PART TWO

Supreme Court Decisions

This section does not try to be a systematic review of Supreme Court decisions in the field of campaign finance; they have been reviewed in the longer articles in this book.

Most Supreme Court decisions on campaign finance have been split decisions, and the three selections in this section express concerns that did not prevail in the majority opinions or went beyond the majority opinion in their concern about the underlying constitutionality of campaign finance legislation and its threat to free speech and association in the political process.

Partial Dissent/Partial Concurrence of U.S. Supreme Court Justice Thomas in the Case of the *Colorado Republican Federal Campaign Committee and Douglas Jones, Treasurer, Petitioners v. Federal Election Commission*

Clarence Thomas

Supreme Court justice Clarence Thomas partially dissented and partially concurred with a campaign finance case decided in the summer of 1996. The Federal Election Commission had brought a case against the Colorado Republican Federal Campaign Committee concerning its support of candidates for office, raising the question whether expenditures of political parties that are coordinated with specific candidates are covered by the legislation limiting contributions and expenditures. The majority opinion in the case was based on the conclusion that the party expenditures were in fact independent of the candidate, and thus not covered by legislative caps, but rather entitled to First Amendment protection. The opinion left uncertain the status of coordinated expenditures.

The chief justice, William Rehnquist, and Justice Scalia joined with Thomas in parts I and III of his opinion, where the distinction between coordinated and independent expenditures is questioned. In part II of the opinion Thomas questions the idea that any meaningful distinction can be made between expenditures and contributions.

I.

The constitutionality of limits on coordinated expenditures by political parties is squarely before us. We should address this important question now, instead of leaving political parties in a state of uncertainty about the types of First Amendment expression in which they are free to engage. . . .

II.

A.

. . . Though we said in *Buckley* that controls on spending and giving "operate in an area of the most fundamental First Amendment activities," id., at 14, we invalidated the expenditure limits of FECA and upheld the Act's contribution limits. The justification we gave for the differing results was this: "The expenditure limitations . . . represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech," id., at 19, whereas "limitation[s] upon the amount that any one person or group may contribute to a candidate or political committee entai[l] only a marginal restriction upon the contributor's ability to engage in free communication," id., at 20–21. . . . Since *Buckley*, our campaign finance jurisprudence has been based in large part on this distinction between contributions and expenditures. . . .

In my view, the distinction lacks constitutional significance, and I would not adhere to it. As Chief Justice Burger put it: ". . . contributions and expenditures are two sides of the same First Amendment coin." *Buckley v. Valeo*, supra, 424 U.S., at 241. . . . Contributions and expenditures both involve core First Amendment expression because they further the "[d]iscussion of public issues and debate on the qualifications of candidates . . . integral to the operation of the system of government established by our Constitution." 424 U.S., at 14. When an individual donates money to a candidate or to a partisan organization, he enhances the donee's ability to communicate a message and thereby adds to political debate, just as when that individual communicates the message himself. . . .

Giving and spending in the electoral process also involve basic associational rights under the First Amendment. . . .

Whether an individual donates money to a candidate or group who will use it to promote the candidate or whether the individual spends the money to promote the candidate himself, the individual seeks to

engage in political expression and to associate with likeminded persons. A contribution is simply an indirect expenditure; though contributions and expenditures may thus differ in form, they do not differ in substance. . . .

Echoing the suggestion in *Buckley* that contributions have less First Amendment value than expenditures because they do not involve speech by the donor, see 424 U.S., at 21, the Court has sometimes rationalized limitations on contributions by referring to contributions as "speech by proxy." . . . The "speech by proxy" label is, however, an ineffective tool for distinguishing contributions from expenditures. . . .

Moreover, we have recently recognized that where the "proxy" speech is endorsed by those who give, that speech is a fully-protected exercise of the donors' associational rights. . . . To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." 470 U.S., at 495. . . .

In sum, unlike the *Buckley* Court, I believe that contribution limits infringe as directly and as seriously upon freedom of political expression and association as do expenditure limits.

The protections of the First Amendment do not depend upon so fine a line as that between spending money to support a candidate or group and giving money to the candidate or group to spend for the same purpose. In principle, people and groups give money to candidates and other groups for the same reason that they spend money in support of those candidates and groups: because they share social, economic, and political beliefs and seek to have those beliefs affect governmental policy. I think that the *Buckley* framework for analyzing the constitutionality of campaign finance laws is deeply flawed. Accordingly, I would not employ it, as Justice Breyer and Justice Kennedy do.

B.

Instead, I begin with the premise that there is no constitutionally significant difference between campaign contributions and expenditures: both forms of speech are central to the First Amendment. . . .

In the context of campaign finance reform, the only governmental interest that we have accepted as compelling is the prevention of corruption or the appearance of corruption, . . . and we have narrowly defined "corruption" as a "financial quid pro quo: dollars for political favors." As for the means-ends fit under strict scrutiny, we have specified that "where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." . . .

In my opinion, FECA's monetary caps fail the narrow tailoring test. Addressing the constitutionality of FECA's contribution caps, the *Buckley* appellants argued:

"If a small minority of political contributions are given to secure appointments for the donors or some other quid pro quo, that cannot serve to justify prohibiting all large contributions, the vast majority of which are given not for any such purpose but to further the expression of political views which the candidate and donor share. Where First Amendment rights are involved, a blunderbuss approach which prohibits mostly innocent speech cannot be held a means narrowly and precisely directed to the governmental interest in the small minority of contributions that are not innocent." Brief for Appellants in *Buckley v. Valeo*, O. T. 1975, Nos. 75-436 and 75-437, pp. 117–118.

The *Buckley* appellants were, to my mind, correct. Broad prophylactic bans on campaign expenditures and contributions are not designed with the precision required by the First Amendment because they sweep protected speech within their prohibitions. . . .

III.

Were I convinced that the *Buckley* framework rested on a principled distinction between contributions and expenditures, which I am not, I would nevertheless conclude that Section(s) 441a(d)(3)'s limits on political parties violate the First Amendment. Under *Buckley* and its progeny, a substantial threat of corruption must exist before a law purportedly aimed at the prevention of corruption will be sustained against First Amendment attack. . . .

As applied in the specific context of campaign funding by political parties, the anti-corruption rationale loses its force. . . .

In any event, the Government, which bears the burden of "demonstrat[ing] that the recited harms are real, not merely conjectural," Turner Broadcasting System, Inc. v. FCC, 512 U.S. (1994) (slip op., at 41), has identified no more proof of the corrupting dangers of coordinated expenditures than it has of independent expenditures. . . . And insofar as it appears that Congress did not actually enact Section(s) 441a(d)(3) in order to stop corruption by political parties "but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending," ante, at 11 (citing *Buckley v. Valeo*, supra, at 57), the statute's ceilings on coordinated expenditures are as unwarranted as the caps on independent expenditures.

In sum, there is only a minimal threat of "corruption," as we have understood that term, when a political party spends to support its candidate or to oppose his competitor, whether or not that expenditure is made in concert with the candidate. Parties and candidates have traditionally worked together to achieve their common goals, and when they engage in that work, there is no risk to the Republic. To the contrary, the danger to the Republic lies in Government suppression of such activity. Under *Buckley* and our subsequent cases, Section(s) 441a(d)(3)'s heavy burden on First Amendment rights is not justified by the threat of corruption at which it is assertedly aimed.

To conclude, I would find Section(s) 441a(d)(3) unconstitutional not just as applied to petitioners, but also on its face. Accordingly, I concur only in the Court's judgment. . . .