

CAMPAIGN FINANCE REFORM SERIES

CAMPAIGN FINANCE REFORM
& THE CONSTITUTION:
A CRITICAL LOOK AT
BUCKLEY V. VALEO

BY BURT NEUBORNE

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This paper is one of a series of papers issued by the Brennan Center for Justice exploring issues of money and politics. The following titles are part of the series:

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By Burt Neuborne

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Introduction

Discussion about reform of the campaign finance process begins, and often ends, with the Supreme Court's landmark decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). Since, reasoned the *Buckley* Court, most campaign speech requires the spending of money, any attempt to limit campaign spending must be analyzed, for constitutional purposes, as if it were an effort to limit political speech itself.

Applying the traditional First Amendment test for limiting political speech, the *Buckley* Court ruled that congressional efforts to regulate campaign spending must advance a "compelling" governmental interest. While the Court agreed that the government has a compelling interest in avoiding the reality or appearance of "corruption," the Justices rejected the argument

that the government has an interest in fostering equal political participation by rich and poor alike.

The *Buckley* Court did two things: It upheld contribution restrictions, reasoning that limits help control corruption. And it struck campaign spending restrictions, reasoning that spending money does not involve a transaction between a donor and a candidate, and thus there is no possibility of corruption.

Buckley has governed for over 20 years. Given Americans' virtual uniform abhorrence of the campaign finance system, and *Buckley's* role as its principal architect, it's no surprise *Buckley* remains an intensely controversial precedent. □

Buckley: Procedural History and Issues Examined

In 1974, following President Nixon's resignation, public demand for campaign finance reform led Congress to enact the Federal Election Campaign Act of 1974 (FECA). This comprehensive set of campaign regulations was built on reforms initially adopted in 1971. In an effort to assure that the constitutional issues raised by FECA would be settled before the 1976 presidential election, Congress created an expedited judicial review process that forced consideration of all of FECA in a single case, before it went into effect.

Buckley was heard at breakneck speed. The lower courts attempted to develop a detailed record, but there wasn't time for a careful fact-sifting process. Ordinarily, an important constitutional case involves adversarial factual hearings, whose products help guide the judicial decision making process. In place of such hearings, the district court encouraged the parties to submit so-called "offers of proof" — which consisted of assertions about the facts. The court then required the parties to negotiate over these offers of proof, and some were adopted as "findings." This process created a product that left the Supreme Court frustrated. Throughout the *Buckley* opinion, the Court notes the insufficiency of the factual record, warning that its review was purely a "facial" testing of the statute as an abstract matter. Repeatedly, the *Buckley* Court reserves the possibility of a subsequent "as applied" review on a fuller factual record.

In an effort to meet the deadline of the impending presidential election, on November 10, 1975, the *Buckley* Court heard oral argument on all four of FECA's components: (1) contribution ceilings; (2) expenditure ceilings; (3) disclosure rules; and (4) public financing of presidential,

as well as a challenge to the procedure for appointing the members of the Federal Election Commission (FEC), and an assault on the expedited judicial review procedures themselves.

Contribution Ceilings

FECA introduced four restrictions for campaign contributions — payments directly to a candidate's campaign — which *Buckley* ultimately upheld and which remain in place today.

First, FECA imposed a ceiling of \$1,000 on the amount that an individual could contribute to a candidate for federal office in connection with a given "election." Since primary elections and general elections were treated separately, the de facto contribution limit was \$2,000 per person for any candidate.

Second, while FECA continued the longstanding ban on corporations and labor unions directly contributing to candidates, Congress explicitly authorized the creation of political action committees (PACs). The creation of PACs allowed corporations, labor unions, and political organizations (e.g., the National Rifle Association, the Chamber of Commerce, and the Sierra Club) to collect voluntary contributions from interested individuals and pass them on to one or more candidates. PACs could give candidates \$5,000 per election, thus \$10,000 each political cycle.

Third, FECA imposed annual limits for contributions to the national committees of political parties. Each year individuals were limited to giving up to \$20,000, and PACs could donate up to \$15,000.

Finally, Congress imposed an annual ceiling of \$25,000 on an individual's combined contributions to all federal candidates,

PACs, and national parties. No aggregate contribution limit applied to PACs.

Expenditure Ceilings

In addition to its contribution limitations, FECA carefully regulated political expenditures with a series of caps, all of which the Court ultimately struck down.

Campaigns were subject to stringent expenditure limits. Presidential campaigns were capped at \$10 million for the primaries, and \$20 million for the general election. Senate campaigns were limited to 8 cents a voter for the primaries, and 12 cents a voter for the general election. House campaigns were limited to \$70,000 for the primaries and \$70,000 for the general elections. These spending limits were indexed annually for inflation.

Finally, the independent spending of individuals was limited to \$1,000 in support of a federal candidate. For example, Voter Jones could take out a newspaper ad supporting Candidate Smith, if Jones' costs were \$1000 or less. Candidates were permitted to spend up to \$50,000 of their own money on a presidential campaign; \$35,000 on a Senate campaign; and \$25,000 on a House campaign.

Disclosure Requirements

The limits on campaign contributions and expenditures were reinforced with stringent reporting and disclosure requirements. Congress required campaigns, PACs, and political parties to record all contributions of more than \$10, and to report to the FEC the name and business address of all persons contributing more than \$100. The FEC would make the latter category of information available for public scrutiny. In addition, independent expenditures of more than \$100 on behalf of any candidate were to be reported to the FEC which would make this information accessible to the public.

Public Financing of Presidential Elections

Finally, Congress provided for optional public funding of presidential elections, which was ultimately upheld and remains in force.

Candidates for party nomination (regardless of a party's size) received matching funds for contributions of \$250 and less, up to a candidate total of \$5 million. Two conditions applied: Candidates had to demonstrate widespread public support by gathering small checks from a substantial number of donors in at least 20 states; and candidates needed to abide by a \$10 million expenditure ceiling. No provision existed for subsidizing a presidential candidate not affiliated with a party.

The major political party nominating conventions (a major party was defined as a party that received 25% of the vote in the last election) received subsidies of \$2 million. Major party nominees also received a \$20 million campaign subsidy for the general election, if they promised to spend no more than this subsidy. In other words, a candidate who accepted public funding would use only public money in the general election campaign.

A minor party candidate (a minor party was defined as a party that received between 5% and 25% of the vote in the last election) received a lower subsidy, keyed to the party's vote in the last election. A candidate from a new party (defined as any party that failed to gain 5% of the vote in the last election) received no pre-election subsidy, but was eligible for a post-election payment if she received more than 5% of the vote. No provision was made for funding independent candidates.

All subsidies were to be adjusted annually for inflation. □

The Arguments on Both Sides

The Challengers

The challengers in *Buckley* were an amalgam of political conservatives, civil libertarians, minor parties, and liberal reformers. Plaintiffs included James Buckley, then a Senator from New York who had been elected as a third-party candidate of the Conservative Party; Eugene McCarthy, a reformer who had run a spirited anti-Vietnam war campaign for the presidency; the Socialist Labor and Socialist Workers Parties, the perennial standard-bearers of the radical left in national campaigns; the American Conservative Union; and the American Civil Liberties Union (ACLU).

What united the various challengers was a belief that Congress' comprehensive regulations would make it more difficult for challengers to defeat incumbents, and for minor parties and independents to challenge the hegemony of the two major parties. (The ACLU, the sole nonpartisan challenger, shared this concern but was most interested in the First Amendment implications of disclosure rules and contribution and spending limits.) In short, the challengers argued that the version of campaign reform before the *Buckley* Court would have had the effect of protecting the "ins" from serious challenge by the "outs."

For example, the challengers argued that individual contribution limits (\$1,000 to candidates per election, and \$25,000 annually) unconstitutionally interfered with freedom of speech and association. This interference, they argued, would make it more difficult for a challenger to raise the money needed to wage a credible threat to an incumbent. These contribution limits particularly upset minor parties, which argued that since they were unlikely to win an election, their acceptance of

large contributions posed no real threat of corruption. Finally, in a prescient criticism, reformers argued that severely limiting contributions from individuals would enhance the power of special interest groups organized as PACs.

The spending limits were challenged as direct restrictions on political speech. Also, limiting campaign expenditures, the challengers argued, gave incumbents an unfair advantage, since they entered most races with name recognition, a staff, and the franking privilege. Moreover, the \$1,000 independent expenditure limit for individuals, was argued to be set so low that it prevented supporters from engaging in acts of political consequence, such as buying newspaper advertisements. The plaintiffs believed that the real problem with elections was too little political speech, not too much. Severe expenditure limits, they feared, would put an artificial cap on political discussion.

The reporting and disclosure requirements were challenged as undue intrusions into private political activity, especially in the context of contributions to minor parties and independent expenditures on behalf of candidates. No one challenged the concept of disclosing large contributions. But the challengers argued that keeping records of \$10 contributions to a minor party unlikely to win an election seemed excessive, and public disclosure of contributions in excess of \$100 seemed an unnecessary interference with the right to political anonymity, especially for gifts to controversial minor parties.

Finally, the presidential election public funding provisions were challenged as fundamentally unfair to third parties and independent candidates. The bulk of the subsidy was reserved for the two major parties, critics noted. Minor par-

ties were locked into a subordinate status, and new parties were denied subsidies until after the election, when it was too late for many. Independent candidates were completely cut out of the subsidy process, both during the general election and at the nomination stage. Critics charged that the subsidies merely took existing two-party orthodoxy and locked it into place for the foreseeable future.

The Government

The government defended FECA on three levels. First, the government argued that regulating the spending of money was not the same thing as directly regulating speech. While regulating the conduct of spending campaign money incidentally impacted on speech, the government claimed that because it was regulating conduct leading up to speech (*e.g.*, the spending of money) and not speech itself (*e.g.*, a candidate's statements) FECA deserved less demanding First Amendment scrutiny. The Court had accepted a similar speech/conduct argument in *O'Brien v. United States*, when it upheld the constitutionality of a ban on draft-card burning during the Vietnam War. The lower court in *O'Brien* upheld Congress' ban by distinguishing between regulating speech (*e.g.*, verbal protests) and regulating conduct (*e.g.*, burning draft cards).

Second, the government argued that since the campaign spending caps applied to everyone, the regulations should be tested by the permissive 'time, place, or manner' constitutional standard, which is used for regulations that limit speech without regard to its content.

Earlier Supreme Court cases had used the "time, place, or manner" rationale to uphold regulations on sound trucks and reasonable limits on the areas where parades and demonstrations could take place.

Finally, the government argued that the regulations were valid even under the most stringent standard of review, the standard reserved for rules that censor political speech. To sustain such rules, the Court demands the showing of a compelling interest. To meet this review level, the government put forth two compelling interests: The interest in deterring the reality or appearance of corruption caused by suspicious campaign financing and the interest in fostering equal political participation by assuring that financially weak voices are not drowned out by strong ones.

The government responded to the charges that the program unfairly benefited incumbents and the existing two-party structure by arguing that FECA leveled the playing field by removing money as a block to political discourse. In the long run, the government argued, a campaign process free from the distorting influence of unfair concentrations of wealth would prove more receptive to the arguments of reformers of every political stripe.

Finally, the severity of the restrictions and the low threshold for reporting and disclosure were defended as necessary to prevent the growth of loopholes and to provide the public with access to campaign finance data. □

The Court's Opinion

The Importance of the Court's *Per Curiam*

The *Buckley* Court issued its opinion on January 30, 1976. Confronted with at least six major issues, and working under severe time constraints, the Court produced a 294 page opinion. The opinion is divided into a 143-page opinion for the Court, adorned with 178 footnotes (some of which are more important than the text), 92 pages of statutory appendices, and an additional 59 pages of separate opinions by individual Justices concurring with, or dissenting from, specific points.

The large number of legal issues and the short period of time available to the Court,

forced the Justices to issue an unsigned *per curiam* opinion, widely believed to have been authored by Justice Brennan. The Court uses the *per curiam* device in settings, like the *Pentagon Papers* case, where time does not permit a single Justice to circulate a signed opinion for concurrence by colleagues, and where the issues are too complex to resolve by unanimous vote.

Justice Stevens did not participate in *Buckley*, thus eight, not nine, Justices reviewed FECA. Only three Justices agreed with the *per curiam* in its entirety, but clear majorities emerged on every issue. Figure 1 summarizes the voting patterns.

FIGURE 1. *BUCKLEY'S* SHIFTING BLOCKS

JUSTICES	CONTRIBUTION CAPS	EXPENDITURE CAPS	DIFFERENTIAL TREATMENT OF CONTRIBUTIONS & EXPENDITURES	PUBLIC FINANCING
Burger, C.J.				
Brennan				
Stewart				
White				
Marshall				
Blackmun				
Powell				
Rehnquist				
Uphold: Strike	6:2	1:6:1	5:3	6:2

Uphold  Strike  Uphold Partially* 

*Expenditure caps permissible as applied to self-financing candidate.

Justice Brennan, Justice Stewart, and Justice Powell agreed with the *per curiam*. Justice White would have upheld all of FECA. Chief Justice Burger would have invalidated the entire plan, except for disclosure of large contributions. Justice Blackmun would have invalidated the limits on contributions and expenditures, but approved the disclosure and public financing provisions. Justice Marshall would have upheld the limits on contributions and a candidate's personal expenditures, but invalidated spending caps for individuals and campaigns. Justice Rehnquist would have upheld contribution ceilings and invalidated expenditure ceilings, but struck the public financing rules as unfair to minor parties.

Contribution limits were approved by six Justices, with only Chief Justice Burger and Justice Blackmun dissenting.

Expenditure ceilings were invalidated by seven Justices, with only Justice White dissenting, joined by Justice Marshall on the narrow issue of a candidate's personal expenditures. Disclosure rules were upheld by seven Justices, with only Chief Justice Burger dissenting on the question of small contributions. And public funding rules were upheld by six Justices, with only Chief Justice Burger and Justice Rehnquist dissenting.

But the clear majorities obscure the opinion's central analytical rift — the radically different First Amendment treatment of contributions and expenditures. On that critical issue, which has played an enormously important role in the evolution of modern election law, the Justices were closely divided, 4 to 3 to 1. Justices Brennan, Stewart, Powell, and Rehnquist argued that a bright-line First Amendment distinction could be drawn between contributions and expenditures. Justice White, Chief Justice Burger, and Justice Blackmun rejected the effort to treat contributions and expenditures differently. Justice Marshall accepted differential treatment, but disagreed with the majority's treatment of a

candidate's personal expenditures, which he viewed as self-directed contributions.

Even though only a bare majority was comfortable with the contribution/expenditure distinction, its analytic framework continues to dominate constitutional analysis of campaign finance reform.

The Standard of Review: Money Equals Speech

The *Buckley per curiam* opinion opens by rejecting the government's effort to secure a more permissive standard of judicial review by characterizing the regulation of campaign finance as a regulation of conduct, not speech. Regulation of campaign spending has such an inevitable impact on political speech, noted the Court, that spending limitations should be analyzed as though they were limits on speech itself.

Over the years, no aspect of *Buckley* has been more criticized than its equation of money and speech. But the Court's rejection of the government's effort to characterize FECA's regulations as mere regulations of conduct, with only an incidental impact on speech, was based on more than a crude confusion between speech and money. It was based on an assumption that, in the campaign context, money is the fuel that powers the political speech process.

As the Court noted, severely limiting the amount of money a political campaign can raise or spend affects political speech in much the same way that limiting the amount of gas in an automobile affects mileage. Given the extremely low expenditure ceilings set by FECA, the *Buckley* Court seemed correct to insist that campaign finance regulation be treated, for analytical purposes, as a direct regulation of speech. All eight participating Justices accepted the need to apply classic free speech analysis, and no member of the Court has ever suggested applying a lesser standard of review.

Two possible responses exist to the Court's equation of political speech and money. First, the Court's assumption that expenditure limits bite deeply into the quantity of political speech may be a function of the severity of the ceiling. In *Buckley*, a very low ceiling may well have justified such an assumption. As we will see, the Court went out of its way to point out that a \$1,000 cap on independent expenditures effectively silenced independent speakers and that many campaigns spent well beyond the levels set by the new limits. It remains to be seen whether the same assumption — that all limits gravely injure the quantity of political speech — would be justified in the context of more generous spending ceilings.

The government's effort to invoke the "time, place, or manner" standard was equally unavailing. The Court noted that FECA, unlike the regulations at issue in the "time, place, or manner" cases had the effect of eliminating speech entirely, not merely shifting it to a different time or place. For example, courts have allowed protesters to be moved from the entrance of an event to an adjacent parking lot, reasoning that the protesters' retain the opportunity to speak. But capping campaign spending entirely removes speech from the political process.

Thus, the *Buckley* Court requires that campaign finance regulations satisfy the stringent constitutional test designed to govern efforts that censor political speech — a test that requires the government to prove that the regulation is the least drastic means of advancing a compelling governmental interest.

The Difference Between Contributions and Expenditures

With the question of the governing standard settled, the *Buckley* Court proceeded to canvass potential compelling interests that might justify regulation. Two interests were identified: Preventing the appearance or reality of "corruption" caused by suspicious forms or amounts of campaign

financing, and promoting effective participation in the electoral process by all, regardless of wealth.

Next, the Court explored the First Amendment values at stake in campaign contributions and expenditures. Campaign contributions, it was decided, were important acts of political association, but not direct acts of expression. Campaign expenditures, on the other hand, were found to be pure acts of expression entitled to the highest level of protection.

The Court then proceeded to balance the potential compelling interests in regulation — preventing corruption and equal political participation — against the First Amendment values. Large campaign contributions, found the Court, risk the appearance or reality of corruption, which the Court equated with a *quid pro quo* arrangement between the contributor and the candidate. On the other hand, limiting large contributions would not materially diminish communication, the Court reasoned, since 94% of campaign contributions were lower than the \$1,000 ceiling, and the remaining 6% could simply be raised in smaller amounts. Balancing the compelling interest of preventing corruption against the Court's view of the mild interference with speech caused by limiting contributions, the *per curiam* opinion firmly upheld the \$1,000 limit on contributions to candidates.

The *Buckley* Court came out the other way on spending limits. For independent expenditures — Voter Jones' advertisement for Candidate Smith — there is little danger of *quid pro quo* corruption because the spender has no contact with the candidate. For a candidate's personal expenditures — Candidate Smith spends \$100,000 of his own money on his campaign — the Court found no danger of *quid pro quo* corruption because there is no one to make a deal with. Finally, for campaign expenditures — the Smith campaign's advertising costs — the Court concluded that because no deals are made in the process of spending money, there is no risk of

quid pro quo corruption.

On the other side of the balance, the Court noted the direct effect expenditure ceilings have on the ability to speak. The extremely low \$1,000 limit on individual independent expenditures would bar a supporter even from taking out an advertisement in a newspaper. And the candidate and campaign expenditure limits would directly impact on the quantity of political discourse. For example at least a quarter of all Senate candidates in the previous two cycles spent more than the new limits. Balancing the lack of serious threat of corruption in the expenditure context, against the significant limit on political speech created by spending ceilings, the *Buckley* Court firmly invalidated all expenditure caps.

As to the government's argument that spending caps were allowable because they advanced a compelling interest in fostering equal political participation, the Court acknowledged this interest as legitimate — relying on it later in the opinion to uphold public financing — but rejected using the equality rationale as a justification for preventing political speech, as opposed to subsidizing it. Strong voices, said the Court, may never be censored in an effort to aid weak voices. Thus, under *Buckley*, if a government wants to equalize political participation, its sole option is subsidizing, not limiting, candidates.

The *Buckley* Court's separate treatment of expenditures and contributions has been criticized on at least three levels. First, critics have argued that the *per curiam* opinion erred in ascribing less First Amendment value to campaign contributions than to expenditures. When Voter Jones writes a check to Candidate Smith, one would think he has made the quintessential expression of political association. Moreover, if the Court was right in treating the spending of money as indispensable fuel for political speech, it should not matter whether the money is in the form of an expenditure, or in the

form of a contribution that makes an expenditure possible. In both settings, the money is the *sine qua non* of political speech. As Justice Marshall noted in his separate opinion in *Buckley*, the distinction between expenditures and contributions becomes even more artificial when spending by candidates from their personal fortunes is considered. Conversely, if, as the *per curiam* argued, campaign contributions can be regulated because they are only indirectly linked to political speech, so are many campaign expenditures. Costs for polling, salaries, and travel are all non-speech expenditures — each certainly seems less connected to speech than the campaign check Voter Jones writes to help Candidate Smith pay for his advertisements.

Second, critics have questioned the *Buckley* Court's assumption that if Voter Jones made the relatively modest campaign contribution of \$1,001, it would risk the appearance or reality of corrupting Candidate Smith; while if Jones made a \$1 million independent expenditure in support of Smith, there would be no risk of corruption. In measuring the potential for corruption, critics ask, is there a real difference between contributing to a candidate, and spending on his behalf?

Buckley, of course, answers this question affirmatively. Independent expenditures, the Court noted, involve no communication between the independent spender and the campaign. Thus, there is no opportunity for corruption. Critics respond by pointing to communications not related to the expenditure. Congressman Smith has legislative business that will affect Voter Jones, who independently spends \$1 million on Smith's behalf. The two individuals never expressly talk about this expenditure — but Smith surely knows Jones made it. After the election, Smith and Jones speak about the legislative matter affecting Jones. It's this communication — the conversation after the independent expenditure — that critics assert the *Buckley* Court ignored.

This issue is where the *Buckley* Court suffers most from having been without a factual record. Enormous independent expenditures were not part of the fictional record the Court considered, mostly because they were not yet part of America's political process. Several scholars, reflecting on the millions of dollars independently spent in the 1996 elections, have called for a factually based study of independent expenditures' potential for corruption.

Finally, critics have attacked *Buckley*'s conclusion that spending can never be regulated in the name of equality. FECA's spending limits were set at an unreasonably low level. The Court was correct to note that the \$1,000 ceiling on independent expenditures was a de facto ban on political participation, and FECA's \$70,000 limit per election for House races was also unreasonably low. Thus, while the *Buckley* Court was correct in concluding that FECA's extremely low expenditure limits significantly restrained political speech, it is not clear this reasoning should apply to higher spending caps.

At some point, critics argue, unlimited campaign spending reaches a point of diminishing returns. Instead of bringing new ideas to the political dialogue, runaway campaign expenditures simply distort the political process. The seemingly absolute language of *Buckley*, critics argue, should not apply to efforts to limit extremely high-end campaign spending in the name of equality.

Reporting and Disclosure

After analyzing contributions and expenditures, the *Buckley* Court turned to the closely related reporting and disclosure requirements. No one challenged the concept of public disclosure of large contributions to major party candidates. The requirement of record-keeping for \$10 contributions was challenged, as was public disclosure of \$100 contributions. Moreover, the plaintiffs argued that disclosure was unnecessary for contributions

to minor parties, especially if the minor parties were controversial. Finally, it was argued that once the expenditure ceilings were invalidated, no basis existed for forced disclosure of independent expenditures.

The *Buckley* Court had little difficulty upholding the disclosure and reporting requirements. First, the Court observed that no reason existed to publish contributions under \$100, which is why they were sealed off from public view. Second, the Court rejected the argument that contributions to minor parties should be exempt, noting that minor parties could affect the outcome of elections, even if they did not win. In an effort to protect the supporters of unpopular political parties, however, the Court provided a blanket exemption from the disclosure rules for any controversial third party able to demonstrate a genuine risk of reprisal.

Most importantly, the Court argued that prevention of corruption was not the only justification for disclosure and reporting. The source of a candidate's financial support, noted the Court, was important information about the candidate's political positions. The Court even found that the importance to voters of such information justified compelled disclosure of independent expenditures, even though earlier the Court had found that independent expenditures pose no threat of corruption.

Public Financing of the Presidential Election

Finally, the *Buckley per curiam* upheld the public financing aspects of FECA, despite the argument that they discriminated in favor of the two major parties. Minor parties had no basis for complaint since they were no worse off than before the subsidies. In both settings, the Court held, minor parties were forced to rely on contributions from the public.

Of course, this analysis overlooked two important things. First, by limiting the size of

contributions, and by requiring public disclosure in the absence of formal proof of a likelihood of reprisal, the Court actually made it harder for minor parties to raise money from the public. The demise of expenditure limits further burdened minor parties, as it was certain that they would be badly outspent in most settings.

Second, FECA altered the relative positions of minor and major parties by guaranteeing major parties a great deal of money, and permitting supporters to spend unlimited amounts, while minor parties were required to continue raising money from the general public in small doses.

In defense of the Court's result, any public funding plan must distinguish between serious candidates and those who do not deserve taxpayer support. While Congress' plan could have

been more generous to serious independents and to minor parties generally, FECA's supporters have argued that it is a fundamentally fair way of subsidizing serious presidential candidates.

By far the most important aspect of the *Buckley* Court's public funding discussion was a casual footnote observing that Congress could condition optional public funding on a candidate's promise to respect campaign expenditure ceilings. The large remaining question is whether public funding can come with other strings, such as restrictions on the size and source of campaign contributions. For in recent years, in other contexts, the Court has been increasingly skeptical of conditioning government assistance behavior. □

The Unfortunate Practical Consequences of *Buckley*

By upholding FECA's contribution limits, while striking down its expenditure ceilings, the *Buckley* Court created a campaign financing system very different from the one Congress intended. Congress had established an integrated series of regulations, with the contribution and expenditure limits reinforcing each other, and the entire package was designed to minimize the impact of money on elections. But without expenditure ceilings, FECA was radically altered. Further, contribution limits and disclosure requirements made raising money harder, but the lack of spending caps maintained the system's voracious need for money. In simple economic terms, the *Buckley* Court limited supply (contributions), while leaving demand (expenditures) free to grow without limit. The predictable effect has been to increase the pressures on candidates to satisfy the ever-increasing demand for campaign cash. Inadvertently, the *Buckley* opinion took a congressional program designed to minimize the impact of wealth on campaigns and turned it into an engine for the glorification of money.

Specifically, *Buckley* dramatically increased the political power of rich candidates, who now could pour limitless wealth into their own campaigns, while opponents were left to raise contributions in small donations from the general public, or from special interest PACS. Before FECA, a candidate's personal wealth could be offset by large donations from wealthy supporters of an opponent. FECA, without the *Buckley* decision, provided a system that had contribution limits (which removed the potential corrupting impact of large donations), and spending limits (which removed the potential corrupting effect of wealthy candidates). But the post-*Buckley* scheme, where contribution ceilings remain in

place, but the limits on candidate expenditures have been removed, makes it impossible to offset the power of individual candidate wealth. In a real sense, *Buckley* gave us Ross Perot, Steve Forbes, and Michael Huffington.

Similarly, *Buckley* increased the relative political power of special interests. Before FECA, a candidate was able to raise money from a large array of sources, including wealthy individuals. FECA cut off these sources by imposing contribution-caps. Under the mutation produced by *Buckley*, however, candidates are under pressure to feed the money machine created by the removal of all expenditure ceilings. But raising money in \$1,000 increments from individuals is not efficient enough. Special interests, organized as PACS, help relieve this pressure — by handing candidates \$5,000 contributions. Additionally, albeit without coordination with the campaign, PACs can support candidates through independent expenditures.

Thus, inadvertently, the Court inverted FECA's intent. Instead of freeing the political process from the effects of wealth disparities and the reality and appearance of corruption, *Buckley* places more pressure on public officials to raise money (having made the process more difficult), and increases the amount of special interest money in the system. This inversion created precisely what the *Buckley* Court identified as a threat to the democratic process: a system corrupt in appearance and reality. In short, the *Buckley* Court inadvertently gave the nation a campaign funding system that, in the words of the principal challenger in *Buckley* — James Buckley — no Congress would ever have enacted.

The *Buckley* Court also upended Congress' intention with respect to the public funding of presidential elections. Instead of placing limits on the role of wealth in presidential elections, the public funding rules were subverted by the elimination of independent expenditure ceilings.

Without these caps, candidates are permitted to accept public subsidies, while receiving the support of unlimited independent expenditures from wealthy supporters and organized special interests. □

The Evolution of the Law Since *Buckley*

In the 20 years since it decided *Buckley*, the Supreme Court has rigorously maintained its distinction between contributions and expenditures. Restrictions on campaign expenditures have been universally invalidated, with the surprising exception, in 1990, of a Michigan ban on corporate expenditures in state and local elections, which the Court narrowly upheld. Restrictions on contributions have been sustained, unless the ceiling was unreasonably low.

The Expenditure Cases

In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court invalidated a ban on independent corporate expenditures in connection with a referendum on taxes. Following the reasoning in *Buckley*, the *Bellotti* Court held that the corporate expenditure ban directly impacted on the flow of political information of potential interest to the electorate. In *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), the Court invalidated a federal ceiling on independent expenditures by PACS in support of federal candidates. It is the *NCPAC* decision that dealt the serious blow to public funding of presidential elections, since it destroyed the government's ability to place a real cap on candidate spending. After *NCPAC*, presidential candidates were free to accept the federal subsidy, knowing that they would also benefit from friendly PACs which would launch expensive independent expenditures to help their candidacies. The next year, in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), the Court expanded *NCPAC*, invalidating a ceiling on independent expenditures on behalf of federal candidates by nonprofit corporations organized to advance a political position.

In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), however, the Court surprised observers by narrowly upholding a Michigan ban on independent corporate expenditures in connection with state and local elections. Surprisingly, Justices Brennan and Marshall, both critical players in *Buckley*'s invalidation of FECA, provided the crucial votes to sustain the Michigan ban. The Court reasoned that corporations accumulate great wealth in transactions having nothing to do with politics, and then are in a position to distort electoral outcomes by pouring wealth into a campaign with no guarantee that the wealth reflects the general views of the public.

Critics of *Austin* argued that the Court had ignored its precedents, and that if the corporate position truly lacked support in the community, the voters would reject it. Supporters of *Austin* saw it as a ray of hope that the Court was open to reconsidering a flat ban on all spending caps. Under existing precedent, therefore, corporations have a First Amendment right to spend money on referenda (*Belotti*), but may be forbidden from spending money in support of candidates (*Austin*). Supporters argue there's logic in this distinction — referenda can't be corrupted, unlike politicians, so they deserve less regulation.

Whether such a fine distinction can survive is debatable. Similarly, disputes have arisen over whether the Court's rationale in *Austin* can be limited to corporate expenditures. After all, virtually all concentrations of wealth come from economic transactions having nothing to do with politics. After *Austin*, can all "wealth" expenditures be regulated to prevent distortion of the political process?

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Committee v. FEC, 116 S. Ct. 2309 (1996), is the most recent expenditure decision. In this case, the Court reasoned that a political party could engage in independent expenditures, as long as this activity was not coordinated with the candidate benefiting from the spending. Critics were astounded by this decision, arguing that the law always treated parties and campaigns as if they were inseparable. That is, it had always been thought that the spending of money by a political party would count against the amount of money a party could give its nominee. Critics fear that allowing parties to use independent expenditures will further escalate campaign spending, as candidates will be able to benefit from the limitless financial support, albeit “uncoordinated,” of political parties.

The Contribution Cases

In *California Medical Ass’n v. FEC*, 453 U.S. 182 (1981), the Court upheld the \$5,000 ceiling on contributions to PACs. The challenger, an unincorporated association, argued that since it had a First Amendment right to spend an unlimited amount in support of a candidate, it should have a similar right to contribute unlimited amounts to PACs, as PACs could not give more than \$5,000 to any given candidate. The funds were not being given directly to a candidate, the challenger argued, so a *quid pro quo* arrangement was not possible.

The Court rejected this argument, holding

that the ceiling was necessary to prevent individuals from avoiding contribution limits by funneling large contributions through associations to numerous PACs for re-transmission to a candidate.

In *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), the Court upheld a ban on solicitation of the general public by corporate PACs. The Court reasoned that corporate PACs were not designed to be organs of general political influence, but rather to provide a convenient method for persons closely associated with the corporation to coordinate their individual political contributions.

Ironically, *National Right to Work* forces PACs to operate as narrow engines for the self-interest of corporate executives, rather than general vehicles for the expression of political ideals. On the other hand, since corporate executives generally determine which federal candidates receive PAC funding, the Court was obviously concerned about providing corporate executives with too much political influence by opening the PAC to the general public.

In *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981), however, the Court invalidated a \$250 ceiling on contributions to committees formed to support and oppose a ballot initiative. The Court stressed the extremely low ceiling, and the lack of a serious risk of *quid pro quo* corruption. □

Some Lessons From the *Buckley* Experience

Buckley is hardly a model for the formulation of public policy. The *per curiam* opinion resulted in the distortion of Congress' intent, imposed a regime on the nation that no Congress would ever have enacted, and, most importantly, has created a campaign finance system abhorred by virtually all political participants. Its many failings provide a cautionary road-map to future efforts of campaign finance.

First, do not look to courts as the primary forum to solve campaign financing. The limited fact-finding capability of courts, coupled with the inherent limitations on judicial power, make courts the wrong place to find a viable solution for campaign funding issues. If courts are to participate in the process, *Buckley* warns, judicial participation should be confined to the usual narrow "case or controversy" approach, which requires challengers to develop a factual record challenging a specific application of the law as it is applied to them, and counsels a court to decide only the actual case before it, unlike the Court's breakneck, recordless review of FECA.

Second, facts matter. At no time in the process leading up to *Buckley* did any institution conduct a searching inquiry into how the proposed law would actually affect the campaign process. There were arguments and opinions about the factual reality of the campaign process, and FECA's impact on future campaigns. But no one — not Congress, not the parties, not the courts — conducted an in-depth study into the role of money in federal elections. This lack of a serious factual underpinning made it easier for the Court to brush aside Congress' judgments. The success of any future effort to reform the campaign process is likely to turn on the persuasiveness of the factual record (not the factual assertions) developed to justify it.

Third, over-regulation is fatal. The 1974 Act's effort to limit expenditures was doomed by its unreasonably low ceilings. Independent expenditures were capped at \$1,000, House campaigns at \$70,000 per election. The Court was correct to decide that these limits bit deeply into the quality and quantity of political discussion. In a real sense, FECA's unreasonably low expenditure ceilings precipitated the *Buckley* Court's controversial link between speech and money. When the money ceiling is set so low that it constitutes a de facto prohibition on reasonable forms of political activity, it is natural for a reviewing court to equate expenditure ceilings with censorship.

Apart from strategic considerations, moreover, over-regulating the political process is a mistake. Unduly low expenditure ceilings dampen legitimate political discussion. Unduly low contribution ceilings harm third parties and independents, and unfairly enhance the relative power of rich candidates. Unduly burdensome reporting and disclosure requirements discourage perfectly legitimate political contributions, especially to controversial candidates.

Fourth, regulations may have unintended effects. Limiting spending may help incumbents. Limiting contributions may help rich candidates. Disclosure rules may hamstring controversial parties. Public financing may enshrine the two major parties. Any serious effort at reform must work through potential unintended effects, and should provide a mechanism for periodic reconsideration as experience reveals its practical impact.

Fifth, a reform effort need not be constitutional in every potential application to survive initial facial scrutiny. During the early years of any campaign reform program, the plan

may operate unfairly in particular settings, justifying judicial intervention to protect First Amendment rights. But merely because a particular aspect of a law may be invalid, the entire legislative plan need not be struck down. Moreover, in the early years of any plan, there

will undoubtedly be conflicting assertions about its practical effects. The fate of the entire program should not turn on such conflicting predictions. Some mechanism allowing the plan to be tested against its predicted effects should be included. □

Reform Initiatives Consistent With *Buckley*

The *Buckley per curiam* leaves open at least five important opportunities for campaign finance reform. First, and most importantly, the *Buckley* opinion explicitly permits expenditure ceilings to be introduced as the *quid pro quo* for public funding. Public funding, according to the *Buckley* Court, is appropriate, both to remove the risk of corruption created by private contributions, and to equalize access to the political process. As the price of a subsidy, the government can demand a pledge to limit campaign expenditures.

Several versions of this pledge are possible. Under one version, exemplified by the presidential funding plan and Maine's recent initiative, 100% of the campaign is funded, in return for a promise to cap spending at the subsidized ceiling. Under another version, a portion of the campaign is subsidized, and candidates are free to raise and spend a specified additional amount. A variant, exemplified by the presidential primary funding plan, or the recently enacted Kentucky plan, provides a subsidy in the form of matching funds keyed to private contributions. Under any of these versions, the effort to cap spending is complicated — and perhaps doomed — by the First Amendment right of supporters to make unlimited independent expenditures in support of a candidate. Whether public subsidies can be keyed to an effort to limit independent expenditures, or the geographical source of campaign contributions, remain unanswered questions.

Finally, public subsidies need not be in the form of cash. For example, free or subsidized access to television has been urged as a means of lowering the demand for money. One form of subsidized access to television relies on vouchers. Another compels the networks to provide free, or under-market, access to candidates. The

constitutionality of such compelled access remains an open question, as the networks will undoubtedly argue that the government's acquisition of network air time is an unconstitutional "taking."

Second, existing loopholes can be plugged. The most glaring loophole, the soft money exception, involves no constitutional issues and can be closed by Congress tomorrow. This exception for state and local party money, allows corporations, labor unions, and wealthy donors — each supposedly barred from contributing large sums to candidates for federal office — to make unlimited contributions to influence federal elections.

Third, laws can be passed that begin to expand the meaning of the term corruption in the *Buckley* opinion. The Court used the term to describe a *quid pro quo* arrangement under which a candidate's action was influenced by the receipt of money. But the corrosive impact of money is not confined to bribery, or some lesser form of financially induced behavior. The political process can be corrupted when a candidate loses (or appears to lose) the ability to think independently, and must constantly appeal for money from individuals and PACs. When voters watch this they increasingly believe that their interests can only be advanced by the payment of money. The deeply corrosive impact of such a cynical view of politics should qualify as a corruption of democracy. Nothing in *Buckley* forecloses a broad reading of the concept.

Fourth, arguably, a spending cap that is more generous could pass muster. The *Buckley* Court's refusal to uphold expenditure limits may well have been precipitated by the unreasonably low limits set in the 1974 statute. It is unclear whether the

seemingly absolute refusal in *Buckley* to permit expenditure limits would apply if the spending caps were far greater than those permitted by FECA. At some point, the argument goes, unlimited expenditures stop acting as the source of new ideas, and become a form of repetitive propaganda, making it impossible for poorer candidates to get a fair hearing.

Finally, *Buckley* considered only two potential compelling interests — avoiding corruption, and equalizing political participation. Several other possible compelling interests exist, including, to name a few: Improving the quality of campaign discourse, preserving confidence in the democratic process, increasing voter turnout, and equalizing access to the ballot.□

The Possibility of Modifying the *Buckley* Ground Rules

Buckley can be modified in two ways. First, the factual assumptions of the opinion can be shown to be inaccurate. For example, the assumption that unlimited personal campaign expenditures and independent expenditures would not create actual corruption, or its appearance, is ripe for attack 20 years after *Buckley*.

Second, the controversial distinction between contributions and expenditures can be attacked as arbitrary, especially in areas like a candidate's personal spending.

Attacking this distinction is risky, as two results are possible. Imagine *Buckley*'s contribution/expenditure distinction as a rotten tree. The Court could push the tree upon reformers by eviscerating the distinction between contributions and expenditures and then deciding that neither may be constitutionally regulated. Alternatively, the Court could push *Buckley*'s logic the other way by eliminating this same distinction and allowing the regulation of contributions *and* expenditures.

Colorado Republican can be read for clues as to where each Justice stands on challenges to this distinction. There appear to be three camps.

Justice Thomas — who observers think will be joined by Chief Justice Rehnquist, and Justices Scalia and Kennedy — wants the tree to fall upon reformers. That is, in *Colorado Republican*, Justice Thomas wrote that it is time to erase the contribution/expenditure distinction and cease regulating campaign contributions. Justices Stevens and Ginsburg agree that *Buckley* rests upon a faulty fiction — but they welcome regulating both sides of the campaign ledger.

Justices O'Connor, Souter, and Breyer are undecided. In *Colorado Republican* this camp argued that the case's facts did not make it necessary to decide the merits of *Buckley*'s contribution/expenditure distinction. In response to Justice Thomas' call for the Court to revisit this distinction, Justice Breyer wrote that the Court should proceed cautiously, noting that neither party briefed this issue.

Observers differ on which way, if any, these undecideds will drift. This environment has split reformers. Some worry that challenging *Buckley* is not worth its risks, and others think a gamble is justified, since, they argue, even a system with unregulated campaign contributions would be better than the *Buckley* status quo. □

Conclusion

As originally written, the *Buckley per curiam* was probably intended to steer the nation to public financing of elections as the only constitutional way to control expenditures and enhance equality. And Justice Brennan's perception that weak voices should be protected by making them stronger, rather than by censoring strong voices, remains wise counsel. But the movement for public funding has stalled, at least at the federal

level, forcing reformers to consider whether other avenues for reform survive *Buckley*.

Twenty years of experience with the campaign finance system that *Buckley* created reveals serious deficiencies in the *per curiam* opinion's factual assumptions, legal conclusions, and practical consequences. It is past time to revisit *Buckley*. □