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Joel Gora

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BUCKLEY V. VALEO: A LANDMARK OF POLITICAL FREEDOM

by

Joel M. Gora*

It is appropriate for an article about the Supreme Court's *Buckley* opinion to appear in a law review in the Buckeye State. In terms of poll rankings, the Buckeye football team finished last season ranked number two in the polls,¹ which was much better than the *Buckley* decision, which many academics have put on their list of the ten worst decisions of this century.² While the football pollsters were right in ranking the Buckeyes so highly, the academic pundits are dead wrong in rating the *Buckley* decision so poorly. The *Buckley* decision, far from being a derelict ruling or a jurisprudential outcast, is a landmark of political freedom, a

*Professor of Law, Brooklyn Law School. Staff Counsel and Associate Legal Director, American Civil Liberties Union, 1969-1978. Co-counsel for the plaintiffs in *Buckley v. Valeo*, 424 U.S. 1 (1976). I would like to express my appreciation for a Brooklyn Law School Summer Research Stipend grant for my work on this article.

¹Joe Drape, *Mission Accomplished, If Sloppily, by the B.C.S.*, N. Y. TIMES, Jan. 6, 1999, at D6.

²Cass R. Sunstein, *Exchange; Speech in the Welfare State: Free Speech Now*, 59 U. CHI. L. REV. 255, 291 (1992); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986). At best, *Buckley* gets compared with and criticized like the "discredited" *Lochner* doctrine which gave broad judicial protection to economic rights against police power regulation. *Lochner v. New York*, 198 U.S. 45 (1905). Worse still, some compare *Buckley* to the Court's disastrous decision upholding the "separate but equal" doctrine in race relations. *Plessy v. Ferguson*, 163 U.S. 537 (1896). Worst of all, some commentators have even compared *Buckley* to the Court's tragic ruling in the infamous Dred Scott case (*Dred Scott v. Sanford*, 19 How. 393 (1857) which essentially upheld slavery and all but guaranteed the inevitability of the Civil War. Scott Turow, *The High Court's 20-Year-Old Mistake*, N. Y. TIMES, Oct. 12, 1997, Section 4, p. 15. The *Buckley* decision, however, is not without its prominent academic defenders, many of whom feel that the Court's decision was basically sound, so far as it went, but that the Court should have been more rigorous in its scrutiny of the way in which limits on campaign funding limit political speech and association. Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258 (1994); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663 (1997); Bradley Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1056 (1996); It also has strong defenders among nationally well-know First Amendment litigators. Floyd Abrams, *Look Who's Trashing the First Amendment*, COLUM. JOURNALISM REV., November/December (1997).

ruling which carefully and conscientiously addressed the critical issues of campaign finance controls and free speech rights which still bedevil the nation today. Though not without considerable flaws, the decision stands as a beacon illuminating the view of First Amendment freedoms and political liberty that has informed Supreme Court jurisprudence for the second half of this century. Compared to the limits-driven repressive regime of government command and control of the political process embodied in the Federal Election Campaign Act, the vision of the *Buckley* opinion seeks to put as much control of the funding of the political process as possible in the hands of the people, not the government.

A. *The core of the First Amendment*

Because of the efforts to demonize the *Buckley* ruling and the repeated rhetoric about how our campaign finance system is corrupting the country and undermining democracy, it is important to remember that campaign finance laws operate in an area of the most fundamental First Amendment concern: they regulate and restrain speech about government and politics. In a ruling just four years ago, in a case arising in Ohio and involving regulation of campaign literature, the Court reminded us of the dangers when government attempts to regulate and control political speech, which, "as we have explained on many prior occasions . . . occupies the core of the protection afforded by the First Amendment . . ."³ Quoting at length and with approval from *Buckley*, the Court explained why this is so:

Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484(1957). Although First Amendment protections are not confined to "the exposition of ideas," *Winters v. New York*, 333 U.S. 507 (1948), "there is practically universal agreement" that a major purpose of that Amendment was to protect

³*McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 346 (1995).

the free discussion of governmental affairs, . . . of course including discussions of candidates" *Mills v. Alabama*, 384 U.S. 214, 218 (1966). This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."⁴

That is why, the Court concluded, as it had in cases from *Buckley* on, that laws regulating and burdening "core political speech" like a campaign leaflet or the funding of political speech must be subject to the most "exacting scrutiny."⁵

⁴*Id.* at 346-347 (quoting *Buckley v. Valeo*, 424 U.S. at 14-15 (1976)).

⁵*McIntyre*, 514 U.S. at 380 (Scalia, J., dissent) and cases cited therein. In a way, the Court's elegant constitutional language reflected its appreciation of an axiom of politics occasionally expressed somewhat less elegantly: "Money is the Mother's Milk of Politics." Actually, my own first encounter with campaign finance issues came in 1962 - well before my involvement in the *Buckley* case - as a college summer intern with the Democratic State Central Committee in my native Los Angeles, when I worked for the man who is widely-credited with having coined that phrase. He was a well-known California politician named Jesse Unruh, who at the time was the powerful Democratic Speaker of the California State Assembly. William Safire, *Clone, Clone, Clone, Clone*, N. Y. TIMES, April 6, 1997, Sec. 6, p. 18. He was a prodigious fund-raiser and pioneered what we now call "Leadership PACs." By centralizing fund-raising for Democratic members of the State legislature, he was able to keep party cohesion which was instrumental in the passage of numerous prominent, progressive pieces of legislation, many of which bore his name. He helped the liberal Governor Edmond G. "Pat" Brown gain an upset victory over former Vice-President Richard M. Nixon in the 1962 gubernatorial race. As Curtis Gans frequently points out, much of the most important progressive legislation of the 20th century was passed during a time when politicians raised funds in a largely unregulated manner such as that. 143 Cong.

B. The initial victims of campaign finance reform

Even before *Buckley*, the civil liberties community and the courts began to encounter the difficulty of reconciling campaign finance controls with First Amendment rights. The first significant case arose when three old-time dissenters came into the offices of the ACLU in the Spring of 1972, with what seemed an incredible story. In late May of that year, they had sponsored a two-page ad in *The New York Times* advocating the impeachment of President Richard Nixon for bombing Cambodia and praising the handful of Members of Congress who had voted against the bombing. The United States Justice Department hauled the group into federal court, demanded to know how they were organized and who had paid for the ad, threatened the group with injunctions for what they had done and told them they could not engage in further political speech of that nature unless they filed reports and disclosures with the government and otherwise complied with a wide variety of rules and regulations.⁶ This was all for sponsoring an advertisement publicly criticizing the President of the United States.

Such a consequence seemed particularly paradoxical because this was a time when First Amendment case law had developed its most rigorous protection of citizen criticism of government officials and policies.⁷ How, in the face of that

Rec. S. 10103, 10135 (1997).

My intern's job, however, was to organize the more grass-roots-oriented door-to-door "Dollars for Democrats" campaign, which made me appreciate, even back then, that it is easier to raise campaign funds in large chunks than in small bites of one dollar at a time.

⁶ *United States v. Nat'l. Comm. for Impeachment*, 469 F.2d 1135 (2d Cir. 1972); *see generally*, Federal Election Campaign Act of 1971, 2 U.S.C. Section 431, *et seq.*

⁷*See, e.g.* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding protection of subversive or revolutionary advocacy of force and violence short of imminent and likely incitement thereof); *New York Times Co. v. United States*, 403 U.S. 713 (1971); (finding protection against prior restraint of "The Pentagon Papers" since government had not met its "heavy burden of justification" for such a restriction of public discussion); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (granting press broad immunity to comment about politicians without fear of libel suits, in recognition of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."); *Mills v. Alabama*, 384 U.S. 214 (1966) (finding "no test of reasonableness" can save a statute that makes it a crime for a newspaper to editorially endorse a political candidate on Election Day.); *Cohen v. California*, 403 U.S. 15 (1971) (holding protection of even the most vulgar form of language used in public in a political setting).

law, could the Government file a lawsuit to suppress that very same citizen criticism of government?

The answer, of course, was campaign finance reform. The government was suing under the brand new Federal Election Campaign Act of 1971.⁸ The government's theory was that the two-page ad - even though it spoke solely about issues - mentioned, criticized or praised people who were candidates for election that year and that this might affect public opinion, which, in turn, might somehow influence the outcome of the federal elections that year. Accordingly, this rendered this ad hoc group a "political committee," which had to file reports with the government and disclose their contributors and supporters, and, if they failed to do so, they would be enjoined from further political speech until they complied.

In addition, to the extent that the advertisement could be interpreted as "on behalf of" those political figures who were praised and/or "in derogation of" those officials who were criticized, not only did such content render the group a regulatable political committee, but the Act and implementing regulations imposed new controls on the placement of such messages in the news media. The rationale of the provision was to enforce a new statutory ceiling on communication media expenditures by federal candidates. But the effect of the rules was that newspapers, magazines, electronic broadcasters and virtually any other medium of mass communication could not even accept for publication such independent citizen political communication unless proper certifications had been provided by the candidates who benefitted from the message - either because they were praised or because their opponents were criticized. For any news medium to run such advertisements without such proper certification - which as a practical matter would be impossible to obtain - would constitute a criminal offense by the news medium. A harsher example of a system of prior restraint could hardly be imagined.⁹

In one sense, though, the government was right. Speech like that might influence people's opinion about Members of Congress, about incumbent

⁸The Federal Election Campaign Act of 1971, 2 U.S.C. § 431, et. seq. Most of the more sweeping provisions that would be at issue in *Buckley* were passed three years later as the Federal Election Campaign Act Amendments of 1974.

⁹ *United States v. Nat'l Comm. for Impeachment*, 469 F.2d. at 1142. That separate provision, operating directly on the press, but restraining both the press and the independent speakers, was directly challenged and found facially unconstitutional in *American Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973) (three-judge court); *vacated as moot*, sub. nom. *Staats v. American Civil Liberties Union*, 422 U.S. 1030 (1975). The New York Times supported the ACLU in that challenge to the media certification provision.

politicians, about the President of the United States, and that, in turn, might influence their vote at the polls and, ultimately, the outcome of the election. And if one is serious about regulating the sources of campaign funding, then those "issue ads" cannot be allowed to slip by. The anti-Nixon, impeachment advertisement cost \$18,000. Adjusted for inflation, that would be about \$50,000 today. That is serious money. So if we are to be serious about controlling political funding, and limiting those who do "too much" of it, or "leveling the playing field," or guarding against people using money to "buy access and influence," then we better be prepared to face the prospect of going after people like the ad hoc impeachment group with injunctions and fines and maybe even criminal penalties for pooling their resources and speaking out on the public issues of the day and the public officials involved in those issues.

And if all that has a familiar ring to it, and sounds, in the words of that great modern philosopher, Yogi Berra, "like *deja vu* all over again," it is because legislative proposals on the front burner today - most notably the McCain-Feingold bill in the United States Senate, and the Shays-Meehan bill which passed the House during the summer of 1998 - would achieve virtually the same kinds of controls on political speech that were at issue and rejected twenty-five years ago in the impeachment ad case.¹⁰

¹⁰The most recent version of the McCain-Feingold bill is § 26, The Bipartisan Campaign Reform Act of 1999. See 145 Cong. Rec. § 396 (January 19, 1999). To give some flavor of how sweeping the multiple page bill is, here are excerpts from a press release issued from Senator McCain's office on the day the bill was introduced and describing key features of the bill. With regard to "soft money":

The central component of McCain-Feingold, this provision would prohibit all soft money contributions to the national political parties from corporations, labor unions and wealthy individuals. In addition, state parties that are permitted under state law to accept these unregulated contributions would be prohibited from spending them on activities relating to federal elections such as voter registration within 120 days of a federal election, get out the vote campaigns, and campaign advertising that mentions a federal candidate. In addition, federal candidates would be prohibited from raising soft money in connection with a federal election. The bill also prohibits the parties from raising money for or transferring money to tax-exempt organizations.

Id.

With regard to "issue advocacy:"

The Snowe-Jeffords amendment, adopted as part of McCain-Feingold during the Senate's February 1998 campaign finance debate, address the

That impeachment advertisement case was a wake-up call to the ferocious First Amendment problems that campaign finance laws could pose. Now, 25 years later, the issues of money, politics, free speech, and, indeed, democracy itself, remain very much the same.

But that is getting a little bit ahead of the story.

In the impeachment ad case, in 1972, the court ruled that campaign finance laws could not be used against non-partisan, issue-oriented groups engaged in public commentary about the political issues of the day and the public officials involved in those issues. Another prominent court came to a similar conclusion one year later and invalidated the application of the relevant provisions of the Federal

explosion of thinly-veiled campaign advertising funded by corporate and union treasuries. These ads skirt federal election law by avoiding the use of direct entreaties to "vote for" or "vote against" a particular candidate. The amendment defines a new category of 'electioneering communications' that refer to a clearly identified candidate or candidates; appear within 30 days of a primary or 60 days of a general election; and are broadcast on TV (including cable or satellite) or radio to the candidate's electorate. This definition would NOT include any printed communication, direct mail, voter guides, or the Internet. The amendment prohibits unions and for-profit corporations from directly or indirectly making electioneering communications using treasury funds. Only voluntarily contributed PAC money could be used for these types of communications. The amendment permits 501(c)(4) non-profit corporations to make electioneering communications as long [as] they use only individual contributions (not corporate or union funds) and make certain disclosures. The amendment prevents unions or corporations from laundering funds through non-profits to make electioneering communications. The amendment provides for disclosure by groups making electioneering communications that total \$10,000 or more in an election cycle. The group must disclose its identity, the cost of the communication, and the names and addresses of all contributors of \$500 or more to the sponsor of the communication within the cycle....The amendment makes clear that electioneering communications that are coordinated with a federal candidate or a political party committee are contributions to that candidate or party committee.

Id.

Although the bill exempts print media messages, it otherwise would reach precisely the kind of message contained in the impeachment ad case.

Election Campaign Act to groups like the ACLU whose "major purpose" was the discussion of public issues, not the election of political candidates.¹¹

C. Campaign Finance Reform Run Riot

Within a year, we had Watergate revelations of campaign funding excesses, and even though much of that occurred before effective disclosure went into effect, Congress was stampeded into enacting the sweeping 1974 restrictions on political activity that would give rise to the constitutional challenge in *Buckley v. Valeo*. In an atmosphere filled with the same kind of rhetoric that we hear today about how money is corrupting politics and destroying democracy, Congress passed a law that was the archetype of government control of political funding and therefore of political speech, association and communication. And that meant government control, ultimately, of democracy itself, because, as the Supreme Court has told us time and again, freedom of political speech is the engine of democracy: "speech concerning public affairs is more than self-expression; it is the essence of self-government."¹²

That law¹³ severely restricted candidates, campaigns, contributors, independent political groups, and even non-partisan issue groups like the ACLU, who had just been assured by the courts that their advocacy would be free of official restraint. And enforcement of those new restrictions was placed in the hands of a commission completely dominated and controlled by the House and Senate - a cynical breach of traditional separation of powers principles that the *Buckley* Court would soon declare invalid.¹⁴

¹¹ *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135 (1972); *American Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D. D. C. 1973) The validity of the "major purpose" test, as a constitutionally-required or statutorily-based limiting gloss on the applicability of the federal election campaign laws to non-partisan groups was before the Court more recently in *FEC v. Akins*, 524 U.S. 11 (1998), but the Court did not reach or decide the issue.

¹² *Garrison v. Louisiana*, 379 U. S. 64, 74-75 (1964).

¹³ That law, the Federal Election of 1971, Public Law 92-255, 2 U.S.C. §§ 431, *et. seq.* [hereinafter '71 Act], was amended by the Federal Election Campaign Act Amendments of 1974, PUB. L. NO. 93-443; *supra* note 8.

¹⁴ Indeed, the portion of *Buckley* which unanimously invalidated the manner in which members of the Federal Election Commission were appointed because of the substantial powers they were given set the tone for two decades of Supreme Court rulings finding that various corner-cutting government mechanisms that Congress had established in ways that departed from the specific design of the Constitution's separation and balance of powers were unconstitutional. *Buckley v. Valeo*, 424 U.S. 1, 143 (1976); *see also* Northern

(1) The Act severely restricted a candidate's overall campaign expenditures, even if the funding all came from small contributions. Even many *Buckley* critics might concede that the spending limits in the Act were unconscionably low and incumbent-protective.¹⁵ The spending limit for House races was \$70,000, an extremely low figure even by 1974 standards, and an amount less than the amount that each House members spent on the average on the free mail frank and constituent services.

(2) The Act severely limited the amount of money candidates could contribute to their own campaigns, even though candidates could not possibly corrupt themselves. Had they used their money to run for the White House, Ross Perot and Steve Forbes would have wound up in the Big House.

(3) Perhaps even worse, independent speakers were all but completely silenced by the new law which placed a ceiling of \$1,000 on how much any person could spend on what we now call "independent expenditures." That was about the cost of a one-quarter page ad in *The New York Times*, criticizing or praising the President of the United States. Spend a dime more on political speech and your free speech would become a felony. What a breathtaking and extraordinary restriction. This unprecedented provision was justified as a "loophole-closing device" which would prevent political supporters who could no longer make large contributions directly to candidates from making large independent expenditures instead. Of course, the loophole being closed was essentially the First Amendment itself and its guarantee of no Congressional abridgements of "the freedom of speech." Only Justice Byron White would have sustained this remarkable provision. Today, \$1,000 would barely buy a tombstone ad on the front page of *The New York Times*. Had this provision been sustained and unchanged, it would effectively have eliminated the use of editorial advertisements by citizens to criticize incumbent officials and political candidates.

Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); *INS v. Chadha*, 462 U.S. 919 (1982); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Clinton v. New York*, 118 S. Ct. 1551 (1998). The only major statute upheld against a separation of powers challenge was one of the other great post-Watergate "reforms" which would cure corruption and unaccountable power forever, namely, the Independent Counsel Act. *Morrison v. Olson*, 487 U.S. 654 (1988).

¹⁵ *Campaign Finance Reform and the Constitution: A Critical Look at Buckley v. Valeo, 1997: Hearings on Free Speech and Campaign Finance Reform Before the Subcommittee on the Constitution of the House Judiciary Committee*, 105th Congress (1997) (statement by Burt Neuborne, John Norton Pomeroy Professor of Law at New York University and Legal Director of the Brennan Center for Justice at NYU); Cass R. Sunstein, *Political Equality and Unintended Consequence*, 94 COLUM. L. REV. 1390 (1994).

(4) Make the smallest of campaign donations and you would get your name and political affiliation publicly disclosed or kept on file with the government.¹⁶ Even controversial, minor and third parties that the government spent a lot of time and money spying on, would have to disclose their most modest contributors, although that might subject such individuals to harassment and retaliation.¹⁷

(5) All the issue-oriented groups that report and comment on the records of incumbents up for re-election would likewise have to file reports with the government disclosing their contributors and supporters. Indeed, the sweeping reforms included one provision specifically targeted on issue advocacy groups that rate and provide "box scores" about how members of Congress vote on issues of concern to the individual groups.¹⁸ Challenged along with the other key provisions

¹⁶The '71 Act required covered political committees and organizations to disclose the names and addresses of all individuals who contributed more than \$100 and to keep on file the names and address of all individuals who contributed as little as \$11. Federal Election of 1971, Public Law 92-255, 2 U.S.C. §§ 431, *et. seq.*

¹⁷In *Buckley*, though sustaining the disclosure provisions on their face, the Court did indicate that where controversial political parties or groups could make a credible showing that disclosure would lead to harassment and disruption, they might be constitutionally immune from compliance with campaign reporting and disclosure rules. *Buckley*, 424 U.S. at 74. That principle would be applied six years later to hold that campaign committees formed by parties like the Socialist Workers' Party would be immune from effective disclosure. *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 98 (1982).

¹⁸That section was § 437a of the Act, 2 U.S.C. codified at § 437 (a). Its rather clumsy language provided as follows:

Any person (other than an individual) who expends any funds or commits any act directed to the public for the purpose of influencing the outcome of an election, or who publishes or broadcasts to the public any material referring to a candidate (by name, description, or other reference) advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, or other official acts (in the case of a candidate who holds or has held Federal office), or otherwise designed to influence individuals to cast their votes for or against such candidate or to withhold their votes from such candidate shall file reports with the Commission as if such person were a political committee. The reports filed by such person shall set forth the source of the funds used in carrying out any activity described in the preceding sentence in the same detail as if the funds were contributions within the meaning of section 431(e) of this title, and payments of such funds in the same detail as if they were expenditures within the meaning of section 431(f) of this title. The provisions of this section do not apply to any publication or broadcast of the United States Government or to any

of the Act, that section was unanimously declared unconstitutional by a D.C. Circuit which was enthralled by every other significant feature of the law. Only that section drew the complete condemnation of judges spanning the ideological spectrum from Bazelon and Wright to Tamm and Wilkey. The en banc D.C. Circuit unanimously ruled the provision defectively vague and overbroad for seeking to regulate core and vital issue speech unconnected to the specific cause of any candidate.¹⁹ It was an impermissible restriction of citizen and organizational speech about important public issues. The Government did not take an appeal from that ruling and the section was allowed to die, only to see attempts at resurrection in recent years.²⁰

news story, commentary, or editorial distributed through the facilities of a broadcasting station or a bona fide newspaper, magazine, or other periodical publication.

Id.

¹⁹Buckley v. Valeo, 519 F.2d 821, 843-44 (D.C. Cir. 1976)(en banc).

²⁰It has not gone remarked sufficiently that key elements of the various bills like McCain-Feingold or Shays-Meehan seek to regulate issue advocacy in language virtually indistinguishable from § 437a which was roundly and conclusively condemned as unconstitutional in Buckley. They are virtually reincarnations of that flawed and condemned provision. As one commentator recently put it:

Section 437a has the distinction of being the only section of the post-Watergate reforms struck down by what, at the time, was the most liberal pro- campaign finance regulation court in the country. Even to that naturally sympathetic court, Section 437a was beyond the constitutional pale. In fact, the section was so indefensible that its overturning was not appealed to the Supreme Court by any of its defenders, including the Department of Justice, the FEC, or their allied reform groups (including Common Cause). Even though the question was not presented directly, the Supreme Court's 1976 decision in *Buckley*, 424 U.S. 1, firmly enunciated the principles that led the D.C. Circuit to strike down Section 437a. The Supreme Court noted that: The distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest. Accordingly, the Supreme Court set forth in *Buckley* the holding, which is valid to this day, that only speech expressly advocating the election or defeat of clearly identified candidates may be subjected to certain forms of regulation, including compulsory disclosure to the government.

Jan Witold Baran, *The Reform That Cannot and Should Not Ever Happen*, LEGAL TIMES,

But otherwise, the lower court upheld the major features of the new act. How could this sweeping monitoring and control of political speech and activity possibly be called "reform?" Especially since as breathtaking as the law was in terms of the political activity it sought to control, it was no less cynical in what it *exempted from* those controls. The most outrageous exemption was for the costs of free franked mail, which by itself, gave incumbent House Members more money to spend on political communication with their constituents than the whole amount that a challenger was allowed to spend on his or her entire campaign under the new spending limits.²¹ How is that creating a level playing field for incumbents?

To groups like the ACLU, these did not seem to be genuine reforms that would expand political participation and opportunity. Rather, they seemed more to be an unprecedented Incumbent Protection Act. They would suppress the individual and group political advocacy which is at "the core of our electoral process *and* of the First Amendment freedoms"²² and which is the very engine of democracy. That is why House Minority Leader Dick Gephardt could not have been more wrong when he insisted that: "What 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."²³ In fact, and in law, there cannot be one without the other.

D. *The Triumph of Reason*

That was the statutory scheme that the Court had before it in *Buckley*, which has been severely criticized and even demonized.²⁴ While certainly not without its flaws, the decision, properly considered, is a landmark of political freedom.²⁵ The Court correctly recognized that limitations on political funding are

Feb. 23, 1998, at S.36. That court ruling calls into severe question many of the proposals today to control issue group spending and thereby speaking.

²¹ *Supra* note 12 and accompanying text.

²² *Buckley v. Valeo*, 424 U.S. at 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)) (emphasis added).

²³ 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, Feb. 3, 1997, at p. 22.

²⁴ *Supra* note 2.

²⁵ For a particularly powerful and relatively contemporary paean to the wisdom of the *Buckley* decision, see Scot Powe, *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243 (1982).

limitations on political speech and thereby threatened well-established principles at the core of the First Amendment's protection.

To the argument that money is not speech, the Court quite sensibly responded that limitations on how much one could spend to speak were limitations on how much one could speak. Whether the subject is funding for political speech or funding for the arts or funding for abortion counseling or funding for legal services programs - or funding for campaign finance reform advocacy - there is an obvious and inextricable link between restrictions on funding and restrictions on speech, and the *Buckley* Court soundly recognized that: "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."²⁶ Indeed, in cases both before and after *Buckley*, the Court has consistently understood that efforts to restrain the funding of speech are tantamount to efforts to restrain the speech itself and has applied the *Buckley* principles to invalidate such schemes.²⁷ Such rulings were particularly appropriate since the

²⁶One of the abiding ironies of the campaign finance reform debate is that so many who attack the Court for "equating" money with speech haven't the slightest hesitation to use their own, often unlimited resources to argue that money is not speech. Presumably the unimaginably wealthy proponents of controlling campaign funding have no embarrassment about using their own extraordinary resources to communicate that message. Either they fail to see the irony or prefer the adage of fighting fire with fire. Groups urging efforts to take private money out of politics have no hesitation to take millions of dollars of private money to put forth their message. See Dierdre Shesgreen, *But Proliferation of Groups Doesn't Spur Progress in Curbing Political Cash*, LEGAL TIMES, Oct. 20, 1997, at p. 1. One article observed that George Soros, the billionaire philanthropist, gave \$3,000,000 to Public Campaign, a group which argues that the wealthy have too much influence over our public life. See Greg Pierce, *Double Standard*, WASH. TIMES, June 18, 1997, p. A10. The billionaire financier, Jerome Kohlberg, supports a campaign finance reform organization which spent \$400,000 to try to defeat a Senate candidate whose politics he did not like. See Ruth Marcus, *The Advocates Pipe Down the Ads*, WASH. POST, October 23, 1998, p. A10. Of course, the most chronic examples of irony are the multimillionaire owners of the nation's newspapers, most of whom editorially and passionately support funding controls on others, while using their own extensive wealth to fund their newspapers and magazines to make that point. See Ira Glasser, *Campaign "Reform" Limits Speech*, N.Y. TIMES, Sept. 9, 1998, p. A. 24.

²⁷The cases before *Buckley* include *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding the fact that political advertisement is paid for does not justify depriving it of First Amendment protection); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (finding the fact that abortion services advertisement is paid for does not justify withdrawing First Amendment protection). Since *Buckley*, the Court has applied its principle numerous times

restrictions in *Buckley* and similar cases were on the use of private funds and resources to communicate private political messages, not on the use of public funds to facilitate those messages.²⁸

To the claim, relentlessly repeated today, that there is "too much" campaign spending and that it must be controlled by government, the Court responded that the First Amendment fundamentally denies government the right to make that choice:

The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. 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.²⁹

Who would quarrel with that principle?

To the claim that the free speech of those with more resources could be restrained in order to enhance the political opportunity of those with less resources -

to invalidate statutes and rules which attempted to restrain speech by restraining the funding of that speech. *See, e.g.* *Buckley v. American Constitutional Law Foundation*, 119 S. Ct. 636 (1999) (invalidating, inter alia, rule that paid petition-signature collectors had to disclose sources of funding); *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) (invalidating rule that federal employees could not be paid honorariums for giving speeches or writing articles while off-duty); *Simon and Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991) (invalidating rule that prevented criminals from receiving money for writing or speaking about his or her crime); *Meyer v. Grant*, 486 U.S. 414 (1988) (invalidating rule that prohibited paying people to circulate petitions to get signatures to put a voter initiative on the ballot).

²⁸In the more complex area of government efforts to control the speech uses of public funds, the Court has also recognized the important link between money and speech, but has been far too willing to let the government use its power of the purse to control the speech of those it patronizes. The issues were addressed most prominently by the Court in *National Endowment v. Finley*, 524 U.S. 569 (1998), which upheld certain vague government restraints on governmentally funded art subsidized by the NEA.

²⁹*Buckley v. Valeo*, 424 U.S. 1, 57 (1976).

a kind of First Amendment Lowest Common Denominator, a principle for leveling down freedom of speech - the Court responded:

The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources *and to assure unfettered exchange of ideas for the bringing about of political and societal changes desired by the people.*³⁰

That too embodies settled doctrine. *Buckley* critics often stress the first part of this quote, to create the impression that the decision is some kind of royalist ruling, while underplaying the second portion of the quote which makes it clear that the evil of restricting some speakers is the consequent restraint on public discussion and the instrumental role of freedom of speech and press.

Finally, in answering the claim that issue-oriented speech about incumbent politicians must be regulated because it might influence public opinion and thereby affect the outcome of elections, the Court, with great force, reminded us of the critical relationship between unfettered issue advocacy and healthy democracy. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."³¹ And with equal clarity, the Court observed that in an election season one cannot abstractly discuss issues without discussing the candidates and their stands on those issues.

The distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but

³⁰*Buckley*, 424 U.S. at 48-49 (emphasis added).

³¹424 U.S. at 14. *See also* *Roth v. United States*, 354 U.S. 476, 484 (1957).

campaigns themselves generate issues of public interest.³²

If any reference to a candidate in the context of advocacy on an issue rendered the speaker or the speech subject to campaign finance controls, the consequences for First Amendment rights would be intolerable.³³

Accordingly, in order to protect First Amendment rights, the Court fashioned the critical "express advocacy" requirement, which holds that only the funding of express advocacy of electoral outcomes may be subject to restraint. All speech which does not in express terms advocate the election or defeat of a clearly identified candidate must remain totally free of any regulation: "So long as persons and 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."³⁴ The Court thus reaffirmed two principles which are critical to today's debate over campaign finance regulation: 1) The area in which campaign finance controls may operate has to be narrowly and carefully and clearly defined; and, 2) Outside of such area of permissible regulation, no, to repeat, no controls are allowable. These principles, which seem almost self-evident, are nonetheless once again threatened by legislative proposals

³²*Buckley*, 424 U.S. at 42.

³³For example:

[W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

³⁴424 U.S. at 45 (emphasis added).

like McCain-Feingold and Shays-Meehan pending in Washington and in many States.³⁵

E. Compromise Controls

Those portions of *Buckley* which struck limits on campaign funding vindicated core First Amendment rights in ways that justify praise and certainly do not merit the condemnation that *Buckley* routinely receives. But other parts of the Court's decision bear the hallmark of judicial compromise and have created a regime of partial regulation which has become the epitome of unintended and undesirable consequences.

First, while striking down limits on expenditures by candidates, political committees or individuals, the Court reversed field and upheld limits on contributions by individuals to political candidates and campaign committees. The Court did so because of its sense that restraints on contributions were less severe than those on expenditures, while more directly implicating concerns with the actual or potential or apparent corrupting effect of "large" contributions on political candidates who are and/or will become public officials. Though noting that the "Act's contributions and expenditure limitations operate in an area of the most fundamental First Amendment activities,"³⁶ the Court nonetheless concluded that limits on campaign contributions are somehow "lesser" restraints because contributions are one step removed from speech compared to expenditures, the amount of a contribution does not add appreciably to the message of support it embodies and contributors are free to spend unlimited amounts to promote their chosen candidate or cause directly and independently.³⁷ With respect to corruption, the Court stated that:

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. [T]o the extent that large contributions are given to secure political quid pro quos from current and potential

³⁵*Supra* note 7.

³⁶*Buckley v. Valeo*, 424 U.S. 1,14 (1976).

³⁷*Id.* at 35.

officeholders, the integrity of our system of representative democracy is undermined.³⁸

The Court's upholding of contribution limits gave insufficient weight to a number of critical arguments pressed by the challengers. First, a restraint on contributions would become a defacto restraint on expenditures, especially for those candidates who are not well-connected or well-heeled. The primary beneficiaries of the upholding of contribution limits have been personally wealthy candidates who do not need the kindness of strangers and incumbents who have more than enough "friends" or groups of friends, i.e. PACs, to help fund them. That is one reason why incumbency rates have remained extremely high.

Second, unless adjusted for inflation - which they have not been - those contribution limits make it harder and harder for candidates, especially challengers, to raise funds to get their message out. Indeed, a number of lower courts have recently invalidated "reform" enactments that lowered contributions limits to levels as low as \$250 or even \$100, reasoning that such Draconian restraints made it all but impossible for non-wealthy candidates to raise funds for their campaigns.³⁹ Some courts have even held that a \$1,000 contribution limit - the exact amount sustained in *Buckley*, but equivalent today to a \$320 ceiling in 1976 terms - failed to survive strict scrutiny where it was set at such a low level - in effect \$320 in 1976 dollars - that it bore no rational relationship to deterring corruption, especially where the limits were put into place in the absence of any record of corruption remotely comparable to that presented in *Buckley*. Indeed, the Court has granted review in one of those cases, placing on the table the question of how relatively low contribution limits can be sustained 25 years after *Buckley*.⁴⁰

³⁸*Id.* at 27.

³⁹*National Black Police Ass'n v. District of Columbia Board of Election and Ethics*, 924 F. Supp. 270 (D.D.C. 1996) *vacated as moot*, 108 F.3d 346 (D.C. Cir. 1997), *aff'd*, 168 F.3d 525 (D.C. Cir. 1999); *California Profile Council PAC v. Scully*, 989 F. Supp. 1282, 1295 (E.D. Cal. 1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1999). *But see*: *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 645-651 (6th Cir. 1997).

⁴⁰The case is *Shrink Missouri PAC v. Adams*, 161 F.3d 519 (8th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999), where the lower court invalidated contribution limits of \$250 for state assembly, \$500 for state Senate and \$1,000 for statewide office. The Court denied certiorari in two cases from Ohio directly challenging *Buckley's* ruling that you cannot have expenditure limits. Those two cases would have permitted the Court directly to consider the validity of *Buckley's* disallowance of expenditure limits. *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998) *cert. denied*, 119 S. Ct. 511 (1998) (striking a Cincinnati ordinance which limited expenditures in City Council races and which was intended to be a test case of *Buckley*); *Suster v. Marshall*, 149 F.3d 523, 528-533 (6th Cir. 1998), *cert. denied* 119 S.

Third, the challengers claimed that the tight controls over contributions would cause campaign funding to flow to areas of political communication which were not subject to those restraints, most notably, issue advocacy and political party activity funded by "soft money," which is funding precisely not limited to \$1,000 from individuals. The Court seemed unmoved by these concerns. But the phenomena of issue advocacy and soft money - and proposals to control both - have dominated campaign finance debate and proposals in recent years.

Moreover, the Court gave insufficient attention to the argument that there were less drastic alternatives to deal with the actuality and potential of corruption than the problematic use of contribution limits. The major suggestion was the use of effective disclosure of large contributions to candidates and campaign committees so that the public would have the means to ferret out whatever undue access and influence might possibly be accorded to campaign contributors. But the Court concluded that full disclosure, coupled with laws against bribery and conflict of interest and the activities of a vigorous free press, was an insufficient inoculation or antidote to corruption or the appearance of corruption.⁴¹

Finally, the Court also sustained a scheme of public funding for Presidential candidates. That, too, has been a mixed blessing. Of course, public funding can be an important antidote to the concerns with corruption from private contributions, and the proper kind of public funding can expand the spectrum of political

Ct. 890 (1999) (invalidating campaign expenditure limits for judicial elections).

⁴¹Often overlooked in the debates about *Buckley* is the fact that the Court also upheld against constitutional challenge the Act's sweeping and overbroad disclosure requirements. As indicated above, campaign contributors of as little as \$101 dollars - equivalent to \$32 today - would have to be automatically publicly disclosed. Contributors who gave as little as \$11 - about \$3.50 today - would have their names stored for supplying to the government upon demand. While the challengers argued that disclosure was a less drastic and more democratic remedy to the concerns with corruption and undue access and influence, the argument was limited to "large" contributions to mainline candidates and parties where there was a real impact. Instead, the Court, though acknowledging that compelled disclosure can substantially interfere with freedom of association, sustained the wide-sweeping disclosure that invades an extremely broad area of political privacy without any sufficient justification. The Court felt that the low disclosure levels were reasonable attempts to detect patterns of giving and to discourage violations of the contribution limits. Though the Court did show some sensitivity to the plight of controversial minor parties, which would lead to a later ruling that such groups did not have to disclose their contributors and supporters, *See Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982) the Court nonetheless upheld the facial validity of the disclosure rules.

participation and opportunity in a very meaningful way. The Court recognized that potential, but the scheme it upheld contained two serious flaws.

First, the funding arrangement is basically designed to benefit the two major political parties and their candidates, with a premium on past electoral success as a measure of current public benefit. Minor parties and new candidates basically need not apply for pre-election funding. The Court sustained this scheme against an Equal Protection challenge. Second, the funding arrangement requires eligible candidates to limit their overall and state-by-state expenditures in order to get primary matching funds. In order to get general election funds, presidential candidates have to agree not to raise or spend even \$1.00 of private money.

That stipulation, in turn, has had two consequences. First, it has legitimized, without serious consideration, a form of "unconstitutional conditions" whereby candidates must give up all rights to raise and spend private funds in order to receive public campaign funds. This has guaranteed that almost all public funding proposals pressed at the federal level and enacted at the state and local level will have strings attached and, in all likelihood, will benefit incumbents over challengers because the arrangements are limits-driven.⁴²

Second, and most notably, the conditioned limits on public funding have led inexorably to the soft money phenomenon and to the rise of "soft money" and multi-million dollar party "issue campaigns" run to skirt those limits.

F. Lessons for the Future

If there is any lesson we should have learned from 25 years of campaign finance controls, it is that limits on campaign funding, apart from constitutional questions, have an equally critical flaw: they just do not work.

Trying to equalize political opportunity and influence through limiting political speech and association is a futile task. Limit the funding of the candidates equally, and the advantage of incumbency or celebrity will disturb the equilibrium, as will the presence of powerful outside voices, independent political groups, labor unions, issue groups and the news media.⁴³ Limit wealthy contributors from giving

⁴²Kathleen M. Sullivan, *Reply: Political Money and Freedom of Speech: A Reply to Frank Askin*, 31 U.C. DAVIS L. REV. 1083 (1998); *See also* Gable v. Patton, 142 F.3d 940 (6th Cir. 1998) (upholding triggered public funding.)

⁴³Michael Janofsky, *Gore Building Network in California*, N.Y. TIMES, Jan. 24, 1999, Section 1, Page 24. *See also* Bernard Weinraub, *Hollywood Raises Curtain on 2000*, N.Y.

money to candidates, and they will still be able to buy newspapers, fund issue groups and give large amounts of "soft money" to get their message out in ways that the average person can never hope to equal. The ability of a George Soros or a Rupert Murdoch to use their vast funds to influence the debate on political candidates and public issues for example, campaign finance reform - is limitless compared to the average citizen. Attempt to limit all those voices and methods of influencing the electorate, on the claim that they are "buying elections" or "drowning out the voice of the people" and you have a First Amendment meltdown.⁴⁴

Far better to deal with such disparities by encouraging average people to band together in groups to support issues and candidates that appeal to them to counter the wealthy few. That is what freedom of speech and association are all about.

The 1974 law limited individual contributions to House and Senate candidates, and we have witnessed a proliferation of PACs, and independent groups and issue advocacy. Challengers have a hard time raising money and incumbents are more insulated against effective challenge. Things are easy only for the well-heeled or the well-connected.

The law sharply limited contributions to Presidential candidates, and we have seen the splurge of soft money funding that has gone on for almost 20 years.

TIMES, February 20, 1999, A8 (noting that both Democratic and Republican Presidential hopefuls "troop in almost every week to gather support from the rich and super-rich" among the Hollywood and entertainment industry moguls.) Compare the remark in *Buckley* that public financing of presidential elections would be "a means of eliminating the improper influence of large private contributions" *Buckley*, 424 U.S. at 96.

⁴⁴Some scholars think that controls on wealthy media owners or other speakers in the service of campaign finance reform and equalization would justify restraints on such publishers. See Richard Hasen *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627 (1999) (arguing that it would be permissible to cover media under campaign finance laws, especially if the equality of political opportunity theme rejected in *Buckley* were adopted by the Court. See also, Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996); Scott E. Thomas, *Corporate Funds: Use in Campaign Banned*, WALL STREET JOURNAL, March 12, 1999, at A15 (Letter to Wall Street Journal from Scott Thomas, Commissioner of the FEC, justifying the proceeding (later dropped) against Steve Forbes for that portion of his monthly magazine column deemed partisan and not issue-oriented). Normal First Amendment instincts are fundamentally averse to such government micro management of media and politics.

The highly structured system of public financing of Presidential elections, hailed as a model of reform, has become the poster child of the failure of limits-driven public campaign funding controls. Political parties have spent millions of dollars on "image ads" to influence public opinion in ways favorable to their party or candidate. Make no mistake, the millions of dollars spent by the Democratic Party on such ads effectively decided the outcome of the 1996 Presidential campaign in favor of President Clinton before that campaign had even officially begun.

The Court's split decision in *Buckley* has helped create the campaign finance dilemma we have had ever since. Wealthy candidates can spend unlimited funds on campaigns, while less wealthy candidates are severely limited in trying to raise funds from others to get their message out. Incumbents have built-in fundraising advantages, while non-wealthy challengers must scramble for funds. People or organizations who want to give financial support directly to candidates and parties are restrained from doing so, but permitted to support issue advocacy or "soft money" party activity without restraint. Public funding is available but only primarily to mainstream parties and candidates and only with acceptance of limiting conditions and stipulations.

G. "Reform" Makes a Comeback

The current "reform" bills pending in Washington and many of the States embody the same kind of limits-based approach that has failed time and again in the past. "Those who cannot remember the past are condemned to repeat it."⁴⁵

Two particular features of many of these bills require analysis: the unprecedented controls on issue advocacy and soft money.

H. Issue Advocacy

The bills' unprecedented regulations of issue advocacy are flatly unconstitutional under settled First Amendment rules. And no amount of pejorative references to "phony" issue ads or "so-called" issue ads or "sham" issue ads can avoid that fact.

⁴⁵George Santayana, *The Life of Reason*; Vol I, *Reason in Common Sense*, quoted in BARTLETT'S FAMILIAR QUOTATIONS, p. 703 (1982). This year's version of McCain-Feingold is S. 26, The Bipartisan Campaign Reform Act of 1999. See *supra* note 7. The Shays-Meehan parallel bill in the House is H.R. 2183.

The Court fashioned the express advocacy doctrine to safeguard issue advocacy from campaign finance controls, even though such advocacy might influence the outcome of an election. The doctrine provides a bright-line, objective test that protects political speech by focusing solely on the content of the speaker's words, not the motive in the speaker's mind or the impact on the speaker's audience, or the proximity to an election, or the phase of the moon. The doctrine protects issue discussion and advocacy by allowing citizens to criticize the performance of elected officials at the time that such commentary is most vital in a democracy: during an election season. It may be inconvenient for incumbent politicians when groups of citizens spend money to inform the voters about a politician's public stands on controversial issues like term limits, but it is of the essence of free speech and democracy.

The McCain-Feingold bill and the Shays-Meehan bill both abandon the clear and narrow test of express advocacy in favor of an impermissibly expanded definition of that critical term in an unconstitutionally vague and overbroad fashion.

* They impose, in effect, a two-month, 60-day blackout before any federal election for any radio or television advertisement on any issue if that communication is one that in any way "refers to" any federal candidate.⁴⁶ Incumbents love that one. Indeed, such proposals have spawned a public policy phrase, to "deep sixty" a bill, namely, to introduce it within sixty days of an election, thereby disabling and silencing any legislative advocacy groups from commenting on a legislator's views or actions on that bill.

* The bills would restrain any communication "expressing unmistakable and unambiguous support for or opposition to" any federal candidate.⁴⁷ If that had been the law in New York City, for example, and the New York Civil Liberties Union had run an ad during the fall campaign criticizing candidate Mayor Giuliani's handling of police brutality issues, that would have been illegal. Police brutality issues have become pervasive in New York City this year. If McCain-Feingold type laws were in effect, all organized public commentary on Mayor Giuliani's police brutality policies would become ensnared in the web of the Federal Election Campaign Act. So too would an ad run last fall criticizing former Senator D'Amato's stand on abortion and praising his Democratic opponent, Congressman, now Senator Charles Schumer. Indeed, there were many ads during that election claiming that, despite his rhetoric, Senator D'Amato was actively anti-choice. Under the proposed legislation, such communications informing the public about

⁴⁶ S. 26, 106th Cong. Section 201(3) (1999).

⁴⁷*Id.* at Section 211.

vital issues of the day would be run through the meat grinder of the Federal Election Campaign Act.

Indeed, that is the basic purpose of bills like McCain-Feingold, namely, to take issue and party speech which is currently beyond the pale of regulation and bring it within the command and control system of the Act. The clear purpose and inevitable effect of such unprecedented restrictions on issue advocacy will be to dampen citizen criticism of incumbent officeholders standing for re-election at the very time when the public's attention is especially focused on such issues.

These bills are in clear violation of First Amendment principles. Such bills would impose unprecedented federal government controls on critical speech about incumbent politicians at the very time when such commentary is most vital in a democracy: during an election season. The bill would stifle such speech by a radical expansion of the Supreme Court's constitutional definition of what political speech can be subject to campaign finance controls, namely, only speech which "expressly advocates" the election or defeat of political candidates. The result would be to bring under federal election controls all of the individuals and organizations whose speech has been constitutionally immune, i.e. "free," from any restraint up to now. It would treat such groups as though they were a PAC or partisan organization, and would subject them to all of the restraints applicable to campaign organizations.

These proposals embody the kind of unprecedented restraint on issue advocacy that violates bedrock First Amendment principles, set forth with great clarity in *Buckley* and reaffirmed by numerous Supreme Court and lower court rulings ever since. Indeed, one of the enduring legacies of the *Buckley* decision is its reaffirmation and strengthening of the indispensable First Amendment principle that public discussion of public issues is at the very core of the freedom of speech and of the press.

First, "issue advocacy" is at the core of democracy. In rejecting the claim that issue-oriented speech about incumbent politicians could be regulated because it might influence public opinion and affect the outcome of elections, the *Buckley* Court reminded us of the critical relationship between unfettered issue advocacy and healthy democracy: "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."⁴⁸

⁴⁸ *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

Second, in an election season, citizens and groups cannot effectively discuss issues if they are barred from discussing candidates who take stands on those issues.

For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.⁴⁹

If any reference to a candidate in the context of advocacy on an issue rendered the speaker or the speech subject to campaign finance controls, the consequences for First Amendment rights would be intolerable.

Third, to guard against that stifling censorial overbreadth, the Court fashioned the critical "express advocacy" doctrine, which holds that only express advocacy of electoral outcomes may be subject to any form of restraint. Thus, only "communications that in express terms advocate the election or defeat of a clearly identified candidate"⁵⁰ can be subject to any campaign finance controls.

Finally, and most importantly, all speech which does not in express terms advocate the election or defeat of a clearly identified candidate is totally immune from any regulation; "So long as persons and 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."⁵¹

⁴⁹*Id.* at 42.

⁵⁰*Id.* at 44.

⁵¹*Id.* at 45 (emphasis added). For almost 25 years, the Federal Election Commission has repeatedly attempted, in one way or another, to expand the concept of express advocacy well beyond what the courts have permitted. And the courts have consistently rebuffed the Commission in cases ranging from *Federal Election Comm'n. v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980) (en banc) to *Right to Life of Dutchess County v. Federal Election Committee*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998). Indeed, as is well known, in one case the Fourth Circuit even awarded costs and attorneys fees to an organization harassed by the Commission for what was clearly and purely issue speech. *Federal Election Comm'n. v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th

Nor does it matter whether the issue advocacy is communicated on radio or television, in newspapers or magazines, through direct mail or printed pamphlets. What counts for constitutional purposes is not the medium, but the message. By the same token, it is constitutionally irrelevant whether the message costs \$100 or \$1,000 or \$100,000. It is content, not amount, that marks the constitutional boundary of allowable regulation and frees issue advocacy from any impermissible restraint. The control of issue advocacy is simply beyond the pale of legislative authority.⁵²

This unprecedented provision is an impermissible effort to regulate issue speech which contains not a whisper of express advocacy, simply because it "refers to" a federal candidate - who is more often than not a Congressional incumbent - during an election season. The First Amendment disables Congress from enacting such a measure regardless of whether the provision includes a monetary threshold, covers only broadcast media, applies only to speech during an election season and employs prohibition or disclosure as its primary regulatory device.

Such proposals would cast a pall over grass-roots lobbying and advocacy communication by non-partisan issue-oriented groups. It would do so by imposing burdensome, destructive and unprecedented disclosure and organizational requirements, and barring use of any organizational funding for such communications if any corporations or unions made any donations to the organization. Such proposals would force such groups to choose between abandoning their issue advocacy or dramatically changing their organizational structure and sacrificing their speech and associational rights.

Other severe problems with such bills are the new "coordination" rules, rules which will interfere with the ability of issue organizations to communicate with elected officials on such issues and later communicate to the public in any manner on such on issues. And the greatly-expanded activities encompassed within the new category of "express advocacy" would be subject to those greatly-expanded coordination restrictions as well. This would be a double deterrent to public discussion: More would be encompassed within the definition of express advocacy and more discussion with respect to that expanded universe of express advocacy would be ensnared under the coordination rules. In effect, any person or group who

Cir 1997).

⁵²As the Court said a decade before *Buckley* in *Mills v. Alabama*, 384 U.S. 214, 220 (1966): "No test of reasonableness can save a state statute from invalidation as a violation of the First Amendment if that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election." *Id.*

talked with a representative about an issue would be subject to the coordination rules and restraints if they publicly commented on the representative's stance on those same issues. And coordinated activity becomes highly controlled activity. Rules like this could even make tax lawyers jealous.

The net result will be to make it virtually impossible for any issue organization to communicate, directly or indirectly, with any politician on any issue and then communicate on that same issue to the public.

All of this will have an exceptionally chilling effect on organized issue advocacy in America by the hundreds and thousands of groups that enormously enrich political debate. These bills fly in the face of well-settled Supreme Court doctrine which is designed to keep campaign finance regulations from ensnaring and overwhelming all political and public speech. And they will chill issue discussion of the actions of incumbent officeholders standing for re-election at the very time when it is most vital in a democracy: during an election season. It may be inconvenient and annoying for incumbent politicians when groups of citizens spend money to inform the voters about a politician's public stands on controversial issues, like abortion, but it is the essence of free speech and democracy.

I. Soft Money

The bill would also impose new controls on "soft money" funding of political parties, thus leaving them far less able to use their resources to communicate their message to the voters. Elections are a time when we need more political party speech and activity, not less. "[i]t can hardly be doubted that the Constitutional guarantee [the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office."⁵³

Likewise, the unprecedented and sweeping restraints on "soft money" funding of issue advocacy and political activity and even a new concept called "federal election activity" by political parties and non-partisan groups alike also raise severe First Amendment concerns.⁵⁴ These activities go beyond express advocacy, and beyond even issue advocacy referring to candidate. The Orwellian concept of regulatable "federal election activity" basically includes things like get-out-the-vote drives and other electoral activities on the theory that the conduct of such praiseworthy democratic activity may somehow be politically motivated or

⁵³ *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

⁵⁴ Bipartisan Campaign Reform Act of 1999, S. 26, 106th Cong. § 101(B)(2) (1999).

partisan. Will licensing of all "federal election activity" be next? Or with proposals like this, is it, in fact, already here.

The same principles that protect unrestrained advocacy by issue groups safeguard issue advocacy and activity by political parties and other organizations. "Soft money" is funding that does not support "express advocacy" of the election or defeat of federal candidates, even though it may exert an influence on the outcome of federal elections in the broadest sense of that term. As such, it is presumptively protected against government regulation. It supports political activity by parties and non-partisan organizations such as voter registration, voter education and get-out-the-vote drives. Because such funding is not used for express advocacy, it can be raised from sources that would be restricted in making federal contributions or expenditures.⁵⁵

To be sure, to the extent that soft money funds issue advocacy and political activities by political parties, it becomes something of a hybrid: it supports protected and unregulatable issue speech, and activities, but by party organizations often closely tied to candidates and officeholders. But the kind of sweeping controls on the amount and source of soft money contributions to political parties and disclosure of soft money disbursements by other organizations raise severe constitutional problems. Disclosure, rather than limitation, of large soft money contributions to political parties, but not to other organizations, is the more appropriate and less restrictive alternative.⁵⁶

The proposed legislative labyrinth of restrictions on party funding and political activity can have no other effect but to deter and discourage precisely the kind of political party activity that the First Amendment was designed to protect.

⁵⁵ Richard Briffault, *Article: Campaign Finance, The Parties and the Court: A Comment on Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 14 CONST. COMMENTARY 91 (1997); Bradley Smith, *The Current Debate Over Soft Money: Soft Money, Hard Realities, The Constitutional Prohibition on a Soft Money Ban*, 24 J. LEGIS. 179 (1998).

⁵⁶ Many of the key Federal Election Commission restraints on the use of soft money for issue advocacy are being challenged in a case currently pending in the District of Columbia Circuit brought by the Republican National Committee and the Ohio Democratic Party as co-plaintiffs. See *Republican National Committee v. FEC*, 1998 U.S. App. Lexis 38361 (1998) (denying a preliminary injunction against FEC regulations).

J. A Better Proposal for Reform

We are at a constitutional crossroads on campaign finance reform. Read The New York Times' latest editorial and be left with the sense that if the Congress does not pass the McCain-Feingold bill by sundown, democracy, not to mention the Constitution, will be lost forever. Unless the federal government enacts such measures to clamp down immediately on unregulated "soft money" and "issue advocacy" and unregistered "federal election activity" and improper "coordination" between citizens and their elected representatives, the Republic is surely doomed. The academic and editorial outcry of support for such an overly broad piece of legislation is almost deafening.

Although McCain-Feingold is unlikely to be passed - let alone be before the Court - anytime soon, a surrogate for all the command and control mechanisms of that flawed piece of legislation will be before the Court in the Missouri contribution limits case.⁵⁷ The forces of "reform" who brought us the Federal Election Campaign Act will use that case to insist that low and restrictive contribution limits must be maintained as the only democratic line of defense against "corruption" and "undue influence" and the "buying of elections." Should the Court agree and sustain extremely low legislatively-compelled contribution limits, that judicial mandate will be used by "reform" forces as the doctrinal pivot to justify attempts to close every "loophole" in campaign finance controls that can be "plugged" by reference to the reaffirmed authority to limit campaign contributions. That is precisely the theory to justify McCain-Feingold's extraordinary expansion of the range of campaign finance controls by making virtually all political party funding and most issue advocacy funding and some "federal election activity" funding subject to the regime of the FECA, particularly its core restraints on the source and size of political contributions.

For 25 years, those of us associated with the ACLU have urged a different approach to the campaign finance dilemma, a triad approach based on three essential principles.

First, raise or even repeal all limits on campaign contributions or expenditures. They offend the principles of the First Amendment, they distort First Amendment doctrine, and they simply don't work. Increasingly, there is a growing amount of editorial and political support for at least raising contribution ceilings to

⁵⁷See *Shrink Missouri PAC v. Adams*, 161 F.3d 519 (8th Cir. 1998), *cert granted*, 119 S. Ct. 901 (1999).

the level of inflation, so that the federal ceiling would be \$3,000, not \$1,000.⁵⁸ Except for those extremists who would wish for all political activity to be publicly funded only, with no right of private contribution or expenditure, no one can justify on policy grounds the retention of the \$1,000 limit for federal campaigns.

Second, insure timely - indeed, instantaneous - and effective disclosure of large contributions to major political parties and committees, so that the public has immediate access to this information. And make sure that these disclosures come out before the election and are widely publicized by the media and watchdog groups like Common Cause so that we will know before the election about the fund-raising activities of candidates and their parties. That is the most appropriate and democratic remedy to deal with the concerns over undue access and influence by contributors on elected officials. Let the people decide who's too cozy with the fat cats and the so-called "special interests." Let the people know about the "China connection" to Presidential fundraising before the election, not after. Let the public know that the President, who agreed only to use public funding for his political campaign in 1996, raised funds for and drafted the copy of Democratic Party campaign advertisements in 1995 that guaranteed his re-election before the official campaign even began.

Third, provide a meaningful and broad-scale package of serious public funding and benefits for all qualified political candidates. This is a strategy to provide floors to support and expand political opportunity, not ceilings to restrict political activity. That would be a real investment in democracy.

The most effective and least constitutionally problematic route to genuine campaign finance reform is a system of equitable and adequate public financing. But proposals for public financing need to avoid certain pitfalls. First, they should not compel candidates and parties to limit their political speech in order to have that speech subsidized by government. Instead, the principle should be one of building floors to support political speech, not ceilings to restrict it. Second, public financing schemes should avoid mechanisms whereby benefits and subsidies to one candidate are triggered by the campaign funding and campaign speech activities of other candidates and even independent groups. Such contingent funding

⁵⁸*Stirrings on Campaign Finance*, WASH. POST, March 19, 1999, A28; *Time to Reform Campaign Reforms*, CHICAGO TRIBUNE, March 7, 1999, at p.20; Paul Merriam, *Biz Backs Bid to Curb Soft Money: A New Corporate-Led Bid for Campaign Reform*, CRAIN'S CHICAGO BUSINESS, April 5, 1999, p.3; Even legislative proposals that would ban soft money entirely, would at least raise the hard money limits on contributions to parties to make up the shortfall.

arrangements can confer too much power on government to determine what campaign activities or speech entitles other candidates to increased funds or fund-raising opportunities. Third, public financing arrangements should be as inclusive as possible, so that new political voices are enabled, rather than stifled. Finally, public financing should take a mix of different forms so that candidates and parties are not dependent on one single governmental funding source.

If a serious public funding program were coupled with an easing of fund raising restrictions on those candidates who do not opt into the public funding system, the combination might give candidates a real choice about the best way to get their messages out and the voters a real choice about which candidates they prefer.

Here are some of the components of such a campaign finance benefits package.

* Give modest tax credits of up to \$100 or even \$500 for private political contributions to any political party or candidate - Democratic, Republican or Socialist. Now that would be the most straightforward and democratic form of public financing of politics -- through private choices, publicly amplified. If 50 million voters gave \$100 each, you could fund all of federal politics in a year to the tune of about \$5,000,000,000 without a penny going through government hands. Now that's a good use of the coming federal budget surplus.

* Give free franked mail privileges to all qualified political candidates, not just Democrats and Republicans, at least during the general election. Incumbents get it free for most of their terms in office, why not let challengers have the same perk during the election season.⁵⁹ It would facilitate political communication and reduce the dependence on private funding. That's a serious way to help level the playing field between incumbents and challengers.

⁵⁹In this regard, the Court's decision allowing broad government regulation of political party choices regarding the "fusion" tickets was a disappointment. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). So too was the Court's decision allowing public broadcasting stations broad discretion to exclude a "non-serious" Congressional candidate from publicly-sponsored televised candidate debates. See *Arkansas Educational Television Commission v. Forbes* 523 U.S. 666 (1998); see generally, Joel Gora, *Forbes, Finley and Free Speech: Does He Who Pays the Piper Always Get to Call the Tune*, 15 *TOURO L. REV* 965 (1999).

* Make serious amounts of public funding or matching funds available to all federal candidates.⁶⁰

* Although posing severe, and perhaps insurmountable, constitutional difficulties, afford candidates free air time, with no restrictions or conditions, to get their message across to the voters.⁶¹

All of these approaches would have the collateral benefit of allowing candidates to spend less time raising money and more time raising issues.

And these strategies have one other thing in common: they expand political opportunity without limiting political speech. They say that if there is to be any leveling principle in the First Amendment, it should be one of level up, not level down. More speech, not silence coerced by law. Time has shown the wisdom of that approach and the folly of an approach based on limits. That should not be surprising because the enduring wisdom of the "more speech" solution is nothing less than the enduring wisdom and very essence of the First Amendment itself:

"Congress shall make no law...abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

⁶⁰Jonathan Rauch, *How to Repair America's Campaign Finance System, Part I: Give Polls Free Money, No Rules*, U.S. NEWS AND WORLD REPORT, Dec. 29, 1997/Jan. 5, 1998, p.54-56. Concluding that our current system of campaign finance is a disaster, one journalist, Jonathan Rauch, proposed in U.S. News and World Report that Congressional candidates be given a real choice between total and extremely generous public funding - perhaps \$500,000 for Congressional candidates, with tough restrictions on private contributions, or forgoing public funding with no restrictions on contributions or expenditures. Implausible? Naive? Crazy? Any more than our current campaign finance system?

⁶¹For a strong argument against the constitutionality of requiring broadcasters to provide free time for politicians, see LILLIAN BEVIER, *IS FREE TV FOR FEDERAL CANDIDATES CONSTITUTIONAL?* (1999); see also, Joel Gora, *Five Fatal Flaws with Proposals for Free TV*, Talk presented at American Enterprise Institute, February 1999.