FIRST AMENDMENT—Right To Free Speech and Free Expression—State Efforts to Regulate The Initiative Process During The Petition Circulation Stage Violated First Amendment Rights To Free Political Speech And Free Political Expression—*Buckley v. American Constitutional Law Foundation Inc.*, 119 S.Ct. 636 (1999).

The United States Supreme Court recently held that three provisions of a Colorado statute restricting initiative-petition circulators were impermissible violations of free speech guaranteed by the First Amendment. *See Buckley v. American Constitutional Law Found. Inc.*, 119 S.Ct. 636 (1999). In so holding, the Court reasoned that states should be given deference regarding the regulation of election processes, but restrictions that thwart efforts to achieve change through political means must be subjected to strict scrutiny. *See id.* at 639-40. The Supreme Court utilized a less intense level of scrutiny than normally afforded laws concerning fundamental rights because it reasoned that elections must be regulated to ensure the validity of the political process. *See id.* at 640. However, the Court concluded that the Colorado provisions crossed the First Amendment barrier that separates reasonable regulations from the basic rights of free political speech. *See id.* Notwithstanding the Court's reasoning, the holding was just another example of the Court substituting its will for the will of a democratically elected state government.

The Colorado statute placed numerous regulations on initiative-petition circulators. *See id.* Only three of the six provisions originally challenged were at issue in this case. *See id.* at 640-41. The first provision required all petition circulators to be registered voters. *See id.* at 640. The second provision compelled the circulators to wear a badge designating themselves as paid or volunteer workers. *See id.* If the circulator was paid, he or she was required to display his or her name and the telephone number of his or her employer on the badge. *See id.* The third regulation required that the initial proponents file a final report, citing the amount paid per signature, the total amount paid to circulators, and all paid workers' names, addresses, and counties of voter registration. *See id.* at 641. They were also required, by the same provision, to submit more detailed monthly reports, but the constitutionality of those reports was not brought before the Supreme Court. *See id.* Other provisions in the statute, that were not at issue before the Supreme Court, included age requirements for petition circulators, a six-month time limitation on initiatives, and a mandatory submission of an affidavit by circulators containing their name, address, and a statement that they read and know the law. *See id.* at 640-41.

The respondents, American Constitutional Law Foundation and a compilation of individuals representing various political organizations ("ACLF"), filed suit in the United States District Court for the District of Colorado pursuant to 42 U.S.C. § 1983, alleging that the statute violated their First Amendment right to

free speech. *See id.* The district court held that the age, affidavit, and six-month limitation requirements were permissible regulations, but struck down the badge and report requirements. *See id.* at 641. Additionally, the court reasoned that although it had reservations about the constitutionality of the requirement that all circulators be registered voters, it was a constitutional amendment passed by the people of Colorado and therefore, the judiciary could not strike it down. *See id.*

The Tenth Circuit Court of Appeals affirmed the district court's ruling, with one exception. *See id.* The appellate court held that the registration requirement was an impermissible burden on political expression, thereby reversing the district court on this issue. *See id.* at 642.

The United States Supreme Court granted the ACLF's petition for *certiorari*. *See id.* at 640. The Court reasoned that the voter registration requirement, mandatory identification disclosure at time of petition circulation, and a final report compelling initiative proponents to list personal and financial information, inhibited the right to free political speech. *See id.* at 642. Additionally, the Court found that the requirements diminished the number of circulators, thus reducing the number of people available to convey the political message to others. *See id.* at 643. This had the effect, according to the Court, of unnecessarily and improperly hindering the right of political expression. *See id.* at 644. Therefore, the Supreme Court affirmed the decision of the Tenth Circuit Court of Appeals. *See id.*

Writing for the majority, Justice Ginsburg first explained the Court's general attitude towards states' rights pertaining to election regulations. *See id.* at 642. Reiterating some past decisions, the majority maintained that no brightline could be drawn between permissible election regulations and impermissible restrictions on a person's fundamental right to participate in the democratic process. *See id.* The Court further suggested that only its informed judgement could separate the two. *See id.* (citing *Storer v. Brown*, 415 U.S. 723, 730 (1974)).

The majority next addressed each provision in the statute. Justice Ginsburg questioned whether the requirement that all initiative-petition circulators be registered voters was justifiable in light of a state interest in protecting the initiative process from corruption. *See id.* at 644. Finding that the requirement reduced the number of people who could proclaim the proponents political message, which in turn diminished the number of people who hear the message, the Court held that the requirement was a burden on political speech and must be warranted by a substantial state interest. *See id.* The Court further maintained that Colorado's proposed state interest, ensuring that the circulators fall under the state's subpoena power, is fulfilled by the affidavit requirement upheld by the lower court. *See id.* The Court also criticized the argument that the ease of registration negates its burden on political speech. *See id.* (citing *amicus curae* testimony claiming that not voting is in itself a form of political expression). Accordingly, the Court struck down the registration requirement because the state interest did not warrant the burden on free speech. *See id.* at 645.

In continuing the discussion of the provisions, the majority held that Colorado's interests did not warrant the burden imposed on free speech by the badge requirement. *See id.* Justice Ginsburg found that the state interest in identifying fraudulent circulators was already addressed by the affidavit requirement, thereby rendering the badge requirement moot. *See id.* at 646. Furthermore, the Court justified its holding by suggesting that because initiative topics were so divisive, many people, if compelled to identify themselves, would not be circulators for fear of reprisals from other political groups. *See id.* This requirement would diminish the amount of people hearing the message and thus, inhibit political speech. *See id.*

Finally, the Court addressed the requirement compelling proponents of initiative-petitions to disclose, in a final report, the amount paid per signature, the specific amounts paid its circulators, and their circulators' names, addresses, and counties of voter registration. *See id.* The majority agreed with the Tenth Circuit's ruling that modified the final report to exclude information specific to individual circulators. *See id.* The Court's holding permitted a report that recorded the amount collectively paid to all petition circulators and the amount paid per signature on the petition. *See id.* at 646-47. Justice Ginsburg followed precedent and applied the same type of scrutiny the Court used when evaluating a statute which required candidates to disclose campaign related payments. *See id.* at 647 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)). Referring to *Buckley*, the Court explained the substantial interest a state has in meticulous record keeping of campaign finance. *See id.* (citing *Buckley*, 424 U.S. at 1). However, the Court did not find that Colorado had a substantial interest in compelling initiative-petitioners to reveal their names and salaries. *See id.* The Court found no evidence proving that paid circulators were more corruptible than their volunteer counterparts. *See id.* at 648.

Justice Thomas concurred in the judgment yet disagreed with the Court's reasoning. *See id.* at 649 (Thomas, J., concurring). The concurrence noted that the majority did not use strict scrutiny, but rather a less exacting form of review. *See id.* Justice Thomas explained that wherever a restriction burdens political speech, the restriction must be narrowly tailored to achieve a compelling state interest. *See id.* at 649-50 (Thomas, J., concurring). The concurrence reasoned that a less exacting form of scrutiny should be applied only when the mechanics of an election are affected. *See id.* at 650 (Thomas, J., concurring). The concurrence then evaluated each provision using strict scrutiny, but arrived at its conclusion which mirrored that of the majority. *See id.* at 650-53 (Thomas, J., concurring). Justice Thomas observed that, although a state has a compelling interest in combating campaign corruption, the Colorado statute was not narrowly tailored enough to achieve that interest. *See id.* The concurrence further stated that the same interests could be protected by several less restrictive means. *See id.*

While concurring with the majority's holding that a badge requirement is an

impermissible burden on political speech, Justice O'Connor, joined by Justice Breyer, disagreed with the Court's decision to declare the registration and reporting requirements impermissible. *See id.* at 653 (O'Connor, J., concurring in part and dissenting in part). Addressing the registration requirement, Justice O'Connor noted that the requirement does not impose an outright ban on anyone willing to circulate the petition because the requirement could be justified with relative ease. *See id.* at 654-55 (O'Connor, J., concurring in part and dissenting in part). Although the dissent acknowledged that the restrictions burden some aspects of political speech, Justice O'Connor noted that because these restrictions are reasonable regulations on the mechanics of elections, thereby entitling the regulations to a less exacting scrutiny. *See id.* at 656 (O'Connor, J., concurring in part and dissenting in part). Accordingly, Justice O'Connor urged that the majority should have reversed the Tenth Circuit Court of Appeals' ruling on the voter registration requirement. *See id.*

Justice O'Connor then addressed the reporting provision, taking exception to the majority's ruling that a final report's specific reference to individuals and their finances was impermissible. *See id.* The dissent explained that the final report and the mandatory affidavit were indistinguishable because both publicly announced who was involved in the initiative-petition process. *See id.* at 656-57 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor condemned the majority's finding that the affidavit was permissible and the disclosure report was impermissable. *See id.* The dissent maintained that disclosure of finances acted as a deterrent to fraud and, thus, it served an important state interest. *See id.* at 657 (O'Connor, J. concurring in part and dissenting in part). Justice O'Connor concluded that the burden on political speech was so incidental, and its effectuation of a state interest was so substantial, that the provisions easily passed the lesser scrutiny normally applied to electoral process regulations. *See id.* 658-59 (O'Connor, J., concurring in part and dissenting in part).

Chief Justice Rehnquist also dissented, reasoning that local elections should be locally regulated. *See id.* at 659 (Rehnquist, C.J., dissenting). The Chief Justice maintained that the state interest in combating fraud clearly justified the regulations imposed. *See id.* Chief Justice Rehnquist imagined this decision reaching every election regulation, thereby making each of them unconstitutional. *See id.*

The dissent first addressed the registration requirement. *See id.* at 660 (Rehnquist, C.J., dissenting). The Chief Justice compared initiative-petition circulators to campaign candidates, who are required by law to be electors, because both play a major role in the democratic process. *See id.* Chief Justice Rehnquist criticized the majority for allowing those individuals who normally make no effort to be a part of democracy, or those who lost their right due to criminal behavior, to engage in highly influential, electoral activity. *See id.* at 661 (Rehnquist, C.J. dissenting). The dissent extended the Court's reasoning to show that a state's right to exclude minors and foreigners from certain aspects of

elections could be in jeopardy. *See id.* The Chief Justice strenuously argued that the decision was an unconstitutional infringement on a state's right to individually govern its own initiative procedures. *See id.* Accordingly, Chief Justice Rehnquist reasoned that the Court should have upheld the Colorado law. *See id.* at 662 (Rehnquist, C.J. dissenting).

ANALYSIS

The decision in *Buckley v. American Constitutional Law Foundation Inc.* reflects the old debate of states' rights versus a strong federal government. The decision erodes the states' right to govern local issues without federal interference. The government should intervene only when basic fundamental rights are at stake. Absent a substantial threat to these basic rights, the states should be left to the judgment of their democratically elected leaders.

The Court, however, took a different view. It entered local politics and imposed its view as to how the initiative-petition process should be run. The Colorado legislature researched, formulated, and implemented its own procedural regulations for the initiative process based on local concerns about fraud and monopolization by wealthy, out-of-state political organizations. The Supreme Court then intervened to strike down the law under the guise of freedom of speech and political expression. The Court neglected to consider that the Colorado electorate's freedom of speech and expression, which could be in greater jeopardy from fraudulent circulators and unscrupulous political lobbyists. While the politicians can be voted out for misconduct, voters have no recourse against un-elected, politically active groups.

Colorado's interest in the statute was compelling enough to justify the incidental burden placed upon political free speech. If the burden was not substantial, the democratically elected state governments should be left to their own devices.

Brian J. Pollock