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# FOR THE SPEAKER, BUT AGAINST THE FIRST AMENDMENT\*

Kenneth J. Levitt†

Although the Supreme Court takes cases sparingly, this past Term the Court took five First Amendment cases. Remarkably, the result is that this Court has muddied the water of First Amendment jurisprudence more than it has clarified it. One needs graph paper to chart the different opinions, determine where the Court's holdings are, and track which Justices concur and dissent. It is a very fragmented Court, and in almost all of the cases, even those that are nearly unanimous in result, there are several opinions with competing impulses.

To begin with, and to put these cases into context, it is important to summon the governing paradigm envisioned when one considers political speech and the First Amendment. The vision that most have and, I submit, the vision which still guides the Court, is that of the "soapbox speaker" standing on the street corner and making his or her political views known in the face of government efforts to censor or suppress that speech. That is the "tradition" out of which these First Amendment cases arise. However, it is necessary to keep in mind who petitioners are in these cases; a cable consortium,<sup>1</sup> a State Republican Party,<sup>2</sup> the liquor industry<sup>3</sup> and independent contractors who have commercial interests with the government.<sup>4</sup> So, in the words of one renowned First Amendment scholar, in many ways, we have moved from the arena of the soapbox speaker to CBS.<sup>5</sup> The advocates of free speech are now some of the more powerful political actors in society, not figures at the fringes of American political debate and culture.

Consistent with this First Amendment tradition, the Court usually views the State as the enemy of the First Amendment—the foe of free speech, sinister in its efforts to regulate expression. It is that tradition which has inhibited legis-

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1. See *Denver Area Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996).

2. See *Colorado Republican Federal Campaign Comm. v. FEC*, 116 S. Ct. 2309 (1996).

3. See *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996).

4. See *Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342 (1996); *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S. Ct. 2353 (1996).

5. See Owen M. Fiss, Essay, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1410 (1986).

lative efforts to regulate larger, more powerful interests in the name of free speech. The idea that the State and the State's efforts to regulate could be a friend of the First Amendment and free speech is foreign to the Supreme Court. While reformers advocate the use of law to promote speech and strengthen the voice of the disenfranchised in order to promote a more inclusive and robust democratic debate, their view has largely been rejected by this Court.

I. CHIPPING AWAY AT CAMPAIGN REFORM—UNLIMITED SPENDING  
IN THE NAME OF THE FIRST AMENDMENT

In *Colorado Republican Federal Campaign Committee v. FEC*,<sup>6</sup> the Court struck down the "Party Expenditure Provision" of the Federal Election Campaign Act,<sup>7</sup> which imposed a dollar limit on expenditures made in connection with the general election campaign of a congressional candidate. The *Colorado Republican* case arose after the 1984 Colorado Senate elections in which Tim Wirth was ultimately elected to the Senate.<sup>8</sup> Before the nominations of either party took place, the Republican Party of Colorado spent \$15,000 on attack ads against Tim Wirth.<sup>9</sup> Under the Federal Election Campaign Act, the Republican Party of Colorado could only spend \$103,000 in any congressional election, an amount based on an apportionment formula provided in the statute. The Republican Party of Colorado had assigned its allotted \$103,000 to the national Republican Party, so its account balance was zero. However, the state party spent an additional \$15,000 on the attack ads against Wirth.<sup>10</sup> The Federal Election Commission took the case to court, saying that the expenditure for the Republican Party of Colorado was a violation of the Act's limits on party expenditures.<sup>11</sup>

The district court read the statutory provision in the Federal Election Campaign Act very narrowly and found that this expenditure really was not in connection with a Congressional election because it was made before the candidates had been nominated.<sup>12</sup> Therefore, the district court held that the spending limit provision did not apply.<sup>13</sup> The Tenth Circuit reversed and held that the expenditure was in connection with a congressional campaign, and that the \$15,000 expenditure was therefore over the limit.<sup>14</sup> On review, the Supreme Court in a very fragmented holding held that the FECA provision was unconsti-

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6. 116 S. Ct. 2309 (1996).

7. 2 U.S.C. § 441a(d)(3) (1994).

8. See *Colorado Republican*, 116 S. Ct. at 2314.

9. See *id.*

10. See *id.*

11. See *id.*

12. See *FEC v. Colorado Republican Federal Campaign Comm.*, 839 F. Supp. 1448, 1455-56 (D. Colo. 1993).

13. See *id.* at 1457.

14. See *FEC v. Colorado Republican Federal Campaign Comm.*, 59 F.3d 1015, 1022 (10th Cir. 1995).

tutional *as applied*.<sup>15</sup> Moreover, a large part of the Court went on to say that the FECA provision at issue is unconstitutional *on its face*.<sup>16</sup>

In assessing the *Colorado Republican* case, it is crucial to step back and review an earlier decision that sets the stage for this opinion. *Buckley v. Valeo*<sup>17</sup> is the nine-hundred pound gorilla of all campaign finance jurisprudence. The case arose in the wake of the Watergate scandal and the passage of the Federal Election Campaign Act Amendments of 1974. The Court dissected much of that Act in the extensive *Buckley* opinion. The Court there distinguished contribution limits from expenditure limits, and held that Congressional regulation of contributions to candidates is permissible and constitutional.<sup>18</sup> The Court concluded that contribution limits do not significantly limit free speech rights, even if one wants to contribute more than the Congressionally mandated limit to a candidate.<sup>19</sup> Because of *Buckley*, for instance, when one contributes to a congressional candidate, one cannot contribute over \$1,000 in either a primary or general election campaign under current law.

On the other hand, in *Buckley* the Court struck down the other half of what the Federal Election Campaign Act was all about—expenditure limitations. There is no constitutional way, according to *Buckley*, to limit the overall expenditures of a congressional candidate or political action committee. So, if a senatorial candidate wants to spend ten million dollars in Oklahoma, that candidate can do it, and it is unconstitutional to limit such an expenditure. The rationale for the distinction, according to the Court, was that the only constitutional justification for limiting contributions or expenditures would be to prohibit bribery. In short, only *quid pro quo* corruption can be regulated.<sup>20</sup> The *Buckley* Court did not see much of a nexus between limiting expenditures and the legislative objective of prohibiting bribery or *quid pro quo* corruption; therefore, any limit on how much a candidate can spend in an election is unacceptable, even if that limit is placed at a level that would enable extraordinary amounts to be expended.<sup>21</sup>

If that distinction and rationale is confusing or unconvincing, it very well should be. It has been assailed by commentators across the spectrum. It also comes under strong attack in *Colorado Republican* by Justice Thomas in his dissent.<sup>22</sup> Nonetheless, the decision by the Court in *Colorado Republican* adheres to *Buckley's* contribution/expenditure distinction. Writing for the Court, Justice Breyer noted that the \$15,000 in radio ads spent by the Colorado Republican Campaign Committee was not related to any specific candidate and

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15. See *Colorado Republican Federal Campaign Comm. v. FEC*, 116 S. Ct. 2309, 2314 (1996).

16. See *Colorado Republican*, 116 S. Ct. at 2321 (Kennedy, J., concurring in part and dissenting in part); *id.* at 2323 (Thomas, J., concurring in part and dissenting in part).

17. 424 U.S. 1 (1976).

18. See *Buckley*, 424 U.S. at 58-59.

19. See *id.* at 29.

20. See *id.* at 45.

21. See *id.* at 46-47.

22. See *Colorado Republican*, 116 S. Ct. at 2323 (Thomas, J., concurring in part and dissenting in part).

was therefore not comparable to a contribution.<sup>23</sup> The disbursement was made before the primaries and was not made in conjunction with any advertising strategy by a specific candidate.<sup>24</sup> The Republican Party, according to the Court, acted alone. Monies spent were not coordinated and, thus, were unlike a contribution. Instead, the Party's actions were considered more closely analogous to an expenditure and expenditures, as the Court held in *Buckley*, cannot be limited.<sup>25</sup>

This leaves open a question for Justices O'Connor, Souter and Breyer; had there been coordination with the Republican nominee to attack Tim Wirth, would that contribution be illegal under *Buckley*? Clearly, the majority would be forced to find that such coordination would be illegal and in that context would have upheld the constitutionality of the FECA provision. Justices Kennedy, Scalia and Rehnquist go much further in their concurrence and hold that the entire effort to restrict political spending by political parties is unconstitutional.<sup>26</sup> In their view, there is no corruption problem when political parties are involved. If a party wants to go out and spend all its money at once in favor of a candidate, that is not bribery—that is what political parties are supposed to do. The parties should get their ideas and visions out to the public.<sup>27</sup> Moreover, parties and candidates are essentially interchangeable because they share an identity of interest.<sup>28</sup> Since these concurring justices believe parties have no improper access to candidates, they would go further and strike down the entire party limit provision of the 1974 Federal Election Campaign Act.<sup>29</sup>

The most striking opinion of *Colorado Republican* is the dissent by Justice Thomas, an opinion joined only in parts by Justice Scalia and Chief Justice Rehnquist. In a remarkably dynamic and aggressive opinion, he summons *Buckley* before him and rejects the entire distinction between contributions and expenditures.<sup>30</sup> While acknowledging that the validity of *Buckley* was not before the Court, Justice Thomas argued the weaknesses of that framework were so appalling that he would strike down as unconstitutional all limits, of any kind, either on contribution or expenditure amounts.<sup>31</sup>

On one hand, the reformers of political campaigns and elections should be elated by Justice Thomas' opinion, since most people in the reform camp find much fault in the *Buckley* distinction between contributions and expenditures. On the other hand, Justice Thomas would hold all limitations unconstitutional—whether related to contributions or expenditures. Had Justice Thomas prevailed and the Court reversed the First Amendment doctrine related to campaign spending according to his theory, there would be no limits at all on political

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23. See *id.* at 2315.

24. See *id.*

25. See *id.*

26. See *id.* at 2321 (Kennedy, J., concurring in part and dissenting in part).

27. See *id.* at 2322.

28. See *id.* at 2323.

29. See *id.*

30. See *id.* (Thomas, J., concurring in part and dissenting in part).

31. See *id.*

contributions—an area where even current First Amendment jurisprudence allows regulation. One would, for example be able to contribute \$100,000 to whomever one wanted in a federal election, and the risk of corruption would not be a justifiable reason to preclude such a contribution. Expenditure limits would also remain unconstitutional. Thus, the First Amendment, according to Justice Thomas, requires a world of unfettered political contributions and expenditures limited only by bribery and disclosure laws, not by any additional regime of campaign finance regulations.

The final opinion in *Colorado Republican* is a dissent written by Justice Stevens and joined by Justice Ginsburg. Although this opinion does not devote much time to criticizing *Buckley*, these justices would view reasonable restrictions on both contributions and expenditures as constitutional.<sup>32</sup> In his dissent, Justice Stevens writes, “[I] believe that the government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns.”<sup>33</sup> The logical consequence of the argument endorsed by Justices Stevens and Ginsburg is that they would vote to overturn *Buckley* but, unlike Justice Thomas, would hold as constitutional limits on both contributions and expenditures.

In view of the several opinions and the holding in *Colorado Republican*, *Buckley* comes out bruised but not unbowed. With regard to the potential for electoral reform of campaign finance laws, one should expect that Congress will not be able to get much further than stricter contribution limits, enhanced disclosure obligations, and restrictions on foreign contributions. Nonetheless, overall reform will be stymied by the holding in *Colorado Republican*. If one wants to prohibit special interests from giving millions of dollars to political parties in the next election cycle—as was done by special interest groups like the investment-securities industry, the trial lawyers, and the tobacco lobby in 1996—those sorts of abuses will be very difficult to address under the *Colorado Republican* framework, as it places severe constraints on reform in the name of the First Amendment.

## II. PROTECTING THE SPEECH RIGHTS OF GOVERNMENT CONTRACTORS

Of all the First Amendment cases decided last term, the government contractor cases most closely fit into the traditional framework of First Amendment jurisprudence. These cases provide added protection for those government contractors who are threatened with economic punishment due to their political views during the pendency of their contracts. The question raised by these cases is: Can the state terminate a contractual relationship with government contractors as a result of their speech?

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32. See *id.* at 2332 (Stevens and Ginsburg, J.J., dissenting).

33. *Id.*

In *Board of County Commissioners v. Umbehr*,<sup>34</sup> the Court (as had the County) faced the problem of an outspoken trash hauler who directed much of his critical energies to the county for which he performed work. The trash hauler was constantly criticizing the county commissioners, and the commissioners eventually decided that they had had enough of the trash hauler and terminated his contract entirely. Similarly, in *O'Hare Truck Service, Inc. v. City of Northlake*,<sup>35</sup> a tow truck operator had been dropped from the rotation list for towing cars for the city because he supported the Mayor's opponent in the preceding election.

The Court was faced in these cases with the issue of whether or not to extend the protection that public employees have historically enjoyed from coercion based on speech to the independent contractor relationship. Although Justice Holmes wrote that "a policeman may have a constitutional right to talk politics but . . . has no constitutional right to be a policeman,"<sup>36</sup> that strict resistance to the possibility that a constitutional right can be deprived through economic coercion has largely been rejected. Under the theory known as the unconstitutional conditions doctrine, the long standing position of the Supreme Court is that a public employee's job may not be conditioned on a surrender of his or her right to speak out as a citizen.<sup>37</sup>

The public contractor cases breathe added life into the doctrine of unconstitutional conditions and hold that the First Amendment protects independent contractors from termination in retaliation for their exercise of free speech.<sup>38</sup> The Court employed traditional balancing analysis by weighing the free speech interest against the state's interest and came to the conclusion that the balancing result is the same whether the individual punished for speech is a public employee or a government contractor.<sup>39</sup> Although the result of the balancing test is the same in either situation, the respective weights that are used are materially different. On one hand, the independent contractor should not have the same right to speak as a public employee because if the independent contractor loses her contract, she can probably make it up somewhere else and get other work. Therefore, the individualized speech interest is diminished for a government contractor as compared to a public employee. However, the risk that the individual's speech will be ascribed to the State is diminished if the speaker is a government contractor. Thus, both the interests of the speaker and the State are reduced in the government contractor context, leading the Court to treat their situations equally for First Amendment purposes.

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34. 116 S. Ct. 2342 (1996).

35. 116 S. Ct. 2353 (1996).

36. See *Umbehr*, 116 S. Ct. at 2347 (citing *McAuliffe v. Mayor of New Bedford*, 55 Mass. 216, 220, 29 N.E. 517 (1892)).

37. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (government "may not deny a benefit . . . on a basis that infringes constitutionally protected freedom of speech.").

38. See *Umbehr*, 116 S. Ct. at 2352; *O'Hare*, 116 S. Ct. at 2355.

39. See *Umbehr*, 116 S. Ct. at 2349; *O'Hare*, 116 S. Ct. at 2357.

The main drawback of the contractor cases is that they do not offer a bright line rule and will spawn much litigation. Any person or company who loses a government contract is immediately going to scream that they are being punished for their exercise of free speech. This concern in its most heightened form, however, is somewhat overblown since the cases do not apply to those who bid for government work, but only to those independent contractors whose preexisting government contracts are revoked.

A major point of interest in this line of cases is clearly the dissent by Justice Scalia, joined only by Justice Thomas. Scalia is practically worked up into a frenzy by the Court's holdings in *Umbehr* and *O'Hare*. While his logic is largely sound and persuasive, his virulent tone and strident attacks are noteworthy. First, Justice Scalia argues that the United States has a long tradition of political patronage, and a political figure should be able to fire those people who do not support him.<sup>40</sup> Second, Scalia argues that it might be good government to have patronage. People are more loyal, and there are related efficiency attributes to patronage.<sup>41</sup> Furthermore, there are other laws that protect against patronage, such as government contracting bidding regulations and anti-bribery laws.<sup>42</sup> Finally, he notes that sometimes a person's political views should play a role in determining the contracts into which the State will enter. For instance, Justice Scalia asked whether a white racist group should be given a contract to provide security services at a low-income housing unit. Scalia points out that political views sometimes ought to matter with respect to government contracts, and the courts should not pretend otherwise.<sup>43</sup>

In criticizing the majority, Justice Scalia does not limit his attack to his differences about this particular opinion. He directs the attack to his fellow justices on a personal level and on to a broader front. He writes, "One logical proposition detached from history leads to another until the Court produced a result that bears no resemblance to the America that we know."<sup>44</sup> Later in the opinion, he writes, "The Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize."<sup>45</sup> These statements shed light into the divided, volatile dynamic of this Court, particularly when it comes to the First Amendment.

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40. See *Board of County Comm'rs v. Umbehr and O'Hare Truck Serv., Inc. v. City of Northlake*, 116 S. Ct. 2361, 2362 (1996) (Scalia and Thomas, J.J., dissenting).

41. See *id.* at 2363.

42. See *id.* at 2364-66.

43. See *id.* at 2368.

44. *Id.* at 2366.

45. *Id.* at 2373.



### III. CONCLUSION

While the Court is divided in the manner in which it analyzed the various First Amendment problems posed last term, it appears to be largely united by a strong hostility against government regulation even when that reform would arguably enhance public debate. In this Court's view, the State cannot be the friend of speech; it is destined to serve as foe. Until the evidence can sway the majority of the Court otherwise, this interpretation of the First Amendment will frustrate the meaningful campaign finance reform the body politic seems to need and want. Moreover, as the government contractor cases reveal, this Court is not driven by consensus, and clarity in First Amendment doctrine will surely prove ever more elusive.