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MISSOURI'S SACRIFICIAL LAMB: POLITICAL PARTY CONTRIBUTIONS AND CAMPAIGN FINANCE REFORM IN *MISSOURI REPUBLICAN PARTY V. LAMB*

> He was led like a lamb to the slaughter, and as a sheep before her shearers is silent, so he did not open his mouth.[1]

I. INTRODUCTION

The state of Missouri most likely did not intend to lead its statewide party organizations to the slaughter, but its campaign finance statute created a similar effect to that described in the Bible. On the altar of reform, the state of Missouri tried to silence its political parties by significantly limiting what they could contribute to their candidates in a campaign for elective office. With the First Amendment in hand, the Eighth Circuit prevented Missouri's sacrifice. Relying partly on the Supreme Court's seminal campaign finance reform case, *Buckley v. Valeo*,[2] the Eighth Circuit found Missouri's limits on parties unconstitutional in *Missouri Republican Party v. Lamb*.[3]

Since *Buckley*, courts have struggled mightily with its application, finding it difficult to determine the constitutionality of subsequent campaign finance reforms passed by both Congress and the states.[4] The primary reason for this is that in *Buckley*, the Supreme Court decided that any limitation of campaign spending triggers First Amendment scrutiny because money is required for political communication; thus, a limitation on its use in campaigns amounts to a limitation on political speech. The most criticized aspect of the Court's extensive decision in *Buckley* was the constitutionally significant distinction it made between campaign contributions,[5] which could be limited under the First

1. *Isaiah* 53:7b.

2. 424 U.S. 1 (1976).

3. 227 F.3d 1070 (8th Cir. 2000), *application for stay denied sub nom.* Nixon v. Missouri Republican Party, 121 S. Ct. 31 (2000) [hereinafter *Lamb III*]. As of publication of this Note, Missouri's petition for writ of certiorari was pending. *See* Petitions for Writ of Certiorari Pending *at* http://www.ca8.uscourts.gov/reports/cert. See *infra* Part III.D for a discussion of Missouri's petition and the Missouri Republican Party's response.

4. Richard Briffault, *Campaign Finance, the Parties and the Court: A Comment on Colorado Republican Federal Campaign Committee v. Federal Elections Commission*, 14 CONST. COMMENT. 91, 92 (1997) [hereinafter Briffault, *Comment*].

5. A contribution is essentially a gift. The Federal Elections Campaign Act (FECA) provides that a person may contribute up to $20,000 per year to the national committees of a

Amendment in order to prevent corruption, and independent campaign expenditures,[6] which could not be limited, due to the absence of the same corruption risk.[7] Using these two labels, the Supreme Court invalidated a large portion of the Federal Elections and Campaign Act (FECA),[8] which significantly weakened its comprehensive scheme and left standing only restrictions on individual and group contributions.[9]

These labels continue to govern the Supreme Court's campaign finance reform jurisprudence today, as demonstrated by a series of Supreme Court cases decided after *Buckley*. In most of the cases since *Buckley*, the Court has been confronted only with independent expenditures and has found the limits unconstitutional. Last year, however, the Court upheld Missouri's limits on contributions in *Nixon v. Shrink Missouri Government PAC* (*Shrink II*).[10]

The Supreme Court recently reconsidered a challenge to the constitutionality of coordinated expenditures[11]—a middle category between independent expenditures and contributions that the FECA created solely for political parties.[12] In 1996, the Court decided *Colorado Republican Federal Campaign Committee v. Federal Elections Commission* (*Colorado Republican I*) and remanded the portion of the case dealing with coordinated expenditures.[13] It was in this case that the Court received its first opportunity to consider campaign finance reform in the party-candidate context. As it prepares to rule on this issue again, perhaps the Court will be influenced by the Eighth Circuit's ground-breaking decision in *Missouri Republican Party v.*

political party and up to $5000 per year to state party committees for activities in connection with federal elections. 2 U.S.C. § 441(a)(1)(B)-(C) (1994).

6. Independent expenditures are expenditures not in cooperation, consultation or concert with a candidate. Briffault, *Comment*, *supra* note 4, at 94. Some questions exist as to whether a political party can make truly independent expenditures. *See, e.g.*, Brief of Amici Curiae Beck, at 4 n.2, Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm. (2000) (No. 00-191), *available at* 2000 WL 1792974.

7. *Id.* at 98.

8. 2 U.S.C. §§ 431-455 (1994).

9. *Buckley*, 424 U.S. at 6-8, 20-21.

10. 528 U.S. 377, 384-85 [hereinafter *Shrink II*].

11. FECA allows political parties to make limited coordinated expenditures in connection with a campaign. 2 U.S.C. § 441a(d) (1994).

12. On February 28, 2000, the Supreme Court heard oral arguments in *Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 213 F.3d 1221 (10th Cir. 2000), *cert. granted*, 121 S. Ct. 296 (2000) [hereinafter *Colorado Republican II*], a case in which, on remand from the Supreme Court, the Tenth Circuit declared unconstitutional a provision of FECA which limited coordinated spending (defined as a contribution by the FEC) between a political party and a candidate. The Court's opinion will likely be issued by the end of June of 2001. *U.S. High Court Considers Party Spending Limits*, REUTERS, *available at* http://news.findlaw.com/legalnews/s/20010228/courtpolitics.html.

13. Colorado Republican Fed. Campaign Comm. v. Fed. Elections Comm'n, 518 U.S. 604, 625 (1996).

Lamb. Table 1 illustrates the evolution of the Supreme Court's campaign finance jurisprudence with respect to the type of spending being regulated.

Table 1: Supreme Court Holdings on Campaign Spending Limits Compared to The Eighth Circuit's Holding in *Lamb*

Limits on:	Independent Expenditures	Coordinated Expenditures	Contributions
Buckley v. Valeo (1976)	Unconstitutional	Constitutional	Constitutional
California Medical Association v. FEC (1981)[14]	Unconstitutional		
FEC v. Nat'l Conservative Political Action Comm: (1986)[15]	Unconstitutional		
Colorado Republican Fed. Campaign Comm. v. FEC (1996)	Unconstitutional	Remanded	
Nixon v. Shrink Missouri Gov't PAC (2000)[16]			Constitutional
Missouri Republican Party v. Lamb (8th Cir. 2000)			Unconstitutional
FEC v. Colorado Republican Fed. Campaign Comm. (2001)		To Be Determined	

14. 453 U.S. 182 (1981) [hereinafter *CalMed*]. In *CalMed*, four members of the Court expressed the view that nothing in FECA restricts the amount that a political action committee (PAC) can independently expend to advocate political views. However, these members of the Court were not persuaded by the California Medical Association's argument that its "speech by proxy" through its own PAC was entitled to full First Amendment protection. *Id.* at 195-96. Consequently, these members of the Court maintained that FECA could constitutionally restrict the amount an association can contribute to its PAC. *Id*. at 184.

15. 470 U.S. 480 (1984) [hereinafter *NCPAC*]. In *NCPAC*, the Court again found that a limitation on a political committee's independent expenditures in support of a candidate were unconstitutional absent an indication that such expenditures have a tendency to corrupt or to give the appearance of corruption. *Id.* at 497-98.

16. 528 U.S. 377 (2000). In *Shrink II*, the Court found Missouri's limits on individual contributions constitutional, concluding that the state statute was not void for lack of evidence where the legitimacy of the state's interest was so well-accepted in the Court's campaign finance jurisprudence. *Id*. at 384. Moreover, the Court rejected the Eighth Circuit's assumption that *Buckley* set a minimum constitutional threshold for contribution limits, finding that Missouri's limits were not too low to allow for effective political advocacy. *Id.* at 396.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

The Eighth Circuit has considered more campaign finance reform cases than any other circuit.[17] Consistently finding the challenged reforms unconstitutional, the Eighth Circuit has earned a reputation for placing a high evidentiary burden on the state before allowing any abridgement of the First Amendment free speech rights associated with campaign spending.[18]

In *Missouri Republican Party v. Lamb* (*Lamb III*), the Eighth Circuit considered the issue of contributions made by political parties to candidates, an issue upon which the Supreme Court has never directly ruled. In finding Missouri's limit on the amount parties can contribute to candidates unconstitutional, the court once again put itself at the forefront of a debate about campaign finance reform that has been churning in our nation's legislatures, courts and halls of academia for the past three decades.[19] This debate may come to a head in the current Supreme Court term, when the Court will directly consider the party-candidate relationship in the context of campaign finance reform.[20]

Lamb III is a product of comprehensive legislation passed by the Missouri Legislature in 1994.[21] Using FECA as a model, the bill limited, among other

17. *See, e.g.*, Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994); Shrink Mo. Gov't PAC v. Maupin, 71 F.3d 1422 (8th Cir. 1995); Carver v. Nixon, 72 F.3d 633 (8th Cir. 1995); Russell v. Burris, 146 F.3d 563 (8th Cir. 1998); Shrink Missouri Gov't PAC v. Adams, 161 F.3d 519 (8th Cir. 1998) [hereinafter *Shrink I*].

18. *See* D. Bruce LaPierre, *Raising a New First Amendment Hurdle for Campaign Finance "Reform*," 76 WASH. U. L.Q. 217 (1998) (explaining that the ACLU of Eastern Missouri has successfully encouraged the Eighth Circuit to adopt a "real harm" standard when considering Missouri's, and other states', justifications for various campaign finance reforms) [hereinafter LaPierre, *First Amendment Hurdle*]. *See also* Matthew S. Criscimagna, Note, *The Narrow Application of* Buckley v. Valeo*: Is Campaign Finance Reform Possible in the Eighth Circuit?*, 64 MO. L. REV. 437 (1999) (discussing the high standard placed on state campaign finance regulations by the Eighth Circuit).

19. *See, e.g.*, *Politicians For Rent*, ECONOMIST, Feb. 8, 1997, at 23; Jill Abramson, *The Nation: Following the Money; For McCain, Now's the Time. But Bush?*, N.Y. TIMES, Jan. 28, 2001, at 16; Robert Dreyfuss, *Harder Than Soft Money*, AM. PROSPECT, Jan.–Feb. 1998, at 30; Linda Greenhouse, *Court Agrees to Review Restrictions on Spending*, N.Y. TIMES, Oct. 11, 2000, at A20; Josh Goldstein, *Campaign Financing Bill Moving Forward With McCain at Helm*, PHILADELPHIA INQUIRER, Jan. 28, 2001; FRANK J. SORAUF, INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES (1992) [hereinafter SORAUF, INSIDE CAMPAIGN FINANCE]. In addition, at least five different law reviews have hosted symposiums on campaign finance reform and other election law issues in the last two years. Symposium, *Money, Politics, and Equality*, 77 TEX. L. REV. 1603 (1999), Symposium, *The Law and Economics of Elections*, 85 VA. L. REV. 1533 (1999); *A Symposium: The Legal and Political Implications of Buckley v. Valeo*, 33 AKRON L. REV. 1 (1999); *Symposium: Law and Political Parties*, 100 COLUM. L. REV. 593 (2000); Symposium, *Election Law*, 50 CATH. U. L. REV. 1 (2000).

20. The Court is expected to issue its *Colorado Republican II* opinion by the end of June of 2001. *See supra* note 12. For a discussion of the oral arguments, see *infra* Part II.C.

21. Appellee's Brief at 3, Missouri Republican Party v. Lamb, 227 F.3d 1070, 1071 (8th Cir. 2000) (No. 00-2686).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

things, the amount of cash and in-kind support a political party could contribute to one of its candidates.[22] After violating the limits in 1998, the Missouri Republican Party (the Party) challenged them on constitutional grounds.[23] The district court awarded summary judgment to the state, basing its decision on *Shrink II*'s holding that limits on contributions are presumptively constitutional.[24] The Eighth Circuit, on appeal, also fit the Party's spending into the contribution category, but announced that the identity of the contributor distinguished *Lamb III* from *Shrink II* in a crucial way.[25] Stressing the differences between an individual contribution and a party contribution, the court found a weightier free speech right in the party context, which enabled it to impose the higher evidentiary burden for which it has become known.[26] Finding that the state failed to meet the burden necessary to justify this abridgement of the Party's speech and associational rights, the court held Missouri's limits on a party's cash and in-kind contributions constituted a violation of the First Amendment.[27]

This Note discusses both the political and constitutional issues that were at stake in deciding *Missouri Republican Party v. Lamb*. After describing the political and legal landscape of campaign finance reform, including the McCain-Feingold legislative effort and Supreme Court and Eighth Circuit precedent in Part II, it discusses the facts and holding of the instant case in Part III. Part III examines the arguments made in the case, both at the district court level, and then by the majority and dissent at the circuit court level. In Part IV, this Note analyzes these arguments, including a discussion of the contribution expenditure distinction and of the past and present role of the American political party in electoral politics. This Note argues that the decision made by the Eighth Circuit was the correct one. The district court's approach, which allowed the type or category of spending to be dispositive, with no regard given to the identity of the contributor, failed to account for political realities and for the important role of the political party[28] in every state and in America

22. Missouri Republican Party v. Lamb, 31 F. Supp. 2d 1161, 1162 (E.D. Mo. 1999) [hereinafter *Lamb I*].

23. Missouri Republican Party v. Lamb, 227 F.3d 1070, 1071 (8th Cir. 2000) [hereinafter *Lamb III*].

24. *Lamb I*, 31 F. Supp. 2d at 1162.

25. *Lamb III*, 227 F.3d at 1072.

26. *Id.* at 1072.

27. *Id.* at 1074.

28. FECA defines a political party as "an association, committee or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." 2 U.S.C. § 431(16) (1994).

The strength of America's major political parties appears to be an unsettled debate. Most would agree with a number of political scientists who recently observed that the "two major political parties and their legislative campaign committees (LCCs) are among the most important

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

as a whole. The recent election highlighted that important role in a manner few of us could have anticipated. Although the U.S. Constitution does not specifically mention political parties, the Eighth Circuit did not err in giving parties special accord. Its conclusion that political party contribution limits should be analyzed differently than individual contribution limits, because of the unique relationship between parties and candidates and the low risk of corruption, was proper. In addition to the constitutional issue, this Note will show that allowing the parties to contribute freely to their candidates enhances the accountability that voters can have over elected officials and the party they support. This creates a healthy democracy, and, by removing the need for politicians to seek contributions from more narrow, less accountable entities such as individuals and PACs, actually removes some of the potential for corruption that exists where political party contribution limits are in place.

II. THE POLITICAL AND LEGAL LANDSCAPE

A. Where We Are: McCain-Feingold and "The Corruption of American Politics"

In 1999, well-known political journalist Elizabeth Drew wrote a book entitled *The Corruption of American Politics: What Went Wrong and Why*.[29] Decrying the current state of affairs with mostly anecdotal evidence, Drew reflected many people's belief that "the money culture" has deeply and perhaps mortally affected American politics.[30] Among money's pernicious effects, Drew listed the following: it influences the issues raised and their outcome, distracts congressional members, directs career choices and subverts values.[31] She wrote: "The culture of money dominates Washington as never before; money now rivals or even exceeds power as the preeminent goal."[32] While there is disagreement over what should be done about this situation, few would

players in our electoral landscape." Brief of Amici Curiae Beck, at 3-4, Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm. (2000) (No. 00-191), *available at* 2000 WL 1792974. In a comparative sense, however, one might conclude that America's parties are far weaker than they could be. *Politicians for Rent*, *supra* note 19, at 23 (claiming that America is unique in that political parties play a relatively small role in financing campaigns, noting that most candidates raise the money themselves).

29. ELIZABETH DREW, THE CORRUPTION OF AMERICAN POLITICS: WHAT WENT WRONG AND WHY (1999).

30. *Id*. at 61.

31. *Id.* at 61-65. Interestingly, each party itself contributes to the perception that the other is corrupt by charging that the other party is "in the pockets" of certain special interests, such as trial lawyers or tobacco. By making such charges, the parties are contributing to the public perception that contributions to political parties can corrupt members of Congress. Brief of Amici Curiae Beck, at 18, Fed. Elections Comm'n v. Colorado Republican Fed. Campaign Comm. (2001) (No. 00-191), *available at* 2000 WL 1792974.

32. DREW, *supra* note 29, at 61.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

argue with Drew's contention that something is seriously wrong with the campaign finance system she blames for these woes.[33] As more policy-makers have realized the direness of the situation, the impetus for campaign finance reform has grown such that one can be fairly certain that the newly elected 107th Congress will produce a campaign finance reform bill. The question becomes: Will it meaningfully address the problems in a constitutional manner? The most well-known of the reform proposals is, of course, the McCain-Feingold bill, with its crusading and controversial Republican sponsor, Arizona Senator John McCain. Aided by a recent election filled with abnormalities, Senator McCain has succeeded in elevating the issue of campaign and election reform to the top of the legislative agenda.[34] In fact, his bill, which had three co-sponsors last year, had just been passed in the Senate—by a comfortable 59 to 41 margin—when this Note went to publication.[35] Before examining the merits of the different legislative proposals being made and their bearing on the party-candidate relationship, one must understand the pressures that bear on this endeavor, making meaningful campaign finance reform an extremely difficult prospect.

The debate over campaign finance reform centers around two goals and two pressures, the collective sums of which appear to be irreconcilable. The reformers' goals are two-fold: (1) to create a neater and tidier political culture void of corruption or pollution; and (2) to create a greater measure of political equality, thus leveling the political playing field.[36] Skeptics have denounced both of these goals as impossible, due to the following pressures: (1) the pressure exerted by money itself, which will almost certainly remain a constant means of influencing elections; and (2) the pressure exerted by the First Amendment, the presence of which seriously hampers the political equality rationale for reform. The first pressure is a function of the fact that political money will seek an outlet. The hope that reform will lessen the amount of money spent on American elections is simply untenable in a capitalistic country with as much wealth as ours and with a constitutional guarantee of the

33. *See* John Copeland Nagle, *Corruption, Pollution and Politics: The Corruption of American Politics: What Went Wrong and Why*, 110 YALE L.J. 293, 305 (2000) (reviewing DREW, *supra* note 29).

34. *See* Helen Dewar, *McCain to Plow Ahead on Campaign Finance Reform; Push for Bill is a Challenge to Bush, Congress*, WASH. POST, Jan. 22, 2001, at A2; Amy Keller & John Bresnahan, *McCain Gets Date Certain on Reform Bill But Reformers Worry New Panel May Delay Action on Campaign Finance Reform*, ROLL CALL, Jan. 29, 2001.

35. Alison Mitchell, *Campaign Finance Bill Passes in Senate, 59-41; House Vows a Fight*, N.Y. TIMES, Apr. 3, 2001 at A-1. *See also* S.27, Bill Summary and Status for 107th Congress, at http://Thomas.loc.gov [hereinafter S.27].

36. *See, e.g.*, E. Joshua Rosenkranz & Richard L. Hasen, *Introduction: Money, Politics, and Equality*, 77 TEX. L. REV. 1603, 1604 (1999). In this introduction of a symposium about the three issues identified in the title, Professor Rosenkranz, the Executive Director of the Brennan Center for Justice at New York University, defended the political equality rationale.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

right to spend that money however one wants. While few people are comfortable with the amount of money that is currently being spent on campaigns,[37] it is unrealistic to believe that the amount can somehow be dammed. This phenomenon caused one critic to exclaim: "The history of 'campaign finance reform' is that every limit inspires new evasions."[38] Academics have given various labels to such evasions including "unintended consequences,"[39] "undemocratic consequences"[40] and "substitution effects."[41] Indeed, the pressure exerted by the never-ending flow of money causes even those who sympathize with reform efforts to conclude that a bill like McCain-Feingold, which focuses on soft money,[42] would have little effect on the real

37. More than one billion dollars was spent on last year's Presidential campaign alone. Editorial, *Campaign Finance*, FORT WORTH STAR-TELEGRAM, Jan. 2, 2001, at 2. National Public Radio recently reported that the two parties together raised and spent more than $750 million in hard money in the last election cycle. In a brief interview, Fred Wertheimer, President of Democracy 21, a pro-reform group, argued that a sum this large shows to what degree conduit corruption through a party is possible in the absence of limits on coordinated expenditures. Jan Baran, the lawyer who recently argued on behalf of the Colorado Republican Party before the Supreme Court countered that "[i]t is a fact of life that reaching millions of voters who are busy and are not particularly attentive to political messages is a costly and complicated process. And it's going to cost a lot of money." Interview on National Public Radio, *Morning Edition* (Feb. 28, 2001).

38. Robert J. Samuelson, Editorial, *Campaign Finance Hysteria*, WASH. POST, Oct. 8, 1999, at A29.

39. William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U. L. REV. 335, 343-45 (2000). Professor Marshall argues that the law of unintended consequences has particular force in this arena because the pressure of money on the system is inevitable, and political money will seek an outlet. He lists a number of adverse unintended consequences including: funds diverted from candidates to special interest groups; issue advocacy, which restricts a candidate's control over her campaign; massive increases in the amount of time candidates must spend raising money; and a practice called "bundling," whereby well-connected persons amass hard money from a number of contributors and present it to the candidate in one package. *Id.*

40. Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1072 (1996) [hereinafter Smith, *Faulty Assumptions*]. Professor Smith lists the following as undemocratic consequences of campaign finance reform: it entrenches the status quo, making it more difficult for challengers; it makes the electoral system less responsive to public opinion; it enhances the power of a select group of elites; it favors independently wealthy candidates; and it limits opportunities for grassroots political activity. *Id.*

41. Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 325 (1998) [hereinafter Sullivan, *Against Reform*]. Professor Sullivan's substitution effects parallel the "consequences" listed by Professors Marshall and Smith. For example, she lists issue advocacy, which is funded by independent expenditures, and soft money as two of the non-accountable effects of spending limits. *Id.* at 325.

42. FECA allows individuals or groups to contribute unlimited amounts of "soft money" to political parties on grassroots, party-building activities such as producing buttons, bumper stickers, brochures, posters and holding voter registration and get-out-the-vote drives. 2 U.S.C. §§ 431(8)(B)(x-xii), 9(B)(xiii-ix) (1994). In contrast, the term "hard money" has come to

world because the $400 million spent on soft money contributions would simply be spent in other ways to influence electoral politics.[43] Another of the "unintended consequences" caused by a spending limit-oriented reform agenda is that it makes it more difficult for challengers to mount effective campaigns against well-entrenched incumbents. This problem hints at the inevitable conflict of interest that occurs when elected officials are put in charge of enacting reforms that affect their own prospects for re-election.[44]

While the effects of spending limits are manifold, perhaps the biggest obstacle to campaign finance reform and political equality in America is the First Amendment. One commentator recently wrote that "[a]s long as we have the First Amendment, the effort to regulate elections—under the guise of 'campaign finance reform'—is futile, self-defeating, and undesirable."[45] Indeed, the First Amendment guarantee of free political speech would appear to be an insurmountable obstacle to creating effective limits on campaign spending. This is so because regardless of how much hard or soft money contributions are limited, the First Amendment will not allow the limitation of a person or group's independent spending.[46] Thus, it is reasonable to conclude that no matter how hard the reformers try to enact campaign finance reform, the result will not be to their liking because only a certain fraction of the world of political money can come under Congress's hand. This fact caused Bradley A. Smith, the current Commissioner of the Federal Elections Commission, to state what is obvious to many but not all. He stated that "[t]he First Amendment does not . . . promise a neat and tidy system of elections."[47]

characterize the type of spending that comes under FECA limits, such as contributions and coordinated expenditures. Even though soft money is the focus of the current legislative debate, this Note will limit its analysis to limits on hard money contributions by parties to candidates.

43. Robert Dreyfuss, *Reforming Reform*, AM. PROSPECT, Dec. 18, 2000, at 26.

44. Marshall, *supra* note 39, at 336. *See also* Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1278-79 (1994) (suggesting that a "premise of distrust" is appropriate when looking at campaign finance reform due to the conflict of interest) [hereinafter BeVier, *Specious Arguments*].

45. Samuelson, *supra* note 38, at A29.

46. Buckley v. Valeo, 424 U.S. 1, 46-49 (1976). Independent advocacy in the form of expenditures, explained the *Buckley* Court, does not propose a danger of corruption because it is carried out independently of the candidate and his or her campaign. The Court noted that such expenditures may provide little assistance to the candidate's campaign and may even prove counterproductive. The Court added that the absence of prearrangement and coordination of an expenditure with the candidate alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate. Having made this observation, the Court concluded that the independent expenditure limitation of the FECA impermissibly burdened the First Amendment. *Id*. at 46-48.

47. Smith, *Faulty Assumptions*, *supra* note 40, at 1090. Against the wishes of many reformers, Smith, a libertarian law professor and opinion leader for those favoring de-regulation of campaign finance laws, was installed as the FEC commissioner last year. It is both ironic and interesting that the individual most responsible for enforcing campaign finance laws believes

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

Campaign finance reformers focusing on the untidiness of the process have responded with an ever-growing web of regulation, the undemocratic result of which, he claimed, has been an even more disconnected and cynical American public.[48] Political equality proponents, nevertheless, counter that efforts to level the playing field and make the system more fair through spending limits and public funding are the remedy for such disconnectedness. Everyone agrees that political equality is a praiseworthy ideal and worth shooting for; however, it would seem that the best means for attaining it, due to the existence of the First Amendment, are the very opposite means of those favored by limit-oriented reformers. This is so because the removal of limits, coupled with aggressive disclosure, would stem the tide of political money being spent outside of the accountable fraction of the world of political money.[49]

In light of these pressures, one must ask how the 107th Congress should address what so many perceive to be the cause of the "corruption of American politics,"—the current campaign finance system. One can only hope that Congress will not create more "undemocratic consequences" by simply adding to the web of regulation that already exists,[50] but rather, that the structures of our Constitution, as well as the realities of our political and economic life, will inform its debate. When this Note was published, debate in the Senate had just been completed on McCain-Feingold-Cochran[51] and three rival plans, in addition to amendments.[52] At issue were primarily soft money limits, in addition to hard money contribution limits, issue advocacy,[53] and a new

those laws should be repealed. The main point of his many writings is that people have a basic right to unfettered political speech. Since his appointment, Smith has succeeded in relaxing some of the rules, arguably making an already weak regulatory organization even weaker. Eliza Newlin Carney, *The Anti-Reformers*, THE NAT'L J., Feb. 17, 2001, at 474-75.

48. Smith, *Faulty Assumptions*, *supra* note 40, at 1090.

49. Professor Sullivan argues in another article that strong and immediate disclosure requirements coupled with the law of diminishing marginal returns is the only real answer to the campaign finance reform conundrum. Kathleen M. Sullivan, *Political Money and Freedom of Speech: A Reply to Frank Askin*, 31 U.C. DAVIS L. REV. 1083, 1090 (1998). She concluded that "[a]s in other areas, such as the regulation of hate speech and pornography, there are limits to how far the regulation of speech can be made to do the work of altering underlying problems of material inequality." *Id.*

50. *See* Smith, *Faulty Assumptions*, *supra* note 40, at 1090.

51. Influential Mississippi Republican Senator Thad Cochran's name was recently added to the title.

52. Keller & Bresnahan, *supra* note 34. *See also Senate Opening Triggers Campaign Finance Reform Battle*, POL. FIN. & LOBBY REP., Jan. 24, 2001.

53. Issue advocacy is the title given to the practice of running television advertisements that do not expressly "advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 44. Because the Supreme Court, in *Buckley*, limited the scope of FECA regulation to express advocacy, "issue advocacy" lacking certain magic words such as "vote for" or "vote

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

disclosure regime.[54] As passed by the Senate, the McCain-Feingold bill would not further the cause of political party involvement in campaign spending. In fact, arguably the foremost targets of the bill are the political parties.[55] The bill's provisions not only ban all soft money donations to political parties and certain types of issue advocacy, they also only marginally increase the twenty-five-year-old limits on political party hard money contributions and coordinated expenditures.[56] The debates have already demonstrated that one challenge for Congress will be to draft a bill that can withstand First Amendment scrutiny. Another challenge will be to draft a bill that adequately takes into account political and legal realities, including the important role that political parties can and should play in the conduct of elections and the guarantees of the First Amendment.

against" has become an important means by which parties, political action committees, and corporations support candidates.

54. *See* Dewar, *supra* note 34, at A2; S.27, *supra* note 35. Nebraska Senator Chuck Hagel's bill, S.22, entitled the Open and Accountable Campaign Financing Act of 2001, focused on revised (monthly) reporting requirements and includes increased contribution limits and a $60,000 per year limit on soft money contributions. *See* S.22, Bill Summary and Status for the 107th Congress, *at* http://thomas.loc.gov. Senator McCain claims that his two top priorities, which he believes would remove ninety percent of the problem, are first, to ban soft money and second, to address independent campaigns and issue advocacy by which radical groups launch attack advertisements. Interview on CNBC, *Tim Russert* (Feb. 10, 2001). Arguably, a ban on issue advocacy would violate the First Amendment. Editorial, *A Flinch on Campaign Finance*, WASH. POST, Feb. 19, 2001, at A-32.

55. Richard Loving, *A Spoiler's Crusade: Senator John McCain and "The System"*, NAT'L REV., Feb. 19, 2001, at 30-32. The author of this cover story described McCain as an anti-party renegade whose anti-party bill, if passed, would be subject to numerous court challenges. He called campaign finance reform "an adjustment to a set of arcane rules that never should have been written in the first place and that no one outside of the directly affected interests feels compelled to pay attention to, let alone understand . . . as a matter of McCain's own stated goals, it is a contradiction, a check on exactly the active citizenship he seeks to promote."

Conservative columnist George Will recently stated the premise of McCain-Feingold is that "[s]omething is inherently corrupt about the relationship between political parties and candidates." George Will, *'Feeble Councils' Want Bush to Fumble on First Amendment*, ST. LOUIS POST-DISPATCH, Mar. 5, 2001, at C-19. Senator Mitch McConnell, on the day McCain-Feingold was passed, pronounced the following malediction on the final bill: "What we have done here, in an effort to get the money out of politics, is to get the parties out of politics . . . welcome to the brave new world, where the voices of the parties are quieted, the voices of the billionaires are enhanced, the voices of the newspapers are enhanced." *See* Mitchell, *supra* note 35, at A-1.

56. S.27, *supra* note 35. *See also* Mitchell, *supra* note 35, at A-1. The limits on how much an individual can give to a federal candidate would rise from $1000 a year to $2000 a year and the limits on how much an individual can cumulatively give to candidates and parties would rise from $25,000 a year to $37,500 a year. *Id.*

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

B. Where We've Been: FECA, Buckley and Eighth Circuit Shrinkage

1. The Federal Elections Campaign Act

The Federal Elections Campaign Act (FECA) was passed in 1971 in response to a perceived need to address the campaign abuses that plagued the election process in the late 1960s.[57] Designed to replace the 1925 Federal Corrupt Practices Act,[58] the FECA, with its emphasis on disclosure, failed to specify its own effective date, leading to more campaign finance abuses after its passage.[59] In fact, it later became clear that President Nixon received more than eleven million dollars in illegal corporate contributions after passage of the FECA, during the 1972 presidential campaign.[60] This, in addition to the Watergate scandal, also paid for by illegally received funds, gave rise to the 1974 FECA amendments which pushed for much tighter restrictions on campaign financing itself.[61] The amendments limited most forms of campaign spending, including individual, party and PAC contributions to candidates, personal spending by candidates and independent spending by groups not affiliated with the campaign.[62] Moreover, the amendments set overall campaign spending ceilings in federal elections.[63]

This comprehensive scheme, however, was never fully adopted due to the legal challenge that ensued soon after its passage. In *Buckley v. Valeo*, the Supreme Court used the First Amendment to strike down limits on independent campaign spending, limits on a candidate's own spending of personal funds and mandatory campaign spending ceilings.[64] Only the contribution limits, disclosure requirements and voluntary system of public funding survived, causing some to question the surviving bill's workability.[65] Despite its

57. For example, President Richard M. Nixon's 1968 presidential campaign was fueled primarily by a $2.8 million gift by an individual, Clement Stone, and his wife. SORAUF, INSIDE CAMPAIGN FINANCE, *supra* note 19, at 4.

58. 2 U.S.C. §§ 241-256 (1926) (repealed 1972).

59. Bradley A. Smith, *Campaign Finance Reform: The General Landscape: The Siren's Song: Campaign Finance Regulation and the First Amendment*, 6 J.L. & POL'Y 1, 24 (1997) [hereinafter Smith, *Siren's Song*].

60. *Id.* The Nixon campaign had refused to disclose contributions made to it during the period just prior to the FECA's effective date. When it was finally forced to do so, the campaign committee revealed that it received eleven million dollars during that period, mostly in the form of large contributions and much of it in the last forty-eight hours before FECA took effect. *Id.*

61. *Id.* at 25.

62. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

63. *Id.*

64. Buckley v. Valeo, 424 U.S. 1, 143 (1976).

65. *Id.* Chief Justice Warren Burger began his dissent as follows:

> By dissecting this Act bit by bit, and casting off vital parts, the Court fails to recognize that the whole of this Act is greater than the sum of its parts. Congress intended to

shortcomings, the basic FECA framework, as it emerged from *Buckley*, remains the core of most campaign finance proposals at both the federal and state level,[66] most of which include limits on contributions, limits on total spending and the use of public funding.[67] After *Buckley*, the only significant change to FECA came in 1979 when Congress passed an amendment to allow parties to spend so-called "soft" or unregulated money without limit on grassroots, party-building activities such as producing buttons, bumper stickers, brochures, posters and holding voter registration and get-out-the-vote drives.[68]

2. The *Buckley* Framework For Analyzing Campaign Spending

The framework that *Buckley* put in place for analyzing the constitutionality of campaign finance reforms can be broken down into a familiar three-part process. First, pursuant to its power of judicial review, the Court will analyze the ends that Congress seeks to vindicate in creating the regulation. Second, the Court will examine the means Congress uses to regulate. Finally, the Court will decide, based on the constitutional values at stake and the ends and means identified, what type of scrutiny to apply to the regulation before it.[69] This decision dictates the degree to which the Court examines the particular ends and means that Congress identifies and, thus, the degree of deference given to Congress. This section will briefly examine how the Court accomplished this process in *Buckley*, the case that set forth the model for analyzing subsequent campaign finance reforms.

> regulate all aspects of federal campaign finances, but what remains after today's holding leaves no more than a shadow of what Congress contemplated. I question whether the residue leaves a workable program.

Id. at 235-36.

66. Missouri is one of the states that has adopted a FECA-like system of campaign spending regulation. Appellee's Brief at 3, Mo. Republican Party v. Lamb, 227 F.3d 1070 (8th Cir. 2000) (No. 00-2686).

67. Smith, *Faulty Assumptions*, *supra* note 40, at 1055.

68. 2 U.S.C. §§ 431(8)(B)(x-xii), 9(B)(xiii-ix) (1994).

69. Professor BeVier discussed these three "scope of review" issues in BeVier, *Specious Arguments*, *supra* note 44, at 1278-79. Regarding the Court's scrutiny of legislative ends, she said the Court's failure to insist on a rigorous definition of corruption has expanded the legislature's power to reorder political realities through the mere use of labels. Regarding the Court's scrutiny of means, she claimed that a premise of distrust is appropriate because legislative proposals often have the effect of protecting incumbents. Hence, she argued the Court should be demanding in its evaluation of the means-end relationship (*i.e.*, it should apply strict scrutiny). In addition, she felt it appropriate for the Court to consider practical realities and political differences when analyzing such measures, however, she doubted that strict scrutiny could withstand political pressure because under it, no reform measures would be able to pass constitutional muster. *Id.*

a. Acceptable Ends: Preventing Corruption or the Appearance of Corruption, Not Leveling the Playing Field

In *Buckley*, the Court determined that the only rationale for limiting political spending is the prevention of corruption and the appearance of corruption.[70] The Court rejected the political equality rationale, popular among many reformers, which argues that limits promote equality of political influence, and called this notion "wholly foreign to the First Amendment."[71] Even though the Court has deemed the prevention of corruption the only adequate rationale for campaign finance limitations, neither it nor Congress has been able to identify what exactly constitutes corruption.[72] Perhaps the closest the Court came was in *Federal Elections Commission v. National Conservative Political Action Committee*, where it said the primary hallmark of corruption was the notion of a financial "quid pro quo" marked by the exchange or appearance of an exchange of dollars for political favors between donors and elected officials.[73] In certain contexts the Court has accepted a broader meaning of corruption by viewing it as undue influence on the outcome of an

70. *Buckley*, 424 U.S. at 26.

71. *Id.* at 48-49. *See also* Smith, *Siren's Song*, *supra* note 59, at 42. Professor Smith offered a critique of the political equality rationale. He likened the political equality rationale to the siren's song that enticed the sailors in Homer's *Odyssey*, concluding that while the music of the reformers (sirens) is sweet—political equality and the end to corruption, scandal and nastiness in American politics—the promise is unfulfilled and the quest carries with it a very high price. *Id.*

Professor Smith never passes up an opportunity to criticize the political equality rationale for campaign finance reform. In another article, he drew a parallel to socialism, noting that as efforts to create economic equality impoverished all, causing greater corruption, the effort to socialize America's political dialogue through regulation will also lead to increased corruption, more power for the elites at the top and an impoverished political life for everyone else. Bradley A. Smith, *Regulation and the Decline of Grassroots Politics*, 50 CATH. U. L. REV. 1, 12 (2000). For even more criticism by the current FEC commissioner see generally Smith, *Faulty Assumptions*, *supra* note 40.

72. Nagle, *supra* note 33, at 316. In his review of Elizabeth Drew's book on the corruption of American politics, *see supra* note 29, Professor Nagle identified three distinct meanings of corruption: first, corruption as a quid pro quo arrangement; second, corruption as monetary influence on the actions of elected officials; and third, corruption as inconsistency with public opinion.

Professor Nagle went on to criticize Drew's failure to define what she meant by the corruption and then proposed an alternative metaphor, that of pollution. Pointing out that the meaning of corruption is itself a significant point of debate in the Senate, because no Senator is ready to acknowledge that he or she has been corrupted, Nagle claimed that the pollution metaphor enables one to consider money's effect on the political environment as a whole rather than on individual legislators. In his article, Nagle analogizes his idea of political pollution to environmental and cultural pollution, comparing regulatory approaches to each. *See generally* Nagle, *supra* note 33. *See also* Briffault, *Comment*, *supra* note 4, at 100 (explaining that the Court has failed to adequately define corruption).

73. Fed. Elections Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1984).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

election that could undermine "the confidence of the people in the democratic process and the integrity of the government."[74] In addition, the Court has implicitly recognized the "anti-evasion rationale," based on the understanding that preventing circumvention of campaign finance laws (for example, the individual contribution limitation)[75] is another means by which the state prevents the appearance of corruption.[76] The state of Missouri used both the anti-corruption and the anti-evasion rationales to justify its regulation of political parties in *Lamb III*.[77]

b. Acceptable Means: Contribution Limits, Not Expenditure Limits

In determining whether a regulation implicates First Amendment concerns in a manner that makes the regulation unconstitutional, the Court has placed great emphasis on the distinction between contributions and expenditures.[78] In *Buckley*, the Court established that contributions entail a lower order of speech than expenditures.[79] It reasoned that contributions can be restricted because they do not involve a direct expression of political views, but rather, serve "as a general expression of support for the candidate and his views, but [do] not communicate the underlying basis for the support."[80] The expressive component of a contribution, the Court explained, rests solely on the undifferentiated symbolic act of contribution; however, the size of the contribution does not "increase perceptibly" the quantity of the contributor's communication.[81] Moreover, while a contribution may result in political speech by a candidate presenting views to voters, "the transformation of

74. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789 (1978) (dealing with contributions made in the corporate context). *See also* Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 301 (1981). It is clear that in contexts where the Court has accepted a broader meaning of corruption, what the Court is concerned about is preventing the appearance of corruption rather than preventing actual corruption.

75. Because the individual contribution limit is the lowest, as well as the most common, type of regulated campaign spending, it is the type that Congress is most concerned with preventing others from circumventing.

76. Cal. Med. Ass'n v. Fed. Elections Comm'n, 453 U.S. 182, 197-98 (1981). In *California Medical Association* (*CalMed*), Justice Marshall, delivering part of the opinion of the Court, noted "Congress enacted [the limitations on contributions to political action committees] in part to prevent circumvention of the very limitations on contributions that this court upheld in *Buckley*." *Id. See also* Missouri Republican Party v. Lamb, 100 F. Supp. 2d 990, 998 (quoting Justice Marshall's *CalMed* opinion as support for Missouri's anti-evasion rationale) [hereinafter *Lamb II*]. *See infra* Part III.B for a discussion of *Lamb II*.

77. Missouri Republican Party v. Lamb, 227 F.3d 1070, 1072-73 (8th Cir. 2000) [hereinafter *Lamb III*].

78. Buckley v. Valeo, 424 U.S. 1, 20-21 (1976). *See infra* Part IV.A for a discussion of the contribution-expenditure distinction.

79. *Id*. at 21.

80. *Id*.

81. *Id*.

contributions into political debate involves speech by someone other than the contributor."[82] The Court has referred to this idea as "speech by proxy."[83] Regarding contributions, the Court also concluded that they raise the possibility of "quid pro quo" corruption because one can easily imagine a large contribution being given to secure a political quid pro quo from an officeholder.[84]

In contrast, because expenditures represent "independent" spending by candidates, organizations and individuals on direct communication with voters, the Court held them to be core political speech, which did not raise the danger of corrupting candidates.[85] Thus, *Buckley* invalidated FECA's restrictions on expenditures by candidates and independent committees.[86] *Buckley* did, however, let stand FECA's regulation of spending "in connection with" an election campaign, otherwise known as a coordinated expenditure (the Federal Elections Commission (FEC) puts this in the contribution category).[87] Not surprisingly, this party-specific category eventually became the vehicle by which campaign spending in the political party context reached the Supreme Court.[88]

c. First Amendment "Exacting Scrutiny"

Campaign finance regulations encroach upon core First Amendment concerns of political speech and association.[89] Without directly equating money to speech, the Court in *Buckley* found that money was essential for the dissemination of political messages and that contributions to campaigns allows "like minded persons to pool their resources in furtherance of common political goals."[90] Thus, because campaign spending rises to the level of "speech," government regulation of campaign spending is subject to the "exacting scrutiny" required by the First Amendment.[91] The Court's

82. *Id*.

83. *See, e.g.*, Cal. Med. Ass'n v. Fed. Elections Comm'n, 453 U.S. 182, 196 (1981).

84. *Buckley*, 424 U.S. at 26-27.

85. *Id*. at 46-48. *See supra* note 46 for the Court's rationale for this conclusion.

86. Briffault, *Comment*, *supra* note 4, at 97.

87. *Buckley*, 424 U.S. at 42-43. *See* Richard Briffault, *Law and Political Parties: The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 625 (2000) (explaining that the FECA does give some degree of special treatment to political parties by giving them the ability to make limited coordinated expenditures to candidates, an ability shared by no other group or entity).

88. Colorado Republican Fed. Campaign Comm. v. Fed. Elections Comm'n, 518 U.S. 604 (1996).

89. Briffault, *Comment*, *supra* note 4, at 96.

90. *Buckley*, 424 U.S. at 22.

91. *Id.* at 16. Since *Buckley* courts have struggled with what level of review is implicated by "exacting scrutiny," strict or intermediate, with respect to different types of campaign finance reforms. *See, e.g.*, Criscimagna, *supra* note 18 (discussing the level of scrutiny required by the

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

application of exacting scrutiny, however, has been somewhat inexact.[92] Due to the different categories of campaign spending, the Supreme Court has varied both the level of scrutiny and, therefore, the degree of deference given to legislative enactments.[93] In *Buckley*, the Court deferred to Congress regarding the level of limits on individual contributions to candidates and on the overall limit on individual contributions to political committees in a year.[94] Regarding the amount of the limits, the Court stated that "we cannot require Congress to establish that it has chosen the highest reasonable threshold."[95] The size of the limit was therefore upheld because it was not wholly without rationality.[96] The Court, however, has indicated that it is less willing to defer to Congress's judgment or espoused rationale where, for example, the regulation is of independent expenditures, a type of campaign spending which it thinks deserves greater First Amendment protection and which does not carry the same risk of corruption.[97] In this situation, the Court will afford little deference to legislators and may not even consider any evidence the government offers.[98]

3. Eighth Circuit Precedent: The Shrinkage of Acceptable Justifications for Limits on Campaign Spending

The Eighth Circuit has considered more cases challenging campaign contribution limits than any other circuit, earning a reputation for finding all spending limits unconstitutional.[99] Some commentators believe that the

Supreme Court's campaign finance jurisprudence and comparing it to the type of scrutiny applied by the Eighth Circuit). *See also* La Pierre, *First Amendment Hurdle*, *supra* note 18, at 228-30 (discussing the "real harm" standard and corresponding strict scrutiny required by the Eighth Circuit); Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045, 1045 (1985) (explaining that the level of review decision reflects the resolution of critically important preliminary issues, which are based on the extent to which constitutional rights are implicated) [hereinafter BeVier, *Money and Politics*].

92. *See, e.g.*, Nagle, *supra* note 33, at 329. According to *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 384-85 (2000), the level of scrutiny is uncertain, but it is certainly not the strict scrutiny that the Court applies to efforts to regulate various forms of cultural "pollution" that implicate the same free speech value, such as violent movies and hate speech. *Id.*

93. Briffault, *Comment*, *supra* note 4, at 103. In addition, because the constitutional question is usually both an empirical and a normative one, the inquiry must include an analysis of whether corruption is present in a given situation. *Id.* at 102-03.

94. *Id*. at 103.

95. *Buckley*, 424 U.S. at 83.

96. *Id*.

97. *See supra* note 46.

98. Briffault, *Comment*, *supra* note 4, at 103.

99. For a more detailed history of campaign finance reform cases in the Eighth Circuit and a summary of contribution caps in the United States, see William J. Connolly, Note, *How Low Can*

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

standard of review in the Eighth Circuit is so strict so as to make campaign finance reform limiting contributions impossible in its jurisdiction.[100] Two themes have characterized the Eighth Circuit's campaign finance jurisprudence: (1) the contribution limits have been too low and thus not "narrowly drawn" to meet the particular state's interest in combating corruption;[101] and (2) the state has not been able to demonstrate that the harms it is trying to prevent are real.[102] As a result of these two themes, states within the Eighth Circuit have experienced the shrinkage of options when it comes to regulating campaign spending. One case in particular, *Shrink Missouri Government PAC v. Adams*[103] (*Shrink I*), demonstrates how the Eighth Circuit

You Go? State Campaign Contribution Limits and the First Amendment, 76 B.U. L. REV. 483 (1996). *See also* La Pierre, *First Amendment Hurdle*, *supra* note 18; Criscimagna, *supra* note 18.

100. *See* Criscimagna, *supra* note 18, at 458.

101. Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994). In *Day*, the Eighth Circuit struck down two Minnesota statutory provisions that limited individual campaign expenditures and contributions to political committees each to $100. The court accepted the state's anti-corruption rationale but found that the requirements of the second part of the *Buckley* test—the "narrowly drawn" requirement—were not met. The $100 limit, an inflation-adjusted $40.60 compared to the $1000 individual limit examined in *Buckley*, was simply "too low to allow meaningful participation in protected political speech and association, and thus was not narrowly tailored to serve the state's legitimate interest in protecting the integrity of the political system." *Id.* at 1366. Judge Pasco Bowman, the only one of the three judges who did not write an opinion in *Lamb III*, wrote the *Day* opinion for a unanimous court.

In *Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998), the Eighth Circuit was again confronted with low contribution limits, this time as part of an Arkansas statute. As in *Day*, the court found these limits in violation of the "narrowly drawn" element of *Buckley*, concluding they were too low to enable successful political advocacy in Arkansas. *Russell*, 146 F.3d at 571. Judge Morris Sheppard Arnold, who wrote the court's opinion in *Lamb III*, authored the court's unanimous opinion in *Russell.*

102. In *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996), the court again held that a statute which limited individual campaign contributions in Missouri to $100 to $300 per election cycle was not narrowly tailored to serve a compelling state interest in preventing corruption or the appearance of corruption. *Carver*, 72 F.3d at 645.

In addition to finding the limits too low, the court required Missouri to meet a high evidentiary burden before allowing any abridgement of a person or group's First Amendment rights. The court stated the government must do more than simply postulate a compelling interest when restricting campaign contributions. Instead, the state had to "demonstrate that the recited harms are real . . . and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 638 (quoting United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 475 (1995)). Judge John R. Gibson, the same judge who wrote the dissent in *Lamb III*, wrote the opinion for a unanimous court. *See* La Pierre, *First Amendment Hurdle*, *supra* note 18, at 235-37 (discussing of the origin of the Eighth Circuit's real harm standard).

103. Shrink Mo. Gov't PAC v. Adams, 161 F.3d 519 (8th Cir. 1998) [hereinafter *Shrink I*]. This case was later overturned by the Supreme Court. Judge John R. Gibson filed a dissent in this case, as he did in *Lamb III*. He claimed that the Eighth Circuit gave *Carver*, an opinion he had written, a far too expansive reading. Because he could not distinguish the *Buckley* limits on individual contributions from Missouri's limits on such contributions, he would have affirmed the

approaches this topic. In addition, *Shrink I* provides a means by which to compare the Eighth Circuit's approach to the Supreme Court's approach, as demonstrated in *Nixon v. Shrink Missouri Government PAC* (*Shrink II*).

The plaintiff in *Shrink I* was a candidate who received funds in excess of Missouri's limits from the Shrink Missouri Government PAC.[104] Believing that the limits seriously hampered his ability to campaign effectively, he alleged that the state's evidence was insufficient to meet its burden and that the limits were unconstitutionally low.[105] Using a strict scrutiny standard, the Eighth Circuit discounted the evidence proffered by the state as "conclusory and self-serving," holding that the standard, which requires objective proof of perceived corruption in Missouri's political process, was not met.[106] In addition, relying on its earlier precedent, the court stated the restrictions were not narrowly tailored and were too low to allow for effective political dialogue in Missouri because they prevented "many candidates from amassing the resources necessary for effective advocacy."[107] The Supreme Court granted certiorari to this case, however, and handed down its decision in June of 2000. Reversing *Shrink I* by a 6-3 margin, the Supreme Court decided what some commentators believe was the most important campaign finance reform case since *Buckley*.[108]

Perhaps not surprisingly, in overturning *Shrink I*, the Court relied heavily on *Buckley*.[109] First, while acknowledging the "exacting scrutiny" called for by *Buckley*, the Court concluded the state statute was not void for lack of evidence, where the legitimacy of the espoused state interest was so well-entrenched in Supreme Court jurisprudence as a justification for contribution limits.[110] The Court stated that "the quantum of empirical evidence needed to

district court's ruling and found the limits constitutional (which is what the Supreme Court eventually did). *Id*. at 524.

104. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 383 (2000) [hereinafter *Shrink II*].

105. *Shrink I*, 161 F.3d at 523. The contribution limits under challenge in *Shrink I* were $275, $525 or $1075, depending on the office of the person. *Id.* at 519.

106. *Id.* at 522.

107. *Id*. at 523 (quoting Buckley v. Valeo, 424 U.S. 1, 21 (1976)).

108. *See* Jane Conrad, Note, *Nixon v. Shrink Missouri Government PAC: Campaign Contributions, Symbolic Speech and the Appearance of Corruption*, 33 AKRON L. REV. 551, 551 (2000) (arguing that *Shrink II* was the most important case since *Buckley* because it was the first time the Court considered the constitutionality of limits on individual contributions since then).

109. *Shrink II*, 528 U.S. at 385-90. Justice Souter authored the opinion for the Court.

110. *Id*. at 391-94. The Court stated: "*Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible." *Id.* at 391. In essence, what the Court did with respect to the contribution limits at issue in *Shrink II* was take judicial notice of the fact that large political contributions cause corruption or the appearance of corruption. Having done so, the level of proof required was zero. *See* Jeremiah W. Nixon & Paul R. Maguffee, *Money Talks: In Defense of a Common-Sense Approach to Judicial Review of Campaign Contribution Limits*, 52 ADMIN. L. REV. 661, 674 (2000).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

satisfy heightened judicial scrutiny will vary up or down with the novelty and plausibility of the justification raised."[111] Since Missouri's justification, in the individual contribution context, was neither novel nor implausible, the Court concluded this was not even a "close call" on the issue of evidentiary obligation.[112] In addition, the Court rejected the Eighth Circuit's assumption that *Buckley* set a minimum constitutional threshold for contribution limits, calling it a fundamental misunderstanding of the case.[113] In sum, the Court explained that the "numbers game"[114] the Eighth Circuit played in *Shrink I* and previous cases, whereby it compared the inflation adjusted present day limit to the $1000 *Buckley* limit, was a misguided application of *Buckley*.[115] Analyzing the size of the limits properly, the Court concluded that these limits were not so low as to impede a candidate's ability to conduct effective advocacy.[116]

C. Where We're Going: Colorado Republican II *and Limits in the Party Context*

The Supreme Court will almost certainly decide the viability of campaign spending limits on political parties this summer when it issues its *Colorado Republican II* opinion. In *Colorado Republican I*,[117] the Court struggled to properly categorize political party expenditures, all of which have

111. *Shrink II*, 528 U.S. at 391.

112. *Id*. at 393. For a critique of the "plausible harm" standard set out by the Court in *Shrink II*, see D. Bruce LaPierre, *Campaign Contribution Limits: Pandering to Public Fears About 'Big Money' and Protecting Incumbents*, 52 ADMIN. L. REV. 687, 725-26 (2000) [hereinafter LaPierre, *Pandering to Public Fears*].

113. *Shrink II*, 528 U.S. at 397.

114. *See* Connolly, *supra* note 99, at 486 (calling the Eighth Circuit's use of a comparative method by which it compared the limits deemed constitutional in *Buckley* to the limits established by various states as a "numbers game"). *See supra* text accompanying notes 101-03 (discussing these Eighth Circuit cases).

115. *Shrink II*, 528 U.S. at 396.

116. *Id*. at 397. When *Shrink II* returned to the Eighth Circuit after being reversed, Judge Pasco Bowman wrote a brief concurring opinion in which he stated:

> In [*Shrink II*], the Supreme Court has spoken in a way that subordinates core First Amendment rights of free speech and free association to the predilections of the legislature and the mood of the electorate. Given the decision and the current political climate, we no doubt can expect further, even more draconian, efforts by government to restrict political speech . . . .

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

117. Colorado Republican Fed. Campaign Comm. v. Fed. Elections Comm'n, 518 U.S. 604 (1996) [hereinafter *Colorado Republican I*]. During the 1986 Colorado senate campaign, the Colorado Republican Party aired television and radio advertisements criticizing incumbent Democratic Senator Tim Wirth. The expense of these advertisements, which aired at a time when there were three Republican candidates seeking the Republican nomination, were above the limits established by FECA. *Id.* at 608.

contributions at their root.[118] Indeed, this very problem caused the Court to issue a narrow plurality opinion because no more than three justices could agree on the proper characterization of political party spending in the context of campaigns.[119] In Justice Breyer's plurality opinion, the Court based its holding on the "constitutionally significant fact" that Colorado Republican's expenditure was independent of its candidates.[120] The opinion avoided any statement that the parties enjoy a preferred position under the Constitution with respect to campaign spending and rejected the argument that a party and its candidates are identical.[121] Justice Kennedy's concurrence, joined by Justices Rehnquist and Scalia, rejected the notion of party independence from candidates, concluding that regardless of the nature of the expenditure, party spending ought to be constitutionally protected. [122] Justice Thomas's concurrence, also joined by Justices Rehnquist and Scalia, claimed that because party spending presents only a minimal danger of corruption, there exists no constitutional basis for its limitation.[123] In a brief dissent, Justice

118. This is so because some individual or group must contribute money to a political party for it to have money to expend or contribute to a candidate.

119. *Colorado Republican I*, 518 U.S. at 613. The Court refused to reach the facial challenge to the Party Expenditure Provision, choosing to consider only whether the provision as applied violated the First Amendment. *Id.*

120. *Id*. at 617. This is because the Republican candidate had not even been determined yet, therefore immunizing it to the danger of quid pro quo corruption. *Id.*

121. *Id*. at 624. The Court implicitly rejected the contention of the concurrences that parties are incapable of corrupting their candidates by commenting that parties and PACs share certain features. *Id.* Since the FEC could not prove that independent spending by parties was either impossible or corruptive, the plurality was forced to view this as an independent expenditure, acknowledging that because party expenditures do not fit neatly into any of *Buckley's* conceptual boxes, it could not consider Colorado Republican's broader challenge to the constitutionality of limits on any kind of party spending. *Colorado Republican I*, 518 U.S. at 624-25.

122. *Id*. at 630. Justice Kennedy's concurring opinion was extensively quoted by both the district court and the Eighth Circuit in *Lamb*, *see infra* Part III.B and Part III.C. It explicitly rejected the plurality's emphasis on the independence of Colorado Republican's spending. Instead, Justice Kennedy stated there is a practical identity of interests between candidates and parties during an election and noted "the tradition of political parties and candidates engaging in joint First Amendment activity." *Id.* In addition, he observed that a party's fate is "inextricably intertwined with that of its candidates," and that parties require candidates to make their messages known. *Id.*

Acknowledging that party spending will tend to function as a contribution to a candidate, Justice Kennedy claimed that such spending by a party also represents spending on its own behalf. For these reasons, he concluded that as the political speech of a political association, party spending, even where coordinated, could not be constitutionally limited. *Id.* However, he distinguished "undifferentiated" party contributions from coordinated expenditures, claiming that Congress may have authority to restrict undifferentiated contributions, but that these were "not at issue here." *Colorado Republican I*, 518 U.S. at 630.

123. *Id*. at 646. In his concurrence, Justice Thomas maintained that there is no danger of corruption where a party is supporting its own candidate. He considered and responded to two

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

Stevens, joined by Justice Ginsburg, stated that despite the unique relationship between parties and candidates, Congress could constitutionally limit all political party spending.[124]

On remand, the parties to *Colorado Republican* compiled an extensive record in order to answer the broader question of whether the FECA's limits on coordinated party expenditures were constitutional.[125] The district court placed a heavy burden of proof on the FEC after weighing the First Amendment interests at stake. It concluded that a political party has a First Amendment interest that is superior to that of individuals with respect to restrictions on campaign contributions. Explaining that the First Amendment has its "fullest and most urgent application to speech uttered during a campaign for political

possible sources of corruption. First, he considered the influence of the party itself on the candidate, concluding that party influence could never be corruptive since "[t]he very aim of a political party is to influence its candidate's stance on issues." *Id.* Thus, he reasoned, if a party succeeds, "that is not corruption; that is successful advocacy of ideas in the political marketplace and republican government in a party system." *Id.*

Second, Justice Thomas considered the possibility of a donor exerting undue influence over candidates through the parties, concluding that parties have a diffusing effect which lowers any corruptive force. *Id.* He said that the "numerous members with a wide variety of interests" in a party make it unlikely that any particular member will be able to exact a quid pro quo from a candidate. *Id.* at 647. In addition, he explained that there is little risk that a wealthy donor could use a party as a "conduit" because Congress can still subject individuals to limits on contributions to the parties. *Colorado Republican I*, 518 U.S. at 646.

In a separate portion of the opinion, however, Justice Thomas said he would also regard such contribution caps as unconstitutional. In that portion, he argued that there is no constitutional difference between a contribution and an expenditure and that, in his opinion, neither can be constitutionally limited. *Id.* The four justices represented in the two concurrences, therefore, all agree that the FECA's ceiling on coordinated party spending, which the FECA defines as a contribution, should be held unconstitutional. Hence, it would appear that only one more justice is needed to uphold the Tenth Circuit's decision in the remanded portion of *Colorado Republican I*.

124. *Id.* at 648. Justice Stevens agreed with Justice Kennedy that parties and candidates share a unique relationship, thus precluding a finding of independence. *Id.* However, he questioned Justice Thomas's conclusion that a party's coordinated spending cannot corrupt its candidates. *Id.* Instead, he maintained that such spending could enable the party or those controlling its influence to influence the candidate "by virtue of its power to spend" and that the lack of limits would enable donors to use the party as a conduit. *Colorado Republican I*, 518 U.S. at 648. In addition, he paid tribute to the political equality rationale, reasoning that a spending limit of this nature has the effect of leveling the electoral playing field. *Id.*

125. Colorado Republican v. Fed. Elections Comm'n, 213 F.3d 1221, 1225 (10th Cir. 2000) [hereinafter *Colorado Republican Remand II*]. The Supreme Court refused to reach this question in 1996 because a holding on coordinated expenditures would have implicated a broader range of issues, including the constitutionality of party contribution limits (since the FEC equates a coordinated expenditure to a contribution). *Colorado Republican*, 518 U.S. at 624.

office,"[126] and recognizing the historical importance of party involvement in campaigns, the court held unconstitutional the FECA's Party Expenditure Provision, which restricted a party's coordinated expenditures.[127] On appeal, the Tenth Circuit affirmed the district court's holding.[128] In doing so, the court questioned whether the contribution-expenditure dichotomy applied to political parties[129] and discussed at length the important place of political parties in the American political system.[130] The court also questioned the FEC's anti-corruption rationale for the restriction, pointing out that the idea that political parties can corrupt their candidates is a misunderstanding of the role of political parties in America.[131] Because parties represent such a broad-based coalition of interests, the court reasoned that any corruptive force will be diluted.[132] For these reasons, the court held that FECA's Party Expenditure Provision constituted an unnecessary abridgement of a political party's First Amendment rights.[133] The Supreme Court granted certiorari to this case on October 12, 2000 and heard oral arguments on February 28, 2001.[134]

The briefs that have been filed in *Colorado Republican II* indicate that the Court's ruling will have far-reaching implications for America's political parties. Not only have both of the parties to *Missouri Republican Party v. Lamb* filed amicus briefs in the case, they also apparently agree that if the Court upholds the Tenth Circuit's ruling, the regulation of political party support for candidates will effectively come to an end.[135] This is so because,

126. Colorado Republican v. Fed. Elections Comm'n, 41 F. Supp.2d 1197, 1209 (D. Colo. 1999), (quoting Eu v. San Francisco County Democratic Comm., 489 U.S. 214, 223 (1989)) [hereinafter *Colorado Republican Remand I*].

127. *Colorado Republican Remand I*, 41 F. Supp.2d at 1214.

128. *Colorado Republican Remand II*, 213 F.3d at 1221.

129. *Id*. at 1227. The court acknowledged that FECA labels a coordinated expenditure as a contribution. *Id.* at 1226. However, it stated that such a "cubbyholing" of constitutional values under labels such as contribution and expenditure "cheapens the currency." *Id.* at 1232.

130. *Id*. at 1228. Highlighting the fact that they are not "economic actors" in the same sense that individuals and PACs are, the court explained that all three branches of government rely heavily on the speech and associational functions of political parties to assure the orderly conduct of government, including elections and the appointment process. *Colorado Republican Remand II*, 213 F.3d at 1227-28.

131. *Id*. at 1231 n.7.

132. *Id*. at 1231. It even quoted the maxim of sanitation engineers: "the solution to pollution is dilution." *Id.*

133. *Id.* at 1232-33.

134. *See* 121 S. Ct. 296 (2000). *See also supra* note 12.

135. *See* Brief of Amici Curiae State of Mo. at 8, Fed. Elections Comm'n v. Colorado Republican Fed. Campaign Comm. (2001) (No. 00-191), *available at* 2000 WL 1793085 ("Because the Tenth Circuit's holding is broad enough to cover expenditures regardless of the level of coordination—it would effectively end the regulation of financial support by political parties to candidates."); *See also* Brief of Amicus Curiae Missouri Republican Party at 3, Fed. Elections Comm'n v. Colorado Republican Fed. Campaign Comm. (2001) (No. 00-191),

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

as the Missouri Republican Party readily admits, parties typically do not make simple contributions to their candidates.[136] In reality, all party spending is coordinated such that when funds are "contributed" to candidates, there has almost certainly been some discussion between the party and the candidate as to how those funds are to be used.[137] Consequently, if the Supreme Court was to strike down limits on coordinated expenditures, it would essentially render moot the issue examined in *Lamb*—namely, limits on political party contributions.[138] The oral arguments provided few hints as to how the Court will rule. However, the positions of all but three of the justices were established in the four opinions written in *Colorado Republican I.* Most commentators believe that Justice O'Connor will provide the swing vote because it appears that Justices Breyer and Souter will join Justices Stevens and Ginsburg in their support for coordinated expenditure limits.[139] Consideration of this case is taking place concurrently with debates on campaign finance reform in Congress, making the Court's ruling an even more anticipated one. This much seems clear at present: If the Court decides to affirm the Tenth Circuit's holding in *Colorado Republican II*—a holding upon which the Eighth Circuit relied in *Lamb*—any legislative victory gained in Congress could be a pyrrhic one at best.

III. INSTANT DECISION: *MISSOURI REPUBLICAN PARTY V. LAMB*

A. Introduction

The dispute arose in November 1998 after the Missouri Ethics Commission informed plaintiffs they were in violation of Missouri Revised Statute section 130.032.4, which limits the amount of cash and in-kind contributions that a political party can make and accept in any one election.[140]

available at 2001 WL 43223 ("The [Missouri Republican Party] provides financial support for Republican candidates only after consultation with the candidate and the candidate's committee and in cooperation with the candidate and the candidate committee.").

136. *Id.*

137. *See id. See also* Appellant's Brief at 10, Missouri Republican Party v. Lamb, 227 F.3d 1070 (8th Cir. 2000) (No. 00-2686).

138. Nevertheless, the state argues in its petition for writ of certiorari that the need for review will actually be greater if the Court strikes down limits on coordinated expenditures, because the only remaining limits under the federal scheme would be those on contributions. Petition for Writ of Certiorari, Nixon v. Missouri Republican Party at 25 (No 00-1136).

139. Damon Chappie & Thaddeus DeJesus, *High Court Hears Arguments in Colorado Case*, ROLL CALL, Mar. 1, 2001 (noting that both Justices Breyer and Souter expressed concern in the oral arguments about the effects of removing another limit on the amount of campaign spending).

140. Missouri Republican Party v. Lamb, 31 F. Supp.2d 1161, 1162 (E.D. Mo. 1998) [hereinafter *Lamb I*]. The statute reads:

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

The plaintiffs included the Missouri Republican Party, three candidate committees and their treasurers and three state-level candidates, including the Republican candidate for state auditor, and candidates for two different state senate seats.[141] One defendant, Charles G. Lamb, was the Executive Director of the Missouri Ethics Commission and other defendants included the chairperson and vice-chairperson of that commission and the Missouri Attorney General, Jeremiah W. Nixon.[142]

In 1994, the Missouri legislature adopted the statute in question as part of a comprehensive campaign finance reform bill.[143] The individual contribution limits that were part of that bill have also been challenged, and after the Eighth Circuit found them unconstitutional, the Supreme Court declared them constitutional in *Shrink II*.[144] As will become evident, the district court relied heavily on the Supreme Court's decision in *Shrink II* when making its decision regarding political party contributions.[145] Under the statute, any committee that accepts or gives contributions in excess of the statutory limits is subject to a significant penalty, unless the contribution is promptly returned to the contributor after the Ethics Commission notifies it of the violation.[146] The per

> Except as limited by this subsection, the amount of cash contributions, and a separate amount for the amount of in-kind contributions, made by or accepted from a political party committee in any one election shall not exceed the following:
>
> (1) To elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor or attorney general, ten thousand dollars;
>
> (2) To elect an individual to the office of state senator, five thousand dollars;
>
> (3) To elect an individual to the office of state representative, two thousand five hundred dollars; and
>
> (4) To elect an individual to any other office of an electoral district, ward or unit, ten times the allowable contribution limit for the office sought.

MO. REV. STAT. § 130.032.4 (1999). Missouri Revised Statute section 130.032.2 requires limits contained in section 130.032.4 be adjusted for inflation every even-numbered year by a calculation employing the cumulative consumer price index. *See* MO. REV. STAT. § 130.032.2 (1999). In 1998, the Missouri Ethics Commission thus increased the limits in § 130.032.4(1)-(3) to $10,750, $5,250, and $2,750 respectively. *Lamb I*, 31 F. Supp.2d at 1162. Twenty-seven states limit the amount a political party can contribute to a candidate. Seventeen states have scaled limitations and ten states have a singular ceiling. The other twenty-three states do not limit political party contributions. EDWARD D. FEIGENBAUM & JAMES A. PALMER, FED. ELECTION COMM'N, CAMPAIGN FINANCE LAW 2000: A SUMMARY OF STATE CAMPAIGN FINANCE LAWS WITH QUICK REFERENCE CHARTS chart 2-B (2000).

141. *Lamb I*, 31 F. Supp.2d at 1161-62.

142. *Id.* at 1162.

143. Both Senate Bill 650 and Proposition A amended Missouri's Campaign Finance Disclosure Law. MO. REV. STAT. § 130.011-.160 (1994 & Supp. 1998). *See also* LaPierre, *First Amendment Hurdle*, *supra* note 18, at 218-19 (discussing the 1994 legislation in depth).

144. Nixon v. Shrink Mo. Gov't PAC, 120 S. Ct. 897, 903 (2000). *See supra* Part II.B.3 for a discussion of this case.

145. *See infra* Part III.B (dealing with the district court's rationale for its holding in *Lamb II*).

146. MO. REV. STAT. § 130.032.7 (1999).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

contribution penalty is $1000 plus an amount equal to the contribution.[147] The candidate and the committee are personally liable for payment of the penalty, or alternatively, they may pay the penalty from the campaign funds existing on the date of notification by the Ethics Commission.[148]

In the 1998 general election, the Missouri Republican Party made a number of monetary contributions to the other plaintiffs in the case (in particular, to each candidate's committee).[149] The Republican Party's contributions to each candidate's committee were in excess of the statutory limits.[150] Consequently, in late October and early November 1998, the Ethics Commission separately informed each of the candidates that his committee was in violation of the section 130.032.4 limits and demanded that the party contributions be returned to the degree that they exceeded the limits.[151] The plaintiffs then decided to file suit seeking to enjoin enforcement and to have the statute declared unconstitutional.[152] The cause of action alleged that the provisions of the Missouri campaign finance statute that restricted political party contributions violated the party's First Amendment rights under the U.S. Constitution.[153]

On January 13, 1999, the district court decided, pursuant to previous Eighth Circuit cases declaring contribution limits unconstitutional, that plaintiffs had met the burden necessary to receive a preliminary injunction against enforcement.[154] On March 1, 1999, the court stayed the proceeding pending the Supreme Court's decision in *Shrink II*.[155] After *Shrink II* declared Missouri's individual contribution limits constitutional, the state moved to vacate the preliminary injunction, which the district court denied, choosing instead to set the case for expedited briefing and a hearing on the merits.[156] The case was set for trial on July 5, 2000, but it never went to trial;[157] on June 22, 2000, the district court awarded summary judgment to defendants.[158] The

147. *Id.*

148. *Id.*

149. Missouri Republican Party v. Lamb, 31 F. Supp.2d 1161, 1162 (E.D. Mo. 1998).

150. *Id*.

151. *Id.*

152. *Id.*

153. *Id*. at 1161.

154. *Lamb I*, 31 F. Supp.2d at 1163.

155. Brief for Appellant at 3, Missouri Republican Party v. Lamb, 227 F.3d 1070 (8th Cir. 2000) (No. 00-2686); Missouri Republican Party v. Lamb, 100 F. Supp.2d 990, 992 (E.D. Mo. 2000) [hereinafter *Lamb II*].

156. Brief for Appellant at 4, Missouri Republican Party v. Lamb, 227 F.3d 1070 (8th Cir. 2000) (No. 00-2686). Missouri filed a notice of appeal, followed by a motion to expedite the appeal, after the preliminary injunction was granted. The Eighth Circuit, however, denied Missouri's motions. *Id.*

157. *Id.*

158. *Lamb II*, 100 F. Supp.2d at 991.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

court found that the Republican Party's financial donations to plaintiff candidates were contributions rather than expenditures because the candidates had control over the use of the funds. Thus, the court held that *Shrink II* required it to find the state's limits on political party contributions constitutional.[159]

B. District Court Rationale: A Contribution is a Contribution; Shrink II *Governs*

One fact dictated the district court's consideration of *Lamb II*—the fact that the campaign spending in question was a contribution as opposed to a coordinated or independent expenditure.[160] After making the preliminary determination that these were contributions, Judge Catherine D. Perry[161] began her analysis with two questions.[162] First, were contributions made by political parties subject to the same standards applied to contributions made by individuals and entities other than political party committees, such as PACs?[163] Second, how could the limitations be effected?[164] The court looked to *Shrink II* for the appropriate standard, explaining that contribution limits could survive if the government demonstrated that the regulation was closely drawn to match a sufficiently important state interest.[165] Concerning the amount of the limitation, the relevant test was whether the limit was so radical as to render political association ineffective, thus driving out the sound of the candidate's voice and making contributions worthless.[166]

The court's determination that these were contributions affected the standard of review it applied and thus the deference given to Missouri's elected

159. *Id*. at 992, 994.

160. *Shrink II* upheld Missouri's individual contribution limits and the district court found that because Missouri's regulation was of a contribution, *Shrink II* required it to uphold the constitutionality of the regulation. *Id*. at 992. The Missouri Republican Party argued that the spending at issue was a coordinated expenditure. *Id.* at 993-94. In its opposition brief to the state's petition for certiorari, the party maintained that there remains a substantial question in the case whether the lower courts properly labeled the support provided by the party to its candidates "contributions" instead of "expenditures." Brief in Opposition at 18, Nixon v. Missouri Republican Party (No. 00-1136).

161. U.S. District Court Judge for the Eastern District of Missouri, Catherine D. Perry, also authored the district court opinion in *Shrink*, an opinion the Supreme Court eventually agreed with. Shrink Mo. Gov't PAC v. Adams, 5 F. Supp.2d 734 (E.D. Mo. 1998). In addition, she authored one other campaign finance opinion. Shrink Mo. Gov't PAC v. Maupin, 892 F. Supp. 1246 (E.D. Mo. 1995).

162. *Lamb II*, 100 F. Supp.2d at 995.

163. *Id*.

164. *Id*.

165. *Id*.

166. *Id*.

decision-makers.[167] Applying the intermediate scrutiny standard that the Supreme Court applied to contributions in *Buckley*, the court accepted the state's two interests—anti-corruption and anti-evasion—as sufficient without specific evidentiary proof.[168] Its understanding of *Buckley* and *Shrink II* led the district court to conclude that the constitutionality of a limitation hinges not on the identity of the contributor but on the type of financial support.[169] Because the type of support implicated in this case was a contribution, it was of little concern to the court that the contributor was a political party. Nevertheless, the court considered the Missouri Republican Party's argument that contributions in the party-candidate context require a different analysis based on their common identity and the minimal corruption dangers.[170] Judge Perry distinguished Justice Kennedy's *Colorado Republican I* concurrence by pointing to Justice Kennedy's statement that Congress may have the ability to restrict undifferentiated political party contributions.[171] Because these contributions were precisely that, as opposed to coordinated expenditures, she reasoned that his conclusion was not applicable.[172] In addition, while she found Justice Thomas's opinion in that case persuasive, Judge Perry felt constrained to rely on *Shrink II's* holding which found *Colorado Republican I* inapposite to the question of campaign contribution limits.[173]

Having answered the "whether" question in the affirmative by finding that a contribution is a contribution, the court was easily able to satisfy *Shrink II's* "sufficiently important interest" test. This was so because both the state's anti-corruption and anti-evasion justifications are well-entrenched in the Supreme Court's campaign finance jurisprudence.[174] The court then turned to the "how" question, which examines the "closely drawn" element of the *Shrink II* test.

167. *Lamb II*, 100 F. Supp.2d at 995-96.

168. *Id*. at 998-99.

169. *Id*. at 996.

170. *Id*.

171. *Id*. at 997. Judge Perry stated that "[u]nfortunately for [the] plaintiffs, [undifferentiated party contributions are] . . . exactly the type of regulation at issue here." *Id. See supra* note 122 for a discussion of Justice Kennedy's opinion in *Colorado Republican I.*

172. *Lamb II*, 100 F. Supp. 2d at 997.

173. *Id*. Judge Perry exclaimed that "[w]hile I find Justice Thomas' reasoning concerning the nature of political parties appealing as a policy statement, I believe that [*Shrink II*] requires me to reject it for purposes of deciding this case." *Id.* Her conclusion echoed this line of thought:

> Were I writing this opinion on a blank slate, I might well conclude that political parties should be exempted from the legal standards governing other kinds of campaign contributors because of their special role in American politics. I might even adopt the approach advocated by Justice Thomas in Colorado Republican . . . .

Id. at 1000. *See supra* note 123 for a discussion of Justice Thomas's *Colorado Republican I* opinion.

174. *See supra* note 110. The *Shrink II* Court affirmed the strength of these justifications when regulating contributions.

Finding that these limits were not "so radical . . . as to render contributions pointless," the court held that the statute was closely drawn to meet a sufficiently important interest and therefore was constitutional.[175] The Missouri Republican Party appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit. After hearing oral arguments, the Eighth Circuit handed down its decision on August 9, 2000.[176]

C. Eighth Circuit Opinion: Political Party Contributions are Different; See Buckley *and* Colorado Republican I

The majority opinion in *Lamb III*, written by Circuit Judge Morris Sheppard Arnold, agreed with the district court on one fact, that the spending in question was a contribution.[177] However, the agreement ended there. Because of the identity of the contributor, the Eighth Circuit came to a conclusion different from that of the district court, basing its decision on different precedent. Even though it applied the *Shrink II* standard, the Eighth Circuit claimed that *Shrink II's* applicability was limited because the fact that the plaintiff was a political party distinguished the case "in a crucial way."[178] Consequently, the court fit *Lamb III* between *Buckley*, which allowed limitations on individual contributions, and *Colorado Republican I*, which disallowed limitations on independent political party expenditures (with four justices arguing that coordinated expenditure limitations should also have been disallowed).[179] Fueled by precedent of this nature, the court felt free to establish a new rule for political party contributions based on the Supreme Court's description of a contribution in *Buckley* and its analysis of the party context in *Colorado Republican I*.

By analyzing *Buckley's* description of an individual contribution, which likened it to a "general expression of support" that did not communicate the underlying basis of the support, the Eighth Circuit found that these considerations did not carry the same force when applied to political party contributions.[180] The court stated the object of a party is to elect candidates to

175. *Lamb II*, 100 F. Supp. 2d at 999.

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

177. *Id*. at 1071. The other circuit judges before whom this case was argued included Circuit Judge Pasco Bowman and Circuit Judge John R. Gibson. For news coverage of the case, see Kit Wagar, *Court Kills State Party Fund Limit; Missouri's Nixon Vows to Appeal Ruling*, KANSAS CITY STAR, Sep. 12, 2000, at A-1; Tim Bryant, *Appeals Panel Rejects Limit on Campaign Spending by Parties; Judges' Ruling Says Missouri Law Violates Free Speech Rights; Fight is not Over, Says Nixon*, ST. LOUIS POST-DISPATCH, Sep. 12, 2000, at A-4.

178. *Lamb III*, 227 F.3d at 1072.

179. *Id.* at 1071.

180. *Id*. at 1072.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

office.[181] Consequently, the candidate's speech is in many ways the party's own speech such that they are "virtual alter egos."[182] Although it acknowledged that there are some observable differences between the two, the court concluded that the identities of a party and candidate merge in such a way that makes their dealings "more than merely transient symbiotic ones between separate and distinct entities."[183] For this reason, it becomes impossible to say in *Buckley's* words, as the district court did, that a party's contribution does not communicate the underlying basis for the support.[184] Indeed, the "ideological endorsement" and "philosophical imprimatur" that attach to this sort of contribution make it an altogether different thing than an individual contribution.[185] Rather than serving as a symbolic expression, reasoned the court, a party's contribution is more like a substantive political statement deserving of and requiring greater First Amendment protection.[186]

Because the majority found a "weightier" First Amendment right, the court imposed a higher evidentiary burden on the state. It reasoned that the nature of parties also affects the kind of reason the government must advance to justify an intrusion on First Amendment rights.[187] Citing Justice Thomas's *Colorado Republican I* concurrence, the court pointed out the logical weaknesses of the anti-corruption rationale in the party-candidate context.[188] Because of their unity of purpose, it becomes difficult to imagine how a party could corrupt its own candidate, making the state's evidentiary challenge an even tougher one in this context. The court also questioned the state's anti-evasion rationale on two grounds. First, the court believed that this rationale worked in a way that burdened the free speech rights of parties to control the activities of someone else.[189] Secondly, it pointed to already existing Missouri statutes which outlaw using parties or other political groups as conduits or means of circumventing individual contribution limits.[190] The court acknowledged that this regulation might have an indirect attenuating effect on earmarking agreements (evasive behavior), but concluded that this rationale is too frail to justify a limitation on the substantial free speech rights of parties.[191] Thus, the state failed to meet the higher evidentiary burden applied by the Eighth Circuit and instead fell

181. *Id*.
182. *Id*.
183. *Lamb III*, 227 F.3d at 1072.
184. *Id*.
185. *Id*.
186. *Id*.
187. *Id*.
188. *Lamb III*, 227 F.3d at 1072-73.
189. *Id*. at 1073.
190. *Id*.
191. *Id*.

victim to a holding that labeled its espoused interests "novel," "implausible" and, therefore, unconstitutional in the party-candidate context.[192]

D. Gibson's Dissent: Party-Candidate Unity is a Shifting Foundation; a Contribution is Still a Contribution

Circuit Judge John R. Gibson concurred with the majority to the extent that it classified this type of spending as a contribution.[193] He also agreed that *Buckley* and *Colorado Republican* provided guidance, but disagreed with the court's conclusion that party contributions were distinguishable from the contributions described in *Buckley* and *Shrink II*. Thus, he also took issue with the assertion that *Shrink II* was of limited value.[194] Instead, he stated that *Shrink II* reinforced *Buckley's* "continuing vitality" in maintaining that contributions impose less severe restrictions on First Amendment rights.[195] In addition, he claimed that *Shrink II* provided the standard the court must use.[196]

The basis for Judge Gibson's dissent was his disagreement over the proper characterization of the party-candidate relationship. He accused the majority of going back and forth between different sides as it reached for a description.[197] For example, he pointed out that the majority acknowledged "observable differences" between the two while simultaneously concluding that they are "virtually indistinguishable."[198] On "this shifting foundation," stated Gibson, the majority's entire opinion is constructed.[199] Referring to *Colorado Republican I*, Gibson claimed that there was no consensus on the Supreme Court about this relationship.[200] To wit, the *Colorado Republican I* plurality rejected the argument that they are identical, "pointing out that Congress treats parties and candidates differently by regulating contributions

192. *Id*. The court's use of this language—basically the *Shrink II* test—caused the Missouri Republican Party to argue in its opposition brief to the state's petition for writ of certiorari that the Court's holding was merely a straightforward application of *Shrink II*. Brief in Opposition, at 12-13, Nixon v. Missouri Republican Party (No. 00-1136).

Shortly after the decision, a Missouri newspaper editorialized that the Missouri Republican Party won on the law but lost on the politics. The reason for this was that following the abolishment of party contribution limits, the Missouri Democratic Party contributed $2.6 million to its candidates, and the Missouri Republican Party contributed merely $600,000. Editorial, *A Wolf in Sheep's Clothing*, ST. LOUIS POST-DISPATCH, Sep. 13, 2000, at B6.

193. *Lamb III*, 227 F.3d at 1074.

194. *Id.* at 1073.

195. *Id.* at 1074.

196. *Id.* Arguably, however, the majority used this standard, simply applying the test in a different manner than Circuit Judge Gibson would have.

197. *Id*. Circuit Judge Gibson used the word "tergivisating." *Id.*

198. *Lamb III*, 227 F.3d at 1074.

199. *Id*.

200. *Id*.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

from one to the other."[201] Even though four justices signed their names to concurrences which stressed the unity of party-candidate interests and behavior, two more justices in the dissent identified a special danger that parties will abuse the influence they have over candidates based on their power to spend.[202] Finally, Gibson claimed that Justice Kennedy's conclusion, the one he said the majority opinion was most similar to, fell short of the majority's conclusion that parties and candidates were virtually identical or merged into one.[203]

Regardless of the nature of the relationship, Judge Gibson argued that the *Buckley* analysis was framed in a way that leads to the conclusion that its reference to contributions applies to all contributions, no matter what their source.[204] *Buckley* stated that the FECA "appl[ies] broadly to all phases of and all participants in the election process."[205] In addition, claimed Gibson, it discussed contributions and expenditures in a part of the opinion entitled "general principles," which indicated that the Court was intending to set forth universally applicable concepts.[206] Moreover, the Court's use of the word "group" in the paragraph directly following its discussion of political parties indicated that it intended its description of contribution limits in that paragraph to apply to all the groups referred to in the previous paragraph.[207] Part of that description included the notion that a contribution limit entailed only a marginal restriction on free speech.[208] Gibson argued these constructional details would seem to indicate that the Supreme Court attaches constitutional significance to the contribution-expenditure distinction in the political party context.[209] If this were so, the free speech rights of parties would be no greater than the free speech rights of individuals. Under this framework, a contribution is a contribution, and the same level of scrutiny is thus warranted.

Judge Gibson then applied the *Shrink II* test which upheld restrictions if they were closely drawn to meet a sufficiently important interest.[210] First, he found the state's anti-evasion rationale enough to meet the sufficiently important interest test because the Supreme Court has acknowledged that the appearance of corruption can be rooted in the suspicion that individuals can evade limits by using parties as a conduit.[211] Second, he found that these

201. *Id*.
202. *Id*.
203. *Lamb III*, 227 F.3d at 1075.
204. *Id.*
205. *Id*.
206. *Id*.
207. *Id*.
208. *Lamb III*, 227 F.3d at 1075.
209. *Id*.
210. *Id.* at 1077.
211. *Id.* at 1076.

justifications were neither novel nor implausible because both anti-corruption and anti-evasion rationales were used and considered plausible in previous cases dealing with contribution limits.[212] He stated the majority's insistence on evidentiary proof ran afoul of those previous decisions.[213] Finally, finding the limits to be "closely drawn" such that they would not suppress political advocacy in Missouri, Judge Gibson stated he would have affirmed the district court's judgment.[214]

At the time of publication of this Note, the state's petition for writ of certiorari was pending before the Supreme Court. In the briefs submitted, each side made its arguments in view of the Court's upcoming *Colorado Republican II* decision. The state argued that *Lamb III* bridges the gap between *Shrink II* and *Colorado Republican II* by addressing the constitutionality of limits on political party contributions.[215] It offered the Supreme Court two choices: (1) if the Court reverses the Tenth Circuit in *Colorado Republican II*, it argued the Court should grant the writ, vacate the decision and remand back to the Eighth Circuit with instructions to reconsider in light of the Court's new precedent;[216] (2) if the Court affirms the Tenth Circuit, the state argued that the need for review would be even greater because the only existing constitutional restriction on political party support under the federal scheme would be the party contributions that the Eighth Circuit held unconstitutional.[217] In response, the Missouri Republican Party argued that *Lamb III* was simply a straightforward application of *Shrink II* whereby the Eighth Circuit found that the threat of a political party corrupting its candidates was both novel and implausible.[218] It claimed that the Court's decision in *Colorado Republican II* is not likely to create any reason to question the Eighth Circuit's application of *Shrink II* to limits on the amount of financial support provided by parties to

212. *Id.* For example, he cited *Buckley v. Valeo*, 424 U.S. 1, 38 (1976) and *California Med. Ass'n v. Fed. Election Comm'n*, 453 U.S. 182, 197-98 (1981).

213. *Lamb III*, 227 F.3d at 1076.

214. *Id.* at 1077.

215. Petition For Writ of Certiorari at 19, Nixon v. Missouri Republican Party (No. 00-1136). In addition, the state argued that the Eighth Circuit's holding threatens a substantial disruption of the statutory scheme (and, thus, upcoming congressional action) and that a conflict currently exists among the courts on whether contribution limits are constitutional. *Id.* at 20, 24.

216. *Id.* at 24.

217. *Id.* at 25. In its *Colorado Republican II* brief of amici curiae, however, the state indicated if the Court decides to affirm the Tenth Circuit's decision to strike down limits on coordinated expenditures, then all limits on political party support to candidates will effectively come to an end. Brief of Amici Curiae State of Mo. at 8, Fed. Elections Comm'n v. Colorado Republican Fed. Campaign Comm. (2001) (No. 00-191); *see also supra* note 135. Hence, it would seem that the need for review would actually not be great were the Court to strike down coordinated expenditure limits.

218. Brief in Opposition at 10, Nixon v. Missouri Republican Party (No. 00-1136).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

candidates.[219] Thus, it concluded that the state's petition for writ of certiorari should be denied. It is doubtful that the Court will rule on the petition until it hands down its *Colorado Republican II* decision.[220]

IV. ANALYSIS: DON'T SILENCE THE LAMB

Like Judge Gibson and the *Lamb II* district court, Missouri's campaign finance reformers put great stock in the contribution expenditure distinction first explicated by the Supreme Court a quarter of a century ago.[221] This distinction has been greatly criticized, however, as this Note has already indicated.[222] The problem with the distinction is both a constitutional problem and a political effects problem. The constitutional problem is that the rationale for the distinction is questionable. As Chief Justice Burger suggested in *Buckley*, the Court's attempt to justify the distinction by identifying two different communicative aspects of contributions, the moral support they convey and the fact that they translate into communication, is flawed because the end result of a contribution is often identical to the end result of an expenditure.[223] The political effects problem is evident in the process by which money, which has been and will likely remain a constant in elections, flows to less accountable sources of expenditures, like PACs, in order to avoid the contribution caps.[224]

While the point of this analysis is not to deconstruct the Supreme Court's contribution expenditure distinction, it will begin by considering the weakness of such categorization in the political party context. It will then discuss the

219. *Id.* at 12, 22. The party further argued that Missouri can provide no evidence that political party contributions cause corruption or the appearance of corruption. *Id.* at 10. It also claimed that a substantial question remains as to whether the spending at issue in the case was a contribution as opposed to a coordinated expenditure. *Id.* at 18. In addition, the party claimed that the current posture of the case, whereby the record is somewhat scant due to the district court's grant of summary judgment and the Eighth Circuit's reversal of that grant, presents many unresolved issues that would control the outcome of the case notwithstanding review by the Supreme Court. *Id.* at 21.

220. There is good reason to believe the Court will rule on the petition for writ of certiorari on the same day it hands down its *Colorado Republican II* decision, because that is precisely what it did in two prior Missouri campaign finance cases, denying certiorari on the same day the *Colorado Republican I* decision was handed down. *See* Carver v. Nixon, 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996); Shrink Mo. Gov't PAC v. Maupin, 71 F.3d 1422 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996); *see also*, LaPierre, *Pandering to Public Fears*, *supra* note 112, at 700.

221. Brief for Appellee at 16, 23-31, Missouri Republican Party v. Lamb, 227 F.3d 1070 (8th Cir. 2000) (No. 00-2686). In its brief, Missouri argued that *Shrink II* affirmed *Buckley's* bright line distinction between contributions and expenditures. Hence, the state believed that the fact that political party contributions were the target of the legislation should have been dispositive.

222. *See supra* Part II B.2.b.

223. *Buckley*, 424 U.S. at 243-44.

224. *See* Sullivan, *Against Reform*, *supra* note 41, at 325-26.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

role of the modern political party in order to demonstrate that embracing the political parties as a means to solve the present real and perceived campaign finance problems is consistent not only with the First Amendment but also with the political realities that face the United States today. The application of this informed view of the political parties and their role in the electoral process, as occurred by the majority in *Lamb III*, would increase accountability in the political sphere and lessen the influence of secondary and tertiary political actors like PACs. Additionally, it will be shown that the effects of this idea may in fact serve the desires of the reformers even more completely than the reformers' regulations could, were they found to be constitutional.[225]

A. The Tyranny of Labels: "Word Game" Jurisprudence

Even though the Supreme Court has claimed that the government's label does not control its analysis,[226] the two labels at issue in the campaign finance context almost always control both the Court's level of scrutiny and its finding regarding the constitutionality of any regulation of campaign spending.[227] There are two primary criticisms of the contribution expenditure distinction.[228] First, "it is difficult to accept the view that contributions do not measure the intensity of support or that the quantity of communication does not increase with the size of the contribution."[229] Second, as Justice Burger pointed out, the nature of the speech, regardless of whether it is a contribution or an expenditure, is arguably the same because the final product is so often the same.[230]

The *Buckley* Court, however, ignored this second critique, choosing instead to rest its justification for the distinction on the premise that limitations of contributions affect only speech by another or "speech by proxy."[231] Justice Burger called this an arbitrary limitation, whereby the Court imposed a flat ceiling without focusing on the actual harm worked apart from the limitation.[232] Furthermore, he stated that under this framework, whether speech is an impermissible contribution or a permissible expenditure turns not

225. *See* discussion *infra* Part IV.C.

226. "[W]e cannot allow the Government's suggested labels to control our First Amendment analysis." Colorado Republican Fed. Campaign Comm. v. Fed. Elections Comm'n, 518 U.S. 604, 627 (1996).

227. *See supra* tbl. 1 and accompanying text (supporting the idea that these labels have controlled the Court's campaign finance jurisprudence).

228. Kirk J. Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities*, 56 FORDHAM L. REV. 53, 83 (1987).

229. *Id.*

230. *Id.* For example, a television commercial carrying an election message could be the product of either contributions from persons or groups to the candidate or independent expenditures from persons or groups on behalf of the candidate.

231. Buckley v. Valeo, 424 U.S. 1, 243 (1976).

232. *Id.* at 244 n.6.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

on whether the speech is by proxy, but rather on whether the speech is authorized by the candidate.[233] Thus, the distinction is really one between independent and authorized political activity.[234] Calling this distinction unrealistic, Burger concluded that the Court was engaging in a "word game" by not recognizing that people contribute money to political actors and activities "because they wish to communicate ideas, and [that] their constitutional interest in doing so is precisely the same whether they or someone else utters the words."[235]

This "word game" critique has caused some to question whether the distinction provides "a reliable barometer of the relative significance of the first amendment values at stake" and whether it alone should trigger different levels of scrutiny.[236] "An individual['s] choice to have a message with which he agrees prepared by professionals [to have another speak for him by proxy] is no less speech" than the real speech (expenditures) that the Supreme Court protects.[237] Because of this, the conclusion that the distinction is flawed and that the level of scrutiny should not differ seems warranted.[238] One might, however, point to the differing risks of corruption that accompany contributions and expenditures, according to the Supreme Court, as support for the distinction. FECA's creators believed that large contributions create a greater risk of quid pro quo corruption because contributions may be given directly to candidates in hopes of securing a quid pro quo from the candidate should he or she experience electoral success.[239] Independent expenditures, however, are indirect and for that reason would seem less susceptible to the dangers of quid pro quo corruption, the primary justification accepted by the Supreme Court for limiting political speech.[240]

Many reformers, however, "do not suggest that most contributions and expenditures fall into the quid pro quo category."[241] Instead, they argue that contributions exert a more subtle influence by increasing the access of moneyed interests who, they claim, already have more than enough access.[242] Thus, it would appear the limitation is, to some degree, an attempt to redress a perceived generalized imbalance of power, rather than the actual practice of

233. *Id.* at 244.
234. *Id.*
235. *Id.*
236. BeVier, *Money and Politics*, *supra* note 91, at 1063.
237. *Id.* at 1064.
238. *Id.* at 1063.
239. *Buckley*, 424 U.S. at 26.
240. *See supra* Part II B.2.a (discussing the anti-corruption rationale).
241. BeVier, *Money and Politics*, *supra* note 91, at 1082-83.
242. *Id*. Professor BeVier makes this comment in her article. Further support for this idea is found in journalist Elizabeth Drew's first book on politics and money. ELIZABETH DREW, POLITICS AND MONEY 59 (1983).

exchanging money for votes.[243] While justifications of this nature are seldom articulated, it does seem clear, based on the state's inability to produce any evidence, that the quid pro quo corruption that most contribution limits aim to address is more of a perception than a reality.[244]

Moving from the justifications to the effects, present political realities demonstrate that the contribution expenditure distinction has produced a campaign finance system far different from what reformers envisioned.[245] According to Professors Samuel Issacharoff and Pamela Karlan, *Buckley* has produced a system in which candidates must contend with an unlimited demand for funds because expenditures cannot be capped and a limited supply of funds because contributions are capped.[246] This increases the value of the commodity (campaign money) such that candidates are constantly preoccupied with fund-raising.[247] As the professors relate, it is like allowing a starving man unlimited trips to the buffet table, but forcing him to use a thimble-sized spoon to serve himself.[248] As with food, such constricted means are likely to create a singular obsession with consumption.[249] Because contribution caps remove the possibility of large direct contributions, candidates must spend more time chasing smaller contributions to satisfy their need for money.[250] The perverse effect of reform, then, is to increase the amount of time and energy that modern candidates spend on fund-raising, thus decreasing the amount of time and energy they spend on governing.[251]

Another theory advanced by Professors Issacharoff and Karlan to describe the weaknesses of the present campaign finance structure is what they term the "hydraulics of campaign finance reform."[252] Like water, they posited, political money must go somewhere, and it is part of a broader ecosystem (the current

243. BeVier, *Money and Politics*, *supra* note 91, at 1082.

244. *See* LaPierre, *First Amendment Hurdle*, *supra* note 18, at 218. Professor LaPierre claimed that Missouri's 1994 campaign finance legislation pandered "to public perceptions about the amorphous evils of 'big money.'" One legislator even remarked to him that "perception is more important than what's real" in the campaign finance reform arena. *Id.*

245. *See* Nahra, *supra* note 228, at 83-84.

246. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1711 (1999). Professors Issacharoff and Karlan have both commented on campaign finance reform both prior to and after this particular joint effort. *See, e.g.*, Samuel Issacharoff, *Introduction: The Structures of Democratic Politics*, 100 COLUM. L. REV. 593 (2000); Samuel Issacharoff & Richard H. Pildes, *Not By "Election" Alone*, 32 LOY. L.A. L. REV. 1173 (1999); Pamela S. Karlan, *Symposium: Defining Democracy for the Next Century: Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291 (1997).

247. Issacharoff & Karlan, *supra* note 246, at 1711.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* Of course, this effect does not hold for the self-promoting superrich candidate, who may, as the authors point out, be the least qualified to hold public office. *Id.*

252. Issacharoff & Karlan, *supra* note 246, at 1708-09.

political landscape, which includes PACs, special interest groups, corporations, soft money and independent expenditures).[253] If money has the outcome-determinative effect on campaigns that reformers identify, they reasoned, then wealthy political operatives will continue to use it to influence outcomes whatever the regulatory regime.[254] This is especially true in a country that guarantees free speech, equating money spent to create speech as speech. When you apply this principle to a finance structure that limits contributions to primary actors like candidates and parties, thus forcing money upstream to secondary and tertiary actors like PACs, you get a system where candidates are not only "perpetual fundraisers" but also more and more indebted to entities like PACs and others who make independent expenditures.[255]

These effects only affirm what many have thought since day one: it is time for the word game to end. At least with respect to contributions between primary actors such as political parties and candidates, the contribution expenditure distinction should be abolished. By refusing to accept the artificial distinction between contributions and expenditures, the Eighth Circuit in *Lamb III* held at bay the movement of money upstream, enabling it to remain within entities that voters can hold accountable. This is a positive effect, as well as an example that other jurisdictions, including the Supreme Court, should follow. For, as the professors conclude: "[T]here are serious reasons to think we would be better off if individuals and institutions who are entitled to advocate views or express themselves were to do so through the mediating institutions of broad-based political parties."[256]

B. The Modern Political Party: A Campaign-Centered Institution

In its brief, the state of Missouri implicitly argued that parties occupy the same ground as PACs when it comes to their role in the political realm and the freedoms associated with that role.[257] Circuit Judge Gibson also argued in his dissent that the *Buckley* court intended to lump political parties in with other

253. *Id*. *See also generally* Marshall, *supra* note 39 (discussing the unintended consequences of campaign finance reform); Smith, *supra* note 40 (discussing the undemocratic consequences of campaign finance reform); Sullivan, *Against Reform*, *supra* note 41 (discussing the substitution effects of campaign finance reform). The meanings that the labels employed by each of these scholars are meant to capture are essentially synonymous with the "hydraulic" principle described in Issacharoff & Karlan.

254. Issacharoff & Karlan, *supra* note 246, at 1709.

255. *Id*. at 1736.

256. *Id*.

257. Brief for Appellee at 21-23, Missouri Republican Party v. Lamb, 227 F.3d 1070 (8th Cir. 2000) (No. 00-2686). The state answered the Missouri Republican Party's argument that a candidate speaks for the party by pointing to a similar argument that was rejected in *CalMed*, that a PAC is a mouthpiece for its parent organization. The state claimed that like a PAC and its parent organization, parties are separate from their candidates and thus not virtual alter egos as the court suggested. *Id.*

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

"groups," including PACs, when it discussed how contribution limits operated.[258] This comparison, that of parties to PACs, because it has played an outcome-determinative role in courts' constitutional analysis, has caused commentators to speculate about whether the differences are differences in degree or differences in kind.[259] Before considering the modern political party and the activities that set it apart from other groups, it is helpful to take a brief look back at the role and development of the political parties in America.

America's two major political parties have existed virtually since the beginning of the republic.[260] In an age lacking the easy means of communication that exist today, the original parties found their niche by developing institutional means for coordinating elections, by communicating between electors and officials and by influencing and guiding legislative behavior.[261] They became an effective mechanism for aggregating individual interests and resources into a coherent program.[262] The local party structure dominated and even provided an important social service function to members of the local community.[263] In the 1960s and 1970s, however, the welfare state began to supplant the social service function performed by the parties. In addition, the parties also became less involved in the process of selecting nominees for office, causing commentators to decry the decline and weakness of the political parties in America.[264] Consequently, in the period just prior to the FECA's passage and the *Buckley* holding, party regulations were not a big concern of the reformers.[265] For this reason, both Congress in the FECA and the Court in *Buckley* essentially ignored the parties in their analysis of the constitutionality of various campaign finance reforms.[266]

Despite its failure to directly consider parties, *Buckley*, in addition to the 1979 amendments to the FECA, forged a different role for the political parties—one that they appear to be flourishing in today.[267] Today's political parties are national and statewide organizations that focus on providing campaign services rather than distributing the spoils of local government elections.[268] Their new role has made the parties major players in the federal

258. *Lamb III*, 227 F.3d at 1075.

259. *See* Kurt D. Dykstra, *Sending the Parties "PAC-ing"? The Constitution, Congressional Control and Campaign Spending After Colorado Republican Federal Campaign Committee v. Federal Elections Commission*, 81 MARQ. L. REV. 1201, 1226 (1998) (concluding that the differences are significant enough to be considered differences in kind).

260. Nahra, *supra* note 228, at 87.

261. *Id.*

262. *Id.*

263. *Id.* at 88-89.

264. *Id.* at 89-90; *see also* SORAUF, INSIDE CAMPAIGN FINANCE, *supra* note 19, at 4-5.

265. *See* Nahra, *supra* note 228, at 88-89.

266. *See id.*

267. *See id.* at 88.

268. *See id.*

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

and state campaign process, where they are significant providers of campaign services and campaign funds.[269] This is despite being limited on both the supply and demand side of contributions, because individuals are often limited as to the amount they can contribute to parties and parties are often limited as to the amount they can contribute to, or spend in cooperation with, candidates. Limitations of this nature would suggest not only that parties are like PACs, but also that the differences that do exist create an even greater risk of corruption because the limitations are in some ways more severe than those on PACs. A closer look at party behavior, however, especially with respect to the campaign process, will demonstrate that parties and special interest groups like PACs are distinguishable in a crucial way.

In his book *Party Politics in America*, Frank Sorauf identified five major differences between political parties and other interest groups.[270] The first difference is the extent to which political parties pursue their activities through the contesting of elections.[271] The parties field candidates at every level.[272] PACs can only support individuals already engaged in the process of campaigning under the auspices of a party, making their involvement secondary.[273] The second difference is that parties must be broad and inclusive to succeed.[274] They cannot afford to be exclusive or to focus on a narrow range of concerns because their goal is to attain the support of a majority of the voting public.[275] PACs, however, are typically the political arms of a narrow special interest group that has involved itself in the political process solely to benefit its own narrow special interest.[276] The third difference is that political parties operate solely in the political arena to effect political goals and purposes.[277] They are not economic actors, nor do they have as a goal the advancement of non-political agendas, as many PACs and special interest

269. *Id.*

270. FRANK J. SORAUF, PARTY POLITICS IN AMERICA 18-22 (2d ed. 1984) [hereinafter SORAUF, PARTY POLITICS].

271. *Id.* at 18-19. In his article, Kirk Nahra argued that the political parties' role in elections is so important that they should be deemed state actors. Nahra, *supra* note 228, at 99.

272. Dykstra, *supra* note 259, at 1226.

273. *Id.*

274. SORAUF, PARTY POLITICS, *supra* note 270, at 19.

275. *Id.* For example, the Missouri Republican Party (MRP) stated in its brief that its primary goal is to take control of state government by electing republican candidates to statewide office to implement republican policies and principles. To do so, the MRP targets races in which the outcome is in doubt and party support might affect the result. In addition, the MRP provides many candidates seed money and participates in recruiting and candidate development as a tangible demonstration of party support. Brief for Appellant at 6-10, Missouri Republican Party v. Lamb, 227 F.3d 1070 (8th Cir. 2000) (No. 00-2686).

276. SORAUF, PARTY POLITICS, *supra* note 270, at 19-20.

277. *Id.* at 19.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

groups do.[278] The fourth difference is that political parties persist over time whereas special interest groups tend to move into and out of existence, depending on the success of their particular agenda.[279] Parties are therefore able to fulfill a stabilizing function in American political life that special interest groups do not contribute to.[280] Finally, the fifth difference is that political parties serve as cues and reference points for voters as they select issues and candidates who they might otherwise know little about.[281] Special interest groups cannot serve this function because their selection is more arbitrary, often based not on a policy stance, but rather on who is likely to win.[282] Sometimes, special interest groups give money to candidates from both parties in order to hedge their bets and ensure themselves some access to political actors regardless of who wins.[283]

Many of these differences between PACs and parties suggest a shared identity between the modern political party and its candidates, the extent of which was hotly disputed in *Lamb III*.[284] The question is whether the party and its candidates are in effect one. While it is easy to see that the two are not identical, it is apparent both from the concurring opinions in *Colorado Republican I* and the majority opinion in *Lamb III* that the level of interdependence is great enough to conclude that the relationship warrants a different kind of First Amendment analysis. As one commentator noted, a political party is like a candidate's extended family.[285] They are subdivisions of an indivisible whole such that neither can function without the other.[286] This is especially true when examining the parties. Were it not for candidates, the parties would clearly be out of business. Although it is not as evident that the candidates need a party to function, virtually all candidates choose to ally themselves with the parties and lean on them for the many benefits they provide, demonstrating that the relationship is more than a mere symbiotic one between separate entities.[287] Indeed, by providing access to a preexisting network of supporters and helping with start-up and maintenance costs, parties are typically necessary vehicles for candidates to achieve electoral victory.[288] In that regard, parties have become essential to the orderly functioning of

278. *Id.* at 19-20.

279. *Id.*

280. *Id.* at 20.

281. SORAUF, PARTY POLITICS, *supra* note 270, at 20-21.

282. Dykstra, *supra* note 259, at 1230.

283. *Id.*

284. *See supra* Part III.B and Part III.C (discussing the two opinions in Missouri Republican Party v. Lamb, 227 F.3d 1070 (8th Cir. 2000)).

285. Dykstra, *supra* note 259, at 1231.

286. *Id.*

287. *Id.* at 1234.

288. *Id.*

democratic governance.[289] The end result of the interdependence and mutuality of interests between parties and candidates is that it is very difficult for corruption to exist in the party-candidate context. Without engaging in either word or metaphysical games in order to properly categorize the spending and relationships that characterize this context, it seems fair, based on the well-recognized qualities of the modern political party, to make this conclusion.

C. The Effects of Removing Party Limits: More or Less Corruption?

It is well established that the only justification allowed by the Constitution for limiting the political speech contained in a contribution is the prevention of corruption or the appearance of corruption.[290] The reformers have other goals as well, including leveling the electoral playing field to create political equality and lowering the overall amount of money spent on campaigns.[291] Based on the "hydraulic principle" identified above, it is debatable to what degree the overall amount of money spent on campaigns can be regulated or in some other manner restrained. By comparing the present FECA-based system employed by many states, including Missouri, with a system that puts less restrictions on primary actors like candidates and political parties, one will discover that a system that does not restrict parties is superior to a system that treats them like narrow special interest groups or individuals. The political parties actually provide a means through which to accomplish the reformers' goals.[292] Striking down limits on parties to support candidates not only reaffirms constitutional principles, it assists the reformers' goals of minimizing corruption, developing an open political system where candidates can compete on a level playing field and providing for public disclosure of spending activity.[293] Striking down political party limits is consistent, not so much with the reformers' idealized notion of what the American political system should look like, but rather with political realities that exist today based on all of the factors that bear on the systems' objective reality.

The campaign finance system involves a choice between options. The FECA-based option currently being employed by the federal government and many states tends to regulate accountable actors like candidates and political parties more than unaccountable actors like PACs and activities like issue advocacy. Noted constitutional scholar Kathleen Sullivan identified the "upstream" effects of restricting some political speech through contribution

289. *Id.* at 1232.

290. Buckley v. Valeo, 424 U.S. 1, 25 (1976).

291. *See, e.g.*, *Colorado Republican I*, 518 U.S. at 649 (Stevens J., and Ginsburg J., dissenting).

292. Nahra, *supra* note 228, at 57.

293. *Id.*

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

caps as "substitution effects."[294] The substitutes she identified (PAC spending, soft money, issue advocacy) take the place of the political money that would otherwise go to candidates or political parties.[295] The current system thus creates incentives to shift political spending away from candidates and parties to secondary organizations which cannot be held accountable by voters.[296] Because these substitution effects cannot be constitutionally limited, the current system also creates a safe harbor for political behavior that is perverse from the standpoint of uninhibited political debate.[297] For example, the Missouri Republican Party alleged in its brief that a system which forces it to make independent expenditures instead of coordinated or direct contributions is less effective because it requires the party to engage in negative advertising and prevents it from presenting a united ticket to the state.[298] The kind of "issue advocacy" engaged in by special interest groups, a political behavior that falls totally outside the control of the candidate or the party, is another example of a perverse effect. The advantages that wealthy candidates have over non-wealthy ones and that incumbents have over cash-starved challengers are further examples.[299] Based on the negative effects of the present reform regime, a better solution in this choice between options would begin with the abolishment of contribution caps between political parties and candidates.

The Eighth Circuit struck down party contribution limits because it found them unconstitutional. There are good reasons to conclude that the court's decision was also smart policy. Candidates and political parties provide a mediating influence in electoral politics because of their shared need to steer a middle course to gain or retain office.[300] Single-issue interest groups have no such influence on the political realm. Instead, they divide and conquer.[301] Political money will be spent no matter what.[302] By keeping it at the level of candidates and parties, both of whom must engage in the give and take of coalitional politics, stake out positions across a variety of issues, and answer to voters, the removal of party limits minimizes the role of substitution effects.[303] In addition, this process may reduce the overall effect of money on campaigns by keeping it at a level where it can be better moderated and controlled.[304]

294. Sullivan, *Against Reform*, *supra* note 41, at 325-26. *See also supra* notes 39 & 40 (discussing different formulations of the same idea).

295. Sullivan, *Against Reform*, *supra* note 41, at 325-26.

296. *Id.* at 326.

297. *Id.*

298. Brief for Appellant at 12, Missouri Republican Party v. Lamb, 227 F.3d 1070 (8th Cir. 2000) (No. 00-2686).

299. Issacharoff & Karlan, *supra* note 246, at 1714.

300. *Id.*

301. *See* SORAUF, PARTY POLITICS, *supra* note 270, at 19-20 and accompanying text.

302. Issacharoff & Karlan, *supra* note 246, at 1708-09.

303. *Id.* at 1714.

304. *Id.*

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

This was the conclusion of the Blue Ribbon Commission on Wisconsin Campaign Finance Reform.[305] Observing that independent expenditures fueled by narrow interest groups and individuals were increasing, leaving candidates less in control of their campaigns, the Commission saw substantial benefits to having campaigns centered on candidates and political parties.[306] This, however, does not answer the question posed above: Whether more or less corruption will inhere in a system that favors candidates and political parties compared to the special interests advantaged under most current reform agendas?

While candidates and political parties are not identical, their common electoral interests and coinciding common incentives to steer a middle course minimize the corruption risk, making a policy position that favors them better than all the other options. The funding gap created by contribution caps funnels money to PACs and special interest groups whose political behavior is more likely to raise the specter of corruption or at least pollution.[307] Because the public tends to view the activities of such groups, due to their narrow interests, with more skepticism than they view candidates acting within the realm of party politics, it would appear that limits on parties have the effect of eroding the public's confidence in the purity of the election process.[308] Because of this, some have suggested that money that flows through political parties to candidates is the cleanest money in politics.[309] Alluding to the Tenth Circuit's recent use of the "solution to pollution is dilution" maxim, these advocates argue, quite convincingly, that the aggregation of money in parties will diffuse any real or perceived undue influence that might arise from a contribution made by an individual source.[310]

The reformers, however, are likely to counter that "conduit" corruption is the real threat when it comes to removing party limits.[311] This refers to the use of the parties by individuals or special interest groups as a conduit, enabling them to circumvent any limits that exist on the direct contributions of these groups. In response to this argument, one might point to the fact that it is illegal under the FECA and most FECA-based systems to do this and adequate disclosure provisions enable policing to occur.[312] Alternatively, some would argue that conduit corruption is not a real threat and that all contribution caps,

305. *Id.* *See* Governor's Blue-Ribbon Commission on Campaign Finance Reform, State of Wisconsin 43, *available at* http://www.lafollette.wisc.edu/campaign%5Freform/final.htm.

306. *Id.* *See also* Issacharoff & Karlan, *supra* note 246, at 1715-16.

307. Amicus Brief, Committee for Party Renewal at 4, Colorado Republican Fed. Campaign Comm. v. Fed. Elections Comm'n, 518 U.S. 604 (1996) (No. 95-489).

308. *Id.*

309. *Id.* at 16.

310. *Id.* at 17-18.

311. Briffault, *Comment*, *supra* note 4, at 115-16.

312. *See Colorado Republican I*, 518 U.S. at 647 (Thomas, J., concurring).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

including those on individuals and special interest groups, should be abolished.[313] Under such a system, two things would happen: first, aggressive disclosure would enable voters to become aware of the likelihood of undue influence themselves; and second, money would flow back to the primary, moderating influences of candidates and parties.[314] While this Note does not aim to address this possibility, it would seem logical to conclude that giving the parties a bigger role in the channeling of money from contributors to candidates reduces the possibility of corruption in a more effective manner than any other constitutional alternative.

Not only would the removal of party limits, whether by the courts or by the legislature, minimize corruption, it is clear that encouraging parties to become a preferred vehicle for contributions from the public would serve a number of positive public policy ends, including the following: it would enable candidates to run effective campaigns that they can control;[315] it would diminish challenger concerns about fund-raising, reducing the advantage currently held by both incumbents and independently wealthy candidates;[316] it would thus contribute to the leveling of the electoral playing field, helping satisfy the oft-repeated desire of reformers to create political equality;[317] it would diminish the impact of PACs and other non-accountable special interest groups;[318] and it would strengthen the parties' ability to achieve policy coherence and mobilize majorities in Congress.[319] The removal of party limits might, however, entail some costs, and the reformers' concern about the increased use of the parties as a conduit to get around other restrictions is probably the chief one.[320] Decisions about the campaign finance system must occur with an eye toward political realities, though, including the freedoms guaranteed by the First Amendment.[321] Because of the close relationship between parties and

313. *See* Sullivan, *Against Reform*, *supra* note 41, at 326; Issacharoff & Karlan, *supra* note 246, at 1736-37.

314. *Id.*

315. Nahra, *supra* note 228, at 107.

316. *Id.*

317. *Id*.

318. *Id*. at 108-09.

319. Amicus Brief, Committee for Party Renewal at 3, Colorado Republican Fed. Campaign Comm. v. Fed. Elections Comm'n, 518 U.S. 604 (1996) (No. 95-489).

320. Justice Thomas in *Colorado Republican I* and the Eighth Circuit in *Lamb III* both recognized the possibility of increased conduit corruption absent party limits, but both concluded that conduit corruption can and should be addressed in other ways. Both pointed out that the government is still free to restrict individual contributions to a party and require disclosure. Moreover, the Eighth Circuit demonstrated that the employment of party contribution limits to stem the tide of conduit corruption restricts the free speech rights of parties to control the activities of someone else. *See supra* text accompanying notes 185-86.

321. *See supra* Part II.A (discussing the impact of the First Amendment on campaign finance reform).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

candidates and the unique role of parties in the election process, it is reasonable to conclude that, where accompanied by an aggressive disclosure regime, a finance system that favors the parties involves less risk of corruption than any other system that might be enacted under our Constitution.

V. CONCLUSION

This Note has demonstrated why political party freedoms should not be sacrificed at the altar of campaign finance reform. While Missouri's reformers certainly meant well, the unconstitutional nature and unintended side effects of a campaign finance system that restrains a party's ability to support its candidates precluded their success. *Missouri Republican Party v. Lamb* was certainly a victory for advocates of free speech. But, in truth, the reformers did not lose much here. In fact, the removal of contribution caps with respect to political parties is a policy choice that offers many benefits, not the least of which is stemming the tide of money flowing to non-accountable political actors and activities. In addition, a world without party limits may actually be one in which the reality and perception of corruption is less, assuming other means are used to prevent any use of the parties as a means to circumvent other limits.

Very soon the Supreme Court will issue its decision in *Colorado Republican II*.[322] This will certainly give the Court an opportunity to provide more clarity to its campaign finance jurisprudence, especially as it relates to the party-candidate relationship. Unlike *Colorado Republican I*, it does not appear that the Court will be able to sidestep the "broader" constitutional questions that it neglected to rule on last time. It is presently unclear whether the Court will decide to finally abolish the contribution expenditure distinction and if so, whether they will do so in a manner that finds limits on both or limits on neither acceptable.[323] Perhaps, the Court will retain the distinction but exempt political parties from contribution limits based on their unique identity, finding a weightier First Amendment right, much like the *Lamb III* court did. One can only hope that the Court will not send the political parties to the

322. On February 28, 2000, the Supreme Court heard oral arguments in *Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 213 F.3d 1221 (10th Cir. 2000), *cert. granted*, 121 S. Ct. 296 (2000) (*Colorado Republican II*). The Court's opinion will likely be issued by the end of June of 2001. *U.S. High Court Considers Party Spending Limits*, REUTERS, *available at* http://news.findlaw.com/legalnews/s/20010228/courtpolitics.html. *See supra* Part II. C (discussing this case and its likely impact on the disposition of *Missouri Republican Party v. Lamb*).

323. LaPierre, *First Amendment Hurdle*, *supra* note 18, at 239-40 (speculating about which way the *Buckley* tree will fall).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

slaughter. Because if they do, it is clear that the campaign finance system in this country will become even more messy than it already is.

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