

## Cato Institute Policy Analysis No. 282: Campaign Finance "Reform" Proposals: A First Amendment Analysis

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### Executive Summary

In the wake of recent reports of questionable campaign finance practices have come ever more draconian proposals to "reform" the campaign finance system. Those proposals pose a disturbing threat to the individual political freedom guaranteed by the Constitution. Under current precedents, none of them could survive a First Amendment challenge.

In *Buckley v. Valeo* (1976), the Supreme Court affirmed that giving money to and spending money on political campaigns is a core First Amendment activity. Accordingly, regulations of political contributions and expenditures will not be sustained unless justified by a compelling state interest and crafted to achieve their objective by the least restrictive means.

Current proposals to regulate campaign finance practices cannot survive the kind of scrutiny that the First Amendment requires. This study demonstrates that the ban on political action committees, the PAC ban fallback provisions, the "voluntary" spending limits, the restrictions on soft money, the regulation of issue advocacy, and the proposals to expand the enforcement powers for the Federal Election Commission all substantially infringe on core First Amendment freedoms, but none serves a compelling interest with the least restrictive means. And the proposal that broadcasters be required to provide free TV time to federal candidates is constitutionally insupportable.

The shortcomings of current "reform" proposals are no small matter, given the First Amendment's crucial historical role in protecting our right to self-government and in sustaining liberty. For the proposals to pass constitutional muster, the First Amendment would have to be itself "amended" by judicial fiat.

### Introduction

Since the 1996 elections, campaign finance practices have dominated the news. Reports of unpalatable fundraising strategies, such as renting out the Lincoln bedroom to major donors and using White House telephones to solicit contributions, have appeared with distressing frequency on the nightly news. The media tend to portray those actions not as straightforward individual ethical or legal lapses but as self-evidently symptomatic of the need for stringent new campaign finance "reforms." President Clinton, who claims to have played by the rules in his reelection campaign, also claims to strongly favor "reform." Recently, for example, in a "stop-me-before-I-kill-again" move, he petitioned the Federal Election Commission to ban political parties from accepting the "soft-money" contributions that provided so much of the fuel for the 1996 presidential contest.

A chorus of those who advocate increased regulation of the political process is always available to chant the reform mantras, and the mainstream press appears credulously willing to broadcast them: "Well-heeled [unequivocally self-serving and never public-regarding] special interests" dominate the political process; challengers and incumbents alike, consumed by the need to raise money for their campaigns, spend "most of their time . . . scrounging for funds." <sup>[1]</sup> A *Washington Post* headline declared, "The System Has Cracked under the Weight of Cash." <sup>[2]</sup> "[F]renzied fundraising and freewheeling spending . . . [of] torrents of cash" now rule the day, and election contests are conducted principally via expensive ad campaigns that saturate the airwaves. <sup>[3]</sup> Money--dollars contributed to candidates, given to political parties, and spent on election campaigns--undermines the integrity of and "defeat[s] the democratic process" <sup>[4]</sup>--or so it is said.

Despite the overheated rhetoric of dysfunctionality and doom, the debate about the nature of the changes that ought to be made in the present system of campaign finance regulations is often framed as though short-term political advantage were the only thing at stake. <sup>[5]</sup> Republicans, it is said, are against restricting campaign contributions and expenditures--but only because they are richer and better at raising money. Democrats, on the other hand, favor restrictions--but only because they wish to counter the perceived Republican money-raising advantage. Because Republicans control the present Congress, stringent new giving and spending regulations are thought unlikely. And finally, it is said that because the incumbents of both parties are "beneficiaries" of the present system, political reality suggests that those incumbents are unlikely to change the system in any way that might threaten their reelection.

For all the rhetoric, however, the debate over campaign finance regulation raises issues that genuinely transcend the short run, issues of fundamental and permanent significance that cry out to be acknowledged. Indeed, though they come to us in the benign guise of "reform," many of the campaign finance regulations that have recently been proposed would require us to renege on a central premise of our representative democracy--the individual political freedom our Constitution guarantees.

This study will examine the constitutionality of current campaign finance regulatory proposals. It will also strive to bring the stakes in the campaign finance debate into the sharpest possible focus--to provide a full accounting of regulation's cost to political freedom so that, if they find themselves tempted to adopt a short-term fix to the campaign finance "mess," legislators will not fatally underestimate the price.

### ***The Regulatory Agenda***

On the agenda of today's proponents of reform are a number of specific, often shifting legislative proposals. Rather than treat each of those proposals in detail, I will proceed in more generic terms, focusing on the broad outlines of the most frequently recurring--and thus most prominent--individual suggestions for "reform." I will consider the following proposals:

**The PAC ban:** Eliminate political action committees (PACs) from federal election activities by banning all expenditures by and contributions to them for purposes of influencing elections for federal office, broadly defined, except those contributions and expenditures made by political parties and their candidates.

**The PAC ban fallback:** If the complete ban is found unconstitutional, lower the permissible amount of PAC contributions to single candidates from the present \$5,000 to \$1,000 and prohibit any candidate from receiving any PAC contribution that would raise that candidate's PAC receipts above a given percentage (say, 20 percent) of applicable expenditure ceilings; ban the "bundling" of individual contributions; ban the receipt by a candidate of PAC monies that exceed 20 percent of the particular election's campaign expenditure ceilings; redefine independent expenditures so as to turn more activities into "coordinated" expenditures (thus subjecting them to the contribution limitations); and broaden the definition of "express advocacy" so as essentially to prohibit generic partisan communications of any kind (by defining express advocacy to include any "expression of support for or opposition to a specific candidate, to a specific group of candidates, or to candidates of a particular political party" and to include suggestions "to take action with respect to an election . . . or to refrain from taking action").

Spending limits and communication discounts: Impose "voluntary" spending limits for candidates in House and Senate races and prohibit spending of personal funds in excess of 10 percent of that limit; provide to candidates who agree to be bound by the limits certain amounts of free television time, plus the right to purchase additional time at reduced rates, and give them a reduced rate for mailing to state voters; limit their receipt of out-of-state contributions by requiring them to receive 60 percent of the contributions to their campaigns from individuals in their own states or districts; and prohibit candidates who do not agree to be bound by the spending limits from receiving PAC contributions, require them to pay full rates for broadcasting and postage, raise the limits on contributions to their opponents from \$1,000 to \$2,000, and raise the expenditure limits of their opponents by 20 percent.

Restrictions on soft money: Bar federal officeholders, candidates, and national political parties from accepting unregulated contributions; subject all election-year expenditures and disbursements by political parties, including state and local parties that "*might affect* the outcome of a federal election"--including those for voter registration, get-out-the-vote drives, generic campaign activities, and any communication that identifies a federal candidate--to the full panoply of Federal Election Campaign Act (FECA) restrictions and compliance and regulatory rules.

Controls on "issue advocacy": Regulate communications that do not contain words of "express advocacy" as defined by the Supreme Court in *Buckley v. Valeo* (i.e., communications that do not "in express terms advocate the election or defeat of a clearly defined candidate for federal office"). [6] Define "issue advocacy" to include a broader range of communications than does "express advocacy"; regulate it by subjecting groups funding issue advocacy communications to FECA disclosure requirements and controlling the content of issue advocacy communications by requiring disclosure of funding sources and disclaimers of candidate advocacy.

Free TV: In exchange for, and as a "public service" condition of, the allocation to them of spectrum space, require broadcasters to provide substantial amounts of free air time to all candidates for federal office. Require candidates to appear in person in the free time provided to them and to speak for themselves.

Expand Federal Election Commission enforcement powers: Grant broad new enforcement powers to the Federal Election Commission, including the right to go to court to seek an injunction against potential offenders on the ground that there is a substantial likelihood that a violation is about to occur.

### ***First Amendment Analysis: General Principles***

#### ***The Buckley Framework***

To be constitutional, the proposals outlined above must not violate principles of political freedom and free political speech as protected under the First Amendment. The cornerstone of the Supreme Court's First Amendment jurisprudence in this area is *Buckley*. In that case the Court decided several challenges to the FECA amendments of 1974. [7] FECA was at that time Congress's most ambitious effort at election campaign reform. According to its defenders, the act was designed to equalize access to and purify the political process by ridding it of corruption and the appearance of corruption. Among other things, the plaintiffs in *Buckley* challenged the act's stringent limitations on the amounts of money individuals could contribute to and spend on campaigns for federal office and the act's provisions for public funding of presidential candidates who agreed to abide by spending limits during their campaigns. The Court sustained the provisions for public funding of presidential campaigns and the contribution limitations. It invalidated the expenditure limitations.

In resolving the *Buckley* challenges, the Court correctly took as its central premises that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs" and that contribution and expenditure limitations "operate in an area of the most fundamental First Amendment activities." [8] Pursuant to conventional canons of First Amendment review, that meant that contribution and expenditure limitations would be subject to "strict scrutiny" by the Court and would not survive unless they were found to serve a "compelling state interest" using the

"least restrictive means." Due to differences it perceived in the relative magnitudes of the First Amendment interests, the Court distinguished between limits on *contributions* of money to politicians or their campaigns and limits on campaign *expenditures* by citizens and candidates. A contribution limit, said the Court, "entails only a marginal restriction upon the contributor's ability to engage in free communication," [\[9\]](#) because "the transformation of contributions into political debate involves speech by someone other than the contributor." [\[10\]](#) Hence, such limits could presumably be evaluated using a slightly more lenient standard of review. [\[11\]](#) Limits on expenditures, on the other hand, "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." [\[12\]](#)

Thus, whereas the Court strongly suggested that limitations on expenditures may well run afoul of the First Amendment regardless of the context or the purported justification for their imposition, it held that limitations on contributions are constitutional if their purpose is the compelling one of preventing corruption (i.e., "the attempt to secure a political quid pro quo from current and potential officeholders") [\[13\]](#) or the appearance of corruption. Of particular importance to today's debate, the Court rejected equalization of political power as even a permissible, much less a compelling, justification for restrictions on either contributions or spending, observing that "the concept that government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." [\[14\]](#)

*Buckley* has proven remarkably robust and has provided the doctrinal framework for all seven of the major campaign finance cases that the Court has since decided. In each of those cases (briefly summarized in the Appendix), the Court has remained committed to *Buckley*'s major conclusions. That is not to say that the *Buckley* framework has gone unchallenged within the Court itself. [\[15\]](#) Still, taken as a whole, *Buckley* and its progeny stand foursquare for the following doctrinal generalizations. Because they represent governmentally imposed constraints on political activity,

Restrictions on political contributions and expenditures infringe on rights of speech and association. Therefore, the Court will strictly scrutinize such restrictions, even when they are directed at corporations instead of at individuals or groups.

Limits on independent expenditures by individuals and political groups are likely to be unconstitutional regardless of the context or the purported justification.

Preventing corruption or the appearance of corruption remains the "single narrow exception to the rule that limits on political activity" are contrary to the First Amendment. [\[16\]](#)

Since a ballot measure offers no opportunity to corrupt elected officials with either contributions or expenditures, the First Amendment probably prohibits restrictions on both contributions and expenditures in the context of ballot-measure elections: both kinds of restrictions infringe on First Amendment rights without countervailing benefit since "there is no significant state or public interest in curtailing debate and discussion of a ballot measure." [\[17\]](#)

Equalization of political influence is not a permissible justification for restrictions. The Court has never wavered in its view that government may not restrict the speech of some to enhance the relative voice of others.

### ***Applying Buckley: In General***

How do the campaign finance regulations that are presently being debated fare when subjected to analysis in light of the *Buckley* framework and the First Amendment foundation upon which it rests? The first step in the calculus of constitutionality is to determine the extent to which each proposal infringes on established First Amendment rights. That step is doctrinally uncontroversial, its analytical path clearly marked, for *Buckley* and its progeny unequivocally establish that regulations of campaign contributions and expenditures operate upon fundamental First Amendment rights to free speech and free association.

Cynically claiming that that central premise of *Buckley* represents nothing more than capitulation to the idea that "money talks," advocates of regulation mock and demean the premise. In doing so, they miss the point entirely. *Buckley* was not written on a blank First Amendment slate. Rather, it was firmly grounded upon, and thus was the natural outgrowth of, a long line of cases that affirmed that the core principles of the First Amendment protected citizens' right to speak, to publish, and to associate for political causes, free from government interference or control. Contributing to and spending money on political campaigns--whether to advocate the election of particular candidates or to take positions with respect to particular issues--was protected in *Buckley* not because money talks but because the central purpose of the First Amendment is to guarantee political freedom. The amendment ensures that individual citizens may exercise that freedom by speaking, discussing, publishing, advocating, and persuading and that they may enhance their individual voices by joining together in groups, organizations, associations, and societies. The specific rights of citizens to contribute to and spend money on political campaigns are merely necessary corollaries of their more general rights to speak freely and to associate with one another to advocate causes in which they believe.

Having established that regulations of campaign contributions and expenditures impinge on fundamental First Amendment rights, the Court will then apply "strict scrutiny" and sustain the regulations only if it finds that they serve a compelling government interest and use the least restrictive means to do so. The analytical task implicit in those second and third steps in the constitutional calculus is the identification and evaluation of the government interests that supposedly support regulation and the appraisal of the means deployed to serve those interests.

Performing that task is not as easy as its doctrinal formulation suggests. Although the Court has clearly commanded that strict scrutiny is required, it has not always adhered to the implications of that command by engaging in rigorous examination of both proffered ends and the means chosen to achieve them. In fact, the Court has occasionally been highly deferential and credulous in its assessments of ends and means, making prediction in the present case an uncertain undertaking. Still, if the integrity of First Amendment principles is to be preserved, it is critically important that both legislators and judges take great care that rhetoric and assertion not substitute for the careful analysis that truly strict scrutiny requires. For that reason, the analysis that follows will attempt not merely to summarize but to examine skeptically the arguments and the rhetorical strategies of the advocates of regulation.

### *Applying Buckley: Specific Proposals*

*The PAC Ban.* In *Buckley*, the Supreme Court held that the only legitimate and compelling government interest in restricting campaign contributions and expenditures is to prevent corruption or the appearance of corruption. And the Court defined corruption precisely and narrowly as entailing a financial quid pro quo: dollars for political favors.

Despite that, advocates of the PAC ban offer justifications unrelated to preventing corruption as the Court defined it in *Buckley*. Instead, such justifications as they offer are directed, in vague terms, at reforming "an unresponsive government and a political process that has grown increasingly mean-spirited"--a view reformers seem to believe is universally shared. Regarding contribution prohibitions, reformers condemn unspecified "elected officials who listen more to big money and Washington lobbyists than to their own constituents"; they decry the "influence-money culture" and claim that "our political system is rigged to benefit campaign contributors and incumbent officeholders at the great expense of citizens"; and they see an "inherent problem"--the nature of which they do not define--"with a system in which individuals and groups with an interest in government decisions can give substantial sums of money to elected officials who have the power to make those decisions." [18] At bottom, the justification they offer seems to be that special-interest PAC contributions are a dominant force in the financing of federal election campaigns, that members of Congress are dependent on them and influenced by them, that the giving of PAC money is linked to the particular PAC's legislative agenda, and that PAC money goes overwhelmingly to incumbents. Thus, they justify the PAC expenditure ban not with reference to preventing corruption but on the ground that it is a loophole-closing measure: if independent PAC expenditures continue to be permitted for "purposes of influencing any election for Federal office," they will undermine the ability of the contribution prohibitions to achieve their purpose of preventing PACs from wielding influence.

*Buckley* and its progeny signal quite clearly that those "justifications" for the PAC contribution and expenditure ban are neither legitimate nor compelling. The rhetorical parade of horrors cited by the advocates of increased regulation simply does not amount to corruption as the Court has defined it; thus, curing the system of them is not corruption

prevention. Even if ridding the political system of the influence of big money and Washington lobbyists were somehow transformed into legitimate ends of government, a total ban on PAC contributions could not survive, for it is grossly overinclusive. Eliminating all political committee activity is not narrowly tailored, nor is it the least restrictive means of ridding the system of the influence of the money culture.

Unless the advocates of increased regulation truly intend to denounce *all* political alliances--regardless of whether they be ideological, issue driven, or public spirited--on the ground that they are *all*, in the very nature of things, bound to represent special interests, and unless they think that *all* attempts by individuals to maximize their political voices by joining together with others of like mind present an inherent problem, it is impossible to imagine how they could justify such a draconian measure as a total ban on PAC giving and spending. Cutting the heart out of the freedom of political speech and association, and conferring what would amount to a permanent monopoly on political parties, is neither necessary nor a narrowly tailored means for attaining even the ill-defined--and probably illegitimate--goal of eliminating the influence of big money and Washington lobbyists.

*The PAC Ban Fallback.* The fallback provision--which would lower the permissible amount of PAC contributions from \$5,000 to \$1,000 per election and would go into effect if or, more accurately, when the total ban on PAC contributions was declared unconstitutional--allegedly serves the same interest as the total ban. Since it aims to reduce rather than prohibit permissible contributions, the fallback provision might appear on its face to be less problematic than the total ban. That appearance is deceptive. Although the Court stated in *Buckley* that contribution limits are easier to defend than expenditure limits, it held that strict scrutiny was appropriate for both. Thus, the contribution limits of the fallback provision must run the same strict scrutiny gauntlet, and their chances of surviving are slim to none.

First, note again that the advocates have not claimed during the course of recent debates that the interest being served by reducing the contribution limit from \$5,000 to \$1,000 is that of preventing corruption in the *Buckley* sense. It seems quite implausible to assert that any politician would be corrupted--or even appear to be corrupted--in the quid pro quo sense by a single contribution of even \$5,000. Instead, the interest that the contribution reduction would serve is, again, the diffuse one of ending the "dominance" and "influence" of PACs. Thus, the problem the fallback limitation confronts at the outset is that, even if precisely defined, it serves an interest that has never been held to be either legitimate or compelling. And second, instead of being narrowly tailored, the limitation appears quite ill-suited to serve the interest asserted for it. Indeed, it is difficult to identify any interest that would be served by making it so much more difficult than it presently is for candidates to raise money: candidates will hardly be less distracted by fundraising if they have to raise money from even greater numbers of people because of the smaller amounts that any one individual or PAC may contribute.

Both the contribution ban and the fallback treat all PACs alike, as though whatever cause they espouse and how-ever great (or limited) their resources, they all pose precisely the same danger--and the same degree of danger--of undermining the integrity of our political process. But given the enormous range and diversity of interests that PACs represent, treating them all alike makes little sense--and certainly fails the narrowly tailored, least restrictive means test. Moreover, it is important to note that even while it was sustaining the particular contribution limits in *Buckley*, the Court "cautioned . . . that if the contribution limits were too low, the limits could be unconstitutional." [\[19\]](#) Thus, contribution limits so low as significantly to impair the regulated party's ability to exercise First Amendment rights (as a \$1,000 limit on PAC contributions would surely do) or so unreasonably below an amount that would give legitimate rise to a perception that the contributor was acquiring "undue influence" (as the \$1,000 limit would surely be) are constitutionally vulnerable.

The only interest served by the fallback provision's ban on the bundling of small individual contributions to PACs would be that of preventing evasion of the contribution limitation. The bundling ban, however, represents a different sort of burden on First Amendment rights than does the constitutionally doubtful contribution limitation, which it supposedly serves as a backstop. For the bundling ban directly burdens the associational rights of individual PAC contributors. The Supreme Court recognizes that the right to associate is a "basic constitutional freedom" [\[20\]](#) and has stated repeatedly that "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." [\[21\]](#)

Advocates of the bundling ban claim that it is necessary to forestall PACs' evading the contribution limitations. Thus, whether the ban serves a compelling state interest will depend upon whether the interest served by the contribution limitations survives review and, if so, whether the ban is narrowly tailored--whether the Court sanctions a one-size-fits-all prohibition. Since the contribution limitations are unlikely to survive review, and since the one-size-fits-all prohibition is a clumsy solution in any event, the bundling ban is likely to be even more vulnerable than the contribution limitation it serves.

The fallback's prohibition of PAC contributions that raise any candidate's PAC receipts above 20 percent of campaign expenditure ceilings would also, to a large extent, stand or fall with the contribution limitations themselves, since the prohibition is defended in terms of its ability to strengthen the contribution limitations. The First Amendment burden of the 20-percent-of-expenditure limitation is more onerous than first appears, however, for after the 20 percent limit is reached the so-called limitation has the effect of a total ban. How such a limit would serve a corruption-prevention objective, moreover, is very difficult to discern. Corruption arises when large contributions are exchanged for particular political favors. If PAC contributions are not individually large enough to create a risk of corruption or its appearance, the fact that a candidate receives many of them--even were he to receive 100 percent of his campaign funding from them--simply does not increase the risk that he will be corrupted. Thus, the 20-percent-of-expenditure limitation not only is not narrowly tailored to serve a compelling state interest in preventing corruption or its appearance but also is not tailored to serve any identifiable or legitimate interest at all.

Finally, the attempt to redefine "independent expenditure"--and, in particular, to redefine "express advocacy" so as to include any and all partisan communications--runs flatly counter to the *Buckley* Court's explicit effort to immunize issue advocacy from regulation or restriction: "So long as persons or groups eschew expenditures *that in express terms advocate the election or defeat of a clearly identified candidate*, they are free to spend as much as they want to promote the candidate and his views." [\[22\]](#)

*"Voluntary" Spending Limits.* The proposals for voluntary spending limits keyed to relevant voting age populations are said to serve the interest in curbing excessive and even obscene campaign spending. Spending limits will hold down the costs of running for office and thus prevent one candidate from having an excessive advantage over another by reason of spending more. The limits are also touted for their supposed ability to redress the present imbalance in favor of incumbents (who have a grossly unfair advantage in fundraising because most PAC money goes to them).

Mandatory spending limits confront an impenetrable constitutional wall. The Supreme Court said in *Buckley* that expenditure limits simply do not serve to prevent corruption or the appearance of corruption in the electoral process, which is the only justification that the Court has ever accepted for limiting political expression. Indeed, the Court went further. It explicitly denounced the other justifications for spending limits that proponents had offered in *Buckley*, namely equalizing speech resources and stemming the rising cost of political campaigns. Because it represents such an unequivocal endorsement of freedom from government as the underlying conception of the First Amendment, the Court's aversion to restricting the voices of some in order to enhance the voices of others is worth emphasizing. Moreover, because it represents such a clear and definite rejection of the paternalism of those who think they know how much is too much to spend on political campaigning, it is worth quoting the Court's confirmation that

the mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. . . . In the free society ordained by our Constitution it is not the government, but the people--individually as citizens and candidates and collectively as associations and political committees--who must retain control over the quantity and range of debate on public issues in a political campaign. [\[23\]](#)

It is, of course, because mandatory spending limits are so clearly unconstitutional that advocates of the proposed spending limits insist that they be voluntary. The transparent objective is to fit the limits into the safe harbor that the *Buckley* Court provided when it qualified its rejection of expenditure limitations by the following footnote:

Congress may engage in public funding of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private

fundraising and accept public funding. [\[24\]](#)

For a number of reasons, all reflecting the magnitude of the benefits and burdens attached to accepting or not accepting the limits, it is pure fiction to call them voluntary. They simply do not fit the *Buckley* proviso. To be specific, significant benefits are promised to those who accept the voluntary limits: candidates become eligible for free and reduced-rate television time [\[25\]](#) and reduced mailing rates while their opponents who do not accept the voluntary limits receive neither free time nor reduced rates. Moreover, candidates who agree to voluntary contribution limits when their opponents do not get an added benefit--their contribution limits and expenditure ceilings are raised. But burdens come with the benefits as well: candidates who volunteer to comply with the spending limits must demonstrate a threshold level of support (by raising 10 percent of the limit) before becoming eligible for the benefits; they must agree to raise 60 percent of their funds from individuals who reside in their own states or districts; and they must agree to limit the use of their own resources. In addition, they cannot use their free air time for commercials of less than 30 seconds in length.

When the Court in *Buckley* sustained the exchange of a presidential candidate's right to make unlimited expenditures in his own behalf for the right to receive public funding, it did so because it concluded that the purpose of public funding "was not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process." [\[26\]](#) The purpose of the current proposals to impose voluntary spending limitations along with their accompanying burdens and benefits, however, is quite different.

In the first place, the limits are not imposed in exchange for receipt of public funding and thus could not be defended as necessary to protect the integrity of a government-funded program. Second, the effect of the proposed expenditure limitations--whether they are deemed voluntary or not--will be to reduce substantially the quantity of campaign speech. Indeed, that must be their purpose, since the restrictions are explicitly motivated by the objective of reducing excessive spending. As the Eighth Circuit Court of Appeals recently noted when evaluating analogous provisions of state campaign finance restrictions, one is "hard-pressed to discern how the interests of good government could possibly be served by campaign expenditure laws that necessarily have the effect of limiting the quantity of political speech in which candidates for public office are allowed to engage." [\[27\]](#)

The spending limitations also do not serve the posited goal of creating a level playing field between incumbents and challengers because the limitations fail to dissipate the already significant advantages of incumbency. Incumbents begin every electoral race with important advantages; equalizing the amount of money that incumbents and challengers can spend would simply make permanent the incumbent advantages that already exist. When the spending limits are combined with the proposed new restrictions on contributions and the increasingly complicated system of fundraising for challengers, they appear narrowly tailored not to level the playing field for challengers but instead to transform a challenger's initial disadvantage into a practically insurmountable barrier. That is the reason the proposals are so susceptible to the charge of being incumbent-protection measures.

*Limits on Soft Money.* Advocates of increased regulation of campaign finance often assert that soft money is the most dangerous and destructive money in the political system today. Soft money is money contributed by individuals, corporations, unions, and the like to the national and state parties for party-building activities, voter registration and get-out-the-vote drives, and generic issue- (rather than candidate-) oriented advertising. It is not subject to contribution limitations imposed by FECA because it is not used to advocate expressly the election of any clearly identified candidate. Reformers want to ban soft money because they believe that even though it does not go to support particular candidates it nevertheless has the unseemly propensity to influence elections. Thus, it invites wholesale evasion of the contribution limits now in place.

The reformers are right, of course: soft money does influence elections. But the resort to soft-money contributions is exactly what one would expect when people are prohibited from giving more directly.

Yet a ban on soft-money contributions would amount to an unprecedented restriction on political activity, one whose justification is not compelling and whose scope far exceeds what the First Amendment allows. Advocates of a soft-money ban defend it as a contribution-limitation-loophole-closing device: corporations and unions that would not otherwise be permitted to contribute to candidates' campaigns make large soft-money donations to political parties;

and individuals often contribute soft money in excess of the amount they would be entitled to contribute to particular candidates. Such arguments assume, of course, that contribution limitations represent an appropriate and inviolable ceiling on the amount of money that individuals, corporations, and unions should be allowed to contribute to the political process *whether or not the contribution funds speech that creates a risk of quid pro quo corruption of particular candidates*. Thus, supporters of the ban make no pretense of establishing a link between soft-money contributions and the appearance or reality of candidate corruption that alone provides a constitutional predicate for regulation. [\[28\]](#)

Calling the soft-money contribution ban a contribution-limit-loop-hole closure does not change the basic fact, however: soft money does not fund speech that "in express terms advocate[s] the election or defeat of a clearly identified candidate for federal office," which is the *only kind* of speech for which the Court has held that contributions may be constitutionally restricted. [\[29\]](#) To regulate contributions for speech that is other than express advocacy of the election of particular candidates, the Court said, would create intractable vagueness problems and cause unacceptable chilling of protected, issue-oriented political speech. It would, in other words, thwart speech debating the merits of government policies and addressing the public issues that are at stake in an election--the very kind of speech that the First Amendment was written primarily to protect. Thus, because a ban on soft money aims directly and indiscriminately at core political activity, and because its proponents have not made their case that soft-money contributions pose a danger of quid pro quo corruption, the ban could not pass muster as a finely tuned means of achieving a compelling state interest.

Also bearing on the First Amendment implications of a ban on soft money is the Court's recent decision in *Colorado Republican Federal Campaign Committee v. FEC*, which held limits on independent expenditures by political parties--expenditures not coordinated with any candidate--to be unconstitutional. The independent expression of a political party's views, the Court affirmed, is core First Amendment activity, and limits on it cannot be justified with reference to a corruption-prevention rationale. Indeed, although the majority of the Court did not reach or address the issue, four justices expressed the further view that, given the practical identity of interests between party and candidate during an election, the corruption-prevention rationale for sustaining limitations on contributions did not support any limits on party spending, whether coordinated with the candidate or not. Although present law makes coordinated spending illegal, Justice Thomas pointedly questioned its rationale: "What could it mean for a party to 'corrupt' its candidate or to exercise 'coercive' influence over him?" [\[30\]](#) If the Court were to decide, when squarely facing the issue, that party spending on political activity cannot be limited, whether or not coordinated, then contributions to the party to make those expenditures would likewise seem to be protected from regulation. In sum, from a constitutional perspective, restrictions on soft money are among the least defensible proposals for campaign finance reform. Indeed, arguments purporting to support such restrictions serve only to raise questions about limits on direct contributions.

*Issue Advocacy*. Insofar as they entail broadening the reach of campaign speech regulation to include speech that does not "in express terms advocate the election or defeat of a clearly identified candidate for federal office," proposals to control issue advocacy are constitutionally infirm for the same reason that the soft-money ban is constitutionally infirm: they would regulate--and thus unacceptably chill--core political speech about the merits of policies and the proper resolution of public issues without a corruption-prevention rationale for doing so. Proponents of controls on issue advocacy claim that controls are necessary to prevent the acquisition of undue influence by advocates of particular issues. There is, however, no constitutional warrant or means for calibrating what constitutes "undue" influence, for the Constitution does not permit, nor does it provide, a metric for discerning how much influence is enough. We have no constitutional Goldilocks to say when the amount of influence possessed by advocates of particular positions is "just right." The inherent payoff for political participation in a democracy is the acquisition of influence, and it is the function of the First Amendment to protect efforts to acquire it, not to limit or constrain them. [\[31\]](#)

The constitutionality of proposals for regulation, insofar as they require disclosure by groups engaging in issue advocacy, is seriously jeopardized by *McIntyre v. Ohio Elections Commission*. [\[32\]](#) In *McIntyre*, the Court had before it an Ohio statute that prohibited the distribution of anonymous campaign literature. Because the statute was a regulation of core political speech, the Court subjected it to strict scrutiny; and, because the statute did not serve a compelling state interest using the least restrictive means, the Court proceeded to strike it down. Unpersuaded that the ban was

justified by Ohio's asserted interests either in preventing fraudulent and libelous statements or in providing voters with relevant information, the Court also could find no support for the statute in either *First National Bank of Boston v. Bellotti* [33] or in arguably relevant portions of *Buckley*.

In *Bellotti*, the Court invalidated a state law that prohibited corporations from spending money on speech designed to influence the outcome of referenda. In the course of doing so, the Court commented in dicta on the possibility that a requirement that the sponsor of corporate advertising be identified might be thought to be permissible on account of its "prophylactic effect." The *McIntyre* Court realized that the context of the *Bellotti* statement--expenditures by corporations--was not the same as the context of the Ohio statute, which purported to regulate independent expenditures by an individual. And whereas in *Buckley* the Court sustained mandatory reporting of independent expenditures in excess of a threshold level, the justices noted in *McIntyre* that the independent expenditures to which the disclosure requirement applied had been construed to mean only those expenditures that expressly advocate the election or defeat of a clearly identified candidate. [34] Thus, in *Buckley* there was a corruption-prevention rationale to support the expenditure-disclosure requirement. Such a rationale would lend only the most tenuous possible support to required disclosures of issue advocacy.

*McIntyre* does not purport completely to foreclose disclosure or reporting requirements with respect to independent expenditures. It does, however, reaffirm the Court's commitment to scrutinize strictly such requirements in order to preserve the right to engage in issue advocacy unencumbered by regulations that burden speech without producing a reciprocal benefit in corruption prevention.

*Free TV*. The proposals to require broadcasters to provide "free" TV time to federal candidates do not come under the *Buckley* rubric. Instead, insofar as they apply to broadcasters, their constitutionality is a function of the unique First Amendment jurisprudence that the Court has developed for the electronic media. That jurisprudence had its beginnings in *Red Lion Broadcasting Co. v. FCC*, [35] in which the Court, pointing to "spectrum scarcity," upheld the Federal Communication Commission's rule that those attacked editorially by the broadcast media had a right of reply. Thus it denied the broadcasters' First Amendment claim that such an obligation impinged on their editorial freedom.

It is clear beyond peradventure that Congress could not constitutionally compel the *print* media to provide free space to similarly situated political candidates. [36] *Red Lion* sanctioned a different set of First Amendment rules for the broadcast media because the Court was persuaded that the scarcity of broadcast spectrum warranted content regulation of spectrum licensees' programming in the interests of diversity and fairness.

Many commentators questioned the rationality of the spectrum scarcity argument even at the time *Red Lion* was decided. [37] Regardless of whether it provided a plausible rationale at that time, however, spectrum scarcity has been rendered obsolete by the advent of cable and other technological advances. And courts, too, have increasingly criticized the argument as a justification for government control of the content of broadcast programming. [38]

There is no longer a factual foundation for the argument that spectrum scarcity entitles the government, in the public interest, to control the content of broadcast speech. Without the spectrum scarcity rationale to support it, the attempt to control broadcasters' speech by requiring them to provide *free* TV time to candidates for office would seem doomed to constitutional failure. Even were the spectrum scarcity rationale still viable, the Court has never held that *Red Lion* sanctioned "government regulations that impose specifically defined affirmative programming requirements on broadcasters." [39] The Court has been suspicious of any government action that "requires the utterance of a particular message favored by the Government," and it has been alert to guard against the "risk that Government seeks not to advance a legitimate regulatory goal but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." [40]

With respect to all speakers except the broadcast media, and most certainly with respect to candidates for political office, it goes almost without saying that any attempt by the government to dictate the format or control the content of speech is constitutionally suspect. In addition to commanding broadcasters to donate time so that political candidates may speak, the free TV proposals contemplate requiring candidates themselves, and not any surrogates, to speak in the donated time, thus dictating the format of their speech; and several suggestions have been made that the candidates

must not engage in "negative" campaigning if they are to receive the free time, thus controlling the content of their entire speech. Those highly questionable aspects of the free TV proposals cannot be defended on the ground that the government, in pursuit of the public interest, is subsidizing certain candidate speech--thus conditioning receipt of its funds on the candidates' agreement to respect the contours of the government program. Such was the rationale that underlay the Court's holding in *Rust v. Sullivan*, [\[41\]](#) where the Department of Health and Human Services' "gag rule" prohibited recipients of federal family planning funds from providing abortion information. The Rust rationale could not support the format and content controls envisaged by the free TV proponents for the simple reason that the speech would be subsidized not by the taxpayers but by the broadcasters. [\[42\]](#)

In fact, what the free TV time proposals contemplate seems to be a bold end-run around traditional and well-established First Amendment principles. The broadcasters have no First Amendment right to resist compliance, proponents say, because spectrum scarcity permits the government to regulate their editorial judgments in the public interest. And the candidates have no First Amendment right to resist compliance with format or content controls because they are being permitted to speak for free. As the analysis above has demonstrated, the First Amendment stands as a more effective defense of freedom than the proponents imagine, and the Supreme Court would surely have little difficulty detecting the constitutional shell game that the free TV proposals epitomize.

*Expanded Federal Election Commission Enforcement Powers.* Many of the proposals for increased regulation of campaign finance envision a hugely enlarged enforcement role for the already overburdened and generally ineffectual Federal Election Commission. [\[43\]](#) The wisdom of imposing such a monumental burden on any federal agency, much less on this particular one, is questionable; but whether the enforcement mechanisms that Congress devises for implementing particular regulatory strategies are feasible or not does not usually raise First Amendment issues.

One enforcement proposal does raise such issues, however: the proposal to give the FEC power to seek to enjoin potential offenders on the ground that "there is a substantial likelihood that a violation is about to occur." The proposal is vulnerable to two different First Amendment challenges. The first involves vagueness. Many of the proposed substantive violations are themselves vague, and the "substantial likelihood" criterion for FEC action is also vague. The threat of FEC action based on either vague element of that ground would not only have an unacceptable chilling effect on many activities that are not violations; more significantly, it would also invite precisely the kind of arbitrary exercise of government power that the vagueness doctrine is designed to forestall. [\[44\]](#)

The second First Amendment challenge to giving the FEC power to enjoin campaign activity involves prior restraint on speech. Prior restraints are the "most serious and the least tolerable infringement of First Amendment rights," [\[45\]](#) and they will not be sustained unless the Court is convinced that "the gravity of the evil, discounted by its probability, justifies such invasion of free speech as is necessary to avoid the danger." [\[46\]](#) It seems unlikely that the Court would hold that the mere possibility of violating campaign finance regulations poses the kind of threat to the national interest that would justify imposing prior restraints on speech, especially since the kind of speech put at risk by such an injunction--political speech during the course of an election campaign--lies at the very core of the First Amendment.

### ***The First Amendment According to the Regulators***

When one looks at Supreme Court precedents--in particular at *Buckley* and its progeny--the First Amendment case against current proposals for more stringent campaign finance regulations appears impregnable. But, given the vehemence and surety with which those proposals are advocated, perhaps it is well to look more closely both at the precedents for *Buckley* and related cases and at the conception of the First Amendment the reformers embrace and how that conception differs from the First Amendment that is presently embodied not only in our democratic traditions but in our supreme law.

An important question to ask is to what extent the precedents--which stand as barriers to so-called reform efforts--are rooted in traditions and ideas of freedom that we wish to preserve. *Buckley* may be the cornerstone of the Supreme Court's modern campaign finance jurisprudence, but it is important to appreciate that it was not a novel, isolated case. Rather, it was laid upon an already existing, solidly constructed First Amendment foundation. Thus, to appreciate its true significance, and understand what is at stake in the present debate, it helps to see *Buckley* as sustaining a First

Amendment tradition that was already deeply embedded at the time the case was decided. *Buckley* was one in a long and continuing line of cases that have articulated and upheld, in a wide variety of contexts, the principles of free political speech and individual political freedom that lie at the very heart of the First Amendment.

The Constitution is the fundamental charter of our representative democracy, the embodiment of our right to self-government and of all our corollary liberties. The First Amendment's specification that "Congress shall make no law . . . abridging freedom of speech or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" plays a crucial role in determining the character of our democracy. "A major purpose of [the] Amendment was to protect the free discussion of governmental affairs." [47] Accordingly, it guarantees that individual citizens may speak, publish, and join together in groups to engage in political activity to try to achieve the substantive ends they deem desirable. [48] They may attempt to persuade others and to acquire political influence, and the government may not interfere with, punish, repress, or otherwise impede their efforts. [49]

That conception of the First Amendment is fleshed out in Supreme Court opinions that both pre- and postdate *Buckley*. Those opinions make it clear that implicit in the First Amendment guarantee of freedom from government control over what citizens may say and with whom they may associate as participants in the political process is the important corollary that citizens may freely contribute or expend the resources at their command--their intellect, their time, their talent, their organizational or rhetorical skills, their money--to or on political activity. [50] The government may not interfere in their efforts to persuade their fellow citizens of the merits of particular proposals or of particular candidates; [51] nor may it disrupt the free communication of their views, [52] nor penalize them for granting or withholding their support from elected officials on the basis of the positions those officials espouse. [53] Government may neither prescribe an official orthodoxy, [54] require the affirmation of particular beliefs, [55] nor compel citizens to support causes or political activities with which they disagree. [56] Government may neither punish its critics nor impose unnecessary burdens on their political activity. [57] Those are the bedrock principles of political freedom with which *Buckley* and its progeny are consistent; those are the principles that impelled the *Buckley* Court's conclusion that government may not restrict independent political expenditures and may limit political campaign contributions only in the name of preventing corruption.

To remain faithful to those principles, one must be vigilant to detect the costs to freedom lurking in reform proposals that come dressed as benign efforts to achieve a healthy politics. In the course of explaining why the First Amendment should be amended, House Minority Leader Richard Gephardt (D-Mo.) baldly stated that formal amendment was needed so that Congress could enact new and stringent campaign finance restrictions because "[w]hat we have is two important values in direct conflict: freedom of speech and our desire for healthy campaigns in a healthy democracy. You can't have both." [58] That breathtaking assertion performs a real service. It alerts us to the fact that, in the eyes of advocates of reform, freedom as we know it cannot survive an ambitious program of campaign finance regulations. Of equal importance, it begs the all-important questions about what a "healthy democracy" would look like and why a healthy democracy is not *by definition* one, like ours at present, in which freedom of speech reigns.

Nevertheless, the regulatory proposals that have recently been placed on the legislative agenda do claim to embody a First Amendment vision of sorts. Based not on legal precedent but crafted by legal scholars and judges who adumbrated it in the pages of scholarly journals and treatises, the conception of the First Amendment that animates proposals for campaign finance regulation bears almost no resemblance to the freedom-oriented conception that actual First Amendment doctrine embodies. Indeed, it distorts our traditional understandings of what the very words of the amendment mean and imparts an extraordinary and unprecedented significance to the phrase "freedom of speech." Precisely because it animates the present reform agenda, however, it warrants a brief summary.

The conception of the First Amendment that underlies the regulatory agenda of proponents of campaign finance reform is best understood as a rejection of the traditional understanding that freedom of speech necessarily implies individual political liberty and the absence of substantive or qualitative regulation of political debate. Proponents of reform do not perceive that they utter a contradiction when they assert that freedom of speech can be "enhanced," [59] its purposes "furthered, not abridged," [60] by legislation that regulates and restricts political speech. That is because the proponents of regulation believe that freedom is a quality of political life that can be regulated into existence rather

than an aspect of democracy that government regulation necessarily and by definition destroys. They think that the guarantee of freedom of speech is in fact a *grant of power* to, rather than a *withholding of power from*, the government. With such power, government can control the content of political debate and fix the political process so that "political reason-giving" will prevail. Political influence will be distributed equally among groups so that "people who are able to organize themselves in such a way as to spend large amounts of cash [will] not [be] able to influence politics more than people who are not similarly able." [\[61\]](#) Then money will no longer play a role in our politics.

The regulators appear to distrust deeply the American people. They unselfconsciously express the concern that "completely unregulated [i.e., free] political campaigns will degenerate in such a way that the electorate would be divested of its power to make a reasoned choice among the candidates." [\[62\]](#) In other words, they believe that the American people cannot be trusted with the choices and political responsibilities entailed in a free political system; instead, the government must regulate the political process in order to help the people to make appropriate decisions.

In the First Amendment context, three aspects of the regulators' conception deserve particular emphasis. The first has already been mentioned: the regulators' conception perverts the meaning of the word "freedom."

Second, while decrying the polluting effect of wealth on the democratic process and celebrating spending and contribution restrictions purporting to keep the voices of individual citizens from being drowned out, reformers exempt the press from their reform proposals. In the recent debate, of course, the press has largely bemoaned the vices of the current system, and "its myth-making has been especially important in the shaping of mass opinion about reform." [\[63\]](#) Simply by virtue of their ability to influence the public agenda, the media distort debate, and the distortion of the political process that results from media treatment of particular candidates or issues is likely to be significant. [\[64\]](#) The Supreme Court has explicitly eschewed defining the rights of the press more broadly than speech rights of ordinary citizens. [\[65\]](#) Yet under the reformers' conception of the First Amendment, the media and media corporations enjoy privileges not enjoyed by ordinary citizens.

The third noteworthy aspect of the reformers' conception of the First Amendment is that the agenda that conception is used to promote is neither premised on empirical analysis, nor derived from established postulates, nor defended in terms of predictions about testable results. Rather, it rests on pejorative and highly charged rhetoric, is formulated in ill-defined but evocative terms, and is defended with extravagant claims about benign effects. Yet upon analysis, the picture the regulators paint--both of political reality and of the goals of reform--is so vague that it begs all the important questions.

Thus, when the late Judge Skelly Wright, long in the reform camp, surveyed the political process, he was dismayed to find "the polluting effect of money in election campaigns." He worried that "[c]oncentrated wealth . . . threaten[ed] to distort political campaigns and referenda," and he announced that "[t]he voices of individual citizens are being drowned out" by the "unholy alliance of big spending, special interests, and election victory." [\[66\]](#) Similarly, Professor Cass Sunstein of the University of Chicago more recently asserted that "[m]any people think that the present system of campaign financing distorts the system of free expression, by allowing people with wealth to drown out people without it. . . . [C]ampaign finance laws might be thought to promote the purpose of the system of free expression, which is to ensure a well-functioning deliberative process among political equals." [\[67\]](#)

What do all those words mean? What does the "pure political process"--the one that is being "polluted"--actually look like? How rich are "people with wealth"? How poor are "people without it"? Apart from one person, one vote, what does it mean to be a "political equal"? If it means that one cannot legitimately attempt to acquire any more political influence than anyone else has, what point is there in participating in even a "well-functioning deliberative process"? And why isn't the individual political freedom that is guaranteed by present First Amendment doctrine the best means of securing a "well-functioning" democracy?

The reason questions like those are important is that the Supreme Court engages in strict scrutiny of legislation that restricts campaign giving and spending. That requires the Court to analyze carefully the asserted relationships between ends and means--a process that can hardly go forward when the ends of the legislation cannot be precisely defined and the means can be rhetorically invoked but not actually spelled out. Moreover, since campaign finance reforms have so

often turned out to have unintended--indeed perverse--consequences for the political process, and since past reforms, far from having leveled the political playing field, have only entrenched incumbents, it appears doubly important that the goals of proposed new regulations be precisely specified and that the means chosen to achieve them be persuasively shown to be well targeted and genuinely likely to hit their mark.

### ***Conclusion***

In conclusion, current proposals for new regulation of federal election campaign finance practices are constitutionally indefensible. In their general conception, they are nothing short of a practically complete rejection of the individual and associational rights of expression and political participation that the First Amendment guarantees. In their specifics, the governmental interests they claim to serve are neither compelling nor even legitimate. And the means they deploy are neither the least restrictive nor finely tailored. If they were to be enacted, and were challenged in court and subjected to genuinely strict scrutiny, none of the proposed regulations could survive review. They could survive only if the Supreme Court decided to amend the First Amendment by judicial fiat.

### **Appendix: *Buckley's Progeny***

*Bellotti*, widely known as the "corporate speech" case, invalidated a Massachusetts law that prohibited banks and business corporations from making expenditures to influence the vote on ballot referenda that did not materially affect their business, property, or assets. The Court strictly scrutinized the state interests asserted in behalf of the statute and the relationship between those interests and the spending limitations alleged to be the means of securing them and rather easily concluded that there was an insufficient means-end relationship to justify the limitations.

Sustaining FEC limits on the amount of money that an unincorporated association is permitted to give to a multicandidate political committee, the Court in *California Medical Association v. Federal Election Commission* engaged in lenient review. Contributions are "speech by proxy," the Court declared, so limiting them did not "restrict the ability of individuals to engage in protected political advocacy." [\[68\]](#)

Insisting that "there is no significant state or public interest in curtailing debate and discussion of a ballot measure," the Court in *Citizens against Rent Control v. City of Berkeley* [\[69\]](#) strictly scrutinized a limitation on contributions to committees formed to support or oppose ballot measures. It invalidated the limitation.

*Federal Election Commission v. National Right to Work Committee* was a challenge to a section of FECA that limited the National Right to Work Committee to solicitation of "members." Declaring that it would not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared," [\[70\]](#) the Court narrowly construed the section and, as so construed, sustained it against a First Amendment challenge.

But in the next case, *Federal Election Commission v. National Conservative Political Action Committee*, [\[71\]](#) the Court reasserted its intention and authority strictly to scrutinize corruption-prevention justifications, at least when they were offered in support of limitations on expenditures. The decision invalidated § 9012(f) of the Presidential Election Campaign Fund Act, which prohibited political committees from making independent expenditures in excess of \$1,000 to support the election of a presidential candidate who had opted to receive public funding. "When the First Amendment is involved," then-Justice Rehnquist said, a "rigorous" standard of review is called for and deference to a legislative judgment is appropriate only "where the evil of potential corruption had long been recognized." [\[72\]](#)

*Federal Election Commission v. Massachusetts Citizens for Life* [\[73\]](#) was the next major campaign finance reform case. Massachusetts Citizens for Life, a nonprofit, nonstock corporation organized to "foster respect for human life and to defend the right to life of all human beings . . . through . . . political . . . activities," violated FECA restrictions on independent spending by corporations when it financed a special edition of its newsletter in which it identified and advocated the election of "pro-life" candidates. The Court held, however, that as applied to MCFL's expenditure in this case FECA was unconstitutional. First, it burdened the right of the organization to make independent expenditures-- "expression at the core of our electoral process and of the First Amendment freedoms." [\[74\]](#) Second, because "it was formed to disseminate political ideas, not to amass capital," [\[75\]](#) MCFL did not pose a threat of "unfair deployment of

wealth for political purposes," nor did it "pose [a] danger of corruption." [76] Thus the "concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL." [77] The commission's argument that it needed a broad prophylactic rule like the one the Court had sustained in *National Right to Work Committee* did not persuade the Court. *National Right to Work Committee* involved restrictions on solicitation for a political committee that made *contributions* to candidates, whereas the regulation at issue in *MCFL* was a restriction on *independent expenditures*; moreover, the administrative convenience of a bright-line rule is of insufficient weight to count as a compelling interest in treating two unlike entities--business corporations and groups like MCFL--alike.

The particular restrictions on independent expenditures at issue in *MCFL* were held unconstitutional. On the way to reaching that result, however, the Court appeared to suggest that if *MCFL* had been an "ordinary" corporation--one that posed a threat of corruption by "unfair deployment of wealth for political purposes" instead of one formed for the particular purpose of engaging in political advocacy--the case might have come out differently.

That suggestion bore fruit in *Austin v. Michigan Chamber of Commerce*, [78] in which the Court sustained a state law prohibiting the use of corporate treasury funds to make independent expenditures in support of or in opposition to candidates in elections for state office. The state defended the expenditure prohibition on the ground that "the unique legal and economic characteristics of corporations necessitate some regulation of their political expenditures to avoid corruption or the appearance of corruption." Justice Marshall's majority opinion upholding the restriction accepted that formulation of the corruption-prevention rationale and in doing so seemingly embraced a conception of legislative power to define and prevent "corruption" different from, more expansive than, and much less precise than that which the *Buckley* court had endorsed. *Buckley* and its progeny had limited legislative power to define corruption by focusing on corruption's deleterious effect on the integrity of elected officials. Corruption that legislatures may prevent occurs only when "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors." [79] The *Austin* opinion implied that legislatures could choose to define "corruption" to include imprecisely defined untoward effects that spending might have not just on the behavior of elected officials but also on the electoral process itself. [80]

Although it may signal a departure from *Buckley*'s limiting principles, the precise extent to which *Austin* undermines *Buckley*'s constraints on legislative power to define corruption remains unclear for at least two reasons. First, the *Austin* Court made much of the fact that the restriction at issue there was imposed on corporate expenditure of treasury funds, thus hinting that had the prohibition applied to independent expenditures by individuals, or even by separate segregated corporate political action committees, the result would have been different and the prohibition would have been struck down. Second, Justice Marshall's opinion is obscure about the meaning it ascribes to the term "corruption." Although the opinion is larded with pejorative and evocative references to the "influence of political war chests" [81] and the "corrosive and distorting effects of immense aggregations of wealth," [82] it does not describe a normative baseline of legitimacy that would permit a disinterested observer to detect a genuine threat of "corruption" in any particular campaign finance practice. The most the opinion does in that regard is to suggest that the distortion that is a permissible target of the legislature's concern stems from the fact that "the resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas." [83] Unfortunately, the opinion fails to explain the First Amendment principle that gives that fact the power to transform the most highly protected category of core political speech into an activity subject to complete legislative proscription.

The Supreme Court's most recent pronouncement on the constitutionality of campaign finance regulations came in the 1996 case of *Colorado Republican Federal Campaign Committee*, in which the Court held seven to two that independent expenditures by political parties cannot constitutionally be limited by Congress. Two justices, Stevens and Ginsburg, dissented. They signaled that they were prepared to retreat from *Buckley*; they would have held that any spending by a political party represents a contribution to a candidate and can accordingly be limited, and they were prepared to defer to Congress's judgment that measures to level the political playing field were necessary and that there was too much spending on political campaigns. The other justices stayed well within the *Buckley* framework, and four of them would have gone further to safeguard the First Amendment than did Justice Breyer's opinion for the Court. Justice Kennedy, for example, got the support of Chief Justice Rehnquist and Justice Scalia for his position that

spending by political parties, even if it is coordinated with candidates, cannot be restricted pursuant to the First Amendment because to restrict party spending is to stifle what parties exist to do. Justice Thomas, in a strongly argued opinion, endorsed abandoning *Buckley's* dichotomy between contributions and expenditures and advocated treating contribution and expenditure limitations the same for First Amendment purposes, subjecting both to strict scrutiny and not permitting broad prophylactic corruption-preventing measures.

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## Notes

[1]. John V. Lindsay, "Free TV for Political Candidates? Yes, to Cleanse the System," *New York Daily News*, February 20, 1996.

[2]. Ruth Marcus and Charles R. Babcock, "The System Cracks under the Weight of Cash: Candidates, Parties and Outside Interests Dropped a Record \$2.7 Billion," *Washington Post*, February 9, 1997, p. A1.

[3]. *Ibid.*, pp. 20-21.

[4]. Frank J. Sorauf, "Politics, Experience, and the First Amendment: The Case of American Campaign Finance," *Columbia Law Review* 94 (1994): 1350 (citing the amicus brief of Common Cause that was filed in *Buckley v. Valeo*).

[5]. Helen Dewar and Guy Gugliotta, "In Campaign Finance, One Party's 'Level Playing Field' Is Another's Shaky Ground," *Washington Post*, April 7, 1997, p. A6.

[6]. *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976) (per curiam).

[7]. Pub. L. no. 93-443, 88 Stat. 1263 (1974).

[8]. *Buckley at 14* (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

[9]. *Ibid.* at 20.

[10]. *Ibid.* at 21. The different treatment accorded to contributions and expenditures has been subjected to scathing criticism both on and off the Court, most recently in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 116 S. Ct. 2309, 2325 (1996) (Thomas, J., concurring in the judgement and dissenting in part).

[11]. *Buckley at 25* (Contribution limitations may be sustained if the state demonstrates a sufficiently important interest and deploys means closely drawn to avoid unnecessary abridgment).

[12]. *Ibid.* at 19.

[13]. *Ibid.* at 26.

[14]. *Ibid.* at 48-49.

[15]. The Appendix to this study contains a more detailed analysis of how the cases decided since *Buckley* have implemented the *Buckley* framework.

[16]. *Citizens against Rent Control v. Berkeley*, 454 U.S. 290, 296 (1981).

[17]. *Ibid.* at 299.

[18]. Ann McBride, president of Common Cause, Testimony before the Senate Rules Committee, February 1, 1996. See also, to the same effect, Joan Claybrook, president of Public Citizen, Testimony before the Senate Rules Committee; and Becky Cain, president of the League of Women Voters, Testimony before the Senate Committee on Rules and Administration, March 13, 1996.

- [19]. *Carver v. Nixon*, 72 F.3d 633, 637 (1995) (citing *Buckley* at 30).
- [20]. *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973).
- [21]. *Citizens against Rent Control* at 294.
- [22]. *Buckley* at 45.
- [23]. *Ibid.* at 57.
- [24]. *Ibid.* at 57n. 65.
- [25]. "Free" in the sense of no cost to them, but not free in the sense of "costless." The cost would be borne by the broadcasters.
- [26]. *Buckley* at 92-93.
- [27]. *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422, 1426 (8th Cir. 1995).
- [28]. People who favor increased regulation indulge in a rhetorical strategy that implicitly equates big money with corruption and undue influence. It is thus important to recall that seeking to influence policy is what political activity--and free speech--is all about. We have no metric to tell us when influence is undue. And the Court has squarely held that only activities that create a danger of quid pro quo corruption can be constitutionally regulated.
- [29]. *Buckley* at 44-45.
- [30]. *Colorado Republican Federal Campaign Committee* at 2330-31 (Thomas, J., concurring in the judgment and dissenting in part).
- [31]. See Douglas Johnson and Mike Beard, "'Campaign Reform': Let's Not Give Politicians the Power to Decide What We Can Say about Them," Cato Institute Briefing Paper no. 31, July 4, 1997.
- [32]. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).
- [33]. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).
- [34]. *McIntyre* at 445.
- [35]. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).
- [36]. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).
- [37]. See, for example, David Lange, "The Role of Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment," *North Carolina Law Review* 52 (1973): 1. See also Scot Powe, "Or of the [Broadcast] Press," *Texas Law Review* 55 (1976): 39.
- [38]. See, for example, *Turner Broadcasting System Inc. v. FCC*, 512 U.S., 622, 637-38 (1996) (noting that both courts and commentators have questioned the validity of the scarcity rationale for disparate treatment of broadcast and print media); *Telecommunications Research & Action Center & Media Access Project v. FCC*, 801 F.2d 501 (DC Cir. 1986).
- [39]. Rodney A. Smolla, "The Culture of Regulation," *CommLaw Conspectus* 5 (1997): 193, 199.
- [40]. *Turner Broadcasting* at 641.
- [41]. *Rust v. Sullivan*, 500 U.S. 173 (1991).

[42]. Cf. *CBS, Inc. v. FCC*, 453 U.S. 367 (1981), in which the Supreme Court sustained the FCC's reading of § 312(a)(7) of the Communications Act of 1943, to the effect that the section created an affirmative, promptly enforceable right of reasonable access to the use of broadcast stations for individual candidates seeking federal office. *CBS v. FCC* provides no comfort to the proponents of free TV, however, since § 312(a)(7) required only that networks provide access for which candidates were willing and had offered to pay.

[43]. Benjamin Weiser and Bill McAllister, "The Little Agency That Can't: Election Law Enforcer Is Weak by Design, Marginalized by Division," *Washington Post*, February 12, 1997, p. A1.

[44]. See, for example, *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974) (The vagueness doctrine "requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.") (Citation omitted.)

[45]. *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). See also *New York Times Co. v. U.S.*, 403 U.S. 713 (1971) ("Any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity.")

[46]. *Nebraska Press Association* at 561. (Citations omitted).

[47]. *Mills v. Alabama*, 384 U.S. 213, 218 (1966).

[48]. *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958).

[49]. *Hague v. CIO*, 307 U.S. 496 (1939).

[50]. *Meyer v. Grant*, 496 U.S. 414 (1988).

[51]. *Pickering v. Board of Education*, 391 U.S. 563 (1968).

[52]. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

[53]. *Elrod v. Burns*, 427 U.S. 347 (1976).

[54]. *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

[55]. *Wooley v. Maynard*, 430 U.S. 705 (1977).

[56]. *Communication Workers of America v. Beck*, 487 U.S. 735 (1988); *Aboud v. Detroit Board of Education*, 431 U.S. 209 (1977).

[57]. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

[58]. Quoted in Nancy Gibbs, "The Wake-Up Call: Clinton Makes Serious Noises about Campaign Reform, But That May Not Be Enough to Change a Cozy System That Loves Special Interest Money," *Time*, February 3, 1997, p. 22.

[59]. Laurence H. Tribe, *American Constitutional Law*, 1st ed. (Mineola, N.Y.: Foundation Press, 1978), § 13-27, pp. 802-3.

[60]. Daniel Hays Lowenstein, "Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory, and the First Amendment," *UCLA Law Review* 29 (1982): 581-82.

[61]. Cass R. Sunstein, "Political Equality and Unintended Consequences," *Columbia Law Review* 94 (1994): 1392.

[62]. Tribe, § 13-26, p. 798.

[63]. Frank J. Sorauf, "Politics, Experience, and the First Amendment: The Case of American Campaign Finance," *Columbia Law Review* 94 (1994): 1356.

[64]. Cf. Sanford Levinson, "Electoral Regulation: Some Comments," *Hofstra Law Review* 18 (1989): 412 ("I am unpersuaded by any analysis that expresses justified worry about the impact of money on the behavior of public officials and, at the same time, wholly ignores the power of the media to influence these same public officials in part through the media's ability to structure public consciousness.")

[65]. Cf. *Pell v. Proconier*, 417 U.S. 817, 834 (1974) ("The Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally.")

[66]. Skelly Wright, "Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?" *Columbia Law Review* 82 (1982): 614, 622.

[67]. Cass R. Sunstein, *The Partial Constitution* (Cambridge, Mass.: Harvard University Press, 1993), p. 84.

[68]. *California Medical Association v. Federal Election Commission*, 453 U.S. 182, 196, 199n. 20 (1981).

[69]. *Citizens against Rent Control* at 291.

[70]. *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197, 210 (1982).

[71]. *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985).

[72]. *Ibid.* at 500.

[73]. *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986).

[74]. *Ibid.* at 251 (citations omitted).

[75]. *Ibid.* at 259.

[76]. *Ibid.* at 260.

[77]. *Ibid.* at 263.

[78]. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

[79]. *Federal Election Commission v. National Conservative Political Action Committee* at 497.

[80]. *Austin* at 659-60.

[81]. *Ibid.* at 659 (quoting *Federal Election Commission v. National Conservative Political Action Committee* at 500-501).

[82]. *Ibid.* at 660.

[83]. *Ibid.* at 659 (quoting *Federal Election Commission v. Massachusetts Citizens for Life* at 258).