

## Vladimir Putin, Campaign Finance Reform, and the Central Meaning of the First Amendment

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*If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.*<sup>1</sup>

This is an Article occasioned by the Supreme Court's important campaign finance reform decision in *McConnell v. Federal Election Commission*.<sup>2</sup> But unlike most other articles with which it shares this genesis, it is not mainly about that case. Instead, this Article takes on a broader concern and examines and decries the drift away from traditional and foundational First Amendment and other constitutional doctrine, and the slouching toward more egalitarian and managerial notions of free speech and democratic government, for which the *McConnell* opinion is an avatar.

In contrast to other critiques of campaign finance reform, I hope to do more than just raise free speech objections. That sort of approach has two main faults—it needlessly limits the purchase and force of one's critical arguments and it invites easy counterpunching replies. The complaint that campaign finance reform measures unduly restrict free speech will receive the reply (for example, from Justice Breyer) that money is not speech (or, at least, is not just speech) and that, even if it is, the need to protect governmental and

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<sup>1</sup> 4 ANNALS OF CONG. 934 (1794) (statement of Rep. Madison). This line is also quoted twice by Justice Brennan in his opinion for the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 275, 282 (1964).

<sup>2</sup> 540 U.S. 93 (2003) (largely upholding against constitutional challenge the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 [hereinafter BCRA], also known as the McCain-Feingold Act) (to be codified primarily in scattered sections of 2 and 47 U.S.C.).

electoral integrity justifies the restrictions.<sup>3</sup> A truer measure of the relative merit and weight of the arguments on both sides of the campaign finance reform issue requires a wider perspective than the one provided by the Free Speech Clause of the First Amendment<sup>4</sup> alone. It requires a perspective that spans the breadth of the entire Constitution because the campaign finance reform that Congress has given us and which the Supreme Court has largely upheld is inconsistent with popular self-rule—the republican form of government that the Constitution establishes.<sup>5</sup>

Granted, the Guarantee Clause<sup>6</sup> itself assures only the *states* a republican form of government. But while not stated in the same form,<sup>7</sup> such a requirement on the federal level was both intended by the Framers<sup>8</sup> and put into the Constitution itself in provisions such as the Preamble<sup>9</sup> and the Free Speech, Assembly, and Petition Clauses of the First Amendment.<sup>10</sup> Would it not be a very strange thing if the

<sup>3</sup> Justice Breyer, in a concurring opinion, stated in *Nixon v. Shrink Missouri Government PAC*:

On the one hand, a decision to contribute money to a campaign is a matter of First Amendment concern—not because money *is* speech (it is not); but because it *enables* speech. . . .

On the other hand, restrictions upon the amount any one individual can contribute to a particular candidate seek to protect the electoral process—the means through which a free society democratically translates political speech into concrete governmental action.

*Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400–01 (2000) (Breyer, J., concurring); *see also infra* note 14.

<sup>4</sup> “Congress shall make no law . . . abridging the freedom of speech[.]” U.S. CONST. amend. I.

<sup>5</sup> The Court has itself, at times, recognized this broader perspective, for example in saying, “speech concerning public affairs is more than self-expression; it is the essence of self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

<sup>6</sup> “The United States shall guarantee to every State in this Union a Republican Form of Government[.]” U.S. CONST. art. IV, § 4.

<sup>7</sup> For, if it were, the federal government would be guaranteeing itself a republican form of government.

<sup>8</sup> As it was, for example, by James Madison in the headnote to this Article. *See supra* note 1 and accompanying text.

<sup>9</sup> The Preamble to the United States Constitution provides:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. pmbbl.

<sup>10</sup> “Congress shall make no law . . . abridging the freedom of speech . . . or the

Constitution guaranteed only the states, but not the nation, a republican form of government?

I do not offer a full definition or description of a republican form of government because I do not need one for my purposes here.<sup>11</sup> But I do mean, at least, to include the idea behind Madison's aphorism introducing this Article, that, in a republic, the "censorial power," along with other aspects of self-government, belongs to the people and not to their representatives.<sup>12</sup>

But a republican form of government is not a pure or direct democracy; it is, instead, a representative democracy.<sup>13</sup> This is the reason that the censorial power is so important: it is needed to ensure that the people and not their representatives rule. Any weakening of this power threatens and undermines the popular self-rule so critical to the republican form of government. If we were a direct rather than a representative democracy (like ancient Athens or a New England town meeting), the people's censorial power would lack this importance, for the right would then only be that of the people to criticize *themselves*. I belabor this point because the egalitarian proponents of campaign finance reform sometimes act and talk as if we had a direct democracy here in the United States.<sup>14</sup> This manifests

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right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

<sup>11</sup> The Supreme Court itself has held the matter, in some aspects, to be a nonjusticiable political question. For example, in *Luther v. Borden*, the Court specifically found:

[A]ccording to the institutions of this country, the sovereignty in every State resides in the people of the State, and . . . they may alter and change their form of government at their own pleasure. But whether they have changed it or not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it.

*Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849).

<sup>12</sup> The censorial power here is nothing more than the power to command or regulate. So, the meaning of Madison's statement in the headnote to this Article is only that in the United States the people command the government and not the reverse. But the fundamental postulate of popular sovereignty that this embodies is crucial to the central meaning of the First Amendment and to our system of government generally.

<sup>13</sup> On this score, Vincent Blasi reminds us that "Article One, the Republican Form of Government Clause, and the Seventeenth Amendment guarantee to the People of the United States and of the individual states that they shall be governed by representatives." Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1283 (1994).

<sup>14</sup> Speech is relatively easy and inexpensive in a direct democracy, such as a town meeting. But in a large, representative democracy like our own, communication is cumbersome and expensive. If political expenditures and contributions there are

itself, as we will see, not just in their devaluing of the censorial power, but also in their penchant for managerial and parliamentary tropes for political and electoral debate.<sup>15</sup> Their misguided conception of American democracy also causes these proponents to overlook the fact that in elections within a representative democracy, most citizens participate (if at all), not as speakers, but as listeners and financial contributors.

I proffer the notion of self-government by the people as the touchstone of our constitutional form of government, one that cannot be impinged upon or denied whatever the purported benefit. That done, I argue that campaign finance reform as it has been theorized, practiced, and defended by its contemporary proponents violates this basic notion of self-government by displacing the “censorial power” away from the people to the federal government. For as Madison said in another context, “[a]n interpretation that destroys the very characteristic of the Government cannot be just.”<sup>16</sup>

How is it that wiser, more experienced heads than mine seem largely to have overlooked this touchstone of self-government? There are two explanations. First, it is hidden in plain sight, but in our clause-bound world of constitutional interpretation, larger, more basic considerations often escape notice.<sup>17</sup> Purpose is rarely explicit in what we do, but if we interpret rightly, it is always implicit. Take, for example, Philip Bobbitt’s standard typology of constitutional

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limited, speech, too, will suffer. Of the debate over whether money is speech, Justice Breyer says, “Money is not speech, it is money. But the expenditure of money enables speech; and that expenditure is often necessary to communicate a message, particularly in a political context. A law that forbids the expenditure of money to convey a message could effectively suppress that communication.” Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 252 (2002).

<sup>15</sup> Those who would limit campaign finance and electoral expression in the name of political equality of voters or civic education inevitably violate Madison’s proviso by casting government in a managerial role overseeing and regulating political debate. And, as Robert Post notes, “The question of whether election speech should be characterized as within such a managerial domain, or instead as within public discourse, is a question that affects the meaning and scope of public discourse.” Robert Post, *Regulating Election Speech Under the First Amendment*, 77 TEX. L. REV. 1837, 1840 (1999) (footnote omitted).

<sup>16</sup> 2 ANNALS OF CONG. 1946 (Joseph Gales ed., 1791) (remarks of Rep. Madison in consideration of a bill to establish the Bank of the United States).

<sup>17</sup> However, on occasion, justices do refer to constitutional foundations. For example, Chief Justice Rehnquist’s opinion for the Court in *United States v. Lopez*, 514 U.S. 549 (1995), begins, “We start with first principles. The Constitution creates a Federal Government of enumerated powers.” *Id.* at 552.

argument.<sup>18</sup> The touchstone of popular self-government is not one of Bobbitt's five types of argument (history, text, structure, prudence, and doctrine), but it is present as the reason or justification for these types. They maintain the censorial power of the people while they inhibit its usurpation by the government. Second, throughout American history there have been relatively few serious challenges to our republican form of government. That is, in part, why I chose a wide range of examples in both place and time, from the Sedition Act in the 1790's to *New York Times Co. v. Sullivan*<sup>19</sup> to contemporary Russia, to elucidate the fundamental importance of self-government in thinking about campaign finance reform, the central meaning of the First Amendment, and the Constitution generally. My task here will be as much one of reorientation and refocusing of perspective as it will be one of argument and persuasion. The argument will take us to Vladimir Putin's Russia as well as to John Adams' America in addition to the more familiar forum of modern Supreme Court decisions, but always for the same purpose of demonstrating the fundamental importance of the touchstone of self-government in thinking about campaign finance reform, the central meaning of the First Amendment, and the Constitution generally.

#### VLADIMIR PUTIN AND CAMPAIGN FINANCE REFORM

Let me start by comparing two seemingly unrelated events that took place in the second week of December 2003. One, the Court's decision in *McConnell*, has an obvious link to our subject. The other, the legislative election in Russia, does not. Both events, however, are related to my topic.

On Sunday, December 7, 2003, Russia held parliamentary elections in which United Russia, the party supporting Russian President Vladimir Putin, inflicted a resounding defeat on the opposition parties,<sup>20</sup> although outside observers questioned the fairness of the process.<sup>21</sup> The *New York Times* editorial writers seemed

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<sup>18</sup> Bobbitt divides constitutional argument into five forms: historical, textual, structural, prudential, and doctrinal. See PHILIP BOBBITT, *CONSTITUTIONAL FATE* 7 (1982).

<sup>19</sup> 376 U.S. 254 (1964) (striking down libel judgment won by public official on free speech and free press grounds).

<sup>20</sup> The *New York Times* story on the election stated, "Mr. Putin's party crushed the Communists and ousted all but a handful of liberal democrats from Parliament, capturing the most votes of any party in any election since the collapse of the Soviet Union in 1991." Steven Lee Myers, *Putin Revels in Election; Others See Flaws*, N.Y. TIMES, Dec. 9, 2003, at A10.

<sup>21</sup> The *New York Times* detailed the report of two European election monitoring groups, which concluded that the election "called into question Russia's willingness

determined to put the best possible face on things. Though mentioning some shortcomings, the editors found it “[h]eartening . . . to see Russians voting freely” and emphasized the “good news” that these elections were freer than their Soviet predecessors.<sup>22</sup> What they found “most troubling” was not the defects in the process itself, but the fact that “so many of the candidates are the new rich, leaving the distinct air of tycoons and oligarchs brazenly buying access to power—or to more wealth.”<sup>23</sup>

The *New York Times*’ own columnist, William Safire, provided the needed corrective to this dose of editorial see-no-evil later in the week with an op-ed that began with the cold-water assertion that, “[b]y taking over the mass media and seizing the political opposition’s source of funds, Vladimir Putin and his K.G.B. cohort have brought back one-party rule to Russia.”<sup>24</sup> Of the big-money-backed candidates, Safire wrote, “The money needed to organize parties and put up a campaign against an entrenched government came from an admittedly unsavory source: the rich oligarchs out to protect their ill-gotten fortunes from confiscation by the state.”<sup>25</sup> Safire corrected his editors’ opinion that the election was, on balance, a plus for democracy, and the implication that moneyed influences constituted a bigger threat to fair and democratic elections than did one-party rule.<sup>26</sup>

The second news story from that week concerned the Supreme Court’s landmark campaign finance reform decision in *McConnell* on December 10, three days after the Russian election. The *New York Times*’ editors hailed the Court’s upholding of the Bipartisan Campaign Finance Reform Act (BCRA) as “A Campaign Finance Triumph” that “closed two gaping loopholes in campaign finance law . . . [namely,] ‘soft money,’ the unlimited, and often very sizable contributions to political parties . . . [and] sham ‘issue ads’ . . . [that] purported to be about political issues but were actually intended to help particular candidates.”<sup>27</sup> The editors agreed with the Court that “Congress has broad authority in acting against the corrupting power

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to move towards European standards for democratic elections.” *Id.* (internal quotation marks omitted).

<sup>22</sup> Editorial, *Russians Inch Toward Democracy*, N.Y. TIMES, Dec. 8, 2003, at A28.

<sup>23</sup> *Id.*

<sup>24</sup> William Safire, *The Russian Reversion*, N.Y. TIMES, Dec. 10, 2003, at A31.

<sup>25</sup> *Id.*

<sup>26</sup> See *supra* notes 21–23 and accompanying text.

<sup>27</sup> Editorial, *A Campaign Finance Triumph*, N.Y. TIMES, Dec. 11, 2003, at A42.

of money in politics.”<sup>28</sup> Dismissing constitutional objections to reform, the editorial concluded, “Now that many of the constitutional objections have been stripped away, Congress has a greater obligation than ever to address what the court’s majority called ‘the ill effects of aggregated wealth on our political system.’”<sup>29</sup>

These two stories may be linked as follows: If one had to pick from American political history the classic use of the popular censorial power in the form of an insurgent political campaign, one could find no better example than Senator Eugene McCarthy’s 1968 campaign against President Lyndon Johnson. Yet, that campaign would not have been possible under subsequent campaign finance restrictions. When interviewed in 1991, Senator McCarthy said that,

[b]y putting a \$1,000 top limit on individual campaign contributions, with matching funds from the federal government, they made it harder for an insurgent candidate to make headway. In 1968 we had several contributors who gave us \$100,000 each. What I say is that there would have been no American Revolution if we’d been dependent on King George III for matching funds.<sup>30</sup>

Bringing things full circle for our purposes, Senator McCarthy concluded, “It’s getting worse, I think. It’s reached the point where it’s easier to start a new political trend, or thought, in Russia than in the US.”<sup>31</sup>

The Russian election and *McConnell* decision, and the *New York Times*’ editorial reaction to them, turn out to have quite a lot in common. Both manifest a preference for the reduction of big money influence in politics over a concern for free speech and other self-government interests. Both diminish liberty in the name of a dubious effort at promoting equality and combating corruption. They represent, in Dr. Johnson’s memorable phrase, “the triumph of hope over experience.”<sup>32</sup> And, just as Mr. Safire provided the necessary experiential corrective to his editors’ hope-blinded optimism about the Russian legislative election, I seek here to do the same concerning the widespread wishful thinking about campaign finance

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* (quoting *McConnell*, 540 U.S. at 224 (opinion of Stevens & O’Connor, JJ.)).

<sup>30</sup> John Lichfield, *Notebook: Square Pegs Aim for the Oval Office*, INDEPENDENT (London), Dec. 29, 1991, at 19.

<sup>31</sup> *Id.*

<sup>32</sup> 2 JAMES BOSWELL, BOSWELL’S LIFE OF JOHNSON 128 (George Birkbeck Hill ed., Oxford Univ. Press 1971 prtng. of 1934 ed.) (1791). I confess that I would have used this as my Article’s title had I not been scooped by another campaign finance reform critic. See James H. Warner, *The Triumph of Hope over Experience: The Bipartisan Campaign Reform Act of 2002 and the First Amendment*, 13 GEO. MASON U. CIV. RTS. L.J. 1 (2003).

reform. As Justice Holmes famously reminded us, preservation of our freedom of speech (as well as of our other freedoms) requires “eternal[] vigilan[ce].”<sup>33</sup> Such vigilance is not compatible with wishful thinking in the face of threats to our constitutional liberties.

#### THE CENTRAL MEANING OF THE FIRST AMENDMENT

Madison’s censorial power maxim, introducing this Article, arises again as we turn to American constitutional history in order to explore “the central meaning of the First Amendment.”<sup>34</sup> By “central meaning,” following Professor Kalven, I mean “a core of protection of speech without which democracy cannot function . . . [and] not the whole meaning of the Amendment.”<sup>35</sup> It accounts for what Edmond Cahn calls “the firstness of the First Amendment”<sup>36</sup> and it is a recurrent theme in the rhetoric of a diverse number of formative First Amendment documents and events (especially those involving the Sedition Act), as well as in such cases as *Abrams v. United States*<sup>37</sup> and *New York Times Co. v. Sullivan*.<sup>38</sup>

Truth be told, the censorial power of the people was in some doubt during the formative period of the Constitution and the question came to a head when the Adams administration brought about the enactment of the Sedition Act of 1798,<sup>39</sup> which criminalized the production of “any false, scandalous and malicious writing or writings against the government of the United States.”<sup>40</sup> Despite its lack of defenders today, numerous historians and commentators have judged the act to be constitutional.<sup>41</sup> At the time, even the great John Marshall spoke favorably of the act and its constitutionality.<sup>42</sup> But the act’s supporters have not prevailed.<sup>43</sup> Instead, the defense of the

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<sup>33</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>34</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

<sup>35</sup> Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment”*, 1964 SUP. CT. REV. 191, 208.

<sup>36</sup> Edmond Cahn, *The Firstness of the First Amendment*, 65 YALE L.J. 464, 481 (1956).

<sup>37</sup> 250 U.S. 616 (1919).

<sup>38</sup> 376 U.S. 254 (1964).

<sup>39</sup> Ch. 74, 1 Stat. 596 (expired 1801).

<sup>40</sup> *Id.*

<sup>41</sup> See Kalven, *supra* note 35, at 206 (collecting authorities).

<sup>42</sup> See John Marshall, *Report of the Minority on the Virginia Resolutions*, 6 J. HOUSE OF DELEGATES (VA.) 93–95 (1798–99), reprinted in 5 THE FOUNDERS’ CONSTITUTION 136–39 (Philip B. Kurland & Ralph Lerner eds., 1987).

<sup>43</sup> As Justice Brennan said, writing for the Court in *Sullivan*, “Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the



people's censorial power by Madison and other Republicans against the Sedition Act became the basis for our free speech traditions.

The Virginia Resolutions of 1798, for example, expressed worry that the Sedition Act claimed for the federal government "a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right."<sup>44</sup> In his report on the Virginia Resolutions, Madison reminded his colleagues that "the right of electing the members of government constitutes more particularly the essence of a free and responsible government. The value and efficacy of the right depends on . . . examining and discussing [the] merits and demerits of the candidates . . . ."<sup>45</sup>

The Sedition Act itself was never the subject of constitutional evaluation by the Supreme Court because it expired before it could be challenged, but the issue of its propriety and of Madison's notion of the people's censorial power has run through a number of important free speech cases, among them *Abrams v. United States*,<sup>46</sup> decided just after World War I. *Abrams* involved a conspiracy prosecution under the Espionage Act against five aliens who had made and distributed circulars opposing American intervention in Russia after the outbreak of the Russian revolution.<sup>47</sup> The Court upheld the convictions, but Justice Holmes dissented:

I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 . . . .<sup>48</sup>

Yet, despite the Virginia Resolutions and Justice Holmes' *Abrams* dissent, "until its disposition by the *Times* case, the status of the Sedition Act of 1798 remained an open question."<sup>49</sup> I turn now to that case in order to close the question.

On its face, *New York Times v. Sullivan* is a simple libel action over

day in the court of history." *Sullivan*, 376 U.S. at 276 (citation omitted).

<sup>44</sup> James Madison, *Report on the Virginia Resolutions* (1800), in 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 554 (Jonathan Elliot ed., Ayer Co. 1987 prtq. of 2d ed.) [hereinafter ELLIOT'S DEBATES].

<sup>45</sup> 4 *id.* at 575.

<sup>46</sup> 250 U.S. 616 (1919).

<sup>47</sup> See *Abrams*, 250 U.S. at 617–21.

<sup>48</sup> *Id.* at 630 (Holmes, J., dissenting).

<sup>49</sup> Kalven, *supra* note 35, at 206.

a newspaper advertisement that was critical of a public official, brought by the official against those who placed the advertisement and the newspaper that published it.<sup>50</sup> But, at base, the case raises the same fundamental constitutional questions about self-government and the censorial power that aroused Madison's ire in 1794. At the heart of this simple libel action, Justice Brennan keenly saw a threat to the very censorial power that had been imperiled shortly after the Founding by the Sedition Act and wisely framed his argument to address the renewed threat.

Justice Brennan introduced his discussion of the Act by stating, "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions."<sup>51</sup> Relating this notion to the case at hand, he famously wrote, "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."<sup>52</sup> After rehearsing some relevant history and precedent, the centerpiece of his opinion was the assertion in the Virginia Resolutions of 1798 that the censorial power was "the only effectual guardian of every other right."<sup>53</sup> These principles, Justice Brennan believed, compelled the conclusion "that the Act, because of the restraint it imposed upon the criticism of government and public officials, was inconsistent with the First Amendment."<sup>54</sup>

Applying the principles forged in the crucible of the Sedition Act controversy to the alleged libel in *Sullivan*, the Court announced, "What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."<sup>55</sup> The Court correctly went on to hold that the censorial privilege of the people thus recognized extended even to honest misstatement.<sup>56</sup>

Commentators quickly realized that *Sullivan* was a landmark opinion. Professor Kalven, for example, asserted in an influential article that "[t]he exciting possibilities in the Court's opinion derive

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<sup>50</sup> For a full statement of the facts of the case, see *New York Times Co. v. Sullivan*, 376 U.S. 254, 256–61 (1964).

<sup>51</sup> *Id.* at 269.

<sup>52</sup> *Id.* at 270.

<sup>53</sup> *Id.* at 273 (quoting Madison, in 4 ELLIOT'S DEBATES, *supra* note 44, at 554); see *supra* text accompanying note 44.

<sup>54</sup> *Id.* at 276.

<sup>55</sup> *Id.* at 277.

<sup>56</sup> See *id.* at 278.

from its emphasis on seditious libel and the Sedition Act of 1798 as the key to the meaning of the First Amendment.<sup>57</sup> The significance of the holding was not merely the resolution of a long-standing question of legal history,<sup>58</sup> but more importantly the specification by the Supreme Court, at long last, of the core meaning and purpose of the First Amendment. Professor Kalven encapsulated that meaning when he commented that “[t]he touchstone of the First Amendment has become the abolition of seditious libel and what that implies about the function of free speech on public issues in American democracy.”<sup>59</sup> And what are these implications? Kalven answers this question, I believe, when he says, “[T]he opinion almost literally incorporated Alexander Meiklejohn’s thesis that in a democracy the citizen as ruler is our most important public official.”<sup>60</sup>

Professor Kalven’s assertion was confirmed the following year when Justice Brennan gave the Alexander Meiklejohn Lecture at Brown University.<sup>61</sup> In that lecture, Brennan summarized the kernel of Meiklejohn’s teaching on the First Amendment: “The first amendment, in his view, is the repository of those self-governing powers that, because they are exclusively reserved to the people, are by force of that amendment immune from regulation by the agencies, federal and state, that are established as the people’s servants.”<sup>62</sup> Justice Brennan believed Meiklejohn would agree that “[f]reedom of expression in areas of public affairs is an absolute.”<sup>63</sup> Justice Brennan then proceeded to lay out some of the principles Meiklejohn had derived from this position. Of those principles, the most relevant to our concerns is the principle whereby “[t]he revolutionary intent of the First Amendment is, then, to deny to all subordinate agencies authority to abridge the freedom of the electoral power of the people.”<sup>64</sup> In this, Meiklejohn’s position tracks that of Madison and the Virginia Resolutions of 1798.<sup>65</sup> Unfortunately, as we will see later, Meiklejohn’s position goes beyond this Madisonian core to also embrace some managerial views of self-

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<sup>57</sup> Kalven, *supra* note 35, at 204.

<sup>58</sup> As Kalven puts it, “until its disposition by the *Times* case, the status of the Sedition Act of 1798 remained an open question.” *Id.* at 206.

<sup>59</sup> *Id.* at 209.

<sup>60</sup> *Id.*

<sup>61</sup> William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

<sup>62</sup> *Id.* at 11–12.

<sup>63</sup> *Id.* at 12.

<sup>64</sup> *Id.* at 13 (quoting Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 254).

<sup>65</sup> See *supra* notes 1, 16, 44, 45, 53 and accompanying text.

government that have relevance to the campaign finance debate.<sup>66</sup>

It is not very difficult to apply this view of the “the central meaning of the First Amendment” to campaign finance reform. Nor does it want for expositors. Many of the features of such a conception have already been noted elsewhere in Supreme Court opinions and law review articles. I have merely collected them, the better to contemplate what one might call “campaign finance reform according to *New York Times v. Sullivan*.” What follows is a sketch of some of the main points of this notion.

In an approach to campaign finance reform that highly values the people’s censorial power and views it as the central meaning of the First Amendment, all aspects of campaign finance would be presumptively strongly protected activity. While their constitutional protection might not be absolute,<sup>67</sup> government restrictions on campaign finance activity would be strictly scrutinized.<sup>68</sup> Although these precise terms were not used in *Sullivan* because they had not yet passed into common parlance, this was essentially the standard used by the Court when it held that defamation rules relating to criticism of public officials must meet an “actual malice” standard.<sup>69</sup>

Exceptions to this standard would likewise be strictly scrutinized, lest they improperly discriminate based on content or viewpoint. No individual or entity, rich or poor, private party or PAC, would be prohibited from engaging in campaign finance activity unless the regulations failed the actual malice test. This stringency would apply to dollar limits as well as to outright bans on various campaign finance activities, since both would constitute infringements of constitutionally protected activity. Because of the level of scrutiny

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<sup>66</sup> For example, Justice Brennan says that “Dr. Meiklejohn’s view did not mean that the agencies of government had no role and that the first amendment protected a freedom to speak at any time and place.” Brennan, *supra* note 61, at 13. For an excellent exposition of these aspects of Meiklejohn’s view of free expression, see generally Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993).

<sup>67</sup> Meiklejohn might have insisted to the contrary. See Meiklejohn, *supra* note 64.

<sup>68</sup> Thus, the government would bear the burden of showing that such regulations served a compelling interest in the least restrictive manner possible.

<sup>69</sup> The Court described the “actual malice” standard as follows:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

*Sullivan*, 376 U.S. at 279–80.

applied, no deference would be given to Congressional findings because such deference would be inappropriate in a strict scrutiny setting. For the same reason, with respect to the evil being fought, a *quid pro quo* definition of corruption would be required since anything short of that would not be the least restrictive means of pursuing a compelling governmental interest, for only a *quid pro quo* definition of corruption would meet the “actual corruption” standard this view would require analogously to *Sullivan’s* “actual malice” standard. Anything broader than that would not be narrowly enough tailored.

One consequence of this approach to campaign finance restrictions would be that merely avoiding the appearance of corruption would not be a sufficiently weighty interest to justify limitation of protected campaign finance activity. Such appearance is often in the eye of the beholder and deprivation of constitutional rights ought to be based on objective fact rather than subjective, perhaps biased, perception. And even if objectivity were attainable (for example, through a reasonable person standard), there would remain an intractable problem with the least-restrictive-means prong of the test since an appearance-based standard would effectively disable the protection normally offered by this requirement. Because strict scrutiny would be applied to campaign finance regulations, the government would also have to show that the measures imposed were the least restrictive alternatives with respect to impinging upon the protected activity. As a result, in order to justify bans, limits, and disclosure requirements, the government would have to demonstrate why non-suppressive alternatives such as subsidies, vouchers, and free airtime would not work to achieve legislative aims. For absent demonstration that non-suppressive alternatives do not work, there can be no showing, as strict scrutiny requires, that alternatives which suppress speech are truly necessary to achieve government’s compelling anticorruption rationale in campaign finance regulation.

One significant result of an approach like that sketched above would likely be the realization of just how far the Court’s decisions increasingly depart from “the central meaning of the First Amendment.” I will now put this notion to use by comparing it first to the earliest and most censorial, power-friendly modern campaign finance reform decision, *Buckley v. Valeo*,<sup>70</sup> and then to later campaign finance reform cases, culminating in *McConnell*.

In *Buckley*, the Supreme Court upheld the constitutionality of the

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<sup>70</sup> 424 U.S. 1 (1976).

Federal Election Campaign Act of 1971.<sup>71</sup> The Court's *Buckley* opinion is clearly of two minds about the *Sullivan* conception of the central meaning of the First Amendment, juxtaposing as it does echoes of *Sullivan*'s stirring rhetoric with statements that are flatly at odds with the Madisonian tradition in *Sullivan*. This is because *Buckley*, at its core, is a compromise decision, founded upon a basic distinction between the constitutional protection afforded to campaign expenditures on the one hand, and to campaign contributions on the other. The *Buckley* Court expressed great concern about the free expression consequences of the campaign expenditure limits there in question:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. . . .

The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. . . .<sup>72</sup>

Only a page or so later, the Court expresses much less constitutional concern over contribution limitations: "By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication."<sup>73</sup>

That the Court's crabbed view of the constitutional protection for campaign contributions is inconsistent with the robust *Sullivan* conception of free expression rights is clear when contrasted with an assertion by Ralph Winter, co-counsel for the plaintiff in *Buckley*, that "[a] limit on the amount an individual may contribute to a political campaign is a limit on the amount of political activity in which he may engage."<sup>74</sup> The *Buckley* Court countenances what the *Sullivan*

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<sup>71</sup> Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C.A. §§ 431-42 (West 2005)).

<sup>72</sup> *Buckley*, 424 U.S. at 19.

<sup>73</sup> *Id.* at 20.

<sup>74</sup> Ralph K. Winter, Jr., *Money, Politics and the First Amendment*, in CAMPAIGN FINANCES: TWO VIEWS OF THE POLITICAL AND CONSTITUTIONAL IMPLICATIONS 45, 60 (2d prtg. 1972). This statement closely tracks the Court's view of campaign expenditures

Court rejects—the existence of different grades of political activity and different modes of criticism of public officials (and corresponding differences in the degree of protection for these activities). So, the *Buckley* Court overruled the appellate court’s classification of contributions and expenditures as conduct rather than speech only in the case of expenditures.<sup>75</sup> For the Court, this difference turned on the requisite level of constitutional scrutiny.<sup>76</sup> Lesser scrutiny will necessarily be accompanied by greater deference to Congress because, by definition, it is less searching than strict scrutiny.

In contrast to the several distinctions propounded by the Court as a consequence of its constitutional analysis, the *Buckley* Court saw one main anticorruption purpose behind both the Act in question and its holdings. In discussing contribution limits, for example, the Court said, “It is unnecessary to look beyond the Act’s primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation.”<sup>77</sup> Yet, in an important sense, the anticorruption purpose has two parts: the prevention of *quid pro quo* bribery<sup>78</sup> and avoiding “the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”<sup>79</sup> The first involves actual corruption, the second only the suspicion thereof.

#### CORRUPTION, EQUALITY, AND CAMPAIGN FINANCE REFORM

Because it was an inconsistent, compromise decision, *Buckley* was subject to strong and contrary pressures. Over time, these pressures have not proven to be of equal force, and the Court has been pushed ever farther from a *Sullivan* approach to campaign finance reform, as most recently demonstrated in *McConnell*. This trend increasingly imperils constitutional self-rule and the people’s censorial power.

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rather than of contributions. See *supra* note 72 and accompanying text.

<sup>75</sup> “We cannot share the view that the present Act’s contribution and expenditure limitations are comparable with the restrictions on conduct upheld in *O’Brien*. The expenditure of money simply cannot be equated with such conduct as destruction of a draft card.” *Buckley*, 424 U.S. at 16.

<sup>76</sup> “Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.” *Id.*

<sup>77</sup> *Id.* at 26.

<sup>78</sup> See *id.* at 26–27.

<sup>79</sup> *Id.* at 27.

The reason why this is so, however, is not readily apparent from the Court's opinions themselves because *Buckley* has not been overruled. The Court continues to use the same terminology, recognizing corruption as the primary evil to be combated by campaign finance reform. But beneath the surface, a tectonic shift is occurring as the Court departs more and more from "the central meaning of the First Amendment" and adopts a more egalitarian, collectivist, and managerial view of the subject. The shift here is from a libertarian view of the First Amendment rights involved to a more egalitarian view.<sup>80</sup> A second difference between these two approaches is that the libertarian view is individualistic, focusing on personal liberty, while the egalitarian view looks more at "the people, as a collectivity."<sup>81</sup> As a result, substantial functional change in the constitutional standards governing campaign finance reform has come about even while the rules themselves have remained nominally the same. And now with the passage of the BCRA, the statute in question in *McConnell*, the underlying statutory rules have changed too.

I will not here attempt a comprehensive analysis and critique of *McConnell*, but rather will examine *McConnell's* departure from "the central meaning of the First Amendment" and the harm that flows from that departure by focusing on the elusive, but central concept of corruption. For this one concept circumscribes all the main difficulties with the now dominant constitutional forces in this area. The debate and disagreement over this important notion is spread both vertically, over the course of campaign finance decisions over the years, and horizontally, within the conflicting opinions and definitions offered by the justices in individual cases like *McConnell*.<sup>82</sup>

We have already seen that *Buckley* itself offered twin definitions of corruption as *quid pro quo* bribery<sup>83</sup> and as an undesirable

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<sup>80</sup> Edward B. Foley describes the contrast between the two approaches as follows: "The egalitarian vision wants limits on the amount of money spent on election campaigns in an effort to equalize the financial influence of all voters in the electoral process. The libertarian vision opposes such limits on the ground that they would interfere with the freedom of voters to use their own money to publicize their political views." Edward B. Foley, *Philosophy, the Constitution, and Campaign Finance*, 10 STAN. L. & POL'Y REV. 23, 23 (1998).

<sup>81</sup> Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1520 (1997) (reviewing OWEN FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996)).

<sup>82</sup> For a good, brief discussion of the concept of corruption and its important role in the campaign finance debate, see David A. Strauss, *What Is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 142-49.

<sup>83</sup> See *supra* note 78 and accompanying text.



appearance inhering in large contributions.<sup>84</sup> Both notions were developed in subsequent cases. In *Federal Election Commission v. National Conservative Political Action Committee*,<sup>85</sup> for example, the Court struck down a presidential election spending limit because it lacked an adequate anticorruption basis. This was a result of the Court employing the narrower of the two *Buckley* corruption definitions.<sup>86</sup> If the Court had adopted the more expansive view, large contributions might well have been found to create the appearance of (in the sense of a potential for) corruption.

A much broader view was taken a few years later in *Austin v. Michigan Chamber of Commerce*,<sup>87</sup> a case concerning corporate campaign expenditures. Setting to one side the *quid pro quo* conception of corruption, the Court said, “Michigan’s regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>88</sup> A later case, *Nixon v. Shrink Missouri Government PAC*,<sup>89</sup> involving a state election contribution limit, defined corruption even more expansively to include “the broader threat from politicians too compliant with the wishes of large contributors.”<sup>90</sup>

Corruption was also an important focus of the BCRA. After starting with a reaffirmation of the money–corruption linkage,<sup>91</sup> the Court proceeded to expand the already broad notion of corruption. For example, to the notions of bribery, appearance of impropriety, corrosive effect, and excessive compliance, the Court now added the dangers of privileged access to candidates and officeholders,<sup>92</sup> and

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<sup>84</sup> See *supra* note 79 and accompanying text.

<sup>85</sup> 470 U.S. 480 (1985).

<sup>86</sup> “The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.” *Id.* at 497.

<sup>87</sup> 494 U.S. 652 (1990).

<sup>88</sup> *Id.* at 659–60.

<sup>89</sup> 528 U.S. 377 (2000).

<sup>90</sup> *Id.* at 389. This passage was cited with approval in *McConnell*. *McConnell*, 540 U.S. at 143 (opinion of Stevens & O’Connor, JJ.).

<sup>91</sup> “We all know that money is the chief source of corruption.” *McConnell*, 540 U.S. at 116 n.2 (opinion of Stevens & O’Connor, JJ.).

<sup>92</sup> The Court noted that the Senate Committee on Governmental Affairs “concluded that both parties promised and provided special access to candidates and senior Government officials in exchange for large soft-money contributions.” *Id.* at 130 (opinion of Stevens & O’Connor, JJ.).

erosion of public confidence in the process.<sup>93</sup> So low, apparently, is the level of scrutiny being applied to the provisions under review that even potential appearances<sup>94</sup> and small likelihoods of occurrence<sup>95</sup> are adequate to justify campaign finance restrictions.

This broad definition of corruption combined with a reduced level of scrutiny creates a dangerous double deference<sup>96</sup> in which the evil to be demonstrated is so subjective and amorphous, and the level of proof so low that mere assertion (at least by Congressional experts) of the evil is tantamount to proof of the evil. Add to that the irony of what might be called the new liar's paradox in which the politician is trusted only to vouch for his own corruption. This irony seems a slim reed on which to build the edifice of a constitutional campaign finance law.

And so it is, for the ever expanding notion of corruption not only drives the law, but is in turn itself driven by an egalitarian participatory view of the values at issue here. For although *Buckley* famously denied the relevance of equality interests in this context,<sup>97</sup>

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<sup>93</sup> The Court wrote:

Our treatment of contribution restrictions reflects more than the limited burden they impose on First Amendment freedoms. It also reflects the importance of the interests that underlie contribution limits—interests in preventing “both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.”

*Id.* at 136 (opinion of Stevens & O'Connor, JJ.) (quoting Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 208 (1982)).

<sup>94</sup> “Take away Congress’ authority to regulate the appearance of undue influence and ‘the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.’” *Id.* at 144 (opinion of Stevens & O'Connor, JJ.) (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000)).

<sup>95</sup> “Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation.” *Id.* at 153 (opinion of Stevens & O'Connor, JJ.).

<sup>96</sup> I take the phrase “double deference” from Richard Epstein, who uses it in a different sense. See Richard A. Epstein, *McConnell v. Federal Election Commission: A Deadly Dose of Double Deference*, 3 ELECTION L.J. 231, 233 (2004) (observing that the first round of deference involves the “question of what it is that legislators . . . should do in the first place” while the second round of deference “arises in part because of the Supreme Court itself, which, in its relaxation of the protection of property rights and economic liberties, has created an unnecessary increase in the opportunities for politicians to trade on their office”).

<sup>97</sup> “But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the

the more recent, broader concerns of the Court with access, influence, and large contributions arise out of a fear of the inequality they represent or threaten.<sup>98</sup> The doctrinal and textual source of the goal of equality in campaign finance is the Equal Protection Clause,<sup>99</sup> rather than the First Amendment, or it is at least an egalitarian reading of the First Amendment.<sup>100</sup> Most famously, the relation of equal protection to the electoral process appears in the “one person, one vote” standard of *Reynolds v. Sims*.<sup>101</sup> All that the equal protection view of campaign finance reform seems to require is the small step of expanding “one person, one vote” from the act of voting itself to the whole electoral process, thus equalizing voters’ ability to influence election results indirectly by equalizing their ability to engage in electoral expression as well as their ability to influence results directly by casting their votes. This would entail using weaker First Amendment standards for electoral expression than would apply to all other forms of protected speech. Advocates of this approach embrace this step under the title of “electoral exceptionalism.”<sup>102</sup>

But electoral exceptionalism would be a step too far. It would distort the constitutional concepts it now informs, would fail in its leveling purpose, and worst of all, would threaten popular self-government and the censorial power. One example of this distortion is manifested in the Court’s stretching of the notion of corruption beyond all recognition.<sup>103</sup> An egalitarian reform of campaign finance would fail for two reasons. First, as the *McConnell* Court itself admits, there is no reason to expect “that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet.”<sup>104</sup> Second, even if all the leaks could be plugged, an egalitarian campaign finance utopia would not result. Removal of big money from the process would only further enhance the not wholly benign influences of incumbents, celebrities, those with access to

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First Amendment . . . .” *Buckley*, 424 U.S. at 48–49.

<sup>98</sup> For more on the relation of corruption and inequality, see generally Strauss, *supra* note 82, at 142–49.

<sup>99</sup> “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

<sup>100</sup> See generally Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

<sup>101</sup> 377 U.S. 533 (1964). For a discussion linking *Reynolds* to the campaign finance context, see generally Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470, 2474–76 (1997).

<sup>102</sup> See, e.g., Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999).

<sup>103</sup> See *supra* text accompanying notes 77–96.

<sup>104</sup> *McConnell*, 540 U.S. at 224 (opinion of Stevens & O’Connor, JJ.).

volunteer labor, and the media, rather than equalize the voices of voters of all income levels. Above all, though, the egalitarian drift of Court and commentators would imperil self-rule and the censorial power by, in Meiklejohn's words, giving "subordinate agencies authority to abridge the freedom of the electoral power of the people."<sup>105</sup>

The egalitarian view of the First Amendment has not yet had its Justice Brennan or its *New York Times v. Sullivan*. And if what has been argued here is persuasive, it never should. For the allure of the egalitarian, managerial, and collectivist approach to electoral expression and campaign finance regulation is completely undercut by its incompatibility with the censorial power of the people and the central meaning of the First Amendment. The error of this theory is, in fact, identical to that of the *New York Times* editorial writers in celebrating the electoral victory in December 2003 of parties supporting President Vladimir Putin over those supported by the rich oligarchs.<sup>106</sup> Both views focus on and seek the limitation of private moneyed power in elections while completely overlooking, if not actually welcoming, the greater danger created by the governmental suppression of liberty, especially freedom of speech, needed to curb that private power.

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<sup>105</sup> Meiklejohn, *supra* note 64, at 254.

<sup>106</sup> See *supra* text accompanying notes 20–26.