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Colorado Republican Federal Campaign Committee v. Federal Election Commission (1996)

Complex First Amendment issues arise in the context of election campaigns and legislative efforts to regulate campaign money—and therefore speech—in an attempt to maintain the integrity and fairness of the political system. Efforts to restrict speech and assembly collide with constitutional protections, and the outcome under any particular set of facts is difficult to predict.

In *Colorado Republican Federal Campaign Committee v. Federal Election Commission,* 518 U.S. 604 (1996), the U.S. Supreme Court found unconstitutional an element of the Federal Election Campaign Act (FECA) of 1971 that restricted expenditures by political parties during the general election campaign of congressional candidates. In 1986, the Colorado Republican Party paid for radio ads attacking the presumptive Democratic nominee in the upcoming senatorial election. Because the amount spent exceeded the dollar limit allowable under the provision, the Federal Election Commission (FEC) and the Democratic Party successfully charged the Colorado Republicans with violating the FECA.

In a ruling invalidating the provision, Justice Stephen G. Breyer, writing the plurality opinion for the Court, reasoned that political parties should be free to make unlimited independent expenditures just as would any ordinary political committee, individual, or candidate. Rejecting the government's claim that "independent" party *expenditures* were the functional equivalent of *contributions*—in that there exists an inherent and unavoidable "coordination" between a party and its candidate—the Court found no evidence to suggest that such expenditures were any more problematic than those afforded constitutional sanction by *Buckley v. Valeo,* 424 U.S. 1 (1976), and its progeny. Of significance, however, is that the plurality declined to reach the question of whether expenditures that were not truly "independent"—those that *were* explicitly "coordinated" between parties and candidates, in other words—would be deserving of similar constitutional protection.

Concurring in the result, though dissenting in part, Justices Anthony M. Kennedy and Clarence Thomas, writing separately, criticized the plurality opinion for failing to invalidate the limits as facially unconstitutional restrictions on the party's First Amendment rights—no matter the form of the expenditure. The state's emphasis on the potential for a corrupt relationship between the organizations making the expenditures and the individuals benefiting from them —following the logic sustaining contribution limits in *Buckley*—was misplaced for the dissenters: Of course parties hold influence over the views, values, and activities of their candidates—that is what they are supposed to do.

For Justice John Paul Stevens, dissenting from the Court's ruling and reasoning; it was precisely this potential for corruption that justified deference to the congressional perceptions expressed in the FECA. Parties, especially those with deeper pockets, have the potential to exert an undue and unhealthy amount of influence over both their candidates and the electoral process in general. Thus, this element of the FECA provided a leveling of the electoral playing field and a cleansing of the political process.

Parties are deserving of speech rights generally on par with those of individuals, the Court said in *Colegrove,* as it chipped away further at the campaign finance restrictions of the FECA. Still, significant unresolved theoretical questions remained: What, for example, is the proper place and purpose of political parties in today's campaigns and elections? Can candidates or potential candidates be "corrupted" by their party? Do independent expenditures by parties inspire problems that require state regulation? For the plurality, the answer was "no," though the *Colegrove* decision left open the question of whether party expenditures made in "coordination" with candidates would receive the same constitutional protection as "independent" expenditures. The issue was eventually resolved in *Federal Election Commission v. Colorado Republican Federal Campaign Committee,* 533 U.S. 431 (2001), in which the Court ruled that parties may

not coordinate their expenditures with candidates' spending.

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See also: Buckley v. Valeo; Federal Election Campaign Act of 1971.

FURTHER READING

Briffault, Richard. "Campaign Finance, the Parties, and the Court: A Comment on *Colorado Republican Federal Campaign Committee v. Federal Election Commission.*" *Constitutional Commentary* 14 (Spring 1997): 91–126.

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Pinaire, Brian K. "A Funny Thing Happened on the Way to the Market: The Supreme Court and Political Speech in the Electoral Process." *Journal of Law and Politics* 17, 3 (Summer 2001): 489–551.

Commercial Speech

Despite the admonition that "Congress shall make no law . . . abridging the freedom of speech," the First Amendment periodically has been deemed inapplicable to certain entire categories of expression. Libel and obscenity are among the most notable examples of speech that the U.S. Supreme Court considers unworthy of constitutional protection. For a time, commercial advertising was also a category of expression that the Supreme Court considered to be outside of the First Amendment. In *Valentine v. Chrestensen,* 316 U.S. 52 (1942), the Court tersely held that government could restrict or even ban commercial leafleting without running afoul of the constitutional right to free speech.

In the 1970s, however, the Court signaled its readiness to reconsider the issue, and in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), the Court abandoned its absolutist posture and conceded that commercial speech was entitled to some form of constitutional shelter. Citing the need for consumers to be able to make informed economic decisions, Justice Harry A. Blackmun determined that the First Amendment protection for free speech could be construed as covering the right to receive economic information. But by couching the issue in terms of the rights of the listener rather than the rights of the speaker, the Court left the door open for paternalistic regulation of advertising. Commercial speech was entitled to constitutional protection only as long as it would be beneficial to consumers; advertisers could not claim an unqualified right to speak their mind about their product or service analogous to the right of political speakers to advance their ideological agenda.

Once advertising's constitutional merit was transformed from a nonstarter into an exercise in drawing legal lines, it became inevitable that the Court would devise a procedure to govern when and how those lines would be drawn (a task left unfinished in *Virginia Board of Pharmacy*). Amazingly, it took four full years, during which time the Court groped its way through six more cases involving commercial speech, before a methodology finally emerged.

The four-part test announced in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557 (1980), focused both on the contested regulation of commercial speech and on the commercial speech itself: "For commercial speech to come within [the First Amendment] . . . it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest."

Although the clear purpose of the *Central Hudson* test was to foment streamlined and consistent resolution of commercial speech cases, it ultimately created more problems than it fixed. Five of the first fifteen commercial speech cases decided after *Central Hudson* could be resolved only via plurality opinions, and many of the majority opinions were unusually fragmented. In addition, a debate raged on the Court for a decade over whether the fourth *Central Hudson* prong merely provided an upper limit to regulatory behavior, or whether it triggered the application of "least restrictive means" analysis mandating a minimum level of legislative or municipal control. Amid