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Constitutional Law—First Amendment Rights of Direct Democracy Participants versus the State's Interest in Regulating the Election Process. *Buckley v. American Constitutional Law Foundation, Inc.*, 119 S. Ct. 636 (1999).

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CONSTITUTIONAL LAW—FIRST AMENDMENT RIGHTS OF DIRECT DEMOCRACY PARTICIPANTS VERSUS THE STATE’S INTEREST IN REGULATING THE ELECTION PROCESS. *BUCKLEY V. AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC.*, 119 S. Ct. 636 (1999).

I. INTRODUCTION

The balance between a state’s interest in regulating its election process and the interest of individual citizens in effectively campaigning for public issues they support is a delicate one. Like many other types of laws regulating speech, election laws have often been challenged on First Amendment grounds. Because the processes of direct democracy are theoretically intended to be conducted by the people, governmental regulation of the process is particularly controversial. For instance, Arkansas recently experienced political turbulence surrounding a proposed ballot initiative in its last general election.¹ Like the attempt to eliminate property taxes in Arkansas, controversial issues are often the focus of direct democracy campaigns.² Confronted with numerous state imposed regulations, the active participants of direct democracy are sometimes forced to defend their fundamental rights, including the First Amendment right of free speech.

This note will examine one of the United States Supreme Court’s most recent decisions involving this tenuous area of First Amendment law: *Buckley v. American Constitutional Law Foundation, Inc.*³ *Buckley* involved a challenge to a Colorado statute that purported to govern the procedure of initiative petitioning in the State. Part II of the note will examine the circumstances that led to the lawsuit between Colorado’s Secretary of State Victoria Buckley and the American Constitutional Law Foundation. Part III will set out the precedent that formed the basis for the *Buckley* decision. In Part IV, the note will discuss the *Buckley* Court’s reasoning, and Part V will address the significance of the *Buckley* decision, including how the decision may affect Arkansas.

1. Proposed constitutional Amendment 4 provoked controversy during Arkansas’s 1998 general election. See *Roberts v. Priest*, 334 Ark. 503, 509-10, 975 S.W.2d 850, 851-52 (1998). Amendment 4, which was the result of an initiative petition drive, sought to eliminate the ad valorem property tax in Arkansas. See *id.* at 509, 975 S.W.2d at 851.

2. See Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don’t Work*, 66 U. COLO. L. REV. 47, 49 (1995). At least according to public perception, initiative petition drives usually concentrate on controversial measures. See *id.*

3. 119 S. Ct. 636 (1999).

II. FACTS

In 1993, Respondent American Constitutional Law Foundation⁴ (ACLF) and several individuals sued Colorado's Secretary of State, challenging the constitutionality of certain aspects of legislation regulating Colorado's initiative⁵ and referendum⁶ processes in the state.⁷ Before filing suit, the plaintiffs sought to repeal through referendum the recently proposed legislation regulating direct democracy procedures.⁸ Colorado's Secretary of State denied the referendum request, however, relying on the Senate's inclusion of a "safety clause" in the bill.⁹ ACLF and the individual plaintiffs then brought suit under 42 U.S.C. § 1983,¹⁰ claiming that the regulations

4. The American Constitutional Law Foundation (ACLF) is a nonprofit organization concerned primarily with direct democracy. The group is composed of members of differing political affiliations, all bound by the common thread of their involvement in the petition and referendum processes. See Brief for Respondents American Constitutional Law Foundation, Inc., Craig Eley, Jack Hawkins, Lonnie Haynes, and Alden Kautz at 4 n.3, *Buckley v. ACLF*, 119 S. Ct. 636 (1999) (No. 97-930).

5. "An electoral process by which a percentage of voters can propose legislation and compel a vote on it by the legislature or by the full electorate; recognized in some state constitutions, the initiative is one of the few methods of direct democracy in an otherwise representative system." BLACK'S LAW DICTIONARY 315 (Abr. 6th ed. 1990).

6. "1. The process of referring state legislative acts or state constitutional amendments to the people for final approval by popular vote. 2. A vote taken by this method." BLACK'S LAW DICTIONARY 530 (Abr. 6th ed. 1990).

7. See *Buckley*, 119 S. Ct. at 640.

8. See *id.* Colorado's legislature passed a law that imposed a number of regulations on the initiative and referendum processes, including limitations on the time period a petition can be circulated, requirements concerning the disclosure of identities of those who circulate petitions and those who pay for the circulations, and requirements that circulators be at least eighteen years of age and registered voters. See *id.*

9. *American Constitutional Law Found., Inc. v. Meyer*, 120 F.3d 1092, 1097 (10th Cir. 1997). A safety clause precludes further review by referendum and may be included when legislation is deemed "necessary for the immediate preservation of the public peace, health, or safety." *Id.* at 1096.

10. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

violated the First¹¹ and Fourteenth¹² Amendments to the United States Constitution.¹³

Respondents complained of six specific limitations proposed by the Colorado legislation.¹⁴ First, ACLF challenged the requirement that all petition circulators be at least eighteen years of age.¹⁵ Second, the organization challenged the requirement that all petition circulators be registered voters.¹⁶ Third, ACLF took issue with the restriction imposed by the state legislature limiting the maximum circulation period for petitions to six months.¹⁷ Fourth, ACLF contested the constitutionality of requiring circulators to wear identification badges stating their name, volunteer or paid status, and if paid, the employer's name and telephone number.¹⁸ Fifth, the complainants challenged the requirement that each petitioner sign an affidavit certifying his knowledge and understanding of the laws pertinent to petitioning.¹⁹ Finally, ACLF questioned the constitutionality of the state's requirement of a disclosure statement revealing the names of paid circulators and the amount of money each is paid.²⁰

ACLF's primary contention was that each of these regulations violated the First Amendment by having a chilling effect on core political speech.²¹ For example, Bill Orr, who was the executive director of ACLF, claimed injury caused by the voter registration requirement.²² He argued that not registering to vote is a form of political speech in and of itself.²³ ACLF

11. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

12. The Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

13. See *Buckley*, 119 S. Ct. at 640.

14. See *id.*

15. See *id.*

16. See *id.*

17. See *id.*

18. See *id.*

19. See *Buckley*, 119 S. Ct. at 640.

20. See *id.* at 641.

21. See Brief for Respondent ACLF at 12-25, *Buckley* (No. 97-930).

22. See Brief of Respondents David Aitken, Jon Baraga, and Bill Orr, as the Parent and Guardian of William David Orr at 2, *Buckley v. ACLF*, 119 S. Ct. 636 (1999) (No. 97-930).

23. See *id.*

pointed out that the First Amendment guarantees free speech to all citizens, not exclusively those who choose to register to vote.²⁴ With regard to the minimum age requirement, William David Orr, a minor who sued individually through his father Bill Orr, complained that despite his desire and physical ability to circulate petitions regarding educational issues important to him, he was not permitted to do so because of the state regulations.²⁵

ACLF member Jon Baraga, who had previously circulated petitions for the Colorado Hemp Initiative, specifically challenged the validity of the identification badge requirement.²⁶ Baraga stressed the importance of anonymity when campaigning for controversial issues, explaining that he had been harassed by law enforcement officials when he circulated petitions seeking the legalization of marijuana.²⁷ Respondents also asserted that the sixth month limit imposed on the circulation of petitions was an arbitrary and unreasonable burden on free speech.²⁸ They further argued that the criminal and civil penalties imposed for a petitioner's failure to sign the required affidavit made this requirement void for vagueness because it was not clear exactly what the petitioner should know and understand about the law.²⁹ ACLF also argued that the disclosure requirement was overbroad because the names of all paid petitioners must be disclosed regardless of the amount they were paid and that the requirement was intrusive because it chilled the speech of paid petitioners.³⁰ In contrast, the State contended that each of the regulations was necessary to prevent abuse and fraud that may occur in the direct democracy process and that any burden on speech was minimal and necessary due to the compelling state interest of preventing such abuse and fraud.³¹

The United States District Court for the District of Colorado upheld the provisions that required a minimum age for petitioners, required petitioners to sign an affidavit, required petitioners to be registered voters, and required a six month maximum circulation period for petitions.³² However, the district court held that the identification badge and disclosure requirements were unconstitutional.³³ On appeal, the United States Court of Appeals for the

24. See Brief for Respondent ACLF at 17, *Buckley* (No. 97-930).

25. See Pro se Respondent Bill Orr's Brief at 40, *Buckley v. ACLF*, 119 S. Ct. 636 (1999) (No. 97-930).

26. See *id.* at 19.

27. See *id.*

28. See *American Constitutional Law Found., Inc. v. Meyer*, 120 F.3d 1092, 1098 (10th Cir. 1997).

29. See *id.* at 1106.

30. See Brief for Respondent ACLF at 24, *Buckley* (No. 97-930).

31. See Petitioner's Brief at 15-17, *Buckley v. ACLF*, 119 S. Ct. 636 (1999) (No. 97-930).

32. See *Buckley*, 119 S. Ct. at 641.

33. See *id.* at 642.

Tenth Circuit affirmed the trial court's approval of the minimum age, affidavit, and six month circulation period requirements.³⁴ It also affirmed the trial court's rejection of the identification badge and disclosure requirements.³⁵ Unlike the district court, however, the appellate court held that the requirement that petition circulators be registered voters was an unnecessary burden on political speech.³⁶

The United States Supreme Court granted Colorado Secretary of State Buckley's writ of certiorari to decide whether these state regulations of direct democracy unduly inhibited core political speech as protected by the First Amendment.³⁷ The Court affirmed the Tenth Circuit, ruling that the voter registration, six month limitation, identification badge, and disclosure requirements were undue restrictions on speech, while the minimum age and affidavit requirements were acceptable.

III. BACKGROUND

This background section begins with a brief examination of the recent history of First Amendment jurisprudence as defined by the Supreme Court, touching on the basic distinctions in the various types of protected speech. Next, the focus shifts to First Amendment law as applicable to election procedures. The remainder of the background compares regulations governing candidate elections to regulations of direct democracy procedures.

A. A Brief Summary of Basic First Amendment Principles

The First Amendment protects a broad array of speech and conduct that arises out of various facts and circumstances. First Amendment doctrine is often referred to as "freedom of speech" or "freedom of expression." Despite its presence throughout the history of the United States, the First Amendment's protection of speech was not the subject of extensive litigation until relatively recent times.³⁸

34. *See id.*

35. *See id.*

36. *See id.*

37. *See Buckley v. American Constitutional Law Found., Inc.*, 118 S. Ct. 1033 (1998).

38. *See generally* JEREMY COHEN, CONGRESS SHALL MAKE NO LAW: OLIVER WENDELL HOLMES, THE FIRST AMENDMENT, AND JUDICIAL DECISION MAKING (1989). One of the first occasions where the Court decided a First Amendment issue was *Schenck v. United States*, 249 U.S. 47 (1919). Challenges to laws prohibiting speaking out against the government, such as the Espionage Act of 1917, ignited a spark forcing the Court to begin creating precedent for future First Amendment cases.

Since the early 1900s, the Court has granted certiorari in a substantial number of cases involving First Amendment issues.³⁹ Today's First Amendment decisions are the product of decades spent developing complex multi-pronged tests that are used to determine the constitutionality of restrictions imposed on communication. The analysis of the early speech cases appears rather rudimentary in comparison.⁴⁰ In evaluating the constitutionality of statutes aimed at regulating speech, the Court looks at several factors. A primary consideration is whether a statute is "content-based" or "content-neutral."⁴¹

The environment where the speech occurs is also pertinent. For instance, expression taking place in a traditional public forum such as a park will receive greater constitutional protection than would speech occurring in a public nonforum such as a courtroom.⁴² Some forms of speech fall neatly into these categories designated by a long line of Supreme Court cases, while others overlap categories. First Amendment cases involving state regulation of election processes, including direct democracy procedures, represent a substantial number of the First Amendment cases of the last quarter century.⁴³

39. During the 1986-1997 sessions, the Court decided approximately 82 cases where freedom of expression was a central issue. See Burt Neuborne, *Free Expression and the Rehnquist Court*, in LITIGATION 1998, at 681, 685 (PLI Litig. & Admin. Practice Course Handbook Series No. HO-002B, 1998). This averages to about seven First Amendment cases per session.

40. In *Schenck* and its progeny, the Court considered whether the speech at issue constituted a "clear and present danger" to governmental operations. See COHEN, *supra* note 38, at 105-24. In contrast, in *United States v. O'Brien*, the Court set forth a four-part test to determine whether state regulation of speech will withstand constitutional muster. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The test is applied in circumstances where regulation is directed at expression composed of both speech and conduct. See RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 3.02[4] (1994). The *O'Brien* test states that: (1) the governmental regulation must be "within the constitutional power of government;" (2) the regulation must further an "important or substantial governmental interest;" (3) the governmental interest must be "unrelated to the suppression of free expression;" and (4) the "incidental restriction on alleged First Amendment freedoms" must be "no greater than is essential to the furtherance of that interest." *Id.*

41. "Content-based" statutes regulate speech according to the content of the expression, whereas "content-neutral" statutes regulate factors other than the content of the communication, such as the "time, place, and manner" in which it occurs. See SMOLLA, *supra* note 40, §3.01[2]. Content-based regulation is generally impermissible without a compelling governmental interest, and such regulations are usually subject to heightened scrutiny. See SMOLLA, *supra* note 40, §3.01[2]. In contrast, lower level scrutiny, sometimes referred to as "intermediate scrutiny," is usually applicable where regulations are content-neutral. See SMOLLA, *supra* note 40, §3.01[2].

42. See SMOLLA, *supra* note 40, § 3.02[3].

43. According to one author, 16 of the 82 First Amendment cases decided during Rehnquist's tenure as Chief Justice have involved election regulations. See Neuborne, *supra* note 39, at 703 (citing statistics current through the 1997 session).

The convoluted rules and seemingly inconsistent precedent created by these cases demonstrate their ill fit into the categorical scheme of other First Amendment cases.

B. First Amendment Challenges to Election Laws

Public political speech is usually the sort of core speech awarded the highest First Amendment protection;⁴⁴ however, the Court has long recognized that states have a legitimate interest in regulating the election process. In one of the earlier election law cases, *Rosario v. Rockefeller*,⁴⁵ the Court upheld a New York law that required voters who wished to vote in primary elections to register to vote before the general election preceding the primary.⁴⁶ New York voters challenged the law, claiming that it violated their First and Fourteenth Amendment rights.⁴⁷ The challengers argued that the law, in effect, disenfranchised them, depriving them of their First Amendment right to vote in the primary election.⁴⁸ The State defended the law by claiming it was necessary to prevent voters from raiding⁴⁹ the primary of their opposing party.⁵⁰ The Court upheld the law, explaining that although voters who had not registered before the deadline were somewhat restricted from participating in primary elections, the State's interest in preventing raiding was sufficiently compelling to overcome the First Amendment challenge.⁵¹

As demonstrated in *Rosario*, states generally argue that their significant interest in preventing corruption and fraud inherent in elections outweighs minor restrictions imposed on election-related speech.⁵² Election speech can be subdivided into two distinct categories: campaigns aimed at electing particular candidates and direct democracy initiative campaigns where the objective is to place an issue before the voters on an upcoming ballot.

44. As a basic guarantee of the First Amendment, the right to participate in expressive activities such as petitioning the government is usually considered a fundamental right. See Emily Calhoun, *Initiative Petition Reforms and the First Amendment*, 66 U. COLO. L. REV. 129, 130 (1995).

45. 410 U.S. 752 (1973).

46. See *id.* at 754.

47. See *id.* at 756.

48. See *id.*

49. Raiding occurs when "voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Id.* at 760.

50. See *id.*

51. See *Rosario*, 410 U.S. at 760-62.

52. See generally SMOLLA, *supra* note 40, § 9.04.

1. *Regulation of Political Candidate Elections*

Election laws regulating third party candidates have spawned many lawsuits challenging election regulations. States often attempt to control access to the political arena by third party candidates, sometimes even excluding them entirely.⁵³ States have offered as a justification for their actions the compelling interest of promoting the two party political system.⁵⁴ In striking down many of the regulations, the Supreme Court has recognized the valuable role fulfilled by third parties.⁵⁵

Confronted with a challenge to a California statute in effect limiting third party participation, the Supreme Court reaffirmed the states' right to regulate the election processes in *Storer v. Brown*.⁵⁶ The plaintiffs were independent candidates for various elected offices.⁵⁷ California prohibited any independent candidate from running for office as an independent if he had participated in the activities of a major political party within the past year.⁵⁸ The candidates claimed the law violated their First and Fourteenth Amendment rights to associate with the political party of their choice.⁵⁹ In contrast, the State claimed a legitimate interest in preventing candidates who lost in one primary from simply filing as a candidate for another party.⁶⁰

The Court found that the State's interest in maintaining stable election processes was compelling and outweighed any inconvenience to independent candidates.⁶¹ Limiting independent party candidacy to those who had not participated in a major party in the past year was, according to the Court, an effective method of ensuring the integrity of the election process.⁶² The Court reasoned that this compelling interest was greater than the interest of a

53. See, e.g., *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998) (holding that the state owned television station could exclude a third party congressional candidate from a televised debate).

54. See, e.g., *Williams v. Rhodes*, 393 U.S. 23, 31-32 (1968).

55. See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983) (stating that third parties have historically been "fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream").

56. 415 U.S. 724 (1974).

57. See *id.* at 727-28.

58. See *id.* at 726.

59. See *id.* at 727-28.

60. See *id.* at 735.

61. See *id.* at 736. The Court stated, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* at 730.

62. See *Storer*, 415 U.S. at 733. The Court compared California's concerns with those of the Founding Fathers, who were concerned that "splintered parties and unrestrained factionalism may do significant damage to the fabric of government." *Id.* at 736.

candidate who had been involved with an independent party for less than a year.⁶³

Attempts to regulate election procedures were again challenged on First Amendment grounds in *Buckley v. Valeo*.⁶⁴ After the notorious political scandal of the 1970s involving corruption at the highest levels of government and ultimately resulting in the resignation of President Richard Nixon, onlookers demanded some form of campaign finance regulation. Congress responded to Watergate with the 1974 Federal Election Campaign Act, an amended version of the 1971 Act.⁶⁵

In *Buckley v. Valeo*, the Supreme Court accepted a plaintiff's contention that his First Amendment rights were abridged by state regulation of the election process.⁶⁶ The Court struck down certain provisions of the Federal Election Campaign Act of 1971, as amended in 1974.⁶⁷ While the Court permitted limitations on individual contributions to campaigns,⁶⁸ it found that electoral candidates possessed a First Amendment right to spend an unlimited amount on their own campaigns.⁶⁹ The Court also found that First Amendment principles were infringed by provisions limiting the total amount that could be spent in a campaign and by provisions limiting the amount any one person could contribute.⁷⁰ The Court did uphold, however, the reporting requirements that mandated disclosure of the names of political action committees that donated money to campaigns and the amount donated.⁷¹

The *Buckley v. Valeo* Court found a significant distinction between funds contributed by outside sources and money deriving from a candidate's own

63. See *id.* at 734.

64. 424 U.S. 1 (1976).

65. See David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 REV. LITIG. 85, 91 (1999). The Federal Election Campaign Act of 1974 limited the amount any individual or group could contribute in a single campaign to \$1000 and permitted political action committees to donate up to \$5000 in a single campaign. See *id.* at 93. In addition, the Act restricted the total amount of one's own money that a candidate could spend. See *id.*

66. See *Buckley*, 424 U.S. at 17-23.

67. See *id.* at 6.

68. See *id.* at 29.

69. See *id.* at 50-51. The Court "recognize[d] that political expression and money are inextricably bound together and that restrictions on campaign spending necessarily curtail, at the least, the quantity of expression." Arthur N. Eisenberg, *Buckley, Rupert Murdoch, and the Pursuit of Equality in the Conduct of Elections*, in 1996 ANNUAL SURVEY OF AMERICAN LAW 451, 455 (1996).

70. See *Buckley*, 424 U.S. at 21.

71. See *id.* at 68. The Court offered three justifications for the disclosure requirements. One was to inform the electorate about who is funding campaigns. See *id.* at 66. Another was to deter corruption by forcing campaign contributors to reveal their identities. See *id.* at 67. Finally, the Court reasoned that keeping such records was the best method of detecting violations of limits imposed on contributions. See *id.* at 67-68.

personal wealth. The compelling factors, such as the prevention of corruption, that legitimized the regulation of contributions were not as prominent when dealing with a candidate's expenditures of his own resources.⁷² The loquacious opinion of *Buckley v. Valeo* explained why regulation of the former was constitutionally permissible, while First Amendment concessions must be made in the regulation of expenditures.

The later case of *Anderson v. Celebrezze*⁷³ presented another First Amendment challenge to an election regulation. There, the Court held that Ohio's early filing deadline imposed on independent party presidential candidates was unconstitutional under the First Amendment.⁷⁴ Because the early deadline was not applicable to candidates of major parties, the Court recognized the burden on independent candidates was onerous and contrary to the First Amendment.⁷⁵ In addition, the Court stated that the deadline essentially discriminated against candidates and voters whose views lay outside the political mainstream.⁷⁶ The Court criticized the burden imposed by the State, noting the far-reaching implications caused by one state's laws in a national election.⁷⁷ The Court was concerned that the rights of voters from other states who support that candidate would be affected by the Ohio law.⁷⁸

In a more recent case, *Timmons v. Twin Cities Area New Party*,⁷⁹ independent party candidates challenged a Minnesota law that prohibited candidates from being listed on an election ballot under more than one political party.⁸⁰ The Court recognized that while a political party has the right to select its own candidates, that right is not absolute.⁸¹ The Court viewed the limitations imposed as insufficient to warrant heightened

72. See Schultz, *supra* note 65, at 99-100.

73. 460 U.S. 780 (1983).

74. See *id.* at 806. The Court noted "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." *Id.* at 793.

75. See *id.* at 805-06. The Court was careful to point out that its primary concern was for the voters who sought to elect Anderson, not the candidate himself. See *id.* at 806.

76. See *id.* at 794.

77. See *id.* at 795. The Court stated that "the President and Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Id.*

78. See *id.*

79. 520 U.S. 351 (1997).

80. See *id.* at 356. The practice of listing candidates under various political parties is known as "fusion" and was prevalent in the past when third parties such as the Populists were popular. *Id.*

81. See *id.* at 358. Several circumstances may prevent a party from nominating the candidate of its choice, such as the individual's ineligibility or unwillingness to serve, or his affiliation with and serving as a candidate for another party. See *id.*

scrutiny.⁸² The Court rejected the notion that parties have a First Amendment right to select whomever they choose as their candidate.⁸³ The Court pointed out that the party members could support their desired candidate even if he were listed under the name of a different party, thus the right to vote for the candidate of their choice was not infringed.⁸⁴ In the Court's view, the process of placing candidates on a ballot serves the purpose of electing a candidate rather than as a form of political expression.⁸⁵

When balancing the State's interest in protecting ballot integrity and political stability with the minor burden imposed on the political parties by the Minnesota law, the *Timmons* Court found that the former outweighed the latter.⁸⁶ Because the Court found that a heightened scrutiny standard was not necessary to justify the anti-fusion regulations, the Court accepted the several justifications offered by the State as sufficient to pass constitutional muster.⁸⁷

2. Regulation of Direct Democracy Procedures

Like residents of other states, Colorado citizens have often employed the processes of direct democracy to implement the laws they want.⁸⁸ In response, the State is constantly attempting to control these procedures to prevent fraud and corruption.⁸⁹ In *Meyer v. Grant*,⁹⁰ the Court struck down Colorado's prohibition against paying individuals to circulate petitions in initiative campaigns.⁹¹ The Court unequivocally characterized petition circulation as "core political speech."⁹² The Court stated that the type of speech at issue was

82. *See id.* at 364.

83. *See id.* at 359.

84. *See id.* at 360.

85. *See Timmons*, 520 U.S. at 363.

86. *See id.* at 369-70.

87. *See id.* The Court stated that the State's interests of maintaining ballot integrity and political stability were "correspondingly weighty" to the minor burdens on the third party candidates. *Id.*

88. *See generally* Collins & Oesterle, *supra* note 2, at 65-70.

89. *See generally* Collins & Oesterle, *supra* note 2, at 65-70.

90. 486 U.S. 414 (1988).

91. *See id.* at 425-27. Critics of modern direct democracy procedures express dismay over the practice of paid petition circulation. *See* John F. Cooper, *The Citizen Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level*, 28 N.M. L. REV. 227, 263-64 (1998). Contrary to the idea that direct democracy is a grassroots form of government by the people, many of the largest special interest groups in the country often employ petition circulators. *See id.* at 262. The National Rifle Association is said to have spent \$6,000,000 in one state's referendum over gun control, while the tobacco industry allegedly spent over \$21,000,000 attempting to stop the tobacco tax from increasing in California. *See id.*

92. *Meyer*, 486 U.S. at 422.

entitled to First Amendment protection “at its zenith.”⁹³ Because of the fundamental right at issue, the Court utilized exacting scrutiny to balance the State’s interest with the First Amendment rights of those paying petition circulators.⁹⁴

After determining the proper standard to apply, the Court held that the statute forbidding the payment of petition circulators was unconstitutional.⁹⁵ According to the Court, the number of circulators as well as the size of the audience reached would be diminished due to the restrictions.⁹⁶ As a result, the Court found a decreased likelihood that a petition issue would make it to the ballot.⁹⁷ In light of the significant restrictions on political expression, the Court found the State’s burden to be insurmountable.⁹⁸ In the *Meyer* Court’s view, the State had not presented a compelling interest to justify the criminalization of paid petition circulation.⁹⁹

In *McIntyre v. Ohio Elections Commission*,¹⁰⁰ an Ohio law prohibiting the distribution of anonymous campaign literature was struck down. The Court granted certiorari after the petitioner was fined \$100 for distributing flyers opposing a school levy to be voted on in an upcoming referendum.¹⁰¹ The law prohibited only anonymous literature that was aimed at influencing an upcoming election.¹⁰² The Court explained that anonymous authors are entitled to the same degree of free speech under the First Amendment that known authors enjoy.¹⁰³ The State, however, attempted to justify the prohibition by claiming that an author’s name provided necessary information to the reader and that it was necessary to prevent fraud and corruption.¹⁰⁴

93. *Id.* at 425.

94. *See id.* at 420.

95. *See id.* at 428.

96. *See id.* at 422-23.

97. *See id.*

98. *See Meyer*, 486 U.S. at 425.

99. *See id.* The State claimed that the statute was necessary to prevent fraud and corruption and to ensure that a petition had the support of a sufficient number of voters. *See id.* at 419-20. The State also asserted that because permitting direct democracy petitions was not constitutionally required, limiting the practice did not violate a constitutional right. *See id.* at 420.

100. 514 U.S. 334 (1995).

101. *See id.* at 338-41. Mrs. McIntyre actually passed away during the litigation, but the executor of her estate requested review before the Supreme Court. *See id.* at 340.

102. *See id.* at 344.

103. *See id.* at 342. The Court noted that authors choose to remain anonymous for a variety of reasons, including fear of retaliation or merely the protection of one’s privacy. *See id.* at 341-42.

104. *See id.* at 348.

The Court rejected the State's argument that it was merely regulating the election process.¹⁰⁵ The Court found that rather than regulating elections procedures, Ohio's statute was attempting to regulate pure speech.¹⁰⁶ The Court stated that providing a reader with an author's name simply for the sake of offering more information about the literature was not a compelling interest.¹⁰⁷ While preventing fraud and corruption is normally a significant state interest, the Court held that in this case the justification was not sufficient.¹⁰⁸ Because Ohio had other statutes in place that served to prevent fraud and corruption, this additional restriction was unnecessary to effectuate its stated purpose.¹⁰⁹

The *McIntyre* Court emphasized the importance of the exchange of ideas in the political arena, particularly in the context of a controversial referendum.¹¹⁰ After concluding that this type of speech deserves the utmost First Amendment protection, the Court reiterated the importance of anonymity in the political sector.¹¹¹ The Court rationalized that although the right to remain anonymous may sometimes be abused, the value of speech far outweighs any potential danger of abuse.¹¹² According to the Court, this idea lies at the very heart of First Amendment jurisprudence.¹¹³

105. See *id.* at 345-46.

106. See *McIntyre*, 514 U.S. at 345-46.

107. See *id.* at 348-49.

108. See *id.* at 349-50.

109. See *id.* One State statute specifically prohibited "making or disseminating false statements during political campaigns." *McIntyre*, 514 U.S. at 349.

110. See *id.* at 347. The Court stated, "[u]rgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed." *Id.*

111. See *id.* at 357. The Court considered anonymity to serve as "a shield from the tyranny of the majority." *Id.*

112. See *McIntyre*, 514 U.S. at 357 (citing *Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting)).

113. See *id.* According to the Court, the purpose of the First Amendment is "to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." *Id.* Direct democracy initiatives are often employed to advance causes supported by individuals who fall outside the majority, such as women and minorities. See Cooper, *supra* note 91, at 250. Thus, anonymity in that context may be particularly important.

IV. REASONING

A. Majority Opinion

In *Buckley v. American Constitutional Law Foundation, Inc.*,¹¹⁴ the United States Supreme Court held that while state regulation of election procedures is sometimes warranted, legislatures must proceed with caution to ensure that core political speech is not unduly burdened.¹¹⁵ The Court's analysis began with a discussion of the voter registration requirement imposed by the Colorado legislature.¹¹⁶ The Court recognized that limiting the pool of citizens eligible to circulate petitions to only those citizens who are registered voters would significantly restrict the number of people capable of effectively communicating a political message.¹¹⁷ The State's argument that the registration requirement is easily fulfilled did not convince the Court, which reasoned that the failure to register is not always due to apathy.¹¹⁸ The Court recognized that many citizens deliberately choose not to register to vote as a form of political expression.¹¹⁹

The Court also did not agree with the State's contention that the registration requirement was necessary to police petitioners.¹²⁰ The Court pointed out that petitioners' names and addresses would be available through the affidavits each is required to sign.¹²¹ Because the State failed to present a compelling reason to uphold the registration requirement, the Court held that this requirement was a violation of the First Amendment.¹²²

In accord with its previous ruling in *McIntyre* that the First Amendment protects anonymous speech,¹²³ the Court explained that the identification badge was also an unnecessary burden on speech.¹²⁴ The Court was

114. 119 S. Ct. 636 (1999).

115. See *Buckley*, 119 S. Ct. at 642. The Court explained that certain state interests (e.g., "administrative efficiency, fraud detection, informing voters") sometimes justify restrictions on speech. *Id.*

116. See *id.* at 642.

117. See *id.* at 643. A restriction survives constitutional scrutiny only when necessitated by a compelling governmental interest. See *id.* at 642 n.12.

118. See *id.* at 644.

119. See *id.* The Court stated that "the choice not to register [sometimes] implicates political thought and expression." *Id.*

120. See *id.* The State claimed that permitting only registered voters to circulate petitions would ensure that the circulators could be more easily subpoenaed when necessary for disciplinary action. See *id.*

121. See *Buckley*, 119 S. Ct. at 645.

122. See *id.*

123. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

124. See *Buckley*, 119 S. Ct. at 645-46. While striking down the requirement that each petitioner wear a badge displaying his or her name, the Court did not address whether requiring

particularly concerned with the fact that advertising one's name while petitioning enables the public to pair the petitioner's identity with the sometimes controversial issue being petitioned, possibly subjecting the petitioner to ridicule and harassment.¹²⁵

Again citing to *McIntyre*, the Court explained that requiring proponents of initiatives to disclose the names and addresses of petition circulators and the amount paid to each circulator was contrary to the right to anonymous speech.¹²⁶ Notwithstanding the State's argument that such reports are necessary to prevent fraud in the petitioning process, the Court expressed doubt that a paid circulator would be any more likely to commit fraud than a volunteer.¹²⁷ In reaching this conclusion, the Court applied an "exacting scrutiny" standard which involved balancing the electorate's need to be informed about the source of campaign funds with the petition proponents' right to anonymously conduct their core political speech.¹²⁸

The Court stressed the fact that although the State did not show sufficient justification to warrant these restrictions on the initiative process, other methods remained to serve the State's compelling interest of preventing fraud and maintaining grassroots support.¹²⁹ Specifically, the Court pointed out that it had not struck down the monthly disclosures of the names of proponents who were financially supporting each initiative campaign, the total amount each proponent paid, and which initiatives were supported by paid circulators.¹³⁰ Moreover, although the Court did not specifically discuss each of the remaining Colorado regulations challenged by ACLF, it affirmed the Tenth Circuit's approval of the minimum age requirement, the affidavit requirement, and the six month time-limit on petition circulation.¹³¹

petitioners to display their volunteer or paid status and employer when applicable was also an undue burden, as the Court of Appeals had not ruled on the issue below. *See id.*

125. *See id.* The Court referred to Respondent Baraga's claims that he had been harassed while petitioning for the Hemp Initiative and other claims that citizens who would otherwise circulate petitions refuse to do so when they are required to wear a name badge. *See id.*

126. *See id.* at 646. Like the Tenth Circuit below, the Court did not express an opinion on the validity of a monthly report including only the names of proponents of petitions, rather than the actual circulators, and listing all initiatives in which paid circulators participated. *See id.* at 647.

127. *See id.* at 648 (citing *Meyer*, 486 U.S. at 426).

128. *See id.* at 647 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam)).

129. *See id.* at 648.

130. *See Buckley*, 119 S. Ct. at 648 (citing *Valeo*, 424 U.S. at 16-17). In addition, the state of Colorado enforces a requirement that for an initiative to be placed on a ballot, it must be supported by a number of signatures equal to five percent the number of voters who participated in the last general election. *See id.*

131. *See id.* at 649.

B. Minority Opinions

In his concurrence, Justice Thomas agreed with the majority's conclusion but explained that he would apply the more stringent strict scrutiny standard to the badge, voter registration, and disclosure report requirements because, in his view, these are significant burdens on core political speech.¹³²

Justice O'Connor, joined by Justice Breyer, concurred in part and dissented in part.¹³³ O'Connor agreed with the majority's rejection of the identification badge requirement,¹³⁴ but unlike the majority, she believed the disclosure reports¹³⁵ and the voter registration requirements¹³⁶ were permissible exercises of state regulation over the election process. O'Connor pointed out that many states require electoral candidates and those circulating petitions on their behalf to be registered voters.¹³⁷ O'Connor argued that requiring petition circulators to be registered voters was a neutral qualification analogous to others that had previously been upheld by the Court.¹³⁸ Similarly, O'Connor argued that the disclosure requirements were an acceptable regulation of the electoral process.¹³⁹ She cited to previous cases where the Court had held such provisions constitutional.¹⁴⁰

Chief Justice Rehnquist dissented, arguing that all the restrictions imposed by the Colorado legislature, with the exception of the identification badge,¹⁴¹ amounted to constitutionally permissible and legitimate state regulation of the election process.¹⁴² He argued that regulating the electoral process is a matter of state concern.¹⁴³ He expressed concern about the far reaching effects of the majority's decision, arguing that it would significantly

132. *See id.* (Thomas, J., concurring).

133. *See id.* at 653 (O'Connor, J., concurring in part and dissenting in part).

134. *See id.* at 654 (O'Connor, J., concurring in part and dissenting in part). O'Connor would apply a strict scrutiny standard to the badge requirement, which would necessitate striking down the requirement as an unwarranted restriction on core political speech. *See id.* (O'Connor, J., concurring in part and dissenting in part).

135. *See Buckley*, 119 S. Ct. at 656 (O'Connor, J., concurring in part and dissenting in part). O'Connor felt the reports were not direct limits on speech and were necessary to prevent fraud and to aid in public awareness. *See id.* (O'Connor, J., concurring in part and dissenting in part).

136. *See id.* at 654-55 (O'Connor, J., concurring in part and dissenting in part).

137. *See id.* (O'Connor, J., concurring in part and dissenting in part).

138. *See id.* (O'Connor, J., concurring in part and dissenting in part) (citing *Rosario v. Rockefeller*, 410 U.S. 752, 756-62 (1973); *Storer v. Brown*, 415 U.S. 724, 728-37 (1974)).

139. *See id.* at 657 (O'Connor, J., concurring in part and dissenting in part).

140. *See id.* (O'Connor, J., concurring in part and dissenting in part) (citing *Buckley v. Valeo*, 424 U.S. 1, 60-84 (1976) (per curiam)).

141. *See Buckley*, 119 S. Ct. at 662 (Rehnquist, C.J., dissenting).

142. *See id.* at 659 (Rehnquist, C.J., dissenting).

143. *See id.* at 661 (Rehnquist, C.J., dissenting).

inhibit the state's ability to regulate elections, possibly calling into question traditionally accepted limitations such as state residency.¹⁴⁴

V. SIGNIFICANCE

The full impact of the *Buckley* decision remains to be seen, but its influence is sure to prove substantial for several reasons. First, *Buckley* demonstrates the Court's willingness to extend First Amendment protection into areas traditionally controlled by the states. The power of the states to regulate many areas that have formerly been accepted as within the parameters of state control may now be questionable. *Buckley* makes it clear, however, that direct democracy procedures such as the initiative petitions at issue are within the purview of what is considered core political speech, and thus are entitled to great First Amendment protection.

Because *Buckley* imposes further restrictions on a state's ability to regulate direct democracy procedures, as is often the case when state powers are weakened or otherwise infringed upon by the federal government, the implications of *Buckley* may be objectionable on Tenth Amendment grounds.¹⁴⁵ However, although some critics of *Buckley* may object due to Tenth Amendment principles, that argument seems tenuous in light of recent Tenth Amendment Supreme Court decisions.¹⁴⁶ Whereas recent Tenth Amendment challenges have successfully struck down federal mandates that unconstitutionally burdened the states, the *Buckley* holding does not impose a similar financial or administrative burden.

A third possible effect of *Buckley* relates to the growth in the popularity of the initiative and referendum. The development of active citizen groups such as the American Constitutional Law Foundation will be encouraged, which in turn, may create a heightened awareness among the public of the

144. See *id.* (Rehnquist, C.J., dissenting).

145. For example, Daniel Hays Lowenstein, a professor at the University of California at Los Angeles and an election law expert, quoted in the *Los Angeles Times*, stated that "the state ought to be able to control [its own ballot]." David G. Savage, *California and the West Justices Ease Limits on Ballot Initiatives Government: In Ruling Affecting California, U.S. High Court Says Petition-Gathering Curbs Violate 1st Amendment*, L.A. TIMES, Jan. 13, 1999, at A3.

146. See, e.g., *Printz v. United States*, 117 S. Ct. 2365 (1997) (requiring state law enforcement officers to further federal law by conducting background checks of potential handgun purchasers violates the Tenth Amendment); *New York v. United States*, 505 U.S. 144 (1992) (forcing states to dispose of radioactive waste within state borders violates the Tenth Amendment). In both *Printz* and *New York*, the Court struck down federal mandates due to unconstitutional burdens they imposed on the states. See generally Daniel S. Herzfeld, *Accountability and the Nondelegation of Unfunded Mandates: A Public Choice Analysis of the Supreme Court's Tenth Amendment Federalism Jurisprudence*, 7 GEO. MASON L. REV. 419 (1999).

availability of direct democracy devices. Along with an increased use of direct democracy would be an increased involvement of special interest groups in the process, who are undeterred by *Buckley*. Some critics maintain that *Buckley*'s effect will be to "commercialize" the initiative process.¹⁴⁷ In contrast, others feel that the commercialization of direct democracy has already occurred and initiated measures already are a veritable industry dominated by influential political action committees and professional petitioners.¹⁴⁸ Ironically, direct democracy, which began as a method of escaping a government controlled by big business, is now being controlled by its original enemy.¹⁴⁹

One unfortunate consequence of the *Buckley* decision is that it causes further confusion as to the appropriate rule to apply when election regulations are challenged on First Amendment grounds. The Court's use of terminology such as "core political speech" that is entitled to First Amendment protection "at its zenith" raises the question of a possible new heightened category of speech.¹⁵⁰ Just as the Court seemed to be relaxing its standards for state regulation, *Buckley* requires a compelling state interest justification for a state's regulations.¹⁵¹ *Buckley* muddies the water as to exactly what state regulations will be permissible in the context of state elections.

Finally, *Buckley* could have a significant impact on Arkansas.¹⁵² When faced with scrutiny of their petitioning practices by opponents, future groups who wish to circulate petitions for ballot proposals can look to the First Amendment to challenge burdens imposed on the circulation process. Supporters of proposed constitutional amendments such as Amendment 4 will

147. See Savage, *supra* note 145, at A3. California state officials predicted that *Buckley* would result in the commercialization of the initiative process and more expensive ballot campaigns. See Savage, *supra* note 145, at A3.

148. See Joan Biskupic, *High Court Rejects Curbs on Ballot Initiatives*, WASH. POST, Jan. 13, 1999, at A01.

149. See Savage, *supra* note 145, at A3.

150. *Buckley*, 119 S. Ct. at 639-40.

151. Cf. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). *Timmons* is a relatively recent Supreme Court case where the Court upheld Minnesota's election regulation prohibiting fusion candidates. See *id.* It appears increasingly difficult to predict whether the Court will hold that any given statute will withstand constitutional scrutiny and which standard of review will apply. *Timmons* employed a lower standard, whereas the *Buckley* Court utilized an exacting standard.

152. The initiative has a long history in Arkansas, dating back to 1911. See Timothy J. Kennedy, *Initiated Constitutional Amendments in Arkansas: Strolling Through the Mine Field*, 9 U. ARK. LITTLE ROCK L.J. 1, 4 (1986-87). An average of two constitutional amendments are placed on the ballot each general election, while about half are adopted by the electorate. See Stephen B. Niswanger, *A Practitioner's Guide to Challenging and Defending Legislatively Proposed Constitutional Amendments in Arkansas*, 17 U. ARK. LITTLE ROCK L.J. 765, 772 (1995).

Supporters of proposed constitutional amendments such as Amendment 4 will have one extra argument for ammunition to attack regulations imposed by the State.¹⁵³ Merely reciting the state interest of preventing fraud and corruption may no longer be sufficient for state regulations to prevail. Initiative proponents such as those who wish to eliminate the property tax may confidently assert their First Amendment rights the next time their petitioning efforts are jeopardized by an “eleventh hour” challenge.

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153. See *Roberts v. Priest*, 334 Ark. 503, 975 S.W.2d 850 (1998).

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