A Profile in Courage: The Bipartisan Campaign Reform Act of 2002 and the First Amendment

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INTRODUCTION

Today the challenge of political courage looms larger than ever before... Our political life is becoming so expensive, so mechanized and so dominated by professional politicians and public relations men that the idealist who dreams of independent statesmanship is rudely awakened by the necessities of election and accomplishment.1

Senator John McCain (R-AZ) gained national notoriety with his presidential run in 2000.2 Although his bid for the presidency ultimately failed, he brought much needed national attention to the issue of campaign finance reform.3 Colorful as always, the former Vietnam POW swore during his presidential run that “we will have blood all over the floor [of the Senate] until we accede to the demands of the American people to be represented in Washington again.”4 While it did not take blood to finally pass campaign finance reform, it took nearly six years of courageous persistence by Senators McCain and Russel Feingold.5 Campaign finance reform has proven to be a “black hole” for legislative regulation and remedies for nearly two decades. It represents a truly unique public policy problem, because “535 experts (435 members of the House of Representatives and 100 Senators) each has his or her own ideas about what, if anything, is wrong with the system” and how to correct those wrongs.6 Additionally, each of these 535 experts has a personal stake in the issue of campaign finance reform: the election system has been perverted in such a man-

1. JOHN F. KENNEDY, PROFILES IN COURAGE 18 (1955).
4. Id.
5. Allison Mitchell, Campaign Finance Bill Wins Final Approval in Congress and Bush Says He’ll Sign It: Vote is 60 to 40: Opponents of Measure say they will push Battle into Courts, TIMES, Mar. 21, 2002, at A1. Russel Feingold is a Democrat representing Wisconsin.
ner that the very continuation of their livelihood is now dependent upon how much money they can raise to fund their re-election campaigns. This Comment will clarify recent Supreme Court and Congressional efforts to reform the manner in which Congressional elections are funded and regulated in the United States.

The main focus of this Comment is the various Congressional and Supreme Court responses to the Party Expenditure Provision of the Federal Election Campaign Act of 1971 (FECA), which regulates the manner in which political parties may contribute and spend money in support of a candidate for federal office. Part II of this Comment provides a background to the interests at issue in campaign finance reform jurisprudence, including the history of legislation enacted by Congress to regulate the allocation of money in federal elections, and the Supreme Court's interpretation of these laws in light of the First Amendment's guarantee to free speech. Additionally, Part II explores the distinctions between issue and express advocacy, hard and soft money, and how the major political parties have used these various funding mechanisms. Part III summarizes the Supreme Court's decision in *Federal Election Commission v. Colorado Republican Campaign Committee (Colorado II).* Part IV analyzes the *Colorado II* rationale, asserting that the Supreme Court made a political realization that political parties often act to circumvent the FECA limitations. Additionally, Part IV argues for greater Congressional regulation of money in federal elections by asserting that the act of contributing and spending money constitutes conduct, rather than speech, under First Amendment jurisprudence. Finally, Part V addresses the impact of the Court's decision on the recently enacted Bipartisan Campaign Reform Act of 2002.

II. Background

This portion of the Comment provides the necessary background to fully understand this complex issue, particularly the analysis and im-

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8. See infra notes 100-108 and accompanying text.
9. See infra notes 15-53 and accompanying text.
10. See infra notes 54-99 and accompanying text.
11. 121 S. Ct. 2351 (2001); see infra notes 134-216 and accompanying text.
12. See infra notes 217-272 and accompanying text.
13. See infra notes 241-265 and accompanying text.
14. See infra notes 272-335 and accompanying text.
15. See infra notes 217-272 and accompanying text.
pact sections. Included are the current contribution and expenditure limits under federal law and the Supreme Court's landmark decision of *Buckley v. Valeo*. Additionally, common campaign finance terms, such as issue and express advocacy and hard and soft money, are explored in depth. Also included is the Party Expenditure Provision, the chief focus of the Comment, as well as the Supreme Court's 1996 ruling in the *Colorado v. Federal Election Commission* line of decisions.

A. Federal Election Campaign Act (FECA)

Throughout the 1970s, political fundraising in the United States went largely unregulated. Congress passed the FECA in an attempt to curtail rising campaign costs and to solidify reporting requirements. However, the clear inadequacies of the FECA were nationally exposed during the Watergate scandal, when President Nixon's campaign raised over fifty million dollars, much of that in illegal contributions designed to circumvent limitations set forth in the FECA. In the aftermath of the scandal, Congress moved swiftly to curtail the underlying political fundraising abuses that nearly crippled both the country and the presidency. This action resulted in a set of 1974 Amendments to the FECA. The Amendments set forth dollar limitations on contributions by individuals, parties, political action committees (PACs), and corporations. The Amendments also lim-

16. See infra notes 273-335 and accompanying text.
17. See infra notes 22-31 and accompanying text.
18. 424 U.S. 1 (1975); see infra notes 32-53 and accompanying text.
19. See infra notes 22-133 and accompanying text.
20. See infra notes 100-108 and accompanying text.
21. See infra notes 109-216 and accompanying text.
25. Corrado, supra note 23, at 32. For a detailed account of these abuses, see generally, S. REP. NO. 93-981 (1974).
28. Frank J. Sorauf, *What Buckley Wrought*, in *If Buckley Fell: A First Amendment Blueprint for Regulating Money in Politics* 12 (E. Joshua Rosenkranz ed., 1999). The FECA did not create PACs. Id. at 13. They have existed in "American electoral politics since 1943, when organized labor founded the original [Political Action Committee]." Id. "But before 1974, PACs operated in the shadow of the legendary 'fat cats,' the wealthy individuals who gave up to several million dollars to presidential candidates." Id. Congress was successfully able to restrict the monetary influence of the "fat cats" through the FECA. Id. However, in doing so, Congress actually enhanced the role of PACs. Id.
ited expenditures by parties, PACs, corporations, and candidates. Additionally, the Amendments set new reporting and disclosure requirements, created a system for the public financing of Presidential campaigns, and established the Federal Election Commission (FEC) to administer the FECA. The broad scope of the FECA Amendments made the legislation destined for confrontation with the First Amendment and the Supreme Court.

B. Buckley v. Valeo

Opponents of congressional campaign regulation quickly challenged the Amendments in the landmark Supreme Court decision Buckley v. Valeo in 1976. A wide group of plaintiffs, composed of federal officeholders and candidates, several potential contributors, and others, challenged various provisions of the Amendments as violations of the First Amendment's guarantee of free speech. The complaint sought a declaratory judgment that the provisions were unconstitutional and an injunction preventing the enforcement of the provisions. The district court directed the case to the United States Court of Appeals for the District of Columbia where that court rejected the plaintiffs' constitutional challenges and upheld the provisions of the FECA.

[[In allowing a PAC to contribute five times as much as an individual donor ($5,000 versus $1,000) and in failing to limit the total amount that any one PAC could contribute to all candidates and parties combined as it did for individuals ($25,000 per year), Congress created incentives for PAC proliferation. Sorauf, supra at 13. In fact, "between 1974 and 1984 the number of PACs registered with the new Federal Election Commission (FEC) increased from 608 to 4,009, and their contributions to candidates for Congress rose from $22.6 million in the 1976 cycle to $111.5 million in 1984." Id. "They accounted for 19 percent of the receipts of congressional candidates in 1976, and by 1984 their contributions totaled 27 percent." Id. See generally Thomas Gais, Improper Influence: Campaign Finance Law, Political Interest Groups, and the Problem of Equality (1996) (giving an exhaustive study of the role of PACs on the American political system).

33. Id. at 7. A United States Presidential Candidate and Senator James Buckley of New York, who were up for reelection, were included as plaintiffs. Id.
34. Id. at 8. The Committee for a Constitutional Presidency McCarthy ’76, the Conservative Party of the State of New York, and the Mississippi Republican Party were also included as plaintiffs. Id.
35. Id. at 11.
37. Id. at 10. The D.C. Circuit held one provision unconstitutionally vague and overbroad. Id. at 11 n.7.
Opponents appealed to the United States Supreme Court, where they argued that the limitations on the use of money for political purposes constituted a restriction of communication that violated the First Amendment. The appellants employed the argument that the modern setting required the expenditure of money in order to achieve meaningful political communications. The appellants also raised constitutional challenges to provisions of the FECA, including the reporting and disclosure provisions, as a violation of their right to freedom of association.

The Court established the foundation for its ruling by stating that the contribution and expenditure limitations of the Act "operate[d] in an area of the most fundamental First Amendment activities." Further, in recognition of the fundamental importance of public discussion and debate on the qualifications of candidates, the Court stated that the First Amendment seeks "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." The Court also rejected the appellants' arguments that the contribution and expenditure of money was conduct or that the regulations were a valid time, place, and manner regulation, rather than pure speech, and therefore should be subject to a lesser degree of judicial review.

As part of its decision, the Court upheld the contribution limitations as only a "marginal restriction upon the contributor's ability to engage in free communication." The Court reasoned that a contribution served as merely a general expression of support for the candidate and their views, rather than a direct communication of their underlying basis for support. In justifying the contribution limitations, the

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38. Id. at 11.
39. Id.
40. Id.
41. Buckley, 424 U.S. at 14.
42. Id. (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).
43. Id. at 16. Had the Court characterized the limitations as content-neutral symbolic conduct, the FECA would have been subjected to a lesser form of scrutiny. Id. Under Supreme Court precedent at the time, United States v. O'Brien, 391 U.S. 367 (1968), would have applied. The Court also found FECA different from the time, place, and manner regulation jurisprudence, because FECA imposed "direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties in addition to any reasonable time, place, and manner regulations otherwise imposed." Buckley, 424 U.S. at 18. Under the time, place, and manner argument, the appellants would have been required to show that FECA was a reasonable regulation that did not discriminate on the basis of viewpoint and was aimed at advancing an important governmental interest that was unrelated to the restriction of communication. Id.
44. Id. at 20-21.
45. Id. at 21.
Court stated the limitations did not interfere with communication because the quantity of the contribution did not actually increase the level of communication.\textsuperscript{46} The Court held that the contribution limitations were narrowly tailored to serve the government's compelling interest in preventing corruption or the appearance of corruption.\textsuperscript{47}

The Court, however, also ruled that the expenditure limitations were unconstitutional because they violated the appellants' freedom of expression.\textsuperscript{48} The Court distinguished expenditure limitations from contributions by stating that the expenditure limitations "represent substantial, rather than merely theoretical, restraints on the quantity and diversity of political speech."\textsuperscript{49} The Court ruled that independent expenditure limitations could not be justified by the government's purported interest in preventing corruption or the appearance of corruption,\textsuperscript{50} or in equalizing the relative ability of individuals and groups to influence an election.\textsuperscript{51} Further, the Court stated that independent and candidate expenditure limitations "place substantial and direct restrictions on the ability of candidates, citizens and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate."\textsuperscript{52}

While subjecting both contribution and expenditure limitations to strict scrutiny, the distinction created by the Court established that restrictions on contributions require a somewhat less compelling justification than required for expenditure restrictions.\textsuperscript{53}

\begin{itemize}
\item \textsuperscript{46} \textit{Id.} Contributions were described as a mere signal of support which has little speech value and whose message does not depend upon the size of the contribution. \textit{See} E. Joshua Rosenkranz, \textit{Introduction, in If Buckley Fell: A First Amendment Blueprint for Regulating Money in Politics} 2 (E. Joshua Rosenkranz ed., 1999).

\item \textsuperscript{47} \textit{Buckley}, 424 U.S. at 29.

\item \textsuperscript{48} \textit{Id.} at 51.

\item \textsuperscript{49} \textit{Id.} at 19. The Court found expenditures to be "much more akin to direct speech, because every dollar spent will actually increase 'the number of issues discussed, the depth of their exploration, and the size of the audience reached.'" Rosenkranz, \textit{supra} note 46, at 2.

\item \textsuperscript{50} \textit{Buckley}, 424 U.S. at 45. \textit{But cf.} John C. Bonifaz et al., \textit{Challenging Buckley v. Valeo: A Legal Strategy}, 33 \textit{Akron L. Rev.} 39, 43 (1999) (arguing that freeing elected officials from the pressures of fundraising so as to allow them to better carry out their duties without interference is a new compelling governmental interest).

\item \textsuperscript{51} \textit{Buckley}, 424 U.S. at 48-49. The Court stated that the concept of restricting some elements of our society in order to enhance other elements was "wholly foreign to the First Amendment, which was designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources,' and 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" \textit{Id.} (quoting \textit{New York Times Co. v. Sullivan}, 376 U.S. 254, 266, 269 (1964)).

\item \textsuperscript{52} \textit{Buckley}, 424 U.S. at 58-59.

\end{itemize}
C. Issue Advocacy and Express Advocacy Restrictions

Developing from the need for a line between election spending, which may be regulated, and general political spending, which may not be regulated, came the judicially-created issue advocacy versus express advocacy distinction. Prior to their First Amendment challenges, the appellants in *Buckley* had challenged the expenditure limitations as unconstitutionally vague. The expenditure limitations withstood the challenge because the Court defined the restrictions as only applicable to expenditures that “in express terms advocat[ed] the election or defeat of a clearly identified candidate for federal office.” Thus, this narrow definition defines the only types of advertisements that may be regulated by the government as election spending. The Bipartisan Campaign Reform Act of 2002 broadens this definition to allow increased regulation and bans certain issue advocacy advertisements prior to an election.

On the other side of the spectrum are advertisements that do not fit the previously mentioned definition and whose chief purpose is issue advocacy. This type of activity can include television advertisements and mass mailings urging the support or defeat of legislation, initiatives, referendum, or general issues. While advertisements containing words of express advocacy are subject to reporting and disclosure requirements, the current law provides very little regulation for issue advocacy advertisements. Additionally, issue advocacy advertise-

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66. Id. at 44. The regulation had defined ‘clearly identified’ as requiring “that the candidate’s name, photograph or drawing, or other unambiguous reference to his identity appear as part of the communication.” Id. at 44 n.51. The Court’s construction would have required a communication to use terms advocating defeat or election, such as “vote for,” “elect,” “support,” etc. Id. at 44 n.52.
71. Briffault, *supra* note 54, at 122. An example of the use of this tool is a Montana television advertisement about 1996 congressional incumbent Bill Yellowtail. The “issue” advertisement stated:

Who is Bill Yellowtail? He preaches family values, but he took a swing at his wife. Yellowtail’s explanation? He ‘only slapped her.’ but her nose was broken. He talks law and order, but is himself a convicted criminal. And though he talks about protecting children, Yellowtail failed to make his own child support payments, then voted
ments are generally funded with unregulated "soft money." The use of issue advocacy advertisements in federal campaigns first exploded during the 1996 federal elections. Prompted by a 1995 FEC ruling, major party issue advertisements equaled nearly $110 million in 1995-1996. Currently, the only regulation of issue advocacy is an FEC requirement that they be financed by 65% hard money and 35% soft money in presidential election years and 60% hard money and 40% soft money in non-presidential years. The Bipartisan Campaign Reform Act of 2002 bans the use of unregulated soft money to fund issue advertisements and also narrows the definition of issue advocacy.

D. Hard Money and Soft Money

Today, direct contributions and expenditures made independently of a political party or committee, on a federal candidate's behalf, are commonly referred to as "hard money." Currently, individuals may directly contribute only $1000 to a candidate per election, $20,000 to a national party, and $5000 to a PAC. In total, an individual may

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against child support enforcement. Call Bill Yellowtail and tell him we don't approve of his wrongful behavior. Call . . .

Id. at 121.

This "attack ad" of a congressional incumbent, couched in a child support advertisement, is not subject to any regulation under current campaign regulation jurisprudence. Id. at 122.

A similar type of advertisement run by the Democratic National Committee (DNC) in 1996 promoted President Clinton:

Announcer: Protect families. For millions of working families, President Clinton cut taxes. The Dole/Gingrich budget tried to raise taxes on eight million. The Dole/Gingrich budget would've slashed Medicare $270 billion, cut scholarships. The President defended our values, protected Medicare. And now a tax cut of $1,500 a year for the first two years of college, most community colleges [are] free. Help adults go back to school. The President's plan protects our values.

Dwyre, supra note 6, at 25.

62. Briffault, supra note 54, at 122. For an explanation of soft money see infra notes 82-99 and accompanying text.

63. Corrado, supra note 23, at 227.

64. The FEC ruled that "the Republican National Committee . . . could use soft money to partially defray the costs of advertising that combined discussion of issues with criticism of President Clinton by name." Richard Briffault, The Political Parties and Campaign Finance Reform, 100 COLUM. L. REV. 620, 632 (2000).


66. Briffault, supra note 64, at 633.


68. Corrado, supra note 23, at 5.


Contribute no more than $25,000 per election cycle. The law limits contribution levels for political committees, including parties and PACs, to $5000 to a candidate, $15,000 to a national party, and $5000 to another political committee. Additionally, the law equates coordinated expenditures, those “expenditures made . . . in cooperation, consultation or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents,” with contributions; such expenditures also fall under the hard money definition. The amount of coordinated expenditures by a party allowed under the FECA in an election for the office of Senator or Representative is the greater of two cents multiplied by the voting age population of the State or $20,000. Independent and candidate expenditures are still unregulated sources of hard money. In the 2000 federal election cycle, the FEC reported that $741 million in hard money was spent. This includes $275.2 million raised by the Democratic Party and $465.8 million raised by the Republican Party. Under the Bipartisan Campaign Reform Act of 2002, individuals will be allowed to contribute $2000 to a candidate per election cycle.

“Soft money” is money that affects federal elections and, therefore, would be thought to be regulated under the FECA. However, “due to statutory definition, administrative action, or judicial decision, [such soft monies] technically fall outside of the FECA’s scope.” Under the concept of federalism, the FECA only regulates federal elections. It has not always been easy, however, to distinguish between funds being used to influence federal elections and those being used to influence state elections. The problem initially arose when party committees undertook campaign efforts to aid both federal and state candidates at the same time. In the late 1970s, party committees asked the FEC to allow them to use unregulated funds to partially

80. Id.
82. Briffault, supra note 64, at 628.
83. Corrado, supra note 23, at 167.
84. Briffault, supra note 64, at 629.
finance efforts that assisted both federal and state elections. The FEC responded favorably to the party committees’ request and, in two advisory opinions in the late 1970s, created the notion of “soft money.” In 1978, the FEC ruled a state party could use funds normally impermissible under the FECA to fund the non-federal portion of their activities. Included in these permissible activities were voter mobilization and registration activities, which directly benefit both federal and state candidates. Additionally, in 1979, the FEC “decided that national party committees could also set up accounts for deposit and disbursement of funds otherwise barred by the FECA to finance support for the non-federal portion of the combined federal-state ticket.”

Based on the idea that some of their activities influenced state candidates, political parties and committees exploited the notion of soft money to build strong party infrastructures in the 1980s. These groups used soft money to defray the costs of the seemingly federal and state operations of political parties, including the hiring of staff, acquisition of office space, development of direct mail capability, running of polling, issues research operations, and others. More prominently, “soft money” is currently used to fund issue advocacy, grassroots organizations, and “get out the vote” activities. Therefore, the costs for certain political tools such as “pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs” may all be funded through soft money.

Since the 1980s, the use of soft money has exploded and now plays a very substantial role in the overall financing of political campaigns. Together, the two national parties raised $86 million dollars in soft money for the 1992 federal elections, which was double the amount raised in soft money from the 1988 federal elections. In the 2000

85. Id.
86. Id.
88. Briffault, supra note 64, at 629.
89. Id.
90. Id.
91. Id.
94. Id.
96. Briffault, supra note 64, at 630.
federal election cycle, the FEC reported that $495.1 million was spent in soft money,\textsuperscript{97} including $245.2 million spent by the Democratic Party and $249.9 million spent by the Republican Party.\textsuperscript{98} The Bipartisan Campaign Reform Act of 2002 bans all soft money.\textsuperscript{99}

\textbf{E. Party Expenditure Provision}

In the aftermath of the \textit{Buckley} decision, Congress repealed the FECA sections ruled unconstitutional\textsuperscript{100} and enacted a new section titled the Party Expenditure Provision (the Provision).\textsuperscript{101} While political parties may only directly contribute $5000 per election to candidates for federal office, the Provision allows parties to spend additional funds on behalf of candidates for federal office.\textsuperscript{102} The importance of the Provision is clear when one considers the fact that the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{97} \textit{Press Release}, supra note 79.
\item \textsuperscript{98} \textit{Id.}
\item \textsuperscript{99} \textit{Id.}
\item \textsuperscript{101} 2 U.S.C. § 441a(d) (2001).
\item \textsuperscript{102} \textit{Id.}
\end{enumerate}
\end{footnotesize}
FECA allows individuals and PACs to contribute significantly more to political parties than to candidates.\textsuperscript{103} The history of the Provision is a bit of an enigma. The “rapid revision of the FECA in the wake of the [\textit{Buckley}] Court’s far-reaching decision” removed the unconstitutional section on expenditures, “but overlooked that on expenditures by party committees and with it the possibility that expenditure limits on parties were just as unconstitutional as those on non-party political committees.”\textsuperscript{104} The FEC resolved this problem when it published regulations for the amended FECA by interpreting the Provision as creating the unique category of coordinated expenditures.\textsuperscript{105} Freeman finds “the legislative basis for coordinated expenditures is rather sparse, consisting solely of an obscure reference in the Conference Report on the 1976 FECA.”\textsuperscript{106} The Conference Report stated the exception for political parties “allows the political parties to make contributions in kind by spending money for certain functions to aid the individual candidates who represent the party during the election process.”\textsuperscript{107} If not for the exception, independent expenditures would be treated as contributions subject to the FECA limitations.\textsuperscript{108}

\textbf{F. Colorado Republican Federal Campaign Committee v. Federal Election Commission}

The distinction between independent and coordinated expenditures and which may be regulated under the FECA was the subject of litigation in \textit{Colorado Republican Federal Campaign Committee v. Federal Election Commission}.\textsuperscript{109} At issue was a radio advertisement paid for by the Colorado Republican Campaign Committee, challenged as a violation of the FECA.\textsuperscript{110} The District Court of the District of Colorado granted summary judgment for the Colorado Party and the United States Court of Appeals for the Tenth Circuit reversed, finding in favor of the FEC.\textsuperscript{111} The Supreme Court granted certiorari to de-

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\begin{itemize}
  \item 103. See \textit{supra} notes 69-81 and accompanying text. Individuals may only contribute $1,000 to a candidate, but $20,000 to a political party. 2 U.S.C. § 441a(a)(1)(1-b) (2001).
  \item 105. \textit{Id.} at 276.
  \item 106. \textit{Id.}
  \item 107. \textit{H.R. REP.} No. 94-1057, at 59 (1976).
  \item 108. \textit{Id.}
  \item 110. \textit{Id.} at 608.
  \item 111. \textit{Id.} at 613.
\end{itemize}
termine if the expenditure was independent and if so, whether it could be constitutionally regulated.\textsuperscript{112}

1. Background

In 1996, opponents of campaign regulation received a substantial victory from the Supreme Court’s decision in \textit{Colorado Republican Federal Campaign Committee v. Federal Election Commission (Colorado I)}.\textsuperscript{113} The petitioners in the case, the Colorado Republican Federal Campaign Committee (Colorado Party), bought radio advertisements\textsuperscript{114} attacking the Democratic Party’s likely senatorial candidate, Timothy Wirth, before they had selected a senatorial candidate.\textsuperscript{115} After the State Democratic Party complained to the FEC, the FEC brought suit against the petitioners for violations of the FECA, charging that the expenditure exceeded the dollar limits of the FECA’s limitation on campaign expenditures.\textsuperscript{116} The State Democratic Party pointed out that the Colorado Party had already assigned all of its $103,248 general election coordinated expenditure allotment to the National Republican Senatorial Committee.\textsuperscript{117} The FEC brought a complaint against the Colorado Party for a violation of the Party Expenditure Provision.\textsuperscript{118} The Colorado Party filed a counterclaim that the Party Expenditure Provision violated the First Amendment.\textsuperscript{119}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 604.
\item Id. at 608. The text of the advertisements read as follows:
\begin{quote}
Paid for by the Colorado Republican State Central Committee.
Here in Colorado we’re used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he’s for a strong defense and balanced budget. But according to his record, Tim Wirth voted against every new weapon system in the last five years. And he voted against the balanced budget amendment.
Tim Wirth has a right to run for the Senate, but he doesn’t have a right to change the facts.
\end{quote}
\item \textit{Colorado I}, 518 U.S. at 608.
\item \textit{Colorado I}, 518 U.S. at 608.
\item \textit{Colorado I}, 518 U.S. at 608.
\item Id. at 612.
\item Id.
\item Id. The Colorado Party also challenged the statute’s applicability, because the radio advertisements were not made in connection with a specific candidate. See David J. Lekich, \textit{Note, Still Blinking at Political Reality in Federal Elections: Colorado Republican Federal Campaign Committee v. Federal Election Commission, 75 N.C. L. REV. 1848, 1855-56 (1997).}
\end{enumerate}
\end{footnotesize}
a. District Court for the District of Colorado

The District Court for the District of Colorado granted summary judgment for the Colorado Party.\(^{120}\) It dismissed the counterclaims as moot, holding that the Party Expenditure Provision only regulated expenditures made in connection with an election campaign using "express words of advocacy or defeat," a standard which was not implicated in the Colorado Party expenditure.\(^{121}\) Both sides appealed the ruling.\(^{122}\)

b. Court of Appeals for the Tenth Circuit

Before the Court of Appeals for the Tenth Circuit, the FEC argued for a broader interpretation of the provision, which would encompass all "advertisements containing an 'electioneering message' about a ‘clearly identified candidate.'"\(^{123}\) The Colorado Party raised its counterclaim once again.\(^{124}\) The Tenth Circuit agreed with the FEC and held the Party Expenditure Provision to be both applicable and constitutional.\(^{125}\) The Supreme Court granted certiorari to review the decisions and consider both parties' arguments.\(^{126}\)

2. Supreme Court Decision

The Supreme Court, in a 7-2 decision, reaffirmed the Buckley distinction between contributions and expenditures and held that (1) the Colorado Party's expenditure constituted an independent expenditure,\(^{127}\) and (2) the portion of the Party Expenditure Provision regulating such expenditures was unconstitutional.\(^{128}\) The Court dismissed the FEC's argument that all expenditures by a political party should be treated as per se coordinated.\(^{129}\) The Court also dismissed the

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120. 839 F. Supp. 1448, 1457 (D. Colo. 1993), rev'd, 59 F.3d 1015 (10th Cir. 1995).
121. Id.
124. Id. at 1018.
125. Id. at 1023. The Tenth Circuit reasoned that because political party expenditures could have corruptive effects on federal elections, the government's interest in limiting those expenditures was sufficiently compelling to justify some First Amendment infringement. See Lekich, supra note 119, at 1857-58.
127. Colorado I, 518 U.S. at 614. The radio advertisement was characterized as independent, because the advertisements were solely developed and approved by the Party Chairman, read only by the executive and political directors of the Party, and discussed at meetings attended only by party staff. See Lekich, supra note 119, at 1858.
128. Colorado I, 518 U.S. at 618.
129. Id. at 614.
FEC's purported compelling governmental interest in preventing corruption or the appearance of corruption by stating the true purpose of the Party Expenditure Provision was "for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending." Therefore, the Court reversed the ruling of the Tenth Circuit and remanded the case to determine if the expenditure at hand was truly independent or coordinated. In doing so, the Court left the issue open as to whether a coordinated expenditure could be constitutionally regulated by the FECA.

Justice Clarence Thomas dissented from the opinion and advocated the rejection of the Buckley framework for analyzing the constitutionality of campaign finance regulations, stating the Party Expenditure Provision's limitations on coordinated and independent expenditures failed strict scrutiny and therefore, were both an unconstitutional violation of the First Amendment.

III. SUBJECT OPINION: FEDERAL ELECTION COMMISSION v. COLORADO REPUBLICAN CAMPAIGN COMMITTEE

Predictably, the constitutionality of regulations on coordinated expenditures became the issue before the courts in Federal Election Commission v. Colorado Republican Campaign Committee. In a 5-4 decision, the United States Supreme Court ruled the regulation of coordinated expenditures did not violate the First Amendment.

A. United States District Court for the District of Colorado

On remand from the Supreme Court, the District Court for the District of Colorado granted summary judgment for the Colorado Party, ruling that the FEC failed to offer "relevant, admissible evidence, which suggests that coordinated party expenditures must be limited to prevent corruption or the appearance thereof." The FEC made two arguments to support their claim that regulation of coordinated expenditures served a compelling governmental interest in the preven-
tion of corruption. First, the FEC suggested “contributors to party committees—individuals and PACs—are so powerful they could force the party committee to compel a candidate to take a particular position.” While unable to offer specific evidence of any *quid pro quo* corruption where a member of Congress took an official action in exchange for any contribution to a political party, the FEC offered substantial evidence of greater levels of access granted to members of Congress and also of the impact of soft money. The district court ruled, however, that the FEC failed to meet its evidentiary burden and dismissed the FEC’s assertion that the coordinated expenditure provision was necessary to prevent a *quid pro quo* exchange of favors. Second, the FEC asserted that “parties themselves have agendas which they wish to pursue and will support only those candidates who agree to follow that agenda.” The district court stated the nature of the modern political party is to “promote political ideas and policy objectives,” and a party is free to refuse to “fund a candidate who engages in . . . undesirable campaign tactics” as an exercise of its First Amendment rights.

Finally, the FEC asserted that the limits on coordinated expenditures prevented the appearance of corruption. The FEC stated that because the public could not distinguish between “hard” and “soft” money, limiting coordinated expenditures would serve to prevent the “general public dissatisfaction with parties and politicians and the amount of money in the political process.” In response, the district court stated that the proper remedy to this problem was the education of the public, rather than the limitation of coordinated expenditures. Unable to find the Party Expenditure Provision’s regulation of coordinated expenditures served a compelling governmental interest in preventing corruption, the district court granted summary judgment for the Colorado Party and ruled the Party Expenditure Provision unconstitutional.

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139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 1212.
143. *Id.* at 1211.
145. *Id.* at 1212-13.
146. *Id.* at 1213.
147. *Id.*
148. *Id.* at 1214.
B. Court of Appeals for the Tenth Circuit

The FEC appealed the district court’s ruling to the Court of Appeals for the Tenth Circuit. The FEC asserted three arguments in support of its proposition that the coordinated expenditure provision prevents corruption or the appearance of corruption.

1. Corruption Through Influence Over the Party

First, the FEC maintained its previous assertion that contributors to a political party could corrupt the political process through their influence over a party. The FEC offered an affidavit from former Senator Paul Simon, who referenced a meeting of the Democratic Caucus where members discussed a particular amendment. Simon observed that the amendment clearly benefited one particular corporation that had contributed $1.4 million to incumbent members in the last election cycle. In response to Simon’s objection to the amendment, one senior colleague stated: “I’m tired of Paul always talking about special interests; we’ve got to pay attention to who is buttering our bread.” However, the Tenth Circuit stated that corporate influence was already regulated by the FECA and if those limits were inadequate, it was the role of Congress, not the courts, to address the issue.

2. Pursuit of Personal Interests

Second, the FEC asserted that “unscrupulous party officials can utilize the party’s coordinated spending authority to further their personal interests or those of an unrepresentative party faction.” In support, the FEC offered evidence that coordinated expenditures were controlled by a small group of incumbent officeholders who had used the power to support candidates from their home states. The Tenth Circuit disagreed, stating political parties, rather than foster corruption, actually provided a check on corruption through their ability to “generate countervailing collective power on behalf of the

150. Id. at 1228.
151. Id. at 1229.
152. Id.
153. Id.
154. Id.
156. Id. at 1229.
157. Id. at 1230.
158. Id.
many individually powerless against the relatively few who are individually—or organizationally—powerful.”

3. Circumvention of Contribution Limits

Finally, the FEC contended that the Party Expenditure Provision was necessary to prevent the circumvention of contribution limitations. The FEC raised the possibility of an individual circumventing the $1000 direct contribution limitation by “contributing $20,000 to a political party with the expectation that this money would be used to support a particular candidate.” While the Tenth Circuit agreed such an act would constitute corruption, the court stated that Congress had precluded this possibility by designating that any contributions specifically “earmarked” for a particular candidate would be treated as a contribution to that candidate and therefore subject to regulation. Further, the court reasoned that vigilant enforcement of the contribution limitations was the more appropriate response, rather than abridging constitutionally protected speech through the coordinated expenditure limitation. Therefore, finding that the Party Expenditure Provision was not closely tailored to the prevention of corruption or its appearance, the Tenth Circuit ruled that the Party Expenditure Provision constituted a significant interference with First Amendment protected speech and affirmed the district court’s ruling.

C. Supreme Court Decision

The Supreme Court granted certiorari to determine whether the regulation of coordinated expenditures violated the First Amendment. Relying on the history of the FECA, various testimony, and the exploration of the true role of political parties, the Court ruled coordinated expenditures could be regulated. Justice Thomas dissented from the majority, arguing coordinated expenditures could not be regulated under the First Amendment.

159. Id. at 1231 (quoting Walter Dean Burnham, Critical Elections and the Main Springs of American Politics 133 (1970)).
161. Id. at 1232.
162. Id. at 1232-33.
163. Id. at 1232-33.
1. *Majority Opinion*

The Supreme Court granted certiorari to address the remaining issue left unresolved by *Colorado I*. In a 5-4 majority opinion, Justice David H. Souter announced the following issues that needed to be resolved: "[D]oes limiting coordinated spending impose a unique burden on parties, and is there reason to think that coordinated spending by a party would raise the risk of corruption posed when others spend in coordination with a candidate?" The Colorado Party argued that because of the intimate relationship between a party and a candidate, a party "cannot function ... without coordinated spending, the object of which is a candidate's election." According to the Colorado Party, the sole point of organizing a party was to elect a successful candidate who shares the party's goals, thus differentiating a party from individuals, PACs, and corporations, all of which are subject to more stringent regulations. Therefore, the Colorado Party believed the Party Expenditure Provision should be subject to the highest level of scrutiny and declared unconstitutional. The Court rejected this argument through an examination of the history of the FECA, reliance upon statements from political scientists regarding the effect of coordinated expenditure limitations upon parties, and an analysis of the broad role played by political parties in elections.

a. History of the FECA and Political Scientist's Testimony

First, the Court found the Colorado Party's statement to be at odds with the history of the FECA for over nearly thirty years. Pointing out coordinated expenditures by parties had been regulated since the 1974 amendments, the Court relied upon testimony of political scientists who stated, "[T]here is little evidence to suggest that coordinated party spending limits adopted by Congress have frustrated the ability of political parties to exercise their First Amendment rights to support their candidates," and that "[i]n reality, political parties are dominant players, second only to the candidates themselves, in federal elections."
In analyzing the role of political parties, the Court found it insufficient to characterize their chief role as electing particular candidates. The Court suggested that the money parties spend comes from a wide variety of sources, including individuals and PACs, each with its own narrow interests. Because it is common for PACs to contribute to both parties during the same election cycle and even to opposing candidates in the same election, the Court characterized parties as:

instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one, narrow issue, or even to support any candidate who will be obliged to the contributors.

The Court identified this party role, which puts the party in position to be used to circumvent contribution limits, as exactly what the Party Expenditure Provision sought to regulate. Additionally, the Court equated the influential ability of parties with that of individuals by asserting that many individuals can rival the spending of a political party because “[r]ich political activists crop up, and the United States has known its Citizens Kane.” Under this reasoning, individuals are subject to coordinated spending limitations, just as parties should be.

The Court applied heightened scrutiny and found the prevention of circumvention of contribution limits was a sufficiently important governmental interest because circumvention constituted an appearance of corruption or actual corruption. The Court relied upon evidence

174. Id.

175. Id. Additionally, the FEC argued that political parties did not deserve any favored constitutional status that would exempt them from the spending limits that apply to other donors. Brief for Petitioner at 14, Fed. Election Comm’n v. Colo. Republican Fed. Campaign Comm., 121 S. Ct. 2351 (2001) (No. 00-191). The FEC also argued that the Framers of the Constitution did not trust political parties and never intended to create any special privileges or incentives for political parties. Id. at 15.

176. Colorado II, 121 S. Ct. at 2364.

177. Id. at 2365. “A candidate assisted by party-coordinated expenditures may, once elected or re-elected, be induced to take actions favorable to the individuals or [PAC] who have contributed funds to the party, thereby in effect using the party as a conduit to evade the FEC limits on contributions to candidates.” Brief for Petitioner, supra note 175, at 14.

178. Colorado II, 121 S. Ct. at 2364.

179. Id. at 2365.

180. Id.

181. Id. at 2366.
of the Democratic Party’s adoption of a tallying system, which is a “system that helps to connect donors to candidates through the accommodation of a party.” Former Senator Paul Simon was also cited as describing the tallying system as “an informal agreement between the DSCC [Democratic Senatorial Campaign Committee] and the candidates’ campaign that if you help the DSCC raise contributions, we will turn around and help your campaign.” Therefore, the tallying system would allow donors to more or less contribute to a specific senatorial campaign by donating money to a party, which would later be contributed to a candidate’s campaign through coordinated expenditures. The Court further evinced the threat of circumvention through the consideration of a fundraising letter offered from Congressman Wayne Allard, “explaining to the contributor that ‘you are at the limit of what you can directly contribute to my campaign,’ but ‘you can further help my campaign by assisting the Colorado Republican Party.’

Finding a clear threat, if not practice, of circumvention, the Court rejected the Colorado Party’s claim that the Party Expenditure Provision was not closely tailored to preventing circumvention. The Colorado Party first argued that better enforcement of the earmarking rule, rather than limitations on coordinated expenditures, consti-

182. Kathleen Dolegowski, Restrictions on Campaign Expenditures Do Not Violate First Amendment Rights, 16 Law. J. 3 (August 10, 2001). Dolegowski’s description of the tallying system is helpful:

This device appears to work in two related ways. Donors contribute to a political party with the understanding, tacit or otherwise, that their contributions, while not direct, are fairly close. The political party then assures the donors that their contributions will be credited to the candidates of their choice. An informal relationship also exists between the individual candidates’ campaign committees and political party campaign committees such that contributions by the individual candidates’ campaign committees to a political party campaign committee will result in increased spending by the latter on behalf of the former in proportion to the amount contributed to the latter by the former.

Id. at 17.

183. Colorado II, 121 S. Ct. at 2368.

184. Id.

185. Id. But see Brief for Respondent, supra note 168, at 39–43. The FEC approved of the tallying system on the condition that earmarking could be disclaimed. Id. at 39. “Senator Simon explained that the tally system ‘made clear that this is not just automatic, so that no one could say if Tom Smith contributed $5,000 to the DSCC, that was a way of laundering it coming to Paul Simon.’” Id. at 40 (internal citations omitted). “Similarly, an aide to Senator Fowler explained that ‘we were not able to tell these contributors that the money could come back directly to help us,’ but rather that it may indirectly help the Senator. Id.

186. Colorado II, 121 S. Ct. at 2368.

187. Id.

188. Id. at 2369.
tuted a more appropriate means of addressing corruption. The Court rejected this argument, however, stating the earmarking rule failed to expose such informal agreements made between parties and candidates. Reliance upon the earmarking rule alone would fail to address these so called “understandings” regarding which donors give what amounts to the party, which candidates are to receive what funds from the party, and what interests particular donors are seeking to promote.” The Court additionally rejected the Colorado Party’s argument that replacing limits on coordinated expenditures by parties with limits on contributions to parties would resolve the problem of corruption. Because the Court found the Party Expenditure Provision to be closely drawn to serve a sufficiently important governmental interest, the judgment of the Court of Appeals for the Tenth Circuit was reversed.

2. Justice Thomas’s Dissent

Justice Thomas issued a dissent with Justice Antonin Scalia and Justice Anthony M. Kennedy joining in full and Chief Justice William H. Rehnquist joining in part. Justice Thomas stated that the Court erred in determining coordinated expenditures were the same as contributions and political parties were the same as individuals and political committees.

a. Coordinated Expenditures

Justice Thomas conceded that coordinated expenditures may sometimes resemble a contribution, offering for example an instance of “a donation of money with direct payment of a candidate’s media bills.” However, he also offered an instance where a coordinated expenditure would be closer to an independent contribution, as in the case where a party developed a television advertisement and merely consulted with a certain candidate on which time slot should be used to maximize exposure.

189. Id.
190. Id. at 2370.
191. Id.
192. Colorado II, 121 S. Ct. at 2370.
193. Id. at 2371.
194. Id. at 2371 (Thomas, J., dissenting).
195. Id. Justice Thomas would have overturned Buckley, as he believed that the FECA regulates political speech, and that no governmental regulation on political contributions or expenditures could satisfy strict scrutiny. Id.
196. Id. at 2372.
197. Colorado II, 121 S. Ct. at 2372 (Thomas, J., dissenting).
198. Id. at 2373.
b. Role of Political Parties

Second, Justice Thomas distinguished the role of the political party from that of an individual or a PAC. Justice Thomas argued, while contribution restrictions on individuals or PACs constitute only a marginal restriction on their First Amendment rights, coordinated expenditure limits on a party have precluded them "from effectively amplifying the voice of their adherents," and has had a "stifling effect on the ability of the party to do what it exists to do." Because "[a] party nominates its candidate; a candidate often is identified by party affiliation throughout the election and on the ballot; and a party's public image is largely defined by what its candidates say and do," the two are inseparable. Justice Thomas stated that a party and candidate have a unity of interest in getting the candidate elected and found it impractical, imprudent, and inefficient "for a party to support its own candidates without some form of 'cooperation' or 'consultation.'" In essence, Justice Thomas argued it was natural for a party and candidate to work together, and "breaking the connection between parties and candidates inhibits the promotion of the party's message."

Justice Thomas also relied on a statement by the FEC that party organizations "had to establish legally separate entities, which in turn had to 'rent and furnish an office, hire a staff, and pay other administrative costs,' as well as 'engage in additional consulting services' and 'duplicate many of the functions already being undertaken by other party offices,'" in order to ensure expenditures were independent. Further, Justice Thomas criticized the majority's reliance on amicus curiae briefs by political scientists rather than the factual and evidentiary record established in the district court.

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199. Id.
200. Id. at 2374.
201. Id. at 2373.
202. Id.
203. Colorado II, 121 S. Ct. at 2376 (Thomas, J., dissenting). See also Brief for Respondent, supra note 168, at 25–31. "[P]arty candidates exist because parties nominate them, and from the moment a party makes a nomination a natural, strong, and unique tie is established." Id. at 26. The candidate relationship is of vital importance to the historical purpose of parties; parties exist to elect candidates that share their views. Id.
204. Colorado II, 121 S. Ct. at 2374 (Thomas, J., dissenting).
205. Id.
c. The Party Expenditure Provision Is Not Closely Drawn to Prevent Corruption

While Justice Thomas found that preventing corruption or the appearance of corruption was a constitutionally sufficient justification, he argued the FEC had failed to meet its evidentiary burden of proving that the Party Expenditure Provision was closely drawn to meet the justification. In Justice Thomas’s view, the FEC failed to provide any congressional findings suggesting the Party Expenditure Provision was necessary or even helpful in reducing or preventing corruption.

Justice Thomas criticized the Court’s suggestion that the Party Expenditure Provision prevented circumvention of contribution limits. He rejected the Court’s characterization of the tallying system as evidence of circumvention of contribution limits. Justice Thomas described the tallying system as legal and stated the DSCC “has allocated money based on a number of factors, including ‘the financial strength of the campaign,’ ‘what [the candidate’s] poll numbers looked like,’ and ‘who had the best chance of winning or who needed the money most.’” Further, relying on the district court’s findings, he maintained “the primary consideration in allocating funds is which races are marginal” because “maintaining party control over seats is paramount to the parties’ pursuits.”

Finally, Justice Thomas found the Party Expenditure Provision not closely drawn to the prevention or appearance of corruption. He adopted the Colorado Party’s argument that stronger enforcement of the earmarking rule served as the precise answer to prevent corruption. Justice Thomas criticized the Court for not putting forth any evidence of why enforcing the earmarking rule would be an improper response to preventing corruption. Second, Justice Thomas suggested lowering the individual contribution cap of twenty thousand dollars as a means of preventing corruption. Through this method, the speech...
restriction would be "directed at the source of the alleged corruption—the individual donor—and not the party."\textsuperscript{215} Explaining that the normal method of deterring unlawful conduct was to punish the wrongdoer, he stated "[i]t would be quite remarkable to hold that speech by a law-abiding [entity] can be suppressed in order to deter conduct by a non-law-abiding third party."\textsuperscript{216}

**IV. Analysis**

A sigh of collective relief from campaign finance reformers was most certainly heard across Capitol Hill after the United States Supreme Court's decision in *Colorado II* upheld the twenty-five year old FECA "hard money" limitations on political parties. As one commentator stated shortly after the Court's ruling, "[t]his comes at a critical time, as some lower courts have been striking down federal and state campaign finance laws, believing such laws cannot withstand constitutional attack."\textsuperscript{217} The Court correctly recognized that political parties can act to circumvent contribution levels through the use of coordinated expenditures.\textsuperscript{218} The Court also realized political parties are not so closely tied to candidates.\textsuperscript{219} In equating the role played by political parties with that of other self-interested actors, the Court properly understood the inherent vulnerability of political parties.\textsuperscript{220} Most importantly, by giving voice to the realities of our political system, the Court took a small, initial step toward understanding the fundamental problem with First Amendment campaign finance regulation jurisprudence. What the Court and previous Courts have failed to recognize is the faulty assumption that underlies not only *Colorado I* but also *Buckley*, which is the assertion that the contribution and expenditure of money is speech, rather than conduct.\textsuperscript{221} Finally, because of *Buckley's* faulty assumption, many have called for its

\textsuperscript{215} Id.

The FEC's theories of actual, potential, and perceived corruption overwhelmingly start with a concern over large contributions to a political party. If such concerns are substantial, a closely drawn response would be to reduce the allowable size of contributions . . . . To address supposed corruption concerns by restricting a political party's use of hard money to fund coordinated speech is fairly described as irrational and perverse. 


\textsuperscript{216} *Colorado II*, 121 S. Ct. at 2380 (Thomas, J., dissenting).

\textsuperscript{217} Edward Zuckerman, *Colorado II: Did the High Court Create Political Equality Trap for McCain-Feingold?*, POL. FIN. & LOBBY REP. 1 (June 27, 2001). Lawrence Noble, who pursued the case throughout his tenure as the Federal Election Commission's general counsel, issued the statement. Id.

\textsuperscript{218} See *supra* notes 166-173 and accompanying text.

\textsuperscript{219} *Colorado II*, 121 S. Ct. at 2380 (Thomas, J., dissenting).

\textsuperscript{220} Id.

\textsuperscript{221} *Supra* note 43.
reversal through the identification of new compelling interests other than corruption, which would withstand strict scrutiny.

A. Political Parties Act to Circumvent Contribution Limits Through Coordinated Spending

While unable to tie such an assertion to actual instances of corruption, the Court properly relied on various testimonies from political actors to infer the practice of circumvention is not the exception, but rather dominates the political arena. In addition to Former Senator Paul Simon's affidavit regarding the practice of tallying and a fundraising letter from Congressman Wayne Allard, a plethora of evidence established the reality of this point. While Justice Thomas was correct when he described the tallying system as a legal practice, he failed to realize the implications of such a practice. The fundamental problem is that the tallying process creates a public perception of corruption and further disenchants the public with the political process. Current statistics show the lack of public confidence in our federal government has reached an all time high.

A public opinion poll taken in 1964 found that 76% of the American people trusted their government to do what is right most or all of the time. Thirty years later, in 1994, the same poll reported only 21% of the public having the same level of faith in Washington’s decisions.

Additionally, a poll taken in 1995 revealed nearly half of those questioned believed special interest groups controlled the federal government. Such glaring statistics expose the political reality that Colorado II recognized.

B. Individuals Use Political Parties to Circumvent Individual Contribution Limits

The tallying system is not the only practice that creates the appearance and actuality of corruption. Private donors often use political

222. See supra notes 172-193 and accompanying text.
223. Colorado II, 121 S. Ct. at 2368.
224. Id.
225. LINDBERG, supra note 95, at 16 (stating that “[o]ne guest at the Democratic Convention was told not to worry about the Federal limit, instead, he should just decide what he wanted to give and someone would tell him how to make out the check.”).
226. Colorado II, 121 S. Ct. at 2378.
228. Id.
229. Id.
parties to evade the individual limits on donors established by the FECA. While small donors may have little influence over how the parties use their donations, "a substantial portion of hard money donations to the parties consists of very large gifts,"230 which increases their individual access to elected officials.231 "In 1996, 86% of the hard money in excess of $200 given by individuals to the national Democratic Party consisted of gifts of $1000 or more; 46% came in donations of $10,000 or more."232 Additionally, in the national Republican Party, 52% of the hard money in excess of $200 consisted of gifts of $1000 or more, and 15% of the hard money consisted of $10,000 or more.233 These types of large donations to political parties establish close links between officeholders and potential donors to the parties, often resulting in greater access to officeholders.234 With clear evidence that donors use political parties to circumvent individual contribution limitations, the Court properly realized that a prohibition on coordinated expenditure limits would only increase such activity and further undermine the public's confidence in the government.

C. Political Parties Play the Same Role as Other Self-Interested Actors

The Colorado II majority rejected the Colorado Party's and Justice Thomas's assertion that political parties and candidates are joined by a "unity of interest."235 In doing so, the Court properly declared that political parties should be treated similar to PACs and other self-interested actors for the purpose of the FECA.236 There is strong evidence that political parties do not share a complete unity of interest with candidates, and this can be found in the common practice of PACs

230. Briffault, supra note 64, at 649.
231. Colorado II, 121 S. Ct. at 2368.
232. Briffault, supra note 64, at 649.
233. Id.
234. Id. at 650. In connection with the 1996 elections, "[d]emocrats offered their $50,000+ donors intimate dinners with the President, small-group coffees in the White House Map Room, and overnight stays in the Lincoln Bedroom. Republicans provided members of their Team 100 -- those who gave $100,000 or more -- with a three-day opportunity to golf with Senate Majority Leader Lott, Speaker Gingrich, and then-House Appropriations Committee Chair (and briefly Speaker-designate) Livingston at The Breakers at Palm Beach." Id. Additionally, in 1995-96, "[d]inners, weekend outings, and other events were regularly used by both major parties to give major donors a sense that they are close to power." Id.
235. Colorado II, 121 S. Ct. at 2368.
236. See supra notes 174-180 and accompanying text. For an argument that a unity of interest exists between parties and candidates, see Stephen Ansolabehere & James M. Snyder, Jr. Symposium: Law and Political Parties: Soft Money, Hard Money, Strong Parties, 100 COLUM. L. REV. 598, 603 (2000) (arguing that party committees are primarily established to win a majority of seats in the legislature or control of the executive office).
contributing to both of the major parties. While ideologically driven, PACs are likely to pursue the election of “like-minded candidates and are therefore more likely to support candidates of a single party and even candidates challenging incumbents,” pragmatic PACs do the opposite. Pragmatic PACs:

have a diverse set of interests . . . [t]heir contributors come from various locales and occupations, united only by the PAC’s issue or cause and the art of direct mail solicitation. They are the PAC analogue to communities of single-issue voters in the electorate. They are free to be ideologically pure, and (because they do not often lobby) to take the political risks of ignoring party lines, of spurning incumbents and supporting challengers.

D. A Faulty Assumption: Money = Speech

The major criticism of the Supreme Court’s campaign finance reform jurisprudence is that Buckley and subsequent decisions have treated political money as speech, rather than conduct. The characterization of money as speech allows the Court to subject any governmental regulation of political expenditures to strict scrutiny, thus requiring such a regulation to serve a compelling governmental interest and be narrowly tailored to serve that end. However, critics of this distinction argue money is not speech, but conduct, therefore requiring only that the regulation serve an important governmental interest and be sufficiently drawn to serve that end.

Indeed, in reviewing Buckley, the Court of Appeals for the District of Columbia analogized the FECA limitations on contributions and expenditures to the symbolic conduct exhibited in the burning of a draft card in United States v. O’Brien. In doing so, the D.C. Circuit used intermediate scrutiny and upheld the expenditure and contribution limitations as serving a “sufficiently important governmental interest in regulating the nonspeech element” that was “unrelated to the suppression of free expression” and that had an “incidental restriction

237. See supra notes 174-180 and accompanying text.
238. Corrado, supra note 23, at 125.
239. Id.
240. Id. at 126.
242. Id. at 32.
on alleged First Amendment freedoms... no greater than [was] essential to the furtherance of that interest. The Supreme Court, however, rejected the D.C. Circuit's O'Brien analysis and ruled that money was speech rather than conduct.

Shortly after the Buckley decision, Judge Skelly Wright defended the D.C. Circuit's treatment of the FECA as regulating conduct rather than speech. Judge Wright stated:

O'Brien used the burning of this draft card as a vehicle for expressing his political convictions. So too the use of money in political campaigns serves nothing more than a vehicle for political expression. It may not have the same overt physical quality that burning a draft card or picketing at the statehouse has, but it remains a mere vehicle. Restrictions on the use of money should be judged by the tests employed for vehicles-for speech-related conduct and not by the tests developed for pure speech.

Under the O'Brien test, the FECA limitations would likely pass constitutional muster. The O'Brien Court ruled when speech and non-speech elements are combined in the same course of conduct, a regulation of that conduct only has to satisfy intermediate scrutiny. The test set forth in O'Brien established:

a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest.

First, the Constitution establishes that Congress has the power to regulate elections of members of the Senate and the House of Representatives. Second, the Buckley Court and subsequent Court decisions have held that Congress could legitimately conclude that the avoidance of corruption or the appearance of corruption "is also

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244. O'Brien, 391 U.S. at 367-77.
245. Supra note 43. The Court stated that the expenditure of money could not be equated with the destruction of a draft card. Id.
247. Id.
248. Id. at 59.
249. O'Brien, 391 U.S. at 376. Intermediate scrutiny only requires that the regulation be closely related to an important governmental interest. Id.
250. Id.
252. See supra notes 32, 128 and accompanying text.
critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent." Therefore, preventing corruption or the appearance of corruption clearly furthers a compelling governmental interest. Third, the FECA limitations are content-neutral regulations because they do not discriminate against any certain viewpoint. The limitations apply to all entities, regardless of which viewpoint the money is directed toward. Because the limitations are content-neutral, they must be closely drawn to the interest in preventing corruption. The Colorado II Court rejected the Colorado Party’s argument that the FECA limitations on coordinated spending were not closely tailored to the government’s interest in preventing corruption or the appearance of corruption.

However, the application of the O’Brien line of jurisprudence to campaign finance regulation has not gone unchallenged. Several arguments have been developed to dispute the applicability of O’Brien to campaign finance regulation. First, one commentator has interpreted the third condition of the O’Brien test which requires the governmental interest be unrelated to the suppression of free speech as warranting judicial deference “only if ‘the harm that the state is seeking to avert is one that . . . would arise even if the defendant’s conduct had no communicative significance whatsoever.’” According to this argument, the anti-corruption purpose advanced by Congress depends on the perceived communicative significance of campaign giving. Plainly stated, if no perceived communicative impact resulted from campaign giving, the anti-corruption argument would fail. While this argument is credible when applied to the action of corruption, it fails to satisfy the Buckley Court’s adoption of the appearance of corruption as a compelling governmental interest.

254. Id.
255. The Buckley Court rejected this assertion and stated that the FECA limitations, while not aimed at specific ideas expressed by certain groups, were related to the suppression of communication. Id. at 17.
257. Colorado II, 121 S. Ct. at 2368.
259. Smith, supra note 258.
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Theor's view, the appearance of corruption always constitutes a harm, regardless of whether the money given to an official actually results in increased favor. As the Buckley Court alluded, where there is an appearance of corruption, public confidence in the government is eroded.262

A second line of arguments against the O'Brien application to campaign regulations purports that campaign regulations can never be content-neutral and are always content-based. This line of argument states that campaign regulations are not content-neutral because those who favor campaign finance reform "do so because they believe the present system of finance gives some individuals too much influence, thus leading to disfavored electoral and legislative results."263 It is further argued that those who seek to reform campaign finance do so because the activities that are a target of the regulation are closely tied to political agendas that reformers oppose.264 Finally, opponents of the O'Brien application argue laws regulating political behavior can never have a neutral impact.265 While campaign finance regulations may ultimately not be wholly content-neutral, they are certainly not content-based. They do not explicitly restrict contributions and expenditures because of their viewpoints. Instead campaign finance regulations restrict all contributions and coordinated expenditures regardless of the issue they support.

E. A Redefined Compelling Governmental Interest to Challenge Buckley

The Buckley holding brought with it many negative societal ramifications. Treating the acts of contributing and spending money to and for a political campaign as pure speech, whose effectiveness increases with the dollar amount, only further marginalizes the average citizen. The Buckley decision tells the average voter, who does not participate in the monetary aspects of a campaign, that by only voting, they are not exercising the maximum level of speech possible. The major flaw is that the Court is reinforcing the idea that those with money are more important than those who "merely" vote or volunteer their time on a campaign. In essence, one need look no further than the Buckley line of jurisprudence as a major reason for the political apathy and distrust266 in the country.

262. Id at 27.
263. Id. at 54.
264. BeVier, supra note 258, at 1061.
265. Id. at 1061-62.
266. See supra notes 226-228 and accompanying text.
The appellees in *Buckley* asserted that the government had a compelling governmental interest in equalizing the ability of all persons to influence elections. Critics of *Buckley* have rephrased the equalization interest and have argued that the government has a compelling interest in equalizing the ability of all persons to participate, rather than influence an election. Therefore, a more accurate description of this interest would be that it seeks to "narrow the gap" between the levels of participation. How the Supreme Court would interpret this redefined interest is difficult to predict; however, two justices have already tipped their hands to reveal their favor of such an interest. It remains to be seen if they can convince another three. While there are sound policy arguments for a greater equalization of the political arena,

268. Id.
270. Id.
271. Id. Justice Stevens and Ginsburg stated that they believe "the Government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns." Id. (Stevens, J., dissenting) (quoting Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 649-50 (1996)). The dissenters went on to argue: "It is quite wrong to assume the net effect of limits on contributions and expenditures - which tend to protect equal access to the political arena . . . will be adverse to the interest in informed debate protected by the First Amendment." Id. Additionally, in *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), the Court "upheld restrictions on campaign spending by corporations in order to shield the election campaign from distortions caused by disproportionate exercises of wealth." Burt Neuborne, *Soft Landings, in If Buckley Fell: A First Amendment Blueprint For Regulating Money In Politics* (E. Joshua Rosenkranz ed., 1999). Neuborne also states:

\[\text{[The Court's willingness to ban big money was justified by a desire to protect the election campaign . . . from the distorting effects of great wealth, even though the speech was otherwise clearly protected. If we already regulate institutionally bounded speech in aid of the proper functioning of the institution, and if we already recognize elections as bounded institutions, and if we have already upheld significant regulation of campaign speech to prevent powerful speakers from distorting the campaign process, why can’t we make the narrow jump remaining? Why can’t we acknowledge that Buckley was wrong, and that generous content-neutral limits on campaign spending designed to level the electoral playing field between the extremely rich and everyone else do not violate the First Amendment?} \]

Id. at 181–82.

272. Neuborne has even gone as far as analogizing this problem to the days when only white men with property were allowed the franchise:

The history of American democracy is a halting journey toward political equality. When Thomas Jefferson became the first presidential candidate to oust an incumbent, only white men of property were deemed worthy of participation in the democratic process. Impediments to political equality have been removed one by one until, as a formal matter, all voters now wield equal political power. In reality, though, uncontrolled campaign spending reintroduces the massive inequality of the early nineteenth century. Under a regime of uncontrolled campaign spending, the richest 2 percent of the population exercises massively disproportionate political power. They decide which
the legal ones are greatly constrained by the Court’s current jurisprudence.

V. IMPACT

Campaign finance reform remains a hotbed of controversy. The recent legislation passed by the Congress challenges several areas of the Supreme Court’s jurisprudence in this field. Additionally, the continued viability of the Buckley decision is also likely to be challenged by the recent reforms. Commentators have vigorously analyzed recent Supreme Court decisions, searching for chinks in the armor of Buckley and they have not been dissatisfied with what they are finding. Several justices have alluded to the numerous problems with Buckley.

A. The Continued Viability of Buckley

Given the current composition of the Court, there is a possibility Buckley may be overturned when the Court reviews the constitutionality of the Bipartisan Campaign Reform Act of 2002. “Only Chief Justice Rehnquist, who voted to uphold contribution caps but strike spending caps, remains, along with Justice John Paul Stevens, who was sitting on the Court but did not participate in the” Buckley decision. Additionally, in Colorado I, three justices, without invitation from the parties, rejected Buckley’s distinction between contributions and expenditures. Justice Stevens, joined by Justice Ruth Bader Ginsburg declared their belief that contributions and expenditures could be regulated. On the other side of the issue was Justice Thomas, who believed contributions and expenditures could not be regulated. Moreover, Justice Thomas’s dissent in Colorado II stated, “I continue to believe that Buckley should be overruled.” Justice Thomas was careful to state this was only his opinion; in making the argument however, he did cite Justice Kennedy’s recent critical review of Buckley. Therefore, regardless of the reason for their disenchanted-

candidates run for office. They decide which issues make their way onto the national agenda. They decide who wins closely contested elections.

Neuborne, supra note 271, at 179.


274. Id.

275. Id.

276. Id.

277. Colorado II, 121 S. Ct. at 2371 (emphasis added).

278. Nixon v. Shrink Mo. Gov’t Pac., 528 U.S. 377, 407-08 (2000) (Kennedy, J., dissenting) (stating that “the melancholy history of campaign finance in Buckley’s wake shows what can happen when we intervene in the dynamics of speech and expression by inventing an artificial scheme of our own” and “Buckley has not worked.”).
ment, it is clear there are at least four Justices who are clearly dissatisfied by *Buckley*. E. Joshua Rosenkranz,279 advocating the reversal of *Buckley* in favor of the Justice Stevens and Ginsburg camp, stated Justices Stephen Breyer, Souter, and Sandra Day O'Connor were the critical three votes in determining the continuing viability of *Buckley*.280 Rosenkranz further stated:

If they vote as a block, they could provide the Stevens/Ginsburg camp with their five votes. The first two are cautious, but not at all doctrinaire. They might just do it in the right case. Justice O'Connor would likely be a wild card, a role she plays in many democracy-related cases.281

B. **McCain – Feingold Bipartisan Campaign Reform Act of 2001**282

On April 2, 2001, the United States Senate passed the McCain-Feingold283 Bipartisan Campaign Reform Act (McCain-Feingold) by a vote of 59 – 41.284 The quality of the two-week long debate in the Senate over campaign finance reform was highly praised, and resulted in a victory for the two Senators who had fought for reform for nearly six years.285

McCain-Feingold courageously places restrictions on issue advocacy advertisements for the first time.286 The legislation broadens the former “express advocacy of a clearly identified candidate definition,” with a new broader electioneering communication definition. The new definition regulates a broadcast, cable, or satellite advertisement that *refers* to a clearly identified federal candidate within sixty days of a general election or thirty days of a primary to an audience that in-

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279. E. Joshua Rosenkranz is a member of the Brennan Center for Justice at New York University School of Law.


281. *Id.*


283. Senator Russell Feingold is a Democrat representing the State of Wisconsin.


The two weeks of debate that ended Friday surprised many veterans of the Senate’s joyless forced marches. The debate was both civil and principled; people listened, and some even changed their mind, persuaded by new arguments and old loyalties to make a leap of faith. No one knew as the week went on how it would turn out; every day brought another threat to the bill’s survival, and the best head counters in the chamber were stumped about who would act as saboteur, who would turn out to be a savior.

*Id.* at 42.

cludes voters in that election. Additionally, the legislation prohibits unions, corporations, and non-profits from funding electioneering communications within the previously mentioned time frame, requiring those types of communications to be funded with hard money from political parties. Finally, the legislation requires strict disclosure and reporting requirements for issue advocacy advertisements.

Another provision of McCain-Feingold affects soft money and hard money. The legislation puts a ban on unrestricted, soft money contributions to political parties and committees by wealthy individuals, corporations, and labor unions. Additionally, "to offset the loss of funding from a soft money ban, McCain-Feingold was amended to increase limits on 'hard money' donations to candidates and party committees."

Finally, another major provision of McCain-Feingold is the amending of the Party Expenditure Provision. The legislation broadens

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287. Id. The Act exempts communications found in new stories, commentaries, or editorials, as well as communications that constitute an expenditure or independent expenditure. Id. at § 201(f)(3)(B).

288. Id. at § 203. The legislation requires the disclosure of issue advocacy advertisements by any spender exceeding ten thousand dollars per year, within twenty-four hours of the each ten thousand dollar disbursement. Id. Such disclosure must include, "the identification of the spender, custodian of the books, and any entity exercising control over activity; principal place of business; identification of disbursements of over $200; identification of donors of $1000 or more; and notation as to election and candidates to which communications pertain." S. 27, 107th Cong. § 201(f)(3) (2001).

289. Title I

SEC. 101. SOFT MONEY OF POLITICAL PARTIES
(a) In General. Title III of the Federal Election Campaign Act of 1971 (2 U.S.C. 431 et seq.) is amended by adding at the end the following:

SEC. 323. SOFT MONEY OF POLITICAL PARTIES

(a) National Committees
(1) In general. A national committee of apolitical party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) Applicability. The prohibition established by paragraph (1) applies to any such national committee, any officer or agent of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee.


291. Id. "Individuals would be allowed to contribute $2,000 per election cycle to candidates, rather than the $1,000 that have been the limit since 1974, and that amount would be indexed to increase in future years at the rate of inflation." Id. Additionally, state and local party committees contributions would increase from $10,000 to $20,000, national party committee contributions would increase from $40,000 to $50,000, and total individual contributions to all candidates and political committees would increase from $50,000 to $75,000. Id.

292. Id. at § 214(b)(c).
the definition of coordinated expenditures, which can be regulated under FECA, thereby narrowing the definition of independent expenditures, which cannot be regulated under FECA.\textsuperscript{293} Under McCain-Feingold, a coordinated expenditure “means a payment in concert or cooperation with, at the request or suggestion of, or pursuant to any general or particular understanding with, such candidate, the candidate’s authorized political committee, or their agents, or a political committee, or their agents, or a political party committee or its agents.”\textsuperscript{294} The legislation directs the FEC to interpret the term “coordinated,” by not specifically requiring collaboration or an overt agreement to establish coordination.\textsuperscript{295} Therefore, “in considering whether ‘coordination’ has in fact occurred, the FEC would be allowed to consider such supposedly suggestive criteria as whether the parties share the same vendor or whether payments for the communications are being directed by a former employee of the candidate.”\textsuperscript{296}

C. Shays-Meehan Bipartisan Campaign Reform Act of 2001\textsuperscript{297}

After McCain-Feingold passed the Senate, the House of Representatives took up its companion bill in the House, the Shays-Meehan Bipartisan Campaign Reform Act of 2001 (Shays-Meehan).\textsuperscript{298} Unfortunately for campaign finance reformers, Shays-Meehan initially did not receive a fair vote because Speaker of the House Dennis Hastert proposed rules for the floor debate that the bill’s supporters thought were unfair and designed to shatter the fragile coalition supporting the legislation.\textsuperscript{299} When the House rejected his rule, Speaker Hastert withdrew the bill from consideration.\textsuperscript{300} Reformers in the House then sought a discharge petition,\textsuperscript{301} seeking to force the leader-

\begin{itemize}
\item \textsuperscript{293} Id.
\item \textsuperscript{294} S. 27, 107th Cong. § 214(b)(c) (2001). \textit{See supra} note 76 and accompanying text (giving a current definition of coordinated expenditures).
\item \textsuperscript{295} S. 27, 107th Cong. § 214 (2001).
\item \textsuperscript{297} H.R. 2356, 107th Cong. (2001).
\item \textsuperscript{298} Amy Keller, \textit{Reform Hinges On Newcomers}, \textit{Roll Call}, Apr. 16, 2001, at 1. In the 106th Congress, the Shays-Meehan bill was passed by the House and received 252 votes. \textit{Id.}
\item \textsuperscript{299} Editorial Desk, \textit{The Battle to Save Shays-Meehan}, N.Y. Times, July 30, 2001, at A16.
\item \textsuperscript{300} Id.
\item \textsuperscript{301} Alison Mitchell, \textit{House Vote is Set on Campaign Bill}, N.Y. Times, Jan. 25, 2002, at A1. A discharge petition requires a majority of House members or 218 signatures to bring the bill out of committee for a vote. \textit{Id.} A discharge petition—officially a motion to discharge a committee of its responsibilities over a given piece of legislation—is a rare parliamentary maneuver that forces a bill out of committee and forces a bill to the floor of the full House. \textit{Id.} A discharge
ship to schedule an unobstructed, up or down floor vote on Shays-Meehan. Reformers succeeded in the discharge petition and Shays-Meehan was brought to floor of the House for consideration on February 14, 2002. After a courageous seventeen-hour marathon debate, Shays-Meehan passed the House by a vote of 240-189 at 2:43 a.m. on February 15, 2002. Reformers fought back a pair of alternate “reform” bills and ten amendments by the Republican leadership that would have changed the bill enough to force it into a House-Senate Conference Committee. The only significant amendment to pass was an increase in the amount individuals could contribute directly to a candidate for federal office to $2000. Shays-Meehan contains identical language to McCain-Feingold in regulation of issue advocacy advertisements. Supporters of reform attributed their success to Senator McCain’s presidential run and to the collapse of Enron as revitalizing the need for reform.

petition is placed in the well of the House and requires the signatures of a majority of members of the House - 218 out of 435. It is considered to be one of the boldest challenges a member of the party in power can make to that party's leadership. Discharge petitions are very rarely used in the House.

Indeed since 1910, when the rule allowing discharge petitions was adopted, only two discharge bills have become law. Yet, in recent years, discharge petitions have been used more frequently, not so much actually to dislodge a bill from committee, but as a threat or for leverage to get a committee or the majority party leadership to move on a bill.

Dwyre, supra note 6, at 67.

302. See Mitchell, supra note 301.


304. Id.

305. Representative Dick Armey (Republican, Texas) offered a substitute to “Shays-Meehan,” that would have banned all soft money activities of parties and candidates, including those used for registration and “get-out-the-vote efforts.” Juliet Eilperin & Helen Dewar, House Defeats Finance Reform Challenges: Foes Almost out of Amendments; Shays-Meehan Backers Near Win, Wash. Post, Feb. 14, 2002, at A1. This substitute bill failed by a vote of 249-179. Representative Bob Ney (Republican, Connecticut) also offered a substitute that would have banned all soft money by political parties for federal election activity, increased contribution limits for political parties and individuals, and defined and regulated express advocacy communications. This substitute failed by a vote of 377-57.

306. Id.

307. Mitchell, supra note 303. The Republican Amendments were described by proponents of reform as “poison pills,” which would result in a House-Senate Conference Committee that would mean the end of any chance for meaningful reform. In 1989-90 and 1993-94, both the House and Senate passed different bills that “died” in Committee.

308. Id.


On March 20, 2002, the United States Senate gave final approval to the Shays-Meehan bill by a vote of 60-40. Senate opponents had already conceded defeat, stating the legislation would be passed and they were not looking for a confrontation on the issue. Finally, on March 27, 2002, President Bush signed the Bipartisan Campaign Reform Act of 2002 into law without ceremony. The major provisions of the Bipartisan Campaign Reform Act of 2002 include the narrowed definition of issue advocacy, the soft money ban, the narrowed definition of independent expenditures, and the increased hard money limit.

D. Colorado II and the Bipartisan Campaign Reform Act of 2002

The legislation will greatly curb contributions and expenditures to political parties as well as issue advocacy advertisements. As previously stated, the legislation’s broad definition of coordinated expenditures and narrow definition of independent expenditures, along with the ban on soft money, would limit the overall amount of money in elections. Taken together with the Supreme Court’s ruling in Colorado II, the new legislation would either eliminate the excess currently in campaigns, or force candidates to devise new ways of funding their candidacy. Both sides have responded differently to the Court’s decision in Colorado II. Senator McCain indicated the ruling clearly demonstrated the constitutionality of McCain-Feingold. Opponents of campaign reform pointed out the obvious that the Court’s government action with regard to Enron — is tainted, and that government actions have less credibility because of that money.”

311. Id.
312. Allison Mitchell, Campaign Finance Bill Wins Final Approval in Congress and Bush Says He’ll Sign It: Vote is 60 to 40: Opponents of Measure say they will push Battle into Courts, TIMES, Mar. 21, 2002, at A1.
313. Helen Dewar, Senate Foess Acknowledge Campaign Finance Bill Will Pass This Year, WASH. POST, Feb. 27, 2002, at A7.
315. Elisabeth Bumiller & Philip Shenon, President Signs Bill on Campaign Gifts; Begins Money Tour, TIMES, Mar. 28, 2002, at A1. Bush was less than enthusiastic about the bill, which was underscored by the quiet, no-cameras signing, followed by a four-state fundraising tour expected to raise four million dollars in soft money, which the legislation will prohibit beginning after the November, 2002, elections for Republican Congressional candidates. Id.
317. Id. at § 101.
318. Id. at § 214c.
319. Id. at § 102.
321. Id. Supporters of the legislation will argue that based on Colorado II, because the Court found potential for apparent corruption in party spending of regulated money on behalf of a
ruling regarded hard money, while the current legislation deals primarily with soft money. The ruling was also described as merely maintaining the status quo. Several commentators have suggested the role of PACs and corporations will increase substantially. Additionally, independent expenditures, which are unregulated sources of funding, will be the chief focus of candidates. However, the key part of the legislation in this area is the narrowing of the term “independent” and the expansion of the term “coordinated,” thereby decreasing the scope of expenditures that cannot be regulated and limiting the ability of political parties to influence federal elections with money.

E. The Bipartisan Campaign Reform Act of 2002 and the United States Supreme Court

The federal courts are certain to review the legislation because Senator Mitch McConnell (R-KY), a longtime opponent of campaign finance reform, as well as numerous other organizations, have challenged the legislation as an unconstitutional violation of the First Amendment. The legislation wisely includes a procedure for an expedited review to the U.S. District Court of the District of Columbia for declaratory or injunctive relief, and then a direct appeal to the U.S. Supreme Court. Absent the express overruling of Buckley, the four major provisions of The Bipartisan Campaign Reform Act of 2002 are constitutional and the Supreme Court must uphold the legislation. Each major provision is discussed in detail below.

1. Issue Advocacy Regulation

Both sides admit the most vulnerable provision of the legislation is the issue advocacy regulation. Because the Buckley Court interpreted the First Amendment to only allow for the regulation of issue advertisements under the “express advocacy” test, the legislation can be viewed as a rebuff to the Buckley holding. The Court is likely to
view the new, broader definition as Congress' attempt to amend the *Buckley* decision. However, this really comes down to a question of what is appropriately defined as a campaign advertisement. The defense team must urge the court to realize *Buckley* was twenty years ago, and what constitutes a campaign advertisement in our modern political setting has drastically changed. The strategy of the reformers should implicate much of the "political reality" reasoning which was prevalent and successful in *Colorado II*.329 If the Supreme Court examines what a campaign advertisement really is, the Court will find out that these "issue ads," properly referred to by most people as shams, are nothing but an extension of the campaign, making them subject to FECA. The legislation provides for an alternate definition330 similar to the current express advocacy test in the event the Supreme Court invalidates the new definition, as well as a severability clause.331

2. *Soft Money Ban*

The soft money ban limits only a donor's ability to contribute to a political party and not the donor's ability to make direct expenditures. As previously stated under the *Buckley* framework, regulations on contributions require a somewhat less compelling governmental interest than regulations on expenditures.332 The soft money ban can survive strict scrutiny because it is consistent with the compelling governmental interest of preventing corruption or the appearance of corruption. It has been observed that soft money corrupts because it

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329. See *supra* notes 217-272 and accompanying text.

330. Bipartisan Campaign Reform Act of 2002, *supra* note 58, at § 201(3)(I)(ii). This alternate definition is based on Fed. Election Comm'n v. Furgatch, 807 F.2d. 857 (9th Cir. 1987), cert denied, 484 U.S. 850 (1987). Id. The McCain-Feingold legislation follows *Furgatch* and narrows the definition of an electioneering communication to, "any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office . . . and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." Id. In 1995, the FEC promulgated regulations defining "express advocacy" in a consistent manner with *Furgatch*. 11 C.F.R. § 100.222 (2000). However, several circuit courts have adhered to a narrower definition of express advocacy. See generally Me. Right to Life Comm. v. FEC, 914 F. Supp. 8 (D. Me. 1996), aff'd per curiam, 98 F.3d. 1 (1st Cir. 1996), cert denied, 118 S. Ct. 52 (1997); FEC v. Christian Action Network, 92 F.3d 1178 (4th Cir. 1997); Vt. Right to Life Comm. v. Sorrell, 221 F.3d 376 (2d Cir. 2000). Despite the circuit courts' rulings, the FEC has declined to revise the "express advocacy" test. See Definition of "Express Advocacy," 63 Fed. Reg. 8363 (Feb. 19, 1998).

331. Bipartisan Campaign Reform Act of 2002, *supra* note 58, at § 407. The severability clause states that if any provision of the legislation is found unconstitutional, the remainder of the legislation is still presumed to be constitutional. Id.

332. See *supra* note 53.
is usually donated in large amounts.\textsuperscript{333} "Soft money donations are
given in such huge amounts—$50,000, $100,000, or more—that the
donors typically expect to receive something in return for any invest-
ment of this magnitude."\textsuperscript{334} Soft money clearly implicates the \textit{quid pro quo} fears enunciated in \textit{Buckley}, therefore making a ban on it
constitutional.

3. \textit{Independent Expenditure Regulation}

The Supreme Court again will likely view Congress's redefinition of
coordinated and independent expenditures as an attempt to amend
the \textit{Buckley} holding. However, the Court must rely on the plethora of
evidence established in \textit{Colorado II} regarding the corrupting influence
of coordinated expenditures and uphold this provision. There can be
no doubt that there are few "truly" independent expenditures in the
modern political setting. The Court must recognize this political real-
ity and prevent the corruption of our governmental officials by up-
holding the Congressional restrictions.

4. \textit{Increased Hard Money Limitations}

Finally, the increase in hard money contributions up to $2000 poses
no constitutional problems. \textit{Buckley} established no precedent con-
flicting with an increase in hard money and focused solely on the lim-
its of hard money.

Most importantly, it must be noted that need for campaign reform
initially arose after the Watergate era, the majority of the attempted
reform was ruled unconstitutional by \textit{Buckley}, and the flaws of current
system are largely a product of \textit{Buckley}. The Supreme Court failed in
\textit{Buckley} to remedy the numerous problems arising from the influence
of money on elections in this country. Congress has recognized this,
and it is now time for the Supreme Court to make a similar realization
and uphold the Bipartisan Campaign Reform Act of 2002.

VI. Conclusion

A new era in American politics is upon us with meaningful cam-
paign finance reform signed into law for the first time in nearly three
decades. The struggle, however, to restore American confidence in
the democratic institutions of American has just begun. With legal
challenges certain to the new legislation, the Supreme Court must

\begin{footnotes}
\footnotetext[333]{Daniel M. Yarmish, \textit{The Constitutional Basis for a Ban on Soft Money}, 67 Fordham L. Rev. 1257, 1279 (1998).}
\footnotetext[334]{Id. at 1279-80.}
\end{footnotes}
stand firm on the principals established in *Colorado II*. Chief among those principals is the willingness to identify a political reality. The recent legislation enacted by the Congress, is only the first step, in what should be an end goal of a complete overhaul of the way America funds its elections. As stated by one of this country’s founding fathers:

Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people.335

*Jeremy Monteiro*

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