July 2015


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COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE v. FEDERAL ELECTION COMMISSION: MAINTAINING WHAT REMAINS OF THE FEDERAL ELECTION CAMPAIGN ACT THROUGH CONSTITUTIONAL COMPROMISE

I. INTRODUCTION

In modern politics, winning an election and strong financial backing are inseparable. Campaign financing is not only a major factor in determining which candidates win political office, but it also strongly influences which candidates actually run for office. In order to promote political expression, campaign contributions and expenditures are often made by individuals, corporations, political action committees, political parties and even the candidates themselves. As a result, a common belief is that the candidate with the most money will win election, and subsequently the largest financial campaign contributors will have a strong influence on the candidate’s policy.

Since 1907, Congress has attempted to implement federal campaign re-

1. See Martin Schram & Ann Snider, Shakedown, MOTHER JONES, Sept. 1, 1994, at 29. The authors discuss how the cost of campaigning has "skyrocketed." Id. The current system forces candidates to cease "doing the public's business for hours each day so they can dial for dollars." Id. During the 1995-96 election season, political parties, candidates, and interest groups spent a record $2.7 billion. Roth Marcus & Charles R. Babcock, The System Cracks Under the Weight of Cash, WASH POST, Feb. 9, 1997, at A1.


3. See Robert J. Samuelson, The Price of Politics: Campaign Contributions Haven't Corrupted Congress, NEWSWEEK, Aug. 28, 1995, at 65 ("A recent New York Times poll found that 79 percent of the respondents believe 'government is run by a few big interests.' Ross Perot clamors for campaign-finance 'reform,' as does President Clinton."); see also Beth Donovan, Constitutional Issues Frame Congressional Options, CONG. Q. WKLY. REP., Feb. 27, 1993 ("Across the country, last year's angry voters remain in an anti-Washington mood, frustrated by the influence of moneyed interests on the legislative process. 'Voters are disgusted with the pernicious role of money in politics,' says Celinda Lake, who conducted a recent poll on campaign finance for the Center for New Democracy, a group that favors spending limits."); Larry J. Sabato & Glenn R. Simpson, Dirty Little Secrets, The Persistence of Corruption in American Politics, BUS. WK., April 29, 1996, at 18 ("In poll after poll, citizens by a wide margin gripe that politics is corrupted by special interests that use their wealth to elect politicians and keep them in power."); Talk Hosts Steer Listeners Into Political Process: Radio Personalities Gear Up for Campaign Finance Reform Push, BROADCASTING & CABLE, May 14, 1990 (quoting Congress Watch staff attorney David Eppier, who stated that "[m]oney plays a certain corrupting and compromising role in politics, because a small handful of people contribute to campaigns and these are the people who get the ears and votes of members of Congress."); David Rapp, Senate Votes to Restrict PAC Contributions, CONG. Q. WKLY. REP., Aug. 16, 1986 (The rise in the number of PACs and their influence in political campaigns has put lawmakers on the defensive against a public perception that special-interest groups have undue influence on politicians. "We have formalized and legalized political
form.\textsuperscript{4} Congress refined its attempts to regulate contributions, leading to the enactment of the Federal Election Campaign Act ("FECA") of 1971.\textsuperscript{5} FECA, as amended in 1974, imposes dollar limits on political party expenditures for congressional candidates' general election campaigns.\textsuperscript{6}

In a 1976 landmark decision, the United States Supreme Court ruled that Congress may limit campaign contributions; however, individual independent expenditures, which are not made in coordination with the candidate, may not.\textsuperscript{7} In 1985, the Supreme Court extended this ruling to political action committees.\textsuperscript{8} Prior to 1996, a political party was considered incapable of making an independent expenditure without coordinating with the candidate.\textsuperscript{9} However, in \textit{Colorado Republican Federal Campaign Committee v. Federal Election Commission},\textsuperscript{10} the Supreme Court held, in a 7-2 plurality decision, that under the First Amendment and FECA, a political party may make independent expenditures.\textsuperscript{11}

This Note will discuss the Court's reasoning and holding in \textit{Colorado Republican}. Additionally, this Note will discuss how the Court distinguished independent and coordinated campaign expenditures that were first established in \textit{Buckley v. Valeo}.\textsuperscript{12} Finally, this Note will discuss why the Court did not address whether limitations on coordinated expenditures for political parties are protected by the First Amendment.\textsuperscript{13}

\textsuperscript{4} Corruption, said Senator William Proxmire of Wisconsin.\textsuperscript{4}

\textsuperscript{5} Congress enacted the Tillman Act, 34 STAT. 864 (1907) and made financial contributions by corporations to federal candidates illegal.

\textsuperscript{6} FECA's purpose is to prevent corruption by large financial contributors and to reduce campaign costs to level the playing field. Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n, 116 S. Ct. 2309, 2312 (1996); see also Buckley v. Valeo, 424 U.S. 1, 25-27 (1976).

\textsuperscript{7} 2 U.S.C.A. §441a(a) (West 1996).

\textsuperscript{8} \textit{Buckley}, 424 U.S. at 81-82.


\textsuperscript{11} \textit{Colorado Republican}, 116 S. Ct. at 2309.

\textsuperscript{12} 424 U.S. 1 (1976).

\textsuperscript{13} U.S. CONST. amend. I.

\textsuperscript{14} The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press, or the right of people peaceably to assemble..." U.S. CONST. amend. I. The Supreme Court first recognized the freedom of association as a separate and distinct
Claims challenging the constitutionality of campaign contributions and expenditures have generally been made under claims of First Amendment freedom of speech and association. Beginning with the Buckley decision in 1976, the Supreme Court has distinguished between campaign expenditures that are constitutionally protected and those that the federal government may regulate. The result of this stance is that FECA’s limits on individual or committee contributions made to candidates or political action committees are constitutional.

A. Buckley v. Valeo: Contributions and Expenditures Distinguished

One of the issues addressed in Buckley was whether certain FECA legislation enacted by Congress violated First Amendment freedoms. The Buckley Court examined FECA’s contribution and expenditure limitations and found that although both concern First Amendment interests, the limitations on expenditures are more restrictive than the limits on financial contributions on “protected freedoms of political expression and association.”


16. No limits may be placed upon independent expenditures made by individuals, which includes the right of a candidate to spend her own money. Id. at 54.

17. Id. at 13. In Buckley, various federal officeholders, candidates, and supporting political organizations brought suit against the Secretary of the Senate, Clerk of the House, Comptroller General, Attorney General, and the Commission. Id. The appellants argued that political contribution limits were a restriction on communication and were thus a violation of the First Amendment. Id. at 11.

18. Id. The limitations on expenditures were best described by the Court’s statement: “Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.” Id. at 19 n.18. The Court stated that limiting contributions is only a marginal restriction because if the candidate needs more funding, all he has to do is raise funds from more people. Id. at 21-22. Contributions only express general support for the candidate. Id. at 22.

19. Id. at 24-25 (quoting Kusper v. Pontikes, 414 U.S. 51, 57 (1973) (“The right to associate with the political party of one’s choice is an integral part of this basic constitutional freedom.”); see Williams v. Rhodes, 393 U.S. 23, 30 (1968) (“We have repeatedly held that freedom of association is protected by the First Amendment.”); United States v. Robel, 389 U.S. 258,
The Court found that FECA’s contribution limits restrict freedom of association, which the Court had previously established as a “basic constitutional freedom” subject to the closest scrutiny. The Court applied strict scrutiny to the contribution limits and found that only marginal restrictions were placed on a contributor’s First Amendment rights by those limitations. The Court found that the interests served by imposing limits on contributions to political candidates justify the limitations imposed on First Amendment freedoms, and the Court upheld limits on contributions as constitutional.

The Court also applied strict scrutiny to the independent expenditure provisions. It found that the governmental restriction “heavily burdens core
First Amendment expression” and was insufficient to sustain the provision.\textsuperscript{25} Therefore, \textit{Buckley} held unconstitutional the limitations on (1) the expenditures of personal funds by individuals, (2) the expenditure of personal funds by candidates for federal office, and (3) the expenditure of more than a set amount of campaign funds by candidates for federal office.\textsuperscript{26} Those expenditures are currently unlimited.\textsuperscript{27}

\textbf{B. Post Buckley: Relevant U.S. Supreme Court Decisions}

\textbf{1. Contributions To Political Action Committees}

In 1981, in \textit{California Medical Association v. Federal Election Commission},\textsuperscript{28} the Court examined the constitutionality of FECA’s limits on contributions made to political action committees by individuals or groups.\textsuperscript{29} The Court upheld limitations placed on individuals and associations from contributing more than $5,000 per year to any “multi-candidate political committee.”\textsuperscript{30} Relying on the reasoning established in \textit{Buckley}, the \textit{California Medical} Court determined that if Congress could limit contributions to campaigns, then there was no First Amendment violation in limiting contributions to political action committees.\textsuperscript{31}

\begin{footnotesize}
\begin{itemize}
\item 29. \textit{Id.} at 184. The California Medical Association (CMA), a not-for-profit unincorporated association of about 25,000 doctors, challenged 2 U.S.C. §441a(1)(C) and §441a(f) when the FEC brought civil enforcement action against them for exceeding contribution limits to the California Medical Political Action Committee (“CALPAC”). \textit{Id.} at 185. CALPAC was a political committee formed by them and registered to the FEC. \textit{Id.} Section 441a(1)(C) prohibited unincorporated associations like CMA from contributing more than $5,000 in to a political committee like CALPAC in any calendar year. \textit{Id.} It is unlawful under §441a(f) for a political committee to “knowingly . . . accept contributions exceeding this limit.” \textit{Id.}
\item 30. The \textit{California Medical Ass'n} Court held that (1) the Fifth Amendment equal protection clause was not violated by the FECA contribution limits which placed restrictions on individuals and unincorporated associations and not on corporations and labor unions, because FECA imposes many more restrictions on corporations and unions than on individuals and unincorporated associations; and (2) relying on the decision in \textit{Buckley}, found that the First Amendment is not violated by the campaign contribution limits. \textit{California Medical Ass'n}, 453 U.S. at 200-01.
\item 31. In upholding the limitations, the Court made an analogy to \textit{Buckley} stating: If the First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign organization which advocates the views and candidacy of a particular candidate, the rights of a contributor are similarly not impaired by limits on the amount he may give to a multicandidate political committee, such as CALPAC, which advocates the views and candidacies of a number of candidates. \textit{Id.} at 197.
\item 32. 470 U.S. 480 (1985).
\item 33. \textit{Id.} at 501. In \textit{California Medical Assoc.}, the Court upheld limits on contributions to PACs from individuals where in the \textit{NCPAC} case, the Court struck down independent expenditures made by PACs. \textit{Id.}
\item 34. \textit{Id.} at 491. The National Conservation Political Action Committee (“NCPAC”), a nonprofit, nonmembership corporation registered as a political committee with the FEC, was
\end{itemize}
\end{footnotesize}
2. Political Action Committee Independent Expenditures

In 1985, in *Federal Election Commission v. National Conservative Political Action Committee*, the Court struck down a limitation on expenditures by political action committees. The provision prohibited a political action committee from spending more than $1000 on behalf of a presidential candidate who had chosen to receive federal campaign financing. The *National Conservative* Court relied heavily on *Buckley*, and struck down limits on expenditures made by political action committees who act independently of the candidate.

3. Independent Expenditures by Incorporated Political Associations

In *Federal Election Commission v. Massachusetts Citizen for Life, Inc.*, the Court examined whether a FECA provision that prohibits a corporation from using treasury funds to make independent expenditures was constitutional. The Court found that there was no compelling justification for infringing protected speech, and found the provision's restrictions on independent expen- 

in violation of 26 U.S.C. § 9012(f). *Id.* The NCPAC solicited funds in support of President Reagan's 1980 campaign. *Id.* at 490 The expenditures in this case were not made in coordination with the official Reagan election campaign committee or its agents. *Id.* at 489. The Presidential candidates of major political parties have the option under the Presidential Election Campaign Fund Act to receive public financing for their campaign. *Id.* If a candidate elects to take under this Act, he is subject to §9012(f) “which makes it a criminal offense for an independent political committee to expend more than $1,000 to further that candidate’s election.” *Id.* at 480.

35. *Id.* at 493-99. The Court disagreed with the FEC's contention that a PAC's method of solicitation “diminishes their entitlement to First Amendment protection” because it amounts to no more than speech by proxy. *Id.* at 494. This Court differentiated *California Medical* because it involved limitations on expenditures by PACs and not on the contributions to PACs. *Id.* at 495. The Court held that the corruption argument was not sufficient to pass strict scrutiny, and that the overbreadth of the provision cannot allow it to be upheld. *Id.* at 501.


37. *Massachusetts Citizens for Life*, 479 U.S. at 241. 2 U.S.C. §441b restricts independent expenditures and forbids corporations to use treasury funds to make expenditures “in connection with” a federal election. *Id.* It also requires that such expenditure “be financed by voluntary contributions to a separate segregated fund.” *Id.* A segregated fund is considered a “political committee” under §431(4)(B) of FECA. *Id.* Massachusetts Citizen for Life, Inc. (“Citizens”) was a nonprofit, nonstock corporation which did not accept contributions from unions or business corporations. *Id.* at 242. Citizens obtained funding by collecting voluntary donations from fund-raising, etc. *Id.* at 243. Citizens distributed a newsletter that advocated the voting of pro-life candidates, but did not endorse any certain candidate. *Id.* The FEC claimed that they violated §441b. *Id.* at 244.

38. *Id.* at 263. The Court found that the anticorruption rationale did not apply here just because a voluntary political association took the form of a corporation. *Id.*

39. *Id.* at 259-60. Once the Court determined that the corporation did violate §441b because their expenditure constituted “express advocacy,” it determined that §441b was unconstitutional as applied to the corporation. *Id.* at 241.

The Massachusetts Citizens Court relied on the Buckley rationale that "restrictions on contributions require less compelling justification than restrictions on independent spending."\(^{39}\)

C. FECA Regulations at issue in Colorado Republican

2 U.S.C. §441(a) restricts both contributions and coordinated expenditures.\(^{40}\) Independent expenditures—those made without coordination with any candidate—cannot be restricted without violating the Constitution.\(^{41}\)

The Federal Election Commission ("FEC") has set the following contribution limits for individuals and political action committees:

<table>
<thead>
<tr>
<th>FECA Contribution Limits(^{42})</th>
</tr>
</thead>
<tbody>
<tr>
<td>To each candidate or candidate committee per election</td>
</tr>
<tr>
<td>----------------------------------</td>
</tr>
<tr>
<td>Individual may give:(^{43})</td>
</tr>
<tr>
<td>Multicandidate Committee(^{44}) may give:(^{45})</td>
</tr>
<tr>
<td>Other Political Committee may give:(^{46})</td>
</tr>
</tbody>
</table>

\(^{41}\) The Federal Election Commission gives the following example to illustrate the practical difference between an independent expenditure and a contribution:

An individual not previously involved in the campaign of candidate Smith purchases a newspaper advertisement supporting Smith without ever contacting the candidate or any of his campaign staff. The purchase is considered an independent expenditure. If, however, before purchasing the ad, the individual asks candidate Smith or his campaign staff how he may help the campaign or when Smith wants a newspaper ad to appear, the individual makes an in-kind contribution. Or, if the individual buys a campaign advertisement using text actually prepared by Smith's campaign staff, the individual makes an in-kind contribution to the candidate. (An in-kind contribution, when combined with all other contributions from the same individual, is limited to $1,000 per candidate, per election.)

FEDERAL ELECTION COMMISSION, INDEPENDENT EXPENDITURES (1986).
42. FEDERAL ELECTION COMMISSION, CONTRIBUTIONS (1987).
43. 2 U.S.C.A. §§441a(a)(1), (3) (West 1996).
44. A multicandidate committee is a political committee with more than fifty contributors which has been registered for at least six months and, with the exception of State party committees, has made contributions to five or more candidates for Federal office. 11 C.F.R. 100.5(e)(3) (1996).
46. 2 U.S.C.A. §441a(d) (West 1996).
47. The contribution chart above includes only individuals and political committees. Section 441a(d) creates an exception to the contribution and expenditure limitations for political
Contributions and expenditures limitations for political parties are governed by a different provision, which the Court refers to as the "Party Expenditure Provision." Prior to Colorado Republican, political parties were thought to be incapable of making independent expenditures.

III. STATEMENT OF THE CASE

A. Facts

In January 1986, Democratic Congressman Timothy Wirth announced his candidacy for the United States Senate. In April 1986, prior to selecting its senatorial candidate, the Colorado Republican Party’s Federal Campaign Com
mittee\textsuperscript{50} purchased radio advertisements\textsuperscript{51} attacking the likely nominee, Congressman Wirth.\textsuperscript{52} The State Democratic Party complained to the Federal Election Commission\textsuperscript{53} asserting that the Colorado Republican Committee had exceeded its expenditure limits.\textsuperscript{54} In January 1989, the FEC determined that there was probable cause that the Colorado Republican Committee violated the Act.\textsuperscript{55}

B. Procedural History

The FEC brought suit against the Colorado Republican Committee, claiming a violation of the "Party Expenditure Provision" of the Federal Election

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 a 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.

\textit{Id.} at 1451.

\textit{52. Colorado Republican,} 116 S. Ct. at 2312.

\textit{53. The FEC provides instructions for citizens who wish to file complaints. FEDERAL ELECTION COMMISSION, SUPPORTING FEDERAL CANDIDATES: A GUIDE FOR CITIZENS 14 (1994). The complainant must send a letter to the FEC explaining why the law may have been violated, describing the facts, circumstances, names of those responsible, and the source of the information (e.g. personal knowledge, etc.). \textit{Id.} The FEC will send the letter, which must be sworn to, signed and notarized, to the respondents (alleged violators), who have the opportunity to explain. \textit{Id.} The FEC confidentially investigates and considers both sides of the complaint, and notifies the parties once it makes a decision. \textit{Id.} At that point the complaint is made public. \textit{Id.}}

\textit{54. Colorado Republican,} 116 S. Ct. at 2314. The State Democratic Party claimed that the Colorado Republican Committee no longer had a spending balance because it had already assigned it to the National Republican Senatorial Committee. \textit{Id.} The State Democratic Party stated that the Colorado Republican Committee assigned a total of $103,000 of its general election allotment, and as such should have had no additional funds for purchasing the radio advertisements. \textit{Id.} The Colorado Republican Committee appointed a national senatorial committee, and the party had the option of giving the committee as an agent the authority to spend this allotment. \textit{Id.}


\textit{56. Colorado Republican,} 116 S. Ct. at 2314. The Federal Election Campaign Act imposes dollar limits upon political party expenditures in connection with the general election campaign of a congressional candidate. \textit{Id.}

\textit{57. An expenditure is defined by FECA as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal Office." 2 U.S.C.A. §431(9)(A)(I) (West 1996).}

\textit{58. 2 U.S.C.A. §441a(d) (West 1996).}

\textit{59. Colorado Republican,} 116 S. Ct. at 2314.

\textit{60. Id.} In its counterclaim, the Colorado Republican Committee claimed that the entire Party Expenditure Provision was unconstitutional, facially and as applied. Brief of Petitioner
Campaign Act of 1971. The FEC argued that this purchase of radio time was an expenditure "in connection with the general election campaign of a candidate for Federal Office," which exceeded the limits of the Party Expenditure Provision. The Colorado Republican Committee claimed that the expenditure limitations of the Party Expenditure Provision violated the First Amendment.

1. Federal District Court Opinion

The Federal District Court narrowly interpreted the phrase "in connection with the general election campaign of a candidate" Party Expenditure Provision, to mean "only expenditures for advertising using express words of advocacy of election or defeat." As a result, the Federal District Court determined that the Colorado Republican Committee did not violate the Act and granted summary judgment for the Colorado Republican Committee. The Federal District Court determined that the Colorado Republican Committee's counterclaim was moot.

2. The Tenth District Court of Appeals Opinion

Both the FEC and the Colorado Republican Committee appealed the district court's ruling. The FEC argued for a broader interpretation of the provision than that afforded by the Federal District Court. The Tenth Circuit Court of Appeals found that §441a(d)(3) was a "permissible burden on speech." Federal Election Comm'n v. Colorado Republican Federal Campaign Comm., 59 F.3d 1015, 1023 (10th Cir. 1995), vacated 116 S. Ct. 2309 (1996).

63. Id. The Court of Appeals found that §441a(d)(3) was a "permissible burden on speech." Federal Election Comm'n v. Colorado Republican Federal Campaign Comm., 59 F.3d 1015, 1023 (10th Cir. 1995), vacated 116 S. Ct. 2309 (1996).
64. See Federal Election Commission v. Colorado Republican Federal Campaign Committee, 59 F.3d. 1015 (1995). The FEC appealed from the dismissal on the merits of the suit filed against Colorado Republican Committee and its treasurer, Douglas L. Jones. Id. at 1017. The Colorado Republican Committee cross-appealed from the dismissal as moot of its counterclaim challenging the Party Expenditure Provision's constitutionality. Id.
65. Id. at 1021.
66. Id. at 1022. The Court of Appeals found the Party Expenditure Provision applicable to "advertisements containing an electioneering message about a clearly identified candidate," which included the radio advertisement attacking Wirth. Id.
67. Colorado Republican, 116 S. Ct. at 2314.
68. Colorado Republican, 116 S. Ct. at 2314.
69. 116 S. Ct. at 2313.
70. See Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986). The FEC sought to hold a nonprofit corporation, Massachusetts Citizens for Life, Inc., liable under FECA for publishing a newsletter urging readers to vote "pro-life" in an upcoming primary election. Id. at 241. Corporations are prohibited by §441b of FECA from using treasury funds to make an expenditure "in connection with" any federal election, and

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The United States Supreme Court granted certiorari to decide the issue of whether “the Colorado Republican Committee’s argument that the Party Expenditure Provision violates the First Amendment either facially or as applied.”

C. The Supreme Court Decision

1. The Plurality Opinion – Justice Breyer

In a 7-2 decision, the United States Supreme Court held that expenditures by political parties that are made independently—that is, without coordination with a candidate—are protected by the First Amendment.

The Court began its analysis by examining the free speech and association protections provided in the First Amendment. In similar cases, the Court weighed the First Amendment interest in permitting candidates to spend money to advance their political views against a compelling governmental interest in protecting the electoral system from the appearance (and reality) of corruption.

FECA requires that those type of expenditures be made to a separate segregated fund by voluntary contributions. Id. The Court found that the practical effect of the section’s restrictions deterred speech protected by the Constitution. Id. at 256. The compelling state interest, a concern for the “corrosive influence of concentrated corporate wealth,” was found by the Court to be insufficient to justify an infringement on protected speech. Id. at 257-63.

In an opinion delivered by Justice Brennan, the Supreme Court held that (1) the corporation’s acts violated FECA, and (2) that §441b violated the First Amendment as applied. Id. at 241.

In Federal Election Comm’n v. National Conservative Political Action Comm., 470 U.S. 480 (1985), the Supreme Court, in an opinion delivered by Justice Rehnquist, held that §9012(f) of the Presidential Election Campaign Fund Act, which made it a criminal offense for independent political committees to exceed the $1000 expenditure restriction to further the election of a candidate receiving public financing, violated the First Amendment. Id. at 482. The Court found that the speech in this case was protected by the First Amendment. Id. at 496. The Court held that state interest of deterring corruption was not strong enough to pass strict scrutiny. Id. at 500-01; see supra text accompanying notes 31-35.

In California Medical Ass’n v. Federal Election Comm’n, 453 U.S. 182 (1981), the Supreme Court upheld the constitutionality of a section of FECA that restricted contributions made to political action committees. Id. at 184-85. Section 441a(a)(1)(C) prohibited contributions of more than $5000 per year to a political action committee from individuals or unincorporated associations. Id. at 185. The Court found that these restrictions did not violate the First Amendment because the speech in this case was not being made by the contributor. Id. at 197. The governmental interest of preventing political corruption was found to be sufficient. Id. at 197-98; see also supra text accompanying notes 29-31; Buckley v. Valeo, 424 U.S. 1 (1976).

71. FECA defines an independent expenditure as “an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.” 2 U.S.C.A. §431(17) (West 1996).

72. Colorado Republican, 116 S. Ct. at 2313. FECA defines a contribution to include “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal Office.” 2 U.S.C.A. §431(8)(A)(I) (West 1996). Section 441a(a) limits contributions and expenditures, and states in relevant part:
The Court found that while some restrictions were permissible, others were not. FECA provisions were found to be unconstitutional when they limited the right of individuals and political committees to designate those expenditures not coordinated with a candidate or a candidate's campaign as "independent." Precedent held other FECA provisions constitutional that imposed contribution limits when; 1) an individual or political committee contributed money "directly" to a candidate, and 2) when they contributed "indirectly" by making expenditures that they coordinated with the candidate.

Additionally, the Court rejected the government's argument that the expenditure was a "coordinated expenditure," which was treated by the Court as

(1) No person shall make contributions--

   (A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000;

   (B) to the political committees established and maintained by a national political party, which are not the authorized political committees or any candidate, in any calendar year which, in the aggregate, exceed $20,000; or

   (C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(2) No multicandidate political committee shall make contributions--

   (A) to any candidate and his authorized political committees with respect to any election to Federal office which, in the aggregate, exceed $5,000;

   (B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or

   (C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) No individual shall make contributions aggregating more than $25,000 in any calendar year.

2 U.S.C. §441a(a); see supra notes 31-35 and accompanying chart.

73. 116 S. Ct. at 2317-18.

74. Id. at 2315. In deciding that the expenditure was independent, the Court examined the summary judgment record and found no actual coordination with the candidate as a matter of fact. Id. The Colorado Republican Committee's Chairman claimed that the party had not selected a nominee at the time of the expenditure, and at his own initiative, he developed the radio advertisement. Id. The Court found that the Colorado Republican Committee acted independently and as such, the expenditure would be treated not as an indirect campaign contribution, but as an "independent" expenditure. Id. The Court rejected the Government's argument that all party expenditures were coordinated. Id.

The Colorado Republican Court relied on the Buckley determination that limits on independent expenditures do not serve any substantial government interest in respect to corruption, and as such, the First Amendment freedom of expression was heavily burdened. Id. Buckley stated:
a contribution that Congress may regulate. The Court held that the political party's expenditure was made independently, without coordination with any candidate, and as such, it was protected by the First Amendment. Because of this finding, the Court did not address the question of whether the provision as a whole was unconstitutional facially or as applied.

2. Justice Kennedy, Concurring in the Judgment and Dissenting in Part

Although Justice Kennedy concurred in the judgment, he claimed that the provision dealt with political speech and was protected by the First Amendment. He concluded that the provision should be struck down as facially unconstitutional.

For the First Amendment right to "speak one's mind... on all public institutions' includes the right to engage in 'vigorous advocacy' no less than 'abstract discussion.'" Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.


Justice Kennedy stated that the Colorado Republican Committee had preserved its claim that the FECA limitations violated the First Amendment both on its face and as applied by the FEC. He concluded that when FECA restricts a political party's spending in "cooperation, consultation, or concert,... a candidate" as a "contribution," then FECA violates the First Amendment on its face. Justice Kennedy argued that the above form of party spending is in substance, no different than the expenditures made by a candidate or his campaign committee. He stated that because the First Amendment does not permit regulation of expenditures made by a candidate or his campaign committees, the First Amendment should also not permit regulation of party spending "in cooperation, consultation, or in concert with... a candidate." Justice Thomas was of the opinion that the Court's reasons for not reaching the Colorado Republican Committee's facial challenge to addressing the constitutionality of limits on political party coordinated expenditures were unpersuasive. In addition, he stated that another reason to address the question is a concern for the chilling of First Amendment rights.
3. Justice Thomas, Concurring in the Judgment and Dissenting in Part

Like Justice Kennedy, Justice Thomas also concurred in the judgment. Justice Thomas argued that the provision at issue was protected by the First Amendment because it was political speech. He rejected the Buckley framework and held that “§441a(d)(3)’s limits on independent and coordinated expenditures fail strict scrutiny.” He argued that the provision could not stand even under the Buckley framework, because “the anticorruption rationale that we have relied upon in sustaining other campaign finance laws is inapplicable where political parties are the subject of such regulation.” He stated that not addressing the validity of the provision’s regulation would “inhibit the exercise of legitimate First Amendment activity nationwide.”

4. Justice Stevens — The Dissenting Opinion

Justice Stevens stated that “all money spent by a political party to secure the election of its candidate for the office of United States Senator should be considered a ‘contribution’ to his or her campaign.” Justice Stevens recommended that any questions concerning limits on campaign spending should be

89. Once deciding that the expenditure at issue was an independent expenditure, the Court rejected the broader constitutional question posed by the Colorado Republican Committee of whether the expenditure provision as a whole was unconstitutional on its face and as applied. Colorado Republican, 116 S. Ct. at 2320-21; see supra note 75 and accompanying text. Among the reasons not to address the facial or as applied challenge, Justice Breyer claimed that the Colorado Republican Committee failed to focus specifically on coordinated expenditures in its challenge and that the issue was complex. Id. at 2320. He noted that in the provision’s 20-year history, this is the first case to claim that coordinated expenditures by political parties are protected by the First Amendment. Id. Justice Breyer also stated that addressing the facial challenge in this case would seem inconsistent with this Court’s view that it is ordinarily “inappropriate for us to reexamine” prior precedent ‘without the benefit of the parties’ briefing,” since the “principles that animate our policy of stare decisis caution against overruling a longstanding precedent on a theory not argued by the parties.”

Id. at 2321 (quoting United States v. International Business Machines Corp., 116 S.Ct. 1793, 1800, 1801 (1996)). He also noted that Congress’ intent was not considered by the lower courts or the parties. Id.

90. If the Court did not recognize that political parties could make independent expenditures, then all political party expenditures would be considered coordinated. Since coordinated expenditures could be restricted without violating the First Amendment, the Colorado Republican Committee would be in violation of the Party Expenditure Provision. Once making that determination, the Court would then have to address the Colorado Republican Committee’s constitutional question. In a practical sense, by allowing political parties to have independent expenditures, the Court did not have to strike down the entire provision. The result is that some expenditures (coordinated) can still be regulated while others (independent expenditures) are unlimited. Otherwise, all expenditures for political parties would be unlimited. See Renne v. Geary, 501 U.S. 312, 324 (1991) (holding that the Court should first determine as applied challenges before considering a facial challenges).

91. When the Buckley Court examined both the potential for corruption and the First Amendment interests at issue it determined that:
deferred to the wisdom and experience of Congress. 84

IV. ANALYSIS

A. The Effect of the Court's Decision in Colorado Republican

1. Political Parties May Make Independent Expenditures

Before the Colorado Republican decision, FECA forbid political party committees from making independent expenditures. 85 The presumption was that all party expenditures were coordinated and were therefore restricted. 86 The Supreme Court now recognizes that political parties can make unlimited independent expenditures. 87 Critics of this decision believe that this has created a loophole that serves to undermine the goals of FECA. 88

2. The Court's Failure to Address the Constitutionality of the Party Expenditure Provision

The Court failed to address the Colorado Republican Committee's attack on the constitutionality of §441a(d) because it found that a political party's independent expenditures did not violate FECA. 89 Perhaps the Court's reluctance to address this question is an indication that some members of the Court are not anxious to gut effective legislation. 90

a. The Distinction Between Contributions, Coordinated Expenditures and Independent Expenditures

Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.


92. In Colorado Republican, Justice Thomas concluded that the Buckley framework should be rejected because there is constitutionally no significant difference between campaign contributions and expenditures. Colorado Republican, 116 S. Ct. at 2325. Justice Thomas quoted Chief Justice Burger in Buckley stating, "contributions and expenditures are two sides of the same First Amendment coin." 93 Id. (quoting Buckley, 424 U.S. at 241). Justice Thomas further argued that:

Whether an individual donates money to a candidate or group who will use it to promote the candidate or whether the individual spends the money to promote the candidate himself, the individual seeks to engage in political expression and to associate with likeminded persons. A contribution is simply an indirect expenditure.

Id. at 2327. Justice Thomas noted that the only significant difference is that in the case of contributions, the money passes through an intermediary, such as an individual or entity. 94 Id.

Similarly, in Buckley, Justice White expressed bewilderment at the distinction made between a contributor's donating money to a candidate and independently spending money to support a candidate. Buckley, 424 U.S. at 261. Furthermore, he was offended by the loophole that this distinction created. 95 Id. Justice White stated:

It would make little sense to me, and apparently made none to Congress, to limit the amounts an individual may give to a candidate or spend with his approval but fail to
The result in *Colorado Republican* was facilitated by the distinction made between expenditures and contributions, that was first introduced by the court in *Buckley v. Valeo*.\(^91\) This distinction was not completely embraced by the Court in *Colorado Republican*\(^92\) nor was it totally embraced in *Buckley*.\(^93\) Critics of the *Buckley* framework feel that this twenty year old case should be overturned.\(^94\)

In *Colorado Republican*, because the Court could determine that a party committee can make independent expenditures, it chose not to address whether a party’s coordinated expenditures could be limited under the Constitution.\(^95\) While this distinction protects independent expenditures, it creates a giant loophole for a candidate’s financial supporters.\(^96\)

*Id.* (White, J., concurring in part, dissenting in part). Justice White, unlike Justice Thomas, did not believe that the spending of money was speech, and hence, the contribution and expenditure limits were constitutional. *Id.*

93. In his dissent, Chief Justice Burger argued that the *Buckley* holding undermined the intent of Congress which was “to regulate all aspects of federal campaign finance.” *Id.* at 236.


96. In theory, when someone can circumvent the contribution limitations with their right to unlimited independent expenditures, there is no restriction at all. *Federal Election Comm’n v. National Conservative Political Action Comm.*, 470 U.S. 480, 518 (1985)(White, J., dissenting). These expenditures can render FECA almost ineffective. *Id.* “By striking down one portion of an integrated and comprehensive statute, the Court has once again transformed a coherent regulatory scheme into a nonsensical, loophole-ridden patchwork. As the Chief Justice pointed out with regard to the similar outcome in *Buckley*, ‘by dissecting the Act bit-by-bit, and casting off vital parts, the Court fails to recognize that the whole of this Act is greater than the sum of its parts.’” *Id.* (quoting *Buckley*, 424 U.S. at 235).

97. Ironically, although the *Buckley* Court used anticorruption rationale to strike down limits on independent expenditures, it later rejected this rationale in order to uphold limits on contributions and coordinated expenditures. *Buckley*, 424 U.S. at 241 (Burger, C.J., dissenting).

98. Once it has been determined that First Amendment rights have been burdened by a statutory provision, the Court has held that “it must be justified by a compelling state interest.” *Federal Election Comm’n v. Massachusetts Citizens for Life*, 479 U.S. 238, 256 (1986). *See also* William v. Rhodes, 393 U.S. 23, 31 (1968); *NAACP v. Button*, 371 U.S. 415, 438 (1963). *Federal Election Comm’n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985); *see also* Citizens Against Rent Control v. City of Berkley, 454 U.S.
b. The Compelling Government Interest

The Court upheld independent expenditures for political parties because it applied a different weight to the same compelling government interest that it applied to contributions and coordinated expenditures. The Court has consistently held that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests identified for restricting government finance. Since independent expenditures were decided to have a higher value of speech than contributions, this compelling government interest was insufficient to justify limits for independent expenditures.


99. In striking down limits on independent expenditures, the anticorruption rationale is sufficient, whereas with contributions, it is not enough. Colorado Republican, 116 S. Ct. at 2322. In his opinion, Justice Kennedy reiterated the Buckley conclusion that only marginal restrictions were imposed on a contributor's First Amendment rights when contributions are limited. Id. The Court in Buckley stated:

A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quality of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

*Buckley*, 424 U.S. at 21. In contrast, limits on independent expenditures were found to be heavily burden First Amendment interests. *Id.*

100. See opinion of Justices Thomas and Kennedy. *See supra* notes 76-80.

101. See Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 257 (1986) ("This concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas .... [D]irect corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace."); Federal Election Comm'n v. National Right to Work Comm., 459 U.S. at 209-10 (1982) ("The special characteristics of the corporate structure require particularly careful regulation.").

102. Buckley, 424 U.S. at 25; *see also* Colorado Republican, 116 S. Ct. at 2312.

103. "Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *Massachusetts Citizens for Life*, 479 U.S. at 265.

104. Colorado Republican, 116 S. Ct. at 2331. Surviving strict scrutiny demands that the state interest be compelling and narrowly tailored. *Id.* at 2328. It is well settled that the anticorruption rationale is the only legitimate and compelling state in this context, but as
c. Is The Party Expenditure Provision Constitutional?

Had the Court in Colorado Republican applied strict scrutiny to the Party Expenditure Provision, the Court would have probably found it unconstitutional.\textsuperscript{100} In this case, the anticorruption rationale would not apply to a political party, where the goal is to deter the corrosive influence of wealthy corporations.\textsuperscript{101}

Without the corruption argument, the only interest remaining to restrict a political party's spending is to reduce campaign costs to level the political playing field.\textsuperscript{102} The Court has found that this interest does not justify the infringement of protected speech, and as such the Party Expenditure Provision would fail

Justice Thomas argues, this argument does not apply to political parties. \textit{Id.} at 2323. As a result, the First Amendment protection of free speech would prevail. \textit{Id.} In order to apply strict scrutiny to the Party Expenditure Provision, the Court would have to find that speech was being restricted. Although it is well settled that political campaign contributions are speech, many have argued that money is not speech. Justice White has argued that “money is not always equivalent to or used for speech, even in the context of campaigns.” \textit{Buckley}, 424 U.S. at 263.

105. See \textit{supra} text accompanying notes 73-83.


107. \textit{Id.} at 2319. Four out of nine Justices agreed that the constitutionality of the provision should have been addressed. Justice Kennedy wrote a separate opinion, concurring in judgment but dissenting in part. \textit{Id.} at 2321-23. He argued that the question of whether the provision was constitutional on its face and as applied was before the Court and should have been addressed. \textit{Id.} at 2321. Justice Thomas also wrote a separate opinion, concurring in judgment and dissenting in part. \textit{Id.} at 2323-31. He argued that it was important to reach the facial challenge in order to clarify the rights of political parties. \textit{Id.} at 2323. Chief Justice Rhenquist and Justice Scalia joined both the opinions of Justices Kennedy and Thomas. See \textit{supra} text accompanying notes 76-81.

108. Justice Stevens and Justice Ginsberg did not concur in the judgment. See \textit{supra} text accompanying notes 82-83.

109. \textit{Id.} at 2325.

110. See J. Skelly Wright, \textit{Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?}, 82 COLUM. L. REV. 609, 643 (1982) (suggesting that the best remedy for enhancing freedom of expression and equality “would be public financing of political campaigns for the House and Senate.”). “Public financing may constitutionally be accompanied by limits on spending and contributions.” \textit{Id.} See also Jamin Raskin \& John Bonifaz, \textit{The Constitutional Imperative and Practical Superiority of Democratically Financed Elections}, 94 COLUM. L. REV. 1160 (1994) (challenging the conventional assumption that private financing of public election campaigns is consistent with the requirements of American constitutional democracy). The authors “propose a replacement for this system in the federal context: total public financing of congressional campaigns.” \textit{Id.}

111. See David J. Weidman, Comment, \textit{The Real Truth About Federal Campaign Finance: Rejecting the Hysterical Call for Publicly Financed Congressional Campaigns}. 63 TENN. L. REV. 775 (1996). “The very idea of financing congressional elections with taxpayer dollars is absurd in light of the fact that the United States currently has a debt of $4.9 trillion, a 1994 budget deficit of $203 billion, and a budget crisis that shut down the federal government for several weeks in . . . 1995.” \textit{Id.} at 781-82. Weidman proposes that changing the regulatory

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strict scrutiny. Justice Thomas argued that if the appropriate strict scrutiny test was applied to the provision it would fail because “FECA’s monetary caps fail the narrow tailoring test.”

B. The Contrasting Views in Colorado Republican

The distinct views that emerged from this case demonstrate the controversy surrounding campaign contributions. Although seven Justices concurred in the judgment, only three comprised the plurality opinion. Four Justices held the constitutionality of the provision should have been addressed, and three of those four concurred that the Buckley framework should have been rejected altogether. The two dissenters held that the government interests were sufficient to uphold the provision as constitutional, and that further questions regarding the limits should be deferred to Congress.

Not addressing the constitutional issue in Colorado Republican leaves “political parties in a state of uncertainty about the types of First Amendment expression in which they are free to engage.” While some would argue that a political system with publicly financed campaigns would eliminate the questions surrounding the constitutionality of contribution limits, others would prefer a complete reform of the current system or no system at all. In this case, perhaps the Court deferred to other powers through constitutional compromise.

V. CONCLUSION

As a result of Colorado Republican Federal Campaign Committee v. Federal Election Commission, independent expenditures by political parties con-
continue to enjoy protection under the First Amendment.\textsuperscript{113} The Court rejected its first opportunity to address the constitutionality of limits on coordinated expenditures for political parties, and the framework created in the landmark case of \textit{Buckley v. Valeo} is still intact.\textsuperscript{114} Perhaps what may appear on the surface as a rejection of the facial challenge, may in reality be only a compromise to preserve what remains of FECA.\textsuperscript{115}

The dissimilar views emerging from the \textit{Colorado Republican} case, \textit{Buckley}, and its progeny, demonstrate the controversy behind monetary limits for campaign contributions and expenditures. But this issue has not been resolved.\textsuperscript{116} With the question of whether limits on coordinated expenditures for political parties are constitutional lingering on the horizon, a \textit{Colorado Republican}-type case will most likely come before the United States Supreme Court again.

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