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Election Disclosure Laws: U.S. Supreme Court Holds Ohio Campaign Disclosure Law Cannot Be Applied Constitutionally to Minor Political Parties Showing Probable Harrassment

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ELECTION DISCLOSURE LAWS: U.S. SUPREME COURT HOLDS OHIO CAMPAIGN DISCLOSURE LAW CANNOT BE APPLIED CONSTITUTIONALLY TO MINOR POLITICAL PARTIES SHOWING PROBABLE HARASSMENT - *Brown v. Socialist Workers '74 Campaign Committee*, 103 S. Ct. 416 (1982).

I. INTRODUCTION

Brown v. Socialist Workers '74 Campaign Committee[1] belongs to that line of cases, headed by the landmark decision *Buckley v. Valeo*,[2] which have decided the constitutionality (whether facial or "as applied") of federal and state election laws. *Buckley* is the most comprehensive interpretation of federal election law ever rendered by the Supreme Court.[3]

After the Watergate scandals, Congress adopted "unprecedented restrictions on the federal electoral process in its 1974 amendments[4] to the Federal Election Campaign Act of 1971"[5] (FECA). Such restrictions[6] on election campaigns, at both federal and state levels, regulate

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1. 103 S. Ct. 416 (1982).

2. 424 U.S. 1 (1976). See *infra* note 8 and accompanying text for a description of the five general *Buckley* holdings and *infra* notes 31-43 and accompanying text for an explanation of *Buckley's* holdings regarding United States campaign disclosure requirements.

For an analysis of selected cases since *Buckley*, see Lansing & Sherman, *The "Evolution" of the Supreme Court's Political Spending Doctrine: Restricting Corporate Contributions to Ballot Measure Campaigns after* Citizens Against Rent Control v. City of Berkeley, California, 8 J. CORP. L. 79 (1982); Note, 3 WHITTIER L. REV. 431 (1981).

3. *Buckley* ruled on the constitutionality of the 1974 amendments to the Federal Election Campaign Act of 1971. 424 U.S. 1 (1976).

4. Comment, *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 171, 171-72 & n.1 (1976)(citing the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1975) (codified in scattered sections of tits. 2, 5, 18, 26, 47 U.S.C.)).

5. Comment, *supra* note 4, at 172 & n.2 (citing the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972)(codified in scattered sections of tits. 2, 18, 47 U.S.C.)). The federal acts have since been amended. Note, 47 BROOKLYN L. REV. 861, 861 n.1 (1981)(citing Federal Election Campaign Act Amendments of 1976 (FECA (1976)), Pub. L. No. 94-283, 90 Stat. 475 (codified in scattered sections of tits. 2, 26 U.S.C.)), and Federal Election Campaign Act Amendments of 1979 (FECA (1979)), Pub. L. No. 96-187, 93 Stat. 1339 (codified in scattered sections of tits. 2, 18, 26 U.S.C.)).

6. The Federal Election Campaign Act of 1971 (FECA), as amended in 1974, sought to accomplish five major election reforms in a comprehensive regulatory scheme. *See generally Buckley*, 424 U.S. at 1-2, app. at 144-235. *See also* Ifshen & Warin, *Litigating the 1980 Presidential Election*, 31 AM. U.L. REV. 487, 492-95 (1982).

First, FECA limited political contributions to candidates for federal elective office by individuals, groups, and political committees. Second, it limited expenditures by individuals or groups associated with a candidate who is clearly identifiable, and also limited expenditures by the candidate himself and his or her family. Third, the Act required detailed disclosure of records of contri-

political campaign activities to promote goals of "fairness and integrity of the electoral process."[7] In this respect, the restrictions serve an important and legitimate government interest.

The *Buckley* case was a response to a comprehensive challenge to the constitutionality of the 1974 FECA amendments. In *Buckley*, the Court "partially dismantled the electoral reform program formulated in the 1974 Amendments to the . . . Act of 1971."[8] However, the *Buckley* holding which is relevant to the *Brown* decision is the one upholding the constitutionality of the FECA's campaign financing disclosure requirement. Commentators have stated that these disclosure requirements serve an important state interest "by guarding against corruption and undue influence in the election of public officials."[9] The

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butions and expenditures including names and addresses of contributors. Fourth, it created a commission to administer the record-keeping, disclosure, and investigatory functions of the Act. This commission was given extensive rulemaking functions. Finally, the Act amended subtitle H of the Internal Revenue Code of 1954 to provide for public financing of presidential campaigns.

The Supreme Court in Burroughs v. United States, 290 U.S. 534 (1934) established and upheld Congress' right to regulate election campaigns. *Buckley* set the limit on Congress' right. *See infra* note 8.

7. Note, *supra* note 5, at 861 (citing the Senate Report that accompanied the FECA (1971), S. REP. NO. 229, 92d Cong., 2d Sess. 2, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 1821, 1821).

8. Note, *The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments*, 86 YALE L.J. 953, 953 (1977). For other comprehensive and diverse analyses of *Buckley*, see Comment, *supra* note 4, and Comment, *Buckley v. Valeo: the Supreme Court and Federal Campaign Reform*, 76 COLUM. L. REV. 852 (1976).

The *Buckley* Court responded to each of the five major election reforms described in note 6, *supra*. In a *per curiam* opinion, the Court first held that the Act's limits on contributions were constitutional. 424 U.S. at 23-38. Such limitations constituted an appropriate legislative means for safeguarding the integrity of the election process without substantially burdening the first amendment rights of citizens to engage in political debate. *Id.* Second, the Court held the Act's *expenditure* provisions *did* violate the first amendment, *id.* at 39-59, because these provisions placed substantial burdens on the ability of citizens, associations, and candidates to engage in political expression. *Id.* Third, the Court held that the Act's disclosure and record-keeping requirements were constitutional. *Id.* at 60-84. It specifically rejected an overbreadth challenge to these provisions as they applied to minor parties and independent candidates and held that no blanket exemption from disclosure requirements was necessary for minor parties. *Id.* at 64-74. *See also* Federal Election Comm'n v. Hall-Tyner Election Campaign Comm., 678 F.2d, 416, 421 (2d Cir. 1982), which discusses this portion of the *Buckley* decision. Fourth, it held the composition of the Federal Elections Commission, except for its investigative and informative powers, violated art. II, § 2, cl. 2 (the appointments clause) of the Constitution. 424 U.S. at 109-143. Finally, the Court held the scheme for the public financing of presidential campaigns was constitutional. *Id.* at 85-109.

9. Note, *supra* note 5, at 861-62. Disclosure requirements, in effect, preserve the public's right to know who supports which candidate for office. The Court has specifically upheld disclosure of contributions to political campaigns. See *Burroughs*, 290 U.S. 534, which upheld the disclosure requirements of the Federal Corrupt Practices Act of 1925, ch. 368, 43 Stat. 1070 (repealed 1976), the predecessor to the FECA.

Ohio law[10] construed in *Brown* closely parallels the federal campaign law in terms of disclosure and reporting requirements.[11]

Although the *Buckley* Court refused to grant minor parties a blanket exemption from disclosure requirements, it established a test by which a minor party could successfully challenge the constitutionality of disclosure requirements as applied to that party.[12] *Brown* is the fruition of this case-by-case, "as applied" constitutional test regarding campaign disclosure laws and minor political parties. *Brown* presents a full evaluation of the conflict between the governmental interests in disclosure and the "well-established fundamental rights of privacy and association."[13]

Brown stands for the proposition that mandatory disclosure directly invades not only "a contributor's privacy of belief by exposing his political affiliations,"[14] but a campaign expenditure recipient's privacy as well. The *Brown* majority thus held that the *Buckley* test applied to both contributors and recipients of campaign expenditures. Therefore, Ohio's disclosure law was found unconstitutional as applied to both. The dissent argued that the *Buckley* test was not met by the recipients of expenditures from the Socialist Worker's Party. It is this disagreement on the issue of disclosure of recipients which constitutes the bulk of the analysis in this casenote.

II. FACTS AND HOLDINGS

Brown began in 1974 as a class action suit instituted by members of the Socialist Worker's Party (SWP) of Ohio in the District Court for the Northern District of Ohio.[15] The Ohio SWP's suit challenged

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10. OHIO REV. CODE ANN. § 3517.01-.99 (Page 1972 & Supp. 1982). *See also* 103 S. Ct. at 418.

11. *See* OHIO REV. CODE ANN. § 3517.10 (Page Supp. 1982).

12. *See infra* text accompanying notes 20, 41.

13. Comment, *Minor Political Parties and Campaign Disclosure Laws*, 13 HARV. C.R.-C.L. L. REV. 475, 475 (1978).

14. *Id.*

15. 103 S. Ct. at 418. "The plaintiff class as eventually certified included all SWP candidates for political office in Ohio, their campaign committees and treasurers, and people who contribute to or *receive disbursement* from SWP campaign committees." *Id.* at 418 n.1 (emphasis added). The United States Supreme Court characterized the SWP as

> a small political party with approximately sixty members in the State of Ohio . . . . [I]ts aim is 'the abolition of capitalism and the establishment of a workers' government to achieve socialism.' . . . [T]he SWP does not advocate the use of violence. It seeks instead to achieve social change through the political process, and its members regularly run for public office.

Id. at 418. The Court went on to note the SWP had "had little success at the polls. In 1980 . . . the Ohio SWP's candidate for the United States Senate received fewer than . . . 1.9% of the total vote." *Id.* Further, its "[c]ampaign contributions and expenditures in Ohio have averaged about $15,000 annually since 1974." *Id.*

"the constitutionality of the disclosure provisions of the Ohio Campaign Expense Reporting Law."[16] These provisions require "every candidate for political office to file a statement identifying each contributor and *each recipient* of a disbursement of campaign funds."[17] The suit maintained that such disclosure[18] would subject SWP members to harass-

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16. *Id. See* OHIO REV. CODE ANN. § 3517.01-.99 (Page 1972 & Supp. 1982).

17. 103 S. Ct. at 418 (emphasis added). OHIO REV. CODE ANN. § 3517.10 (Page Supp. 1982), provides in relevant part:

> (A) Every campaign committee, political committee, and political party which made or received a contribution or made an expenditure in connection with the nomination or election of any candidate at any election held in this state shall file, on a form prescribed under this section, a full, true, and itemized statement, made under penalty of election falsification, setting forth in detail the contributions and expenditures. . . .
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> (B) Each statement required by division (A) of this section shall contain the following information:
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> (4) A statement of contributions made or received, which shall include:
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> (a) The month, date and year of contribution;
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> (b) The full name and address of each person, including any chairman or treasurer thereof if other than an individual, from whom contributions are received. The requirement of filing the full address does not apply to any statement filed by a state or local committee of a political party, to a finance committee of such committee, or to a committee recognized by a state or local committee as its fund-raising auxiliary.
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> (c) A description of the contribution received, if other than money;
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> (d) The value in dollars and cents of the contribution;
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> (e) All contributions and expenditures shall be itemized separately regardless of the amount except a receipt of a contribution from a person in the sum of twenty-five dollars or less at one social or fund-raising activity. An account of the total contributions from each such social or fund-raising activity shall be listed separately, together with the expenses incurred and paid in connection with such activity. No continuing association which makes a contribution from funds which are derived solely from regular dues paid by members of the association shall be required to list the name of address of any members who paid such dues.
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> (5) A statement of expenditures which shall include:
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> (a) The month, day, and year of expenditure;
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> (b) The full name and address of each person to whom the expenditure was made, including any chairman or treasurer thereof if a committee, association, or group of persons;
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> (c) The object or purpose for which the expenditure was made;
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> (d) The amount of each expenditure.
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> . . . .
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> (C). . . All such statements shall be open to public inspection in the office where they are filed, and shall be carefully preserved for a period of at least six years.

If the candidate is running for a statewide office, the statement shall be filed with the Ohio secretary of state; otherwise, the statement shall be filed with the appropriate county board of elections. *See id.* § 3517.11(a).

The federal law is analogous. Those parts of the United States Code reviewed by the Court in *Buckley* "require each political committee to keep detailed records of both contributions and expenditures, including the names of campaign contributors and recipients of campaign disbursements, and to file reports with the Federal Election Commission which are made available to the public." 103 S. Ct. at 420 n.7 (construing 2 U.S.C. §§ 432, 434, 438 (1982)).

18. Note especially that the Ohio statute requires that the "object or purpose" of each dis-

ment and would therefore violate SWP members' first amendment rights of association and belief.[19] By this challenge, the plaintiffs sought to meet the test established in *Buckley* which held that "the First Amendment prohibits the government from compelling disclosure by a minor political party that can show a 'reasonable probability' that the compelled disclosures will subject those identified to 'threats, harassment, or reprisals.' "[20]

The defendants in the class action, and later the appellants before the United States Supreme Court, were Ohio's secretary of state (Brown) and other state and local officials responsible for administering the state's disclosure law.[21] The lower court trial was finally held in February, 1981[22] before a three-judge federal district court panel.[23] During the period between 1974 and the trial, the SWP did not disclose either the names of its contributors or the names of the recipients of its campaign disbursements; it complied with the statute in all other respects.[24]

The district court reviewed the " 'substantial evidence of both governmental and private hostility toward and harassment of SWP members and supporters.' "[25] It concluded, under *Buckley*, that the Ohio

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bursement must be disclosed. *See* OHIO REV. CODE ANN. § 3517.10(B)(5)(c) (Page Supp. 1982). Note also that the lists of names and addresses of contributors and recipients are open to public inspection for at least six years. *See id.* § 3517.10(C). There is a fine of up to $1000 a day for violating Ohio's disclosure requirements. *Id.* § 3517.99.

19. 103 S. Ct. at 423.

20. *Id.* (citing 424 U.S. at 74).

21. 103 S. Ct. at 418 n.1.

22. In November 1974, the District Court for the Northern District of Ohio issued a temporary restraining order. This barred Ohio from enforcing its disclosure requirements against the SWP until the case could be determined on its merits. The effect of this order was to postpone any period of violation of the disclosure laws by the plaintiff until the case could be decided by the three-judge panel. *Id.* at 418-19.

The case was then transferred to the District Court for the Southern District of Ohio. In February, 1975, that court entered an identical order. A period of extensive discovery followed until the three-judge court convened. *Id.* at 419.

23. This court was convened pursuant to 28 U.S.C. § 2281 (repealed 1976). Although § 2281 was repealed in 1976, the repeal was not applicable to actions commenced prior to August 12, 1976. *Id.*

24. 103 S. Ct. at 419.

25. *Id.* (citing Socialist Workers '74 Campaign Comm. v. Brown, No. C-2-75-95 (S.D. Ohio June 25, 1981) (available Sept. 4, 1983, on LEXIS, Genfed library, Briefs file)) [hereinafter all references to the district court opinion will be cited to S. Ct.]. In the trial, the plaintiffs had "introduced proof of specific incidents" of such hostility. 103 S. Ct. at 423. These incidents included threatening phone calls, burning of SWP literature, destruction of SWP property, police harassment of their candidate, and the firing of shots at one SWP office. There was also evidence of SWP members being fired from jobs because of their party membership. The district court found this evidence amply supported its conclusion regarding hostility. *Id.* at 423-24.

The court also found a "past history of government harassment," including FBI surveillance of the party until at least 1976 and an FBI counterintelligence program against the party and its

disclosure requirements had been applied unconstitutionally to the plaintiffs.[26]

The United States Supreme Court affirmed the district court's decision. In *Brown*, the Court crystallized an example of when and how campaign disclosure laws cannot be constitutionally applied to a minor political party. The Court framed the issue as "whether certain disclosure requirements of the Ohio Campaign Expense Reporting Law . . . can be constitutionally applied to the Socialist Workers Party, a minor political party which historically has been the object of harassment by government officials and private parties."[27] Then, employing the *Buckley* test[28] as the district court had done, the Court concluded that the "Ohio statute is unconstitutional as applied" to the SWP.[29]

The Supreme Court held "that the test announced in *Buckley* for safeguarding the First Amendment interests of minor parties and their members and supporters applies not only to the compelled disclosure of campaign contributors but also to the compelled disclosure of *recipients of campaign disbursements*."[30]

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youth group, the Young Socialist Alliance (YSA). *Id.* at 424. This program included disclosure of members' past criminal records and the distribution of FBI reports to the armed services intelligence groups, the United States Secret Service, and the Immigration and Naturalization Service. *Id.*

The district court "specifically found the FBI had conducted surveillance of the Ohio SWP and had interferred with its activities within the State." *Id.* The court found that the government possessed 8,000,000 documents relating to the SWP and YSA, and, since 1960, had paid its informants over $350,000 for their services and expenses relating to the SWP. *Id.* at 424 n.18. The district court obtained this information from "Part I of the Final Report of Special Master Judge Breitel in *Socialist Workers Party, et al v. The Attorney General of the United States*, 73 Civ. 3160 (TPG) (SDNY February 4, 1980), detailing the United States Government's admissions concerning the existence and nature of the Government surveillance of the SWP." *Id.* at 424 n.17.

26. The evidence caused the district court to conclude that there was reasonable probability that recipients and contributors of the SWP would be subject to harassment, threats and reprisals if their names were disclosed. *Id.* at 424 n.19. The court found the harassment "ingrained and *likely to continue*." *Id.* at 425 (emphasis added).

The district court held that the Ohio statute was unconstitutional *as applied* to the Ohio SWP. *See id.* at 419. It did *not* decide the statute was *facially* invalid, which the plaintiffs had claimed. The plaintiffs had based this claim on the absence of a monetary threshold in the Ohio law. *Id.* at 419 n.6. The statute compelled disclosure of even *nominal* amounts of contributions and expenditures. *See* OHIO REV. CODE ANN. § 3517.10(B)(4)(e) (Page Supp. 1982).

27. 103 S. Ct. at 418.

28. *Id.* at 423 (citing 424 U.S. at 74).

29. 103 S. Ct. at 418.

30. *Id.* at 423 (emphasis added). Justice Marshall delivered the opinion of the Court. Justices Burger, Brennan, White, and Powell joined him. Justice Blackmun joined in Parts I, III, and IV of the opinion, concurring in part and concurring in the judgment. Justice Blackmun preferred to assume that the flexible proof rule of *Buckley* applied to force disclosure of contributions and expenditures equally, rather than to hold such. *Id.* at 425. Justice O'Connor concurred in part and dissented in part. Justice O'Connor opined that Ohio's disclosure requirements regarding expenditures did meet the strict scrutiny test and were constitutional. *Id.* at 428. Justices Rehnquist and Stevens joined Justice O'Connor.

III. ANALYSIS

A. Background

Buckley v. Valeo[31] is clearly the foundation for *Brown*. Most relevant, for purposes of this casenote, is the *Buckley* Court's position on the first amendment challenge to the reporting and disclosure requirements[32] of the Federal Election Campaign Act of 1971 (FECA).[33] The *Buckley* Court *upheld* the constitutionality of these disclosure requirements.[34] It did so on the basis of three governmental interests which it found sufficient to withstand strict scrutiny,[35] when measured against the burden placed on fundamental first amendment rights of association and belief by the FECA requirements.

The three governmental interests which the Court considered sufficient to subordinate one's first amendment rights were: 1) providing the voting public with information about where campaign dollars came from and how they are spent by the candidate,[36] 2) deterring "actual corruption" and avoiding "the appearance of corruption by exposing large contributions and expenditures to the light of publicity,"[37] and 3) gathering the date necessary to detect violations of the FECA.[38]

Although the Court upheld the FECA's disclosure requirements, the Court noted the balance in favor of the government's interest will tip *against* "disclosure when it is required of contributors to certain

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31. 424 U.S. 1 (1976).

32. *See* 2 U.S.C. §§ 432, 434, 438 (1976).

33. *See* Comment, *supra* note 4.

34. 424 U.S. at 60-74.

35. *Id. See also id.* at 64-65 (to compel disclosure requires that any subordinating state interest must survive an "exacting scrutiny" test). The Court also insisted there "be a . . . 'substantial relation' between the governmental interest and the information to be disclosed." *Id.* at 64 (citations omitted).

The *Buckley* Court held that strict scrutiny of the disclosure law was necessary, even though the government's conduct requiring disclosure only *indirectly* and *unintentionally* deterred the exercise of first amendment rights. *Id.* at 65 (citation omitted).

The Court completed its strict scrutiny analysis by holding that "disclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* at 68 (citation omitted). *See also id.* at 68 n.82 (Court's explanation of the importance of preelection disclosure).

36. 424 U.S. at 66 (citing H.R. REP. No. 564, 92d Cong., 1st Sess. 4 (1971)).

37. 424 U.S. at 67-68. *See* S. REP. No. 689, 93d Cong., 2d Sess. 2 (1974); H.R. REP. No. 564, 92d Cong., 1st Sess. 4 (1971).

"Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants . . . ." 424 U.S. at 67 (quoting L. BRANDEIS, OTHER PEOPLE'S MONEY 62 (National Home Library Foundation ed. 1933)). *See* Burroughs v. U.S., 290 U.S. 534, 548 (1934) (Congress could reasonably conclude that full disclosure can "prevent the corrupt use of money to affect election.").

38. 424 U.S. at 67-68. The *Brown* Court found this "government interest in enforcing limitations [to be] completely inapplicable . . . since the Ohio law imposes no limitations on the amount of campaign contributions." 103 S. Ct. at 420 n.8.

parties and candidates."[39] In this statement, the *Buckley* Court laid the groundwork for *Brown*.[40]

Although the *Buckley* Court refused to carve out a flat exemption for minor parties, it established a test for determining when the FECA (and analogous state-level) disclosure requirements might be unconstitutional when applied to minor parties: "The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment or reprisals from either Government officials or private parties."[41]

In designing this test, the Court acknowledged that it was a "heavy burden of proof"[42] for a minor party to show that such harassment was directly attributable to specific disclosure requirements. Therefore, the Court held that it would allow sufficient flexibility in the proof of injury to meet the Court's test.[43] Although the proof is flexible, the minor party still carries the burden of production and persuasion to show its rights of association and belief outweigh any substantial government interests. This is the burden the *Brown* Court held that the SWP met.[44]

B. *Brown Court Rationale*

Relying on a series of critical cases cited in *Buckley*,[45] the *Brown*

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39. 424 U.S. at 68.

40. The Court envisioned a case, similar to those before it in "*NAACP v. Alabama*, and *Bates*, where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied." *Id.* at 71. The *Buckley* Court specifically discussed allegations which had been made by a branch of the Socialist Workers Party in a civil action seeking to declare the District of Columbia's disclosure and filing requirements unconstitutional as applied to its records. Those allegations were sufficient "to withstand a motion to dismiss in *Doe v. Martin*, 404 F. Supp. 753 (1975) (three-judge court)." *Id.* at 71 n.87. The District of Columbia had required political committees to record contributions of $10 or more and to report contributors of $50 or more. *Id.*

Although the Court found the *Buckley* appellants had not "tendered the record evidence of the sort proffered in *NAACP v. Alabama*," *id.* at 71, and it could not find, therefore, the disclosure requirements unconstitutional, it was clearly foreseeing such a case. *Brown* is the fruition of the Court's vision.

41. 424 U.S. at 74.

42. *Id.*

43. *Id.* The Court held that such flexibility would assure fair consideration of a minor party's claim. The Court stated:

> The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views. *Id.*

44. 103 S. Ct. at 425.

45. These key cases and the United States Supreme Court's holdings in each are as follows: 1) In Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963), the Court held it was unconstitutional for the Florida Legislature to require the president of a local NAACP chapter

Court first traced the principles underlying the rights of association and belief. It opened its opinion with the statement that "[t]he Constitution protects against the compelled disclosure of political associations and beliefs. Such disclosures 'can seriously infringe on privacy of association and belief guaranteed by the First Amendment.' "[46] The Court then related the right to privacy (against disclosure) with the right to associate by citing *NAACP v. Alabama*, which stated that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[47] The *Brown* Court indicated that it would apply the strict scrutiny test to its evaluation of the SWP's rights of association.[48]

The state interests which the *Brown* Court weighed against the burden placed on the SWP's associational rights were two of the three interests identified in *Buckley*: "enhancement of voters' knowledge about a candidate's possible allegiances and interests, [and] deterrence of corruption . . . ."[49] Referencing *Buckley*, the *Brown* Court did not find knowledge of a candidate's allegiance to be a subordinating state interest because minor party candidates usually have viewpoints well-known and publicized.[50] Again referencing *Buckley*, the *Brown* Court did not find prevention of corruption a subordinating interest because the improbability of a minor party winning reduces the dangers of cor-

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to divulge his membership list for two reasons. First, it violated rights of association protected by the first and fourteenth amendments. Second, the state had failed to show a substantial relation between the information sought and an overriding and compelling state interest; 2) In NAACP v. Button, 371 U.S. 415 (1963), the Court held that the NAACP's effort to challenge racial discrimination was a mode of expression and association and that Virginia's attempt to stop such efforts, by broadening its statutory definition of legal malpractice, violated first and fourteenth amendment rights of association; 3) In Shelton v. Tucker, 364 U.S. 479 (1960), the Court held that an Arkansas statute which required teachers to file an affidavit listing every organization to which they belonged was a violation of their right of association; 4) In Bates v. Little Rock, 361 U.S. 516 (1960), the Court held that city tax ordinances which required compulsory disclosure of membership lists of local NAACP branches significantly interfered with freedom of association and that the government demonstrated no interest which justified such a substantial abridgment of associational freedom; 5) In NAACP v. Alabama, 357 U.S. 449 (1958), the Court held that a compelled disclosure of the NAACP's membership lists would likely constitute an effective restraint on freedom of association.

46. 103 S. Ct. at 419-20 (citing *Buckley*, 424 U.S. at 64).

47. 357 U.S. at 462.

48. This indication comes from the Court's statement that "[t]he right to privacy in one's political associations and beliefs will yield only to 'a subordinating interest of the state [that is] compelling' . . . and then only if there is a 'substantial relationship between the information sought and [an] overriding and compelling state interest'." 103 S. Ct. at 420 (citations omitted).

49. *Id. See also* 424 U.S. at 67-68 (government's interest inapplicable in enforcing contribution limits).

ruption.[51] Therefore, the *Brown* Court concluded that "government interests in compelling disclosure are 'diminished' in the case of minor parties."[52]

Yet, while the Government's interests were diminished, the *Brown* Court found "the potential for impairing First Amendment interests is substantially greater."[53] The *Brown* Court underscored the *Buckley* Court's description of this danger to minor parties:

> We are not unmindful that the damage done by disclosure to the associational interests of minor parties and their members and to supporters of independents could be significant. These movements are less likely to have a sound financial base and thus are more vulnerable to falloffs in contributions. In some instances fears of reprisals may deter contributions to the point where the movement cannot survive. The public interest also suffers if that result comes to pass, for there is a consequent reduction in the free circulation of ideas both within and without the political arena.[54]

Therefore, the *Brown* majority concluded that the SWP could not constitutionally be compelled to disclose either its campaign contributors *or* its campaign disbursement recipients. In sum, the *Brown* Court found the Ohio SWP had met its burden of proof regarding probable harassment. Further, the Court held the first amendment protects the SWP's rights of association and belief for both contributors and recipients.[55]

It is on the issue of disclosure of recipients that the *Brown* majority and dissent differ.[56] Initially the appellants, Ohio state officials, contended that "the [*Buckley*] test had *no* application to the compelled disclosure of names of *recipients* of campaign disbursements."[57] Justice O'Connor softened this sweeping statement by agreeing with the majority that the appellants overstated their argument in declaring this, and that *Buckley's broad* concerns did indeed apply to disclosure of recipients.[58]

Nevertheless, Justice O'Connor found "important differences between the disclosure of contributors and disclosure of recipients of cam-

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51. *Id.*

52. *Id.* (citing *Buckley*, 424 U.S. at 70).

53. *Id.*

54. *Id.* (citing *Buckley*, 424 U.S. at 71 (citations omitted)).

55. 103 S. Ct. at 423.

56. Justice O'Connor, with whom Justice Rehnquist and Justice Stevens joined, concurred in part (regarding disclosure of contributions) and dissented in part (regarding disclosure of recipients of campaign expenditures). *Id.* at 428-32.

57. *Id.* at 421 (emphasis added in part).

58. *Id.* at 428 (emphasis added).

paign expenditures."[59] These differences indicate that she also questioned whether the recipient issue should even have been before the Court. Justice O'Connor made this determination by noting that although the *Buckley* Court did rule on an overbreadth challenge to the FECA's disclosure requirements "as they apply to *contributions* to minor parties," the appellants in *Buckley* had not challenged the application of disclosure requirements to the *expenditures* of minor parties.[60] Therefore, she concluded that the *Buckley* Court had not directly considered any first amendment interests of minor parties relating to the disclosure of who received their expenditures,[61] thus indicating the *recipient* question was not properly before the *Brown* Court.

In response, Justice Burger, speaking for the majority, asserted that "the question whether the *Buckley* test applies to the compelled disclosure of recipients of expenditures is properly before us."[62] The

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59. *Id.* at 429.

60. *Id.* at 428 (quoting *Buckley*, 424 U.S. at 68-69 (emphasis added)). In a footnote, Justice O'Connor explained the *Buckley* plaintiffs had, however, challenged expenditure limits and disclosure requirements for independent contributions and expenditures. Of course, the *Buckley* Court "upheld all disclosure requirements, including disclosure of independent expenditures [made] 'for communications that expressly advocate the election or defeat of a clearly identified candidate.' " 103 S. Ct. at 428 n.1(quoting *Buckley*, 424 U.S. at 80). In a point perhaps too finely drawn, she pointed out that the plaintiffs did not challenge expenditure recipient disclosure for all *political parties* (versus individual independent expenditures). 103 S. Ct. at 428 n.1.

61. Justice O'Connor argued at length that the *Buckley* test "contemplates only assessing possible harassment of *contributors*, without a word about considering the harassment of *recipients* of *expenditures* if their names are disclosed or any effects this harassment may have on the party." *Id.* at 428 (emphasis added).

62. *Id.* at 421 n.9. Justice Blackmun, concurring in part and concurring in the judgment, argued that the Court should "leave for another day" the question of whether the "flexible proof rule of *Buckley* . . . applies equally to forced disclosure of contributions and to forced disclosure of expenditures." *Id.* at 425. Justice Blackmun would "merely *assume* for the purposes of [the] present decision" that it does. *Id.* This is because the appellants' jurisdictional statement (presentation of its issue) only *assumed* the "applicability of *Buckley* to the entire case." *Id.* at 426. The appellants presented the issue as follows:

> 'Whether, under the standards set forth by this Court in *Buckley v. Valeo*, 424 U.S. 1 . . . (1976), the provisions of Sections 3517.10 and 3517.11 of the Ohio Revised Code, which require that the campaign committee of a candidate for public office file a report disclosing the full names and addresses of persons making contributions to or *receiving expenditures* from such committee, are consistent with the right of privacy of association guaranteed by the First and Fourteenth Amendments of the Constitution of the United States when applied to the committees of candidates of a minority party which can establish only isolated instances of harassment directed toward the organization or its members within Ohio during recent years.'

Id. at 425-26 (emphasis added).

Supreme Court Rules state: " 'Only the question set forth in the jurisdictional statement or fairly included therein will be considered by the Court.' " SUP. CT. R. 15.1(a), *cited in id.* at 425.

However, *Buckley* did not address the recipient issue. Therefore, Blackmun's concern is that "[a]bsent extraordinary circumstances, [the] Court does not decide issues beyond those it has agreed to review." *Id.* at 436. The appellants had asked for application of the *Buckley* test; the *Buckley* test did not address recipients and therefore Blackmun felt the appellants had not in-

majority based this belief, first, on the fact that Ohio had maintained throughout the litigation that it could constitutionally require disclosure of contributors *and recipients*. In turn, at the district court level, the court had held that the *Buckley* standard of "flexible proof of reasonable probability of threats"[63] could apply to both. It found the SWP's evidence was sufficient to show "disclosure would subject both contributors and recipients to . . . harassment."[64] Therefore, when the case reached the Supreme Court, the Court held that due to the correctness of the lower court's holding, both the contributor and recipient issues were "fairly included" in the appellants' question (jurisdictional statement) presented to it.[65] The majority, therefore, refused to discard the recipient issue, even though the Court's rationale for reviewing it appears somewhat self-serving.

Apparently conceding, then, that the "broad concerns of *Buckley* apply to the required disclosure of recipients of campaign expenditures,"[66] Justice O'Connor nevertheless found that the SWP "failed to carry its burden of showing there is a reasonable probability that disclosure of recipients of expenditures will subject the recipients themselves or the SWP to threats, harassment, or reprisals,"[67] thus chilling their first amendment right of association. Furthermore, she noted "the strong public interest in fair and honest elections outweighs any damage done to the associational rights of the party."[68] For Justice O'Connor and the dissent, in the strict scrutiny equation which balances governmental interests against first amendment rights, the gov-

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voked the Court's jurisdiction "to review specifically the proper standard for disclosure of campaign expenditures." *Id.* He also felt the case presented "no extraordinary circumstances justifying deviation from [the] Court's Rule." *Id.* at 427.

Blackmun's conditioned concurrence and the dissent's argument regarding the Court's holding on recipients are not too far removed from the criticisms the dissent leveled on the majority in Roe v. Wade, 410 U.S. 113 (1973). In *Wade*, the dissent accused the majority of "an exercise of raw judicial power" by creating and upholding the fundamental right to privacy over the state's interest in the preservation of life. *See* Doe v. Bolton, 410 U.S. 179, 221 n.*, 222 (1973).

63. 103 S. Ct. at 421 n.9.

64. *Id.*

65. *Id.* (citing SUP. CT. R. 15.1(a) and Procunier v. Navarette, 434 U.S. 555, 559 n.6 (1978), for the proposition that its "power to decide [was] not limited by the precise terms of the question presented.").

The majority found the appellants' and the dissent's attempts to limit the minor party exemption to laws which require disclosure of only contributors to be inconsistent with the rationale of *Buckley* which recognized the potential for a minority party exemption from disclosure requirements. 103 S. Ct. at 421.

66. *Id.* at 428.

67. *Id.* Justice O'Connor found "no direct evidence of harassment of either contributors or recipients of expenditures." *Id.* at 431. Rather, she noted that "the evidence concerns harassment and reprisals of visible party *members*, including violence at party headquarters and loss of jobs." *Id.* (emphasis added).

68. *Id.* at 428.

ernment interests won.[69]

On the fundamental rights side of the strict scrutiny equation, Justice O'Connor did not find the right to association sufficiently chilled or endangered to warrant nondisclosure of recipients' names. Regarding proof of harassment of recipients, although the Justice was willing to accept that harassment of party members supports the conclusion "that there will be a reasonable probability of harassment of contributors if their names are disclosed,"[70] she was unwilling to infer that disclosure of recipients would lead to harassment of recipients.[71] Apparently, she could visualize how contributors might suffer—as SWP members do—from disclosure, but could not visualize how a recipient of SWP funds might suffer in the same way.[72]

The Justice herself acknowledged that associational rights of minor parties are sensitive and that the *Buckley* Court emphasized this.[73] She found contributions to a campaign to be a form of political expression, so that disclosure of such contributions "implicates the contributors' associational rights."[74] Yet the Justice also found disclosure of recipients of expenditures would "have a lesser impact on a minority party's First Amendment interests than will disclosure of contribu-

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69. In strong terms, Justice O'Connor pointed out the "governmental interest in disclosure of expenditures remains significant for minor parties." *Id.* at 429. She reiterated that the "purpose of requiring parties to disclose expenditures is to deter improper influencing of voters." *Id.* She cited the many forms which corruption can take. Although she found that improper minor party practices were unlikely to elect a candidate, she feared such practices could "determine the outcome of the election of other candidates." *Id.* Therefore, to her, "the requirement of a *full* and *verifiable* report of expenditures is important in deterring such practices, for otherwise the party could hide the improper transactions through an accounting sleight-of-hand." *Id.* The majority disagreed completely.

70. *Id.* at 431.

71. Justice O'Connor found the evidence of harassment of party *members* "sufficiently linked to disclosure of contributors in large part because any person publicly known to support the SWP's unpopular ideological position may suffer the reprisals that this record shows active party members suffer, and disclosure of contributors may lead the public to presume these people support the party's ideology." *Id.*

72. 103 S. Ct. at 431. Justice O'Connor was unwilling to draw this analogy for recipients. She found that the record "does not suggest that disclosure of recipients of expenditures would lead to harassment or reprisals to the party or its members." *Id.* She found the majority of expenditures would be for business transactions like office supplies, and that there was "virtually no evidence that disclosure . . . will impair the SWP's ability to obtain needed services." *Id.* She brushed off the effect on campaign workers by saying they have already publicly demonstrated their support for the party. Finally, Justice O'Connor was willing to accept the contention that the "FBI's actions against the SWP have long been ended, . . . and Congress has since instituted more rigorous oversight of [the] FBI . . . ." *Id.* at 431 n.9 (citation omitted). She was, however, unwilling to infer from past FBI incidents that "disclosure of recipients of expenditures would increase any difficulty the party might have . . . and is plainly outweighed by the 'substantial public interest in disclosure.' " *Id.* (citation omitted).

73. *Id.* at 428-29.

74. *Id.* at 430.

tors."[75] Justice O'Connor discounted the impact of disclosure on business transactions, and also on party workers by stating that "[o]nce an individual has openly shown his close ties to the organization by campaigning for it, disclosure of receipt of expenditures is unlikely to increase the degree of harassment so significantly as to deter the individual from campaigning for the party."[76]

Justice O'Connor appears to disregard the fact that not all campaign workers make their party affiliation known to the public. Many do nothing more than anonymously answer phones or address envelopes. Likewise, a close analogy might be drawn between contributing services—with a minimal reimbursement for expenses—and contributing dollars, which the Justice readily admitted is protected by the first amendment. Therefore, the majority, and by implication, the dissent, rightly argued that both appellants in this case "seriously understate the threat to First Amendment rights that would result from requiring minor parties to disclose the recipients of campaign disbursements."[77]

On the governmental interest side of the equation, Justice O'Connor found that "unlike the government's interest in disclosure of contributions, its interest in disclosure of expenditures does not decrease significantly for small parties."[78] She predicted that even parties with a small chance of political success might nonetheless finance improper or corrupt activities to achieve recognition.[79]

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75. *Id.*

76. *Id.*

77. *Id.* at 422. The majority noted:

> Expenditures by a political party often consist of reimbursements, advances, or wages paid to party members, campaign workers, and supporters, whose activities lie at the very core of the First Amendment. Disbursement may also go to persons who choose to express their support for an unpopular cause by providing services rendered scarce by public hostility and suspicion. Should their involvement be publicized, these persons would be as vulnerable to threats, harassment, and reprisals as are contributors whose connection with the party is solely financial. Even individuals who receive disbursements for 'merely' commercial transactions may be deterred by the public enmity attending publicity, and those seeking to harass may disrupt commercial activities on the basis of expenditure information. Because an individual who enters into a transaction with a minor party purely for commercial reasons lacks any ideological commitment to the party, such an individual may well be deterred from providing services by even a small risk of harassment. Compelled disclosure of the names of such recipients of expenditures could therefore cripple a minor party's ability to operate effectively and thereby reduce 'the free circulation of ideas both within and without the political arena.'

Id. at 422-23 (citations omitted).

78. *Id.* at 429.

79. *Id.* Justice O'Connor recognized, relying upon *Buckley*, that knowing who the contributors to a minor party were did not significantly increase the voter's ability to identify the ideology of a minor party candidate, since his stance was usually well known. Nor did identifying contributors prevent "buying" an election, since it was improbable that any minor candidate would win an election. *Id.* Therefore, she would agree that these two major government interests in disclosure

In responding to Justice O'Connor's argument, the majority determined that she had mistakenly relied on Justice White's concurring opinion in *Buckley*,[80] in which he stated "unlimited money tempts people to spend it on *whatever* money can buy to influence an election."[81] When the majority examined the context in which White made his comment, it found his observation indicated precisely why the state's interest in preventing corruption was insubstantial in the case of recipients.

The majority noted that Justice White in *Buckley* was addressing *ceilings* on campaign expenditures,[82] not disclosure of them. His "point was that such ceilings 'could play a substantial role in preventing unethical practices.' "[83] Where minor parties are concerned, however, their limited resources function as an automatic expenditure ceiling, which "minimizes the likelihood" that they will finance improper activities.[84] Finding Justice White's observation "particularly apposite in the case of minor parties,"[85] the majority found that it could not agree "that minor parties are as likely as major parties to [fund] . . . dirty tricks."[86] The essential reason for this position was that there was simply not enough money to finance corrupt activities.

A more important point for the majority was that "the mere *possibility* that minor parties will resort to corrupt or unfair tactics cannot justify the substantial infringement on First Amendment interests that would result from compelling the disclosure of recipients of expenditures."[87] In *Buckley*, the *Brown* Court recalled, it had acknowledged that a major party candidate's supporters "might channel money into minor parties to divert votes from other major party contenders."[88] Therefore, it recognized the distorting influence of large contributors.

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of contributions are significantly reduced for minor parties." *Id.*

She found, however, "the governmental interest in disclosure of expenditures remains significant for minor parties." *Id.* She noted that the purpose of requiring an expenditure disclosure was to deter any wrongful influence of voters. She recognized the many forms corruption of the electoral process could take, including dirty tricks and slush funds. She acknowledged that such tricks were unlikely to bring a minor party success, but felt minor parties were as tempted as major parties to resort to such impermissible actions. For Justice O'Connor, the possibility that votes thus deflected might affect an election outcome was enough to justify a "*full* and *verifiable* report of expenditures [to deter] such practices." *Id.*

80. 103 S. Ct. at 422 n.11 (questioning Justice O'Connor's dissent, 103 S. Ct. at 429 n.4).

81. 424 U.S. at 265.

82. 103 S. Ct. at 422 n.11.

83. *Id.* (quoting *Buckley*, 424 U.S. at 265).

84. *Id.* Recall the Ohio SWP averaged $15,000 each election year to spend for campaigns. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* (emphasis added).

88. *Id.* (citing *Buckley*, 424 U.S. at 70).

Nevertheless, the *Brown* Court noted that in *Buckley* it also had held minor parties were exempt from disclosure requirements regarding contributors where they could "show a reasonable probability of harassment."[89] Now in *Brown*, the majority similarly concluded that the government interest requiring disclosure of *recipients* was also "substantially reduced in the case of minor parties."[90] Therefore, the Court held "the minor party exemption recognized in *Buckley* applies to compelled disclosure of expenditures as well."[91]

In summary, "heightened government interest in disclosure of *expenditures*"[92] and the reduced impact on minor parties' first amendment associational interests prompted the dissent to "uphold the constitutionality of those portions of the Ohio statute that require the SWP to disclose the recipients of expenditures."[93] It was plain to the dissent that the appellees failed to carry the flexible burden of proof enunciated in *Buckley* when challenging the expenditure-disclosing provisions. It was, however, not at all plain to the majority that the SWP had failed. For the majority, the first amendment prohibited a state from compelling any disclosures by a minor party. Therefore, seeing "substantial evidence of past and present hostility from private persons and government officials against the SWP,"[94] the majority held that "Ohio's campaign disclosure requirements cannot constitutionally be applied to the Ohio SWP."[95]

The majority's position, that disclosure of both contributors' and recipients' names is unconstitutional as applied to minor parties, is now law. It is also the stronger argument. Disclosure intrudes upon fundamental rights.[96] While it affects all political campaign contributors and recipients, it has an even "greater impact upon . . . minor political parties which are by nature small and unpopular."[97] The *Brown* Court's findings regarding harassment of SWP members are persuasive

89. *Id.* at 422 n.11.

90. *Id.*

91. *Id.*

92. *Id.* at 430 (emphasis added).

93. *Id.* at 432 (footnote omitted).

94. *Id.* at 425.

95. *Id.*

96. Comment, *supra note* 13, at 475-76. This comment criticized the *Buckley* Court's refusal to create a categorical constitutional exemption for minority parties from the FECA's reporting requirements, and the Court's requirement that minor parties show "on a case-by-case basis a sufficient burden on first amendment rights to merit an exemption." *Id.* at 477. At that time, the comment's author felt the Court had given insufficient weight to contributors' interests and had "been overly deferential to congressional judgments." *Id.* (citation omitted). The author should feel vindicated to the extent that the *Brown* Court favored not only contributors' interests but expenditure recipients' interests as well.

97. *Id.*

evidence of this.[98]

The *Brown* majority, in agreeing with the district court's opinion, inferred from evidence about harassment of members that there was a "reasonable probability that disclosing the names of contributors and recipients will subject them to . . . harassment."[99] It would appear to be inconsistent to infer harassment of one group and not the other, as the dissent was willing to do.

Ohio's disclosure law makes it "particularly easy to identify [recipients] since it requires disclosure of the *purpose* of disbursements as well as the identity of the recipients."[100] Whether one contributes or receives SWP funds in Ohio it "results in a dramatic increase in public exposure."[101] Records of a person's affiliation with the SWP (in contributor *or* recipient form) are kept open to inspection by anyone for at least six years.[102] The majority is only being realistic when it finds "preservation of unorthodox political affiliation in public records substantially increases the potential for harassment above and beyond the risk that an individual faces simply as a result of having worked for an unpopular party at one time."[103]

The dissent is unrealistic in holding that disclosure of recipients of SWP funds will have a lesser impact on associational rights. One fanatic with a vendetta against the SWP or anyone affiliated with it, having public access to complete records of SWP contributors and recipients, could commit mayhem. The dissent is also unrealistic in believing that FBI-type surveillance of groups like the SWP has ended.[104] The dissent may be correct in holding that the *Buckley* Court did not provide that its test was applicable to recipients. This is a distinction too finely drawn where harassment threatens such a chilling effect on associational rights.

The majority's argument concerning reduced governmental interests is also stronger than the dissent's. Not only does it make a clear case for the remoteness of *influential* corruptions in minor party expenditures, it also refutes part of the dissent's basis for holding governmental interests to be heightened when it finds Justice White's observa-

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98. *See supra* note 25 and accompanying text.

99. 103 S. Ct. at 424.

100. *Id.* at 422 n.12 (citing OHIO REV. CODE ANN. § 3517.10(B)(5)(c) (Page Supp. 1982)).

101. 103 S. Ct. at 423 n.14.

102. *Id.* (citing OHIO REV. CODE ANN. § 3517.10(C) (Page Supp. 1982)).

103. 103 S. Ct. at 423 n.14.

104. *See, e.g.*, Federal Election Comm'n v. Hall-Tyner Election Campaign Comm., 678 F.2d 416, 417-18 (2d Cir. 1982) (Communist Party was exempt from disclosure and record-keeping requirements of the FECA because the compelled disclosure of names of contributors would subject the contributors to harassment from either private parties or government officials).

tions in *Buckley* apposite.

The majority applies strict scrutiny to the Ohio disclosure laws and finds them unconstitutional as applied to *both* contributors and recipients. In the face of substantial first amendment rights it finds no compelling government interest sufficient to subordinate those rights.[105] Its reasoning is clear, its findings of facts are sufficient to support its contention, and its conclusion is thus compelled. That the *Buckley* Court did not specifically address recipients of minor party expenditures, although it addressed independent expenditures, is not a sufficient reason to hold otherwise.

IV. CONCLUSION

Brown represents the classic application of the *Buckley* test to a minor political party, with a twist that protects recipients of campaign funds as well as contributors. The factual pattern of *Brown* clearly shows when a minor party will have sufficiently demonstrated reasonable probability of harassment so as to prevent disclosure of those affiliated with it.

Holding any law requiring such disclosure unconstitutional when applied to a minor party preserves that party's fundamental first amendment rights of association and belief. Where the strict scrutiny test is applied to state laws requiring disclosure of a minor party's contributors and recipients, the government's interest is diminished and the threat to first amendment rights is sufficient enough to exempt the parties from such requirements. Any minor party seeking such relief should look to the flexible burden of proof the Ohio SWP met in *Brown* to find the guidelines for presenting its own case.

Tricia A. Suttmann

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105. See 103 S. Ct. at 420.