Federal Election Commission v. Colorado Republican Federal Campaign Committee and Implications for the Future of Campaign Finance Reform

F. C. Ford IV
FEDERAL ELECTION COMMISSION V. 
COLORADO REPUBLICAN FEDERAL 
CAMPAIGN COMMITTEE AND 
IMPLICATIONS FOR THE FUTURE OF 
CAMPAIGN FINANCE REFORM

I. INTRODUCTION

Campaign finance reform as an issue has been around for over a century. Campaign finance reform as policy has taken on many different guises. However, campaign finance reform as a solution to a problem has never materialized. Anyone familiar with today's political climate should be convinced of this truth because the debate over campaign finance reform is heated and very well publicized. On the national level, Senator John McCain is the fiery, straight-talking, standard bearer for reform. His proposal, popularly known as McCain-Feingold, was debated numerous times over the past several years, and just recently, Congress passed the bill, and President Bush signed it into law. However, the debate is not exclusively a national one. In South Carolina, reform rhetoric has grown as the 2002 gubernatorial election approaches. Governor Jim Hodges created an advisory commission to study state campaign finance laws and charged the commission to issue a report as well as proposals to improve the system. The Report of the Governor's Task Force on Campaign Finance Reform was submitted in April 2001, but the Governor and the Legislature have not yet acted upon its recommendations.

The most important theater for campaign finance reform debate has been the United States Supreme Court. Since the early 1970's, our court system has been wrestling with the constitutional questions that are intertwined with campaign finance reform. The First Amendment

4. See Buckley v. Valeo, 424 U.S. 1 (1976), the seminal case dealing with the constitutionality of campaign finance reform. See also Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (reversing a decision of the Eighth Circuit that held a Missouri statute limiting contributions to candidates for state office to be unconstitutional under the First Amendment); Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990) (reversing a decision of the Sixth Circuit that held a Michigan statute prohibiting
to the United States Constitution, which guarantees the freedoms of speech and association to all citizens, has served as a gatekeeper to the legislative efforts. For example, those who believe that the campaign process is corrupt may desire a flexible interpretation of the First Amendment in order to clear the path for regulations that would change the process. Others see a prohibition in the First Amendment as the only “regulation” that needs enforcing to achieve effective reform of our campaign finance system.

The latest case to be decided by the Supreme Court regarding campaign finance reform is Federal Election Commission v. Colorado Republican Federal Campaign Committee (Colorado Republican II). The decision, which upholds the constitutionality of restrictions on “a party’s coordinated expenditures,” was well received by reformists and by Sen. McCain who said, “[c]learly, this decision demonstrates that McCain-Feingold restrictions on campaign contributions are constitutional.” This statement will certainly be tested over the next few years, as challenges to the legislation will be heard in federal courts across the country. Whether McCain is correct in his analysis will depend on several variables—the most crucial of which is the make-up of the Court. Colorado Republican II was a 5-4 decision featuring a sharp philosophical divide and could be one new Justice away from being overruled. Therefore, rather than focusing entirely on the application of the Colorado Republican II holding to McCain-

---

corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office to be unconstitutional under the First Amendment as applied to a non-profit corporation); Fed. Election Comm’n v. Nat’l Conservative PAC, 470 U.S. 480 (1985) (affirming a decision from the Eastern District of Pennsylvania that held a federal statute making it a criminal offense for independent political committees to expend more than $1000 to aid a presidential candidate receiving public financing for his general election campaign to be unconstitutional on its face under the First Amendment); Brown v. Socialist Workers ’74 Campaign Comm., 459 U.S. 87 (1982) (affirming a decision from the Southern District of Ohio that held an Ohio statute requiring every political party to report names and addresses of campaign contributors and recipients of campaign disbursements to be unconstitutional as applied to the Socialist Workers Party).

5. U.S. CONST. amend. I. “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Id.

6. See BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 225-27 (2001) (concluding that the solution to perceived campaign corruption is to heed the strict First Amendment prohibition that “Congress shall make no law . . . .” to “keep[] government out of the electoral arena” and allow for “a full interplay of political ideas”).


8. Id. at 465.

Feingold, this Note will consider the Court’s reasoning and balancing of the government’s interest in preventing corruption against the Constitution’s restrictive language. Though directly impacting only federal law, the resolution of this balancing in the area of campaign finance will also be profoundly felt in the halls of state government. As a result, the precedents set in the federal system today will inevitably shape reforms here in South Carolina.

Part II of this Note discusses the relevant history of campaign finance reform, including statutes and cases that have preceded the Colorado Republican II decision. Part III will explain the facts of Colorado Republican II, its fascinating procedural history, and the holding. Part IV will apply the decision to the Bipartisan Campaign Reform Act of 2002, which is Congress’s adoption of the McCain-Feingold Bill, to consider the constitutionality of its measures. Part V will analyze the reasoning of the Court and argue for de-emphasizing regulatory measures that violate the spirit of the First Amendment and argue for promoting honest disclosures by political actors. Part VI will conclude by commenting on proposed reforms of South Carolina’s campaign finance laws.

II. HISTORY

Campaign finance legislation was first initiated by Progressives almost one hundred years ago, and in 1925, the established rules were codified and expanded in the Federal Corrupt Practices Act. Campaign contributions and expenditures by corporations, national banks, and labor organizations to federal campaigns were forbidden, disclosure of campaign contributions and expenditures was required, and spending limits on campaign contributions and expenditures were established. However, the act lacked any meaningful bite, was defenseless against creative-maneuvering, and resulted in no prosecutions during its fifty-one-year life.

Developing during this time was a concern that money was buying influence in the government. While one person equaled one vote, critics of the system believed that larger donations equaled a louder voice in the discussion and direction of public policy. "Quid

12. Id. § 313.
13. Id. at 1071-73.
15. See SMITH, supra note 6, at 30.
16. See id.
pro quo agreements, . . . undue influence on an officerholder’s[sic] judgment, and the appearance of such influence' were believed to be direct results of big money in politics. In 1971, Congress responded by passing the Federal Election Campaign Act (FECA). FECA’s primary mechanism to level the political playing field was to have more stringent disclosure requirements. The desired result of these requirements was to easily spot quid pro quo agreements upon matching the candidate’s money sources with his political agenda. Corruption would be discouraged and punished.

Amendments to FECA were passed in 1974 after the Watergate scandal. Watergate provided reformers the perfect illustration of corruption; therefore, it gave the support necessary to increase the regulation of federal campaign practices. The amendments established public financing for presidential races and new limits on contributions and spending. The first addition to FECA now exists on a taxpayer’s Form 1040. There is a voluntary check-off box that diverts $3.00 of the taxes owed to a pool of money, which is distributed to candidates as matching funds in exchange for a candidate’s promise to limit his spending. The second addition limited contributions so that a person may only contribute up to $1000 for candidates, $20,000 for political parties, and $5000 for political action committees (PACs). The third addition limited spending for House races to $75,000 and for Senate races to $250,000, which could increase depending on a state’s population. The spending limits included both “direct candidate spending and “spending ‘relative to a clearly identified candidate,”

An unlikely coalition of political players from all corners of the political spectrum, including conservative Senator James Buckley and the American Civil Liberties Union, immediately challenged these new provisions in court. In 1976, the U.S. Supreme Court addressed this challenge in Buckley v. Valeo. The Court found that FECA’s limits on contributions and expenditures impinged on the First

19. See id. § 434.
20. See SMITH, supra note 6, at 31.
21. Id. at 32.
22. Id. at 31-32.
23. Id. at 32.
26. SMITH, supra note 6, at 33.
27. Id.
28. Id. at 34.
29. 424 U.S. 1.
Amendment right to free speech. However, the prevention of the “actuality and appearance” of corruption was found to be a sufficient federal government interest to justify this impingement in regard to contribution limits. The Court determined that large contributions have the potential to lead to quid pro quo agreements, so contribution limits were justified. In regard to limits on expenditures, the Court found they imposed “direct and substantial restraints” on core First Amendment rights of political speech and expression. Consequently, it held such limits to be unconstitutional. However, this holding had the effect of allowing wealthy candidates to spend freely from their own pockets and allowing independent groups and individuals to spend money in support of or against a candidate, so long as no direction came from the candidate favored by such spending.

In 1979, Congress made the final alteration to FECA. In an effort to bolster grassroots political activity (or party-building), Congress amended FECA to allow parties to spend unlimited sums of money raised pursuant to the federal rules for these grassroot activities, without counting such expenditures as “contributions” to federal candidates. These funds, raised for purposes other than the express advocacy of the election or defeat of candidates for federal office, soon became known as “soft money.”

If soft money is successfully banned, the constitutionality of such a ban will certainly become a matter for the federal court system. The ultimate result will rest upon the statutory language of FECA and the judicial interpretations, beginning with Buckley, of that language.

The only expenditure provision of FECA that survived the strict scrutiny of the Buckley Court was the provision popularly known as the Party Expenditure Provision. This provision prohibits parties

---

30. Id. at 22-23.
31. Id. at 26.
32. Id.
33. Id. at 39.
34. Id. at 51, 54, 58-59.
35. SABATO & SIMPSON, supra note 10, at 15.
36. SMITH, supra note 6, at 35.
37. 2 U.S.C. § 441a(d)(3). The provision provides:
The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which
from spending money on behalf of candidates for federal office in excess of the statutory limit. As the Court ruled in Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n (Colorado Republican I), it is unconstitutional to restrict independent expenditures, which are those made free from any consultation or control of a candidate, his committee or agents. However, before Colorado Republican I, political parties were thought to be incapable of making independent expenditures.

III. FEDERAL ELECTION COMMISSION V. COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE

A. Facts

The United States Supreme Court's June 25, 2001 decision of Colorado Republican II put to rest a case that arose more than fifteen years ago. The decision made in the case represents the Court's only review of the Party Expenditure Provision. The facts of the case begin in January 1986 when Democratic Congressman Timothy Wirth announced his run for the open Senate seat to be filled in that November's general election. Three months later, before selecting its own candidate, the Colorado Republican Federal Campaign Committee bought radio advertisements attacking Congressman Wirth. The ad campaign prompted a complaint from the Colorado Democratic Party to the Federal Election Committee (FEC). The Democratic Party argued that the purchase of radio time was an "expenditure in connection with the general election campaign of a
candidate for Federal office," which caused the Republican Party to exceed the Party Expenditure Provision limits.46

B. Procedural History

1. Colorado Republican I

The FEC agreed with the Democratic Party and filed a complaint against the Colorado Republican Party.47 In its defense, the Republican Party argued that the Party Expenditure Provision's expenditure limitation violated the First Amendment.48 The U.S. District Court held that the provision did not cover the expenditures at issue and entered summary judgment for the Republican Party.49 On appeal, the FEC argued for a broader interpretation of the statute that would apply "the limits to advertisements containing an 'electioneering message' about a 'clearly identified candidate,'" which would cover the expenditure while satisfying the Constitution.50 The U.S. Court of Appeals for the Tenth Circuit agreed, finding the Party Expenditure Provision constitutional and applicable.51 The Supreme Court granted certiorari to consider whether the Party Expenditure Provision violated the First Amendment as applied to the Republican Party's particular expenditure.52 The Court held that the spending limits set by the Federal Election Campaign Act were unconstitutional as applied to the Colorado Republican Party's independent expenditures in connection with the senatorial campaign.53 Significantly, the case was remanded for consideration of the Republican Party's secondary claim that all limits on expenditures by a political party in connection with congressional campaigns are facially unconstitutional and, thus, unenforceable even as to spending coordinated with a candidate.54

46. Id. (citing 2 U.S.C. § 441a(d)(3)).
48. Id.
49. Id.
50. Id. at 613.
51. Id.
52. Id.
54. Id. at 625-26.
2. *Colorado Republican II: United States District Court, District of Colorado*

The Supreme Court remanded the Republican Party’s counterclaim to the district court in Colorado.\(^{55}\) The counterclaim was a constitutional challenge to the Party Expenditure Provision, which “places limits on the amount of money which committees of political parties may expend ‘in connection with the general election campaign of candidates for Federal offices.’”\(^{56}\) In response, the FEC argued that “the Party Expenditure Provision serves a compelling Government interest and is narrowly tailored to achieve that interest . . . [and] is not unconstitutionally vague.”\(^{57}\) Contributions are limited by 2 U.S.C. § 441a(a), so the FEC reasoned that, since coordinated expenditures are considered contributions, the Party Expenditure Provision is valid.\(^{58}\) However, the district court noted that regulation of contributions have been allowed only because “the regulations imposed a ‘marginal restriction’ on the contributor’s First Amendment rights.”\(^{59}\) In the case of political parties, the party’s speech cannot be separated from speech on the candidate’s behalf without constraining the party from advocating its most essential positions and from pursuing its most basic goals.\(^{60}\)

The court reasoned that “a political party functions to promote political ideas and policy objectives over time and through elected officials.”\(^{61}\) Therefore, the district court held that party spending coordinated with a candidate is basically the same as expenditures by the candidate or his campaign.\(^{62}\) Since the Supreme Court’s decision in *Buckley* prohibits the regulation of expenditures, the district court ruled that the Party Expenditure Provision cannot regulate party coordinated expenditures without violating a party’s First Amendment rights.\(^{63}\)

The FEC also argued that the Party Expenditure Provision’s limitation of party coordinated expenditures is necessary to avoid corruption or the appearance thereof.\(^{64}\) The FEC maintained that a party with unlimited ability to spend on behalf of a candidate would


\(^{56}\) Id. at 1198.

\(^{57}\) Id. at 1204.

\(^{58}\) Id. at 1208.

\(^{59}\) Id.

\(^{60}\) Id. at 1210.

\(^{61}\) *Colorado Republican*, 41 F. Supp. 2d at 1212.

\(^{62}\) Id. at 1213.

\(^{63}\) Id.

\(^{64}\) Id. at 1210-11.
have a corrupting effect because a party could pressure a candidate to, in effect, toe the party line. However, the district court found no corruption, citing Buckley for the proposition that corruption is related to "large individual financial contributions." The court reasoned that hard money contributions, those raised in accordance with FECA limits and the only money which parties may spend on behalf of candidates for federal election, come from many individuals who donate in small amounts. While the FEC urged the court to consider the cumulative impact of hard and soft money contributions from one entity, the court held that no evidence suggested that soft money is used for coordinated expenditures. Since "[t]he FECA reporting requirements which indicate the sources and the amount of contributions are designed to insure that campaign finance is scrutinized," the district court rejected the FEC argument that coordinated expenditures must be limited.

3. Colorado Republican II: United States Court of Appeals, Tenth Circuit

To reach its decision, the Tenth Circuit analyzed three of the FEC's arguments on how coordinated spending by parties corrupts or appears to corrupt the electoral system. The first argument was that contributors could corrupt the process through their influence over a party. The FEC attempted to show how soft money promotes the purchasing of power. However, the circuit court dismissed the argument because the FECA regulates only hard money, and hard money is used to expressly advocate the election or defeat of federal candidates. Additionally, no evidence was presented that suggests that parties have illegally utilized soft money donations for hard money spending.

The FEC's second argument was that unethical party officials could use a party's coordinated spending authority to apply improper pressure upon its own candidates. The circuit court rejected the notion that political parties can corrupt the electoral process by

65. Id.
66. Id. at 1212.
68. Id. at 1211.
69. Id. at 1212-13.
71. Id. at 1229.
72. Id.
73. See id.
74. See id.
75. Id. at 1230.
influencing their candidates' positions. It reasoned that political parties represent broad-based coalitions of interest (unlike PACs which represent one interest) and that there was nothing inherently ruinous in such a coalition shaping the views of its candidates. The court suggested that "the solution to pollution is dilution."

The FEC's third argument was that the Party Expenditure Provision must be upheld to prevent evasion of FECA's other contribution limits. The fear is that if coordinated expenditure limits are lifted, individuals may circumvent the contribution limit by giving to a party with the understanding that those funds are to be earmarked for use by a specific candidate. This argument was also rejected because, under FECA, earmarked contributions are treated as contributions to a specific candidate, and vigilant enforcement of that provision is the proper means to prevent such maneuvering.

However, in dissent, Chief Judge Seymour stated that the majority had improperly substituted its judgment for that of Congress's on how best to balance the need to promote the role of political parties and the need to combat its potential for corruption. According to the dissent, the FEC "amply supported its argument that limits on coordinated expenditures by political parties serve the public interest in preventing both corruption and the appearance of corruption by limiting the leverage parties possess to pay off the political debts owed to large contributors.

Common sense and experience justify the view that candidates or elected officials will promote policies favorable to large contributors that they may not otherwise have promoted. Finally, the judge opined that "FECA has played a major role in the curtailment of abuses . . . [and] [e]liminating an integral part of the Act would allow those abuses to flourish once again."

4. Colorado Republican II: United States Supreme Court

The U.S. Supreme Court subsequently granted certiorari in order to resolve the constitutionality of the Party Expenditure Provision's limitation on coordinated expenditures by political parties. The result

76. Colorado Republican, 213 F.3d at 1230-31.
77. Id. at 1231.
78. Id.
79. Id.
80. Id.
81. Id. at 1232.
82. Colorado Republican, 213 F.3d at 1233 (Seymour, C.J., dissenting).
83. Id. at 1244.
84. Id.
85. Id.
was a narrow 5-4 decision that reversed the lower courts and rejected the challenge to limits on parties' coordinated expenditures. Justice Souter penned the majority decision and was joined by Justices Breyer, Ginsburg, O'Connor and Stevens. Justice Thomas dissented and was joined by Justices Kennedy and Scalia and by Chief Justice Rehnquist in part.

The majority laid the groundwork for its decision by recalling the 1976 seminal opinion of Buckley v. Valeo,\textsuperscript{87} the first case to challenge FECA.\textsuperscript{88} The most important distinction arising from that case was that made between "contributions" and "expenditures."\textsuperscript{89} The Buckley Court held that it was generally constitutional to limit contributions to a candidate's election campaign, but it was not constitutional to limit election expenditures.\textsuperscript{90} The Court noted that this distinction has been respected by the ensuing line of cases\textsuperscript{91} and that the Court had "routinely struck down limitations on independent expenditures by candidates, other individuals, and groups, . . . while repeatedly upholding contribution limits."\textsuperscript{92} The Court also made it clear that expenditures coordinated with a candidate are considered contributions.\textsuperscript{93} Thus, the Court had to decide whether a party is in a different position from other political speakers so as to require a generally higher standard of scrutiny before its coordinated spending can be limited.\textsuperscript{94}

To reach its decision, the majority considered whether limiting coordinated spending would impose a unique burden on parties and whether a party's coordinated spending would raise the same risk of corruption as when others spend in coordination with a candidate.\textsuperscript{95} The majority concluded that no unique burden is imposed upon a party by these limitations\textsuperscript{96} and that the likelihood of corruption would increase with unlimited, party-coordinated expenditures.\textsuperscript{97}

The Court was swayed by evidence that suggested Congress's coordinated spending limits had not frustrated the ability of parties to exercise their First Amendment rights to support their candidates.\textsuperscript{98} The Court suggested that a conclusion to the contrary would mean that "for almost three decades political parties have not been functional or
have been functioning in systemic violation of the law.\footnote{Colorado Republican II, 533 U.S. at 449.} The Court cited with approval commentary and prior case law, which suggests that parties serve as agents for spending on behalf of those who want obligated officeholders.\footnote{Id. at 450-52.} This idea supported the notion that limits on parties’ coordinated spending should be viewed “through the same lens applied to such spending by donors, like PACs, that can use parties as conduits for contributions meant to place candidates under obligation.”\footnote{Id. at 452.} Furthermore, the Court stated that parties are prime targets for exploitation for corrupt purposes, because they are “efficient in generating large sums to spend and in pinpointing effective ways to spend them.”\footnote{Id. at 453.}

The majority is further convinced by the FEC’s evidence of the “tallying” system, which helps to “connect donors to candidates through the accommodation of a [political] party” once that donor can no longer make direct contributions to the candidate.\footnote{Id. at 458-59.} Additionally, while some contributions are small, the majority is convinced that contributions of up to $20,000 to a party can earn that donor special meetings and receptions whereby they can get their points across to a candidate or official.\footnote{Id. at 461.} In fear that such activity would only increase with unlimited coordinated expenditures, the Court held that coordinated spending leads to corruption to the same degree as direct contributions.\footnote{Colorado Republican II, 533 U.S. at 464-65.} Therefore, the Court held that the Party Expenditure Provision, which limits a party’s coordinated spending, serves a substantial government interest and is just as constitutional as statutory limits on contributions.\footnote{Id. at 465.}

The dissent, on the other hand, concluded that the Party Expenditure Provision “sweeps too broadly, interferes with the party-candidate relationship, and has not been proved necessary to combat corruption.”\footnote{Id. at 465 (Thomas, J., dissenting).} Justice Thomas stated that the majority’s conclusions that coordinated expenditures are no different from contributions and that political parties are no different from individuals and political committees are both flawed.\footnote{Id. at 467.} He reasoned that political parties and their candidates are “inextricably intertwined,” that “a party’s public image is largely defined by what its candidates say and do,” and that “it would be impractical and imprudent . . . for a party to support its
own candidates without some form of ‘cooperation’ or ‘consultation.’”

The dissent maintained that the Party Expenditure Provision is unconstitutional because there is insufficient evidence to show that coordinated expenditures by parties give rise to corruption and because “the restriction is not ‘closely drawn’ to curb this corruption.” Justice Thomas suggested alternatives that he would find constitutional for addressing the government interest in curbing corruption. First, simple enforcement of bribery laws, disclosure laws, and the earmarking rule would be precise responses to the Court’s circumvention concerns. Additionally, Justice Thomas suggested that, since the majority believes that a $20,000 donation is enough to corrupt a candidate, the constitutional solution should be to lower the contribution cap to political parties rather than limiting what the party can spend.

In summary, Justice Thomas feels that “it makes no sense to contravene a political party’s core First Amendment rights because of what a third party might unlawfully try to do.”

IV. IS MCCAIN-FEINGOLD CONSTITUTIONAL?

For those who support McCain-Feingold as the solution to a corrupt election system, the Court’s decision in Colorado Republican II was welcome news. John McCain himself commented, “[c]learly, this decision demonstrates that McCain-Feingold restrictions on campaign contributions are constitutional, [and] [o]ur opponents will have to find some other excuse not to enact laws to restore Americans’ confidence in our political system.” Common Cause, a reform organization that supported the bill, released a statement saying, “[t]he
same reasoning the court used to sustain the party limits today will also sustain a ban on soft money.”

Opponents of McCain-Feingold had a different take on the decision. Jan Baran, who represented the Republican Party in the case said, “[t]his case will be used to support the proposition that government can regulate campaign contributions to a certain extent, [but] . . . [t]his case is not carte blanche for regulating politics.” Craig Engle, former general counsel to the National Republican Senatorial Committee, said, “[t]hroughout the majority opinion, it is pretty clear that party committees cannot be treated differently than other political actors . . . [so] [][i]f the court won’t give parties special permission [to spend in coordination with a candidate without limits], then it’s unlikely the court will give parties special prohibitions.” In addition, James Bopp, Jr., general counsel of the James Madison Center for Free Speech, said, “[t]he high court’s opinion confirms that when parties act independently from candidates or pursue activities that are not contributions to candidates, they may not constitutionally be limited, much less be subjected to an outright ban as in McCain-Feingold.”

The primary goal of McCain-Feingold is to ban soft money, which is money given by corporations and other large donors for party-building and electioneering communications and is currently unregulated by FECA. The reasoning of Colorado Republican II, that unlimited expenditures by a party in coordination with a candidate leads to corruption, can easily be transferred to the soft money setting. If the Justices feel that unlimited soft money contributions garner a donor direct access to candidates and elected officials, then a ban on such money would be constitutional because access at least leads to the appearance of undue influence by a donor. This access is gained, theoretically, through the soft money loophole, as corporations are not currently allowed to make direct contributions to a candidate or hard money contributions to a party, and individuals are limited in what they can give to a candidate or party.

118. Id.
119. Lane, supra note 9.
120. Id.
124. See id. § 441a(a).
As long as the law views parties as agents for spending on behalf of those who seek to produce obligated officeholders, regulations aimed at such activity by parties will survive the current application of strict scrutiny. However, after the Court’s decision in *Colorado Republican II*, it remains clear that a party’s expenditures “truly independent” of its candidate cannot be limited without violating a First Amendment right to free speech. With this precedent, a ban on money given in such a manner would not appear constitutional.

However, one must wonder what the Court means when it says “truly independent.” When the Colorado Republican Party spent its money in 1986, they did not have a candidate, and, therefore, coordination was not at all possible. If truly independent expenditures means spending by a party when there is no party candidate, then truly independent expenditures would be possible only in a time span between the general election and the next primary. Spending during a general campaign after the primaries would automatically be assumed to be coordinated with a candidate. The language of McCain-Feingold reflects this concern and provides that “[o]n or after the date on which a political party nominates a candidate, no committee of the political party may make . . . coordinated expenditure[s] [and independent expenditures] with respect to the candidate during the election cycle.” This consistent ideology is further evidence that the Court will be receptive to this newly enacted legislation as constitutional.

Thus, the language of *Colorado Republican II* indicates that the McCain-Feingold formula for campaign finance reform will pass constitutional muster if ever challenged in court. However, there is still the notion that further regulation of money in the form of campaign contributions and expenditures is flawed and violates the basic understanding of the First Amendment rights to free speech and political association. Emphasizing disclosure laws would empower the voters to be the ultimate judges of corruption in politics.

V. FULL DISCLOSURE

The decision in *Colorado Republican II*, and the analysis used to reach that decision, is evidence of the need to reform the federal campaign finance law. The precedent on which *Colorado Republican II* rests, FECA, its amendments, and the many interpretations of FECA by the Court, is flawed. The enactment of the McCain-Feingold Bill

125. *Colorado Republican II*, 533 U.S. at 452.
126. Id. at 465.
has essentially built on this flawed campaign finance system in its creation of new regulations. A likely result is that weaknesses will be found and manipulated, as has consistently occurred over the history of campaign finance reform. Instead of adding to the current structure of the law, which has created the movement for change, reform should take on its true meaning and the old law should be discarded. A new law that is simple, manageable, and built on a strong foundation of realism and, most importantly, the Constitution, should be constructed in its place.

A. Constitutionality of Campaign Finance Reform

At the outset of its analysis, the Colorado Republican II Court lends credence to the idea that the law of campaign finance should remain closely tied to its constitutional base. The Court stated that, "[s]pending for political ends and contributing to political candidates both fall within the First Amendment's protection of speech and political association." Thus, the Court made it clear that FECA regulations of campaign finance are regulations of activities protected by the Constitution. When the Court discusses the circumstances under which the government may step in and regulate otherwise constitutional activities, it becomes evident that such exceptions have swallowed the First Amendment rule. It is because of these exceptions that McCain-Feingold will most likely pass constitutional muster.

As Justice Thomas emphasizes in his dissent, restrictions on First Amendment rights to speech and political association are subject to strict scrutiny and are constitutional only if tailored to serve a compelling government interest. As is clear from the past thirty years of campaign finance law, the compelling government interest is to eliminate corruption in politics. Indeed, the prevention of corruption, wherever it may exist, is a worthy goal. However, as corruption is defined by the Colorado Republican II Court, one must wonder if FECA regulations reach beyond what is justified by the exceptions to First Amendment freedoms. The Court explained that corruption is understood not only as quid pro quo agreements between contributors and candidates and undue influence on an officeholder's judgment, but also as the appearance of such influence. This reflects a belief that corruption in politics should be presumed to exist even where there is in fact no corruption. This is not very compelling, and

128. See Smith, supra note 6, at 39.
129. Colorado Republican II, 533 U.S. at 440 (citing Buckley v. Valeo, 424 U.S. 1, 14-23 (1976)).
130. See id. at 466 (Thomas, J., dissenting).
131. Id. at 441.
preclusion of First Amendment rights for such a broadly defined
government interest should not survive under a reasonable person’s
interpretation of strict scrutiny.

Even if corruption, as defined by the Court, is considered a
compelling government interest, the mechanism used to prevent such
corruption should be evaluated for its effectiveness. The Party
Expenditure Provision of FECA and McCain-Feingold both seem
inspired by the idea that money is the source of a corrupt political
system. The law limits the amount of money given as contributions to
candidates, political parties, and PACs.\(^\text{132}\) Money spent by political
parties, PACs, and individuals in coordination with a candidate is also
limited.\(^\text{133}\) In *Colorado Republican II* the Court reasoned that a
political party’s efficiency in spending money for the benefit of a
specific candidate places the party in a position to be used as a means
to circumvent contribution limits that apply to individuals and
PACs.\(^\text{134}\) The Court fears political parties may be used as conduits for
corruption.\(^\text{135}\)

The response to this corruption, real and imagined, has been to
specify random dollar amounts not to be exceeded by contributors and
parties when given to a candidate.\(^\text{136}\) But imposing such limits in order
to prevent corruption reveals a significant gap in logic. If money in the
form of donations and coordinated expenditures is corrupting, then
limits on such money merely limits corruption. The goal of the
government should be to prevent or eradicate corruption. Following
the government’s logic would mean that all contributions by
individuals and PACs and all coordinated expenditures by parties
should not just be limited but eliminated in order to rid politics of
corruption.

The result from such action would be that political parties and
PACs would cease to exist. Individuals with popularity in a
community or those with significant wealth would be the only
candidates for office. In a country where political speech and
associational rights are constitutionally protected, money must be
allowed to flow in support of such rights. Television and radio time
and newspaper and magazine space all cost money. Political money
should be earned and spent freely and should not be presumed to be
mischievous or corrupting in a capitalistic society.

---

133. *See* id. § 441a(d)(3).
134. 533 U.S. at 453.
135. *See* id. at 463-64.
136. *See* 2 U.S.C. § 441(a)-(g).
B. Reforming Campaign Finance Laws and Respecting the Spirit of the Constitution

Therefore, the answer is not more regulation in the form of limits because that logic simply does not lead to the prevention of corruption and is not consistent with the realities of our economy. The answer is honest disclosure by candidates, parties, and other political committees of who is giving and how much is given. This would utilize the most important aspect of our political system—the judgment of those citizens who exercise their right to vote. The Buckley Court laid out the rationale for these types of disclosures more than twenty-five years ago:

First, disclosure provides the electorate with information “as to where political campaign money comes from and how it is spent by the candidate” in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate’s financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate’s most generous supporters is better able to detect any post-election special favors that may be given in return. And . . . full disclosure during an election campaign tends “to prevent the corrupt use of money to affect elections.”

The constitutionality of requiring full disclosure of political contributions and expenditures is not absolutely free from First Amendment scrutiny. The Buckley decision, while ultimately approving compelled disclosure of campaign finances, emphasized that “significant encroachment on First Amendment rights of [this]
sort...must survive exacting scrutiny." The abridgment of rights by required disclosure survived the Court's scrutiny because it believed that the "free functioning" of our national political system would be enhanced by such disclosure.

The system needs complete and honest disclosure by every candidate, party, and PAC, and strong punishment must follow for failure to do so. Honest disclosure would allow the free press to seek out disclosed information and to report such information to the public. The determination of whether or not corruption exists in the political process would be left not to the nine justices of the Supreme Court but to the citizens themselves.

Just as the Securities and Exchange Commission protects the American investor, the Federal Election Commission should protect the American voter. SEC oversight of American stock markets ensures that publicly traded companies accurately disclose vital information about their finances, and the result is that investors are given the data necessary to make a wise investment. FEC oversight of the finances of political actors, including candidates, parties, and PACs, should serve the same purpose and empower voters to judge the nature of certain contributions and expenditures before they invest their final vote in a particular candidate.

VI. REFORM IN SOUTH CAROLINA

The Report of the Governor's Task Force on Campaign Finance Reform supports the notion of full disclosure by candidates and all other entities engaged in electioneering speech or acting in coordination with a party or candidate. The Task Force would require information on all contributors giving in excess of $200 to include the contributor's name and address, the size of the contribution, and the occupation and employer of the contributor.

138. Id. at 64.
139. Id. at 66.
140. McCain-Feingold, in fact, mandates this sort of disclosure and requires a report of all receipts and disbursements by political parties and political committees. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 103, 116 Stat. 81, 87 (2002). The bill also requires any person independently expending more than $10,000 in a single year for electioneering communications to disclose the source of its money. Id. § 201, 116 Stat. at 88-90.
141. See SABATO & SIMPSON, supra note 10, at 330.
142. See id.
143. See id.
145. Id.
All expenditures in excess of $500 would be reported as well.\textsuperscript{146} Required disclosures would be filed with the State Ethics Commission for statewide and legislative races and would be entered into an Internet-based system accessible to anyone.\textsuperscript{147} 

Certainly, if such measures were put into place, the press and concerned voters would have easy access to all significant contributions and expenditures by those running for office. The general public could easily reach conclusions as to whether undue influence was being exerted on candidates and elected officials by any individual or special interest donor.

Another recommendation by the Task Force is to raise current contribution limits that were set in 1991, in light of increasing media costs and inflationary pressure.\textsuperscript{148} This recommendation is accompanied by a finding that excessive money in the campaign process creates the possibility of corruption.\textsuperscript{149} The concern is based on the assumption that money is itself corrupting and that, as more money flows from a single source, that source will have an increasingly disproportionate amount of influence compared to those giving less or nothing at all.\textsuperscript{150} As mentioned earlier in this Note, such logic is flawed, because to do away with corruption as defined by the U.S. Supreme Court and by this Task Force, the government would need to eliminate all contributions.

With a system of full disclosure in place, there is no real need for limiting contributions. For those concerned, corruption or the appearance of corruption would be easily detected looking at lists of donors available on the Internet. As a result of this public scrutiny, those wishing to unduly influence a candidate with a sizeable donation will be discouraged from doing so—a sort of laissez faire contribution limit. Donations of support, given because a donor simply likes a candidate's positions on the issues, would thereby be encouraged. It should be noted that this system of full disclosure and unlimited contributions is currently in place in Virginia.\textsuperscript{151}

The Task Force further recommends that contributions should be limited by source and amount in order to align state law with federal law. Currently in South Carolina, contributions to candidates and parties may come from any source,\textsuperscript{152} whereas contributions from any national bank, corporation or labor organization in connection with

\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
federal elections are forbidden. The Task Force would forbid corporations and unions from contributing directly to candidates, but would allow such contributions to political parties. The concern with corporate and union donations is that such entities have a comparatively greater potential to make large contributions and, therefore, may have a greater influence on the recipient of their donations. This may be so, but in a system of full disclosure, such contributions will also be much easier to detect and distinguish from an individual donor. Therefore, disclosure is most effective against the influences of "big tobacco", "big labor", and all other "big" special interest groups.

The final significant recommendation of the Task Force is public financing of campaigns for both statewide and legislative offices. Under this system, qualified candidates who raise a set minimum amount of money would be eligible to receive government funds so long as they agree to accept and spend only the amount of money available from public sources. The expected result would be elections free from undue influence caused by large private campaign contributions. The system would be voluntary and the publicly funded candidate would be allowed an infusion of money from the public election funds to at least match a privately funded candidate's spending. The proposed source of this public election fund would be a combination of general revenue dollars, a campaign check-off system, and proceeds from a variety of licensing fees. The Task Force estimates the cost to taxpayers would be roughly $25,000,000 to cover each four-year statewide election cycle.

While arguments for this type of election system are based on notions of equality and arguments against emphasize its costly nature, the best argument remains that full disclosure, properly enforced by one vigilant agency—the Federal Election Commission on the federal level and the State Ethics Commission on the state level—provides the best method for attaining clean, efficient, and fair elections.

155. Id.
156. Id.
157. Id.
158. Id.
159. Id.
161. Id.
VII. CONCLUSION

Campaign finance reformers must change their framework in order to achieve their goals. The answer to the perceived ills of the current systems, both federal and state, does not lie in the form of more regulation. The courts, legislators, and commentators talk of a corrupt system driven by money. Money may indeed be the root of all evil, but it also makes the world go 'round, and the answer to exorcising any evils of the campaign finance system is to let that world work. We should let the press discover any corruption and let citizens do it, as well, through databases on the Internet. In this Information Age, information should be given honestly by political actors, and the judges of their actions should be the people they seek to represent. If full disclosure is emphasized, then, in the spirit of the Constitution, the verdict on corruption will be handed down at the polls.

F. Cordes Ford, IV