

**A SYMPOSIUM: THE LEGAL AND POLITICAL IMPLICATIONS OF BUCKLEY V. VALEO
(1976)**

by

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One of the most vexing issues in constitutional jurisprudence concerns the political regulation of money and its democratic implications. The resolution of the constitutional question for democracy involves striking a balance between two competing interests: the protection of political liberty under the First Amendment and the legitimate interest government has in preventing money from having a corrosive or corrupting effect on the political system. With its landmark ruling in *Buckley v. Valeo*,¹ some say that the Supreme Court successfully reconciled these interests and, in fact, strongly preserved the basic ideal of American freedom. Different commentators, however, maintain that the Supreme Court managed to protect neither interest adequately. Still others familiar with campaign finance adopt a more neutral position, implying that *Buckley* is a sound ruling but nonetheless leaves many key constitutional issues and public policy questions unsettled. To be sure, the range of debate surrounding *Buckley* illustrates that it is the basis for legal and political controversy.²

There are several reasons why *Buckley* is the point of departure for comprehending the modern campaign finance debate. In deciding the issue of whether Congress could regulate political money under the 1974 Amendments to the Federal Election Campaign Act (reform legislation inspired by the Watergate scandal), the Supreme Court of the United States created an analytical distinction between contributions and expenditures. The act of contributing money, the Court ruled, is properly subject to congressional regulation (and generally tested by a less rigorous standard of judicial review) because it only minimally intrudes upon a donor's ability to express their underlying support for a candidate or group in an election. In contrast, since "virtually every means of communicating ideas in today's

¹ 424 U.S. 1 (1976).

² DANIEL R. ORTIZ, *The Reform Debate: Politics and the First Amendment*, in CAMPAIGN FINANCE REFORM: A SOURCEBOOK 95-97 (1997).

mass society requires the expenditure of money,³ government-imposed limitations on political spending are subject to strict scrutiny. Under this heightened standard of judicial review, the Court held that the restrictions substantially, and improperly, burden political expression.⁴ Accordingly, the underlying interests of the First Amendment are not only the basis for creating the distinction between political spending and giving, but they also directly affect the level of scrutiny that the Justice's applied to the 1974 Amendments and, later on, many other post-1976 campaign finance cases.⁵

In addition to testing expenditure limitations with a more rigorous standard of judicial review, the Court used the difference between political expenditures and contributions to articulate a standard for government efforts to prevent corruption. The Court held that restrictions on contributions are constitutionally permissible on the grounds that the government has a strong interest in curbing the threat of the political *quid pro quo*, a reality or appearance that dollars are exchanged for votes or favors. *Buckley* also holds, though, that preventing the reality or appearance of corruption is not an acceptable rationale for reducing the quantity and diversity speech in elections. For example, the Court struck down the provision of the 1974 Amendments that imposed a \$1,000 limitation on spending "relative to a clearly identified candidate" (which regulates spending that is uncoordinated with a specific candidate) because the Court reasoned that such a prohibition is unjustified since there is little opportunity for the politician to control the expenditure and use it as a means to secure improper influence.⁶ Notably, too, the Court employed the interest in stopping corruption as the intellectual foundation for supporting the disclosure and reporting requirements imposed by the 1974 Amendments.⁷

³ *Id.* at 19.

⁴ *Id.* at 58-59. *See also* SAMUEL ISSACHAROFF ET AL, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 620 (1998) (observing that the Court has generally extended broad protection to all candidate expenditures by using strict scrutiny whereas it permitted content-neutral contributions under a less stringent standard of review). *See also* GERALD GUNTHER AND KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 1409 (1997), (stating that the *Buckley* Court applied a lower degree of scrutiny to the contribution limits than to the spending limits which, in turn, allowed it to uphold the contribution limits as preventing actual or the appearance of corruption).

⁵ *See, e.g.*, *Colorado Republican Fed. Campaign Comm.v. Federal Election Comm'n.*, 116 S.Ct. 2309 (1996); *Federal Election Comm. v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

⁶ *Buckley*, 424 U.S. at 39-51.

⁷ *See id.* at 60-84.

Apart from the constitutional distinction it formulated and the emphasis it gave to whether the limitations prevented the reality or appearance of political corruption, *Buckley* is controversial because it does not require equality in the funding of campaigns. By stating that the “First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive, or unwise,”⁸ the Supreme Court rejected the notion that campaign finance regulations can legitimately restrict advantages in monetary resources in campaigns. The attainment of political equality, in other words, is not an express or implied goal of the *Buckley* decision that, in turn, arguably skews electoral outcomes in favor of monied interests and inherently treats candidates with lesser financial resources unfairly.⁹

Not surprisingly, the principles announced in *Buckley* have far reaching implications for the operation of the American political system. For instance, in striking down expenditure limits and, in effect, characterizing money as highly protected speech,¹⁰ the decision is the impetus for political actors to engage in unlimited campaign spending, despite the common view that unlimited spending is a serious problem.¹¹ American politics is also affected by what the *Buckley* decision actually decided and what issues remain open by virtue of what the Supreme Court did not do in ruling itself or in subsequent cases. To illustrate, since *Buckley* condoned all of the spending limitation provisions of the 1974 Amendments relating to voluntary public funding of presidential campaigns, it has indirectly suggested that voluntary spending limits will pass constitutional muster in other analogous contexts.¹² Or since the Court, in *Colorado Republican Federal Campaign*

⁸ *Id.* at 57. Notably, the Court made this remark in the course of invalidating limitations on overall campaign expenditures by candidates seeking election to federal office.

⁹ JAMIN B. RASKIN & JOHN BONIFAZ, *THE WEALTH PRIMARY: CAMPAIGN FUNDRAISING AND THE CONSTITUTION* (1994).

¹⁰ *Buckley*, 424 U.S. at 262 (J. White, concurring and dissenting).

¹¹ See, e.g., David Schultz, *Revisiting Buckley v. Valeo: Eviscerating the Line Between Candidate Contributions and Independent Expenditures*, 14 J.L. & POL. 32, 93-00 (1998), (observing that various polls suggest that the overall impact of campaign spending has a corrosive effect on voter confidence in the political system). There is little question that candidates for federal public office raise and spend large amounts of political money. The Federal Election Committee reports, for example, that congressional candidates raised a total of \$790.5 million and spent \$765.3 million in the 1995-96 election cycle. Federal Election Commission, *Congressional Fundraising and Spending Up Again in 1996*. (visited on April 26, 1998) <<http://www.fec.gov/press/canye96.htm>>.

¹² See Frank J. Sorauf, *Caught in a Political Thicket: The Supreme Court and Campaign Finance*, 3 CONST. COMMENTARY 97, 99 (1986).

*Committee*¹³ held that political parties may spend an unlimited amount of money in congressional elections if the expenditures are considered independent (that is, uncoordinated with a candidate or his campaign), it raised the possibility that coordinated spending by political parties may get First Amendment protection in the future.¹⁴ Also, since in its 1998-1999 term the Court has granted review in *Nixon v. Shrink Missouri Government PAC*,¹⁵ the issue of whether a state can constitutionally set contribution limits that are too low will also become part of the complex framework of legal precedent that epitomize the Court's campaign finance jurisprudence.

As the foregoing suggests, perhaps most importantly *Buckley* clearly invites an extended discussion about the proper role that judiciary plays in superintending the political process. As one commentator put it, with *Buckley* "unwittingly, the Supreme Court became one of the prime architects of the 'new era' in American campaign finance."¹⁶ The suggestion that the judicial branch, instead of the legislature, controls the political regulation of money is of great significance in terms of American politics and constitutional democratic theory. Not only does it imply that an unelected judiciary is making public policy that directly affects political representation, but it also underscores the reality that the Supreme Court is increasingly diving head-first into the so called "political thicket"¹⁷ and wielding its discretion to superintend the political process.

This symposium, which is an extension of a panel discussion held in Akron, Ohio in September 1998,¹⁸ addresses the issue of judicial control over campaigns

¹³ 116 S. Ct. 2309 (1996).

¹⁴ Lower courts have already addressed this issue. *See, e.g.*, *F.E.C. v. Colorado Republican Fed. Campaign Comm.*, 41 F.Supp.2d 1197 (D. Colo.1999) (holding that Congress cannot limit coordinated spending of political parties as a matter of law).

¹⁵ *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519 (8th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999).

¹⁶ Sorauf, *supra* note 12, at 100.

¹⁷ The term "political thicket" is used by Justice Felix Frankfurter in writing the Opinion for the Court in *Colegrove v. Green*, 328 U.S. 549, 556 (1946), where the Supreme Court dismissed a redistricting challenge on the grounds that the case involved a political question.

¹⁸ The conference, entitled *Parties, Politics, and the Law: Toward a More Representative Democracy*, was held on September 25, 1998 in Akron, Ohio and sponsored by the University of Akron's Ray C. Bliss Institute of Applied Politics and the Constitutional Law Center of the School of Law. The articles written for this symposium stem from the discussion at the conference between the contributors on a panel entitled "Campaign Finance and the Legal Impact of *Buckley v. Valeo*."

and elections by presenting the viewpoints of three well-known scholars who are actively involved in the controversy that *Buckley* generates.

In the first article law professor Joel Gora, who also acted as co-counsel for the plaintiffs in the *Buckley* ruling, strongly defends the decision as a landmark of political freedom. For Gora, *Buckley* correctly invalidated expenditure limitations because to do otherwise would improperly restrict how much speech an individual could engage in during an election, a critical time in a democracy when citizens need to associate and discuss important issues about the candidates and their campaigns. Working from the premise that the people in a democracy (and not the government) have the sole power to control political expression, Gora also quickly dismisses the notion that government has the right to impose limits on spending for the purpose of equalizing monetary resources in a competitive election. Achieving that sort of equal opportunity is not only impracticable, Gora maintains, but it also threatens core values of the First Amendment. After defending *Buckley* and the First Amendment principles it represents, Gora then criticizes recent legislative efforts to enact campaign finance reform on the grounds that the legislation embodies the same kind of limits-based approach that have failed in the past. At the end of his discussion, Gora proposes several alternatives for reform -- which include raising or repealing all limits on campaign contributions or expenditures -- that in his view expand political opportunities without limiting political speech.

In contrast, John Bonifaz, Gregory Luke, and Brenda Wright, as representatives of the National Voting Rights Institute, attack *Buckley* for the very reason that Gora embraces it: that it condones unlimited spending in American politics. For the authors, unlimited spending -- along with the guiding maxim of *Buckley* that "money is speech" -- is a serious threat to the democratic process because it undermines public confidence in elections, it increases the danger of actual political corruption, and it interferes with the governing duties of our elected representatives. After noting that *Buckley* does not enjoy wide support in the academic and legal communities, they also maintain that the ruling wrongly undermines the principle of political equality by allowing wealthy candidates to stifle the ability of candidates with less money to compete fairly in the electoral arena. For these reasons and others Bonifaz, Luke, and Wright assert that the time has come to re-visit *Buckley* and all it represents by adopting a new strategy for reform, one that has already taken hold in the states and in recent court cases. As the authors observe, this new legal movement -- which, in part, emphasizes developing a strong factual record in litigation to defend spending limits -- presents a formidable challenge to *Buckley* and presents a cogent argument for campaign finance reform that is principled and just in a democracy.

Attorney Trevor Potter, a partner of the Washington, D.C. law firm of Wiley, Fein, and Fielding and former commissioner and chairman of the Federal Election Commission, completes the symposium by objectively exploring the status and limitations of *Buckley* in the context of political disclosure. After observing that the ruling generates the most consensus by endorsing the principle of prompt disclosure of election finance data, Potter surveys the limitations of the decision by indicating that the Court has left unanswered many constitutional questions about the scope of permissible disclosure in campaign finance law. As a result of the Court's inconsistent and often unpredictable approach in deciding where to draw the line between permissible regulation and disclosure, Potter suggests that full disclosure is a favored, but elusive, goal of campaign finance law. Even so, in his article Potter offers a useful four-part test to analyze the constitutionality of disclosure legislation. In doing so, he shows that *Buckley* retains some analytical force in spite of its incoherence or ambiguity as a controlling constitutional principle in campaign and election law.

The contributions to this symposium highlight the prominent role that the Supreme Court of the United States has in shaping issues that cross at the intersection between law and politics. As a result, the articles underscore the reality that the Court is a political institution that not only often decides issues of constitutional liberty, but one that also controls in a very direct way the practical operation of the electoral process. By analyzing the scope and limitations of the campaign finance debate through the *Buckley* ruling, each author therefore indicates that the Court's intervention in the political process has enormous implications for the extent to which money is the legal basis for expanding or restricting political freedom and, simultaneously, the source or destruction of democratic ideals.