Colorado Republican Federal Campaign Committee v. Federal Election Commission: A Court Divided--One Opinion Properly Subjects Campaign Finance Jurisprudence to a Reality Check

Lisa Gordon

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/1839

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
Comment

Colorado Republican Federal Campaign Committee v. Federal Election Commission: A Court Divided—One Opinion Properly Subjects Campaign Finance Jurisprudence to a Reality Check

Lisa Gordon*

In January 1986, Democratic Congressman Timothy Wirth announced his candidacy for the U.S. Senate. Before Wirth secured the Democratic Party's nomination, a series of negative campaign advertisements directed at Wirth flooded the radio. The advertisements accused him of misrepresenting his stand on balanced budget and defense spending issues. Although the Republican nominee had yet to be determined, the Colorado Republican Federal Campaign Committee (CRFCC) paid for the advertisements. The Democratic party filed a complaint with the Federal Election Commission (FEC), alleging that the CRFCC advertisement "was an 'expenditure in connection with' a candidate for federal office in violation of the spending limits set out in [Federal Election Campaign Act] § 441a(d)(3)." The FEC filed suit alleging that the CRFCC failed to report the expenditure made on the Wirth advertisements, thereby violating FECA's party expenditure provision. The CRFCC responded by claiming the FECA provisions violated the First Amendment.

---

* J.D. Candidate 1998, University of Minnesota Law School; B.A. 1994, University of California, Davis.
2. Id. at 1018.
3. Id. at 1018 n.1. The Colorado Republican Federal Campaign Commission spent $15,000 on radio advertisements directed at Mr. Wirth. Id. at 1018.
4. Id.
5. Id. The Federal Election Campaign Act is referred to as FECA, 2 U.S.C. § 441a (1994).
6. Colorado Republican Fed. Campaign Comm., 59 F.3d at 1018. The
The Federal District Court for the District of Colorado held that the provision did not cover the advertisement because the advertisement did not expressly advocate a particular candidate, and granted summary judgment for the CRFCC. The United States Court of Appeals for the Tenth Circuit reversed, finding that the provision encompassed more than just a political party's express advocacy and that the provision was constitutional as applied. The United States Supreme Court reversed, holding that the FECA provisions violated the First Amendment because they restricted a political party's ability to make independent expenditures. There was no majority opinion, and the plurality opinion's differing approaches leave lower courts with no direction on the type of analysis to perform when analyzing campaign finance legislation.

FECA political party provision restricts the amount political parties can spend during a federal election. \textit{Id.} at 1018-19.

7. \textit{Id.} at 1018. The CRFCC alleged that the FECA restrictions were unconstitutional as applied to political party independent expenditures, and also alleged that the entire FECA political party provision was unconstitutional. \textit{Id.} at 1023-24.


9. \textit{Colorado Republican Fed. Campaign Comm.}, 59 F.3d at 1023-24. The court of appeals found that "political parties are considered incapable of making independent expenditures." \textit{Id.} at 1019. Consequently, the court's analysis centered on whether the expenditure in question was coordinated. \textit{Id.} at 1021. Determining that FECA's phrase "in connection with" was not entirely clear, the court looked to the FEC's interpretation. \textit{Id.} The court found reasonable the agency's interpretation that "in connection with" was not limited to express advocacy for a clearly identified candidate. \textit{Id.} at 1022.

Rejecting the facial challenge to FECA's restrictions on political parties, the court found that the government interest in preventing corruption justified the First Amendment restrictions of FECA on political parties. \textit{Id.} at 1023-24. For a discussion of the Tenth Circuit's analysis, see generally Geoffrey M. Wardle, \textit{Time to Develop a Post-Buckley Approach to Regulating the Contributions and Expenditures of Political Parties: Federal Election Commission \textit{v.} Colorado Republican Federal Campaign Committee}, 46 CASE W. RES. L. REV. 603 (1996).


11. Seven members of the Court supported the judgment, with Justice Stevens and Justice Ginsberg dissenting. \textit{Id.} at 2331. Justice Breyer wrote for the Court, and Justices Kennedy and Thomas each issued an opinion concurring in part and dissenting in part. \textit{Id.} at 2312-31.
Commentators have found campaign finance reform one of the "most fundamental issues facing the nation." As special interests increasingly dominate the political landscape with their infusions of capital, the demand for reform has become urgent and widespread. Before Congress acts, however, it needs to consider the constitutional limits on campaign finance reform. Although the plurality opinions in CRFCC paid homage to Buckley v. Valeo, the seminal campaign finance reform case, the fractured Court gave Congress little insight on the continuing importance of a Buckley-type analysis.

This Comment contends that Justice Kennedy's contextual approach in CRFCC is preferable to Justice Breyer's categorical approach for evaluating limitations on campaign finance legislation. Part I briefly discusses the history of the Supreme Court's treatment of campaign finance legislation. Part II describes the CRFCC Court's decision and the various types of reasoning advanced by the pluralities. Part III argues that Justice Breyer's three-Justice plurality opinion misconstrues recent precedent and represents a categorical approach to campaign finance analysis that is incompatible with political reality. Part III also contends that Justice Kennedy's three-Justice concurrence, advancing a contextual approach, is consistent with the Supreme Court's recent campaign finance analysis. Part III then argues that the Court's categorical Buckley approach to campaign finance regulation was so removed from the realities of the American electoral system that it unnecessarily thwarted legislative efforts to reform campaign financing. This Comment concludes that the Court should continue to move from a categorical to a contextual


14. Cf. Molly Ivins, On voter turnout, the Jones indexes and campaign finance reform, STAR TRIB. (Minneapolis), Dec. 3, 1996, at 13A (noting that the one clear mandate from the 1996 election is campaign finance reform).

analysis of campaign finance issues, and that lower courts should base future decisions on Justice Kennedy's approach.

I. HISTORY OF CAMPAIGN FINANCE REFORM

Campaign finance reform is one of the most explosive and pressing issues facing America. Despite the public's demand for reform, partisan standoff has generally monopolized and handicapped recent congressional attempts to reform the campaign system. The First Amendment places further limits on congressional action. Taken together, political and constitutional demands have transformed campaign finance jurisprudence into a quagmire of rules and exceptions.

A. THE FEDERAL ELECTION CAMPAIGN ACT AND AMENDMENTS

In the early part of the twentieth century, Congress passed its first federal campaign finance legislation. These laws were largely unsuccessful at curbing outrageous campaign practices. In 1971, new legislation signified a renewed com-
CAMPAIGN FINANCE REFORM

commitment to meaningful campaign finance reform. Congress passed the Federal Election Campaign Act of 1971 (FECA), requiring greater disclosure of political campaign contributions, and the Presidential Election Campaign Fund Act of 1971, providing for public financing of presidential elections and tax incentives for political contributions. The aftermath of the Watergate scandal illustrated the enormous deficiencies that remained in the campaign finance system.

In 1974, Congress responded with amendments to FECA that profoundly expanded regulation of federal election campaigns. First, the amendments imposed contribution limits on individuals and multicandidate political committees. They also limited the amount individuals could independently spend on an identifiable candidate. The amendments re-

ELECTION CAMPAIGN ACT: AFTER A DEcade OF POLITICAL REFORM 13 (1981) (noting that the Acts were riddled with loopholes and were largely ineffective). One reason for the laws' ineffectiveness was that they only applied to selected organizations, such as corporations and labor unions, and only targeted certain elections. Id. at 14-15. The narrow scope of the laws also encouraged circumvention of the legislation, and persistent lack of enforcement further contributed to the problem. Id. at 13-14.


26. Id. § 608(b)(1)-(3) (current version at 2 U.S.C. § 441a(a)(1)-(3) (1994)) (limiting political committees, except for principle campaign committees, to a $5,000 contribution limit per individual federal candidate).

27. Id. § 608(e) (current version at 2 U.S.C. § 441a(a) (1994)) (restricting
stricted the amount a candidate and his family could personally spend on a campaign,28 and capped the total amount a candidate could spend on a political campaign.29 FECA also imposed reporting and disclosing requirements on political committees.30 The Act created FEC to enforce the provisions.31 Finally, FECA restricted the amount a political party could spend and contribute to candidates for federal office.32

B. THE BUCKLEY DECISION

United States Senator James Buckley filed suit in federal court challenging FECA’s constitutionality under the First Amendment.33 Unlike prior cases, in which the Supreme Court had intentionally avoided addressing the constitutional questions surrounding campaign finance legislation,34 the Court’s per curiam decision in Buckley v. Valeo35 was detailed. Buckley laid the foundation for campaign finance reform analysis by articulating the constitutional parameters.

The Court found that the crux of political campaigns is protected First Amendment expression.36 In light of the dependence on money to promulgate political speech, the Court held that money equals political expression.37 Consequently, spending restrictions necessarily implicate the First Amendment.38
Because FECA restricted individual and candidate First Amendment rights of political expression and association, the Supreme Court used a strict standard of review. The Court held that the only compelling government interest was preserving the integrity of the electoral system. The Court characterized this interest as “preventing corruption or the appearance thereof” due to large contributions given in exchange for political favors. It summarily rejected the government’s other asserted interests in equalizing “the relative ability of all citizens to affect the outcome of elections,” and curbing the skyrocketing costs of political campaigns to open the political system up to less affluent persons.

The Court separately examined contribution and independent expenditure limitations, and found that expenditure

39. The Court stated that “[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression . . . because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.” Id.

40. Since contributions to and expenditures on a candidate serve to identify people with that candidate, and enable people to pool their resources to further a particular goal, the FECA restrictions on contributions and expenditures directly impacted the First Amendment right to freedom of association. Id. at 23.

41. Although the Court never explicitly identified the level of review used to assess the FECA amendments, it stated that limitations on First Amendment rights are subject to “exacting scrutiny.” Id. at 44-45. The Court has subsequently stated that government restrictions directed at speech restrictions must be narrowly drawn and justified by a compelling interest. First Nat’l Bank v. Bellotti, 435 U.S. 765, 786 (1978); see also Michael J. Garrison, Corporate Political Speech, Campaign Spending, and First Amendment Doctrine, 27 AM. BUS. L.J. 163, 174 & n.69 (1989) (noting that “the Court implicitly adopt[ed] the ‘compelling state interest’ test”). But see Patrick Mulligan, Unlimited PACcess to the Political Process: First Amendment Protection of Independent Expenditures by Political Action Committees, 57 U. COLO. L. REV. 759, 760 (1986) (noting that “the Court has applied varying standards of judicial review to congressional regulation of campaign spending”).

42. Buckley, 424 U.S. at 26.

43. Id. The Court termed this “quid pro quo” corruption. Id. Since candidates depend on campaign contributions, there is a risk that the integrity of the political system may be compromised if “large contributions are given to secure a political quid pro quo from current and potential office holders.” Id. The Court considered equally important the negative impact that the appearance of corruption could have on the political system by eroding the public’s confidence. Id. at 27.

44. Id. at 48-49. The Court stated that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” Id.

45. The term contribution means any contribution made directly or indi-
limitations invaded primary areas of First Amendment values.\textsuperscript{47} The Court then determined that independent expenditures were \textit{primary speech} because they involved direct, individual expression.\textsuperscript{48} Thus, any restrictions aimed at such communication "represented substantial . . . restraints on the quality and diversity of political speech."\textsuperscript{49} Observing that the lack of coordination between the speaker and the candidate inherent in independent expenditures negated the government's asserted interest in preventing corruption, the Court found the relationship between the government's interest and the restriction tenuous.\textsuperscript{50} Since the restriction severely infringed on First Amendment rights without serving a compelling governmental interest, the Court held the restriction unconstitutional.\textsuperscript{51}

In contrast, the Court found that contributions were an \textit{indirect} form of communication because they involved speech by someone other than the contributor.\textsuperscript{52} Due to the indirect nature of contributions, the Court found that they deserved less First Amendment protection than direct speech.\textsuperscript{53} Since contribution limitations do not infringe on an individual's ability to engage in direct speech, the Court noted, the law imposes only marginal restrictions on freedom of expression and asso-

\textsuperscript{46} The term independent expenditure means any expenditure made by an individual or other entity without the cooperation, authorization, coordination, or consent of the candidate or his agent. \textit{Federal Election Campaign Act, 2 U.S.C. § 431(e) (1994).}

\textsuperscript{47} \textit{Id. at 19.}

\textsuperscript{48} \textit{Id. at 19-20.}

\textsuperscript{49} \textit{Id. at 19.} The Court found that the expenditure limitations severely curtailed speech because they prevented everyone except political parties and political action committees from expressing their views about a candidate that cost in excess of $1,000. \textit{Id. at 19-20.}

\textsuperscript{50} \textit{Id. at 44-47.} The Court found that "independent expenditures . . . may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate . . . undermines the value of the expenditure . . . [and] alleviates the danger that expenditure will be given as a quid pro quo for improper commitments from the candidate." \textit{Id. at 47.}

\textsuperscript{51} \textit{Id. at 51.} By striking down the independent expenditure restrictions and the restrictions on personal spending, the Court invalidated FECA's restrictions capping total costs of political campaigns. \textit{Id. at 51, 58.}

\textsuperscript{52} \textit{Id. at 20-21.} When a person contributes money to a candidate, it is the candidate, not the donor, that engages in direct political speech. \textit{Id. at 21.} The donor's communication is indirect because the candidate essentially stands between the donor and the communication. \textit{Id.}

\textsuperscript{53} \textit{Id.}
The Court further found the contribution limitations justified as narrowly tailored means to remedy the corruption problems associated with large political contributions. Accordingly, the Court found limitations on campaign contributions constitutional.

Justice White illustrated in his dissent in Buckley that the majority's categorical approach focused on election theory rather than reality. Justice Blackmun, in his dissent, found Buckley's distinction between contributions and expenditures illusory. Still other scholars disagreed with Buckley's premise that money equals speech, and argued that the Court too

54. Id. at 51-52. Specifically, the Court reasoned, "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 quantity of communication by the contributor does not increase perceptibly with the size of his contribution." Id.

55. Id. at 28-29. The court noted that the contribution limitation of the Act targeted "the problem of large campaign contributions . . . while leaving persons free to engage in independent political expression." Id. at 28.

56. Specifically, Justice White contended that the Court should defer to Congress's judgment, because Congress better understood the realities of political campaigns. Id. at 260-61 (White, J., dissenting); see J. Skelly Wright, Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?, 82 COLUM. L. REV. 609, 611 (1982) (arguing that the Court's lack of experience and understanding of political campaigns led to its faulty assertion that money necessarily equals political speech).

57. Buckley, 424 U.S. at 287 (Blackmun, J., dissenting). Addressing federal campaign practices, the Committee on House Administration observed that "the large sums of money spent in congressional elections have created an appearance of corruption damaging to public confidence in the electoral process." H.R. REP. NO. 340, at 8 (1991). Voters now believe that lobbyists control Congress and that election outcomes are determined by money, not voters. Id.

Whether independent expenditures are truly "independent" is a recurring issue. People running "independent" campaigns can run them "in tandem" with candidates even without formal consultation. Richard Briffault, The Federal Election Campaign Act and the 1980 Election, 84 COLUM. L. REV. 2083, 2092 (1984) (book review). Candidates and committees can retain the same pollsters and media consultants, and can use the same mailing lists. Id. Even without such "indirect" coordination, independent committees can read newspapers and newsletters, and thereby learn "the candidate's campaign strategy, themes . . . and apply their independent dollars accordingly." Id. at 2092-93; see also FRANK J. SORAUF, MONEY IN AMERICAN ELECTIONS 121-53 (1988) (discussing the role of political party money in congressional elections).

readily dismissed as uncompelling the government's asserted interest in political equality.\textsuperscript{59} Despite the overwhelming disappointment generated by the \textit{Buckley} decision, the Supreme Court continued to invoke \textit{Buckley}’s principles when assessing government efforts to regulate campaign financing.\textsuperscript{60}

Although the \textit{Buckley} Court specifically acknowledged that Congress enacted FECA to make the government responsive to the needs of the majority and dispel the view that elected officials are beholden to special interests,\textsuperscript{61} the \textit{Buckley} decision ultimately thwarted Congress’s original purpose, and forced Congress to redraft FECA.\textsuperscript{62} Congressional action in response to \textit{Buckley} weakened restrictions on campaign spending.\textsuperscript{63} In sum, the \textit{Buckley} holding has severely curtailed congressional attempts to reform campaign financing.

\textbf{C. BUCKLEY’S PROGENY}

In the twenty years following \textit{Buckley}, the Supreme Court further delineated the constitutional parameters of campaign finance legislation. The Court’s First Amendment analysis has focused primarily on three factors: the type of election, the type of speech restriction, and the form of the regulated entity. The Court examines the type of election at issue to assess the legitimacy of the government interest.\textsuperscript{64} In determining the type of speech restriction, the Court determines whether the legislation restricts contributions or expenditures to measure the

\begin{footnotes}
\item[59.] See Wright, supra note 56, at 642 (contending that “equality is part of the central meaning of the first amendment and underlies each of its most important purposes”).

\item[60.] See infra notes 82-90 and accompanying text (tracing the Court’s subsequent application of \textit{Buckley}).

\item[61.] \textit{Buckley}, 424 U.S. at 25-26.


\item[63.] Responding to concerns over FECA’s effects on a political party’s ability to engage in grass roots party building, Congress amended FECA in 1979 and exempted party “building” activities from the FECA spending limits (termed soft money). \textit{Id.} § 431(8)(B)(x), (xii), (9)(B)(viii), (ix). Another method used to circumvent FECA is called “bundling.” For an extensive discussion on “bundling” and other types of third-party fundraising see Wardle, supra note 17, at 549-58.

\item[64.] See infra notes 68-80 and accompanying text (discussing the Court’s approach to noncandidate elections).
\end{footnotes}
Finally, the Court evaluates the form of the regulated entity to determine the impact of the speech restriction and whether the restriction is narrowly tailored to achieve the government's interest. This three-factor approach has restricted the legislature's ability to impose effective campaign finance reforms.

1. Nonpartisan Elections

_Buckley_ did not squarely address the issue of corporate speech in noncandidate elections. Shortly after _Buckley_, however, the Supreme Court in _First National Bank v. Bellotti_ held unconstitutional a law prohibiting corporations from making contributions and independent expenditures in referenda elections. The Court found corporate speech valuable "in affording the public access to discussion, debate, and the dissemination of information and ideas." While recognizing a long standing government interest in preventing undue influence from corporate funds as compelling, the Court rejected this interest as a justification for restrictions in noncandidate elections. Instead, the Court focused on the inherent differ-

---

65. _See infra_ notes 81-90 and accompanying text (addressing the Court's differing treatment of contribution limitations and independent expenditure restrictions).

66. _See infra_ notes 92-108 and accompanying text (discussing the Court's treatment of nonprofit ideological corporations).

67. _See, e.g.,_ Mulligan, _supra_ note 41, at 764-65 (noting that the Court based its decision in a related case on a "series of misconceptions" and "theoretical" notions that ignore the reality of the electoral system); Wright, _supra_ note 56, at 636 (arguing that the Supreme Court has misused the First Amendment in campaign finance cases by "invok[ing] the first amendment, not to protect diversity, but to prevent society from defending itself against the stifling influence of money in politics").


69. _Id_. at 785.

70. _Id_. at 783. The Court found the source of communication unimportant and rejected the argument that corporate speech deserved less protection than citizen speech. _Id_. at 777.

71. _Id_. at 788-89.

72. _Id_. at 789-90. By rejecting the corporate corruption doctrine in noncandidate elections, the Court modified its prior treatment of corporate political activity. _See_ United States v. Automobile Workers, 352 U.S. 567, 570-75 (1957) (recognizing the dangers of union and corporate speech in the electoral process, and refusing to strike down congressional efforts to restrict such speech).

The Court rejected the notion that corporate speech should be suppressed because it might influence individual voters. _Bellotti_, 435 U.S. at 790. While the Court found no evidence that corporations actually monopolized or unduly
ence between candidate and referenda elections, finding that when there were no candidates to bribe, the potential for corruption did not exist.\textsuperscript{73} The Court struck down the statute because the government's interest could not justify the infringement on First Amendment rights.\textsuperscript{74}

Although the Court indicated that it would reconsider \textit{Bellotti}'s holding if the government empirically demonstrated the negative effects of corporate speech,\textsuperscript{75} it subsequently refused to do so in \textit{Citizens Against Rent Control v. City of Berkeley}.\textsuperscript{76} In that case, the Court found unconstitutional an ordinance that limited contributions to political committees established to support or oppose noncandidate elections.\textsuperscript{77} Despite empirical evidence demonstrating the influence of such committees in noncandidate elections,\textsuperscript{78} the Court struck down the ordi-
nance.\textsuperscript{79} Relying on \textit{Bellotti}, the Court held that corporate influence in noncandidate elections in the form of special interest groups did not constitute corruption, and therefore did not justify restricting the First Amendment rights of association and free speech.\textsuperscript{80}

2. Contributions vs. Independent Expenditures

Under \textit{Buckley}, the Court allows legislatures to impose contribution limitations.\textsuperscript{81} The Court has determined that contributions are an indirect form of political communication, such that restrictions impose only a marginal infringement on First Amendment rights.\textsuperscript{82} In contrast, the Court generally strikes down restrictions on independent expenditures. For example, in \textit{Federal Election Commission v. National Conservative Political Action Committee (National Conservative PAC)},\textsuperscript{83} the Court examined whether the Presidential Election Campaign Fund Act (Fund Act)\textsuperscript{84} violated the First Amendment by imposing a $1,000 limitation on independent expenditures when a presidential candidate accepted federal funding.\textsuperscript{85} Although dissenting). In his dissent, Justice White argued, "Large contributions, mainly from corporate sources, have skyrocketed as the role of individuals has declined. Staggering disparities have developed between spending for and against various ballot measures." \textit{Id.} at 307 (citations omitted). Justice White also observed that, unlike in \textit{Bellotti}, the issue in \textit{Citizens Against Rent Control} was a contribution limit, not an expenditure limit, and under \textit{Buckley}, a contribution limitation is generally constitutional because it represents only a marginal speech infringement. \textit{Id.} at 304-05; \textit{see also infra} notes 81-90 and accompanying text (discussing the distinction between contribution and expenditure restrictions).

\textsuperscript{79} \textit{Citizens Against Rent Control}, 454 U.S. at 299.

\textsuperscript{80} \textit{Id}. Since \textit{Bellotti} and \textit{Citizens Against Rent Control}, studies have found that corporate spending "threatens the foundation of the democratic system." \textit{Lagasse}, \textit{supra} note 73, at 1378. While corporate spending is not always determinative, it does have a substantial impact on election outcomes, especially when corporations oppose a ballot measure. Daniel H. Lowenstein, \textit{Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment}, 29 \textit{UCLA L. REV.} 505, 511 (1982).

\textsuperscript{81} \textit{Buckley v. Valeo}, 424 U.S. 1, 20, 28-29 (1976) (per curiam).


\textsuperscript{83} \textit{470 U.S. 480} (1985) [hereinafter \textit{National Conservative PAC}].


\textsuperscript{85} \textit{National Conservative PAC}, 470 U.S. at 495-98. By allowing PACs to make independent expenditures after a candidate accepts federal funds, the Court's decision directly overturned a congressional attempt to limit PAC influence and instead revived the need for candidates to solicit PACs for support. \textit{Mulligan}, \textit{supra} note 41, at 768-69. Because of the enormous influence that PACs wield, candidates are more likely to be persuaded by influential
the Court recognized that political action committees (PACs) spend substantial sums to exert influence, it rejected the government's contention that PACs should have diminished First Amendment rights. The Court reasoned that the collective pooling of citizen resources to amplify a message was entitled to full First Amendment protection. It found that restrictions

PACs than individual voters. Id. at 769. Additionally, "[s]ince the only avenue of political expression realistically open to the less affluent individual is the vote, allowing massive PAC expenditures to directly and powerfully influence candidates serves to diminish the value of a single individual's vote." Id. Consequently, PACs have become a very powerful part of the electoral process at the expense of the individual voter, thereby jeopardizing the integrity of the democratic process. Id.

The National Conservative PAC decision also gave PACs a monetary advantage in the campaign system as compared to political parties. Id. at 770. PACs have no spending limit under FECA and can make independent expenditures even after a candidate accepts public financing. Id. Political parties are capped in the amount they can contribute to candidates. While PACs and political parties have "surface similarities," political parties are "unique institutions" distinguishable from PACs. John F. Bibby, Politics, Parties, and Elections in America 14-15 (1987). Whereas PACs represent narrow interests, political parties "take stands on the whole spectrum of issues with which government deals." Id. at 15. Additionally, while PACs overwhelmingly represent corporate, business, and special interest groups, political parties represent diverse interests. Mulligan, supra note 41, at 770. Interest groups are primarily concerned with government policy, whereas parties are chiefly concerned with winning elections and therefore show "flexibility in... their policy positions and willingness to accommodate a wide variety of different views." Bibby, supra, at 16. Unlike PACs, political parties are "open, inclusive, and semi-public political organization[s] composed of [their] own clientele." Id. at 17. Political parties "can help assure that groups without financial access to candidates... are not shut out of the system... [and] provide a means by which the vast majority of people can gain both political identity and political leverage." Long, supra note 23, at 1176.

National Conservative PAC, 470 U.S. at 494. The Court also refused to equate PACs with corporations. Id. at 495-96.

Id. at 495. The Court ignored the realities of PACs in the American electoral system. Mulligan, supra note 41, at 764. The structure and focus of PACs resemble corporations rather than grass roots organizations. Id. at 761. PACs are highly bureaucratic and centralized, with the PAC leadership controlling the PAC money and receiving access to candidates. Id. at 765-66. While PACs are open to everyone, they are not representative of the general population. Id. at 764-65. "Statistics tend to show a concentration of PACs and PAC growth in particularly well-represented business fields, with the majority of the populace left unrepresented." Id. at 765. PAC expenditures "often take the form of highly concentrated lobbying efforts on a certain narrow issue, with only a few interested businesses, corporations, or influential individuals committed to a position on the issue—quite contrary to the Court's vision of widespread populist organization." Id. at 761. PACs maintain "disproportionate power... by virtue of the sums of money they command and the single issue that unites their members." Long, supra note 23, at 1178. Because of the amount of PAC money available in campaigns, elected officials
on independent expenditures represented a substantial infringement on First Amendment rights.\textsuperscript{88} Relying on \textit{Buckley}, the Court deemed the government interest in preventing corruption insufficient,\textsuperscript{89} noting that a lack of coordination with a candidate undermines an expenditure's value and mitigates the risk of corruption.\textsuperscript{90}

3. Corporate Form

Initially, the Supreme Court approached corporate speech in candidate elections without evaluating the type of corporation involved.\textsuperscript{91} In 1986, however, the Supreme Court abandoned this inflexible analysis. \textit{Federal Election Commission v. Massachusetts Citizens for Life}\textsuperscript{92} (Citizens for Life) distinguished nonprofit ideological corporations from for-profit corporations in campaign finance restriction evaluations.\textsuperscript{93} The case centered on whether the FECA amendment requiring corporations to keep a separate political fund was unconstitu-
tional as applied to a nonprofit ideological corporation. The Court found that the FECA restrictions on corporations could dissuade some organizations from engaging in political speech.

The Court evaluated the restriction's imposition on First Amendment rights in light of the government's compelling interest in restricting a corporation's ability to use wealth to improperly influence the electoral system. The Court reasoned that the potential for corporate wealth corruption did not exist because the ideological nonprofit corporation "was formed to disseminate political ideas, not to amass capital." Since the government interest did not apply to a nonprofit organization and the regulation imposed substantial obstacles to the organization's ability to exercise First Amendment rights, the Court held the FECA provision unconstitutional as applied. The Court also established a three-prong test for determining when a corporation may be exempt from FECA. Under this test, the Court evaluates the purpose of the organization, the rela-

94. Id. at 241. In Citizens for Life, a nonprofit corporation spent over $9,000 from its general treasury fund to send out a special newsletter identifying candidates who were for and against abortion. Id. at 243-44.

95. Id. at 254. The Court observed that these requirements impose substantial administrative costs that small organizations may not be able to afford. Id.

96. Id. at 259. The government justified the separate fund requirement as necessary to ensure that "competition among actors in the political arena is truly competition among ideas" and not monetary prowess. Id.

97. Id.

98. Id. at 263. Despite rejecting the government's interest as it applied to Massachusetts Citizens for Life, the Court, in dicta, upheld this interest as compelling. Id. at 263-64. By embracing the notion that "quid pro quo" corruption is not the only type of corruption that can justify a government restriction, id. at 260, the Court departed from Buckley.

The same analysis the Court used in rejecting the government's corruption interest as applied to a nonprofit ideological corporation could apply to political parties. Political party contributions to candidates are not typically viewed as corrupt and do not constitute the "quid pro quo" corruption that justifies FECA's speech restrictions. Long, supra note 23, at 1187-88. Because political parties have long-term interests and goals, they have an incentive to prevent corruption in order to minimize the risk of losing political power. Id. When a party contributes money to its candidate (even a candidate with different views), it is considered "party qua party influence." Id. at 1188-89. The Supreme Court has not considered such behavior corruption, and such party influence over candidates "performs the positive social function of labeling a candidate for voters." Id. at 1189.

99. Citizens for Life, 479 U.S. at 264. In essence, the Court found Congress's regulation not narrowly tailored in certain contexts. Id. at 265.
tionship of persons affiliated with the organization, and the entity that established the organization.\textsuperscript{100}

The Supreme Court subsequently applied this test to a nonprofit organization engaging in both political and nonpolitical activities. In \textit{Austin v. Michigan Chamber of Commerce},\textsuperscript{101} a corporation contended that a state law similar to FECA was unconstitutional as applied.\textsuperscript{102} After evaluating the chamber of commerce under the three-prong test,\textsuperscript{103} the Court found the corporation distinguishable from the nonprofit in \textit{Citizens for Life}, and therefore subject to the statute's requirements.\textsuperscript{104} Given the compelling government interests, the legislature could properly regulate the corporation because the restrictions were narrowly tailored to further the government's interest.\textsuperscript{105}

In \textit{Michigan Chamber of Commerce}, the Court adopted the definition of corruption outlined in \textit{Citizens for Life}\textsuperscript{106} and recognized that political corruption was not limited to the "financial quid pro quo" arrangement. Instead, political corruption included the distorting effects of corporate wealth on the electoral process when amassed by virtue of state-conferring benefits.\textsuperscript{107} The Court held that a restriction guaranteeing that

\begin{flushleft}
\textsuperscript{100} Id. at 264.
\textsuperscript{102} Id. at 656. The provisions of the Michigan statute were very similar to FECA's requirements. Id. at 656 n.1.
\textsuperscript{103} See id. at 661-65 (outlining and applying the three-prong test established in \textit{Citizens for Life}).
\textsuperscript{104} Id. at 662-65. Specifically, the Court found that the corporation failed the first prong by engaging in nonpolitical activities. Id. at 662-63. Additionally, while the corporation did not have shareholders, many of its members would be reluctant to withdraw because of the benefits of associating with the corporation. Id. Finally, the corporation was not independent of business corporations because "more than three-quarters of the Chamber's members are business corporations." Id. at 664.
\textsuperscript{105} Id. at 668-69. The Court emphasized that the restriction did not absolutely deny corporations the ability to engage in political speech, but merely imposed a regulation on how a corporation may engage in such speech. Id. at 660.
\textsuperscript{106} Id. at 659.
\textsuperscript{107} Id. at 659-60. After Buckley, the Court's holdings did not squarely address this issue. While the Court embraced a similar interest in \textit{Right to Work Committee}, the Court considered that a contribution case. See supra note 91 and accompanying text (discussing \textit{Right to Work Committee}, which upheld restrictions on corporate contributions). Despite discussing this government interest in \textit{Citizens for Life}, the Court ultimately found the interest inapplicable. See \textit{Citizens for Life}, 479 U.S. 238, 263-64 (1986) (noting that the Court's discussion was dicta). Thus, \textit{Michigan Chamber of Commerce} was
\end{flushleft}
"expenditures reflect actual public support for the political ideas espoused by corporations" served a compelling government interest.\textsuperscript{108}

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

In Colorado Republican Federal Campaign Committee v. Federal Election Commission (CRFCC),\textsuperscript{109} the Supreme Court held that the FECA provisions prohibiting political parties from making independent expenditures violated the First Amendment.\textsuperscript{110} While consistent with the Supreme Court's general prohibition on independent expenditure limitations,\textsuperscript{111} the Court's seven to two decision contained no majority opinion. Justice Breyer wrote for the Court, but only two Justices, the same number of Justices that supported concurring opinions by Justice Kennedy and Justice Thomas, joined him.\textsuperscript{112}

A. JUSTICE BREYER'S APPLICATION OF THE BUCKLEY FRAMEWORK TO POLITICAL PARTIES

Justice Breyer used Buckley's categorical analysis to examine FECA's political party restrictions.\textsuperscript{113} His opinion centered on the notion that political parties are essentially no different

\textsuperscript{108} Michigan Chamber of Commerce, 494 U.S. at 660.
\textsuperscript{109} 116 S. Ct. 2309 (1996).
\textsuperscript{110} Id. at 2312.
\textsuperscript{111} See supra notes 46-51, 83-90 and accompanying text (discussing independent expenditures).
\textsuperscript{112} CRFCC, 116 S. Ct. at 2310. Justices O'Connor and Souter joined Justice Breyer's opinion. Id. Justice Kennedy filed an opinion concurring in the judgment and dissenting in part, and Chief Justice Rehnquist and Justice Scalia joined his opinion. Id. at 2321. Justice Thomas filed an opinion concurring in the judgment and dissenting in part, joined by Chief Justice Rehnquist and Justice Scalia, in which he sought to overrule Buckley. Id. at 2323. Justice Stevens filed a dissenting opinion that Justice Ginsburg joined. Id. at 2332.
\textsuperscript{113} Id. at 2312. Justice Breyer noted that FECA case law, dominated by the Buckley decision, should control the Court's analysis of CRFCC. Id. He observed that Buckley adopted a distinction between independent expenditures and contributions. Id. at 2313. He also explained that expenditures made in coordination with a candidate are considered contributions and therefore can be regulated. Id.
than other entities and should be afforded the same constitutional rights.\textsuperscript{114} Labeling the money spent on the Wirth advertisement an independent expenditure,\textsuperscript{115} he found this type of donation to fall well within fundamental First Amendment protection under \textit{Buckley}.\textsuperscript{116} He reasoned that a political party's independent expenditure is a core First Amendment activity, equally as important to free political expression as similar expressive activity by other entities.\textsuperscript{117} Thus, because of its First Amendment implications, the FECA restriction had to serve a compelling state interest to be constitutional.\textsuperscript{118}

Justice Breyer determined that no special danger of corruption or the appearance of corruption existed with relation to political parties.\textsuperscript{119} The prevention of corruption, therefore, could not justify substantial speech restrictions.\textsuperscript{120} Although Justice Breyer recognized that political parties are entitled to certain benefits not offered to other entities,\textsuperscript{121} he found that the benefits did not provide a greater opportunity for corruption or circumvention of other FECA provisions.\textsuperscript{122} Supporting this contention, he observed that the FECA party provisions are not based on fears of corruption, but rather are

\begin{itemize}
\item \textsuperscript{114} Id. at 2315-16.
\item \textsuperscript{115} Id. at 2315. Justice Breyer accepted the fundamental difference between contributions and expenditures as outlined in \textit{Buckley}. Id. While contribution restrictions only marginally limit speech, independent expenditure restrictions significantly impair political speech. Id. Additionally, restrictions on contributions serve the compelling state interest of preventing corruption or the appearance thereof. Id. Conversely, restrictions on independent expenditures do not directly serve the government's interest. Id. at 2315-16.
\item \textsuperscript{116} Id.
\item \textsuperscript{117} Id. Justice Breyer noted that a party's expression "reflects its members' views about the philosophical and governmental matters that bind them together, [and] it also seeks to convince others to join those members in a practical democratic task." Id.
\item \textsuperscript{118} See id. at 2315-17 (discussing whether the government's interest in preventing political corruption is compelling enough to outweigh a political party's First Amendment right to make contributions).
\item \textsuperscript{119} Id. at 2316-17.
\item \textsuperscript{120} Id. Justice Breyer reiterated that, under \textit{Buckley}, the only justification for FECA's speech restrictions is to remedy the appearance or reality of corruption. Id. at 2315.
\item \textsuperscript{121} Id. at 2316. Under FECA, political parties have a higher limit on coordinated expenditures and can receive unregulated "soft money." Id.
\item \textsuperscript{122} Id. Since there is no prearrangement with the candidates, Justice Breyer found the risk of corruption regarding independent expenditures negligible. Id.
\end{itemize}
based on Congress's desire to reduce excessive campaign spending, an interest the Court found un compelling in *Buckley*.

Justice Breyer rejected the FEC's presumption that political party expenditures are always coordinated. Instead, he found that political parties could make independent expenditures and that the FEC Advisory Opinions suggested that political parties did make independent expenditures. Justice Breyer remanded the broader issue of regulating a political party's coordinated expenditure.

**B. JUSTICE KENNEDY'S REJECTION OF A STRICT *BUCKLEY* ANALYSIS**

The Kennedy opinion endorsed the Breyer opinion with regard to its reasoning and its conclusion that the FEC violated the Constitution by presuming that political parties could not make independent expenditures. Instead of relying solely on *Buckley*’s categories, however, Justice Kennedy’s opinion offered an evaluation of the characteristics and functions of political parties in the context of free political expression, and focused on the rationale behind the constitutionality of contribution and expenditure limitations.

Justice Kennedy first determined that *Buckley*’s categorical framework did not expressly address political parties and

---

123. *Id.* at 2317. Justice Breyer found that the legislative history undercut the FEC’s unsupported assertions regarding political parties and corruption. *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 57 (1976) (per curiam)).

124. *See id.* (refusing to deny political parties the constitutional right to make individual expenditures).

125. *Id.* at 2318-19.

126. *Id.*. The FEC failed to provide any empirical or experience-based evidence showing that all party expenditures are coordinated with a candidate. *Id.* at 2318.

127. *Id.* at 2321.

128. *Id.*.

129. *Id.* at 2322-23. Justice Kennedy focused on the reason behind the *Buckley* Court’s holding that contributions are “less like ‘speech’ for First Amendment purposes.” *Id.* at 2322. Justice Kennedy discussed *Buckley*’s reasoning that contributions provide a rough indicator of an individual’s support for a candidate, and noted that the amount an individual can contribute has only a marginal effect on political expression. *Id.*. Since contributions pass from the individual to the candidate, they involve speech by someone other than the contributor. *Id.*
should not automatically be applied to political parties. Finding that Buckley's categorical distinctions were based on static assumptions about the effect speech restrictions have on individuals and candidates, Justice Kennedy refused to resort to Buckley's labels to determine whether the speech restriction on political parties was constitutional.

Instead, Justice Kennedy independently examined the nature and function of political parties to determine whether the speech restriction was narrowly tailored. He found that political parties play a vital role in promoting First Amendment values by selecting candidates to espouse their principles and beliefs. Noting the important and unique functions of political parties in advancing free speech, he emphasized that, unlike other entities, political parties rely on candidates to convey their message. He concluded that FECA's restriction posed an overarching constitutional problem because it substantially stifled a political party's ability to engage in free political expression. Finally, Justice Kennedy noted that political parties are indistinguishable from their candidates, and questioned whether Congress could constitutionally regulate party spending during an election.

III. A CONTEXTUAL APPROACH: THE BETTER OPTION

Despite its seven to two decision, the Court's splintered opinions in CRFCC leave lower courts without clear guidance for analyzing campaign finance restrictions. Future courts should reject Justice Breyer's categorical approach. His analysis misapplies Buckley and ignores recent Court precedent. By returning the Court to a rigid, categorical method of evaluation, Justice Breyer's approach would unnecessarily hamper future campaign finance reform. Although neither the Breyer opinion

130. Id. In Justice Kennedy's view, "we should not transplant the reasoning of cases upholding ordinary contribution limitations to a case involving FECA's restrictions on political party spending." Id.
131. Id.
132. Id.
133. Id.
134. Id. Justice Kennedy stated that parties are most effective when they are able to publicize their views by "selecting and supporting candidates." Id.
135. Id. at 2323. Justice Kennedy concluded that "[t]he party's speech . . . cannot be separated from speech on the candidate's behalf without constraining the party in advocating its most essential positions and pursuing its most basic goals." Id.
136. Id.
nor the Kennedy opinion are binding precedent, courts should adopt Justice Kennedy's contextual approach. Justice Kennedy correctly followed recent Court precedent in holding Buckley's premises inapplicable to political parties, and assessed the unique characteristics of political party speech in candidate elections. Despite an inadequate examination of the governmental interest, Justice Kennedy proffered a supportable analysis that will positively impact the future of campaign finance jurisprudence by assessing campaign finance reform in accordance with political reality.

Although the Supreme Court initially adopted a categorical approach to campaign finance issues, similar to the approach in Justice Breyer's opinion, the Court has more recently used a contextual analysis. The categorical approach ignores political realities and undercuts Congress's ability to enact comprehensive campaign finance reform. Conversely, Justice Kennedy's contextual approach narrowly tailors First Amendment analysis to the regulated parties and elections. This approach more accurately reflects political realities without sacrificing valid constitutional protection.

A. SHORTCOMINGS OF JUSTICE BREYER'S APPROACH

Justice Breyer's decision avoids flexible analysis in favor of applying existing and often inapplicable Court principles. His analysis fails to consider that prior Court cases arose in contexts quite different from political party speech. Ultimately, the major flaw in Justice Breyer's opinion is that he ignored recent Court precedent and discounted the importance of examining context rather than adhering blindly to Buckley categories.

1. Justice Breyer Incorrectly Applied Buckley

Justice Breyer automatically employed Buckley's categorical framework without determining whether this framework applied to the issues in CRFCC. Although Buckley is the seminal case addressing campaign finance reform and still contains valid principles of First Amendment election law, it did

137. Prior to CRFCC, the Supreme Court had not examined FECA restrictions on political parties. While the campaign finance cases are relevant constitutional jurisprudence, they do not raise many of the unique issues pertaining to political parties. See supra notes 85, 98 (examining the unique characteristics of political parties).

138. CRFCC, 116 S. Ct. at 2312.
not address FECA’s political party expenditure provision.\footnote{139} Buckley dealt only with individuals and candidates. Additionally, the \textit{Buckley} Court premised its observations and reasoning on assumptions about the behavior of individuals and candidates, not political parties.\footnote{140} Political parties’ behavior differs from that of other entities because their survival is dependent upon uniting diverse interests.\footnote{141} Because they rely on candidates to achieve political success, political parties are ultimately responsible to the public for their candidates’ actions.\footnote{142} Justice Breyer failed to consider whether \textit{Buckley} applied to \textit{CRFCC}. While a review of \textit{Buckley}’s basic principles may assist in conducting a First Amendment analysis, Justice Breyer’s decision to automatically extend \textit{Buckley}’s categorical framework to political parties misconstrued \textit{Buckley}’s precedential significance.

Using \textit{Buckley}’s assumptions about individuals and candidates to measure the speech restriction on political parties, Justice Breyer did not explore the \textit{actual} impact of FECA’s restrictions on a political party’s First Amendment rights. Recently, to accurately assess whether a speech restriction is narrowly tailored, the Court has examined the magnitude of the speech restriction by evaluating the form of the regulated entity.\footnote{143} Because a political party’s sole reason for existence is to engage in political speech, constraints on a political party’s political expression constitutes substantial government infringement.\footnote{144} Thus, using the \textit{Buckley} framework without a

\begin{footnotes}
\item[139] Buckley v. Valeo, 424 U.S. 1, 6-7 (1976) (per curiam).
\item[140] \textit{Buckley}, 424 U.S. at 51-52 (noting the constitutional difference between contribution and expenditure limitations based on their effect on people’s ability to communicate political messages).
\item[141] \textit{See supra} note 85 (highlighting the unique features that distinguish political parties from other entities).
\item[142] \textit{See supra} note 85 (discussing political party responsibility and goals). While he aptly noted the importance of political parties in the United States, Justice Breyer proceeded to treat political parties just like individuals or candidates. \textit{CRFCC}, 116 S. Ct. at 2312. This Comment does not argue that political parties deserve or have elevated First Amendment rights, but rather that parties function differently than other entities. Because they serve a unique function as compared to individuals, candidates, or PACs, political parties are affected differently by restrictions and implicate different constitutional concerns. Thus, restrictions on political parties should be individually assessed to understand the type, amount, and necessity of a First Amendment restriction.
\item[143] \textit{See supra} notes 91-108 and accompanying text (discussing the FECA regulations as they apply to different types of corporate entities).
\item[144] \textit{See CRFCC}, 116 S. Ct. at 2323 (noting that FECA stifles “the ability
thorough, independent assessment of political parties, Justice Breyer failed to make a true assessment of First Amendment interests.

2. Justice Breyer Failed to Examine Whether the Restriction Was Narrowly Tailored to Achieve the Government’s Interest

Justice Breyer accepted the government’s interest in protecting the electoral system from “the appearance of corruption” without assessing the interest’s pertinence to the behavior of political parties. First Amendment analysis requires a speech restriction to achieve a “compelling governmental interest.” Although Justice Breyer found that the government’s interest was certainly compelling in the abstract, he failed to examine whether restricting a political party’s speech actually served the government’s interest. While the government has a justifiable interest in dealing with individuals and PACs, restricting political party expenditures may not necessarily further the government’s interest in combating electoral corruption. Whereas special interest money is often viewed as a corrupting influence, it is generally not construed as corruption when a political party spends money to support its candidates. The expected relationship between political parties and their candidates performs the social function of labeling candidates for voters. Thus, the nature and function of American political parties makes the relevance of the government corruption interest to political parties questionable. Even if the government’s interest is justified with respect to

of the party to do what it exists to do”); see also supra note 85 (discussing the function of political parties in America).

145. CRFCC, 116 S. Ct. at 2313; see also supra note 98 (discussing political party contributions and the likelihood that they will be used in government corruption).


147. See supra note 98 (suggesting that political party corruption is unlikely).

148. See H.R. REP. NO. 340, at 8 (1991) (discussing the public’s belief that the electoral process is governed by money and lobbyists); supra note 13 and accompanying text (discussing the large amounts of PAC money contributed to elections).

149. See supra note 98 (examining the relationship between parties and their candidates).

150. See supra note 98 (discussing the benefits of the relationship between political party behavior and candidates).
political parties, Justice Breyer should have at least engaged in the inquiry. His failure to examine its applicability to political parties made his First Amendment analysis incomplete.151

B. JUSTICE KENNEDY'S CONTEXTUAL APPROACH

Unlike Justice Breyer, Justice Kennedy went beyond a mechanical application of the Buckley categorical framework and specifically assessed its applicability to CRFCC.152 Justice Kennedy's opinion then went further, evaluating the characteristics of political parties and exploring the ramifications of FECA provisions on political parties rather than simply labeling CRFCC's advertisement money as an independent expenditure and striking down the law.153 Despite this strong start, Justice Kennedy inadequately completed his analysis by failing to examine the government's interest.154

1. Justice Kennedy Followed Recent Precedent

Justice Kennedy's opinion properly determined that the Buckley framework did not apply to CRFCC.155 Justice Kennedy observed that the Court's differential treatment of contributions and independent expenditures in Buckley focused on the behavior of individuals and candidates, not political parties.156 He also found that the Court "had no occasion in Buckley to consider possible First Amendment objections to limitations on spending by [political] parties."157 Justice Kennedy noted that political parties function differently than individuals and candidates because parties "exist to advance their members' shared political beliefs."158 Thus, Justice Kennedy aptly concluded that the Court should subject First Amendment restrictions on political parties to an independent contextual analysis, and that Buckley should not control.159

151. See CRFCC, 116 S. Ct. 2309, 2312, 2315 (1996) (stating the issues of the case, with no mention of the relevance of the government corruption interest to political parties).
152. Id. at 2321-22.
153. Id. at 2322-23.
154. Id. at 2321-23.
155. Id. at 2322.
156. Id.
157. Id.
158. Id.
159. Id. at 2322-23.
Justice Kennedy next correctly evaluated the unique role political parties play in contributing to public debate.\textsuperscript{160} By centering his analysis on the regulated entity to ascertain the effect of the speech restriction, his analysis traced the contextual approach the Court used in \textit{Citizens for Life}\textsuperscript{161} and \textit{Michigan Chamber of Commerce}.\textsuperscript{162} Just as the Court explored the differences between nonprofit corporations and for-profit corporations in \textit{Citizens for Life},\textsuperscript{163} Justice Kennedy distinguished political parties from individuals and candidates. He recognized that political parties have distinct "traditions and principles that transcend the interests of individual candidates and campaigns."	extsuperscript{164} These characteristics enable parties to play a unique and significant role in debate on public issues.\textsuperscript{165} Consequently, Justice Kennedy properly assessed the speech restriction in light of political parties' function in society.\textsuperscript{166}

Justice Kennedy correctly found that the FECA restrictions on political parties represented more than just a marginal restriction on a political party's expression.\textsuperscript{167} Under \textit{Buckley}, Congress can only impose marginal restrictions on freedom of political expression.\textsuperscript{168} Under Justice Kennedy's approach, political parties receive the same close examination of their function and First Amendment interests as any other organization. Although political parties function differently than candidates, Justice Kennedy appropriately observed that "candidates are necessary to make the party's message known

\begin{itemize}
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} 479 U.S. 238, 259 (1986); see also \textit{supra} notes 92-100 and accompanying text (examining \textit{Citizens for Life}'s differentiation between for-profit and nonprofit corporations).
\item \textsuperscript{162} 494 U.S. 652, 662-65 (1990); see also \textit{supra} notes 101-108 and accompanying text (discussing the Court's reasoning in \textit{Michigan Chamber of Commerce}).
\item \textsuperscript{163} \textit{See Citizens For Life}, 479 U.S. at 259.
\item \textsuperscript{164} \textit{CRFCC}, 116 S. Ct. at 2322.
\item \textsuperscript{165} \textit{Id.}
\item \textsuperscript{166} \textit{Id.}
\item \textsuperscript{167} \textit{See supra} notes 133-135 and accompanying text (noting that restrictions on political party speech have substantial effects on a party's ability to engage in free political expression).
\item \textsuperscript{168} \textit{See Buckely v. Valeo}, 424 U.S. 1, 289 (1976) (per curiam) (finding a narrowly tailored restriction on campaign contributions constitutional because of its minimal impact on the freedom of independent political expression); see also \textit{supra} notes 39-51 and accompanying text (discussing the restriction imposed in \textit{Buckley}).
\end{itemize}
and effective."\textsuperscript{169} Restricting the amount a political party may spend on a candidate necessarily impedes a party’s ability to promote its candidates and its message. FECA has a “stifling effect on the ability [of a political party to] do what it exists to do.”\textsuperscript{170} Political parties unite a myriad of interests and strive to get out political messages that obtain broad-based support.\textsuperscript{171} Hence, Justice Kennedy correctly determined that constraining a political party’s ability to speak prevents a political party from “pursuing its most basic goals.”\textsuperscript{172} This is hardly a marginal restriction.

2. Justice Kennedy Failed to Complete the First Amendment Analysis

Despite Justice Kennedy’s thorough analysis of the effect of the restriction on political parties, he failed to address whether the government’s interest could justify the restriction.\textsuperscript{173} He did not acknowledge that a restriction on speech fails only if the government cannot support the restriction with a compelling interest.\textsuperscript{174} Even though the extent of the speech restriction’s effect is often the most contentious issue, the First Amendment demands that the Court evaluate the government’s interest.\textsuperscript{175} Admittedly, the government may not be able to justify its corruption interest when political parties are at issue.\textsuperscript{176} Nonetheless, to establish precedent, courts should at least assess the government interest.

3. The Ramifications of Justice Kennedy’s Analysis

Justice Kennedy’s ultimate conclusion that restrictions on a political party’s ability to make independent expenditures

\textsuperscript{169} \textit{CRFCC}, 116 S. Ct. at 2322.
\textsuperscript{170} \textit{Id.} at 2323. While restrictions on PACs may also infringe on a PAC’s ability to participate in the political process, PACs serve a different purpose in American politics. Whereas PACs are exclusive organizations, representing limited groups with narrow interests, political parties are inclusive organizations that strive to unite a multitude of interests and address a vast number of issues. \textit{Bibby}, supra note 85, at 14-16.
\textsuperscript{171} \textit{CRFCC}, 116 S. Ct. at 2323.
\textsuperscript{172} \textit{Id.} at 2223.
\textsuperscript{173} \textit{Id.} at 2321-23.
\textsuperscript{174} See supra note 41 and accompanying text (discussing strict scrutiny).
\textsuperscript{175} See supra notes 39-41 and accompanying text (listing the First Amendment’s requirements).
\textsuperscript{176} See supra note 98 (noting that the corruption concerns espoused in \textit{Buckley} are generally not present with regard to political parties).
were unconstitutional\textsuperscript{177} implied that parties and their candidates were distinct entities. If political parties and their candidates were considered one entity, it would be logically impossible for parties to make expenditures independent of their candidates. Justice Kennedy noted, however, that during an election, "[p]arty spending... is indistinguishable in substance from expenditures by the candidate."\textsuperscript{178} Although this assertion may appear contradictory, it can be viewed as a continuation of the Court's recent methodology in \textit{Citizens for Life}\textsuperscript{179} and \textit{Michigan Chamber of Commerce.}\textsuperscript{180} Justice Kennedy's opinion noted that during elections, parties and their candidates are virtually identical because they "are engaging in joint First Amendment activity [and] have a practical identity of interest."\textsuperscript{181} By looking to the reality of political campaigns rather than resorting to categories, Justice Kennedy incorporated a contextual approach to campaign finance legislation better suited to assess the real problems campaign finance legislation addresses.

C. \textbf{FUTURE COURTS SHOULD ADOPT JUSTICE KENNEDY'S CONTEXTUAL APPROACH}

1. A Contextual Analysis Comports with Recent Supreme Court Precedent

Beginning in 1986, the Supreme Court altered its approach to evaluating campaign finance cases, indicating a retreat from its rigid, categorical system of analysis. In \textit{Citizens For Life}, the Court did not automatically resort to Buckley's per se rules governing campaign finance legislation;\textsuperscript{182} it conducted an independent examination of the government's interest and the severity of the speech restriction on the individual corporation.\textsuperscript{183} By

\begin{itemize}
\item \textsuperscript{177} See supra notes 133-135 and accompanying text (discussing Justice Kennedy's finding that the magnitude of the speech restriction could not be justified under the First Amendment).
\item \textsuperscript{178} \textit{CRFCC}, 116 S. Ct. at 2323. Justice Kennedy's concluding paragraph appears to question whether independent expenditures are possible during an election.
\item \textsuperscript{179} 479 U.S. 238 (1986).
\item \textsuperscript{180} 494 U.S. 652 (1990).
\item \textsuperscript{181} \textit{CRFCC}, 116 S. Ct. at 2223.
\item \textsuperscript{182} See supra notes 91-93 and accompanying text (noting that the Court's method of evaluation evolved from the per se approach in \textit{Right to Work Committee} to a more in-depth approach in \textit{Citizens for Life}).
\item \textsuperscript{183} See supra notes 96-98 and accompanying text (discussing the govern-
assessing the characteristics of the regulated nonprofit corporation rather than just placing the corporation into a *Buckley* organization category and the regulation into an expenditure restriction category, the Court focused on the restriction's actual impact on a nonprofit corporation's ability to engage in political speech to determine the provision's constitutionality. This reasoned analysis enabled the Court to uphold the restriction generally and protect the entity's First Amendment rights.

In *Michigan Chamber of Commerce*, the Court again employed a practical analysis and did not resort to the *Buckley/Bellotti* categorical approach to resolve questions about corporate speech in the political process. Instead, the Court examined the actual function and effect of corporate speech in the American electoral process, and properly found that the government had a compelling interest in protecting the individual voter from marginalization by preventing corporations from distorting the political process. Using a contextual approach, the Court again upheld legislative campaign finance reform while adequately examining the First Amendment interests.

2. Reexamining Past Supreme Court Decisions Using a Contextual Analysis

From its inception, many scholars and practitioners criticized *Buckley* for dismantling FECA by inventing a categorical framework couched in fine-line distinctions that failed to account for the realities and diversity of the American election

---


185. *See supra* notes 98-99 and accompanying text (noting that the Court in *Citizens for Life* upheld the restriction, but found it unconstitutional as applied to an issue-oriented nonprofit corporation).

186. *See supra* notes 101-108 and accompanying text (discussing the Court's analysis in *Michigan Chamber of Commerce*).

187. *See supra* notes 68-75 and accompanying text (discussing *Bellotti*).

188. *See supra* notes 106-108 and accompanying text (discussing the *Michigan Chamber of Commerce* Court's expanded definition of political corruption).

The remaining FECA provisions forced Congress to adopt a piecemeal approach to campaign finance reform and dramatically altered the American electoral system. After Buckley, the Supreme Court adhered to its categorical approach to review campaign finance legislation, severely curtailing legislative attempts to regulate campaign financing. The Court, using Justice Kennedy's superior contextual approach, could have upheld campaign spending limits, restrictions on corporate speech in noncandidate elections, and restrictions on PAC spending without sacrificing the First Amendment.

a. Buckley Transformed FECA

Buckley held that the First Amendment permitted limitations on contributions but not expenditures, resulting in asymmetrical regulation of campaign financing. Thus, while PACs and individuals are limited in the amount of money they may contribute to political campaigns, campaigns themselves may spend unlimited sums. Under a contextual analysis, a court would have examined the negative impact unlimited campaign spending has on the electoral system. With no upper limit on campaign spending, the cost of elections has increased dramatically, driving candidates to continually solicit contributions from special interests. Despite the appeal of encouraging candidates to maintain a broad base of support, the reality is that candidates, once elected, must devote considerable time to fundraising, thereby neglecting their responsibility to individual constituents. Instead of empowering voters by making

190. See supra notes 56-59 and accompanying text (describing the general discontent with the Buckley decision). As one prominent legal scholar noted, the Buckley Court "treated the first amendment as a near-absolute in the sphere of political debate" without importing "the realities of political campaigns" into the analysis. Wright, supra note 56, at 611-12.

191. See supra notes 64-90 and accompanying text (discussing the Court's post-Buckley approach to campaign finance reform).

192. See supra notes 61, 57 (discussing Buckley's effect on campaign costs).

193. See supra notes 68-80 and accompanying text (explaining Bellotti and Citizens Against Rent Control).

194. See supra notes 83-90 and accompanying text (describing National Conservative PAC).

195. See Buckley v. Valeo, 424 U.S. 1, 51-52 (1976) (per curiam) (noting that Congress can only regulate contributions and not expenditures).

196. See supra notes 44, 51-57 and accompanying text (noting that Congress cannot limit the total amount spent on an election).

197. See supra note 13 (describing the enormous sums of money raised during the 1996 elections, most of which came from PACs).
politicians accountable, the *Buckley* decision displaced the importance of individual votes and made campaign fundraising a predominant concern for politicians. When unlimited sums enter the political sphere, voters believe elections are determined by money, not voters.199 Such public sentiment jeopardizes "the integrity of our electoral process and the essence of our political faith."199 Thus, using a contextual approach, a court could have found that a reasonable legislative ceiling on campaign spending would be a proper means for rectifying the serious problems associated with excessive campaign costs, and would be justified by the government's interest in maintaining the integrity of the American electoral process.

b. Courts Should Evaluate the Corporate Impact in Noncandidate Elections

In *Bellotti*, the Supreme Court found that in noncandidate elections, voters have a right to hear corporate speech because it provides information.200 Discounting the dangers inherent in corporate speech, the Court again ignored political reality. Using a contextual approach, a court would have examined the actual role of corporate speech in noncandidate elections. Corporations spend enormous amounts of money on noncandidate media campaigns that disproportionately impact voter choice and election outcome.201 Instead of contributing to the political debate and assisting voter literacy, corporations dominate communication and drown out other speakers.202 Thus, the Court could find that the potential domination of the corporate form warranted different treatment to protect First Amendment principles, because the competition of ideas cannot coexist in a system where corporations overwhelm the modes of communication.

The *Bellotti* Court's declaration that corporate spending in noncandidate elections did not present a corruption problem

199. See supra note 57 (describing the relationship between voter discontent and large sums of campaign money).
199. Wright, supra note 56, at 624.
201. See supra notes 72-80 and accompanying text (discussing the documented cases of undue corporate influence in noncandidate elections that amount to corruption of the political system).
202. See supra note 72 (discussing the effect of corporate speech on political debate).
was an uninformed assertion, because the public can perceive massive corporate spending in a referenda election as a corrupting influence. 203 In referenda elections where corporate spending is disproportionate to that of other speakers, corporations generally are successful in influencing the election. 204 When corporations dominate a campaign, individuals may be squeezed out of the political process. 205 Under a contextual analysis, a court would assess real empirical evidence about the corporate impact in noncandidate elections. 206 A court could then conclude that the government had a compelling interest in preserving the integrity of the electoral system by preventing corporations from overwhelming the medians of communication and snuffing out individual voters. 207

c. A Contextual Analysis Equates PACs with Corporations, Not Individuals

In National Conservative PAC, the Supreme Court misconstrued the actual role of PACs in American elections and held that PACs were not entitled to different treatment under the First Amendment than individuals 208 because PACs represent individual voters. 209 Instead of clinging to idealized notions of

203. See supra notes 57, 72 (discussing the relationship between voter discontent and excessive campaign spending).
204. See supra notes 72-73, 80 (discussing instances when corporations dominate the political process in noncandidate elections).
205. See supra note 72 (discussing the negative impacts of corporate speech on voter confidence and participation in popular elections).
207. For most of this century, the Court accepted regulation of corporations because corporations could unduly influence the political system. Until Bellotti, the Court weighed the possibility of the substantial negative effects of corporate speech against the corporations' First Amendment rights. See supra note 72 (noting the Court's prior treatment of corporate political speech).
209. See supra notes 86-87 and accompanying text (noting that PACs are entitled to full First Amendment protection). By equating PACs with individuals, the Court mechanically applied the Buckley rule that independent expenditure restrictions are per se unconstitutional. See supra notes 47-51 and accompanying text (discussing the Court's determination that independent expenditure restrictions are unconstitutional). Had the Court equated PACs with corporations rather than automatically finding the independent expenditure an unconstitutional restriction, the Court could have balanced the restriction against the government's corporate corruption interest. Such an analysis would reflect the reality that most PACs function more like corpo-
PACs, a court using a contextual approach would look at the true function and structure of modern PACs in American elections. Most PACs are highly organized, bureaucratic institutions representing business and corporate interests, not grass root organizations representing the general populace. Additionally, a PAC's leadership controls its money and is its voice, not the individual donor. With campaign costs skyrocketing, candidates have found that appeals to PACs are the most efficient fundraising technique. As a result, individual voters have become marginalized and the growth of special interest PACs has exploded, dominating the political process. Thus, a court using a contextual analysis could find that PAC structures more closely resemble corporations than individuals, and that PAC domination resulting in voter marginalization justifies congressional attempts to regulate PAC spending, just as corporate domination justifies the same restrictions.

If a "traditional, grass roots" PAC challenged congressional legislation, a court could still uphold the legislation against a facial challenge and examine the particular PAC characteristics to see if the legislation was constitutional as applied. This is precisely what the Supreme Court did in Citizens for Life. The contextual approach imports flexibility into First Amendment analysis that allows courts to protect an individual entity's First Amendment rights while generally upholding campaign finance legislation. At the same time, this approach allows courts to narrowly tailor decisions based on the differ-
ences in organizations and elections without resorting to the all-inclusive categorical approach formulated in *Buckley*.

3. A Contextual Approach Comports with Congressional Reform Efforts

Congress enacted FECA in an attempt to implement practical solutions to a campaign finance system riddled with corruption.\(^{215}\) FECA provisions aimed to empower individual voters while simultaneously decreasing candidate dependence on large individual contributions.\(^{216}\) While the Supreme Court's categorical decision in *Buckley* stymied congressional reform efforts, the decisions following *Buckley* further removed judicial opinions from the reality of political campaigns.\(^{217}\) Evaluating campaign finance legislation using a contextual approach ensures that courts employ an analysis best suited for dealing with campaign finance reform. This analysis allows courts to evaluate empirical evidence to determine if a problem creates a compelling state interest. The courts could then assess whether the legislation was narrowly tailored to achieve that interest. Under a contextual analysis, a court would not abandon First Amendment values. Instead, a court would recognize that a government interest may be so strong that it outweighs laissez-faire notions about the First Amendment. It also allows the courts needed flexibility to distinguish between various subsets of corporations and PACs, rather than stereotyping all such groups in a single category, thereby giving a true look at the impact of a campaign finance restriction on an individual or group.

D. CRFCC UNDER A CONTEXTUAL APPROACH

A contextual analysis also addresses Justice Kennedy's assertion in *CRFCC* that during elections, political parties and candidates are essentially indistinguishable.\(^{218}\) Thus, the

---

215. See supra note 23 (discussing the need for reforms of the campaign finance system that were exposed by the Watergate scandal).

216. See supra notes 43-44 and accompanying text (noting that FECA was an attempt to curb campaign finance abuses by decreasing candidate dependence on large sums of money and equalizing the relative power of the individual voter).

217. See supra notes 68-90 and accompanying text (discussing Supreme Court cases that followed *Buckley*).

question remains whether, during an election, a party is even capable of making independent expenditures. Often, the party and the candidate will consult the same political analyst and strategist, allowing the party to discover the candidate's campaign strategy. Additionally, even if parties and their candidate do not engage in any direct consulting, the party will do all that it can to assist the candidate's strategy. The Court's assertion in Buckley that those making independent expenditures could intentionally hurt a candidate by failing to coordinate strategy is inapplicable to political parties who depend heavily on candidates. While it may be possible in theory, current campaign behavior suggests it is unlikely that political parties engage in truly independent expenditures during campaigns.

CONCLUSION

The Supreme Court's decision in Colorado Republican Federal Campaign Committee v. Federal Election Commission found the independent expenditure restriction on political parties an unconstitutional abridgment of First Amendment rights. The plurality opinions indicate, however, that the Court is split on the appropriate doctrinal analysis. Justice Breyer advocated a return to Buckley's categorical evaluation of campaign finance legislation. Once he labeled the legislation a restriction on expenditures, he found the law unconstitutional. Justice Kennedy embraced a contextual approach that thoroughly examined the specific nature of political parties and their speech in candidate elections.

Since both opinions received identical support, the Court left lower courts and Congress without any clear guidance for balancing campaign finance reform laws against First Amendment principles. This Comment therefore argues that courts should adopt Justice Kennedy's contextual approach to evaluate campaign finance laws. This approach builds on the Court's recent trend of examining political realities. It also reflects the myriad of differences in various political and non-

that political parties are essentially the same as their candidates during an election).

219. See supra note 57 (describing the indirect methods a party can use to discover a candidate's strategy).

220. This is likely to occur because political parties are dependent on candidates during elections. CRFCC, 116 S. Ct. at 2322; see also supra note 57 (discussing indirect campaign assistance).

221. See supra notes 133-135 and accompanying text (noting the important relationship between political parties and their candidates).
political organizations. Most importantly, a contextual analysis enables courts to narrowly tailor decisions based on political realities, thus facilitating congressional efforts to enact campaign finance reform without degrading the value and importance of the First Amendment. Such accommodation is vital to secure the integrity of the electoral process and to convince disenfranchised voters that they are as important to the political system as big-money corporations and PACs.