AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech/Campaign

Finance

**Colorado Education Association v. Rutt, 184 P.3d 65** (CO 2008)

*In 2002, the voters of Colorado adopted state constitutional amendment XXVIII. The complicated amendment created a comprehensive scheme of campaign finance regulation in the state. The amendment prohibited corporations or labor unions from making contributions of “anything of value” to political campaigns or expenditures to advocate for or against a candidate except through a separate political committee. The amendment clarified, however, that “expenditures for communication between membership organizations and their members and families” would still be allowed.*

*In 2004, the Colorado Education Association (CEA) and the Poudre Education Association (PEA), two teachers’ unions, voted to support the candidacy for the senate of Bob Bacon, a former president of the PEA. The unions then organized efforts to support the campaign, including two “walks” in which members of the unions volunteered to distribute campaign literature for Bacon. In order to organize the walks, the unions used paid staff to recruit and organize volunteers and provided instructions and supplies to the volunteers. The Bacon campaign provided signs and literature to the union, and Bacon appeared at each walk to encourage and thank the volunteers. Bacon won the election.*

*In 2005, Wayne Rutt, a local parent, filed a complaint with the secretary of state, alleging that the unions were illegally aiding the Bacon campaign. The complaint was forwarded to an administrative law judge, who dismissed it. A court of appeals reversed that ruling, but in a 5-2 decision the state supreme court reversed the court of appeals. The majority concluded that the First Amendment of the U.S. Constitution required that the Colorado state constitutional amendment be interpreted so as to not unduly interfere with the right of individuals to freely associate to more effectively express their political views. As a consequence, the membership exception to the prohibition on unions using general funds to aid a political campaign should be construed broadly so as to allow unions to expend funds to organize their membership to distribute campaign literature to the general electorate.*

JUSTICE BENDER.

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Rutt asserts that the unions engaged in prohibited expenditures by paying staff salaries for time spent organizing the walks and recruiting volunteers, preparing postcards to be sent to nonmembers by members, making phone and mail contact with nonmembers, and buying supplies and materials for the walks.   To resolve these claims, we must construe the definition of “expenditure” and the “membership communication exception” to expenditures in article XXVIII consistent with the First Amendment mandates of the United States Supreme Court and the language of the article itself. . . .

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The membership communication exception covers payments by a membership organization for “any communication” solely to members and their families.   The key phrase, “any communication,” is broad and all-inclusive.   Given this broad language, we are not free to imply limitations or qualifications that are not found in article XXVIII. . . .

Consistent with the broad membership communication exception contained in article XXVIII is the precedent of the United States Supreme Court which carefully scrutinizes campaign finance regulations because they interfere with both political speech and association. *Buckley v. Valeo* (1976). . . .

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Just as restrictions on expenditures impinge upon political expression, they also restrain political association, which is equally protected by the First Amendment. . . . Restrictions on contributions and expenditures by labor organizations implicate this right because they impose burdens on individuals acting together to amplify their speech. . . .

When the state “impos[es] limitations ‘on individuals wishing to band together to advance their views ․ while placing none on individuals acting alone, [it] is clearly a restraint on the right of association.’ ” *Eu v. San Francisco County Democratic Central Committee* (1989). . . . The guarantee of freedom of association in the political context “protects the right of union members both to express their point of view and to support their position financially.” . . . Laws banning union contributions and expenditures impinge upon union members' associational freedom by “preventing them from supporting candidates collectively through the union.”

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Article XXVIII's broad membership communication exception serves to protect both the freedom of speech of the union and the constitutionally protected associational rights of union members by permitting unions to make expenditures for communication with their members, even if the communication expressly advocates a candidate's election.

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Union staff members made building visits to hold meetings with members, sent e-mails to members, used the inter-school mail system to send notices to members, and prepared information for members regarding the walks.   The CEA and the PEA, as entities, did not communicate with voters or the general public; they communicated with their members.   In turn, the union members volunteered to communicate with nonmembers.   While it is accurate to say that the unions' organized efforts sought to help elect Bacon, the payments of union staff salaries involved activities communicated to members and their families to promote union purposes. The union staff's efforts were directed toward assisting the union members in promoting their own interests-activities that lie at the very heart of the associational freedoms protected by the membership communication exception.

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Given our conclusion that it was permissible for union staff members to plan the walks and recruit union members to participate, it would make little sense to determine that it was impermissible for the union to provide water, donuts, or walking maps to volunteer participants.   We conclude that payments for materials and supplies for the walks are not prohibited expenditures. . . .

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However, as we view the record, while it may be accurate to say that the challenged union activities were directly provided to union members with the purpose of promoting union interests, it seems similarly accurate to say that the unions' collective activities provided a benefit to the Bacon campaign when thousands of his campaign flyers were distributed to voters throughout the senate district.   Thus, Rutt's argument that Bacon's campaign benefited and indirectly received value from the unions' activities and literature distribution rings true.

We have facts that may lead to two reasonable but contradictory conclusions:  that the challenged union conduct is either permissible or prohibited under the article's two related definitions of a regulated contribution. To resolve this factual dilemma, we turn to the Supreme Court's mandate that requires us to give the benefit of the doubt to the union's right to core political speech rather than to Rutt's argument that involves censorship and regulation. Hence, applying the Court's mandate, we conclude that neither the unions' payments of staff salaries to organize the walks to distribute Bacon literature, payments for supplies and materials for the walks, nor the unions' course of conduct taken as a whole constitute prohibited contributions. . . .

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*Reversed*.

JUSTICE COATS, with whom JUSTICE EID joins, dissenting.

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. . . . Basically, the majority lights upon a caveat in the article's definition of “expenditure,” which is clearly included to ensure that any expenses incurred by a union in communicating with its own membership not be erroneously accounted a political expenditure, and it transforms that caveat into an “exception,” or “protection,” for partisan political campaign activities by paid union staff, as long as any direct contact with potential voters is left to union volunteers.   In addition to finding no support in the actual language of the provision, the majority's “exception” virtually swallows the proscription itself, converting words of prohibition into a license for union campaigning.

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. . . . [T]he majority nevertheless excuses the use of general union funds to organize, administer, and supervise campaign efforts, including acquiring and providing partisan campaign materials for distribution by union members, as merely “communicating” with its membership.   Surely there can be no serious doubt that these are precisely the kinds of expenditures by membership organizations the constitutional provision was designed to prohibit.

It is, of course, the use of salaried employees, rather than *de minimus* expenses for water and the like, that is at issue here.   By exempting the union activities in this case from the article's prohibition of expenditures by membership organizations, the majority necessarily gives its blessing to these kinds of partisan campaign efforts by paid union staff, even if those efforts are clearly coordinated with political candidates.   For my part, I am quite convinced that article XXVIII's proscription of all political expenditures by unions and corporations comports with the dictates of the First Amendment.   If the majority doubts this proposition, it should strike down article XXVIII as a violation of the Supremacy Clause rather than simply rewriting it.

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JUSTICE EID, with whom JUSTICE COATS joins, dissenting.

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Since the 1970s, the United States Supreme Court has recognized that campaign contributions by, and expenditures from, union general funds can be significantly restricted when there are adequate alternative avenues for speech through the use of segregated funds.   In a trilogy of cases, the Court identified the concerns that inhere in union-sponsored campaign activities. . . . On the one hand, unions have a First Amendment right to engage in political speech, including contributing to political campaigns. On the other hand, there is a danger that unions will use funds from their members to further political agendas with which some members disagree. *McConnell v. Federal Election Commission* (2003).

The balance, according to the Court, may be struck by requiring unions to set up segregated funds to pay for campaign activities. . . .

An exception to this segregated-funds scheme is the so-called membership communication exception, which finds its roots in the Supreme Court's decision in *United States v. CIO* (1948). In that case, a union used general funds to distribute a newsletter to its members for the purpose of advocating the election of a particular candidate.   The Court concluded that, given First Amendment concerns, it would not interpret a statute to prevent a union from using general funds to communicate campaign messages to union members. . . .

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Article XXVIII of the Colorado Constitution mirrors the federal segregated-funds scheme. . . .

. . . . Given the dictates of the First Amendment and the explicit authorization of article XXVIII, the campaign activities engaged in by the union staff members in this case could have been paid for with segregated funds.   Here, however, the question is whether the activities could be paid for with general funds.   They could not:  first, because they were directed toward nonmembers and consequently fell outside the protection of article XXVIII's membership communication exception;  and second, because under Supreme Court case law, the First Amendment permits the requirement that unions use segregated funds to pay for campaign activities directed toward nonmembers.

To state the flaw in the majority's reasoning somewhat differently, the question is not whether the First Amendment allows the union to conduct the challenged campaign activities at all. . . . If that were indeed the question, I would agree that the membership communication exception should be read broadly. . . . Rather, as noted above, the question is whether the campaign activities could be paid for with general funds, or whether segregated funds should have been used instead.

By refusing to apply the membership communication exception as written to the union's campaign activities, today's opinion essentially finds Colorado's segregated-funds scheme to be unconstitutional as applied to the facts of this case. . . . I can see no reason to question the constitutionality of Colorado's segregated-funds scheme, and thus no reason to read the membership communication exception so broadly that it swallows the prohibition on union contributions and expenditures. . . .