The New Campaign Finance Sourcebook

Chapter 4

THE FIRST AMENDMENT AND THE LIMITS OF CAMPAIGN FINANCE REFORM

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Updated April 2004

One would search the Constitution in vain for any mention of "campaign finance," let alone "contributions," "expenditures," "soft money," "issue advocacy" or any of the other specialized terms in the campaign finance vocabulary. Yet despite this silence the Supreme Court has firmly and repeatedly held that the Constitution greatly limits what Congress and the states can do. Believing that campaign finance regulations can restrict political expression and so implicate the First Amendment, which says only that "Congress shall make no law . . . abridging the freedom of speech," the Court has subjected them to searching review. In a series of cases which has sparked much public discussion, the Court has developed an often conflicted set of rules and principles.

THE SUPREME COURT AT WORK

Buckley v. Valeo

In *Buckley v. Valeo*,[1] the first and most important of the campaign finance cases, the Supreme Court created a framework which still guides analysis. In response to Watergate, Congress amended the Federal Election Campaign Act (FECA) in 1974. Congress intended to close several loopholes that had made FECA largely ineffective. In particular, Congress tightened the regulation of financing of federal primary and general elections by (i) restricting the amount of

money individuals and entities could contribute to political campaigns, (ii) restricting the amount candidates could contribute to their own campaigns, (iii) restricting the amount individuals and entities could expend on behalf of candidates, (iv) requiring disclosure of all sizeable contributions, (v) restricting the amount of money that could be spent by or on behalf of a candidate, and (vi) providing for public financing of presidential primaries and elections. The 1974 amendments constituted the most wide-ranging and ambitious attempt to regulate money in federal elections up to that point.

In *Buckley v. Valeo*, the Supreme Court considered challenges to all the major provisions of the 1974 amendments. While upholding most of these provisions, including the contribution limitations (except when a candidate is contributing to herself), the overall presidential campaign spending limitations, the disclosure provisions, and the public financing scheme for presidential elections, it struck down one of the most central features of the revised act: the limitation on so-called "independent" expenditures, that is, money spent by an individual or entity without coordination with a political campaign. At first, the Court's decision to uphold contribution limitations while invalidating expenditure limitations seems surprising. Do not both types of spending have similar effects: promotion of a particular candidate or set of views?

The Court defended treating contributions and expenditures differently on two grounds. First, the Court argued, contributions pose a threat of political corruption that expenditures do not. Simply put, the Court believed that a candidate could become beholden to a contributor but not to someone who merely expended monies on her behalf. If expenditures could not indebt a candidate to a voter, they could never give rise to even the appearance of corruption and so regulating them could not be claimed to protect the integrity of the political process.

Second, the Court saw contributions and expenditures as two quite different kinds of speech. To the Court, contributions serve only a signaling function. They indicate to the candidate and

perhaps to others that the contributor supports the candidate's views. They have no greater communicative content. As the Court put it, "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." Since a contribution signals only the presence of a symbolic bond, its expressive content does not vary with its size. A small contribution expresses a contributor's political identification with the candidate just as effectively as a large one. If one believes, as the Court said it did, that "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing," then capping contributions at any amount above the threshold at which this signal can be perceived does not impair communication. Expenditure limitations, by contrast, do significantly affect speech. Since, to the Court's mind, expenditures serve to communicate one's own ideas rather than the mere fact of support for the views of another, limiting them poses much greater First Amendment problems. Expenditure regulations, in particular, affect both the quantity and content of political discourse.

Both grounds of the Court's distinction between contributions and independent expenditures have sparked much criticism--both on and off the Court. First, might a candidate not feel just as beholden to people who have expended sums on her behalf as to someone who actually gave her money? Contributions may produce a somewhat greater degree of indebtedness but expenditures can create at least the appearance of a quid pro quo too.

Second, contributions serve to communicate much more than the mere fact of an individual's political "identification" with a particular candidate. If that were all contributions expressed, candidates presumably would spend less time and effort garnering them and contributors would seldom give more than symbolic amounts. After all, anything above the signaling threshold would be wasted. The importance of contributions to contributors and candidates alike lies rather in their

ability to magnify the voice of the candidates themselves. Few people contribute in order to express their own ideas directly. Many contribute, however, in order to allow the candidates to promote their own views more effectively and to convince other voters of the wisdom of their values. To be sure, contributions are, as the Court has characterized them in another case, "speech by proxy," but speaking by proxy may heighten the effect of the communication. To discount the speech value of contributions because they allow the candidate but not the contributor herself to speak misses their point. If I give money to a candidate, I do so to better communicate and put into operation *my own* ideas. That is exactly what I hope the candidate will do. Most contributors would doubtless be surprised to learn that they contribute in order to express a symbolic connection between the candidate and themselves rather than to better carry out their own ideas through the candidate's agenda.

By itself, identifying a special First Amendment interest in independent expenditures did not invalidate their regulation. All it did was place on the government the burden of arguing a compelling governmental purpose. Because the Court had characterized them, however, as inherently noncorrupting, the government to argue a different purpose, and it did so. Congress argued that expenditure limitations were necessary in order to level the playing field of political competition. If one person could expend much more than another, the argument went, that person could have much greater influence over the outcome of the election. Expenditure limitations thus served an egalitarian purpose: preventing undue influence in elections. The Court was skeptical. It doubted that equalizing peoples' ability to influence elections could ever be a legitimate, let alone a compelling, goal for government to pursue if it required restricting the speech of some:

> The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources and to assure unfettered interchange of ideas

> for the bringing about of political and social changes desired by the people.

With respect to political expression, the Court held, the more, the better.

One other move in *Buckley* has greatly shaped law in this area: the Court's emphasis on the need for clear rules. Worried that vagueness in some of the Federal Election Campaign Act's definitions might lead citizens to steer clear of speech that would be constitutionally permitted, the Court felt it necessary to interpret these statutory provisions quite specifically. Moreover, since the bright lines had to avoid any potential constitutional problems in application, the Court "erred" on the side of free expression. As a result, the Court narrowed the statute's coverage quite dramatically. For example, the Court interpreted the Act's central provision limiting "any expenditure . . . relative to a clearly identified candidate" to require mention of "explicit words of advocacy of election or defeat,'" such as "vote for," "elect," "vote against," and "defeat." These magic words protected free speech, to be sure, but they also failed to capture much spending clearly intended to benefit or harm particular candidates.

First National Bank of Boston v. Bellotti

The next major case in this area, *First National Bank of Boston v. Bellotti*,[2] followed *Buckley* by two years. It decided the constitutionality of a Massachusetts criminal statute prohibiting corporations from spending money to influence referendums on questions not materially affecting the property, business, or assets of the corporation. The First National Bank of Boston wanted to run an ad opposing a proposed state constitutional amendment that would have allowed a graduated state income tax. Massachusetts law clearly prohibited corporate expenditures on such campaigns by stating that "[n] o question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property,

business or assets of corporation[s]." The bank sought a declaratory judgment from the state court invalidating the law on First Amendment grounds. The Massachusetts Supreme Judicial Court, however, upheld the law on the ground that a corporation's First Amendment rights extended no further than to issues affecting its property, business, and assets. The United States Supreme Court reversed.

The Supreme Court found that the state court had approached the issue incorrectly. The issue was not whether and to what extent corporations had First Amendment rights, but rather whether the particular kind of speech involved was entitled to First Amendment protection. At bottom, the Court held, the state court had erred in looking at the issue from the speaker's rather than from the audience's perspective. Analysis had to proceed according to what was said, not who said it. "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source."

The Court's approach is interesting not only because it so clearly identifies the listener's as the appropriate perspective for First Amendment analysis but also because it identifies the yardstick the courts should use in measuring the value of different kinds of speech: "their capacity for informing the public." The Court found this yardstick so compelling that it used it not only to help decide the issue in *Bellotti* but also to justify large areas of existing First Amendment doctrine. Thus, in passing, the Court justified applying heightened scrutiny in its press cases because of the "role of that institution in informing and educating the public, offering criticism and providing a forum for discussion and debate" and justified its searching inquiry in cases involving entertainment or communication as "based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." Furthermore, the Court justified its controversial approach in the commercial speech cases as following the principle that the First Amendment "prohibit[s]

government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected . . . [largely] because it furthers the societal interest in the 'free flow of commercial information.' " In *Bellotti* itself, applying this yardstick led the Court to see the Massachusetts law not as regulating campaign expenditures, but as "prohibiti[ng] ... the 'exposition of ideas.'" From this perspective, of course, the law required compelling justification.

The Court then proceeded to reject Massachusetts's argument that allowing corporations to spend money on referendums might unduly influence the public. As the Court described this argument, Massachusetts claimed that "corporations are wealthy and powerful and [that] their views may drown out other points of view." The Court first rejected this argument for lack of legislative findings or support in the record, but then went on to suggest more ominously that empirical evidence could *never* support it:

> Nor are appellee's arguments inherently persuasive or supported by the precedents of this Court. .... To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it .... [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate.

In other words, to the Court, corporate spending influences voters only insofar as the ideas and arguments it serves to communicate rationally persuade. Any difference advertising makes is a good one, for it leads people to change their choices on the basis of more information and more fully tested argument.

In short, the Court decided that a state could not treat individuals and corporations differently. A state could bar neither individual nor corporate expenditures. But the Court's holding was limited by the facts of the case: *Bellotti* concerned a *referendum*, not a *candidate*,

election. Since a corporation cannot seek a quid pro quo from a ballot measure, states did not need to ban corporate expenditures in referendum elections in order to prevent the one type of corruption *Buckley* had identified as a constitutionally permissible concern. It left open the question of whether expenditures in candidate elections were different.

Massachusetts Citizens for Life, Inc. v. FEC* and *Austin v. Michigan State Chamber of Commerce

Not until 1986 did the Court begin to address this issue. In two cases, *Massachusetts Citizens For Life, Inc. v. FEC* (*MCFL*)[3] and *Austin v. Michigan State Chamber of Commerce*,[4] the Court developed some complex rules. In *MCFL*, the Supreme Court held that the First Amendment barred the government from prohibiting ideological corporations, defined as corporations existing for the purpose of promoting their members' views on particular issues, from making independent expenditures. In this case, a group called Massachusetts Citizens for Life (MCFL), a pro-life advocacy group incorporated under Massachusetts law, published a special edition of its newsletter endorsing particular candidates in Massachusetts primary elections. The FEC claimed that the expenditure violated § 441b of the Federal Election Campaign Act, which prohibits corporations from expending funds from the corporate treasury for candidate elections. If a corporation wants to engage in political activity, FECA allows it do so only through the use of a "separate segregated fund." Under this scheme, the corporation can pay for the administration of the fund but cannot contribute directly to its resources. The fund's money would have to come from the corporation's "members," who are generally its boardmembers, officers, shareholders, and employees.

The question was whether Massachusetts Citizens for Life could use its general corporate funds to endorse particular candidates or whether it was limited to administering a separate

segregated fund. Because the FECA scheme limited the amount of money MCFL could expend and because running a separate segregated fund would have imposed many significant recordkeeping, reporting, and personnel requirements, the Supreme Court thought that FECA's direct expenditure prohibition posed a significant burden on the corporation's First Amendment interests. This result was unsurprising of course given *Buckley*'s finding that "[t]he expenditure limitations . . . in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." The expenditure prohibition, then, penalized speech by forcing an organization that wanted to promote a particular candidate to forego the advantages of the corporate form. The burden then shifted to the government to show a compelling interest for this burden.

The FEC argued that the "importan[ce of] ... protect[ing] the integrity of the marketplace of political ideas" justified any burden on the organization's First Amendment interests. As the Supreme Court redescribed this argument, "direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." To the Court, the basic question in the case was whether the state's interest in preventing the transformation of economic into political power was strong enough to outweigh the burden on the corporation's First Amendment rights.

The Court answered this question in a surprising way. It said:

> Political "free trade" does not necessarily require that all who participate in the political marketplace do so with exactly equal resources. Relative availability of funds is after all a rough barometer of public support. The resources in the treasury of the business corporation, however, are not an indication of the popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

The Court's discussion is surprising because although it rejects the equalization rationale for regulation, just as it did in *Buckley* and *Bellotti*, it also rejects one of the rationales of *Buckley* itself.

In that case, the Court argued that although money may influence apart from the power of the ideas it expresses, it cannot distort since it reflects the amount of popular support the ideas have. This argument appears in the part of the opinion striking down the overall limitations on expenditures by individual campaigns. In this section, the Court says that the goal of equalizing financial resources cannot justify capping overall campaign expenditures because "given the limitations on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support." In this view, there is no reason to regulate campaign finance because it cannot bias politics. Any influence money has on elections is proper because it reflects popular support. According to the Court in *MCFL*, however, corporate money's power to influence works in the opposite direction since corporate support may not reflect popular support at all. Adopting this position, despite its problems with respect to individual expenditures, allows the Court to save the result in *Buckley* and *Bellotti* while embracing the opposite result with respect to most corporate expenditures.

The Court's discussion of this point is doubly odd since it is purely dictum. Since the Court found that the First Amendment forbids preventing ideological corporations like MCFL from making direct expenditures, its express "acknowledg[ment of] the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace [should] not gain unfair advantage in the political marketplace" is, technically speaking, unnecessary. Since MCFL was not a traditional economic corporation, the Court's discussion answered "a question not before [it]." Thus, although *MCFL*'s reasoning contradicted that underlying the earlier cases, its actual holding did not. It technically left open the question whether the First Amendment similarly barred prohibiting expenditures by everyday "business" corporations.

In *Austin v. Michigan State Chamber of Commerce*, the Court took up this larger question. This case raised the same claim as *MCFL*, but this time the claim was made by an

economic corporation. In *Austin*, Michigan law prohibited corporations from making independent expenditures. Michigan law, however, did allow corporations to make expenditures from separate segregated funds created solely for political purposes. In essence, then, the Michigan scheme paralleled the federal one. The Michigan State Chamber of Commerce, a Michigan non-profit corporation, brought suit seeking an injunction against enforcement of the expenditure prohibition. It put forward two primary claims. First, it argued, the First Amendment barred limitation of any corporation's campaign expenditures. This claim tried to extend *Bellotti* from referendum to candidate elections. Second, it argued that as a non-profit trade association it represented an ideological corporation like MCFL.

The Court decided both claims against it. Although recognizing the Chamber's nonprofit status, the Court found that the Chamber satisfied none of the factors it had laid out in *MCFL* for identifying ideological corporations. In particular, the Chamber pursued many nonpolitical activities, was structured so as to make it difficult for those members who disagreed with its politics to withdraw, and could serve as a conduit for economic corporations seeking to circumvent the limitation of expenditures. The Court made clear that a corporation's for-profit or nonprofit status did not determine its ideological or economic character. The Chamber was a nonideological nonprofit, which was to be considered an economic corporation for constitutional purposes.

As to the other claim, the one discussed extensively as dictum in *MCFL*, the Court held that the state could bar economic corporations from making independent expenditures in candidate elections. In fact, the Court simply quoted its reasoning from *MCFL* and thereby incorporated it as part of the holding of the new case. The Court described the evil Michigan sought to correct as "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." "The Act," the Court wrote, "does not attempt 'to equalize the relative

influence of speakers on elections;' rather it ensures that expenditures reflect actual public support for the political ideas espoused by corporations." The Court thus refused to extend *Bellotti* and its assumptions about individual political decisionmaking. At the same time, however, the Court, just as it had in *MCFL*, sought to minimize the conflict with *Buckley*. In an odd statement, it said "[w]e emphasize that the mere fact that corporations may accumulate large amounts of wealth is not the justification for [the expenditure prohibition]; rather, the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit. . . ."

The importance of the case lies not in its actual holding, which, after all, only made authoritative what *Massachusetts Citizens for Life* had strongly suggested. Rather, its importance lies in the Court's total departure from its earlier assumptions, which Justice Scalia's dissent makes clear. Justice Scalia reveals the fundamental contradiction between the Court's reasoning in *Massachusetts Citizens for Life* and its assumptions in *Buckley* and *Bellotti*. As he states it: "that corporations 'amas[s] large treasuries' . . . is . . . not sufficient justification for the suppression of political speech, unless one thinks it would be lawful to prohibit men and women whose net worth is above a certain figure from endorsing political candidates." If corporate expenditures trouble us because they do not reflect public support of the corporation's ideas, individual expenditures should trouble us as well, he argues. The same analysis applies to both.

To see this, it is helpful to reconsider the Court's reasoning in *MCFL* in terms of individual expenditures. First, individual expenditures, like the corporate expenditures discussed in *MCFL*, do not necessarily reflect the extent of public support for the ideas they convey since their amount depends in great part upon the wealth of those making them. Two candidates enjoying the complete support of similarly sized groups of very rich and very poor people, respectively, would not expect equal expenditures to be made on their behalf. Thus, "relative availability of funds [from individuals] is" *not* "after all a rough barometer of public support," as the MCFL court suggested.

The resources in a person's bank account, just like "[t]he resources in the treasury of a business corporation, . . . are not an indication of popular support for the [individual's] political ideas." They too "reflect instead . . . economically motivated decisions," like how hard one works, the type of job one has, and the success of one's investments. "The availability of these resources [, then,] may make [an individual] a formidable political presence, even though the power of the [individual] may be no reflection of the power of [her] ideas." As Justice Scalia points out, the Court cannot persuasively distinguish between individual and corporate expenditures:

> [The Court] does not endorse the proposition that government may ensure that expenditures 'reflect actual public support for the political ideas espoused,' but only the more limited proposition that government may ensure that expenditures 'reflect actual support for the political ideas espoused *by corporations'*. The limitation is of course entirely irrational. Why is it perfectly all right if advocacy by an individual billionaire is out of proportion with 'actual public support' for his positions? There is no [satisfactory] explanation ...."

What's sauce for the goose is sauce for the gander.

This inconsistency is not, moreover, of just theoretical interest. As Justice Scalia argues forcefully in his dissent, this change undermines a critical feature of *Buckley*. Such a broad interpretation of corruption effectively rehabilitates the equalization rationale rejected in *Buckley* as "wholly foreign to the First Amendment." *Austin*, in other words, seems to say that in some cases Congress may legislate to equalize just so long as it describes itself as doing something else. At the very least this move introduces great tension and some confusion into the jurisprudence.

Colorado Republican I and *II*

In a single case, the Supreme Court has twice considered the constitutionality of congressional regulation of party spending on behalf of candidates. In 1986, before the Colorado

Republican Party had selected its own candidate for that fall's senatorial election, its federal campaign committee bought ads attacking the Democratic Party's likely candidate. The FEC eventually charged that this expenditure exceeded the limits FECA imposed on political party "expenditures in connection with" a "general election campaign" for congressional office. The Colorado Republican Party responded that this party expenditure provision violated the First Amendment both generally and as applied to this particular set of facts. As a general matter, it argued, Congress could not limit any--either coordinated or uncoordinated--party expenditures on behalf of candidates. More narrowly, it argued, Congress could not limit party expenditures like these that were truly uncoordinated with candidates.

In *Colorado Republican Federal Campaign Committee v. FEC (Colorado Republican I)*,[5] decided in 1996, the Supreme Court addressed the narrower of these two claims. Although splintering four ways with no opinion garnering the support of a majority of justices, the Court decided that the First Amendment did bar Congress from limiting party expenditures truly uncoordinated with its candidates. The principal opinion, written by Justice Breyer and joined by Justices O'Connor and Souter, found no reason to deviate from the Court's prior belief that the First Amendment generally protects independent expenditures from limitation. "We are not aware," Justice Breyer wrote, "of any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction . . . [and t]he Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures."

The only question, then, was whether the expenditure here was independent or not. The FEC argued that because parties and their candidates are so close all party expenditures on behalf of candidates should be conclusively presumed to be coordinated. The principal opinion,

however, disagreed. It found no factual or legal reason to make such a presumption and without it the expenditure in the case could only be classified as independent. Although all six other justices would have ruled on the more general argument of whether the First Amendment bars limitation of truly coordinated party expenditures—four said it would and two said it would not—the principal opinion refused to address this question. As a result, the Court remanded the case to the lower courts to consider the broader claim.

In 2001, the broader claim returned to the Supreme Court in *Federal Election Commission v. Colorado Republican Federal Campaign Committee* (*Colorado Republican II*).[6] This time a Court majority joined in a single opinion upholding congressional limitations on party expenditures coordinated with candidates. As the Court framed the inquiry:

> The issue in this case is . . . whether a party is . . . in a different position from other political speakers, giving it a claim to demand a generally higher standard of scrutiny before its coordinated spending can be limited. The issue is posed by two questions: does limiting coordinated spending impose a unique burden on parties, and is there reason to think that coordinated spending by a party would raise the risk of corruption posed when others spend in coordination with a candidate?

The Party's argument, the Court believed, boiled down to a factual one: "coordinated spending is essential to parties because 'a party and its candidates are joined at the hip.'" Because of this special relationship, the Party argued, a party "cannot function . . . without coordinated spending, the object of which is a candidate's election," and a party is "uniquely able to spend in ways that promote candidate success."

The Court, however, rejected both arguments. It thought that "[p]arties … perform functions more complex than simply electing candidates; whether they like it or not, they act as agents for spending on behalf of those who seek to produce obligated officeholders." Since they perform this other function, "a party's efficiency in getting large sums and spending

intelligently" is reason to be wary, not solicitious, of coordinated party expenditures. "If the coordinated spending of other, less efficient and perhaps less practiced political actors can be limited consistently with the Constitution," the Court asked, "why would the Constitution forbid regulation aimed at a party whose very efficiency in channeling benefits to candidates threatens to undermine the contribution (and hence coordinated spending limits) to which those others are unquestionably subject?"

The Court, in other words, was worried by the prospect of traditional, *Buckley*-type corruption. The fear was not that parties would influence candidates for the parties' own political purposes. Given parties' special role in the political process, that makes little sense as a form of corruption. Rather, the fear was that parties would exert influence over candidates on behalf of others. As the Court put it, "parties' capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation as channels for circumventing contribution and coordinated spending limits binding on other political players." The Court accordingly applied the same level of constitutional scrutiny to coordinated expenditures by parties as to coordinated expenditures by other actors and found sufficient evidence of others using parties to circumvent the non-party contribution and coordinated expenditure limitations to support the regulation.

Together *Colorado Republican I* and *II* place political parties in exactly the same position as other political actors. Just as the First Amendment bars Congress from restricting uncoordinated party expenditures more than it can restrict the uncoordinated expenditures of others (*Colorado Republican I*), the First Amendment does not allow political parties to escape restrictions on coordinated expenditures that apply to other actors (*Colorado Republican II*). The one decision is the flip-side of the other.

Nixon v. Shrink Missouri Government PAC

In 2000, between *Colorado Republican I* and *Colorado Republican II*, the Supreme Court decided another important campaign finance case*: Nixon v. Shrink Missouri Government PAC (Shrink Missouri).*[7] This case concerned a Missouri statute that imposed contribution limits ranging from $250 to $1,000 (depending on the particular state office and the size of the constituency) and provided for yearly inflation adjustments. The Court had little trouble upholding the limits and in the process clarified several important features of *Buckley*. Admitting that A[p]recision about the relative rigor of the standard to review contribution limits was not a pretense of ... *Buckley*,@ the Court held that stricter standards governed expenditure than contribution limits and that both standards Abore more heavily on the associational right than on freedom to speak.@ Thus, if the Court could identify the standard that applied to claims that contribution limits violated associational rights and determined that the limits passed this test, it could uphold the limits without having to actually identify the standard of review that applied to free speech interests. This is exactly what it did. It held that under *Buckley* Aa contribution limit involving 'significant interference' with associational rights could survive [only] if the Government demonstrated that contribution regulation was closely drawn to match a 'sufficiently important interest,' though the dollar amount of the limit need not be fine tuned." Under this approach, in claims asserting both free speech and associational interests, free speech will have no independent bite. As a practical matter, only the analysis of the burden on associational rights will matter.

The Court further held that the state=s interest in preventing corruption and the appearance of corruption was "sufficiently important" to support the contribution limit, just as it

was in *Buckley* itself. The Court made clear, however, that this interest swept beyond the most traditional forms of corruption. The interest was Anot confined to bribery of public officials, but extend[ed] to the broader threat from politicians too compliant with the wishes of large contributors.@ And the appearance of corruption was Aalmost equal@ in concern to corruption itself. ALeave the perception of impropriety unanswered,@ the Court said, Aand the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.@ To the Court's mind, *Buckley* clearly settled this much.

The question remained, however, how much evidence of corruption and particularly of the appearance of corruption was necessary to support this rationale. Could a state limit contributions without citing hard evidence that its citizens thought large contributions corrupted the political process? The Court basically believed *Buckley* settled this question too. AThe quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised [and] *Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible.@ The Court refused to define the minimum amount of evidence needed, simply finding that the evidence in the case--together with that in *Buckley* itself--supported this concern. But the evidence offered in the case, at least the evidence the Court mentioned--was somewhat slim. It consisted of an affidavit from a state senator stating that large contributions have "the real potential to buy votes"; several newspaper reports of large contributions supporting inferences of impropriety; several questionable contributions mentioned in an unrelated Missouri case; and the popular vote in favor of a state initiative containing even stricter contribution limits. If this is safely above the evidentiary threshold *Buckley* requires, one of two things must be true--either the *Buckley* evidentiary

threshold is fairly low or the evidence offered in *Buckley* itself goes very far towards meeting the threshold in later cases. Either way the evidentiary standard is not as demanding as it might seem.

The Court also found that the particular limits in this case, although lower than those in *Buckley*, posed no constitutional problem. Although it stated that in *Buckley* the relevant test had been Awhether there was any showing that the limits were so low as to impede the ability of candidates to 'amass the resources necessary for effective advocacy,'" it focused the test in *Shrink Missouri* in a way that made it much harder to find a constitutional violation--Awhether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate=s voice below the level of notice, and render contributions pointless.@ Under this refashioned standard, it may be possible to set contribution limits low indeed.

Although it settled many issues, *Shrink Missouri* is ultimately more interesting for what it suggested about *Buckley's* future than for what it said about its current reach. The separate concurrences and dissents of six justices clearly indicated great doubts about *Buckley's* continued vitality among two-thirds of the Court=s membership. Justice Stevens, for example, stated that if there is to be a "new beginning . . . I make one simple point. Money is property; it is not speech." He would have offered campaign spending some protection but less than the amount accorded traditional speech and suggested that the source of that protection might lie in some constitutional provision other than the First Amendment. Justices Breyer and Ginsburg, by contrast, would have recognized a speech interest in campaign spending but believed that strict review is inappropriate because "this is a case where constitutionally protected interests lie on both sides of the legal equation." They believed that "a presumption against constitutionality

was out of place" and went so far as to question the central justification of *Buckley* itself—"the concept that government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others." In passing, moreover, they suggested that their view would permit regulation of soft money, leave open the constitutionality of many other reforms, particularly reduced-price media time, and might permit the Court to revisit in light of post-*Buckley* experience some of the features of *Buckley* itself, most notably, its rejection of limits on how much money wealthy candidates can contribute to their own campaigns. If *Buckley*, moreover, does not permit Athe political branches sufficient leeway to enact comprehensive solutions to the problems posed by campaign finance,@they would overrule it.

Justices Thomas and Scalia would have overruled *Buckley* too but in the opposite direction. They would have subjected contribution limits to the same strict scrutiny that applied to expenditure limits and so would have invalidated contribution limits too. While Justice Kennedy largely agreed with Justices Thomas and Scalia, he would have taken a novel course. He "would overrule *Buckley* and then free Congress or state legislatures to attempt some new reform, if, based upon their own considered view of the First Amendment, it is possible to do so." In other words, he called for a fresh start. We should throw overboard *Buckley's* "misshapen system," go back to serious First Amendment principles, and see if a more sensible system of campaign finance regulation can survive serious First Amendment review.

McConnell v. FEC

In early 2002, Congress enacted and President Bush signed the Bipartisan Campaign Reform Act of 2002 (BCRA), known popularly as McCain-Feingold or Shays-Meehan after its

chief senate and house sponsors. BCRA changed much of the legal landscape. Among other things, it

1. raised contribution limits;
2. banned soft-money contributions to influence federal elections; and
3. regulated certain forms of so-called "issue advocacy."

Of all the changes, the regulation of soft money and of issue advocacy sparked the most debate. The first dried up a major source of funds for political parties and the second barred some entities, most notably business corporations and labor unions, from funding certain kinds of political advertisements from their general treasuries and required individuals who ran such advertisements to disclose that they were doing so and how much they were spending. Legal challenges to BCRA focued primarily on these two provisions.

In *McConnell v. FEC*,[8] the Supreme Court upheld nearly all the challenged provisions. BCRA's soft money provisions are quite complex. The cornerstone provision, § 323(a), prohibits national party committees and their agents from soliciting, receiving, directing, or spending any soft money—i.e., money raised outside of FECA's contribution rules, including any money from general corporate and union treasuries and money from individuals in excess of their contribution limits. The other soft money provisions are meant to reinforce the restrictions of § 323(a). As the Court described them:

> New FECA § 323(b) prevents the wholesale shift of soft-money influence from national to state party committees by prohibiting state and local party committees from using such funds for activities that affect federal elections. … New FECA § 323(d) reinforces these soft-money restrictions by prohibiting political parties from soliciting and donating funds to tax-exempt organizations that engage in electioneering activities. New FECA § 323(e) restricts federal candidates and officeholders from receiving, spending, or soliciting soft money in connection with federal elections and limits their ability to do so in connection with state and local elections. Finally, new FECA § 323(f) prevents circumvention of the restrictions on national, state, and local party committees by prohibiting state and

> local candidates from raising and spending soft money to fund advertisements and other public communications that promote or attack federal candidates.

In general, the Court thought that these various restrictions had "only a marginal impact on the ability of contributors, candidates, officeholders, and parties to engage in effective political speech." As "[c]omplex as its provisions may be," the Court found, "§ 323, in the main does little more than regulate the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders."

The Court focused most of its attention on the "cornerstone" provision. It believed it fit squarely within the framework of *Buckley*. As a bar to certain types of *contributions*, § 323(a) did not significantly burden either speech or association, and "[b]oth common sense and the ample record" indicated that regulation of soft money was necessary to prevent corruption or its appearance. After looking to the record, the Court found "that candidates and donors alike have in fact exploited … soft money …, the former to increase their prospects of election and the latter to create debt on the part of officeholders, with the national parties serving as willing intermediaries." "[L]obbyists, CEOs, and wealthy individuals alike all have candidly admitted donating substantial sums of soft money to national committees not on ideological grounds, but for the express purpose of securing influence over federal officials." The Court found "[p]articularly telling … the fact that … more than half of the top 50 soft-money donors gave substantial sums to *both* major national parties, leaving room for no other conclusion but that these donors were seeking influence, or avoiding retaliation, rather than promoting any particular ideology."

Even more significantly, the Court expanded its traditional notion of "corruption." Although some dissenting justices argued that "corruption" should only encompass clear *quid*

pro quo arrangements in which a candidate promises to take action in return for a contribution, the Court found that conception too narrow. As the Court put it,

> [m]any of the deeply disturbing examples of corruption cited by this Court in *Buckley* to justify FECA's contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials. Even if that access did not secure actual influence, it certainly gave the appearance of such influence.

Once the notion of corruption was thus expanded to encompass selling access, the record easily supported extensive soft money regulation. The record was "replete … with examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations." The practice was so pervasive, in fact, "that the six national party committees actually furnished their own menus of opportunities for access to would-be soft-money donors, with increased prices reflecting an increased level of access." Given its low burden on speech and association and the high importance of Congress's goal, banning soft money contributions to the parties easily passed constitutional muster.

In passing, the Court's discussion of soft money appeared possibly to settle one important question some had thought left open from before. In an earlier case, *California Medical Association v. FEC* (*CalMed*),[9] the Supreme Court had upheld FECA's $5,000 limit on individual contributions to political action committees but seemingly avoided considering "the hypothetical application" of FECA to political committees that made independent expenditures but no contributions. One justice, in fact, Justice Blackmun, signaled misgivings about applying the limit to such committees. He wrote:

> [a] different result [sh]ould follow if [the $ 5,000 limit] were applied to contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates …. [Political action committees like the California Medical Association are] essentially conduits for contributions to candidates, and as such they pose a perceived threat

> of actual or potential corruption. In contrast, contributions to a committee that makes only independent expenditures pose no such threat.

Justice Blackmun, in other words, would seemingly distinguish between those organizations that make contributions to candidates and perhaps to parties and those that make only independent expenditures. Contributions to the former could be limited; contributions to the latter could not. His distinction, however, was technically dictum and would not have been controlling even if his own opinion had represented the views of a majority of justices. Since the California Medical Association did make direct contributions to candidates, the facts of the case only implicated the first half of his distinction and that was all that was necessary for decision of the case. Thus, while the case made clear that Congress could limit contributions to political committees that made contributions to candidates, it appeared to leave unclear whether Congress could limit contributions to those committees that made only independent expenditures.

In footnote 48 of *McConnell*, however, the Court appeared to take a clear stand on this issue. It mustered a particular interpretation of *CalMed* to reject Justice Kennedy's argument that only *quid pro quo* corruption should count. In the Court's view, *CalMed* itself foreclosed that position:

> [In *CalMed*], we upheld FECA's $ 5,000 limit on contributions to multicandidate political committees. It is no answer to say that such limits were justified as a means of preventing individuals from using parties and political committees as pass-throughs to circumvent FECA's $1,000 limit on individual contributions to candidates. Given FECA's definition of "contribution," the $5,000 … limi[t] restricted not only the source and amount of funds available to parties and political committees to make candidate contributions, but also the source and amount of funds available to engage in express advocacy and numerous other noncoordinated expenditures. If indeed the First Amendment prohibited Congress from regulating contributions to fund the latter, the otherwise-easy-to-remedy exploitation of parties as pass-throughs (*e.g.*, a strict limit on donations that could be used to fund candidate contributions) would have provided insufficient justification for such overbroad legislation.

In other words, the Court believed that despite Justice Blackmun's stated misgivings and the plurality's stated avoidance of the issue the Court in *CalMed* had necessarily held that Congress could limit contributions to entities that engaged solely in independent expenditures. If Blackmun's own stated view were controlling in that case, footnote 48 argues, then the only permissible goal of the $5,000 limit would have been to prevent parties from serving as "pass-throughs," a goal that could have been achieved through a much more limited form of regulation: "a strict limit on donations that could be used to fund candidate contributions." In that case, however, the Court would have struck down FECA's $5,000 limit as overbroad. That the *CalMed* Court instead upheld it, in the view of *McConnell*, means that Justice Blackmun in broadly upholding limits on all donations to political committees that make contributions rather than forcing Congress to take the narrower approach and limiting the amount of money donated that the political committee could use to fund candidate contributions undercut his own stated misgivings. And, since his misgivings were dictum while his bottom-line vote to uphold the limit at issue in *CalMed* itself was necessary for the decision, his bottom-line, not his misgivings, should control.

At first glance, footnote 48 seems arcane and hardly worthy of extended discussion. Why focus on a footnote? The Court's considered statement of the law in this area, however—if that is truly what it is—is tremendously important. It settles a question that the upholding of BCRA's soft-money bans makes pressing. Before, in a world where political parties could accept unlimited amounts of soft money, donors seeking influence would give to the parties themselves. They had no reason to give to independent political committees since, as the Court found in *McConnell*, the parties were effective influence-conduits. Once BCRA's soft money provisions closed down this means of influence, however, independent committees became an attractive

alternative but only to the extent the $5,000 limit on contributions to them did not apply. Justice Blackmun's opinion in *CalMed* seemingly left open the possibility that contributions to political committees that engaged solely in independent expenditures would, as a constitutional matter, have to be treated exactly the same as independent expenditures themselves. In other words, they could not be limited so long as they consisted of individual, rather than corporate or union, money. If that were the case, individuals could now circumvent the soft money bans by contributing unlimited amounts to committees that engaged solely in independent expenditures, even when everyone understood that those expenditures would be used to support or defeat particular candidates for federal office. In a nutshell, this is the current turmoil over the status of so-called "527 organizations," which is the most important campaign finance issue after *McConnell*. Can individuals contribute unlimited amounts for other groups to spend to influence federal candidate elections or, if they are going to spend unlimited amounts, do they have to spend it themselves? This is a big issue with real political consequences. In legal terms, the question is whether the Court meant what it said in footnote 48. If it did, individuals will not be able to contribute unlimited amounts to political committees that make only independent expenditures. If it did not, the question is still an open one. On this little footnote hangs much indeed.

The Court's treatment of BCRA's provisions regulating so-called "sham issue advocacy" is thankfully less complex. In *Buckley*, the Court had held that in order to avoid vagueness concerns FECA's central provision restricting expenditures "relative to a clearly identified candidate" should be construed as limited to communications that included explicit words of advocacy of election or defeat of a candidate—words like "vote for," "elect," "support," "defeat," and "reject"—the so-called "magic words." BCRA, proceeding on the understanding

that the Court's *particular* narrowing construction was not constitutionally required, adopted a different bright-line test to identify the relevant communications, which it called "electioneering communications." Its definition covered only (1) broadcast, cable, and satellite communications (2) clearly identifying a candidate for federal office (3) aired within 60 days before a general or 30 days before a primary election, which (4) could be received by 50,000 or more people in the jurisdiction the candidate sought to represent. BCRA then applied this definition in two different ways. It required disclosure of disbursements for them by individuals totaling more than $10,000 in a calendar year and barred business corporations and unions and any nonprofit that received any money from business corporations and unions from spending any general treasury funds on "electioneering communications."

BCRA's opponents attacked these provisions first by claiming that the definition itself was unconstitutional. They argued that "magic words" were constitutionally required. The Court quickly rejected that argument. *Buckley's* "express advocacy restriction," it noted, "was an endpoint of statutory interpretation, not a first principle of constitutional law." It was simply a way "to avoid problems of vagueness and overbreadth [and] we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line." As a matter of constitutional law, the Court held, "*Buckley*'s magic-words requirement [wa]s functionally meaningless." And, whatever dangers the definition of "electioneering communications" posed, vagueness was not one of them.

The Court easily upheld the disclosure requirements placed on those engaging in "electioneering communications." It simply noted that "the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and

gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to BCRA[,]" and then proceeded to quote a single paragraph in the lower court's opinion which documented how the "magic words" approach had allowed spenders to conceal their identities from the public, a practice which, in the Court's view, did "not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA …."

The Court also upheld the prohibition against business corporations and unions spending from their general treasuries to fund electioneering communications—even with disclosure. The Court noted that the prohibition was not complete. Business corporations and unions could always spend for such advertising from their connected-PACs and they could spend from their general treasuries for political communications that fell outside this specific category of advocacy. The question was whether the bar was overbroad or underinclusive. BCRA's opponents challenged it as overbroad because they believed "that the justifications that adequately support[ed] the regulation of express advocacy [under the "magic words" test] do not apply to significant quantities of speech encompassed by the definition of electioneering communications." The Court held that the argument failed to the extent that electioneering communications not containing express advocacy "are the functional equivalent of express advocacy." They were, the Court thought, "if the ads are intended to influence the voters' decisions and have that effect," which, the Court found, "the vast majority of [covered] ads" did. "Far from establishing that BCRA's application to pure issue ads is substantial, … the record," the Court found, "strongly supports the opposite conclusion."

The argument to underinclusiveness proved no better. Here the challengers argued that the exclusion of print and internet ads from coverage invalidated the prohibition. The Court found, however, that the "record amply justifies Congress' line drawing" because business

corporations and unions had primarily used the one type of media but not the others. As it held in *Buckley*, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."

THE LARGER REFORM DEBATE

Few recent constitutional decisions have raised as much commentary as *Buckley v. Valeo* and its progeny. On the one side, reformers attack the Supreme Court for misunderstanding both the First Amendment and how money works in politics. They read many of these cases as constitutional mistakes, as wrongheaded judicial meddling that magnifies the power of the rich and distorts politics. On the other side, deregulationists celebrate the Court for vindicating the First Amendment against strong public opinion while criticizing it in some other cases for not going far enough. In their eyes, the Court has acted bravely to save the American political system from misguided (albeit popular) reform. Many commentators, of course, see some wisdom in both positions and seek to defend a view in between.

Arguments in Favor of Reform

Four seemingly different concerns motivate campaign finance regulation. First, some reformers advocate regulation as a means to improve the day-to-day operation of legislative politics. Vincent Blasi, for example, has argued in "Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All" that the need to keep representatives' eyes on their jobs justifies some important campaign finance restrictions.[10] Since elected representatives feel they need to spend much time that could otherwise be spent on lawmaking raising money to protect their seats from challenge, they will

devote too much of their energy to tasks other than those their constituents elected them to do. As Blasi puts it:

> As difficult as the general subject of representation can be, one does not need a sophisticated understanding of either republican theory or modern interest group politics to conclude that there is a failure of representation when candidates spend as much time as most of them now do attending to the task of fund-raising. This feature of modern representation should trouble those who favor close constituent control as well as those who favor relative independence for legislators; those who favor an "aristocracy of virtue" as well as those with more populist ideals regarding who should serve; those who conceive of representation as flowing exclusively from geographic constituencies as well as those who see a role for constituencies defined along other lines, be they racial, ethnic, gender, economic, religious, or even ideological. Whatever it is that representatives are supposed to represent, whether parochial interests, the public good of the nation as a whole, or something in between, they cannot discharge that representational function well if their schedules are consumed by the need to spend endless hours raising money and attending to time demands of those who give it.

In this view, fundraising is a form of shirking, which impairs the quality of the voters' representation. Blasi believes that the state has an important interest in representatives avoiding such behavior, an interest which supports some regulation of money in politics, particularly the imposition of campaign spending limits.

Second, many argue that regulating money in politics can help improve the quality of political discussion and debate. The two most notable proponents of this view, the late J. Skelly Wright and Cass Sunstein, believe that appropriate regulation can refocus political discourse on substantive ideas. Wright, for example, argues in "Politics and the Constitution: Is Money Speech?"[11] that unregulated spending leads to people voting according to what he calls "intensities." When candidates spend huge amounts of money on mass advertising, he argues, voters will follow the louder rather than more thoughtful voice. He also believes that restraining spending would improve discussion by encouraging retail rather than mass, wholesale politics. The giving and spending restrictions may cause candidates and other individuals to rely more on

less expensive means of communication. But there is no reason to believe that such a shift in means reduces the number of issues discussed in a campaign. And, by forcing candidates to put more emphasis on local organizing or leafleting or door-to-door canvassing and less on full-page ads and television spot commercials, the restrictions may well generate deeper exploration of the issues raised. To his mind, such a shift would mean that candidates would individually engage and address voters rather than treating them as mass consumers to be targeted with affective advertisements, the same way a deodorant manufacturer interested in increasing demand for its product might view them.

Similarly, in "Political Equality and Unintended Consequences,"[12] Cass Sunstein hopes that campaign finance regulation will improve political debate, but he focuses on legislative rather than electoral politics. As he puts it:

> Politics should not simply register existing preferences and their intensities, especially as these are measured by private willingness to pay. In the American constitutional tradition, politics has an important deliberative function. The constitutional system aspires to a form of "government by discussion." Grants of cash to candidates might compromise that goal by, for example, encouraging legislatures to vote in accordance with private interest rather than reasons.

By lessening the legislator's incentive to serve contributors rather than constituents, campaign finance regulation may improve the chance that the legislature will function through discussion, reason-giving, and debate. Thus, according to Wright and Sunstein, campaign finance regulation is necessary to improve the quality of political decisionmaking on both the elective and representative levels of democratic politics.

Third, even more reformers argue that campaign finance regulation protects the political process from direct, quid pro quo corruption. This view, like Sunstein's, maintains that without some forms of regulation, particularly limitations on individual direct contributions to political candidates, candidates become so beholden to contributors that they will follow the contributors'

rather than the voters' interests. Many, including the Supreme Court, agree that this is a serious danger and that even its appearance can seriously weaken politics. In "Campaign Finance Reform: A Key to Restoring the Health of Our Democracy,"[13] Fred Wertheimer and Susan Weiss Manes catalog remarks and testimony from people as diverse as the late Senator Barry Goldwater ("To be successful, representative government assumes that elections will be controlled by the citizenry at large, not by those who give the most money . . . . Elected officials must owe their allegiance to the people, not to their own wealth or to the wealth of interest groups who speak only for the selfish fringes of the whole community.") to former Senator Dale Bumpers ("[E]very Senator knows I speak the truth when I say bill after bill after bill has been defeated in this body because of campaign money."). The late Senator Paul Douglas, they believe, summed up this view well:

> What happens is a gradual shifting of a man's loyalties from the community to those who have been doing him favors. His final decisions are, therefore, made in response to his private friendships and loyalties rather than to the public good. Throughout this whole process, the official will claim—and may indeed believe—that there is no causal connection between the favors he has received and the decisions which he makes. He will assert that the favors were given and received on the basis of pure friendship unsullied by worldly considerations. He will claim that the decisions, on the other hand, will have been made on the basis of the justice and equity of the particular case. The two series of acts will be alleged to be as separate as the east is from the west. Moreover, the whole process may be so subtle as not to be detected by the official himself.

The pivotal questions concern how great a danger corruption and its appearance actually present and how well alternative means of regulation, like bribery laws, can control it.

Fourth, and most controversially, many reformers argue that regulation is necessary to maintain political equality. These writers all start with the belief that democracy demands formal equality in the political sphere. Some voters' candidates may win, some may lose, but each voter should have an equal chance to affect the ultimate decision. This principle represents

the democratic norm of equal political entitlement and is reflected in such legal rules as one person, one vote, the Fifteenth and Nineteenth Amendments, and the Voting Rights Act of 1965. To this last group of reformers, problems arise from democracy's tolerance of great economic inequality. The danger is that some of the rich will try to stretch their economic advantage into the political sphere. If the rich do convert economic into political power, they violate the norm of equal political entitlement. Many reformers believe that campaign finance regulation is necessary to help keep the inequality accepted in the economic realm from infecting politics, where inequality is not so tolerated. Proposals limiting individual spending, for example, are often defended as a way of preventing the wealthy from exerting a disproportionate influence on politics.

Ronald Dworkin presents a strong version of this reform argument. In his article, "The Curse of American Politics,"[14] Dworkin begins by asking whether *Buckley* was wrongly decided and ends by calling for the Court to overrule it. Cutting through to the Court's central justification, he finds that *Buckley* stands on an "individual-choice" model of politics. By this he means that its overall stance, which is deeply suspicious of government regulation, rests ultimately on the view that the First Amendment allows people to hear whatever they want, at least in the realm of politics. Although this notion may be attractive (especially to people who believe in a bustling, free marketplace of ideas) Dworkin thinks it fundamentally mistaken. To his mind, it misunderstands not only free speech, but also "what it really means for free people to govern themselves." The result is not just legal error but the weakening of democratic politics.

The mistake Dworkin finds in this view is that it sees equality as necessary to only one part of democracy. Although the individual-choice model gives each voter one vote and thus makes each an equally powerful judge of competing candidates and positions, the model ignores

equality among citizens in another important respect. It allows some people more power than others as participants in the contest of forming political opinion. Wealthy individuals can "command [more] attention for their own candidates, interests, and convictions" than can others. As Dworkin puts it:

> When the Supreme Court said, in the *Buckley* case, that fairness to candidates and their convictions is "foreign" to the First Amendment, it denied that such fairness was required by democracy. That is a mistake because the most fundamental characterization of democracy--that it provides self-government by the people as a whole--supposes that citizens are equals not only as judges but as participants as well.

According to Dworkin, we must have equal power not only to judge among the views presented--as the rule of "one person, one vote" seeks to guarantee--but also to command the attention of others to our own views. Such equality does not, of course, require that others find our arguments persuasive, but it does demand that each citizen be able to compete on equal terms for every other citizen's attention.

Dworkin believes this type of equality justifies regulating some spending in elections and thus necessitates overruling *Buckley*. But he sees little prospect of that--at least soon. Instead, Dworkin argues a more realistic strategy: we should simply declare *Buckley* a mistake, even if the Supreme Court will not admit it, and do everything we can to avoid its implications. He thus advocates reform that pursues this second type of equality to the full extent *Buckley* permits and urges us to challenge *Buckley* whenever we can.

Arguments Against Reform

Like the arguments in favor of campaign finance reform, those against it are many and diverse. First, some deregulationists argue that the reformers' basic descriptive theories about how money works in politics are wrong. In "Faulty Assumptions and Undemocratic

Consequences of Campaign Finance Reform,"[15] for example, Bradley Smith lays out four major descriptive assumptions reformers make about money in politics: that too much money is spent, that smaller contributions are better than larger ones, that money buys elections, and that money corrupts politicians. All four, he argues, are wrong or at least unsupported. Smith argues against the first by comparing political and product advertising. As large as the amounts spent in political advertising may be, he points out, they are dwarfed by the amounts spent in advertising products. When considered per voter, moreover, the costs look reasonably small. Smith challenges the second assumption--that when it comes to contributions smaller is better--by pointing out that too few Americans actually make contributions to support adequate political debate. Moreover, those candidates who can garner widespread small contributions are usually those who excite the passions of supporters on the extremes of the political debate. The mainstream appears poorly stocked with small contributors. Smith contests the third assumption--that money buys elections--by arguing that money may follow success more than success follows money. And finally, he uses empirical arguments to fight the view that money corrupts candidates. Money affects few votes in the legislature, he claims, and "the available evidence simply does not show a meaningful, causal relationship between campaign contributions and legislative voting patterns." This empirical claim, of course, has quite far-reaching implications for the anticorruption rationale *Buckley* upheld.

Smith does not rest there. He goes on to argue that the consequences of reform are just as bad as its assumptions. To his mind, the reformers have it exactly backwards. Far from shoring up democracy, reform undermines it in several particular ways. First, Smith argues that campaign finance reform entrenches the status quo. It necessarily favors incumbents by making it harder for challengers to raise money. Second, he believes that campaign finance reform

promotes influence-peddling in the legislature. By restricting contributions, reform restricts people's ability to monitor their representatives and so keep them from shirking. Bad enough by itself, decreased monitoring also makes bribery, which Smith sees as a "substitute" for contributions, more likely.

Third, Smith argues that campaign finance reform favors "select elites." To the extent that reform decreases the power of money to influence elections, it increases the power of elite attributes (like name recognition and celebrity status) to influence them. This change simply redistributes power from wealthy individuals to select elites without making its overall distribution more equitable. In addition, Smith contends that campaign finance reform favors wealthy candidates. Additional regulation only increases the advantage *Buckley* gave to such candidates when it struck down restrictions on candidates contributing to their own campaigns. Finally, Smith argues that campaign finance reform favors special interest over grass-roots activity. Because it requires lawyers and others with specialized knowledge to navigate through the shoals of legal requirements, regulation "professionalizes" politics and thus distances it from ordinary citizens.

In "The Hydraulics of Campaign Finance Reform,"[16] Samuel Issacharoff and Pamela Karlan attack reform differently. They lay out two different reform critiques—one consequential and one normative. "Because," they believe, many reformers "are relatively unfamiliar with the more general history of electoral reform or are largely uninterested in the practical details of political regulation," reform strategies have largely led to "perverse consequences." As they colorfully argue,

> [Reform has] produced a system in which candidates face an unlimited demand for campaign funds (because expenditures generally cannot be capped) but a constricted supply (because there is often a ceiling on the amount each contributor can give). As in all markets in which demand runs high but supply is

> limited, the value of the good rises. In campaigns, the result is an unceasing preoccupation with fundraising. The effect is much like giving a starving man unlimited trips to the buffet table but only a thimble-sized spoon with which to eat: chances are great that the constricted means to satisfy his appetite will create a singular obsession with consumption. If candidates are unable to rely on large contributions, the rather predictable outcome is that they will spend all their time having to chase smaller contributions to fill their giant-sized appetites . . ..

The more serious perverse consequence they see is that since the "money that reform squeezes out of the formal campaign process must go somewhere" power will move away from more accountable political actors, like candidates and parties, towards less accountable actors like individuals and special interest groups.

Their normative critique attacks the vision of politics they see underpinning the reformers' case. To their minds, reform necessarily rests on an "idealistic" or "republican-communitarian perspective" that is wrong-headed as a normative matter and unrealistic as a descriptive one. Reformers, they believe, think politics should be thoughtful, deliberative, and aimed at the public good. Such a view, they argue, violates equality because it devalues the ways many ordinary people actually make decisions and would shift power "towards those individuals who are good at making political arguments for themselves and away from individuals who depend on others to make their arguments for them. . . . [I]t is hardly surprising that the scholarly argument for campaign reform would produce a world in which intellectuals would have more influence and the persons they have chosen not to be—businessmen or the people who devote their working hours to earning a living in a fashion that does not involve having and disseminating deep political thoughts—will have less."

In two different short pieces, Kathleen Sullivan argues against the dangers reformers fear and the legal arguments they muster to defend campaign finance regulation. In "Political Money and Freedom of Speech,"[17] she attacks the "seven . . . supposedly deadly sins of unregulated

political money," which run from political inequality in voting, distortion of public policy, corruption, carpetbagging, diversion of legislative and executive energies, and enervation of political debate to lack of competitiveness in elections. Each, she claims, is overstated, misconceived, or otherwise wrong. As a result, the reform movement needs to narrow its ambitions to disclosure. Only in this way can it avoid perverse, unintended consequences and a cure that is worse than the disease.

In "Against Campaign Finance Reform,"[18] Sullivan attacks reformers' legal arguments. To her mind, they make four different arguments for why limits should escape the strict bite of the First Amendment: that money is not speech, that elections are different from other occasions of speech, that campaign finance restrictions are content-neutral, and that compelling interests justify limits. The first argument, she believes, rests on a mistaken "ontological approach" that is notoriously slippery and which the Court has largely rejected in other areas. The second argument "is odd and maybe backwards [in] privileg[ing] noncampaign over campaign debate" and leads to unacceptable difficulties in administration. The third she rejects as resting on an indefensible form of structural redistribution among speakers. And the fourth she rejects for the reasons given in "Political Money and Political Speech": the compelling interests reformers assert are misguided.

Finally, in "Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform,"[19] Lillian BeVier takes on the reformers' central constitutional argument—that courts should not employ strict scrutiny. This is mistaken, she argues, for two reasons. First, reformers fail to realize the great injury most campaign finance reforms do to critical First Amendment interests. In particular, "limitations on giving and spending burden certain forms of political participation rather than regulating the entire range of political activities [and t]he

political realities of campaign finance reform . . . suggest that these activities are the target of regulation at least in part because they are closely tied to political agendas that reformers oppose." Second, reformers get the institutional concerns exactly backwards when they suggest that courts should exhibit great deference to Congress's judgments in campaign finance matters. In few other areas, BeVier argues, is there less reason to trust congressional judgments. Campaign finance, like election law generally, offers unique opportunities for incumbents to bias the system in their own favor.

These writers offer a fair sample of the many different positions political and legal commentators take in this area. The great differences of opinion spring not just from different notions of what the Constitution requires, but also from different normative and descriptive assumptions about democratic politics. The debate is complex and fascinating, and so long as we all have such robust and differing ideas about how democracy should and does function it will remain unresolvable.

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[1] 424 U.S. 1 (1976).
[2] 435 U.S. 765 (1978).
[3] 479 U.S. 238 (1986).
[4] 494 U.S. 652 (1990).
[5] 518 U.S. 604 (1996).
[6] 533 U.S. 431 (2001).
[7] 528 U.S. 377 (2000).
[8] 124 S.Ct. 619 (2003).
[9] 453 U.S. 182 (1981).
[10] Vincent Blasi, "Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All," *Columbia Law Review* 94:4 (May 1994) 1281-1325.
[11] J. Skelly Wright, "Politics and the Constitution: Is Money Speech?" *Yale Law Journal* 85 (1976) 1001.
[12] Cass R. Sunstein, "Political Equality and Unintended Consequences," *Columbia Law Review* 94:4 (May 1994) 1390-1414.
[13] Fred Wertheimer and Susan Weiss Manes, "Campaign Finance Reform: A Key to Restoring the Health of Our Democracy," *Columbia Law Review* 94:4 (May 1994) 1126-59.
[14] Ronald Dworkin, "The Curse of American Politics," *New York Review of Books* 43:16 (17 Oct. 1996) 19.
[15] Bradley A. Smith, "Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform," *Yale Law Journal* 105:4 (Jan. 1996) 1049-91.
[16] Samuel Isaacharoff and Pamela S. Karlan, "The Hydraulics of Campaign Finance Reform," *Texas Law Review* 77:7 (June 1999) 1705-38.

[17] Kathleen M. Sullivan, “Political Money and Freedom of Speech,” *U.C. Davis Law Review* 30:3 (Spring 1997) 663-90.
[18] Kathleen M. Sullivan, “Against Campaign Finance Reform,” *Utah Law Review* (1998) 311-29.
[19] Lilian BeVier, “Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform,” *California Law Review* 73 (1985) 1045.