528 U.S. 377 (2000 & Supp. 2000) [hereinafter *Shrink Missouri*].

3. 533 U.S. 431 (2001) [hereinafter *Colorado II*].

4. *Mo. Republican Party v. Lamb*, 270 F.3d 567 (8th Cir.), *cert. denied*, 122 S. Ct. 2329 (2002) [hereinafter *Missouri Republican Party II*].

limit on a party's in-kind (nonmonetary) contributions was also \$11,675.⁵ The federal limit on a political party's coordinated expenditures to support its candidate for the United States Senate was \$603,576.⁶ Even though the federal limit on coordinated expenditures was more than twenty-five times higher than the combined \$23,350 state law limit on cash and in-kind contributions, the Supreme Court's generic approval of federal limits on coordinated expenditures in *Colorado II* was reason enough for the court of appeals to uphold the state's party contribution limits.

The lesson from Missouri is clear: the Supreme Court has "subordinate[d] core First Amendment rights of free speech and free association to the predilections of the legislature and the mood of the electorate."⁷ Even though the court of appeals had found before the *Colorado II* decision that "the record [was] wholly devoid of any evidence that limiting parties' campaign contributions will either reduce corruption or measurably decrease the number of occasions on which limitations on individuals' campaign contributions are circumvented,"⁸ Missouri did not have to fill this evidentiary gap. In fact, "no predicate record-making by the state of Missouri [was] necessary before the validity of its statute [could] be established."⁹ Even though a political party could spend \$580,000 more in statewide elections to support a federal candidate than it could spend to support a state candidate, the court of appeals did not examine the effects of the Missouri contribution limits on state political parties. It was, instead, enough that the state limits were not "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless."¹⁰

The Eighth Circuit's decision is no aberration. When campaign contribution limits are at issue, the First Amendment no longer guarantees "uninhibited, robust, and wide-open" political speech.¹¹ It ensures only

5. See *infra* text accompanying notes 140-41.

6. See *infra* note 194 and accompanying text.

7. *Shrink Mo. Gov't PAC v. Adams*, 204 F.3d 838, 843 (8th Cir. 2000) (Bowman, J., concurring).

8. *Mo. Republican Party v. Lamb*, 227 F.3d 1070, 1073 (8th Cir. 2000) [hereinafter *Missouri Republican Party I*].

9. *Missouri Republican Party II*, 270 F.3d at 570-71.

10. *Id.* at 571 (quoting *Shrink Missouri*, 528 U.S. at 397).

11. See, e.g., *McIntyre v. Oh. Elections Comm'n*, 514 U.S. 334, 346 (1995) (noting that the First Amendment "reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'" (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964))).

that government cannot establish a “system of suppressed political advocacy.”¹²

When the Court addresses the new federal limits on contributions to national political parties and related provisions regulating state political parties, the critical question is whether it will rethink its skewed analysis of campaign contributions and revise its First Amendment standards. In the Court’s view, “contributions [are] meant to place candidates under obligation.”¹³ Although the Court recognizes that some donors make contributions to a political party to support its message and candidates, it gives little or no weight to the First Amendment interests of these donors, parties, and candidates. The Court sees political contributions almost exclusively in a negative light because voters “tend to identify a big donation with a corrupt purpose.”¹⁴ In the Court’s view, the benefits of regulation—preventing corruption or the appearance of corruption—come at little cost. Although the Court recognizes that expenditure limits impose severe burdens on political speech and association, it claims that contribution limits impose only “marginal” restrictions.¹⁵ The Court is mistaken. Contribution limits, as is the case in Missouri, impose substantial burdens on a political party’s ability to target financial support on critical elections necessary to take control of the government and, in turn, to implement the party’s political agenda.

If protection of political speech really is at the core of the First Amendment,¹⁶ then the Court must put the burden of justifying campaign contribution limits—like the burden of justifying all other limits on political activity—on the government. It must examine critically claims that contributions, pejoratively labeled “soft money,” create an appearance of corruption. Appearances are in the eye of the beholder, and an appearance of corruption may arise whenever an official votes or takes other actions consistent with the position of a contributor. Most importantly, the Court must examine critically the effects of contribution limits on our basic political freedoms. As one judge has warned, “[a]ny state armed with the power to limit what citizens may choose to contribute

12. *Shrink Missouri*, 528 U.S. at 396.

13. *Colorado II*, 533 U.S. at 452.

14. *Shrink Missouri*, 528 U.S. at 391.

15. See *Buckley v. Valeo*, 424 U.S. 1, 18-23 (1976).

16. *Buckley*, 424 U.S. at 15 (noting that the First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office”) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

to candidates for political office, or what they otherwise may spend on political activity, bears close watching.”¹⁷

I. THE FIRST AMENDMENT PROHIBITION AGAINST CONTRIBUTION LIMITS THAT CREATE A “SYSTEM OF SUPPRESSED POLITICAL ADVOCACY”

Campaign contributions—from a candidate’s perspective—are necessary in order to speak. Just as limits on the amount that a newspaper could collect from subscribers or advertisers would restrict the newspaper’s speech, limits on campaign contributions restrict a candidate’s speech.¹⁸ The Court, however, views contribution limits primarily from the perspective of contributors, not from the perspective of the recipients of political contributions, the candidates. Beginning in *Buckley v. Valeo*, the Court held that contribution limits, in contrast to expenditure limits, impose only “marginal restrictions” on contributors’ interests in political speech and association.¹⁹ It assumed that contribution limits do not have a “severe impact” on candidates.²⁰ Contribution limits “merely . . . require candidates and political committees to raise funds from a greater number of persons.”²¹ Individuals “who would otherwise contribute amounts greater than the statutory limits” could “expend such funds on direct political expression.”²² There would be no reduction in “the total amount of money potentially available to promote political expression.”²³

In *Shrink Missouri* and *Colorado II*, two recent decisions upholding political contribution limits, the Court confirmed its expenditure/contribution dichotomy. The Court held that “[r]estraints on expenditures generally curb more expressive and associational activity than limits on contributions.”²⁴ Although expenditure limits are subject to

17. *Shrink Mo. Gov’t PAC v. Adams*, 204 F.3d at 843 (Bowman, J., concurring).

18. Ronald A. Cass, *Money, Power, and Politics: Governance Models and Campaign Finance Regulation*, 6 SUP. CT. ECON. REV. 1, 18 (1998) (noting that if “Congress [were] to restrict the amount that newspapers could collect from any one subscriber or advertiser, judges would ask whether the restriction abridges the speech rights of news organizations”).

19. *Buckley*, 424 U.S. at 20-23.

20. *Id.* at 21.

21. *Id.* at 22.

22. *Id.*

23. *Id.*

24. *Colorado II*, 533 U.S. at 440 (citing *Shrink Missouri*, 528 U.S. at 386-88; Colo. Republican Fed. Campaign Comm’n v. FEC, 518 U.S. 604, 610, 614 (1996) [hereinafter *Colorado I*]; *Buckley*, 424 U.S. at 19-23). The Court also distinguished contributions from expenditures on the ground that contributions are more closely linked to political corruption than expenditures. *Id.*

strict scrutiny,²⁵ contribution limits are not subject to the same demanding level of scrutiny.²⁶ A political contribution limit is valid if it is “‘closely drawn’ to match . . . the ‘sufficiently important’ government interest in combating political corruption.”²⁷

Although *Shrink Missouri* and *Colorado II* confirmed the *Buckley* expenditure/contribution dichotomy, these decisions also worked two major changes in First Amendment law. In *Shrink Missouri*, the Court transformed the government’s interest in preventing actual *quid pro quo* corruption or the appearance of such corruption into a much broader and vaguer justification of contribution limits: voters’ perceptions of “‘politicians too compliant with the wishes of large contributors.”²⁸ In *Colorado II*, the Court explained directly that corruption should be “‘understood not only as *quid pro quo* arrangements, but also as undue influence on an officeholder’s judgment, and the appearance of such influence.”²⁹

In addition to expanding the definition of corruption, the Court relieved the government of the burden of justifying contribution limits. The basic rule that government has the burden of justifying limits on First Amendment interests is well-settled.³⁰ In *Shrink Missouri*, however, the Court transformed the state’s duty to justify restrictions on political activity into a duty of the party challenging contribution limits to prove a First Amendment violation.³¹ In *Colorado II*, the Court effectively relieved the government of any real burden of justifying contribution limits by discounting the First Amendment value of contributions.³² Although the Court in *Buckley* had assumed the truth of the “‘proposition that most large contributors do not seek improper influence over a

25. See, e.g., *Colorado I*, 518 U.S. at 640-41 (Thomas, J.) (arguing that contribution limits, like expenditure limits, should be subject to strict scrutiny, which requires a showing that legislative means are “‘narrowly tailored” to serve “‘a compelling governmental interest”).

26. *Colorado II*, 533 U.S. at 440 (“Limits on political expenditures deserve closer scrutiny than restrictions on political contributions.”); see *Shrink Missouri*, 528 U.S. at 386-88.

27. *Colorado II*, 533 U.S. at 456 (quoting *Shrink Missouri*, 528 U.S. at 387-88, and *Buckley*, 424 U.S. at 25, 30).

28. *Shrink Missouri*, 528 U.S. at 389.

29. *Colorado II*, 533 U.S. at 441.

30. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 804 (2000) (“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.”); *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (quoting *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 71 n.20 (1983)) (“[T]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.”) (internal quotation marks omitted); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

31. See *infra* text accompanying notes 66-69.

32. See *infra* text accompanying notes 97-99.

candidate's position or an officeholder's action,"³³ the Court assumed in *Colorado II* that contributions are made to produce "obligated officeholders."³⁴

A. Shrink Missouri and "*The Outer Limits of Contribution Regulation*"

When the Court upheld the \$1,000 federal limit on campaign contributions in *Buckley v. Valeo* in 1976, it imposed the burden of justification on the government.³⁵ Although the *Shrink Missouri* Court invoked *Buckley's* requirement that contribution limits must be closely drawn to achieve a sufficiently important interest,³⁶ it did not make the state justify Missouri's \$1,075 campaign contribution limit.³⁷ The Court did not require the state to produce any "empirical evidence of actually corrupt practices or of a perception among Missouri voters that unrestricted contributions must have been exerting a covertly corrosive influence."³⁸ The Court did not make the state demonstrate that the benefits of regulation outweigh burdens on political speech and association. *Buckley* was "authority for comparable state regulation."³⁹ The Court assumed that the state's \$1,075 limit had the same effects in 2000 as the \$1,000 federal limit upheld 24 years earlier unless the candidate challenging the contribution limit could demonstrate that it created "a system of suppressed political advocacy that would be unconstitutional under *Buckley*."⁴⁰

33. *Buckley*, 424 U.S. at 29.

34. *Colorado II*, 533 U.S. at 434.

35. *Buckley*, 424 U.S. at 25 (stating that contribution limits "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms"); see *id.* at 24-29; see generally D. Bruce La Pierre, *Raising a New First Amendment Hurdle for Campaign Finance "Reform,"* 76 WASH. U. L.Q. 217, 223-25 (1998) (summarizing *Buckley*).

36. 528 U.S. at 390.

37. See D. Bruce La Pierre, *Campaign Contribution Limits: Pandering to Public Fears About "Big Money" and Protecting Incumbents*, 52 ADMIN. L. REV. 687 (2000) (discussing in depth the Missouri regulations and the Supreme Court's decision) [hereinafter La Pierre]. See *infra* notes 129-43 and accompanying text (discussing Missouri's campaign finance regulations).

38. *Shrink Missouri*, 528 U.S. at 378.

39. *Id.* at 382. The Court's additional comment that state contribution limits "need not be pegged to *Buckley's* dollars" opened the door to contribution limits lower than \$1,000. See *id.* On remand, the court of appeals upheld Missouri's \$275 and \$525 limits, as well as the \$1,075 limit. *Shrink Mo. Gov't PAC v. Adams*, 204 F.3d 838 (8th Cir. 2000).

40. *Shrink Missouri*, 528 U.S. at 396.

1. Plausible Harm: Voters Who “Tend to Identify a Big Donation with a Corrupt Purpose”

The Court declared that it had “never accepted mere conjecture as adequate to carry a First Amendment burden,”⁴¹ but it required little, if anything, more. Plausible harms, not real harms, were enough to justify campaign contribution limits. The court of appeals would have required Missouri to “prove” that it “has a real problem with corruption or a perception thereof as a direct result of large campaign contributions.”⁴² The Court, however, rejected the argument that “governments enacting contribution limits must demonstrate that the recited harms are real.”⁴³ Instead, “[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.”⁴⁴

In the Court’s view, “the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible.”⁴⁵ Not surprisingly, the “quantum of empirical evidence” necessary to establish the “plausible” proposition that voters might think that “politicians [are] too compliant with the wishes of large contributors” was quite small.⁴⁶ *Buckley*’s “evidentiary showing,” or even less, as in Missouri’s case, was enough.⁴⁷ Even though Congress had only scant evidence of corruption or the appearance of corruption in the 1972 Presidential elections,⁴⁸ the Court would have permitted Missouri to rely “on the evidence and findings accepted in *Buckley*.”⁴⁹ The Eighth Circuit had refused “to extrapolate from [*Buckley*’s examples of problems in federal campaign financing in 1972] that in Missouri [in 1999] there is corruption or a perception of corruption from ‘large’ campaign contributions,”⁵⁰ but the Supreme Court would have had no such difficulty.

The Missouri legislature, however, had not relied on “the evidence and findings accepted in *Buckley*,” and the Court found instead that “the

41. *Id.* at 392.

42. *Shrink Mo. Govt. PAC v. Adams*, 161 F.3d 519, 522 (8th Cir. 1998).

43. *Shrink Missouri*, 528 U.S. at 392 (internal quotations and citations omitted).

44. *Id.* at 391.

45. *Id.*

46. *Id.* at 389.

47. *See id.* at 391 (“While *Buckley*’s evidentiary showing exemplifies a sufficient justification for contribution limits, it does not speak to what may be necessary as a minimum.”) (footnote omitted).

48. *La Pierre*, *supra* note 37, at 691-92.

49. *Shrink Missouri*, 528 U.S. at 393 (footnote omitted).

50. *Shrink Mo. v. Adams*, 161 F.3d at 522.

substantiation of the congressional concerns reflected in *Buckley* has its counterpart supporting the Missouri law.”⁵¹ The Missouri “counterpart,” however, was more apparent than real. The Court “required virtually no evidence to support [Missouri’s] claim that the limits prevented corruption and the appearance of corruption.”⁵²

The Court noted, for example, a state senator’s affidavit asserting that campaign contributions in excess of the Missouri limits have “the real potential to buy votes,”⁵³ but, as the court of appeals had found, the senator’s claims were “conclusory and self-serving.”⁵⁴ The Court also noted some “newspaper accounts,” which the district court had cited as “supporting inferences of impropriety.”⁵⁵ The Court stated that one of these “newspaper accounts,” an editorial, “questioned the state treasurer’s decision to use a certain state bank for most of Missouri’s banking business after that institution contributed \$20,000” to the treasurer’s campaign.⁵⁶ The Court ignored, however, the editor’s finding that the bank at issue “appears to have won the contest [for Missouri’s business] fair and square” and that it had “submitted the lowest bid.”⁵⁷

At bottom, the Court’s “plausible” harm standard was satisfied simply because “voters . . . tend to identify a big donation with a corrupt purpose.”⁵⁸ The state did not have to present any objective evidence that corruption or the appearance of corruption was an “actual problem.”⁵⁹ For the *Shrink Missouri* Court, there was “little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters.”⁶⁰

51. 528 U.S. at 393.

52. Richard L. Hasen, *Shrink Missouri, Campaign Finance, and “The Thing That Wouldn’t Leave,”* 17 CONST. COMMENTARY 483, 494 (2001); see La Pierre, *supra* note 37, at 725-32 (discussing in detail the minimal evidentiary demands of the plausible harm standard).

53. 528 U.S. at 393 (internal quotations and citations omitted).

54. *Shrink Mo. v. Adams*, 161 F.3d at 522; see also La Pierre, *supra* note 37, at 714-16 (2000).

55. 528 U.S. at 393 (quoting *Shrink Mo. Govt. PAC v. Adams*, 5 F. Supp. 2d 724 at 738 n.6 (1998)).

56. *Id.* (citing Editorial, *The Central Issue Is Trust*, ST. LOUIS POST-DISPATCH, Dec. 13, 1993, at 6C).

57. Editorial, *The Central Issue Is Trust*, ST. LOUIS POST-DISPATCH, Dec. 31, 1993, at 6C, available at 1993 WL 8063218.

58. 528 U.S. at 391.

59. *Shrink Mo. v. Adams*, 161 F.3d at 521 (noting Missouri’s argument that “corruption and the perception thereof are inherent in political campaigns where large contributions are made, and that it is unnecessary for the State to demonstrate that there are actual problems in Missouri’s electoral system”).

60. 528 U.S. at 395.

2. *Limits That Do Not Make Contributions “Pointless”*

Absent anything more concrete than “suspicion[s]” that campaign contributions in “large,” but unspecified, amounts cause corruption,⁶¹ any inquiry whether Missouri’s \$1,075 limit was “tailored” to remedy such an amorphous harm would have been futile. In the Court’s view, however, there was no need for any inquiry whether the Missouri contribution limit was “closely drawn.”⁶² Given the “resemblance” between Missouri’s \$1,075 limit and the federal \$1,000 limit at issue in *Buckley*, there was no “new issue about the adequacy of the Missouri statute’s tailoring to serve its purposes.”⁶³

The Court read *Buckley* as establishing, in effect, a presumption that Missouri’s \$1,075 limit was adequately tailored. *Buckley* had upheld the \$1,000 federal limit because there was “no indication . . . that [it] would have any dramatic[ally] adverse effect on the funding of campaigns and political associations” and because there was “no showing that ‘the limitations prevented the candidates and political committees from amassing the resources necessary for effective advocacy.’”⁶⁴ Similarly, Missouri’s \$1,075 limit was adequately tailored unless it created a “system of suppressed political advocacy that would be unconstitutional under *Buckley*.”⁶⁵

The Court’s “system of suppressed political advocacy” standard transformed the state’s duty to justify restrictions on political activity into a duty of candidates challenging contribution limits to prove a First Amendment violation. On the one hand, Missouri could rely on nothing more than “plausible” conclusions that the \$1,075 limit did not have adverse effects on the resources necessary for effective advocacy.⁶⁶ On the

61. *Id.*

62. *Buckley*, 424 U.S. at 25.

63. 528 U.S. at 395 (footnote omitted). The “resemblance” between the \$1,000 federal limit and Missouri’s \$1,075 limit was, at most, superficial. *See id.* at 425 (Thomas, J., dissenting) (Missouri’s limit, given inflation, is “drastically lower” than the federal limit approved in 1976 and applies, unlike its federal counterpart to political committees, as well as individuals); La Pierre, *supra* note 37, at 718-19 (analyzing the differences between the state and federal campaign contribution limits); *see infra* text accompanying notes 203-05.

64. *Shrink Missouri*, 528 U.S. at 395-96 (quoting *Buckley*, 424 U.S. at 21).

65. *Id.* at 396.

66. *Id.* The Court accepted the “plausibility” of the district court’s conclusions that “in the period since the Missouri contribution limits became effective, ‘candidates for state elected office [have been] quite able to raise funds sufficient to run effective campaigns’” and that some “‘candidates for political office in the state [have been] able to amass impressive campaign war chests.’” *Id.* The actual campaign finance data discussed by the district court, however, [fell] far short of supporting these conclusions. La Pierre, *supra* note 37, at 735; *see Shrink Missouri*, 528 U.S. at 426 (Thomas, J.,

other hand, a challenger must show more than an adverse effect on his “ability to wage a competitive campaign.”⁶⁷ The Court declined to measure the \$1,075 limit by its effect on one individual: “a showing of one affected individual does not point up a system of suppressed political advocacy.”⁶⁸ Challengers, instead, must show that the contribution limit burdened other candidates as well—that the contribution limit created a *system* of “suppressed political advocacy.”⁶⁹ As Justice Thomas observed, the majority permitted Missouri to suppress the speech of one candidate “simply because other candidates (or candidates in the aggregate) may succeed in reaching the voting public.”⁷⁰ Ironically, given the Court’s distinction between expenditure limits and contribution limits in terms of the effects of contribution limits on contributors’ associational rights and contributors’ freedom of speech,⁷¹ it measured contribution limits in *Buckley*—as well as in *Shrink Missouri*—in terms of their effects on candidates—the recipients of contributions.

Candidates who challenge campaign contribution limits face a daunting, perhaps insuperable, task.⁷² To prove that a state has exceeded the “outer limits of contribution regulation,” candidates will have to show that “the contribution limitation [is] so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.”⁷³ The Court’s test, as one proponent of contribution limits predicted, has proven to be “exceedingly difficult for challengers to meet.”⁷⁴ After all, “[h]ow low would a contribution limit have to be before it is ‘pointless’?”⁷⁵ In the wake of *Shrink Missouri*, the courts uniformly have upheld limits on contributions made by individuals and political action committees⁷⁶ and at

dissenting) (rejecting the district court’s conclusions that the Missouri limits had “not reduced the resources supporting political speech”).

67. *Shrink Missouri*, 528 U.S. at 396.

68. *Id.*

69. *Id.*

70. 528 U.S. at 420 (Thomas, J., dissenting); *see id.* (stating that “the right to free speech is a right held by each American, not by Americans en masse”).

71. *See supra* text accompanying notes 18-23.

72. La Pierre, *supra* note 37, at 736-37 (examining the difficulty of proving that contribution limits violate the constitution); *Shrink Missouri*, 528 U.S. at 427 (Thomas, J., dissenting) (arguing that the “hunt for suppressed speech” in the aggregate is “futile”).

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

74. *See Hasen, supra* note 52, at 496.

75. *Id.* (quoting *Shrink Missouri*, 528 U.S. at 394).

76. *Mont. Right to Life Ass’n v. Eddleman*, 306 F.3d 874 (9th Cir. 2002), *opinion withdrawn*, 2003 WL 69488 (9th Cir. Jan. 9, 2003) (upholding \$100, \$200, and \$400 limits on campaign contributions made by individuals and political action committees to candidates and upholding a \$1,000 cap on total PAC contributions to any one candidate); *Landell v. Vt. Pub. Interest Research*

least one judge now wonders if “the limits can be driven down essentially to zero.”⁷⁷

B. Colorado II and the Presumption That Political Contributions Are Made to Produce “Obligated Officeholders”

In its second decision in a case challenging federal limits on the amount of support provided by political parties to their candidates, the Court extended *Shrink Missouri* to limits on political party contributions. The Court had held in 1996, in *Colorado Republican Federal Campaign Committee v. FEC (Colorado I)*, that federal spending limits as applied to a political party’s independent expenditures violate the First Amendment.⁷⁸ It remanded the case for further consideration of the question whether limits on expenditures made by a political party in coordination with its candidates are valid.⁷⁹ In *Colorado II*, the Court found that coordinated expenditures are the functional equivalent of contributions.⁸⁰ It upheld federal coordinated expenditure limits on their face: “a party’s coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits.”⁸¹ In light of *Shrink Missouri*, it was enough that there was a “potential for corruption”⁸² and that enforcement of the federal limits would not make political parties “useless.”⁸³

Group, 300 F.3d 129 (2d Cir. 2002), *withdrawn pending further proceedings and possible amendment*, 2002 WL 1803685 (2d Cir. Aug. 7, 2002) (upholding Vermont’s \$200 limit on contributions to candidates for state representative or for local office, a \$300 limit on contributions to candidates for the state senate or for county office, a \$400 limit on contributions to candidates for statewide office, and a \$2,000 limit on contributions to political parties and political action committees); Frank v. City of Akron, 290 F.3d 813 (6th Cir. 2002), *petition for reh’g and for reh’g en banc denied*, 303 F.3d 752 (6th Cir. 2002), *cert. denied*, 2003 WL 138451 (Jan. 21, 2003) (upholding \$100 and \$300 limits on contributions to city council candidates); see *Casino Ass’n of La. v. La.*, 820 So. 2d 494 (La. 2002) (upholding statute prohibiting campaign contributions by riverboat and land-based casino industries).

77. Frank v. City of Akron, 303 F.3d at 754 (Boggs, J., dissenting from denial of rehearing en banc of a panel decision upholding \$100 and \$300 limits on contributions to city council candidates).

78. *Colorado I*, 518 U.S. 604 (1996). An expenditure made by a political party that is not coordinated with a candidate or with the candidate’s campaign is an “independent” expenditure. *Id.* at 618 (Breyer, J., O’Connor, J., & Souter, J.). The Court noted “the central holding in *Buckley* . . . that spending money on one’s own speech must be permitted” and held that that “[t]he independent expression of a political party’s views is ‘core’ First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees.” *Id.* at 616 (Breyer, J., O’Connor, J., & Souter, J.), 627 (Kennedy, J., Rehnquist, C.J., & Scalia, J. concurring in the judgment and dissenting in part).

79. *Colorado I*, 518 U.S. at 622-23, 624, 625 (Breyer, J., O’Connor, J., & Souter, J.).

80. *Colorado II*, 533 U.S. 431, 447 (2001).

81. *Id.* at 465.

82. *Id.* at 461.

83. *Id.* at 455.

The Court recognized that “[c]oordinated spending by a [political] party . . . covers a spectrum of activity.”⁸⁴ Coordinated expenditures “share some of the constitutionally relevant features of independent expenditures,” but many coordinated expenditures are “virtually indistinguishable from simple contributions.”⁸⁵ Spending by other political actors—individuals and political action committees (PACs)—in coordination with candidates is subject to regulation as contributions,⁸⁶ and the Federal Election Campaign Act treats a party’s coordinated expenditures as “contributions”—as exceptions to contribution limits that otherwise would apply to political parties and PACs.⁸⁷

The critical question was whether there was any difference between political parties and other political speakers that would give parties a claim to a higher standard of scrutiny.⁸⁸ The answer to this question turned on the answers to two subsidiary questions: (1) whether limits on coordinated expenditures impose “a unique burden on parties” and (2) whether “there [is] reason to think that coordinated spending by a party would raise the risk of corruption posed when others spend in coordination with a candidate.”⁸⁹

The Court held that limits on coordinated spending do not impose a “unique burden” on political parties.⁹⁰ It rejected the argument that “coordinated spending is essential to parties because a party and its candidates are joined at the hip.”⁹¹ Political scientists had concluded that “there is little evidence to suggest that coordinated party spending limits adopted by Congress have frustrated the ability of political parties to exercise their First Amendment rights.”⁹² Given this finding, the Colorado Republican Federal Campaign Committee (the Party) could not prove a First Amendment violation. Federal coordinated expenditure limits had been in effect since 1974, and political parties had survived “almost three decades” of regulation.⁹³

84. *Id.* at 445; *see infra* text accompanying notes 166-76 (assessing the full spectrum of support provided by the Missouri Republican Party to its candidates).

85. *Colorado II*, 533 U.S. at 444-45 (quoting *Colorado I*, 518 U.S. at 624 (Breyer, J., O’Connor, J., & Souter, J.)).

86. *Id.* at 454.

87. *See Colorado I*, 518 U.S. at 610-12 (Breyer, J., O’Connor, J., & Souter, J.).

88. *Colorado II*, at 445.

89. *Id.*

90. *Id.* at 447.

91. *Id.* at 448 (internal quotation and citation omitted); *see id.* at 449-50.

92. *Id.* at 449-50 (quoting Brief of Amici Curiae for Paul Allen Beck et al., at 5-6, available at 2000 WL 1792974).

93. *Colorado II*, 533 U.S. at 449.

The Court also rejected a second argument that coordinated expenditure limits impose a unique burden on political parties. The Colorado Republican Federal Campaign Committee argued that “parties are organized for the purpose of electing candidates” and that limits on coordinated spending interfered with the way it worked with its candidates.⁹⁴ In rejecting this argument, the Court did not examine how political parties function, how they support their candidates, or the effects of the coordinated expenditure limits on political parties and their candidates.⁹⁵ The Court did not compare the effects of coordinated spending limits on political parties with the effects of similar limits on individuals or on political action committees. Instead of examining the effects of the coordinated expenditure limits on a party’s function in electing candidates, the Court looked exclusively at “a party’s function in getting and spending money” and invoked its understanding of “how the power of money actually works in the political structure.”⁹⁶

In the Court’s view, donors make campaign contributions for a bad purpose: “to place candidates under obligation” that is often “harmful to the general public interest.”⁹⁷ Political parties, “whether they like it or not . . . act as agents for spending on behalf of those who seek to produce obligated officeholders.”⁹⁸ Even if some persons make contributions “to support the party’s message or to elect party candidates across the board,”

94. *Id.* at 450; *see id.* at 450-52.

95. *See infra* text accompanying notes 144-76 (explaining the functions of a state political party and how that party supports its candidates) and text accompanying notes 246-91 (assessing burdens of party contribution limits on a state political party).

96. *Colorado II*, 533 U.S. at 450.

97. *Id.* at 533 U.S. at 452 n.14 (quoting *United States v. Automobile Workers*, 352 U.S. 567, 576 (1924) (internal quotation and citation omitted)). The Court’s conclusion that contributions are made to produce “obligated officeholders” rested on its finding that some political action committees contribute “to both parties during the same electoral cycle, and sometimes even directly to two competing candidates in the same election.” *Colorado II*, 533 U.S. at 451 (footnotes and citation omitted). Although the Court “apparently did its own web-surfing” to find examples of PAC contributions to two political parties and to opposing candidates, *see* Richard L. Hasen, *The Constitutionality of a Soft Money Ban after Colorado II*, 1 *ELECTION L.J.* 195, 203 (2002), it ignored other evidence that “campaign contributions are made to support those politicians who already value the same positions as their donors and that “[j]ust like voters, contributors appear able to sort into office politicians who intrinsically value the same things that they do.” Stephen G. Bronars & John R. Lott, Jr., *Do Campaign Donations Alter How a Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things That They Do?* 40 *J.L. & ECON.* 317, 319, 347 (1997); *see infra* text accompanying notes 416-80 (assessing “common sense” claims that campaign contributions cause corruption). Moreover, as Dean Kathleen Sullivan has explained, “the hedging strategy of the many corporate and PAC donors who . . . giv[e] to both sides suggests a low level of confidence that their contributions will be effective in influencing any particular recipient.” Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 *UTAH L. REV.* 311, 324 (1998).

98. *Colorado II*, 533 U.S. at 452.

political “[p]arties are . . . necessarily the instruments of some contributors whose object is . . . to support a specific candidate for the sake of a position on one, narrow issue, or even to support any candidate who will be obliged to the contributors.”⁹⁹

The Party’s claim that it had a “strong working relationship with candidates and [a] unique ability to speak in coordination with them” exacerbated the problem: donors could take advantage of political parties’ “efficiency in channeling benefits to candidates.”¹⁰⁰ The Court saw no reason to treat parties differently than other political actors—individuals and political action committees—that had long been subject to coordinated spending limits.¹⁰¹ A party, moreover, like individuals and PACs, has the right under *Colorado I* “to spend money in support of a candidate without legal limit so long as it spends independently.”¹⁰²

Having found that limits on coordinated expenditures do not impose a unique burden on political parties and that parties are “agents” of donors “who seek to produce obligated officeholders,” the Court held that a political party’s coordinated spending is “the functional equivalent of contributions.”¹⁰³ Limits on party contributions, just like limits on individual and PAC contributions, are valid under *Shrink Missouri* if they are “closely drawn” to achieve the “sufficiently important government interest in combating political corruption.”¹⁰⁴ The “bone of contention [was] evidentiary”: “whether adequate evidentiary grounds exist to sustain the [coordinated expenditure] limit . . . on the theory that unlimited coordinated spending by a party raises the risk of corruption (and its appearance) through circumvention of valid contribution limits.”¹⁰⁵

The Court, however, had already played its trump card. The Court’s focus on “parties as conduits for contributions meant to place candidates under obligation” begged the question whether coordinated expenditure limits burdened a political party’s function in “electing candidates.”¹⁰⁶ Even if there was little or no hard evidence of circumvention, the Court

99. *Id.*; see *infra* text accompanying notes 107-21 (assessing the Court’s argument that donors circumvent limits on direct contributions to candidates by making contributions to political parties).

100. *Colorado II*, 533 U.S. at 453, 454.

101. *Id.* at 454-55.

102. *Id.* at 455.

103. *Id.* at 447, 452.

104. *Id.* at 456 (internal quotation and citation omitted).

105. *Id.* The Court declined to address the additional argument that coordinated spending limits could be justified on the ground of directly preventing corruption or the appearance of corruption. *Id.* 456 n.18.

106. *Colorado II*, 533 U.S. at 452; see *id.* at 450 (distinguishing a party’s “purpose of electing candidates” and its “function in getting and spending money”).

had already decided that limits on coordinated expenditures could be imposed at no cost to any legitimate First Amendment interest.

1. Another Plausible Harm: The “Potential for Corruption by Circumvention”

The Court did not have any hard evidence that donors, either individuals or PACs, channeled contributions in excess of the limits through political parties to particular candidates.¹⁰⁷ Nonetheless, “experience under the present law confirms a serious threat of abuse.”¹⁰⁸ Donors who want to produce “obligated officeholders” can use political parties to circumvent limits on direct contributions to candidates. Given a \$2000 limit on direct contributions to candidates and a \$20,000 limit on contributions to national party committees, “[w]hat a realist [some one who knows that contributions are made to create obligated officeholders] would expect to occur has occurred[:]. Donors give to the party with the tacit understanding that the favored candidate will benefit.”¹⁰⁹

As evidence of such “tacit understandings,” the Court noted the Democratic Party’s practice of “tallying” contributions.¹¹⁰ Under this “informal bookkeeping” system, candidates who raised money for the Democratic Senatorial Campaign Committee (DSCC) understood that the DSCC would help their campaigns, and donors were told that contributions to the DSCC could be credited to particular Senate candidates.¹¹¹ Although the Court found that the tally system “connect[ed] donors to candidates through the accommodation of a party,”¹¹² it ignored evidence that the DSCC was not a “mere conduit.”¹¹³ As Justice Thomas pointed out, the record showed that political parties allocate money to candidates on the basis of their assessments of candidates’ ability to win elections and the parties’ goal of controlling the legislature.¹¹⁴ Parties, as the experience in Missouri confirms, exercise independent judgment about

107. *See Colorado II*, 533 U.S. at 457 (citing *Burson v. Freeman*, 504 U.S. 191, 208 (1992) (opinion of Blackmun, J.) for the “difficulty of mustering evidence to support long enforced statutes”).

108. *Id.* at 457.

109. *Id.* at 458.

110. *Id.* at 459. The Court also quoted four statements by candidates and party fundraisers as evidence that parties funnel contributions to candidates. *Id.* at 458. The dissent discounted the significance of these quotations. *Id.* at 480 n.10 (Thomas, J., dissenting).

111. *Id.* at 459.

112. *Id.*

113. *Id.* at 478.

114. *Id.* at 478-79.

the expenditure of funds contributed to the party,¹¹⁵ and “some candidates get back more money than they raise, and others get back less.”¹¹⁶

The evidence that parties funnel contributions was, at best, mixed, and the Court’s bottom line was appropriately modest. Under the existing limits on coordinated spending, there was a potential harm: “the evidence rules out denying the potential for corruption by circumvention.”¹¹⁷ This modest conclusion, however, proved no barrier to substantial speculation. If the Court struck down the coordinated spending limits, “the inducement to circumvent would almost certainly intensify.”¹¹⁸ Enforcement of statutes that prohibit donors from making contributions to political parties that are “earmarked” for particular candidates would not be an effective means of preventing circumvention.¹¹⁹ Although these two predictions may well be right, the Court, as Justice Thomas observed, “jettisoned [the *Shrink Missouri*] evidentiary requirement.”¹²⁰ The Court in *Shrink Missouri* denied that “conjecture” was adequate to carry a First Amendment burden.¹²¹ Now, potential harm, multiplied by speculation and conjecture, was enough to justify coordinated spending limits.

115. See *infra* text accompanying notes 230-45.

116. *Colorado II*, 533 U.S. at 478-79 (internal quotation and citation omitted).

117. *Id.* at 461.

118. *Id.* at 460; see *id.* at 457 (stating that “contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties’ coordinated spending wide open”). The Court did not explain how the elimination of limits on coordinated spending would cause “additional” circumvention, but it may have thought that the absence of limits on coordinated spending would induce donors to channel larger sums or would induce a new set of donors to use party contributions to circumvent limits on direct contributions to candidates. As Justice Thomas noted, the supposition that there would be additional “corruption-through-circumvention” was pure speculation. *Id.* at 479 (Thomas, J., dissenting).

119. Federal law provides that contributions that “are in any way earmarked or otherwise directed through an intermediary or conduit to [a] candidate” are treated as contributions to a candidate. 2 U.S.C. § 441a(a)(8) (2000 & Supp. 2002). As Justice Thomas explained, “[i]f a donor contributes \$2,000 to a candidate . . . he cannot direct the political party to funnel another dime to the candidate without confronting . . . civil and criminal penalties.” *Colorado II*, 533 U.S. at 481 (Thomas, J. dissenting). The Court held that the earmarking provisions of federal law were not a more narrowly tailored alternative means of addressing corruption than limits on coordinated spending. *Id.* at 462-63. In the Court’s view, reliance on these earmarking provisions “ignores the practical difficulty of identifying and directly combating circumvention under actual political conditions.” *Id.* It said that “circumvention is obviously very hard to trace” and that the prohibition against earmarking “would reach only the most clumsy attempts to pass contributions through to candidates.” *Id.* This analysis of the prohibition against earmarking was entirely speculative. See *id.* at 481 (Thomas, J. dissenting) (noting that there was no evidence that the government had made any effort to uncover circumvention or to enforce the prohibition against earmarking contributions).

120. *Colorado II*, 533 U.S. at 474 (Thomas, J., dissenting).

121. *Shrink Missouri*, 528 U.S. at 392.

2. *Contribution Limits That Do Not Make Political Parties “Useless”*

Given the presumptions that contributions are made to produce “obligated officeholders” and that political parties are the witting or unwitting agents of donors seeking favors, the Court never examined the effects of the coordinated expenditure limits on political parties’ First Amendment interests.¹²² There was nothing on the scales to be balanced against the “potential” harm of circumvention.

Although Senator Jeffords’ May 2001 resignation from the Republican Party gave the Democrats control of the Senate just one month before the Court’s decision,¹²³ the majority ignored political parties’ interest in capturing and retaining control of the government. It did not examine the effects of the coordinated expenditure limits on a political party’s ability to target its resources on the small set of candidates whose election would help the party take control of the legislature.¹²⁴ The Court recognized that coordinated expenditure limits “prompt[] parties to structure their spending in a way that they would not otherwise choose to do” and “impose[] some burden on parties’ associational efficiency,” but it did not examine these burdens.¹²⁵ It never considered the effects of coordinated expenditure limits on the ability of political parties to provide in-kind, as opposed to cash, support to their candidates. The Court assumed, instead,

122. See *supra* text accompanying notes 94-96; *Colorado II*, 533 U.S. at 472 (Thomas, J., dissenting) (arguing that the Court “downplay[ed] the extent of the burden on political parties’ First Amendment rights”).

123. With the election of President George W. Bush in November 2000 and the Republican Party’s success in congressional elections, the Republicans had united control of the executive branch and both houses of Congress for the first time since the early 1950s. The party’s complete control of the national government lasted only five months. In May 2001, Senator Jim Jeffords of Vermont resigned from the Republican Party and became an Independent. Before Jeffords’ resignation, the Senate was evenly divided (50-50) between the Republicans and Democrats, but Vice President Richard Cheney’s tiebreaking vote gave the Republicans control of the Senate. After Jeffords’ resignation, the Democrats had a 50-49 majority and took control of the Senate. See John Lancaster & Helen Dewar, *Daschle Pledges Bipartisan Approach; Decorum Reigns in Senate Shift*, WASH. POST, June 7, 2001, available at 2001 WL 17634074; Janet Hook & Greg Miller, *The Nation-Senate’s Under New Management*, L.A. TIMES, June 6, 2002, available at 2001 WL 2493270.

124. The majority recognized the interest of political parties in electing their candidates, but it did not expressly acknowledge the party’s interest in targeting elections to take control of government. *Colorado II*, 533 U.S. at 450 (noting the argument that “parties are organized for the purpose of electing candidates”). The dissent noted the political parties’ practice of targeting elections only in the course of refuting claims that donors used parties to funnel contributions to particular candidates. *Id.* at 478 (Thomas, J., dissenting) (noting the district court’s finding that “‘the primary consideration in allocating funds is which races are marginal—that is which races are ones where party money could be the difference between winning and losing’”) (citation omitted).

125. *Id.* at 450 n.11.

that any burdens are offset by the political parties' right to make unlimited independent expenditures.¹²⁶

Under *Shrink Missouri*, contribution limits are valid unless they are “so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.”¹²⁷ Now, coordinated spending limits are valid because “[d]espite decades of limitation on coordinated spending, parties have not been rendered useless.”¹²⁸

II. MISSOURI LIMITS ON POLITICAL PARTY CONTRIBUTIONS: A CASE STUDY OF THE EROSION OF FIRST AMENDMENT PROTECTION OF POLITICAL SPEECH

The Eighth Circuit’s decision upholding Missouri’s limits on campaign contributions made by political parties to their candidates demonstrates the extent to which *Shrink Missouri* and *Colorado II* have eroded First Amendment protection of political speech. In *Missouri Republican Party II*, the Eighth Circuit, faithfully following *Shrink Missouri* and *Colorado II*, upheld Missouri’s party contribution limits. The court of appeals upheld these limits even though there was no evidence that party contributions cause any real harm in Missouri elections. The court of appeals upheld the party limits without addressing the burdens imposed on the First Amendment interests of political parties and their candidates.

A. The 1994 Missouri Campaign Finance Reform Legislation

Before 1994, Missouri did not limit either political contributions to state and local candidates or candidates’ political expenditures. In 1994, Missouri imposed limits on candidates’ campaign expenditures and on political contributions in two sets of amendments to its Campaign Finance Disclosure Law.¹²⁹ In July 1994, the Missouri legislature enacted Senate Bill 650, which imposed limits on campaign contributions and expenditures. On November 8, 1994, the Missouri electorate approved Proposition A, a ballot initiative that also established campaign finance regulations and expenditure limits. The Missouri Attorney General ruled that Proposition A, which was to become effective immediately,

126. *Id.* at 450 n.11, 455.

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

128. *Colorado II*, 533 U.S. at 455.

129. MO. REV. STAT. §§ 130.011-130.160 (2000); see La Pierre, *Raising a New First Amendment Hurdle*, *supra* note 35, at 218-22.

superseded Senate Bill 650 to the extent its provisions were more restrictive and that, otherwise, Senate Bill 650 would become effective on January 1, 1995.¹³⁰ In 1995, the Court of Appeals for the Eighth Circuit held that certain campaign expenditure limits and Proposition A's \$100, \$200, and \$300 campaign contribution limits violated the First Amendment.¹³¹

1. State Limits on Individual and PAC Contributions

After the invalidation of the contribution limits set by Proposition A, the limits imposed by Senate Bill 650 became effective.¹³² Senate Bill 650 originally limited campaign contributions to candidates for office in Missouri on a sliding scale from \$250 to \$500 to \$1,000.¹³³ It also provided that these contribution limits "shall be increased" to take inflation into account, and the Missouri Ethics Commission increased the contribution limits in 1998 and again in 2000.¹³⁴ As adjusted for inflation and finally upheld by the Supreme Court in January 2000, Missouri prohibited contributions in the 2002 elections of more than \$300 to candidates for state representative or for offices in districts with a population of under 100,000; contributions of more than \$575 to candidates for state senate or for any office in electoral districts with a population between 100,000 and 250,000; and contributions of more than \$1175 to candidates for governor, lieutenant governor, secretary of state, state treasurer, state auditor, and attorney general, as well as to candidates in districts with a population of at least 250,000.¹³⁵

2. State Limits on Cash and In-Kind Contributions Made by Political Parties to Their Candidates

In addition to these limits on individuals and PACs, Senate Bill 650 also limits the amount of financial support that political parties can provide to their candidates. The party contribution limits do not apply

130. 94 Mo. Op. Att'y Gen. 218 (Dec. 6, 1994).

131. *Shrink Mo. Gov't PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996); *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996); La Pierre, *Rising a New First Amendment Hurdle*, *supra* note 35, at 230-37.

132. MO. REV. STAT. § 130.032 (2000).

133. MO. REV. STAT. § 130.032.1 (2000).

134. MO. REV. STAT. § 130.032.2 (2000).

135. MO. REV. STAT. § 130.032.1 (2000); Missouri Ethics Commission, *Adjusted Individual Contribution Limits*, at <http://www.moethics.state.mo.us/MEC/AdjustedContributionJan2002.htm#Individual> (on file with author).

directly to political parties. Instead, the party contribution limits apply to “political party committees.” Missouri law provides that each established political party shall have a state committee, congressional district committees (9), judicial district committees (40), state senatorial district committees (34), legislative district committees (163), and county committees (115).¹³⁶ Each one of these 362 committees is a “political party committee” under the state’s campaign finance laws.¹³⁷ State law limits both cash contributions made by these political party committees to their candidates and “in-kind” contributions, which are defined broadly to include any contribution or expenditure in any form other than money.¹³⁸ Although Missouri does not prevent a political party committee from making expenditures independently of its candidates, the slightest degree of cooperation, coordination, or consultation between a political party committee and its candidates makes the party’s support a “contribution” subject to these state law limits.¹³⁹

As adjusted for inflation, the statute limits “monetary contributions and a separate amount for the amount of in-kind contributions, made by or accepted from a political party committee” to elect an individual to \$11,675 for the offices of governor, lieutenant governor, secretary of state, state treasurer, state auditor and attorney general; to \$5,850 for the office of state senator; to \$2,925 for the office of state representative; and “[t]o elect an individual to any other office of an electoral district, ward or unit, ten times the allowable contribution limit for the office sought.”¹⁴⁰

Political party committees may make both cash and in-kind contributions up to these limits in both the primary election and the general election.¹⁴¹ For example, in the 2002 elections, each political party

136. MO. REV. STAT. § 115.603 (2000); *see* State of Missouri, Official Manual, 2001-2002 at 203 (listing one hundred sixty-three state legislative districts), 243 (listing forty-five judicial district committees including five districts that are designated non-partisan under Mo. Const. Art. V, § 25), and 718-68 (listing the MRP’s state committee, nine congressional committees, thirty-four state senatorial district committees, and one hundred fifteen county committees).

137. MO. REV. STAT. §§ 130.011(24), (25).

138. MO. REV. STAT. § 130.032.4 (2000); *see id.* § 130.011(19) (2000) (defining an “in-kind contribution” or “in-kind expenditure” interchangeably as “a contribution or expenditure in a form other than money”).

139. *See* Missouri Ethics Commission, Opinion No. 00.05.100 (May 15, 2000) (ruling that “if a candidate participates in the selection of billboard signs or other medium to advertise a website for that candidate, and the candidate has some design, control or influence concerning the website, such billboard expenditure advertising and website expenditure would be considered a contribution from the party to the candidate”).

140. MO. REV. STAT. § 130.032.4 (2000); Missouri Ethics Commission, Adjusted Political Party Committee Contribution Limits, *at* <http://www.moethics.state.mo.us/MEC/AdjustedContributionJan2002.htm#Party> (on file with author).

141. MO. REV. STAT. § 130.032.4 (2000). In an unopposed primary election, the maximum

committee could make a \$11,675 cash contribution and a \$11,675 in-kind contribution in a contested primary election for state-wide office and identical amounts of cash and in-kind contributions in the general election. The “aggregate cap”—the sum of the maximum cash and in-kind contribution that a political party committee could make to its candidate in the primary election and general election—was \$46,700. Although state law limits the amount of financial support that a party can provide to its candidates, it does not impose any limits on the amounts that corporations, unions, or individuals may contribute to political party committees.¹⁴² Political party committees, however, may not pass along a corporate, union, or individual contribution to a candidate if these donors have already contributed the statutory maximum.¹⁴³

B. The Missouri Republican Party

The Missouri Republican Party (MRP) is a political party established under Missouri law.¹⁴⁴ The MRP’s primary goal is to control state government by electing Republican candidates to statewide office and to the state legislature. Controlling the government gives a political party the final say on policy issues and on the state budget, which was \$18.9 billion dollars in 2002.¹⁴⁵ The MRP’s fate is inextricably tied to its candidates. The MRP, like other political parties, can give effect to its views “only by selecting and supporting candidates.”¹⁴⁶

At the state level, the MRP was the minority party for most of the last half of the twentieth century.¹⁴⁷ From 1948 through the 2000 elections, the

contribution is one-half the otherwise applicable limit. *Id.*

142. Missouri allows all “persons,” including corporations and unions, to make campaign contributions to candidates. See MO. REV. STAT. § 130.032.1 (2000) (limiting campaign contributions by “persons” other than the candidate); see *id.* § 130.011(22) (defining the term “person” to include corporations and unions).

143. The state can prevent corporations, unions, and individuals from channeling contributions to candidates through political party committees by enforcing the limits on these contributions with civil and criminal sanctions. MO. REV. STAT. §§ 130.032.7 (2000), 130.081 (2000); see Missouri Ethics Commission, Opinion No. 00.07.101 (stating that “candidates cannot request contributions be made to political party committees with the express purpose of passing those contributions through the committee to the candidate.”).

144. State of Missouri, Official Manual, 2001-2002, at 600.

145. State of Missouri, Office of Administration, Division of Budget and Planning, Budget at a Glance, at <http://www.oe.state.mo.us/bp/newsbudget02.htm> (last visited Jan. 3, 2003).

146. *Colorado I*, 518 U.S. at 629 (1996) (Kennedy, J., Rehnquist, C.J. & Scalia, J., concurring in the judgment and dissenting in part).

147. Aff. of John Hancock ¶ 25, *Mo. Republican Party v. Lamb*, 227 F.3d 1070 (8th Cir. 2000) (Nos. 00-1773/00-2686EM) (filed July 5, 2000), *pet. for cert. granted, judgment vacated, and remanded*, 533 U.S. 945 (2001), *on remand*, 270 F.3d 567 (8th Cir. 2001), *cert. denied*, 122 S. Ct.

MRP never controlled the state legislature. During this fifty-two year period, the MRP never held a majority in the state senate, and it held a majority in state house only for two years, from 1952 to 1954. In a special election in January 2001, the MRP took control of the state senate for the first time.¹⁴⁸ At the statewide level, the MRP enjoyed only a little more success. From 1948 up to the 2000 elections, the MRP held a majority of the six statewide offices for only ten years, from 1972 to 1974 and from 1984 to 1992.¹⁴⁹ Even when the MRP held a significant number of statewide offices, the Democrats still controlled both houses of the state legislature.¹⁵⁰

1. The Party Works Through Its Candidates to Take Control of State Government

The MRP works to take control of state government by recruiting, training, developing, and supporting candidates, by providing its candidates with “seed” money to launch their campaigns, by presenting a “team” of state and federal candidates, and, most importantly, by “targeting” crucial electoral races. Party support is a critical element of electing candidates because winning elections is a difficult enterprise. The MRP provides Republican candidates with the professional campaign support that is necessary to wage effective campaigns for public office.

a. Recruiting and Developing Candidates

The MRP has a comprehensive process for identifying, recruiting, and developing candidates. The MRP looks for Republicans who hold local and municipal public offices and asks local party activists for suggestions. The MRP, for example, might approach someone like a popular football coach in a rural district who had not yet given any serious thought to running for office. The MRP assesses the overall quality of potential candidates, their fundraising ability, their involvement in the community, their political philosophy, the political makeup of the district, and the extent to which the candidate mirrors the kind of people who live in the district. The process of recruiting and developing candidates was particularly important in the 2001-02 election cycle. As a result of term

2329 (2002) [hereinafter Hancock Aff. 1].

148. See *infra* note 159 and accompanying text.

149. Hancock Aff. 1, *supra* note 147 ¶ 25b.

150. *Id.* ¶ 25c.

limits approved by the voters in 1992, almost fifty percent of incumbent state legislators were barred from running from office, and both state parties established extensive training programs for their novice candidates.¹⁵¹

b. Seed Money

The MRP occasionally provides cash or in-kind goods and services to some candidates early in an election cycle to help them get their campaigns off the ground and rolling. This “seed money” may be necessary to recruit candidates to run against incumbents who have large campaign war chests,¹⁵² and candidates who can show that they have received seed money support from the MRP then may have a leg up in raising support from other donors. Although seed money is the exception rather than the rule, it may be very important. For example, in March 2000, before the primary election and long before the November general elections, the MRP gave \$20,000 to one state senate candidate, \$10,000 to a second state senate candidate, and \$5,000 to a state representative candidate.¹⁵³ These seed money contributions were important because the Democratic Party had only a thin margin of control in the state legislature, and the success of a few Republican candidates could have led to change in control of state government.

c. Targeting Crucial Elections

The MRP, like all political parties, “targets” its financial support to candidates who have a chance of winning races that will help the party capture control of the legislature and the executive branch. The election of Republican candidates to the six executive branch statewide offices (Governor, Lieutenant Governor, Attorney General, Secretary of State,

151. Eric Stern, *As Term Limits Become a Reality, Both Parties Begin Grooming Hopefuls*, ST. LOUIS POST-DISPATCH, June 9, 2001, at A13; see Terry Ganey, *Control of the House Changes for First Time in 48 Years*, ST. LOUIS POST-DISPATCH, Nov. 6, 2002, A1, at A10 (reporting that “[e]ach of 134 Republican candidates got at least 72 hours of training [by the MRP] in how to campaign, raise money and get their message out”).

152. See Jo Mannies & Phil Sutin, *Westfall’s Imposing War Chest Keeps Away GOP Opponents*, ST. LOUIS POST-DISPATCH, Oct. 18, 2001, at B2.

153. MRP, Report to the MEC (Apr. 15, 2000) (listing a \$20,000 contribution to Foster for Senate on March 16, 2000, a \$10,000 contribution to Howerton for Senate on March 29, 2000, and a \$5,000 contribution to Friends of Denny Hettenhausen (100th House District) on March 29, 2000). The party was able to make these seed money contributions, which exceeded the state limits, because the lower courts had enjoined enforcement of the party contribution limits pending a final decision on the merits. See *infra* note 181.

Treasurer, and Auditor), as well as the election of a majority in both houses of the Missouri legislature, is necessary to take control of state government and to implement the party's policies. The party's goal, for example, is to elect at least 82 Republicans to seats in the Missouri House of Representatives so that it will have a majority of the 163 seats.

Each election cycle, the party evaluates the strengths of Republican and Democratic candidates, their fundraising abilities, polling data, and the overall makeup of legislative districts, and it identifies the Republican candidates who have the best chances of winning elections. It then targets statewide races, state senate races, and state house races where party support will help gain control of state government. Republicans and Democrats frequently target the same competitive races.¹⁵⁴ It is not unusual for several Republican committees—state and federal—to support the same candidate because they have the same targeting data.

Targeting party support is critically important. In the Missouri 1996 general elections, for example, a switch of about 3000 votes in key legislative districts would have permitted the MRP to take control of the state legislature for the first time since 1948.¹⁵⁵ Similarly, in the 2000 elections, the MRP was only six seats away from controlling the state house and only two seats away from controlling the state senate.¹⁵⁶ The party targeted its financial support on three to five senate races and some twenty house races.¹⁵⁷ Success in taking control of state government in 2000 was especially important because the legislature and the governor would have responsibility for making state and federal redistricting decisions in response to the 2000 census, and these redistricting decisions would have a significant partisan effect on the ability of the state's two major political parties to gain or retain control of government for the next ten years.¹⁵⁸

Although the MRP did not succeed in gaining control of the state legislature in the November 2000 general election, it was more successful in the January 2001 special elections. The MRP targeted—and won—two of three state senate races and took control of the Missouri state senate, 18-16, for the first time since 1948. Even though the Governor was a

154. A political party may also provide support (cash and in-kind) to candidates in non-targeted races, and it might support a "sure winner" to enhance the candidate's reputation or to create ballot flow to aid other candidates.

155. *Aff. of John Cozad* ¶ 23, *Mo. Republican Party v. Lamb*, 100 F. Supp. 2d 990 (E.D. Mo. 2000) (No. 4-98CV-01909 CDP) [hereinafter *Cozad Aff.*]; *Hancock Aff.* 1 ¶ 31.

156. *Hancock Aff.* 1 ¶ 19.

157. *Hancock Aff.* 1 ¶ 13.

158. *Hancock Aff.* 1 ¶ 20.

Democrat and the Democrats still controlled the state House of Representatives, there was a dramatic shift in power. The party took “command of the chamber that has the upper hand in determining which bills pass and which bills fail.”¹⁵⁹ The Republicans also gained a significant voice in state and federal redistricting under the new census. The Executive Director of the MRP believes that the party probably would not have been successful in taking control of the state senate if the party contribution limits had been in effect.¹⁶⁰ As discussed below, the court of appeals had enjoined enforcement of the party contribution limits, and the MRP, as well as the Missouri Democratic Party, was able to spend more than \$300,000 on the targeted elections.¹⁶¹

d. Presenting a State and National Team

The MRP works hard to present its candidates for all federal, state, and local offices as a team. All elections—for both federal and state office—are interrelated. The success or lack of success of Republican candidates for President, the United States Senate and House, statewide office, the state legislature, and local office affects the elections of all other Republican candidates. In 1998, for example, the MRP was confident that its incumbent candidate, Senator Christopher S. Bond, would win his campaign for the United States Senate campaign. The MRP, however, was concerned that Charles Pierce, a political novice, might lose the only statewide contest, the election for State Auditor. The MRP targeted Pierce’s election contest and presented a team of Republican federal and state candidates in an effort to create a strong “ballot flow” from the top of the ticket, the United States Senate candidate, through its state auditor candidate down to its state legislative candidates.¹⁶²

159. Terry Ganey, *GOP Senate Shifted Power Dramatically in Legislature*, ST. LOUIS POST-DISPATCH, May 20, 2001, at A1; Terry Ganey et al., *GOP Will Control State Senate for First Time in 52 Years*, ST. LOUIS POST-DISPATCH, Jan. 25, 2001, at A1.

160. Aff. of John Hancock ¶ 10, *Mo. Republican Party v. Lamb*, 227 F.3d 1070 (8th Cir. 2000) (Nos. 00-1773/00-2686EM) (filed June 29, 2001), *pet. for certiorari granted, judgment vacated, and remanded*, 533 U.S. 945 (2001), *on remand* 270 F.3d 567 (8th Cir. 2001), *cert. denied*, 122 S. Ct. 2329 (2002) [hereinafter Hancock Aff. 2]. In the 2002 elections, the Missouri Republican Party successfully completed its long effort to gain control of the state legislature: it gained control of “both chambers of the Legislature for the first time since 1947—when Harry S. Truman was in the White House.” Ganey, *supra* note 151. In addition to gaining control of the state house of representatives, the party also “solidified [its] hold on the Missouri Senate [by] walloping Democrats in most targeted races.” Virginia Young, “*Enormous Victory*” *Leaves GOP in Firm Control of Chamber*,” ST. LOUIS POST-DISPATCH, Nov. 6, 2002, at A10.

161. See *infra* note 181 and text accompanying notes 267-70.

162. See Hancock Aff. 1 ¶ 24.

As the 2002 general election illustrates, the party's state and federal candidates are inextricably intertwined. On the one hand, a convicted felon defeated the MRP's candidate in the August 2002 primary election for state auditor, and there was much speculation that this candidate would harm the chances of the MRP's candidate for election to the United States Senate.¹⁶³ On the other hand, the MRP hoped that its candidate for St. Louis County Executive would attract enough Republican votes to help its United States Senate candidate defeat his Democratic opponent.¹⁶⁴ In the end, the MRP's success in capturing control of the state legislature was widely viewed as helping the party's candidate for the United States Senate, Jim Talent, defeat the Democratic incumbent, Jean Carnahan.¹⁶⁵

2. *The Party Provides Both Cash and In-Kind Support to Its Candidates*

A political party's financial support for its candidates can include independent expenditures, coordinated expenditures, and pure contributions.¹⁶⁶ An "independent expenditure" is one made by a political party without any consultation or coordination with its candidates.¹⁶⁷ A political party can make coordinated expenditures with its candidates by purchasing goods and services for them, by contributing party funds to them to purchase these goods and services, or by providing goods (e.g., a mailing list) and services (e.g., campaign planning) directly to them. A pure contribution is financial support provided to candidates without any consultation and without any conditions, explicit or implicit, on the use of the funds.

These distinctions, however, are more theoretical than real. From the party's perspective, all of its support—cash and in-kind—is an expenditure to achieve the party's goals. From the candidate's perspective, the party's expenditure is also a campaign contribution. As a former Chairman of the MRP has explained, candidates, who focus on their own elections, and not on party's broader goal of taking control of the

163. Jo Mannies, *Talent Expects No Impact from Felon's Bid*, ST. LOUIS POST-DISPATCH, Aug. 11, 2002, at B1; Virginia Young, *Felon Upsets GOP's Pick in State Auditor Primary*, ST. LOUIS POST-DISPATCH, Aug. 7, 2002, at A1.

164. Jo Mannies, *Borchelt's Campaign Against Westfall Aims to Boost Talent*, ST. LOUIS POST-DISPATCH, May 5, 2002, at C2.

165. See Editorial, *Welcome, Madame Speaker*, ST. LOUIS POST-DISPATCH, Nov. 8, 2002, at C20.

166. See *Colorado I*, 518 U.S. at 613-14, 624-25 (Breyer, J., O'Connor, J., & Souter, J.) (distinguishing independent expenditures and coordinated expenditures and distinguishing coordinated expenditures and "simple contributions").

167. See *id.*

government, may view the party's expenditure as a contribution to their campaign effort.¹⁶⁸ If a political party contributes \$2500 to the campaign of a candidate for the state legislature, the candidate at that moment may not be very concerned whether the party gets control of the Missouri house. The party, nonetheless, supports its candidate to achieve its own ends: to advance its legislative agenda by taking control of the government.¹⁶⁹

a. Cash Support

Coordinated expenditures are the most effective way for a political party to achieve its goals.¹⁷⁰ Coordinated expenditures, unlike either independent expenditures or pure contributions, allow the party and the candidate to plan the campaign together and to coordinate their message. Consider, as Justice Breyer has suggested, two alternative ways that a political party, in consultation and cooperation with its candidate, might decide to pay its candidate's media bills—"a donation of money" or "direct payment of a candidate's media bills."¹⁷¹ The party could make a \$100,000 payment to its candidate to purchase television time for a specific advertisement as discussed by the party with its candidate, or the party could make a direct payment of the same sum to television stations to purchase television time for the same advertisement. The first alternative—the party's "donation" or payment to its candidate could easily be labeled a "contribution," and the second alternative—the party's "direct payment" of its candidate's media bills could easily be labeled an "expenditure."

Any distinction, however, between (1) passing the party's funds through a candidate's campaign committee to purchase television time and (2) purchasing television time directly for the same advertisement elevates form over substance. There is no difference—much less a constitutionally significant difference—between cash "contributions" made by a political party in cooperation with its candidates and cash "expenditures" made by a political party in cooperation with its candidates. Indeed, the Federal

168. Cozad Aff. ¶ 58.

169. Dep. of John Cozad at 69-70, *Mo. Republican Party v. Lamb*, 100 F. Supp. 2d 990 (E.D. Mo. 2000) (No. 4-98CV-01909 CDP).

170. See *FEC v. Colo. Republican Fed. Campaign Comm.*, 41 F. Supp. 2d 1197, 1210 (D. Colo. 1999), *aff'd* 213 F.3d 1221 (10th Cir. 2000), *cert. granted*, 531 U.S. 923 (2000), *rev'd*, 533 U.S. 431 (2001) (finding that "[c]oordinated expenditures," unlike independent expenditures or contributions, "provide the candidate and the party the optimum opportunity to communicate their message").

171. *Colorado I*, 518 U.S. at 624 (Breyer, J., O'Connor, J., & Souter, J.).

Election Campaign Act confirms the fundamental point that political party expenditures and contributions are indistinguishable. As Justice Breyer noted in *Colorado I*, federal law treats contributions as the equivalent of expenditures: the Federal Election Campaign Act (FECA) regulates political party *expenditures* in support of its candidates as an exception to otherwise applicable *contribution* limits.¹⁷²

The MRP makes independent expenditures, as opposed to “coordinated expenditures” or “coordinated contributions,” only because Missouri law limits the amount of cash and in-kind support that political parties can provide their candidates.¹⁷³ An independent expenditure—the expenditure of party money on behalf of the party’s candidate without the knowledge of the candidate—artificially separates the party and its candidate. Independent expenditures are not, from either the party’s or the candidate’s perspective, as effective as coordinated expenditures or contributions.¹⁷⁴ Although the party does make some independent expenditures, it rarely makes pure contributions. In order to achieve its goal of taking control of government, the party usually controls, explicitly or implicitly, the use of its funds.¹⁷⁵

b. In-Kind Goods and Services

In addition to cash, political parties also provide extensive in-kind support to their candidates. The MRP, for example, provides many valuable goods to its candidates. The party gives its candidates lists of registered voters, party members, and contributors; it provides office space, telephones for local and long-distance calls, and copying machines for candidates who are working in the capitol; it loans audio and visual

172. See 518 U.S. at 610-12 (Breyer, J., O’Connor, J., & Souter, J.). Thus, in *Colorado II*, the court of appeals measured federal limits on a political party’s “coordinated expenditures” by the *Shrink Missouri* standard of scrutiny of “contribution” limits because “FECA treats coordinated expenditures as ‘contributions.’” 213 F.3d at 1226-27 (citation omitted). The Federal Election Campaign Act of 1971 (FECA) is codified at 2 U.S.C. §§ 431-56 (2000), as amended by the Bipartisan Campaign Reform Act of 2002, effective Nov. 6, 2002. See *infra* text accompanying notes 301-60.

173. As Justice Kennedy recognized, “in most cases” a “party’s spending is made in cooperation, consultation, or concert with its candidate.” *Colorado I*, 518 U.S. at 629 (Kennedy, J., Rehnquist, C.J., and Scalia, J., concurring in the judgment and dissenting in part) (internal quotation marks omitted).

174. See *infra* text accompanying notes 271-78.

175. A political party does not have to make a contract with its candidates to ensure that they use the party’s funds and resources to achieve the party’s goal. It is not necessary to impose specific terms and conditions on candidates’ expenditures of party funds because (1) coordination and cooperation are implicit in the party’s identity with its candidates, (2) the party and its candidates always have a tacit common understanding that the party’s funds are to be used to convey their common message, and (3) the election of the party’s candidates advances the party’s goal of taking control of the government.

equipment, a podium, and flags to conduct public meetings and press conferences; and it allows candidates to use the party's computers to store and manage data. The MRP also provides numerous services for its candidates. It researches Democratic Party candidates and analyzes their voting histories and positions on public policy issues; it helps Republican candidates to design and disseminate press releases and to set up news conferences. MRP officials also serve as campaign consultants. The Chairman of the MRP, the party's Executive Director, the party's political director, and the party's staff and volunteers consult frequently with Republican candidates to help them build a campaign, to hone their messages, to solicit contributors, to develop issues, to take and evaluate polls, and to take the proper steps to win an election.

Providing these goods and services to its candidates is the crucial component of the party's efforts to take control of state government. Although candidates for federal office are often experienced politicians, many Missouri legislative candidates are novices. These first-time candidates cannot wage effective campaigns without comprehensive party training and support. Even for more experienced state candidates, in-kind support is more important than cash support. The party provides its candidates with a wealth of information and professional advice that they could not assemble themselves. In-kind support is so important in state elections that, in the late 1990s, the Executive Director of the Missouri Republican Party and the Executive Director of the Missouri Democratic Party had an informal agreement not to file complaints with the Missouri Ethics Commission against the other party for providing in-kind assistance in excess of the limits.¹⁷⁶

C. The Eighth Circuit: Approval of Party Contribution Limits

The litigation over the validity of the Missouri party limits began at the close of the 1998 general election. In late October and early November 1998, the MRP contributed \$133,500 to Charles Pierce (a Republican

176. *Aff. of John Hancock ¶ 35, Mo. Republican Party v. Lamb*, 100 F. Supp. 2d 990 (E.D. Mo. 2000) (No. 4-98CV-10909 CDP) [hereinafter *Hancock Aff. 3*]. The two parties also had a common interest in avoiding the record keeping necessary to comply with the limits on in-kind contributions. The MRP, for example, hires consultants who provide advice to many candidates and who take polls or create mailing lists that may be helpful to many candidates. It would be difficult, time consuming, and expensive to allocate the costs of these goods and services to specific candidates. In short, keeping track of all goods and services provided to statewide candidates, as many as 17 state senatorial candidates and as many as 163 state house candidates, would also impose substantial administrative and financial burdens on a political party. *Id.*

candidate for statewide office), \$73,750 to Eric Zahnd (a Republican state senate candidate), and \$8,300 to Mike Reid (a Republican state house candidate).¹⁷⁷ The MRP made these contributions to the three candidates because it had “targeted” their races; that is, the party believed that the election of Pierce, Zahnd, and Reid was critical to its goal of taking control of the executive and legislative branches of government.¹⁷⁸

The party believed, in light of certain representations by officials of the Missouri Ethics Commission (MEC), that there were no enforceable limits on party contributions in the 1998 general elections.¹⁷⁹ It filed campaign finance reports listing these contributions, but the MEC then determined that state law prohibited the party from making cash payments of more than \$10,750 to its statewide candidate, of more than \$5,375 to its state senate candidate, and of more than \$2,700 to its state house candidate. The state claimed that the MRP was liable in the amount of \$201,725 for “overlimit” contributions, that Pierce was liable in the amount of \$126,500, that Zahnd was liable in the amount of \$68,375, and that Reid was liable in the amount of \$6,600.¹⁸⁰

177. Hancock Aff. 1 ¶¶ 69, 76; *see* *Mo. Republican Party v. Lamb*, 31 F. Supp. 2d at 1162.

178. After the 1998 general election, for example, the Democrats held an 18-16 majority over the Republicans in the state senate. If Zahnd had won his targeted contest for election as a state senator, control of the state senate would have been tied, 17-17. If Zahnd and Steelman, another targeted Republican state senate candidate, had both won their races, then the MRP would have gained control of the state senate for the first time in the last half of the twentieth century. Hancock Aff. 1 ¶ 25.

179. The party also believed that the state had no legitimate reason to enforce the party limits when it made the disputed contributions to Pierce, Zahnd, and Reid in the 1998 general elections. The court of appeals had enjoined enforcement of the individual and PAC limits on July 23, 1998; this injunction was in effect throughout the remainder of the 1998 general election and throughout 1999. *Shrink Mo. Gov't PAC v. Adams*, 151 F.3d 763, 765 (8th Cir. 1998). Although the Supreme Court ultimately upheld Missouri's limits on individual and PAC contributions on January 24, 2000, there were no individual contribution limits in effect in November 1998 that could have been circumvented by unlimited party contributions. 528 U.S. 377, 397-98 (2000). Any individual or PAC could have made unlimited contributions directly to Pierce, Zahnd, and Reid in November 1998. As the district court held early in the proceedings, the party limits served no purpose after the limits on individual contributions had been enjoined. 31 F. Supp. 2d 1161, 1164 (E.D. Mo. 1999) (district court holding that “one of the purported objectives” of the party limits to “thwart[] a person from evading the limit on the amount that he or she can legitimately give to a given candidate . . . ceased to have any force whatsoever” when enforcement of the individual limits was enjoined) (internal parentheses omitted). Indeed, Missouri conceded that it had no reason to enforce the party limits while the individual limits were enjoined in 1998: “Defendants, all state officials, consented to [district court's January 13, 1999 preliminary injunction barring enforcement of the party limits] because the limits on party committee contributions could have little effect so long as individuals and non-party committees could contribute unlimited amounts directly to candidates.” Missouri's Opp. to Motion for Injunction Pending Appeal at 2, *Mo. Republican Party v. Lamb*, 100 F. Supp. 2d (E.D. Mo. 2000) (No. 4-98CV-1909 CDP) (July 14, 2000).

180. Hancock Aff. 1 ¶¶ 76-80; *see* *Missouri Republican Party v. Lamb*, 31 F. Supp. 2d at 1162.

I. Missouri Republican Party I

The court of appeals held initially on September 11, 2000, that the Missouri limits on a political party's cash and in-kind contributions to its candidates violated the First Amendment on their face.¹⁸¹ It found that the party limits imposed more substantial burdens on First Amendment interests than limits on individual contributions,¹⁸² but it did not address the actual effects of the Missouri party limits on the MRP or its three candidates. Instead, the court of appeals found that the state had failed completely to justify any limits on the amount of support provided by a political party to its candidates: "the record is wholly devoid of any evidence that limiting parties' campaign contributions will either reduce corruption or measurably decrease the number of occasions on which

181. *Missouri Republican Party I*, 227 F.3d 1070 (8th Cir. 2000). Before this initial September 11, 2000, decision, enforcement of the party limits had been enjoined for all but 27 days from November 16, 1998. After the MRP and its three candidates filed a complaint in November 1998 challenging the constitutionality of the Missouri party contribution limits, the district court enjoined enforcement of these provisions pending the Supreme Court decision in *Nixon v. Shrink Missouri Government PAC*. See *Mo. Republican Party v. Lamb*, 87 F. Supp. 2d at 912; *Mo. Republican Party v. Lamb*, 31 F. Supp. 2d at 1162. Although the district court subsequently held on June 22, 2000, that the party contribution limits were valid under *Shrink Missouri*, *Mo. Republican Party v. Lamb*, 100 F. Supp. 2d 990 (E.D. Mo. 2000), it granted a limited injunction pending appeal and continued to enjoin enforcement of the party limits through noon on July 5, 2000. Injunction Pending Appeal, *Mo. Republican Party v. Lamb*, 100 F. Supp. 2d 990 (E.D. Mo. 2000) (No. 4-98CV1909 CDP) (July 5, 2000). The court of appeals then granted an injunction pending appeal on July 31, 2000. Injunction Pending Appeal, *Mo. Republican Party v. Lamb*, 227 F.3d 1070 (8th Cir. 2000) (Nos. 00-1773/00-2686EM) (July 31, 2000), *pet. for certiorari granted, judgment vacated, and remanded*, 533 U.S. 945 (2001), *on remand*, 270 F.3d 567 (8th Cir. 2001), *cert. denied*, 122 S. Ct. 2329 (2002).

182. The court of appeals held there was no ready analogy between political party contributions and the individual contributions at issue in *Buckley* and *Shrink Missouri*. *Missouri Republican Party I*, 227 F.3d at 1072. The *Buckley* Court upheld limits on an individual's contributions because these limits imposed "only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* (quoting *Buckley*, 424 U.S. at 20-21). In *Buckley*, the Court found that an individual's "contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support" and that a limit on such contributions "involves little direct restraint on . . . political communication, for it permits the symbolic expression . . . evidenced by a contribution." *Id.* (quoting *Buckley*, 424 U.S. at 21).

The considerations that supported individual contribution limits in *Buckley*, however, "simply do not carry the same force when the contributor is a political party." *Id.* Given "their unity of purpose, and the virtual identity of parties and their candidates," the Eighth Circuit found that "it is not easy to say, in the words of *Buckley* . . . that a political party's contribution 'does not communicate the underlying basis for the support.'" *Id.* (quoting *Buckley*, 424 U.S. at 21). Instead, "a party's contribution provides an ideological endorsement and carries a philosophical imprimatur that an individual's contribution does not, and thus it cannot properly be called a 'contribution' in the same sense that the individual contributions at stake in *Buckley* were." *Id.* Moreover, "a party's contribution to its candidate, again in the words of *Buckley* [is not] merely a 'symbolic expression' of support; it is more like a substantive political statement than others' contributions are." *Id.* (quoting *Buckley*, 424 U.S. at 21).

limitations on individuals' campaign contributions are circumvented."¹⁸³

The Eighth Circuit expressly recognized the Supreme Court's determination in *Shrink Missouri* that "the 'quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.'"¹⁸⁴ The state's first justification—"the threat that a political party will corrupt a candidate"—was "novel and not particularly plausible."¹⁸⁵ More importantly, Missouri had no evidence that political party contributions cause corruption or the appearance of corruption.¹⁸⁶

Missouri's second contention, that preventing the circumvention of limits on individual contributions justified limiting the size of a political party's contributions, fared no better than its anti-corruption rationale. The Eighth Circuit recognized that "[l]imitations on party spending might have an indirect attenuating effect on secret 'earmarking' agreements between individuals and political parties because such agreements may be hard to detect and police directly."¹⁸⁷ Nonetheless, even if some individuals attempt to circumvent limits on individual contributions to candidates by making "earmarked" contributions to political parties for particular candidates, there was no reason to limit political parties' freedom of speech.¹⁸⁸ Missouri "already ha[s] a mechanism in place that deals with attempts by individuals to circumvent limits on their contributions by using a political party as a mere conduit."¹⁸⁹ As the Eighth Circuit explained, "it would be illegal under Missouri law for an individual and a political party secretly to agree that the party would pass along the individual's contribution to a candidate after that individual had already

183. *Missouri Republican Party I*, 227 F.3d at 1073.

184. *Id.* (quoting *Shrink Missouri*, 528 U.S. at 378).

185. *Id.*

186. *Id.*

187. *Id.*

188. The court of appeals recognized that *Buckley* had upheld a \$25,000 limit on total individual contributions to federal candidates, national party committees and other political committees on the ground of preventing evasion of the federal \$1,000 limit on individual contributions to candidates. 227 F.3d at 1073 (citing *Buckley*, 424 U.S. at 38). *Buckley*, however, did not provide any authority for limiting the size of contributions made by political parties to their candidates. As the Eighth Circuit explained, *Buckley* "upheld a limitation on the total amount that any one person could contribute on the ground that it would keep individuals from circumventing the limits on giving to any one candidate." *Id.* (citing *Buckley*, 424 U.S. at 38). In the case of Missouri's "contribution" limit, however, "the challenged restriction is on the party's giving, and the [government] seek[s] to justify it on the ground that it would keep individuals from doing an end run around limits on their own giving." *Id.* As the Eighth Circuit held, imposing "burdens [on] the free speech rights of political parties in order to control the activities of someone else [an individual contributor]" is "something quite different from what *Buckley* approved." *Id.*

189. *Missouri Republican Party I*, 227 F.3d at 1073.

contributed the statutory maximum,” and any such “earmarked” contribution would be subject to the limits on individual contributions.¹⁹⁰

2. Missouri Republican Party II

After the Supreme Court held in *Colorado II* that federal limits on a political party’s coordinated expenditures are valid on their face, it granted Missouri’s petition for certiorari and vacated the court of appeals’ September 11, 2,000, judgment.¹⁹¹ On remand, the Eighth Circuit reversed course.¹⁹²

Colorado II upheld, on their face, federal coordinated expenditure limits for the 2000 Senate elections, which ranged from a high of \$1,636,438 to a low of \$67,560, but it did not consider the specific coordinated expenditure limits for Missouri or any other state.¹⁹³ In the 2002 Missouri general election, the federal limit on a political party’s coordinated expenditures to support its candidate for the United States Senate was \$603,576.¹⁹⁴ The state limit on a political party’s cash contributions to a candidate for statewide office was \$11,675 and the limit on a party’s in-kind contributions was also \$11,675.¹⁹⁵

Even though the federal limit on coordinated expenditures was more than twenty-five times higher than the combined \$23,350 state law limit on cash and in-kind contributions, the court of appeals held simply that *Colorado II* “establishes as a matter of law the constitutionality” of the Missouri contribution limits.¹⁹⁶ It did not make the state produce any evidence that party contributions in any amount had ever caused any problems in Missouri elections. The court of appeals did not determine the actual effect of the party limits on state political parties. The court of appeals did not distinguish limits on cash contributions and limits on in-kind support.

Although the MRP argued that there was “no evidence . . . that parties’

190. *Id.*

191. *Nixon v. Mo. Republican Party*, 533 U.S. 945 (2001).

192. *Missouri Republican Party II*, 270 F.3d 567 (8th Cir. 2001).

193. 533 U.S. 431, 439 n.3.

194. The coordinated party expenditure limit for 2002 Senate nominees in Missouri was \$301,788. Coordinated Party Expenditure Limits for 2002 Senate Nominees, 28 FEC RECORD 15 (Mar. 2002). Both the national committee of a political party and the state committee could spend this sum, 11 C.F.R. § 110.7, and, as a result, the actual limit that a party could spend in the 2002 general election to support its Senate candidate was doubled to \$603,576. The state committee and the national committee can designate a common agent for the purpose of spending their allotments. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 42 (1981).

195. *See supra* text accompanying notes 140-41.

196. *Missouri Republican Party II*, 270 F.3d at 570.

contributions are in fact being used to circumvent [state limits] on contributions by individuals,” the state did not have to justify the party limits by showing “that circumvention is actually occurring in Missouri.”¹⁹⁷ The court of appeals held that “the factual record developed in *Colorado II*” was sufficient to sustain the state limits on party contributions and that “no predicate record-making by the state of Missouri is necessary before the validity of its statute can be established.”¹⁹⁸ The state, under *City of Renton v. Playtime Theatres, Inc.*,¹⁹⁹ could rely on evidence in *Colorado II* that (1) circumvention was a problem in federal elections and (2) that prohibitions against earmarking were not adequate means of preventing this problem in federal elections.²⁰⁰

The court of appeals’ decision to excuse Missouri from any duty to demonstrate that the party contribution limits address any real problem in state elections is a direct product of *Shrink Missouri*. Although the Supreme Court claimed in *Shrink Missouri* that it had “never accepted mere conjecture as adequate to carry a First Amendment burden,”²⁰¹ the Eighth Circuit correctly took this disclaimer with a grain of salt. The court of appeals implicitly recognized that *Shrink Missouri* had not required the state to produce any evidence that individual contributions in excess of \$1,075 caused any real harm.²⁰²

In *Shrink Missouri*, the Supreme Court invoked its decision in *Renton* that a legislature can borrow relevant evidence and permitted Missouri to justify its \$1,075 limit on individual contributions on the basis of evidence supporting a \$1,000 federal limit on individual contributions upheld in *Buckley* in 1976.²⁰³ Any analogy between the state and federal contribution limits was at best superficial. Taking inflation into account, a campaign contribution of \$1,075 in 1997 was the equivalent of only \$378 in 1976 dollars—that is—\$1,075 bought only the same amount of goods and

197. *Id.*

198. *Id.* at 570-71.

199. 475 U.S. 41 (1986).

200. *Missouri Republican Party II*, 270 F.3d at 570.

201. *Shrink Missouri*, 528 U.S. at 392. See *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 312 (2000) (Souter, J., concurring in part and dissenting in part) (making same assertion); *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 822 (2000) (stating that government “must present more than anecdote and supposition”).

202. See *supra* text accompanying notes 41-60.

203. *Shrink Missouri*, 528 U.S. at 393. The Court permitted Missouri under *Renton* to rely on evidence before Congress, only as “substantiated” by Missouri’s own evidence of harm in state elections. *Id.* at 393-94 & n.6. Here, however, the court of appeals excused Missouri from making any record to show that donors made contributions to political parties to circumvent limits on direct contributions to candidates.

services that \$378 purchased in 1976.²⁰⁴ Buckley's \$1,000 contribution limit would have been \$2,840 in 1997 when adjusted for inflation; it would have taken \$2,840 to buy the same amount of goods that \$1,000 bought in 1976.²⁰⁵ Just as the Supreme Court did not address the question whether a \$1,000 contribution in 1976 and a \$1,075 contribution in 1997 had the same capacity to cause corruption or the appearance of corruption, the court of appeals did not pause to consider the fact that the federal limit on coordinated expenditures was more than twenty-five times higher than the state party contribution limit. Instead, it tacitly speculated that political party contributions of more than \$23,350 cause the same problems of circumvention in state elections as coordinated expenditures in excess of \$603,576.

In holding that Missouri could rely on "evidence" in *Colorado II* that prohibitions against earmarking were not an adequate means to prevent party contributions from being used to circumvent individual contribution limits, the court of appeals piled speculation on speculation. Although it is well-settled that government has the burden of proof,²⁰⁶ *Colorado II* excused the FEC from making any showing that the federal anti-earmarking provision would not be effective.²⁰⁷ On the basis of *Colorado II*, the court of appeals in turn excused Missouri from making any showing that it had tried to enforce the state law prohibitions against earmarking or that enforcement had not been effective.²⁰⁸

In addition to relieving the state of any burdens of demonstrating either that circumvention is a problem in state elections or that its prohibition against earmarking is ineffective, the court of appeals did not determine "[t]he degree to which speech is suppressed . . . under [the state's] particular regulatory scheme."²⁰⁹ Without acknowledging that the federal limit on coordinated expenditures in Missouri (\$603,576) was twenty-five times higher than the combined \$23,350 state limit on a party's cash and in-kind contributions, the court of appeals simply characterized the

204. La Pierre, *supra* note 37, at 718.

205. *Id.*

206. *See Playboy Entm't Group*, 529 U.S. at 816 ("When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals.")

207. 533 U.S. at 462.

208. 270 F.3d at 570 (stating that "the factual record developed in *Colorado II* suffices to justify Missouri's conclusion that means other than its earmarking prohibition are necessary to prevent circumvention").

209. *Lorillard Tobacco v. Reilly*, 533 U.S. 525, 563 (2001) (citing *Renton*, 475 U.S. at 53-54, and finding that a prohibition against tobacco advertisements within 1000 feet of a school may suppress significantly greater amounts of commercial speech in urban areas than in rural or suburban areas).

Missouri party limits as “much lower.”²¹⁰ It then asserted that “[n]othing in this record would indicate” that the Missouri party limits are “so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.”²¹¹ Given the posture of the case, there was no basis for the court of appeals’ assertion about the allegedly limited effects of the Missouri party limits.²¹² More importantly, the court’s reliance on the *Shrink Missouri* test of the effects of contribution limits on *candidates* ignored the critical issue in the case: the effects of the cash and in-kind limits on the ability of a *political party* to compete for control of state government and to implement party policies.²¹³

Although the court of appeals initially held that state law limits on in-kind contributions, as well as on cash contributions, were unconstitutional, it did not make this distinction on remand.²¹⁴ In-kind contributions are primarily the party’s own speech because the party controls the in-kind support that it provides to its candidates. *Colorado II* addressed some evidence about coordinated expenditures or cash contributions, but it apparently did not have any occasion to consider in-kind assistance like polling data, office space and equipment, campaign planning, advice about media relations, and information about designing and producing campaign materials.²¹⁵ The court of appeals’ indiscriminate decision upholding limits on in-kind contributions, as well as limits on cash contributions, ignores the warning in *Colorado II* that party contribution limits may be invalid as applied to expenditures that involve more of the party’s own speech than payment of a candidate’s bills.²¹⁶ The Eighth Circuit’s decision upholding limits on in-kind contributions and expenditures will have a substantial—

210. *Missouri Republican Party II*, 270 F.3d at 571.

211. *Missouri Republican Party II*, 270 F.3d at 571 (quoting *Shrink Missouri*, 528 U.S. at 397).

212. This assertion about the allegedly limited effects of the Missouri party limits ignored the fact that the district court’s decision to grant the state’s motion for summary judgment had cut short the development of the record. The court of appeals, moreover, never had any occasion to review completely the limited district court record. It held initially that the Missouri party limits were unconstitutional “on their face.” *Missouri Republican Party I*, 227 F.3d at 1074. It found that “the record is wholly devoid of any evidence that limiting parties’ campaign contributions will either reduce corruption or measurably decrease the number of occasions on which limitations on individuals’ campaign contributions are circumvented.” *Id.* Thus, the court of appeals never had any occasion to consider the effects of the party limits on the MRP.

213. For an assessment of the court of appeals’ claim that a political party’s ability to make unlimited independent expenditures offsets the burdens imposed by the party contribution limits, see *infra* text accompanying notes 271-75.

214. Compare *Missouri Republican Party I*, 227 F.3d at 1073-74, with *Missouri Republican Party, II*, 270 F.3d 567.

215. See *Colorado II*, 533 U.S. 431.

216. *Colorado II*, 533 U.S. at 456 n.17; see *id.* at 469 n.2 (Thomas, J., dissenting).

but never considered—effect on party expenditures that are more the party’s own speech than the payment of its candidates’ bills.²¹⁷

D. Erosion of First Amendment Protection of Political Speech

The Eighth Circuit’s second decision upholding the Missouri party contribution limits demonstrates that *Shrink Missouri* and *Colorado II* have significantly eroded First Amendment protection of political speech. The court of appeals did not make a case-specific inquiry whether the Missouri party limits are “closely drawn” to match a “sufficiently important” interest.²¹⁸ It did not determine “[t]he degree to which speech is suppressed . . . under [the Missouri] regulatory scheme.”²¹⁹ It assumed, simply, that “the factual record developed in *Colorado II*,” which would justify a \$603,576 federal limit on coordinated expenditures, justifies state limits of \$11,675 on a political party’s cash and in-kind contributions.²²⁰

If the court of appeals had put Missouri to the task of justifying the state limits on party contributions, it would have seen that the speculative benefits of regulation come at a very high First Amendment price. The party limits severely burden the MRP’s ability to provide seed money to its candidates, to recruit candidates, to present its candidates as a united team or ticket, to target elections, to provide in-kind support to its candidates, and to make coordinated contributions or expenditures. These burdens have a systemwide effect of suppressing political advocacy because the goal of a political party is systemwide—to take control of state government and implement party policies on a systemwide (statewide) basis.

1. A Record “Wholly Devoid” of Any Evidence That Party Contributions Cause Any Harm

The court of appeals’ initial finding is correct: “the record is wholly devoid of any evidence that limiting parties’ campaign contributions will either reduce corruption or measurably decrease the number of occasions on which limitations on individuals’ campaign contributions are circumvented.”²²¹ There is, put simply, no evidence that contributions

217. See *infra* text accompanying notes 279-85.

218. *Colorado II*, 533 U.S. at 456 (internal quotation marks omitted) (citing *Shrink Missouri*, 528 U.S. at 387-88 (quoting *Buckley*, 424 U.S. at 25)).

219. *Lorillard Tobacco Co.*, 533 U.S. at 563.

220. *Missouri Republican Party II*, 270 F.3d at 570.

221. *Missouri Republican Party I*, 227 F.3d at 1073.

made by political parties to their candidates cause corruption or even an appearance of corruption in Missouri elections.

Colorado II does not fill this evidentiary void. The Supreme Court expressly declined to reach any argument that limits on coordinated expenditures could be “justified by a concern with *quid pro quo* arrangements and similar corrupting relationships between candidates and parties themselves.”²²² *Colorado II* upheld federal limits on coordinated expenditures solely on the ground of “minimiz[ing] circumvention of contribution limits,”²²³ but the “evidence” supporting these federal limits does not support state limits on party contributions.

a. No Evidence That Party Contributions Cause Corruption or the Appearance of Corruption in Missouri Elections

When Missouri first imposed contribution limits in 1994, it did not have any evidence that campaign contributions had caused any real harm in state elections. There was no evidence that individual contributions to candidates caused either corruption or the appearance of corruption.²²⁴ The Joint Committee on Campaign Finance Reform, which drafted 1994 contribution limits, did not consider any specific evidence that party contributions (cash or in-kind) caused corruption or the appearance of corruption.²²⁵ The Joint Committee prepared graphs breaking out the number and amount of contributions made by individuals, political action committees, corporations, and labor unions in seven previous elections, but it did not consider political party contributions in any one of these seven elections.²²⁶

After the Joint Committee set limits on individual contributions, it set the party limits at “ten times” the individual limits.²²⁷ Although the legislative history might be read to support the suggestion that the Joint Committee tried to avoid interference with state political parties by setting the party limits above the amounts of contributions made by political parties in previous elections, the multiplier appears to be just a convenient number, picked out of thin air. There was no analysis of a threshold for

222. *Colorado II*, 533 U.S. at 456 n.18.

223. *Id.* at 465.

224. See La Pierre, *supra* note 37, at 713-18.

225. Records of this state legislative committee are on file with the author.

226. See *supra* note 225. The committee examined contribution data in a gubernatorial primary election, a senate election and a house election in a rural district, a senate election and a house election in an urban district, a senate special election, and a house special election.

227. See *supra* text accompanying note 140.

corruption or the appearance of corruption.

During the course of the litigation, the state did not produce any post-enactment evidence that party contributions cause corruption or the appearance of corruption. Indeed, as one member of the panel observed in the first opinion, Missouri did not even attempt to justify the party limits on the ground that a political party's contributions to its candidates cause corruption or create the appearance of corruption.²²⁸ It is, of course, hardly surprising that Missouri could not produce any evidence that party contributions corrupt the party's candidates or give rise to public perceptions of corruption: "[t]he very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office, . . . his votes."²²⁹

b. No Evidence That Party Contributions Are Used to Circumvent Limits on Individual Contributions

Just as there is no evidence that the state legislature set the party limits with an eye to preventing corruption or the appearance of corruption, there is also no evidence that the legislature even considered the question whether party contributions could be used to circumvent the newly imposed limits on contributions by individuals and political action committees. Any suggestion that the state imposed party contribution limits to prevent an end run around individual limits is negated by the fact that the statute expressly provides a means for these donors to provide substantial support, in excess of the limits on individual contributions, to the set of the candidates targeted by a political party.²³⁰

228. *Missouri Republican Party II*, 227 F.3d at 1076 n.1 (Gibson, J., concurring & dissenting).

229. *Colorado I*, 518 U.S. at 646 (Thomas, J., Rehnquist, C.J., & Scalia, J., concurring in the judgment and dissenting in part).

230. Each political party can establish as many as 362 political party committees, and each of these committees can make the maximum cash and in-kind "contribution" to candidate. *See supra* note 136 and accompanying text. A donor cannot compel anyone of these political party committees to support a particular candidate, but a political party and its political party committees may share the view that particular races are important and that the party's candidate should receive support. As the district court found, "determined contributors," given multiple political party committees sharing views about important elections and targeted candidates, can "easily circumvent the individual limits" and provide substantial support, in excess of the limits on individual contributions, to the set of candidates targeted by a political party. *Mo. Republican Party v. Lamb*, 87 F. Supp. 912, 916 & n.5 (E.D. Mo. 2000) (denying Missouri's motion to vacate preliminary injunction).

For example, in the 2002 general election, an individual who wanted to contribute \$59,550 to a statewide candidate of a political party could have made a direct contribution of \$1,175 to the candidate, *see supra* note 135 and accompanying text, and could also have written five checks in the amount of \$11,675, *see supra* note 140 and accompanying text, payable to five different political party committees—the party's state committee, one of its congressional district committees, one of its state

The court of appeals' speculation that the concerns in *Colorado II* about circumvention of federal limits apply equally to state limits is just that: speculation.²³¹ The weak evidence that funneling is a problem at the federal level falls far short of establishing that there is an analogous problem at the state level.²³² There are significant differences between federal and state regulatory schemes, and corporations and unions have less incentive to use political parties to skirt state limits, as opposed to federal limits, on campaign contributions. Moreover, even though the Supreme Court assumed that donors "use parties as conduits for contributions meant to place candidates under obligation,"²³³ there is countervailing evidence that state parties are not willing to be used in this fashion and that they exercise independent judgment over the use of funds contributed to the party. Given these differences, *Colorado II's* untested assumption that anti-earmarking provisions are not an effective means to prevent circumvention of contribution limits has little office in evaluating Missouri's party limits.

Federal and state campaign finance regulations do not establish the same incentives for potential donors to use political parties to circumvent campaign contribution limits. Missouri, for example, does not prohibit either corporate or union contributions to candidates, and it does not impose any limits on the amount of money that individuals, corporations, unions, PACs or others can contribute to political parties.²³⁴ Federal law, however, prohibits corporations and unions from using funds in their corporate treasuries to contribute to or to make expenditures in connection with any campaign for federal office.²³⁵ Federal law also limits the amount of money that individuals can contribute to political parties for federal elections.²³⁶ Since corporations and unions can contribute directly to state

senatorial district committees, one of its state representative district committees, and one of its county committees. Although the contributor could not have required anyone of these five committees to support any particular candidate, each committee could have contributed up to \$11,675 to the candidate who inspired the contribution. Given a multitude of political party committee sharing views about important elections and targeted candidates, limits on contributions made by a political party committee to its candidate do not prevent evasion of limits on individual contributions to candidates.

231. See *supra* notes 197-213 and accompanying text.

232. See *Colorado II*, 533 U.S. at 457-60; see *supra* text accompanying notes 107-21.

233. *Colorado II*, 533 U.S. at 452.

234. Missouri allows all "persons," including corporations and unions, subject to the limits upheld in *Shrink Missouri*, 528 U.S. 377, to make campaign contributions to candidates. See MO. REV. STAT. § 130.032.1 (2000) (limiting campaign contributions by "persons" other than the candidate); see *id.* § 130.011(22) (defining the term "person" to include corporations and unions).

235. See *Mariani v. United States*, 212 F.3d 761, 769-70 (3d Cir. 2000), *cert. denied*, 531 U.S. 1010 (2000).

236. Although corporations and unions cannot make so-called "hard money" contributions to

candidates, they can obtain “credit” for their support directly and do not need to use political party as an intermediary, except to the extent that like individuals, they want to make contributions in excess of the applicable limits.

Some donors, of course, may be tempted to try to use political parties to funnel contributions in excess of the limits to particular state candidates, and the Supreme Court asserted in *Colorado II* that “whether they like it or not, [parties] act as agents for spending on behalf of those who seek to produce obligated officeholders.”²³⁷ The Court did not point to any evidence that political parties are the witting or unwitting tools of donors. Instead, its assertions that political parties are donors’ agents and parties are “necessarily the instruments” of donors rest on two assumptions—that parties do donors’ bidding and that candidates can easily trace party contributions back to particular donors.²³⁸

These two assumptions are at odds with the evidence from Missouri. At least in the case of the MRP, the sworn testimony of party officials shows that the chain of connection from the donor through the party to a candidate is not as unbroken or direct as the *Colorado II* Court claims. Even if the description of the MRP’s practices overstates the degree to which the party exercises independent judgment about the use of contributions, this evidence strongly suggests that the court of appeals’ tacit speculation that the problems of circumvention in federal elections have a counterpart in state elections is, at best, simplistic.

The MRP does not permit individuals, corporations, or unions to funnel contributions to particular candidates.²³⁹ Instead, to ensure that the party’s funds are spent to achieve the party’s goal of obtaining control of the government, the MRP exercises independent judgment about the expenditure of all funds contributed to the party. The party also recognizes that if it does not exercise independent judgment, then a contribution made through a political party committee to a candidate would be illegal to the

political parties for use on behalf of federal candidates, they could, prior to the effective of the 2002 BCRA amendments, make unlimited “soft money” contributions to political parties for other purposes such as issue advocacy. *See Mariani*, 212 F.3d at 767-68. *See infra* notes 325-29 and accompanying text.

237. *Colorado II*, 533 U.S. at 452.

238. *Colorado II*, 533 U.S. at 451-52 (holding that political “[p]arties are thus necessarily the instruments of some contributors whose object is not to support the party’s message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one, narrow issue, or even to support any candidate who will be obliged to the contributors”).

239. *Dep. of John Hancock at 93, Mo. Republican Party v. Lamb*, 100 F. Supp. 2d 990 (E.D. Mo. 2000) (No. 4-98CV-01909 CDP).

extent that it exceeded the applicable limit on individual contributions.²⁴⁰

Donors discuss candidates, pending elections, party strategy and goals, and the political environment with the MRP's staff and officials. In the experience of the party's Executive Director, donors rarely attempt to dictate allocation of their contributions to specific candidates.²⁴¹ Some donors, nonetheless, may express interest in seeing party support for candidates in races that are obviously very important and that the MRP has targeted. Even when the MRP and a donor share an interest in a targeted election, the party exercises independent judgment about how to use the donor's contribution to reach the party's objectives.

If, for example, an individual, a union, or a corporation contributed \$10,000 to the MRP and expressed an interest in a particular candidate, the MRP would not give that sum to the candidate simply because the party had decided to target the election. The party would decide independently how much support it should provide to the candidate and whether, depending on the strength and needs of the candidate's campaign, it should provide in-kind or cash support. The MRP would also decide the timing of the support, and it would discuss with the candidate the use of the party's resources. The MRP would not provide any additional support to the candidate if it determined later in the election cycle that the race had already been won or lost and that it should no longer target the election.²⁴²

Just as individuals who make contributions to the MRP cannot ensure that their funds will be directed to any particular candidate, candidates cannot trace to any particular donor support provided by the party. Although there was evidence in federal elections that some contributions to political parties are "tallied" or "earmarked" for particular candidates,²⁴³ there is no evidence of any analogous practice at the state level. There is no direct connection between any contribution to the MRP and the support provided by the party to a particular candidate, and, therefore, a candidate cannot trace to any particular donor support provided by the party. The recipient, at most, is beholding to the party, and not to the party's donors.

240. *Id.* ¶ 86-97.

241. *Id.* ¶ 86. If a hypothetical donor insisted that the MRP funnel a contribution to a particular candidate, the MRP would not accept the contribution. *Id.* ¶ 89. One, two, or even a handful of contributions that appeared to have been funneled through a political party to a particular candidate would at most prove that an individual party official had made isolated mistakes.

242. *Id.* ¶¶ 68, 89-90.

243. *See supra* text accompanying notes 110-16.

Party contributions, in short, do not present the same circumvention problems at the state and federal level. Donors have less incentive to use parties to circumvent state limits, as opposed to federal limits, on direct contributions to candidates. The assumption in *Colorado II* that parties are merely agents of donors is undercut by evidence that the MRP exercises independent judgment about the expenditures of funds contributed to the party. Given these differences, there was no reason for the court of appeals to reject its initial determination that “Missouri already had a law that prohibited earmarking agreements.”²⁴⁴ Even if the *Colorado II* Court is correct that the federal anti-earmarking provision is not effective at the federal level, there is no reason to assume that an anti-earmarking provision would be ineffective at the state level in dealing with the problem on a smaller dimension.²⁴⁵

2. *Contribution Limits Impose Substantial Burdens on State Political Parties*

Although the benefits of limiting party contributions are, at best, speculative, the First Amendment costs of regulation to state political parties, as well as their candidates and supporters, are quite real and very substantial. The party limits prevent the MRP from targeting its financial support on candidates whose success is necessary for the party to take control of state government. The party limits force the MRP to make independent expenditures, which are less effective than coordinated expenditures, to support its candidates. The party limits impose substantial burdens on the MRP’s ability to make critical in-kind contributions to its candidates. The party contributions limits will force Missouri political parties to support their candidates through devices and stratagems that are not as open and visible as direct contributions and that are not subject to the same ready measure of accountability.

Missouri’s party contribution limits have a much more severe effect on political parties than the federal limits on coordinated spending upheld in *Colorado II*. In the 2002 general election for a statewide candidate, the combined \$23,350 state limit on cash and in-kind contributions was about one-twenty-fifth of the federal limit, \$603,586, on party coordinated expenditures.²⁴⁶ In terms of limits on individual contributions, a state \$40

244. *Missouri Republican Party II*, 270 F.3d at 570.

245. See *Colorado II*, 533 U.S. at 462; *supra* note 119 and accompanying text.

246. The “aggregate cap,” the sum of the maximum cash and in-kind contribution that a political party committee could make to a statewide candidate in the 2002 primary and general election, was

limit would be one-twenty-fifth of the \$1,000 limit upheld in *Buckley*. The Supreme Court's determination in *Colorado II* that coordinated expenditure limits do not impose a unique burden on political parties in federal elections²⁴⁷ does not excuse the Eighth Circuit's failure to consider the burdens that Missouri's much lower party contribution limits impose on political parties in state elections.

In fact, restrictions on the amount of support provided directly by a party to its candidates have a much greater effect on Missouri political parties than on national political parties. At the federal level, so-called "soft money" was a major spending mechanism of political parties,²⁴⁸ and before the Bipartisan Campaign Reform Act's near complete prohibition of soft money,²⁴⁹ the limits on coordinated expenditures upheld in *Colorado II* may not have a major impact on national political parties in federal elections.²⁵⁰ Under Missouri law, however, there is no such thing as state "soft money."²⁵¹ Instead of supporting candidates indirectly through issue advertisements financed by soft money, the MRP and other state political parties support their candidates directly through cash and in-kind contributions. Most of the MRP's state candidates have far less experience than candidates for federal office and, consequently, need much more cash and in-kind assistance from the party than more experienced and seasoned candidates for federal office.²⁵²

\$46,700. See *supra* notes 140-42 and accompanying text. This sum includes a \$11,675 cash contribution and a \$11,675 in-kind contribution in a contested primary election and the identical amounts of cash and in-kind contributions in the general election. The "aggregate cap" is not the correct measure of the effect of the limits on state political parties because it combines the primary and general election limits and ignores the effect of the limits on the party's ability to support its candidates in the general election. Primary contributions and general election contributions are not fungible. Although the MRP, for example, does make contributions in some primary elections, the general election is the main event in the contest for control of state government, and contributions made long before any party has selected a standard bearer are not as effective as contributions made in the general election itself. With the exception of seed money, the MRP provides most of its support in the final weeks of the general election campaign when it has made a complete investigation of the strengths and weaknesses of its candidates and their opponents, determined its candidates' needs for cash and in-kind support, and assessed the likelihood that party support for particular candidates will help the party take control of state government.

247. 533 U.S. at 447-56.

248. See *infra* text accompanying notes 325-34.

249. See *infra* text accompanying notes 347-60.

250. See Michael J. Malbin, *Practical Effects of the Colorado Decision: More Questions Than Answers* (June 26, 2001) (An Analysis From the Campaign Finance Institute).

251. See *supra* notes 136-43 and accompanying text.

252. Hancock Aff. 2 ¶¶ 43-48.

a. Contribution Limits Prevent Political Parties from Targeting Elections Necessary to Take Control of State Government

The MRP's support of Republican candidates in targeted races is critically important because success in these races is the means to achieve the party's goal—taking control of state government. Regardless of the size of the party's treasury, spending large sums on a small group of candidates is normally more important than spending small sums on a large group of candidates.²⁵³ The Missouri party contribution limits will have a severe effect on the MRP's ability to target its financial support. In every targeted race from 1988 to 2001 with the exception of 1996 (when the party limits were in effect), the MRP's support for targeted Republican candidates far surpassed the limits.²⁵⁴ Now, the party limits will force the MRP to spread its support among a large group of candidates instead of concentrating its support on the elections that are critical to taking control of state government. In the words of the party's Executive Director, "the party limits may force [us] to put fertilizer on places where there is already green grass or on places where grass has never grown instead of places where the party knows that grass can grow."²⁵⁵

The party limits effect the ability of both the Missouri Republican Party and the Missouri Democratic Party to target elections, but targeting is probably more important to the party that is out of power.²⁵⁶ Winning or losing one or two targeted races can spell the difference between remaining the minority party or taking control of one house in the state legislature.²⁵⁷ In the 2001 special elections, for example, the MRP,

253. MICHAEL J. MALBIN & THOMAS L. GAIS, *THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES* 158 (1998) ("Political parties . . . consistently gave disproportionately to candidates who were in close races, especially challengers and open-seat candidates. Party spending, therefore, seems to be an important vehicle for satisfying one of the two major goals of campaign finance reform: encouraging electoral competition.")

254. Hancock Aff. 1 ¶ 32.

255. Hancock Aff. 1 ¶ 17b.

256. Incumbents have a substantial advantage. The majority party simply needs to keep the seats its incumbents already hold. The minority party, however, has to win seats held by the opposition to obtain control of government. If the majority party has only a small margin of control, or if there is a substantial number of open legislative seats, targeting is probably important for both parties. Hancock Aff. 1 ¶¶ 11-15.

257. Targeting scarce resources on important elections may also be important to small parties. In the 2002 election, the Green Party had seven candidates on state and local ballots. The statewide race for state auditor was probably the Green Party's most important contest. The Republicans had disavowed their nominee who was a convicted felon, *see supra* text accompanying note 163, and the Green Party hoped that voters would see their nominee as the best alternative to the Democratic candidate. Although the Green Party's candidate had no real chance of winning, it was very important for this small party to make a strong showing in the state auditor election. If the Green Party garnered

targeted two of three senate seats, and it gained control of the state senate for the first time since 1948.

Although the MRP's efforts in 1998 and 2000 to target elections and take control of the state senate were not successful, a special election for three senate seats in January 2001 gave the Republicans a new opportunity.²⁵⁸ The party targeted two rural elections, and it essentially conceded a third contest in the 4th Senate District in heavily democratic St. Louis City. The MRP targeted the 12th State Senate District, where it believed that the Republican candidate had a good chance of victory, and it also targeted the 18th State Senate District, where its candidate was at least initially a substantial underdog.

The party's candidates won both of the targeted elections.²⁵⁹ In the 12th State Senate District, the Republican, state representative David Klindt, defeated his Democratic opponent, State Representative Randall Relford, by a vote of 16,937 to 8,678.²⁶⁰ In the 18th State Senate District, the Republican John W. Cauthorn defeated State Representative Robert Clayton III in a close vote of 18,502 to 15,658.²⁶¹ By winning these two elections, the MRP took control of the state senate (by an 18-16 margin) for the first time since 1948, and Republican state Senator Peter Kinder, who was subsequently elected as president pro tem to lead the senate, claimed that these two victories ensured the MRP "a seat at the table" on budget issues and on state and federal redistricting under the 2000 census.²⁶²

at least two percent of the statewide vote, it, like the Missouri Republican Party, the Missouri Democratic Party, and the Missouri Libertarian Party, would earn automatic ballot access as an "established political party." Mo. Rev. Stat. § 115.317 (2000); *see id.* § 115.031(10) (defining an "established political party"). In the absence of party limits, the Green Party could have concentrated all its resources on this goal. *See* Jo Mannies, *Auditor's Race May Help Green Party Secure Spot on Ballot in Missouri*, ST. LOUIS POST-DISPATCH, Aug. 25, 2002, at C2. In the election, the Green Party's candidate fell short of the goal and garnered only 1.3% of the state wide vote. *See* <http://www.sos.state.mo.us/enrweb/stateresultsprinter.asp?eid=87> (last visited Jan. 3, 2003).

258. *See supra* notes 155-58 and accompanying text.

259. In the third untargeted election, the Democratic candidate, Patrick Dougherty, handily defeated the Republican candidate Dwight Billingsly, by a vote of 6539 to 1257. *See* <http://www.sos.state.mo.us/enrweb/raceresults.asp?eid=49&oid=14913&arc=1> (last visited Jan. 3, 2003).

260. *See* <http://www.sos.state.mo.us/enrweb/raceresults.asp?eid=50&oid=15526&arc=1> (last visited Jan. 3, 2003). *See also* Bill Bell, Jr., *Power Struggle for State Senate Includes Fight in 12th District*, ST. LOUIS POST-DISPATCH, Jan. 22, 2001, at C1.

261. *See* <http://www.sos.state.mo.us/enrweb/raceresults.asp?eid=51&oid=15537&arc=1> (last visited Jan. 3, 2003); *see* Eric Stern, *Senate Race in Northeast Missouri Focuses on Guns, Abortion*, ST. LOUIS POST-DISPATCH, Jan. 19, 2001, at C4.

262. Ganey, *GOP Will Control State Senate for First Time in 52 Years*, ST. LOUIS POST-DISPATCH, Jan. 25, 2001, at A1; Terry Ganey, *A 'New' Peter Kinder Holds the Reins in State Senate*, ST. LOUIS POST-DISPATCH, Feb. 10, 2001, at A1; Capitol Briefs, *Republicans Officially Take Reins of*

In the critical 18th State Senate District contest between the Republican Cauthorn and the Democrat Clayton, each party, given the court of appeals' injunction barring enforcement of the party limits,²⁶³ contributed more than \$300,000 to its candidate.²⁶⁴ The MRP's Executive Director, John Hancock, strongly believes that the Republicans would not have succeeded in their efforts to take control of the Missouri Senate if the party limits had been in force.²⁶⁵ The 18th Senate District was historically a Democratic stronghold. Robert Clayton, the Democratic candidate was an incumbent state representative. His father was a well-known circuit court judge, and Clayton enjoyed a 60% name awareness rating. Cauthorn, the Republican candidate, had never run for office, and he started with a 14% awareness rating. To overcome the Democratic candidate's advantages, the MRP spent over \$300,000 to support its candidate. Most of these expenditures were cash contributions to the candidate's campaign, and party officials and the candidate discussed carefully how the money would be spent. In addition to cash contributions, the party's in-kind expenditures also exceeded the state limit. The party, for example, paid the salary of the candidate's finance director and research director, and it also helped teach its novice candidate how to campaign.²⁶⁶ Even though the Democrats matched the Republicans' spending, the absence of party contribution limits permits each party to present its strongest case and gives the public the maximum opportunity to make an informed choice.

After the MRP took control of the state Senate in January 2001, it tried to duplicate its success in the other chamber of the legislature. The party focused on August 7, 2001, special elections for the Missouri House of Representatives and targeted two of the three seats at stake.²⁶⁷ Although winning the two targeted races would not have resulted in an immediate take-over of the House of Representatives, the party hoped to lay the groundwork for gaining control in the 2002 elections. The party designed, printed and mailed campaign brochures, helped solicit campaign contributions, created and implemented direct voter contact programs, prepared large scale get-out-the vote drives, and hired a campaign expert to assist the candidates. By late June 2001, the MRP's in-kind expenditures already exceeded the \$2,800 statutory limit in both of the

Senate, ST. LOUIS POST-DISPATCH, Feb. 6, 2001, at B4.

263. *See supra* note 181.

264. *See* Ganey, *supra* note 262, at A1.

265. Hancock Aff. 2 ¶¶ 10, 16.

266. *Id.* ¶¶ 11-16.

267. *Id.* ¶¶ 20-25.

targeted August 7, 2001, special election races.

The party had to curtail its in-kind support for the two targeted candidates after the Supreme Court's *Colorado II* decision on June 25, 2001, and its June 29, 2000, decision vacating the court of appeals' initial decision striking down the Missouri party contribution limits.²⁶⁸ Even though injunctions barring enforcement of the party limits remained in effect, the Missouri Attorney General threatened to enforce the party limits.²⁶⁹ Faced with the uncertainty created by the Attorney General's threats, the MRP complied with the party limits. It ultimately won only one of the two targeted elections, and the Democrats expanded their margin of control in the state House of Representatives.²⁷⁰

b. Contribution Limits Force Political Parties to Work at Arm's Length from Their Candidates

In addition to preventing political parties from concentrating their resources on targeted elections critical to taking control of state government, Missouri's party contribution limits force parties to work at arm's length from their candidates. When a political party reaches the state limit on coordinated cash expenditures and contributions, it can support its candidates only by making independent expenditures, and it must cut-off completely all in-kind contributions.²⁷¹

Although the court of appeals did not assess the actual effects of the party contribution limits, it claimed that political parties would still "have substantial avenues for expressing [their] support of [their] candidates and for maintaining a political and ideological solidarity with" them by making independent expenditures.²⁷² It is true, as the court of appeals recognized, that a state political party, "may 'spend money in support of a candidate without legal limit so long as it spends independently.'"²⁷³

268. See *supra* note 191 and accompanying text.

269. Jo Mannies, *Supreme Court Backs State Limits on Party Spending on Candidates*, ST. LOUIS POST-DISPATCH, June 30, 2001, at A7; Jo Mannies, *Contribution Limit Ruling Has State Parties in a Quandary*, ST. LOUIS POST-DISPATCH, July 1, 2001, at E2.

270. Eric Stern, *Democrats Win 2 of 3 Special House Elections in Missouri*, ST. LOUIS POST-DISPATCH, Aug. 8, 2001, at B1.

271. Independent expenditures are not a substitute for in-kind contributions because a party cannot provide in-kind support "independently" to its candidates. A party, for example, can provide assistance in campaign and finance planning, voter and contributor lists, and research about the opposing party only by coordinating with its candidates. See *infra* text accompanying notes 279-85 (discussing effects of party limits on in-kind contributions).

272. *Missouri Republican Party II*, 270 F.3d at 571.

273. *Id.* (quoting *Colorado II*, 533 U.S. at 455); see *infra* text accompanying notes 359-60 (discussing new limits on political parties' independent expenditures in federal elections).

Independent expenditures and coordinated cash expenditures or contributions, however, are not fungible. Even though parties can spend unlimited sums for “advertising campaigns designated to promote issues and candidates, so long as those campaigns are not coordinated with those candidates,”²⁷⁴ the defect of independent expenditures, from both the party’s perspective and the candidate’s perspective, is the very fact that the party’s support is not coordinated with the candidate.²⁷⁵

When state law limits on coordinated support force the MRP to make independent expenditures, the party cannot discuss with its legislative candidate the best approach to voters in the candidate’s district, the best timing for campaign messages, the set of voters, like senior citizens, who may be critical to the success of the campaign, or other important matters. Advertisements promoting the party (“Vote Republican” or “Republicans are for lower taxes”) are not an effective alternative to coordinated expenditures. These generic requests to support the party or the party’s agenda address the party’s general interest in creating a Republican electorate, but they do not address the party’s goal of taking control of the government by electing particular Republican candidates. Independent expenditures for advertisements and brochures urging voters to elect particular candidates also deny these candidates an opportunity to frame the messages being attributed to them and may force candidates to defend statements and positions that they would not have pursued.

These problems of forcing a political party to support its candidates with independent expenditures are exacerbated by the difficulties of “determin[ing] whether particular party expenditures [or contributions] are in fact coordinated or independent.”²⁷⁶ When does a party official’s discussion with a candidate transmute an independent expenditure into a coordinated expenditure? The FEC’s presumption in *Colorado I* that all party expenditures are coordinated suggests that the line will be difficult to draw.²⁷⁷ Fear that independent expenditures may be challenged as coordinated and that such expenditures may then exceed statutory limits will have a “chilling effect” on the ability of state political parties to work with their candidates. Government efforts to police the thin line between coordinated expenditures and independent expenditures will “inevitably

274. *Missouri Republican Party II*, 270 F.3d at 571.

275. Hancock Aff. 3 ¶ 13. See also Hasen, *supra* note 97, at 203 n.75 (2002) (noting that *Colorado I* and *Colorado II* have the “perverse result of encouraging parties to act independently of their candidates”).

276. *Colorado II*, 533 U.S. at 471 n.3 (Thomas, J., dissenting).

277. See *Colorado I*, 518 U.S. at 612-13.

... involve an intrusive and constitutionally troubling investigation of the inner workings of political parties.”²⁷⁸

c. In-Kind Contribution Limits Prevent Political Parties from Working Directly with Their Candidates

Although a political party can continue to make independent expenditures to support its candidate after it reaches the limits on cash contributions, it must completely stop working directly with its candidates after it reaches the limits on in-kind contributions. The court of appeals ignored the distinctions between cash and in-kind contributions,²⁷⁹ but, in Missouri state elections, limits on in-kind support have a much more severe impact on parties and their candidates than limits on cash contributions.²⁸⁰ Many state legislative candidates have limited political experience. They count on the party to help plan their campaigns, to raise funds, to develop voter and contributor lists, and to research opponents. Many of these candidates cannot wage effective campaigns unless they work closely with party officials. Consulting and other standard party support for candidates, if assigned their full market values, would often exceed the \$2,925 limit on in-kind contributions to candidates for the state house, the \$5,850 limit on in-kind contributions to candidates for the state senate, and the \$11,675 limit on in-kind contributions to candidates for statewide office.²⁸¹

The in-kind limits had an especially severe effect in the November 2002 elections.²⁸² As a result of term limits adopted in 1992, the MRP had to field and present 13 new candidates for open seats in the Missouri Senate and as many as 90 new candidates for open seats in the Missouri House of Representatives. Given the special expenses of recruiting and training new candidates, hiring and training new employees to assist the candidates, developing campaign themes, and planning media campaigns for individual candidates, the MRP feared as early as June 2001, more than one year before the general election, that it might start to exceed the in-kind limits and would have to cut off support for some of its candidates.

Even if party support does not reach the in-kind limits, allocation of the costs of consulting, polling, and other party activities to specific

278. *Colorado II*, 533 U.S. at 471 n.3 (Thomas, J., dissenting) (internal quotation and citation omitted).

279. See *supra* text accompanying notes 214-17.

280. Hancock Aff. 2 ¶¶ 20-36, 48.

281. Hancock Aff. 2 ¶¶ 20-25.

282. *Id.* ¶¶ 28-34.

candidates as in-kind contributions will impose—absent renewal of the two major parties’ informal agreement to ignore violations of the in-kind limits²⁸³—substantial administrative burdens. The party hires consultants who provide advice to many candidates, takes polls that may be helpful to many candidates, and creates mailing lists that may be helpful to many candidates. It will be very difficult to assign a precise valuation of these consulting services, polls, and mailing lists to individual candidates. If, for example, the Executive Director of the MRP speaks to members of the Republican party about the importance of making individual contributions to party candidates, he will have to allocate the value of his fund-raising services as in-kind support among a large group of candidates, including some candidates who never prove to be the beneficiaries of his efforts.²⁸⁴

Similarly, just as it will be difficult to allocate benefits of party services among many candidates, it will be difficult to distinguish party building activities from coordinated party support for candidates. All party building activities are designed ultimately to support the party’s candidates.²⁸⁵ The MRP may conduct a poll to make its targeting decisions, and it may also use the poll to assist one or more candidates. There is no clear line between party building and in-kind support, and consistent reporting (by the party and its candidates) may be difficult. If, for example, the MRP reports an activity to the MEC as party building and a candidate reports the same activity as in-kind support, the party may face some risk of a complaint by the state that it has violated the limit on in-kind contributions.

Allocation of the costs of consulting, polling, and other party building activities to specific candidates as in-kind contributions and accounting for all consulting services provided to candidates would be a substantial administrative burden even if Missouri simply required disclosure of all party in-kind support and did not limit the amount. The newly revived in-kind limits, nonetheless, will exacerbate substantially the burdens of accounting for and disclosing all party in-kind support.

In the absence of limits on in-kind support, disclosure rules would still require a state political party to account for all its in-kind services and to allocate these in-kind expenditures among candidates. The party, however, could err on the side of overstating the amount of in-kind support provided to its candidates without any risk of being forced to stop working with its

283. See *supra* note 176 and accompanying text.

284. Hancock Aff. 2 ¶ 38.

285. Hancock Aff. 2 ¶ 41 (stating that “the vast majority of the party’s work is done to benefit the party’s candidates”).

candidates. If, for example, a poll costing \$10,000 could be viewed as benefiting ten candidates, a party could avoid the burdens of a detailed determination and accounting of the amount of benefits inuring to each candidate and report the full cost of the poll (\$10,000) as an in-kind service to each of the ten candidates. With the limits in force, however, the party will have to be very precise and parsimonious in the assignment of in-kind support to particular candidates. If the same \$10,000 poll could be viewed as benefiting ten candidates, a party will have to determine the extent to which each candidate is a beneficiary of the poll, allocate its \$10,000 expenditure among the ten candidates, and then check to make certain that the total amount of its in-kind assistance to these ten candidates does not exceed the state law limits.

d. Contribution Limits Will Force Political Parties to Support Their Candidates by Less Visible and Directly Accountable Means

Now that the Eighth Circuit has upheld Missouri's party contribution limits, state political parties will consider alternate means of supporting their candidates. As Issacharoff and Karlen have observed, "political money—that is, the money that individuals and groups wish to spend on persuading voters, candidates, or public officials to support their interests—is a moving target."²⁸⁶ The alternatives, however, are not as open and visible as direct party contributions to candidates, and the party contribution limits "[f]ar from making politics more accountable to democratic control, . . . may make it less so."²⁸⁷

There are many ways—other than direct cash contributions to party candidates—that political parties can provide financial support to their candidates. A party, for example, can make unlimited contributions to all of the 362 political party committees authorized by state law,²⁸⁸ and it can encourage these committees, without being able to require them, to make contributions to candidates whose success is widely understood to be critical to the party's efforts to take control of state government.

In the 1998 general election, for example, the MRP could have made the same \$133,500 contribution that it made directly to Charles Pierce, its candidate for state auditor, indirectly through multiple party

286. Samuel Issacharoff & Pamela S. Karlen, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1707 (1999).

287. *Id.*

288. See *supra* note 136 and accompanying text.

committees.²⁸⁹ Given a broad understanding of both the importance of Pierce's success in the only statewide race and its critical down ballot effect on state legislative races, the MRP could have contributed the \$10,750 statutory maximum directly to Pierce and contributed \$122,750 to twelve Republican political party committees. Eleven of these committees, in turn, could have contributed \$10,750 to the Pierce campaign and a twelfth committee could have contributed \$4,500. Although the MRP could not have controlled these committees' spending decisions, it would have had a fair degree of confidence that these committees shared the overall Republican view of the importance of the Pierce race. Similarly, the MRP could have encouraged potential contributors to make contributions directly to multiple Republican political party committees.²⁹⁰

Although neither the MRP nor Republican donors could compel a political party committee to support any particular candidate, these committees often target the same important elections and support the same set of candidates. Missouri Democrats, for example, contributed \$10,087 to a state senate candidate in the 1998 general election through nine different party committees: the Missouri State Democratic Committee, the 12th Democratic State Senate District Committee, the Mercer County Democratic Committee, the Clinton County Democratic Committee, the Central Democratic Committee, the 18th Senatorial District Committee, the Grundy County Democratic Committee, the Harrison County Democratic Committee, the Livingston County Democratic Committee.²⁹¹ Although there is no reason to believe that either the Missouri Democratic Party or Democratic supporters used these nine political party committees to circumvent the \$5,250 state law limit on contributions by a single political party committee, the record of these contributions suggests how easily a party might use multiple committees to support its candidates and the resulting loss of direct accountability. Nine contributions through nine different political party committees are not subject to the same ready measure of accountability as one contribution of \$10,087 made directly from a political party to its candidate.

289. See *supra* text accompanying note 177. The MRP also could have formed a PAC (*e.g.*, "The Missouri Republican Club"), which, given a July 23, 1998 injunction barring enforcement of state limits on contributions by individuals and PACs, see *supra* note 181, could have made unlimited contributions to Pierce. The MRP, however, did not employ either one of these stratagems to diffuse responsibility for supporting its candidates. Instead, it forthrightly and openly contributed sums in excess of the state limits to its candidates and reported these contributions directly to the MEC. See Hancock Aff. 1 ¶¶ 70-74.

290. See *supra* note 136 and accompanying text.

291. Hancock Aff. 1 ¶¶ 70e, 90.

III. THE HARD QUESTION ABOUT SOFT MONEY: DOES A COMMON—BUT MISTAKEN—PERCEPTION OF CORRUPTION JUSTIFY POLITICAL CONTRIBUTION LIMITS?

Proponents of the Bipartisan Campaign Reform Act (BCRA) are confident that Supreme Court, like the Eighth Circuit in *Missouri Republican Party II*, will not take a hard look at claims that political party funding causes corruption. There will be no need to “prove, in any social science sense, that soft money donations are corrupting, or even that they lead to the appearance of corruption [because] the Court in *Shrink Missouri* and *Colorado Republican II* has shown that the amount of evidence it requires to prove corruption of the appearance of corruption *in a legal sense* is minimal.”²⁹² Newspaper reports, as in *Shrink Missouri*, will be enough to “raise[] an inference of impropriety.”²⁹³ BCRA’s proponents are also confident that the Court will not examine carefully the burdens of regulation on political parties. They argue that that the new regulations impose minimal burdens on contributors to political parties, and they ignore, for the most part, the effects on political parties.²⁹⁴

If “political speech in the course of elections [is] the speech upon which democracy depends,”²⁹⁵ the Court must revise the lax First Amendment standards of *Shrink Missouri* and *Colorado II*. The Court should put the burden of justifying BCRA squarely on the government. It should not assume simply that “contributions [are] meant to place candidates under obligation.”²⁹⁶ Instead, the Court should recognize that most campaign contributions have a legitimate First Amendment purpose: to promote the political agenda of the contributor and the recipient.²⁹⁷ It

292. Hasen, *supra* note 97, at 204 (emphasis in the original); see ROBERT F. BAUER, *SOFT MONEY, HARD LAW: A GUIDE TO THE NEW CAMPAIGN FINANCE LAW* 105 (Perkins Coie 2002) (noting “the possibility that the Court will appear to force a showing of compelling ‘anti-corruption’ purpose, but still allow for a loose showing lacking in rigorous evidentiary standards”) [hereinafter BAUER].

293. Hasen, *supra* note 97, at 204; see also BAUER, *supra* note 292, at 105-06 (noting that *Shrink Missouri* Court relied on a state legislator’s declaration that large contributions have “the real potential to buy votes” and “newspaper accounts of large contributions supporting inferences of impropriety” (citing *Shrinking Missouri*, 528 U.S. at 393), and commenting that there is “much material that, from the point of view of proponents of the reforms, is at least as potent as that which the Court considered in [*Shrink Missouri*]—and that from the point of view of opponents, is no more substantial or persuasive”).

294. Trevor Potter, *New Law Follows Supreme Court Rulings*, Daily Rep. for Executives (BNA) Nos. 1-4 (Apr. 22, 2002); see *infra* text accompanying notes 383-89.

295. *Shrink Missouri*, 528 U.S. at 405 (Kennedy, J., dissenting).

296. *Colorado II*, 533 U.S. at 452.

297. See *infra* text accompanying notes 425-30 and note 430.

should not assume that contribution limits impose only “marginal” restraints.²⁹⁸ Instead, it should recognize that federal regulation of political party funding, like Missouri’s party contribution limits, imposes substantial burdens on the First Amendment interests of political parties, their supporters, and their candidates.²⁹⁹ The Court should not assume that the government’s interests in preventing corruption or the appearance or corruption outweigh these burdens. Instead, it should require the government, at a minimum, to “demonstrate that the recited harms are real, not merely conjectural and that the regulations will in fact alleviate these harms in a direct and material way.”³⁰⁰

A. Regulation of Political Party Funding Under the Federal Election Campaign Act and the Bipartisan Campaign Reform Act of 2002

The Federal Election Campaign Act of 1971 (FECA) limits the amounts and sources of contributions to candidates, political committees, and political parties for use in federal elections.³⁰¹ It also limits contributions and expenditures made by political parties to support their candidates. Contributions and expenditures subject to these federal regulations are commonly known as “hard money” or “federal funds.”³⁰² Contributions that are not subject to these regulations are labeled “soft money” or “non-federal funds.”³⁰³ The Bipartisan Campaign Reform Act of 2002 (BCRA) amends FECA and prohibits national parties from raising or spending soft money.³⁰⁴ The 2002 amendments also regulate the solicitation and use of non-federal funds by state, district, local political parties and by federal, state, and local candidates and officeholders. BCRA provides for expedited judicial review by a three-judge court and for direct

298. *Buckley*, 424 U.S. at 20.

299. See *supra* text accompanying notes 246-91.

300. *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 475 (1995) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion of Kennedy, J.) (internal citation omitted)).

301. Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431-456 (2000); see ANTHONY CORRADO ET AL., *THE NEW CAMPAIGN FINANCE SOURCEBOOK, A HISTORY OF FEDERAL CAMPAIGN FINANCE LAW* (forthcoming 2003), available at <http://www.brookings.edu/dybdocroot/gs/cf/sourcebk01/HistoryChap.pdf>.

302. Federal Election Commission, Final Rule: Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49063, 49064-65 (July 29, 2002) [hereinafter *Soft Money Final Rules*].

303. *Id.*

304. Bipartisan Campaign Reform Act of 2002 (BCRA), Public Law 107-155, 116 Stat. 81 (Mar. 27, 2002). Most provisions of this Act went into effect on November 6, 2002. BCRA § 402 to be codified at 2 U.S.C. § 431 (2000 & Supp. 2002).

review by the Supreme Court.³⁰⁵

Shortly after President George W. Bush signed the Bipartisan Campaign Reform Act on March 27, 2002, more than eighty plaintiffs filed eleven actions challenging the provisions regulating political party funding and most of the other major provisions of this statute.³⁰⁶ The defendants are the Department of Justice and the Federal Election Commission, and the principal congressional sponsors of BCRA are intervenor-defendants.³⁰⁷ The three-judge court consolidated the eight principal cases as *McConnell v. Federal Election Commission*, and it permitted the parties to file long briefs, albeit on a very tight schedule.³⁰⁸ The three-judge court heard argument on December 4 and December 5, 2002.³⁰⁹

1. *Hard Money*

FECA regulates political parties' revenues and their expenditures. On the revenue side, it limits the amounts that individuals and "multicandidate political committees,"³¹⁰ commonly called political action committees or PACs, can contribute to the national committees of a political party in any year. Prior to the 2002 Act, an individual could contribute \$20,000 to the national committees of a political party in any year,³¹¹ and a PAC could

305. BCRA § 403(a) (codified at 2 U.S.C. 437(h) (2000 & Supp. 2002)).

306. Campaign and Media Legal Center, *Status Update: McConnell v. FEC* (Dec. 3, 2002), at <http://www.camlc.org/advocacy-court.html>.

307. See BCRA § 403(b) (authorizing intervention by Members of Congress) (codified at 2 U.S.C. § 437(h)(b) (2000 & Supp. 2002)).

308. *McConnell v. Fed. Election Comm'n*, No. 02-581 (D.D.C. filed Mar. 27, 2002). The court ordered the plaintiffs in eight of the principal actions (the "McConnell" group) to "file together one opening brief of no more than 335 pages, one opposition brief of no more than 205 pages, and one reply brief of no more than 160 pages." Briefing Order, Oct. 15, 2002, *McConnell v. Fed. Election Comm'n* (D.D.C. No. 02-581) at 4. It also ordered the government defendants, the FEC and the Department of Justice, and the intervenors (Members of Congress) to "file together one opening brief of no more than 395 pages, one opposition brief of no more than 245 pages, and one reply brief of no more than 180 pages." *Id.* at 5. The court required the parties to file the opening briefs, as well as "fact witnesses and expert testimony and documentary evidence," by November 6, 2002, opposition briefs by November 20, and reply briefs by November 27. *Id.* at 9. The briefs were filed under seal because some of the testimony was designated confidential. The parties, however, published redacted versions of the briefs, which are available at websites maintained by the Campaign and Media Legal Center at <http://www.camlc.org/advocacy-court.html> and by the Stanford University Law School Library at <http://www.law.stanford.edu/library/campaignfinance/>. Unless otherwise noted, citations to briefs, orders, and other materials in *McConnell v. FEC* are to the redacted versions posted by the Campaign and Media Law Center.

309. See Status Update, *supra* note 306.

310. 2 U.S.C. §§ 441a(a)(2), (4) (2002). See *Buckley*, 424 U.S. at 35.

311. An individual could also contribute \$1,000 to a federal candidate "with respect to any election" and \$5,000 to any political committee in any year, but an individual's total contributions,

contribute \$15,000.³¹² The Act prohibits corporations and unions from contributing funds from their general treasuries for use in federal elections,³¹³ but it permits corporations and unions to form PACs that can make contributions to the same extent as other multicandidate committees.³¹⁴

The Court has never addressed the effects of these contribution limits on political parties,³¹⁵ but it did uphold an overall \$25,000 annual limit on individual contributions to federal candidates, national party committees, and PACs³¹⁶ because it “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 unmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate’s political party.”³¹⁷

On the expenditure side, FECA creates special, complex provisions regulating the contributions and expenditures that political parties can make to support their candidates.³¹⁸ As a formal matter, FECA prohibits political parties, like other multicandidate political committees, from making contributions, including coordinated expenditures, of more than

including party contributions, could not exceed an annual limit of \$25,000. 2 U.S.C. §§ 441a(a)(1), (3) (2000). The \$1,000 limit on individual contributions to candidates applied to each election—primary and general—and the aggregate limit for the election cycle was \$2,000. 2 U.S.C. §§ 441a(a)(6). BCRA increases these limits on individual contributions to candidates from \$1,000 per election to \$2,000; it increases the amount that an individual can contribute to a national committee from \$20,000 to \$25,000; and it increases the aggregate limit on individual contributions from \$25,000 to \$95,000. BCRA § 307 (a) (b) (amending 2 U.S.C. §§ 441a(a)(1), 441a(a)(3) (2000 & Supp. 2002)); see BAUER, *supra* note 292, at 65-68.

312. A “multicandidate political committee” could also contribute \$5,000 to a candidate “with respect to any election” and \$5,000 to another political committee in any year. 2 U.S.C. § 441a(a)(2) (2000). FECA does not impose any overall limit on annual contributions by PACs in federal elections, and the 2002 amendments did not change these limits on contributions by PACs to candidates and parties. See Trevor Potter & Kirk L. Jowers, *Summary Analysis of Bipartisan Campaign Finance Reform Act Passed by House and Senate and Sent to President*, available at <http://www.brookings.edu/dybdocroot/gs/cf/headlines/FinalApproval.htm> (last visited May 22, 2002) (on file with author).

313. 2 U.S.C. § 441b; see 2 U.S.C. § 441b(a) (prohibiting contributions from national banks); 2 U.S.C. § 441c (prohibiting contributions from government contractors); 2 U.S.C. § 441e (prohibiting contributions from foreign nationals), and 2 U.S.C. § 441f (prohibiting contributions made in the name of another). BCRA adds a provision prohibiting contributions by minors. BCRA § 318 (codified at 2 U.S.C. § 441k (2000 & Supp. 2002)).

314. 2 U.S.C. § 441b.

315. *Cf. Colorado I*, 518 U.S. at 628 (Kennedy, J., concurring in judgment and dissenting in part) (noting that the Court had “no occasion in *Buckley* to consider possible First Amendment objections to limitations on spending by parties”).

316. See *supra* note 311.

317. *Buckley*, 424 U.S. at 38.

318. 2 U.S.C. § 441a(d); see *Colorado I*, 518 U.S. at 610-11 (Breyer, J., O’Connor, J., & Souter, J.).

\$5,000 to a candidate.³¹⁹ Federal law, however, also creates an exception to this contribution and expenditure limit.³²⁰ This exception, which the Court upheld in *Colorado II*,³²¹ authorizes political parties to make coordinated expenditures to support their candidates. In senatorial elections, for example, a political party may make coordinated expenditures of \$20,000 or “2 cents multiplied by the voting age population of the State.”³²² Under these statutory provisions, a political party in the Missouri 2002 elections could contribute \$5,000 to its senatorial candidate, and the party could also make coordinated expenditures up to \$603,576 to support the candidate.³²³ The party, under *Colorado I*, could also make unlimited independent expenditures in support of its candidate.³²⁴

2. Soft Money

In addition to the “hard money” raised and spent under this regulatory scheme, the national and state committees of political parties also raised and spent substantial sums—“soft money”—that were not subject to FECA’s source limits and prohibitions. They accepted contributions from individuals in excess of the \$20,000 limit, and they accepted contributions from corporations and unions. Political parties initially spent these unregulated contributions on party building activities.³²⁵ As a result of an

319. See *Colorado I*, 518 U.S. at 610-11 (Breyer, J., O’Connor, J., & Souter, J.). Under these provisions, “each national, congressional, and state party campaign committee can give \$5,000 to a House candidate at each stage of the election process . . . and “the maximum amount that may be contributed, assuming a run-off election in addition to a primary and general election, is \$15,000 per committee.” See ANTHONY CORRADO ET AL., CAMPAIGN FINANCE REFORM: A SOURCEBOOK 168 (Brookings 1997), available at <http://www.brookings.edu/dybdocroot/gs/cf/sourcebk/chap6.pdf> [hereinafter CORRADO]. FECA also permitted the “parties’ national and senatorial campaign committees to give . . . a combined total of \$17,500 . . . in an election cycle. *Id.* BCRA increases this \$17,500 limit to \$35,000. BCRA § 307(c), amending 2 U.S.C. § 441a(h). FECA permitted “[s]tate party committees to contribute an additional \$5,000 to a Senate candidate.” CORRADO, *supra*, at 168. BCRA does not change this limit. See BAUER, *supra* note 292, at 64 (providing table outlining increases in the contribution limits).

320. 2 U.S.C. § 441a(d)(1) (2000 & Supp. 2002) (“Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, . . . political party [committees] . . . may make expenditures in connection with the general election campaign of candidates for Federal office . . .”).

321. See *supra* text accompanying notes 79-81.

322. See *Colorado I*, 518 U.S. at 611 (Breyer, J., O’Connor, J., & Souter, J.) (*citing* 2 U.S.C. § 441a(d)(3)(A)(i), as adjusted for inflation since 1974, 2 U.S.C. § 441a(c)).

323. See *supra* note 194 and accompanying text.

324. See *supra* note 78 and accompanying text.

325. See CORRADO, *supra* note 319, at 171-72 (explaining “the rise of soft money”); see also Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. LEGIS. 179, 181-84 (1998) [hereinafter Smith].

FEC ruling and 1979 amendments to the FECA, state and national party organizations could “spend unlimited amounts of money raised under the federal rules on voter programs,” campaign materials, and get-out-the-vote drives, and they could also “pay a share of [these] costs with funds not subject to the federal limits.”³²⁶ Parties subsequently discovered another use for soft money—“issue ads.”³²⁷ These advertisements “featured themes and issues . . . designed to benefit” the parties’ candidates,³²⁸ but they fell “outside the contribution and expenditure limits of FECA because they stop[ped] short of expressly advocating the election or defeat of any particular candidate.”³²⁹

As Robert F. Bauer has explained, issue advertising:

lauds or attacks a federal candidate, or an officeholder who is a candidate, for a position on an issue. These ads typically urge the viewers to call those officeholders to praise them or to invite them to burn in hell. A telephone number typically, but not always, appears on the screen to facilitate the proposed contact with the named candidate-officeholder. What does not appear in the ad are “magic words” exhibiting a clear-cut intention to affect the outcome of an election—words like “vote,” “defeat,” “support,” or “don’t you wish that you would never see or hear from him again?”³³⁰

Even though issue ads do not expressly advocate the election or defeat of particular candidates, they “discuss issues in ways that can affect federal campaigns.”³³¹ For example, in the 2002 contest for United States Senate, the Missouri Republican Party sponsored a television advertisement addressing an important, then current issue about the creation of a Department of Homeland Security.³³² The advertisement stated, over pictures of Presidents John F. Kennedy and George W. Bush, that:

326. CORRADO, *supra* note 319, at 172; *see also* Smith at 184 (identifying one type of soft money as “unregulated contributions to state and local parties . . . which may be used for grass-roots, volunteer activities that specifically advocate the election of federal candidates, such as get-out-the-vote drives, bumper stickers, and yard signs).

327. CORRADO, *supra* note 319, at 175; Smith, *supra* note 325, at 182-84.

328. CORRADO, *supra* note 319, at 175.

329. Smith, *supra* note 325, at 182; *see Buckley*, 424 U.S. at 44 & n.52 (defining independent expenditures as “expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office”).

330. BAUER, *supra* note 292, at 9.

331. Smith, *supra* note 325, at 183.

332. A video copy of this issue advertisement is on file with the author.

To better protect Americans from terrorism, the President must have the authority to hire and fire those responsible for homeland security. The same authority granted every President since John F. Kennedy. But the liberal special interests say ‘no’.

Then, showing a picture of Jean Carnahan, the Democratic candidate for the United States Senate, and setting out a telephone number, the advertisement continued:

Jean Carnahan: she accepts thousands of dollars from these same liberal special interests and rejects the President’s plan.

Call Jean Carnahan. Tell her to put our security interests first.

This advertisement did not expressly advocate either the defeat of Jean Carnahan or the election of her Republican opponent, Jim Talent. It addressed an important issue, but it is also easily understood to support the election of the Republican, senatorial candidate, who presumably would back the Republican President, George W. Bush, on homeland security issues.

Soft money and hard money expenditures have increased substantially in the last three presidential election cycles, and soft money expenditures have also increased substantially as a proportion of total expenditures. The Brennan Center for Justice reported that in 1992 election cycle, the Democratic Party and Republican Party spent \$421.8 million in hard money and \$86.1 million in soft money, and these soft money expenditures were 16.95% of the two parties total hard and soft money expenditures of \$507.9 million.³³³ Four years later, in the 1996 election cycle, the two parties spent \$617.5 million in hard money and \$263.5 million in soft money, and soft money as a percentage of total expenditures of \$881 million increased to 29.91%. In the last presidential election cycle in 2000, the two parties spent a total of \$1,204.8 billion dollars. The parties spent \$717.3 million in hard money and \$487.5

333. The author calculated the figures reported here on the basis of data set out in Brennan Center for Justice, *The Purposes and Beneficiaries of Party “Soft Money”* (2002), at http://www.brennancenter.org/resources/downloads/purposes_beneficiaries070301.pdf (on file with author) [hereinafter Brennan Report]. The author used data from Figure One, Total Hard Money and Soft Money Expenditures In Federal Elections by the Democratic and Republican Parties, 1992-2000 Election Cycles; and Figure Eleven, Soft Money Spending by National and State Party Committees: Democrats vs. Republicans, 1999-2000 Election Cycle. The Brennan Center for Justice is a prominent proponent of campaign finance regulation. See http://www.brennancenter.org/programs/programs_dem.html (last visited Jan. 2, 2003) (stating that its “Campaign Finance Reform Project seeks to defend political equality against the corrosive effects of economic inequality by attacking the influence of money on our electoral and legislative processes”).

million in soft money, and soft money expenditures increased to 40.46% of the two parties' total expenditures. The Brennan Center also analyzed the purposes of soft money expenditures. It found that the Democrats and the Republicans spent \$173,057,173 (38.13%) in soft money on issue advocacy, \$10,747,736 (2.37%) on general mail, \$37,787,591 (8.33%) on voter mobilization, \$15,939,795 (3.51%) on consultants, \$64,379,533 (14.19%) on party salaries, \$81,663,434 (17.99%) on administration, and \$70,243,637 (15.48%) on fundraising.³³⁴

The growth of soft money—and especially political parties' expenditures on issue ads—provoked calls for “reform.”³³⁵ More regulation was said to be necessary because soft money undermined FECA's “hard” limits on party revenues and expenditures.³³⁶ Given a tacit assumption that FECA set the “correct” limits on both the amount of revenues that parties can raise and the amount of financial support provided by political parties to their candidates, the reformers complained—in effect—that soft money gave the parties too much revenue and permitted them to provide too much assistance to their candidates. The parties could exceed FECA restrictions by using soft money to pay for overhead expenses and for voter mobilization that would otherwise have to be paid out of hard money and free up hard money to support candidates with coordinated expenditures and independent expenditures.³³⁷ The parties could also exceed FECA's limits on coordinated expenditures by using soft money to pay for issue ads that “benefit a candidate without counting against any party spending ceilings.”³³⁸

The reformers also complained that the Supreme Court's *Colorado I* decision undermined FECA's “hard” limits on the amount of support that

334. See Brennan Report, *supra* note 333 (Figure Eleven, Soft Money Spending by National and State Party Committees: Democrats vs. Republicans, 1999-2000 Election Cycle). Although the Brennan Center reported total soft money expenditures of \$487.5 million in the 1999-2000 election cycle (see *id.* at Figure One), it used a different, slightly lower base of \$453,818,899 when it reported in Figure Eleven the allocation of party soft money expenditures by the national and state committees of the two major parties.

335. See, e.g., Brennan Report, *supra* note 333, at 1 (complaining that “soft money is first and foremost used to finance ‘electioneering’ messages through the media for and against federal candidates”).

336. See CORRADO, *supra* note 319, at 176 (noting reformers' concerns that “soft money and independent spending by political parties constitute direct challenges to the ability of [FECA] to effectively limit fund-raising and spending by political parties”).

337. CORRADO, *supra* note 319, at 173.

338. CORRADO, *supra* note 319, at 176; see BAUER, *supra* note 292, at 9 (noting complaints that political “parties, on the thinnest of excuses, were spending soft money liberally for attack ads with the clear effect and probable intent of influencing federal campaigns”).

political parties could provide to their candidates and created “an additional opportunity to spend hard money.”³³⁹ Before the 1996 *Colorado I* decision, political parties did not make independent expenditures in support of their candidates. There was a presumption that all party expenditures were coordinated with the party’s candidates and thus subject to FECA’s coordinated expenditure limits.³⁴⁰ *Colorado I*, however, rejected this presumption of coordination and held that a party’s independent expenditures, like independent expenditures of other political actors, were constitutionally protected.³⁴¹ In response to *Colorado I*, the two major national parties began to make independent expenditures, as well as coordinated expenditures subject to FECA’s limits.³⁴²

In addition to complaints that political parties used soft money and independent expenditures to exceed FECA’s limits on the amount of support provided to party candidates, reformers also complained that wealthy individual donors used soft money contributions to circumvent FECA’s \$1000 limit on direct contributions and that corporations used soft money contributions to circumvent FECA’s prohibition of corporate contributions.³⁴³ The Brennan Center, for example, reported that “[b]usiness interests and individuals [are] the primary source of soft money.”³⁴⁴ It also analyzed the size of soft money contributions totaling \$199.4 million in the 1997-1998 elections cycle and found that 38% (\$75.1 million) were between \$200 and \$24,999, 23% (\$45.3 million) were between \$25,000 and \$49,999, 18% (\$35 million) were between \$50,000 and \$99,999, 10% (\$19.1 million) were between \$100,000 and \$149,999, 4% (\$7.9 million) were between \$150,000 and \$249,999, and 9% (\$17 million) were \$250,000 or higher.³⁴⁵ In the eyes of campaign finance reformers, these soft money contributions are evidence that political parties are conduits for large contributions that corrupt the parties’ candidates or create the appearance of corruption.³⁴⁶

339. CORRADO, *supra* note 319, at 175-76.

340. *Id.* at 175.

341. *Colorado I*, 518 U.S. at 618-19.

342. CORRADO, *supra* note 319, at 175-76.

343. *E.g.*, Donald J. Simon, *Beyond Post-Watergate Reform: Putting an End to the Soft Money System*, 24 J. LEGIS. 167, 175 (1998).

344. Brennan Report, *supra* note 333, at 2; *see id.* Figure 12 (Sources of Soft Money Contributions to the National Party Committees).

345. Brennan Report, *supra* note 333, Figure 14 (Soft Money Contributions by Size, 1994 and 1998).

346. CORRADO, *supra* note 319, at 176 (“The revival of unlimited donations from sources that have been prohibited from participating in federal elections for much of this century once again raises questions about the role of large contributors in the political process . . . and concerns that these donors may be getting special privileges or other quid pro quos in exchange for their largesse.”).

3. BCRA's New Rules for Party Revenues and Expenditures

The Bipartisan Campaign Reform Act of 2002 responds to these complaints about soft money by forcing political parties to finance almost all of their activities with hard money—money subject to FECA's source and amount restrictions and reporting requirements.³⁴⁷ It prohibits national committees of political parties from raising and spending soft money.³⁴⁸ These national committees can raise and spend only funds “subject to the limitations, prohibitions, and reporting requirements” of FECA.³⁴⁹ Under this restriction, they cannot accept corporate or union contributions; they can accept individual contributions up to \$25,000 annually under BCRA's new increased hard money limits; they can accept contributions up to \$15,000 per year from corporate and union PACs and from other “multicandidate committees.”³⁵⁰ Under BCRA, national committees can spend only money that is subject to these limits. The party can contribute \$35,000 to senate candidates and \$5000 to house candidates;³⁵¹ it can make independent expenditures; it can make coordinated expenditures—

347. BAUER, *supra* note 292, at 10-21. Compare Potter, *supra* note 294, at 1-3 (outlining an analysis supporting BCRA) with James Bopp Jr. & Richard E. Coleson, *Fatal Flaws in the Bipartisan Campaign Reform Act of 2002* at 12-15 in BNA, *Money and Politics* (Apr. 22, 2002) (making an analysis attacking BCRA).

In addition to the provisions of Title I which regulate political party funding, Title II (“noncandidate campaign expenditures”) imposes substantial restrictions on “electioneering communications” made by corporations, unions, and other entities. See generally BAUER, *supra* note 292, at 51-63. These provisions are aimed at “sham issue” advertisements that “promote or attack a federal candidate at election time, but avoid the legal prohibition against corporate and labor expenditures by omitting words such as ‘vote for’ or ‘vote against.’” Potter, *supra* note 294, at 7. They are designed to prevent corporations and unions from making an “end-run” around “restrictions on corporate or labor attempts to influence the outcome of elections.” *Id.* at 8. BCRA defines an “electioneering communication” broadly to include “any broadcast, cable, or satellite communication” which “refers to a clearly identified candidate for Federal office.” BCRA § 201(a) (codified at 2 U.S.C. § 434(f)(3) (2000 & Supp. 2002)). It prohibits corporations and unions from making an “electioneering communication” within 60 days of a general election or 30 days of a primary election. BCRA § 203 (codified at 2 U.S.C. § 441b(c) (2000 & Supp. 2002)). Political action committees, formed by corporations and unions and subject to FECA's limits, may still fund electioneering communications during these pre-election periods. See Potter at 7. It also provides that payments for an “electioneering communication” that are coordinated with a party or its candidates are subject to FECA's limits on individual and PAC contributions and to FECA's prohibition against corporate and union contributions. BCRA § 202 (amending 2 U.S.C. § 441a(7)).

348. The national committees of the two major parties are the Democratic National Committee and the Republican National Committee and their “congressional campaign committees” (the Democratic Senatorial Campaign Committee, the National Republican Senatorial Committee, the Democratic Congressional Campaign Committee, and the National Republican Congressional Committee). Soft Money Final Rules, *supra* note 302, at 49087.

349. BCRA § 101(a) (codified at 2 U.S.C. § 441i(a)(1) (2000 & Supp. 2002)).

350. Potter & Jowers, *supra* note 312; see also BAUER, *supra* note 292, at 11.

351. BAUER, *supra* note 292, at 64.

but all these contributions and expenditures must be made with hard money. Although BCRA does not directly regulate national committee expenditures for issue advertisements, it completely prohibits them from raising or spending the soft money that they had previously used to finance these advertisements and forces them instead to use “hard money.”

In addition to the complete prohibition against the use of soft money by national committees, BCRA severely restricts the use of soft money by state, district, and local committees of political parties. These committees must pay for most “Federal election activity” with hard money.³⁵² They must use hard money to pay for most political advertisements that make any mention of a candidate for federal office.³⁵³ They must use hard money to pay for voter registration within a 120 day period before a federal election, and they must also use hard money to pay for voter identification, get-out-the-vote, generic campaign (party promotion) activity conducted in connection with an election in which a candidate for federal office appears on the ballot.³⁵⁴ BCRA, however, does permit state, district, and local party committees to pay for some of these voter registration, voter identification, get-out-the-vote, and party promotion activities with a mix of hard and soft money as long as the contributions made for these purposes do not exceed \$10,000.³⁵⁵

To enforce these prohibitions and restrictions on soft money, BCRA regulates fundraising by national and state parties, as well as fundraising and other activities by federal and state officeholders and candidates. National and state parties, including their officers and agents, must pay the

352. BCRA § 101a (codified at 2 U.S.C. § 441(a)(1) (2000 & Supp. 2002)); BCRA § 101(b) (codified at 2 U.S.C. § 431(20) (2002)) (defining “Federal election activity”); see BAUER, *supra* note 292, at 22-38 (examining BCRA restrictions on state political parties), at 64 (summarizing federal limits on contributions to state political parties).

353. The Act defines “Federal election activity” to include “a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate).” BCRA § 101 (b) (codified at 2 U.S.C. § 431(20)(A)(iii) (2000 & Supp. 2002)). It also defines a “public communication” broadly to include almost all means of communication. See BCRA § 101(b) (codified at 2 U.S.C. § 431(22) (2000 & Supp. 2002)) (“public communication means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public advertising”).

354. BCRA § 101(a) (codified at 2 U.S.C. § 431 (20)(A)(i),(ii) (2000 & Supp. 2002)). State, district, and local political committees must also use hard money to pay the salaries of employees who spend more than 25 percent of their compensated time during a month on *activities* in connection with a federal election. BCRA § 101(a) (codified at 2 U.S.C. § 431 (20)(A)(iv) (2000 & Supp. 2002)).

355. BCRA § 101(a) (codified at 2 U.S.C. § 441(b)(2) (2000 & Supp. 2002)); see BAUER, *supra* note 292, at 29-34.

costs of raising funds for federal election activity with hard money.³⁵⁶ BCRA prohibits federal candidates and officeholders from raising soft money for national and state parties.³⁵⁷ It also prohibits state and local officeholders and candidates from spending soft money on communications that advance their candidacy if the communication refers to a federal candidate and appears to support or oppose that candidate.³⁵⁸

Although most of BCRA's provisions are designed to prohibit or restrict the use of soft money by political parties, the new Act also includes one very important restriction on the expenditure of hard money. It prohibits political parties from supporting their federal candidates with both coordinated expenditures and independent expenditures.³⁵⁹ After the party nominates a candidate, the party—all national, state, district, and local committees—can make either coordinated expenditures or independent expenditures, but it cannot make both types of expenditures to support that candidate.³⁶⁰

B. Back to Basics: The Government's Duty to Justify BCRA's Political Contribution Limits

The Court, beginning in *Buckley*, has insisted that contribution limits, as compared to expenditure limits, impose only “marginal restrictions” on First Amendment interests.³⁶¹ This dichotomy is false. BCRA's soft money contribution limits will have a substantial effect of political parties, their supporters, and their candidates. In the last Presidential election cycle, by one count, soft money contributions accounted for more than forty percent of the two major parties' total expenditures of \$1,204.8 billion dollars.³⁶² BCRA's nearly complete prohibition of soft money contributions will inevitably reduce political parties' expenditures to support their candidates. Contributions and expenditures, as Chief Justice Burger said in his separate opinion in *Buckley*, are “two sides of the same First Amendment coin.”³⁶³

356. BCRA § 101(a) (codified at 2 U.S.C. § 441i(c) (2000 & Supp. 2002)); see BCRA § 101(a) (adding new § 441i(d)) (prohibiting political parties from soliciting funds for or donations to certain tax-exempt organizations).

357. BCRA § 101(a) (codified at 2 U.S.C. § 441i(e) (2000 & Supp. 2002)); BAUER, *supra* note 292, at 17-21, 79-85.

358. BCRA § 101(a) (codified at 2 U.S.C. § 441i(f)(1) (2000 & Supp. 2002)). See BAUER, *supra* note 292, at 85-87.

359. BCRA § 213 (codified at 2 U.S.C. § 441a(d)(4) (2000 & Supp. 2002)).

360. BAUER, *supra* note 292, at 41-44.

361. See *supra* text accompanying notes 19-23.

362. See *supra* text accompanying note 334.

363. *Buckley*, 424 U.S. at 241 (Burger, C.J. concurring in part and dissenting in part); see *id.* at 235 (“[C]ontribution limitations infringe on First Amendment liberties and suffer from the same

The Court should not blindly accept broad claims that BCRA's soft money limits are necessary to reduce "special interest influence."³⁶⁴ BCRA reduces parties' soft money revenues at least in part in response to a complaint that political parties have exceeded "hard" limits on the amount of support provided to their candidates.³⁶⁵ The argument that political parties' revenues should be cut back to the original bounds—the hard limits—of FECA begs an important question: whether the burdens imposed by FECA on political parties are justified in the first place.³⁶⁶ BCRA also reduces party resources in response to a second complaint that wealthy individual donors used soft money contributions to circumvent FECA's \$1,000 limit on direct contributions and that corporations used soft money contributions to circumvent FECA's prohibition of corporate contributions.³⁶⁷ The government argues that regulation is necessary to prevent these soft money donors from using political parties as conduits for large, corrupting contributions to individual candidates.³⁶⁸ The government also argues that soft money limits are necessary to prevent circumvention of other limits—the limit on individual contributions and the prohibition against the contributions from corporate and union treasuries—that are themselves necessary to prevent corruption or the appearance of corruption.³⁶⁹ These arguments assume the very ground in controversy: do soft money contributions and other political contributions

infirmities that the Court correctly sees in the expenditure ceilings.”).

364. The caption of Title I of the BCRA, which includes the principal provisions regulating political party soft money, is “Reduction of Special Interest Influence.” 116 Stat. 82.

365. See *supra* text accompanying notes 339-42.

366. Although *Buckley* upheld FECA's annual limit on the total of all contributions made by individuals to federal candidates, political parties, and political action committees, it did not address the effect of this contribution limit on political parties. See *supra* text accompanying notes 315-17. Thus, even if FECA never contemplated that political parties would have soft money in addition to hard money, see *supra* text accompanying notes 336-38, there is no warrant for any assumption that FECA's limits are valid and that BCRA's soft money limits in turn are valid simply because they restore FECA's original hard money limits or close loopholes in the original regulatory scheme. There is, moreover, no basis under the First Amendment for the government to decide the “correct” amount that a political party, or any other political actor, should spend on elections. See *Shrink Missouri*, 528 U.S. at 427 (Thomas, J. dissenting) (“The First Amendment vests choices about the proper amount and effectiveness of political advocacy not in the government—whether in the legislatures or the courts—but in the people.”).

367. See *supra* notes 343-46 and accompanying text.

368. Opening Brief of Defendants, *McConnell v. Fed. Election Comm'n*, No. 02-0582 (D.D.C. filed Mar. 27, 2002) at 62-63, 66-67, 71-84, available at <http://www.camlc.org/advocacy-court.html> [hereinafter *FEC Opening Brief*].

369. *Id.* at 61 (“BCRA prevents the evasion of . . . contribution limits, which the Supreme Court has already recognized are necessary to prevent corruption and the appearance of corruption.”); see *id.* at 58-62, 64-66, 68-71.

cause any real harm?—do they cause corruption or create the appearance of corruption?

Although *Colorado II* asserted that contributions are made to produce “obligated officeholders,”³⁷⁰ the Court is probably wrong. An important new study debunks “the popular notion that contributions buy legislators’ votes.”³⁷¹ This comprehensive study found instead that “[l]egislators’ votes depend almost entirely on their own beliefs and the preferences of their voters and their party.”³⁷² Just as the Court insists that government demonstrate that most speech regulations address some real harm, it should require the government to demonstrate that the recited harm—special interest influence—is real. If political contributions do not cause corruption, but the public, nonetheless, believes that “big money buys votes,”³⁷³ then the Court will have to address a hard question that it finessed in *Shrink Missouri*: does a common—but mistaken—perception of corruption justify substantial burdens on First Amendment interests?

1. Contributions and Expenditures: A False Dichotomy

Although BCRA raises the limits on hard money contributions to political parties, it cuts off soft money contributions almost completely. These contribution limits do not effect contributors alone; they also effect the recipients—political parties. Parties have come to depend on soft money.³⁷⁴ Just as limits on the amount that a newspaper could collect from subscribers or advertisers would restrict the newspaper’s speech and just as limits on campaign contributions restrict a candidate’s speech,³⁷⁵ BCRA’s new limits on political parties’ revenues will have substantial effects on the parties’ ability to speak and to make expenditures or contributions to support their candidates.

Parties will now have to use hard money to finance most party building and administration that they had previously covered with soft money.³⁷⁶

370. *Colorado II*, 533 U.S. at 452. See *supra* text accompanying notes 97-99.

371. Stephen Ansolabehere, et al., *Why Is There So Little Money in U.S. Politics*, J. ECON. PERSPECTIVES (2002), available at http://econ-www.mit.edu/faculty/snyder/files/CF_JEP_Final.pdf (on file with author) [hereinafter MIT Study].

372. *Id.* at 5.

373. See *supra* text accompanying notes 58-60.

374. See Smith, *supra* note 325, at 180 (arguing that political parties have used soft money contributions to mitigate the effects of limits on hard money that “remained unchanged and unadjusted for inflation since 1974”).

375. See *supra* note 18 and accompanying text.

376. See Stephen Ansolabehere & James M. Snyder, Jr., *Soft Money, Hard Money, Strong Parties*, 100 COLUM. L. REV. 598, 598 (2000) (finding that soft money finances state party voter registration drives and mobilization efforts that increase voter turnout and that limits on soft money will reduce

They will also have to finance costs of fundraising with hard money. Political parties, for example, will now have to spend substantial amounts of hard money, which otherwise could be spent to support their candidates, to replace soft money expenditures for mail, voter mobilization, consultants, party salaries, administration, and fundraising that totaled more than \$280 million in the 2000 election cycle.³⁷⁷ Political parties will not have soft money resources—some \$173,057,173 in the 2000 election cycle—for issue advertisements to magnify support of their candidates beyond FECA’s hard money limits.³⁷⁸ BCRA also restricts political parties’ speech on public issues. It forces political parties to pay for issue advertisements with hard money even though other political actors can raise and spend unlimited sums of soft money to address public issues.³⁷⁹

In addition to limiting political parties’ expenditures by cutting off soft money contributions, one provision of BCRA also imposes a new, direct limit on the amount of support that political parties can provide to their candidates. It prevents parties from supporting candidates with both coordinated expenditures and independent expenditures.³⁸⁰ This provision completely undermines the Court’s theory in *Colorado II* that the burdens imposed on political parties by limits on coordinated expenditures are offset by the parties’ ability to make unlimited independent expenditures to support their candidates.³⁸¹ It appears to serve no purpose other than limiting the total amount of support that political parties can provide to their candidates—that is—to prevent political parties from making both coordinated expenditures under FECA’s limits and independent expenditures under *Colorado I*.³⁸² To spend limited amounts of campaign funds in coordination with their candidates, political parties, unlike other political entities, must forego their constitutional rights under *Colorado I* to make unlimited independent expenditures.

Advocates of regulation do not deny the burdens imposed by the soft money regulations on political parties,³⁸³ they ignore them. They focus

participation).

377. See *supra* text accompanying note 334.

378. *Id.*

379. See BAUER, *supra* note 292, at 27-28, 51; Smith, *supra* note 325, at 184-200 (arguing that limits on soft money contributions used to finance party issue advertisements violate the First Amendment).

380. See *supra* text accompanying notes 359-60.

381. See *supra* text accompanying note 126.

382. *Colorado I*, 518 U.S. at 614-19; see *supra* text accompanying notes 339-42.

383. The catalogue of burdens set out above is far from complete. See Bopp & Coleson, *supra* note 347, at 12 (stating that BCRA “dramatically limits the issue advocacy, legislative, and organizational activities of political parties”). BCRA, for example, imposes extensive regulations on

exclusively on the effects of the soft money restrictions on contributors.³⁸⁴ Richard L. Hasen, for example, argues the prohibitions on soft money contributions by individuals, PACS, corporations and unions are justified, but he does not address the effects of the soft money limits on political parties.³⁸⁵ Others, like Trevor Potter, argue that the BCRA “reinstates” FECA’s original limits on “the size and sources of contributions to political parties.”³⁸⁶ He argues that “BCRA renews the bright-line restriction on . . . corporate and union contributions . . . and again restores . . . individual contribution limits,” but he does not consider BCRA’s effects on political parties.³⁸⁷ The government, in a similar vein, does not evaluate the burdens imposed on political parties by BCRA. It asserts simply that “[t]he political parties thrived before they began accepting hundreds of millions of dollars in soft money contributions, and there is no basis for finding that they will not continue to do so after BCRA takes effect.”³⁸⁸ It ignores its duty to justify regulation of political parties’ funding and argues instead that the political parties cannot make any showing that BCRA renders them “useless.”³⁸⁹

The focus of BCRA’s proponents on the effects of contribution limits on contributors is incomplete. Without contributions, the recipients—political parties and candidates—do not have revenues necessary to pay for political speech. Money, of course, is not literally speech. Money is not, however, just property when it is used to finance political speech.³⁹⁰

state and local candidates and on state, district, and local political parties, *see supra* notes 352-55 and accompanying text, and these regulations will have substantial effects on the ability of state political parties, like the Missouri Republican Party, to present their national, state, and local candidates as a team. *See supra* text accompanying notes 162-65.

384. *E.g.*, Brief of Amici Curiae Former Leadership of the American Civil Liberties Union, In Support of Defendants Federal Election Commission et al., *McConnell v. FEC* at 17 (defending effects of soft money restrictions on corporate, union, and individual donors and ignoring effects on political parties).

385. Hasen, *supra* note 97, at 200-02.

386. Potter, *supra* note 294, at 1.

387. *Id.* at 4; *see id.* at 1-4.

388. FEC Opening Brief at 62; *see* Defendant-Intervenors’ Excerpts of Brief of Defendant (Redacted Version for Public Distribution), *McConnell v. FEC* at I-64 (asserting same argument) [hereinafter Intervenors’ Opening Brief].

389. FEC Opening Brief at 88 (quoting *Colorado II*, 533 U.S. at 455); *see id.* at 62 (arguing that BCRA’s soft money provisions “from the parties’ perspective” are not “so radical in effect as to render political association ineffective” (quoting *Shrink Missouri*, 528 U.S. at 397); Intervenors’ Opening Brief, *supra* note 388, at I-61 (arguing that soft money provisions are valid because they are not “so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.” (quoting *Shrink Missouri*, 528 U.S. at 397)).

390. Justice Stevens’ claim that the “[m]oney is property, it is not speech,” *Shrink Missouri*, 528 U.S. at 398, permits him and others tacitly to avoid careful consideration of effects of campaign

Money, like other types of property—a bullhorn, a printing press, a television station, or a website—is necessary, especially for political outsiders, to speak effectively to large groups of voters. Contributions—revenues—may be especially important to political outsiders or underdogs. It is not simply a matter of happenstance that the candidate who challenged Missouri’s limits on individual campaign contributions was a political neophyte fighting the Republican Party’s choice for nomination as its candidate for state auditor.³⁹¹ It is not simply a matter of happenstance that the political party challenging the state’s limits on party contributions was the underdog, the MRP, the minority party in state politics.³⁹²

Limits on contributions to political parties, like the Missouri limits on contributions made by parties to their candidates, impose substantial burdens on First Amendment interests. A party can only spend what it collects; a restriction on revenues is a restriction on expenditures.³⁹³ Given the burdens imposed by BCRA on party revenues, and in turn on party expenditures, there is great force to the Tenth Circuit’s observation that “a simple cubbyholing of constitutional values under the labels ‘contribution’ and ‘expenditure’ cheapens the currency.”³⁹⁴ The Court should make the government justify BCRA’s soft money regulations just like it makes the government justify expenditure limits and other speech regulations.

finance regulations on political speech and association.

391. La Pierre, *supra* note 37, at 703-05.

392. *See supra* text accompanying notes 147-50.

393. In addition to the assumption that contributions impose only marginal restrictions on contributors, *Buckley* assumed that limits on individual contributions to candidates would not have a “severe” impact on the recipients (candidates) because they could raise funds in smaller amounts from a larger number of contributors. *See supra* text accompanying notes 20-23. The government argues that the Court should make a parallel assumption that political parties can replace large soft money contributions with smaller hard money contributions from a larger number of contributors. FEC at 88-89. This argument is strained. Soft money expenditures were more than forty percent of the total expenditures of the two major parties in the 2000 election cycle. *See supra* text following note 333. Many soft money contributions were made in large amounts that dwarf hard money contributions, and corporations, which were a major source of soft money contributions to political parties, are otherwise restricted to making limited contributions through PACs. *See supra* notes 344-45 and accompanying text. More importantly, the government conflates its duty to justify burdens imposed on political parties with the parties’ ability to minimize the effects of regulations. The mere fact that a political party may find its way around certain regulations does not mean that the regulations do not impose any burden or that the burden is justified. The First Amendment protects political parties’ choices about how to conduct their affairs unless government can demonstrate that there is some real harm. *See infra* text accompanying notes 399-415.

394. *See* FEC v. Colo. Republican Fed. Campaign Comm’n, 213 F.3d 1221, 1232 (10th Cir. 2000), *cert. granted*, 531 U.S. 923 (2000), *judgment rev’d*, 533 U.S. 431 (2001) (rejecting any distinction between party contributions to candidates and party expenditures for candidates).

2. *The First Amendment “Real Harm” Standard*

The Court has held that “preventing corruption or the appearance of corruption are the only legitimate and compelling government interests . . . for restricting campaign finances.”³⁹⁵ It defined these interests broadly in *Shrink Missouri* to include voters’ perceptions of “politicians too compliant with the wishes of large contributors” and in *Colorado II* to include “undue influence on an officeholder’s judgment, and the appearance of such influence.”³⁹⁶ Government may limit campaign contributions to prevent these harms; government may also regulate campaign financing “to minimize circumvention of contribution limits” that are themselves necessary to prevent corruption or the appearance of corruption.³⁹⁷

It should not be enough, however, merely to intone a purpose of preventing corruption or the appearance of corruption. The government’s interest in preventing corruption and appearance of corruption does not arise—and cannot justify contribution limits—unless political contributions actually cause these problems.³⁹⁸ To justify the burdens BCRA imposes on political parties—as well as on their supporters and their candidates—the government must do more than invoke the specter of special interest influence. The government must demonstrate that party support in excess of FECA’s original hard money limits, party issue advertisements, and other uses of soft money cause some “real harm.”

The government’s duty to demonstrate that speech regulations address some real harm is well-established:

When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply ‘posit the existence of the disease sought to be cured.’ . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.³⁹⁹

395. *FEC v. Natl. Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985).

396. *Shrink Missouri*, 528 U.S. at 389; *Colorado II*, 533 U.S. at 441.

397. *See Colorado II*, 533 U.S. at 465.

398. *See* Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002) (recognizing that the government’s interest in preventing crime could justify regulation of door-to-door solicitations, but raising the preliminary question whether door-to-door solicitations create this harm in the first place); *DiMa Corp. v. Town of Haillie*, 185 F.3d 823, 829 (7th Cir. 1999) (explaining that government has burden of showing that there is evidence supporting its proffered justification for regulations burdening First Amendment interests).

399. *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 475 (1995) (quoting Turner

The Court has held consistently that the government must demonstrate that commercial speech regulations address some real harm.⁴⁰⁰ It has held that regulation of government employees' nonpolitical speech requires "a justification far stronger than mere speculation about serious harms."⁴⁰¹ It has measured content-neutral cable television regulations by the real harm standard.⁴⁰² When vital First Amendment interests are significantly burdened, the government "must present more than anecdote and supposition"; it must demonstrate that there is a "real problem."⁴⁰³

The First Amendment real harm standard is a critical safeguard of political speech and association. As the Court has observed in reviewing commercial speech regulations, the requirement that government "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree" is "critical."⁴⁰⁴ Absent some evidence of real harm, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression."⁴⁰⁵ Similarly, absent some evidence that corruption or the appearance of corruption is a real harm, the government "could with ease restrict [political] speech in the service of other objectives"—leveling the playing field, protecting incumbents, or merely pandering to popular fears—"that could not themselves justify a burden on [political] expression."⁴⁰⁶ The real harm requirement "smoke[s] out" the risk that the government has burdened political speech for unconstitutional purposes.⁴⁰⁷

Although the Court had held that regulations of commercial speech, of government employees' speech, and of cable television must address some real harm, it expressly refused in *Shrink Missouri* to apply the real harm standard to regulation of campaign contributions.⁴⁰⁸ There was little need

Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (plurality opinion of Kennedy, J.) (internal citation omitted)).

400. La Pierre, *supra* note 37, at 693-95.

401. United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 475 (1995); *see* La Pierre, *supra* note 37, at 695-96.

402. La Pierre, *supra* note 37, at 696-97.

403. *Playboy Entm't Group, Inc.*, 529 U.S. at 822, 827.

404. Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 188 (1999) (quoting *Edenfield v. Fane*, 507 U.S. at 770-71) and *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995)).

405. *Greater New Orleans Broad. Ass'n, Inc.*, 527 U.S. at 188 (quoting *Rubin*, 514 U.S. at 487, quoting *Edenfield*, 507 U.S. at 771).

406. *Id.* at 188.

407. *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989).

408. *See Shrink Missouri*, 528 U.S. at 379 (rejecting a "requirement that governments enacting contribution limits must demonstrate that the recited harms are real, not merely conjectural") (internal quotations and citations omitted); *see supra* notes 41-60 and accompanying text. The *Shrink Missouri*

for any hard evidence to establish the “plausible” proposition that contributions buy votes or create the appearance of corruption.⁴⁰⁹ The Court did acknowledge, however, that “[t]here might . . . be need for . . . more extensive evidentiary documentation” if a candidate challenging contribution limits could “cast doubt on” the proposition that campaign contributions cause corruption.⁴¹⁰ In *Shrink Missouri*, however, “academic studies said to indicate that large contributions to public officials or candidates do not actually result in changes in candidates’ positions” were not enough to create such doubt.⁴¹¹ There were other “[o]ther studies [that] point the other way.”⁴¹² Even if studies showed conclusively that campaign contributions did not cause corruption, the Court suggested that a mistaken public perception of corruption might be enough to justify contribution limits.⁴¹³

Shrink Missouri stands the First Amendment on its head: real harm is necessary to justify regulation of commercial speech; plausible harm is enough to justify regulation of political speech. A new comprehensive study “casts doubt on” the proposition that money buys votes.⁴¹⁴ This

Court ignored most of its decisions that had required proof of real harm to justify speech regulations, see *La Pierre*, *supra* note 37, at 693-97, but it did address its decision in *Colorado I* holding that limits on political parties’ independent expenditures violated the First Amendment. *Shrink Missouri*, 528 U.S. at 386. In *Colorado I*, the Court applied the real harm standard and found that the government had not made any showing that independent expenditures by political parties caused corruption. See *La Pierre*, *supra* note 37, at 700-01. The *Shrink Missouri* Court claimed that its decision to require evidence of real harm in *Colorado I* was consistent with its decision not to impose same prerequisite for Missouri’s regulation of campaign contributions. *Shrink Missouri*, 528 U.S. at 392. In the Court’s view, the decisive factor was the distinction between independent expenditures and contributions: “[l]imitations on independent expenditures are less directly related to preventing corruption’ than [limitations] on contributions.” *Id.* In other words, the Court was willing to indulge in the presumption that large campaign contributions create a perception of corruption or of politicians “too compliant with the wishes of large contributors.” See *id.* at 389. The Court was not willing to indulge in the presumption that a large independent expenditure can create the same perception.

The distinction here is, at best, illusive. Consider, for example, Charles Wyly’s decision, shortly before the March 2000 New York presidential primary elections, to spend \$2.5 million on political commercials praising then Texas Governor George W. Bush’s environmental record and sharply criticizing Senator John McCain, Bush’s opponent. Richard W. Stevenson & Richard Perez-Pena, *The 2000 Campaign: The Tactics; Wealthy Texan Says He Bought Anti-McCain Ads*, N.Y. TIMES, Mar. 4, 2000, at 1A. If there is any risk that the public might believe that the \$2.5 million dollar independent expenditure might inspire as much gratitude from candidate Bush as a direct contribution of the same amount, the Court’s effort in *Shrink Missouri* to distinguish its application of the real harm requirement in *Colorado I* fails.

409. See *supra* text accompanying notes 45-57.

410. *Shrink Missouri*, 528 U.S. at 379.

411. *Id.* at 394.

412. *Id.*

413. See *id.* at 395 (noting “the absence of any reason to think that public perception has been influenced” by studies showing that big money does not buy votes).

414. See *supra* note 371 and see *infra* text accompanying notes 419-30.

study should lead Court to require “evidentiary documentation” that soft money contributions cause some real harm.⁴¹⁵ This study should also force the Court to confront squarely its suggestion that a mistaken perception of corruption suffices to justify limits on political contributions.

3. *Beyond Anecdote and Conjecture: Is There Any “Evidentiary Documentation” That Soft Money Causes Some Real Harm?*

BCRA proponents place heavy stock in the cynical proposition that soft money buys votes. There is, for them, “little doubt that large ‘soft money’ contributions to political parties can corrupt, and are widely perceived as corrupting, government officials.”⁴¹⁶ Reports documenting large soft money contributions to political parties, politicians’ complaints about the tawdry pursuit of contributions and about the corrosive effects of soft money, and media reports linking soft money contributions to legislative policy—all confirm the evil effects of money in our political system.⁴¹⁷

It is, after all, just a matter of common sense. Derek Bok, an expert witness and former President of Harvard University claims, for example, that

[I]t strains credulity to suppose that contributions running into tens and hundreds of thousands of dollars—frequently given on the eve of important legislative decisions—do not have an effect on the final outcome. Powerful interests would hardly give such large sums of money—often to strategically lawmakers from both major parties—if they were not persuaded that their contributions were likely to have *some* significant effect.⁴¹⁸

This “common sense” claim that campaign contributions corrupt politicians and officeholders, however, is most probably wrong. A recent study finds that “campaign contributions are not a form of policy-

415. It is not enough that there remain “[o]ther studies [that] point the other way,” *Shrink Missouri*, 528 U.S. at 394. If studies are in conflict, the government must address the conflict and demonstrate that campaign contributions cause corruption. Any presumption that contributions cause corruption would be inconsistent with the government’s duty to justify limits on First Amendment interests. See *supra* note 30 and accompanying text.

416. Brief of Amici Curiae Former Leadership of the American Civil Liberties Union, *supra* note 384, at 14; see *id.* at 17 (arguing that there is “no question that unlimited corporate, labor union, and individual soft money contributions create both actual and apparent corruption”).

417. See generally FEC Opening Brief, *supra* note 368, at 62-84; Intervenors’ Opening Brief, *supra* note 384, at I-19 to I-44.

418. Derek Bok Expert Report at 3-4 as quoted in Intervenors’ Opening Brief, *supra* note 388, at I-37 (emphasis in original).

buying.”⁴¹⁹ Even if it “strains credulity” to suppose that campaign contributions do not cause corruption, “[t]he discrepancy between the value of policy and the [small] amounts contributed strains basic economic intuitions.”⁴²⁰ The study found, for example, that “[t]he United States government spent approximately \$134 billion on defense procurement contracts in fiscal year 2000.”⁴²¹ Total contributions by “[a]ll defense firms and individuals associated with those firms” to candidates and parties in 2000, however, were only \$13.2 million, a sum that is less than one hundredth of one percent (.00985%) of the amount of defense spending.⁴²² If money really buys votes, then “given the value of policy at stake, firms and others interest groups should give more.”⁴²³ If money really buys votes, then “[a] surprisingly large number of firms—even firms in the Fortune 500—do not participate at all, even though there are virtually no barriers to entry.”⁴²⁴

Instead of buying votes, campaign contributions are “a form of consumption, or, in the language of politics, participation.”⁴²⁵ The study, by three professors at the Massachusetts Institute of Technology (MIT), found that “almost all money in the existing campaign finance system comes ultimately from individuals” and not from special interests.⁴²⁶ Individuals make contributions “because they are ideologically motivated, because they are excited by the politics of particular elections, and because they are asked by their friends or colleagues, and because they have the resources to engage in this form of participation, namely money.”⁴²⁷ Although “corporations, labor unions and other interest groups give nontrivial amounts of money to politics,” the evidence that these contributions have a substantial influence on policy is “thin.”⁴²⁸ After an extensive survey of the social science literature and its own “analyses of legislative decision making,” the MIT study found that “[c]ontributions explain a miniscule fraction of the variation in voting behavior in the U.S. Congress.”⁴²⁹ Instead, “[l]egislators’ votes depend almost entirely on their

419. MIT Study, *supra* note 371, Abstract.

420. *Id.* at 2.

421. *Id.*

422. *Id.*

423. *Id.*

424. *Id.* at 3.

425. *Id.* at 4.

426. *Id.* These individual contributions are made in “relatively small sums.” *Id.*

427. *Id.*

428. *Id.* at 4-5.

429. *Id.* at 5.

own beliefs and the preferences of their voters and their party.”⁴³⁰

The government does not challenge these findings. It does not argue that soft money actually causes corruption; it argues instead that soft money creates “the potential for corruption in the political process.”⁴³¹ The “potential” for corruption—the possibility that money can buy votes even if it does not in fact buy votes—is at bottom simply a claim that political contributions create the appearance of corruption. To the extent that the government makes any argument that soft money actually causes corruption, its evidence is little more than anecdote and conjecture.

The government argues, for example, that “[r]espected political scientists endorse Congress’ conclusion that soft money donations to the national political parties have the *potential* to lead to the trading of legislative or policy favors or otherwise corrupt the political process.”⁴³² It also claims that the “risk”—or potential—of corruption extends beyond “final roll-call votes on legislation” to “other, less public, aspects of the legislative and policymaking process.”⁴³³ The government’s political science experts, however, do not claim that soft money actually causes corruption at any stage of the legislative process, and the government does not point to any study showing that soft money actually causes corruption.⁴³⁴

Although the government’s political scientists raise only the potential of corruption, the government makes one claim that soft money actually causes corruption. It asserts that “[c]urrent and former Members of Congress likewise agree that large soft money donations and the special access to legislators and policymakers that they provide, can corrupt, and

430. *Id.* at 5. This conclusion is consistent with “the broader literature.” *Id.* at 20; *see, e.g.*, Stephen G. Bronars & John R. Lott, Jr., *supra* note 97, at 346 (1997); *see also id.* at 319, 347 (“[C]ampaign contributions are made to support those politicians who already value the same positions as their donors” and that “[j]ust like voters, contributors appear able to sort into office politicians who intrinsically value the same things that they do”); Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 58 (1997) (finding that “systematic studies have found little or no connection between campaign contributions and legislative voting records”); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1067-68 (1996) (stating that studies rejecting the commonplace assumption that “campaign contributions are the dominant influence on policymaking” may seem counterintuitive, and arguing that other factors including “party affiliation, ideology, and constituent views and needs” are the dominant forces in legislative behavior). The MIT study found that “only one in four studies from the previous literature support the popular notion that contributions buy legislators’ votes” and “when one controls for unobserved constituent and legislator effects, there is little relationship between money and legislator votes.” *Id.* Abstract.

431. FEC Opening Brief, *supra* note 368, at 71.

432. *Id.* at 78 (emphasis added).

433. *Id.* at 79.

434. *See id.* at 78-79.

have corrupted, the lawmaking process.”⁴³⁵ The anecdotes and opinions of past and present legislators, however, establish at most isolated instances of corruption, and they are most easily viewed as assertions that other legislators appear to be corrupt. The government, for example, cites former Senator Alan K. Simpson’s (R. Wyoming) testimony that he recalled ““specific instances when Senators’ votes were affected by the fear of losing future donations”” and notes that he “opined that ‘[d]onations from the tobacco industry to Republicans scuttled tobacco legislation, just as contributions form the trial lawyers to Democrats stopped tort reform.’”⁴³⁶ These “opinions,” however, may be little more than “sour grapes”—the perception that legislators on the other side of an issue prevailed because of money and not because of principle. Senator John McCain’s (R. Arizona) testimony also falls short of the mark. The government claims only that this Senator “cited several instances in which large soft money donors at least strongly *appear* to have influenced various states of the legislative process.”⁴³⁷

Finally, the government claims that “[t]estimony from lobbyists, corporate representatives, major donors, and party insiders confirms that corporate donors frequently give soft money to parties to ‘influence the legislative process for their business purposes.’”⁴³⁸ It may well be true, as the MIT study suggests, that special interests make contributions as rational “investors” and that they “behave as if they expected favors in return.”⁴³⁹ These corporate “investments,” however, “do not account for most of the money [in politics], and they do not explain much government activity.”⁴⁴⁰

435. *Id.* at 79.

436. *Id.* at 80.

437. *Id.* (emphasis added).

438. *Id.* The government also makes a closely related claim that political parties, as well as their candidates and officeholders, coerce corporate contributions. *Id.* at 84-86; *see generally* Brief of Amicus Curiae Of The Committee For Economic Development In Support Of Defendants at 4, 7, *McConnell v. FEC* (No. 02-0582) (arguing that corporations make soft money contributions “to secure preferred access” to government officials and “to avert perceived retribution”). The government argues that “business leaders who are asked to contribute soft money . . . accede to requests for large donations because they believe that if they do not, they will lose access to federal officials and may face adverse legislative consequences.” FEC Opening Brief, *supra* note 368, at 85. Although some business leaders may well believe that they are being “shaken down”, *id.* at 86 (quoting Senator Russell Feingold (D. Wisc.)), the MIT study concluded that “extortionary practices seen unlikely given the trivial amounts of money raised.” MIT Study, *supra* note 371, at 3. Indeed, business leaders may actually contribute, not out of fear of retribution, but simply because they “value being part of the Washington establishment” and enjoy social “events attended by prominent national politicians—people of celebrity status.” *See id.* at 22.

439. MIT Study, *supra* note 371, at 5, 21.

440. *Id.* at 21.

If there really was “a competitive market for private benefits from public laws or for services and efforts from politicians,” economists would expect to find a large market and extensive corporate participation.⁴⁴¹ Instead, the MIT study found that the market is small and that corporate participation is low. The study found that political spending was only a small percentage of national economic activity.⁴⁴² Although total campaign contributions and spending in the 1999-2000 national election cycle was about \$3 billion, this sum was only 0.15% of the federal government’s total \$2 trillion spending in 2000.⁴⁴³ The majority of the \$3 billion spent in the 1999-2000 elections “came from individuals in small amounts.”⁴⁴⁴ The authors of the study estimated that “individuals contributed nearly \$2.4 billion, the public treasury paid \$235 million, and about \$380 million came directly from the treasuries of corporations, unions, and other associations.”⁴⁴⁵

Although the MIT study does not rule out the possibility that further research might show that campaign contributions influence a small percentage of government decisions,⁴⁴⁶ it seems unlikely that the government can prove—at least in any social science sense—that the political contributions actually cause corruption. Indeed, there is so little relation between political contributions and legislators’ votes that the critical question is why do interest groups give at all.⁴⁴⁷ Just as Missouri had no evidence that political parties’ contributions to their candidates caused corruption,⁴⁴⁸ the government’s limited argument that soft money creates only the “potential” for corruption is a tacit concession that it cannot show, except perhaps in a few isolated instances, that soft money contributions to political parties actually cause any corruption.⁴⁴⁹

441. *Id.* at 3 (footnote omitted).

442. *Id.* at 10 (“Political contributions in 2000 were just 4 hundredths of one percent of national income.”).

443. *See id.* at 1.

444. *Id.* at 8.

445. *Id.* at 8 (footnote omitted).

446. *See id.* at 20-22.

447. *Id.* at 20; *see id.* at 21 (“The question is not why do corporations, unions, and other special interest groups give so little, but why do they give at all?”).

448. *See supra* text accompanying notes 221-45.

449. McConnell Omnibus Brief in Consolidated Brief For Plaintiffs In Support of Motion for Judgment (Redacted Version), at McConnell-35 *McConnell v. FEC*, No. 02-0582 (arguing that the government has no evidence of actual corruption); Republican National Committee Brief at RNC-16 in McConnell Omnibus Brief for Plaintiffs in Support of Motion for Judgment, *McConnell v. FEC*, No. 02-0582 (same).

The government argues, of course, that it does not have to prove that soft money contributions are actually corrupt because they create the appearance of corruption.⁴⁵⁰ It cites experts' opinions that "the public . . . perceives that 'policy-decisions are bought and sold in Washington.'"⁴⁵¹ It points to polls showing that "people view large soft money contributions to political parties as contrary to the democratic ideal of honest policy-making."⁴⁵² It argues that contributions create "access" to politicians and officeholders and that "access" in turn has the potential to corrupt the political system and creates the appearance of "'politicians too compliant with the wishes of large contributors.'"⁴⁵³

The government's arguments ignore the critical point that the appearance of corruption created by political contributions is, in fact, mistaken. Political contributions, as the MIT study and others found, do not actually cause corruption.⁴⁵⁴ Mistaken perceptions are a doubtful warrant for regulating important constitutionally protected interests. Just

450. FEC Opening Brief, note 368 *supra*, at 81 ("Whether or not soft money contributions have in fact resulted in political corruption, the legislative record and the record developed in this case demonstrate that the unregulated soft money system has created the *appearance* of corruption.") (emphasis in original).

451. *Id.* at 83 (quoting Mann Expert Rep. at 35).

452. *Id.*

453. *Id.* at 78 (quoting *Shrink Missouri*, 528 U.S. at 377). The government argues in some detail that political parties "routinely and openly reward large soft money donors with access to federal officeholders and party leaders, not only through meetings, but also through informal opportunities to discuss issues with officeholders at fundraising events, such as dinners, retreats, golf tournaments, and other events." *Id.* at 77; see *id.* at 75-78. The government, however, stops short of claiming that access is corruption and argues only that access creates the potential for corruption or the appearance of corruption. *Id.* at 78. Moreover, the government's evidence that political parties reward soft money donors with an opportunity to spend a night in the White House or to have coffee with the President, *id.* at 76, may show that access is, at bottom, nothing more social gratification—the opportunity to be "part of the Washington establishment." See MIT Study, *supra* note 371, at 22.

Although money may create opportunities for substantive discussions with officeholders, access does not mean that legislators are changing policy in response to contributions. The MIT study suggests that further study might show that "money buys access," but it also cautions that "access itself does not guarantee influence, but only the opportunity to provide information that might influence legislators." *Id.* at 21, 22. This caution is appropriate because other studies suggest that access—the opportunity to present one's case—is not bought; instead, individuals and groups contribute to candidates who have similar policy preferences, and candidates meet with, and obtain information from, supporters who share their political goals and beliefs. David Austen-Smith, *Campaign Contributions and Access*, 89 AM. POL. SCI. REV. 566 (1995); see Janet M. Grenzke, *PACs and the Congressional Supermarket: The Currency Is Complex*, 33 AM. J. POL. SCI. 1, 19-20 (1989) (contributions provide PACs an opportunity to state their case but do not systematically bias votes). In any event, a finding that contributions create access would not undercut the MIT study's central finding that party, ideology, and constituent views, not contributions, are the dominant forces in legislative behavior. MIT Study, *supra* note 371, at 5. A finding that contributions buy access would only help solve the riddle why special interests—who get so little for their contributions—bother to give at all. *Id.* at 21, 22.

454. See *supra* note 430.

as the Court would not lightly permit a local government to make zoning decisions on the basis of common—but mistaken—perceptions about mentally retarded persons,⁴⁵⁵ it should not lightly permit Congress to regulate political contributions on the basis of mistaken perceptions of corruption.

The Court, of course, can not be confident that there is a “real problem”—that the mistaken perception of corruption causes any real harm—unless the government presents objective evidence.⁴⁵⁶ The government points to public opinion polls showing the public’s belief that “[t]he views of large contributors to parties improperly influence policy and are given undue weight in determining policy outcomes.”⁴⁵⁷ This “appearance of corruption,” or alternatively the “potential for corruption,” is an amorphous, dangerous ground for regulating political speech.

The “everyday business of a legislator” is “[s]erving constituents and supporting legislation that will benefit the district and individuals and groups therein,”⁴⁵⁸ and an “appearance of corruption” may arise whenever officeholders make decisions of interest to their contributors. If a presumption of corruption arises from the mere fact that a public official votes in a way that pleases contributors, then, as the Eighth Circuit observed, “legislatures could constitutionally ban all contributions except those from [an] official’s opponents, a patent absurdity.”⁴⁵⁹ To find an appearance of corruption when legislators “act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries” would subject to regulation “conduct that . . . is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.”⁴⁶⁰

455. See *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-50 (1985).

456. See *Sao Paulo State of Federative Republic of Brazil v. American Tobacco Co.*, 535 U.S. 229 (2002) (determination whether the “impartiality [of a judge] might reasonably be questioned” should be made in light of the facts); *Microsoft Corp. v. United States*, 530 U.S. 1301, 1301 (2000) (Rehnquist, C.J.) (inquiry into the appearance of impartiality is “an objective one” and must be “made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances”).

457. FEC Opening Brief, *supra* note 368, at 83 (internal quotation and citation omitted); see *id.* at 81-84.

458. *McCormick v. United States*, 500 U.S. 257, 272 (1991).

459. *Russell v. Burris*, 146 F.3d 563, 569 (8th Cir. 1998), *cert. denied*, 525 U.S. 1001 (1998).

460. *McCormick*, 500 U.S. at 272. If an appearance of corruption is “unavoidable so long as election campaigns are financed by private contributions,” then public financing would be the only appropriate legislative response. *Id.*

To justify BCRA's limits on political contributions, the Court should require the government to produce objective evidence, not just of the public perception of corruption, but also of some real harm caused by this mistaken perception. The government claims that "Congress viewed the soft money ban as a means of reducing public cynicism about politics and increasing public participation in democratic governance" and that members of Congress were concerned about "the steady downward trend in voter turnout."⁴⁶¹ Others claim that that soft money "erodes citizens' trust in government."⁴⁶² The government and BCRA's proponents, however, do not have any objective evidence that soft money actually causes these harms or of the dimensions of these harms. As Senator John McCain (R. Ariz.), for example, has acknowledged, there are many reasons other than soft money for negative perceptions of government.⁴⁶³

The Court should take seriously its empty claim in *Shrink Missouri* that it has "never accepted mere conjecture as adequate to carry a First Amendment burden."⁴⁶⁴ It should make the government demonstrate that, apart from the potential for corruption inherent in all political contributions, soft money causes some real harm. It should make the government demonstrate that the ban on soft money contributions to national political parties and limits on state political parties "will in fact alleviate these harms in a direct and material way."⁴⁶⁵

There is reason for concern that regulation of soft money contributions is designed—not to address the allegedly harmful effects of the appearance of corruption—but to achieve other ends. The "millionaire" provisions of BCRA, for example, strongly suggest that Congress does not believe that political contributions cause any real harm. These provisions increase the amounts that individuals and political parties can contribute to a candidate facing a wealthy opponent who spends personal funds.⁴⁶⁶ Although BCRA imposes a \$2,000 limit on individual contributions to candidates in federal

461. FEC Opening Brief, *McConnell v. FEC*, *supra* note 368, at 82.

462. Intervenor's Opening Brief, *McConnell v. FEC*, *supra* note 388, at I-38.

463. Committee for Economic Development Amicus Brief, *supra* note 438, at 10 (quoting Senator McCain's observations that "[a]ssassinations, Vietnam, Watergate, and many subsequent public scandals" as well as "frequent campaign finance scandals and their real or assumed connection to misfeasance by public officials" have fueled the public's "distrust" in their government").

464. *Shrink Missouri*, 528 U.S. at 392; *City of Erie v. Pap's A.M.*, 529 U.S. 277, 312 (2000) (Souter, J., concurring in part and dissenting in part).

465. *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 475 (1995) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion of Kennedy, J.) (internal citation omitted)).

466. BCRA § 304(a) (adding new FECA § 441a(i) (Supp. 2002)); *see* BAUER, *supra* note 292, at 68-74.

elections, it permits individuals to contribute as much as \$12,000 to candidates facing wealthy opponents.⁴⁶⁷ Even though *Colorado II* upheld limits on coordinated expenditures to prevent corruption,⁴⁶⁸ BCRA authorizes political parties to make unlimited coordinated expenditures to support candidates facing wealthy opponents.⁴⁶⁹

As Robert Bauer notes, “[i]f a contribution exceeding \$2,000 risks corruption, then, . . . it will presumably do so regardless of the reasons why a candidate needs the money [and] [i]n fact, a candidate who urgently needs the money to counter the resources of a wealthy opponent, stands to incur an even larger measure of indebtedness to the donor who lends a monied hand in the time of need.”⁴⁷⁰ The millionaire provisions suggest either that Congress does not believe that individual contributions or unlimited party support cause corruption or perhaps that other interests, like protecting incumbents from wealthy challengers, outweigh any appearance of corruption.⁴⁷¹

If limits on political contributions do not really address any interest in preventing corruption or the appearance of corruption, they may well serve other purposes. The Brennan Center, for example, complains that “soft money comes overwhelmingly from business interests and wealthy individuals,” “[g]roups seeking to promote a social agenda, such as civil rights or environmental protection, are not major contributors of soft money,” and “[r]elative to business interests, labor provides a very small share of party soft money.”⁴⁷² These complaints strongly suggest that the goal of at least some BCRA proponents is to “level the playing field.” Given the Court’s disapproval of efforts to “equaliz[e] the financial resources of candidates,⁴⁷³ such “egalitarian” goals must be buried in the

467. BAUER, *supra* note 292, at 71.

468. See *supra* text accompanying notes 81-83.

469. BAUER, *supra* note 292, at 71, 73.

470. BAUER, *supra* note 292, at 74; see *id.* (“Critics may question how the Act might plausibly limit contributions to \$2,000 per election, on the grounds that a larger amount would risk corruption, while authorizing contributions substantially larger for a candidate facing a millionaire.”).

471. Contribution limits generally aid incumbents. See Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 685-87 (1997) (observing that “[c]ampaign finance limits themselves may help to entrench incumbents in office”); Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance*, 73 CAL. L. REV. 1045, 1080 (1985) (asserting that campaign finance limitations often “impose more serious strictures on challengers than on incumbents”). Contribution limits, of course, do not have any effect on a wealthy challenger who finances a campaign with personal resources, and BCRA’s provisions for increasing contribution limits may easily be understood as protecting incumbents from competition. See McConnell Omnibus Brief, *supra* note 449, at McConnell-95-97 (arguing that the millionaires provisions “serve only to protect incumbents”).

472. Brennan Report, *supra* note 333, at 1, 2.

473. *Buckley*, 424 U.S. at 56.

anti-corruption rationale of *Buckley*, and now *Shrink Missouri*.⁴⁷⁴ The millionaire provisions suggest that Congress may have designed BCRA and its limits on soft money contributions to political parties with an eye to protecting incumbents.⁴⁷⁵ Even though the Court has held that any interest “in reducing the allegedly skyrocketing costs of political campaigns” does not justify campaign finance regulations,⁴⁷⁶ cost containment may be another goal of the soft money limits. The Federal Election Commission complains, for example, that there is “an unrelenting arms race for cash that gives at least the appearance that legislative votes are for sale,”⁴⁷⁷ and the Brennan Center complains about the tremendous growth of soft money.⁴⁷⁸

The real harm requirement is a critical safeguard of commercial speech;⁴⁷⁹ it should also be a critical safeguard of political speech. By requiring the government to demonstrate that the mistaken perception of corruption actually causes some real harm, the Court can smoke out the risk that Congress has regulated political contributions for constitutionally impermissible or inadequate purposes. Unless the government demonstrates that soft money causes some real harm, the Court can not begin to judge the tradeoff between the cure and the burdens imposed on the First Amendment interests of political parties, their candidates and adherents. The real harm requirement provides a basis for ensuring that there is at least some rough proportionality between the alleged harm and the burdens imposed on speech.⁴⁸⁰

474. The Brennan Center for Justice has counseled this approach:

Goals that galvanize reformers and voters may not necessarily be the purposes accepted by the Supreme Court. Focus groups tend to report high positive responses to statutes aimed at ‘leveling the playing field,’ while *Buckley* rejected in no uncertain terms Congress’s effort to limit spending by monied interests to enhance the relative voice of others To promote survival of bills or initiatives, market research may therefore have to take a back seat to the law, when drafters formulate legislative purposes.

Brennan Center for Justice, *Writing Reform: A Guide to Drafting State & Local Campaign Finance Laws II-4* (Deborah Goldberg, ed. 1998).

475. *See supra* note 471 and accompanying text.

476. *Buckley*, 424 U.S. at 57.

477. FEC Opening Brief, *supra* note 368, at 7.

478. *See supra* notes 333-34 and accompanying text.

479. *See supra* text accompanying note 404.

480. *See Cass, supra* note 18, at 30-59 (explaining that constitutional costs of trying to control corruption and the appearance of corruption are greater than the costs of these uncertain harms).

CONCLUSION

The Eighth Circuit's decision upholding Missouri's party contribution limits shows that *Shrink Missouri* and *Colorado II* have substantially eroded First Amendment protection of political speech. The Court should raise the bar for campaign finance regulation. Political speech is "the lifeblood of a self-governing people."⁴⁸¹ It should not be enough that the new federal campaign finance regulations might not render contributions to political parties "pointless."⁴⁸² It should not be enough that these regulations might not render political parties "useless."⁴⁸³

481. *Colorado II*, 533 U.S. at 466 (Thomas, J., dissenting).

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

483. *Colorado II*, 533 U.S. at 455.