

## Seeking Coherence in Doctrines of Party Election Expenditures

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*Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 213 F.3d 1221 (10th Cir. 2000), *cert. granted*, 121 S. Ct. 296 (2000) (00-191).

The 2000 election marked a decisive step in the rebirth of political parties as the dominant force in American elections, thanks in no small part to increased rights won in the courts at the expense of federal election law.<sup>1</sup> The only major election law still constraining party expenditures on races for Congress and the Senate was, midway through the campaign, struck down in the 10th Circuit<sup>2</sup>; if, on its current appeal, the Supreme Court decides against the Federal Election Commission (FEC), parties will be free to make unlimited expenditures on behalf of their candidates.<sup>3</sup>

At the same time, however, the cases that have disallowed federal limitations on various kinds of party spending hinge on visions of party politics that cannot be consistently advanced. Indeed, the procedural history of a single case, *Federal Elections Commission v. Colorado Republican Federal Campaign Committee*,<sup>4</sup> contains judgments which themselves cannot be reconciled into a single conception of the constitutional place of political parties. Contrary to these inconsistent doctrines emerging from the *Colorado Republican* litigation, this Case Note argues that the Courts should clearly delineate the alternative conceptions of parties and their concomitant expressive rights but leave the ultimate choice to the political branches.

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1. See, e.g., *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (hereinafter "*Colorado Republican I*").

2. *FEC v. Colo. Republican Fed. Campaign Comm.*, 213 F.3d 1221 (10th Cir. 2000).

3. David K. Ryden, *To Curb Parties or to Court Them? Seeking a Constitutional Framework for Campaign Finance Reform*, in *THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS* 169, at 169 (David K. Ryden, ed., 2000). See also Petitioner's Reply Brief at 4, *Colorado Republican* (No. 00-191) ("[T]he court of appeals' decision gives political parties a First Amendment right to pay their candidates' bills.").

4. 839 F. Supp. 1448 (D. Colo. 1993), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *rev'd*, 518 U.S. 604 (1996), 41 F. Supp. 2d 1197 (D. Colo. 1999), *aff'd*, 213 F.3d 1221 (10th Cir. 2000), *cert. granted*, 121 S. Ct. 296 (2000) (00-191).

## I. THE LONG HISTORY OF COLORADO REPUBLICAN

The *Colorado Republican* litigation began with a 1986 FEC enforcement action over state-party spending in a federal Senate campaign.<sup>5</sup> The FEC was roused to act by the party's buying a radio advertisement critical of the opposing party's candidate before it had held its own primary. The party challenged the FEC's presumption of the applicability of § 441a(d)(3) of the Federal Election Campaign Act (FECA), as amended,<sup>6</sup> on the grounds that the application of party spending limits to expenditures independent of a candidate violated the party's First Amendment rights to expression and association. The Supreme Court, in *Buckley v. Valeo*, had struck down FECA's limitations on such independent expenditures by individuals and non-party political committees.<sup>7</sup> In addition to a parallel First Amendment defense, the Committee sought a declaration that the statutory provision limiting *coordinated* expenditures between candidates and party committees was violative of the party's First Amendment guarantees.<sup>8</sup>

The District Court,<sup>9</sup> and ultimately the Supreme Court, ruled in favor of the Committee on the independent expenditure issue, but without reaching the facial challenge to limits on coordinated expenditures.<sup>10</sup> The impact of the decision was immediate: in the few months between the decision and the 1996 election, the two major parties spent more on independent advertising than all other political committees and individuals combined.<sup>11</sup>

On remand, the district court<sup>12</sup> and the 10th Circuit<sup>13</sup> supported the Committee, holding that § 441a(d)(3)'s limitation created a "significant interference" with the party's rights<sup>14</sup> (this despite the fact that party campaign activity has grown substantially since the introduction of FECA<sup>15</sup>). As the court read *Buckley* and its progeny, the only justification for restrictions like § 441a(d)(3)

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5. *Colorado Republican*, 839 F. Supp. at 1451.

6. Federal Election Campaign Act Amendments of 1976, 2 U.S.C. §§ 441a-441h (2000). The state party committee had already assigned its coordinated spending ability to a committee of the national party organization.

7. *Buckley v. Valeo*, 424 U.S. 1, 50 (1976).

8. *Colorado Republican*, 839 F. Supp. at 1451.

9. *Id.* at 1456.

10. In *Colorado Republican I*, two Justices dissented and would have upheld § 441a(d)(3) as applied to independent and coordinated expenditures. A plurality of three allowed that the Committee's advertisement was protected under the First Amendment but chose not to reach the Committee's facial challenge, remanding the case for further proceedings. Four others would have struck down § 441a(d)(3) altogether. *Colorado Republican I*, 518 U.S. 604.

11. FRANK J. SORAUF, *What Buckley Wrought, in IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS* 11, 53 (E. Joshua Rosenkranz, ed., 1999).

12. *Colorado Republican*, 41 F. Supp. 2d 1197.

13. *Colorado Republican*, 213 F.3d 1221.

14. *Id.* at 1232 (citing *Buckley*).

15. See, e.g., SORAUF, *supra* note 11 (describing the low ebb of party power at FECA's passage and the "resurgence" of parties thanks to FECA's favorable structure).

## Party Election Expenditures

must be the prevention of political corruption or the appearance of corruption; but “the role of political parties in our democracy” precludes the analysis *Buckley* used to uphold contribution limits for individuals and political committees.<sup>16</sup> Drawing heavily from Justice Kennedy’s partial dissent in *Colorado Republican I*, the 10th Circuit relied on its own analysis of the unique status of political parties in the American system to justify a different, and more conservative, analysis of the constitutional limits which might be placed on party conduct in order to limit corruption. Again, the parties were quick to react with expanded spending programs, at least in states under the 10th Circuit’s jurisdiction.<sup>17</sup>

### II. THE PLACE OF PARTIES

At the heart of *Colorado Republican* are two competing visions of the role of political parties in American elections and the rights the First Amendment secures to them. In the *Colorado Republican I* plurality opinion, parties emerged as super-political action committees (PACs), engaging in independent speech on behalf of their election goals.<sup>18</sup> What makes political parties unique, on this conception, is just that political parties have as their end not merely the furtherance of a particular policy prescription on a single issue, but the election of their candidates to office. On the second view, parties are “joint venturers”<sup>19</sup> with their candidates, fused in message and, in effect, in electoral role. Not just candidates but, on the district court’s view, parties are “held accountable at the ballot box by voters.”<sup>20</sup> On this understanding of the role of parties, the free speech rights of parties exceed those even of PACs, since a limitation on expenditures coordinated with their candidate artificially limits their participation in the elections for which parties are, in effect, candidates.<sup>21</sup> Yet parties cannot be *both* independent committees *and* candidates for office under the scheme Congress contemplated. A resolution of the *Colorado Republican* case along the lines used by the 10th Circuit would manage to entitle political parties to the rights of both PACs and individual candidates, but leave them free of the anticorruption restrictions that apply to either. This Section considers these competing visions.

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16. *Colorado Republican*, 213 F.3d at 1232.

17. See Mike Allen, *GOP May Defy Curb on House Campaigns; Spending Would Test Court Ruling*, WASHINGTON POST, July 10, 2000, at A1.

18. Note that under FECA, the provisions for political party contributions and donations to candidates are cast as exemptions from the generally more stringent rules applying to political organizations. See *Colorado Republican I*, 518 U.S. at 611 (“[W]ithout special treatment, political parties ordinarily would be subject to the general limitation on contributions by a ‘multicandidate political committee’”) (citing 2 U.S.C. § 441a(a)).

19. Transcript of Oral Argument, *Colorado Republican I*, 518 U.S. 604, 1996 WL 188710, at \*16.

20. *Colorado Republican*, 41 F. Supp. 2d at 1210.

21. Candidates cannot themselves be subject to expenditure limits. *Buckley*, 424 U.S. at 15.

On the former view, the electing of candidates is the political mission for which political parties are formed, as the opposition to handguns or to environmental regulation may be the *raison d'être* for other political committees. The party has “views” of which its independent expenditures are “expression[s],”<sup>22</sup> protected by the same First Amendment protections covering “individuals, candidates, and ordinary political committees.”<sup>23</sup> It follows from this view, as ratified in *Colorado Republican I*, that parties are in principle capable of speaking as proponents of their political views apart from any particular candidate or election.

The 10th Circuit advanced a sharply differing conception. On its view, once a candidate has been chosen and an election campaign is underway, the interests of a candidate (in being elected) and a party (in seeing its nominees win) converge, producing a fusion of their interests. Since a party’s chief interest is in advancing its candidates, and its candidates provide the primary means to that end, limitations on its ability to contribute monies raised under the FECA limits (“hard money”) would infringe its core First Amendment associational activity.<sup>24</sup> Parties, after all, lend their space on the ballot to a single candidate, and the candidate generally runs as the nominee of a single party.<sup>25</sup> Indeed, since parties are but “one step removed from the candidate,” on this line of reasoning, infringement on their associational right to make unlimited contributions at least verges on infringement of their candidates’ speech rights.<sup>26</sup>

The post-*Buckley* cases indicate that while advocacy of policies and political views must generally receive wide First Amendment protection, different sorts of actors may be subject to different sets of limitations on their election-related activity, so long as the limitations target corruption or the appearance of corruption.<sup>27</sup> Thus, in *FEC v. Massachusetts Citizens for Life, Inc.*,<sup>28</sup> the Court sustained FECA’s restrictions on corporate election expenditures but carved out a First Amendment exception for corporations of a purely ideological nature, while, in *California Medical Association v. FEC*,<sup>29</sup> contribution limitations on unincorporated (commercial) associations were upheld against a First

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22. *Colorado Republican I*, 518 U.S. at 616.

23. *Id.* at 618 (emphasis added).

24. See *Colorado Republican*, 213 F.3d at 1227.

25. See Richard Briffault, *Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 639 (contrasting PACs, which contribute only money, and parties, which give ballot access).

26. *Colorado Republican*, 213 F.3d at 1227. Counsel for the Committee advocated this view in oral arguments for *Colorado Republican I*, urging a close analogy between a party’s relation to a candidate and the candidate’s relation to her own campaign. See Transcript of Oral Argument at 16, *Colorado Republican* (No. 95-489), available at 1996 WL 188710 (1996).

27. See *Buckley*, 424 U.S. at 46; *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 388 (2000) (reaffirming the *Buckley* corruption standard).

28. 479 U.S. 238 (1986).

29. 453 U.S. 182 (1981).

## Party Election Expenditures

Amendment challenge. The nature of an organization—commercial or ideological, in particular—determines the degree of scrutiny awarded to its First Amendment claims. Similarly, the nature of political parties bears on the degree of protection accorded to them, which is why *Colorado Republican I* upheld party independent expenditures as activity that would be permitted of any non-party PAC.

Yet parties *are* quite different from non-party political committees. Unlike the Sierra Club's or the NRA's PAC, the Republicans and Democrats in effect own permanent nationwide ballot access, including in many jurisdictions a public apparatus for carrying out primary elections to determine party nominees. Recognition on the ballot is, under federal law, what *makes* a political organization into a party.<sup>30</sup> As such, the party is enmeshed in the public elections apparatus in the way an ordinary political committee is not—perhaps, even, to the point of being a quasi-state actor.<sup>31</sup> (This distinction is even sharper if, as Justice Kennedy has suggested, parties are *necessary* for effective campaigning.<sup>32</sup>) The rationale for allowing PAC independent spending does not necessarily extend to political parties insofar as those parties are acting under their public institutional role of providing ballot access. So while the kinship between parties and PACs gives them the freedom to make unlimited independent outlays, the relationship between parties and the electoral apparatus cuts against the claim that *all* party support of its candidate is protected. “Core political speech” demanding “exacting scrutiny” when conducted by private individuals or political committees may demand less strict scrutiny when it is the speech of a political party acting in an official, public capacity.<sup>33</sup>

Even if the quasi-state-actor question can be resolved in favor of the parties, the 10th Circuit's reasoning is unsound. From the alleged identity of interests between candidates and parties, nothing follows about the identity of their First Amendment rights. Parties have associational rights candidates do not have; but while their names appear on the ballot, they receive no official power when their ballot line receives the most votes. Parties can open unregulated “soft money” accounts to fund certain organizational expenditures; candidates cannot. The more closely the party and the candidate are identified, the more

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30. 2 U.S.C. § 431(16) (“The term ‘political party’ means an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization.”)

31. One Justice suggested this view at oral argument for *Colorado Republican I*. See Transcript of Oral Argument, *supra* note 19, at \*20; see also Brief for Petitioner at 15, *Colorado Republican* (No. 00-191) (arguing that “when a political party assumes an official role in the State’s electoral machinery, it is typically subject to greater constraints than a political organization acting in a purely private capacity”).

32. *Colorado Republican I*, 518 U.S. at 629 (Kennedy, J., concurring in judgment and dissenting in part).

33. See, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (“When a law burdens core political speech, we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest”) (citations omitted).

suspect the Colorado Republican I holding appears.<sup>34</sup> Moreover, if a party exists only to advance its candidates, it is unclear what ideological message its independent expenditures might advance. Party advertisements, even those which avoid express advocacy, are almost invariably about particular candidates, not general election issues.<sup>35</sup>

### III. "CONDUIT CORRUPTION" AND THE *BUCKLEY* TEST

Though the 10th Circuit's theory of party-candidate fusion seems incompatible with *Colorado Republican I*, a contrary holding would, on the *Buckley* line of cases, require that the Court find the limits on party-candidate coordinated spending suitably tailored to meet the government's acknowledged interest in stopping corruption or the appearance thereof. While the literature on what "corruption" means in this context is quite vast, even a limited construction of the term can be recognized to apply to the current system of donor-party-candidate campaign funding. Hence the Court can uphold § 441a(d) on at least two ordinary *Buckley* grounds.<sup>36</sup>

One form of corruption is so-called "conduit" corruption, in which the close party-candidate connection is exploited as an extra way for individual donors and interest groups to secure a *quid pro quo* arrangement with a candidate. While individuals are able to give only \$1000 to a candidate for a given election cycle, the "hard money" limit for direct donations to parties is, at \$20,000, substantially higher.<sup>37</sup> If limits on party donations to candidates are lifted altogether, the parties can become funnels for full-limit hard-money donations to each of their candidates. One thousand wealthy donors would under the current regime be limited to donating, collectively, \$1 million to a Congressional candidate plus \$20 million to her party; the party could hand over only \$10,000 of that to the candidate. Without § 441a(d), the thousand donors could direct all \$21 million to the candidate, \$1 million directly and the other \$20 million through the party funnel. While parties are not supposed to "earmark" contributions for particular candidates, it is hard to see how this restriction would or could be enforced under a regime in which the parties are able to donate *all* of their receipts directly to their candidates' campaign accounts.

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34. See also Richard Briffault, *Political Parties and Campaign Finance Reform*, *supra* note 25, 636ff (making a different set of arguments for the incompatibility of the two views contrasted in text).

35. See also Scott Thomas & Jeffrey Bowman, *Coordinated Expenditure Limits: Can They Be Saved?* 49 CATH. U. L. REV. 133, 157 (1999) (noting that perhaps only one-fifth of advertisements paid for by candidates contain the "magic words" of express advocacy).

36. It is unclear whether a party official's offer to direct extra party backing to a member of Congress to secure her vote for the party line would or should be considered a *quid pro quo*. On the "fusion" theory of party and candidate, such an arrangement is surely allowed, and perhaps ineradicable from a party-political system with private campaign financing. See, e.g., *Colorado Republican I*, 518 U.S. at 646 (Thomas, J., concurring in part and dissenting in part) ("The very aim of a political party is to influence its candidate's stance on issues and... his votes.").

37. 2 U.S.C. § 441a(a)(1)(B).

## Party Election Expenditures

There is no reason to think that the intermediary funnel would greatly compromise a large donor's ability to exact a *quo* for his quid.

More invidious is the prospect of "detour" corruption by unregulated, unlimited "soft money"—money that corporations and unions, unable to make "hard money" donations, nonetheless provide to party committees. National and state party committees have established an elaborate shadow market in which soft and hard dollars are exchanged among various organs, with hard dollars trading at a decided premium to soft.<sup>38</sup> Since soft money can buy hard money, and since *Colorado Republican I* frees parties to do much more electioneering activity with soft money, a decision to strike down § 441a(d) would likely result in parties channeling their hard dollars where their soft-money donors direct. A large corporate soft-money donation can buy a party's allegiance just as much as a large private hard-money donation. Soft money will determine the priorities by which the party spends its hard money. With unlimited hard-money transfers to candidates, soft money will find its way to candidates, discounted by the hard-money premium. Not only is this an environment in which the *quid pro quo* can flourish, but any regime in which extremely large contributions are apt to become the focus of fund-raising efforts triggers *Buckley's* sensitivity to the appearance of corruption.

The Court has touched on conduit corruption, albeit obliquely. In *California Medical Association v. FEC*,<sup>39</sup> the Court denied an unincorporated association the ability to harness the election-spending powers of a PAC while evading the requirement that a political committee draw its support from a reasonably large membership. Rejecting the idea that a political committee's main supporter might be entitled, in addition to its regulated contributions, to fund the committee's administrative support, the Court noted that, "[i]n this manner, political committees would be able to influence the electoral process to an extent disproportionate to their public support and far greater than the individual or group that finances the committees operations would be able to do acting alone. In so doing, they could corrupt the political process in a manner that Congress . . . has sought to prohibit."<sup>40</sup> Displacement of regulated money by unregulated contributions thus presents a hazard of corruption which Congress may prevent. The challenged § 441a(d) does just that by limiting the size of the conduit.

Were the Court to have adopted the candidate-party "fusion" theory in *Colorado Republican I*, the conduit-corruption worry as regards coordinated expenditures might have less bite. If parties and candidates were two faces of the same enterprise, then perhaps their associational rights would protect their

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38. See *Colorado Republican*, 41 F. Supp. 2d at 1201 (finding soft-money is traded for hard money, sometimes at a premium).

39. 453 U.S. 182 (1981).

40. *California Med. Ass'n v. FEC*, 453 U.S. 182, 199 n.19.

ability to transfer money from one pocket to another. Whatever would license that associational privilege, however, plainly undermines the *Colorado Republican I* holding that, even once a party has named its candidate, it is capable of buying completely independent, uncoordinated election advertising. The freedom of a party and its candidate to act as strangers, as conferred by *Colorado Republican I*, precludes their freedom to act as a unitary organization. Either cluster of rights could be coherently asserted under the pre-*Colorado Republican* election-law jurisprudence; but the two clusters cannot be grasped simultaneously, and *Colorado Republican I* has already chosen the law of the case.

#### IV. BACKING OFF FROM A POLITICIAN'S QUESTION

It may, and indeed should, be objected that the choice between these competing models of party-candidate interaction is not itself a First Amendment question. The freedom to associate does not determine the types of protected associations. Both the fusion and independent-advocacy models of party-candidate interaction appear desirable sorts of arrangements, and one or the other may be necessary for modern mass politics.<sup>41</sup> Congress's interest in preventing corruption and the appearance of corruption defines the allowable limits on the First Amendment rights a party and its candidate can expect under each of these models. But which of the two models should prevail is not thereby settled. The question becomes which conception, and which bundle of attendant rights, the Court ought to recognize.

The courts have hardly shied away from grappling with this fundamental question of political structure. The 10th Circuit's decision hinges on its finding that "Parties are—or should be—integral parts of all political life."<sup>42</sup> From that finding flows its concern that party speech is precisely the kind of core political activity requiring strong First Amendment protection. In so far as such judicial notice, aided by legislative findings,<sup>43</sup> recognizes the central role parties play in the electoral process, no harm is done. Once that assessment shifts, however, into a choice of how that role is to be conceived for First Amendment purposes, judicial notice is insufficient. Committee-candidate fusion organizations are, apparently, constitutional; and committees that advocate on behalf of political issues clearly are. Which sort of protected organization the major American party committees are, however, is a matter for neither First Amendment deduction nor judicial fact-finding. It is a matter for political judgment.

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41. There may of course be limitations on what party systems are available in the United States, no matter how desirable. After all, "Partisan politics bears the imprimatur only of tradition, not the Constitution." *Elrod v. Burns*, 427 U.S. 347, 369 n.22 (1976) (plurality opinion).

42. *Colorado Republican*, 213 F.3d at 1228 (quoting with approval JOHN H. ALDRICH, *WHY PARTIES: THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 19 (1995)) (emphasis added).

43. See, e.g., S. REP. no. 93-689, at 7 (1974) (calling the party system "vital to American politics").

## Party Election Expenditures

The 10th Circuit's *de novo* conceptualization of the matter notwithstanding, Congress has already made the relevant judgment. In choosing to regulate parties through a set of exemptions from the regulations generally applying to political committees, Congress set the policy that the parties were, beyond those statutory exceptions, to be considered ordinary political committees. FECA could have enacted, but did not, the party-candidate fusion model of electoral politics prevalent in some other democracies. The fusion theory may well be viable; it might even be preferable. The lead opinion in *Colorado Republican I* may be read for the proposition that Congress erred in attempting to deny to a certain kind of political committee the ability to make independent expenditures awarded to other such committees. But this was a legislative error in implementing, not in conceiving, the sort of anticorruption measures which might regulate party involvement in federal elections. Nothing adduced by the Colorado Republican Party or by the 10th Circuit indicates why the one vision of party role is to be *judicially* preferred over another in the face of a manifest legislative intent.

Note that the proper deference to Congress here arises from standard principles of statutory interpretation and not, as some commentators and courts have suggested, because members of Congress have special personal expertise in federal elections.<sup>44</sup> This argument turns the traditional "political question" doctrine on its head and would specially defer to the legislative branch in its institutional capacity on matters which its members, in their personal capacities, have a particular stake. Election laws have the capacity to favor incumbents over challengers, and basic tenets of public-choice theory suffice to raise the issue of divergence between individual legislators' interests in campaign laws and that of the nation's legislature.<sup>45</sup>

The proper holding in *Colorado Republican II*, then, in order to avoid the awkward result that political parties receive vastly more First Amendment protection than candidates, private citizens, or nonparty political groups, would salvage as much as possible of the remains of FECA. The Colorado Committee's facial challenge to § 441a(d) can be rejected along with its creative but groundless theory of party-candidate union. The Court should, however, take the opportunity to clarify the result of *Colorado Republican I* in light of the failure of the facial challenge. The right to independent expenditures recognized in the earlier holding depends on Congress's intent to treat parties as a subset of all political committees. It would not cross the line into advisory

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44. Compare *Colorado Republican*, 59 F.3d at 1024 ("The members of Congress who enacted this law were surviving veterans of the election campaign process, and all were members of organized political parties. They should be considered uniquely qualified to evaluate the risk of actual corruption or appearance of corruption from large coordinated expenditures by political parties") with *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.")

45. See Sorauf, *supra* note 11, at 57-58 (discussing incumbents' advantages under FECA).

opinion to note that, were the statutory scheme to treat parties under a different rubric, the rationale of granting them all the privileges of PACs need no longer apply. Affirming the 10th Circuit's decision would bind Congress within the incompatible constraints of the party-candidate fusion and independent-advocate theories. Reversing would at least allow the opportunity, and perhaps the needed guidance, for a legislative reconsideration of the place of parties in "the melancholy history of campaign finance."<sup>46</sup>

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46. *Shrink Missouri*, 528 U.S. at 407 (Kennedy, J., dissenting).