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Buckley's Analytical Flaws

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BUCKLEY'S ANALYTICAL FLAWS

Professor Burt Neuborne[*]

I am delighted to be able to honor David Trager today. David and I go back a long way. We met as young(er) lawyers in the early 70s when, between the two of us, we still had one full head of hair. We had the responsibility in those days of arguing the constitutionality of the Vietnam War against each other: David, as a member of the United States Attorney's office for the Eastern District and I, as the Assistant Legal Director of the ACLU. Those were days when passions ran so high that, often, opponents could not even talk to each other without enmity and anger. But David's professionalism and decency created a bridge that allowed what began as mutual respect for the lawyers' craft, to grow into a deeply valued personal friendship. That is why I am so pleased to appear today at a symposium in his honor. You could not have chosen a more appropriate way to celebrate what David Trager stands for.

You can see why *Buckley v. Valeo*[1] was decided as it was. The plaintiffs had two terrific advocates in Ralph Winter and Joel Gora. Both advocates have made splendid presentations in defense of the *Buckley* holding. But I do not recognize the rosy democratic world that they describe today. Neither Joel nor Ralph are looking at the same political world that I see when I open my eyes in the morning.

I see a world where the *Buckley* rules foster the open sale of special, privileged access for the rich to public officials. Whether it is renting the Lincoln Bedroom for campaign contributions,[2] or

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[1] 424 U.S. 1 (1976).

[2] *See* Glenn F. Bunting & Ralph Frammolino, *Up to 900 Donors Stayed Overnight at White House Campaign: Many Clinton Backers Used Lincoln Bedroom, Official Says; Numbers Are Called Staggering*, L.A. TIMES, Feb. 9,

donating $250,000 to the Republican Party in order to obtain privileged meetings with the congressional leadership,[3] or buying your way into coffee with important policy makers,[4] access to public officials is for sale in the post-*Buckley* world, and not only in Washington. Throughout the country, lobbyists make contributions to candidates that should really be called investments. Like any investment, the lobbyist expects a return on his money: a return calculated in privileged access and a guarantee that his views will be heard, often to the exclusion of persons who cannot afford to buy equivalent access.

In any other public setting, it would be inconceivable to set up a structure that provides overtly privileged access for the rich. For example, Judge Winter would never tolerate a system where scarce oral argument time was allocated according to how much a litigant could pay. Nor would we tolerate selling time on the floor of the legislature to the highest bidder. But, in any setting where we really care about fairness, a reality that we would never think of tolerating is the norm under *Buckley*.

I see a world in which voter turnout is plummeting, in large part, because people are disgusted with the fact that elections look more like auctions than exercises in democracy. For the 1996 Presidential election, only 48.8% of the eligible electorate voted.[5]

1997, at A1 (describing Clinton's fundraising events); David E. Rosenbaum, *Campaign Finance: Developments So Far,* N.Y. TIMES, Apr. 3, 1997, at B9 (discussing fundraising practices of the Clinton Administration); Michael Weisskopf & Charles R. Babcock, *Donors Pay and Stay at White House; Lincoln Bedroom a Special Treat*, WASH. POST, Dec. 15, 1996 at A1 (listing Clinton's campaign contributors, their donations, and the benefits received by each).

[3] Don Van Natta, Jr. & Jane Fritsch, *$250,000 Buys "the Best Access to Congress,"* N.Y. TIMES, Jan. 27, 1997, at A1 (reporting that in January, 1996, the Republican National Committee offered private receptions with republican congressional and presidential candidates in exchange for $250,000 donations).

[4] Stephen Labaton, *A Clinton Social With Bankers Included a Leading Regulator*, N.Y. TIMES, Jan. 25, 1997, at 1 (discussing White House coffees where large Democratic donors met with high ranking regulatory officials).

[5] Bob Minzesheimer, *Turnout Takes a Record Downturn: Nonvoters Outnumber the Voters,* USA TODAY, Nov. 7, 1996, at A3 (reporting turnout of 48.8%); Barbara Vobejda, *Just Under Half of Possible Voters Went to the Polls*, WASH. POST, Nov. 7, 1996, at A30 (discussing the recent decline in participation

Voter turnout is at the lowest ebb in recent history and going down all the time. Why are American voters voting with their feet and literally "walking out" on American democracy?[6] One important reason is that most Americans feel left out of the process by which the government is chosen. They view that process as a giant auction. They feel like spectators at the auction because the vast bulk of Americans cannot afford the ticket of admission.[7] And, frighteningly, under *Buckley*, they may be right.

I see a world without new political ideas and almost bereft of serious political debate. We spent at least $2.7 billion on the 1996 election, and I defy you to show me a single new idea that emerged from the so-called debate.[8] No new ideas are put forward. The only ideas we hear are ideas that can raise enough money to be heard. No new candidates emerge. No new access is created for persons and groups who feel left out of the system. We simply recycle our incumbents at an astonishing rate. Even in an election year of great change, over 90% of incumbents get re-elected. Historically, the incumbent re-election rate hovers in the mid to upper nineties.[9]

In 1988, I debated the Soviet Deputy Minister of Justice. He made a terrifying point. He pointed out that over the past twenty-five years, the turnover rate in the Politburo had been higher than

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in elections).

[6] *See* Kevin K. Green, Note, *A Vote Properly Cast? The Constitutionality of the National Voter Registration Act of 1993*, 22 J. LEGIS. 45, 45-46 (1996) (discussing the decline in voting).

[7] David Cay Johnston, *Voting, America's Not Keen On. Coffee is Another Matter*, N.Y. TIMES, Nov. 10, 1996, § 4, at 2 (explaining that many Americans do not vote because they believe that large contributions determine the election).

[8] Ruth Marcus & Charles R. Babcock, *The System Cracks Under the Weight of Cash; Candidates, Parties and Outside Interests Dropped a Record $2.7 Billion*, WASH. POST, Feb. 9, 1997, at A1 (reporting that the 1996 Presidential election was "the costliest ever," as total spending approximated $2.7 billion).

[9] *See* Center for Voting and Democracy, *Monopoly Politics: General Elections, U.S. House of Representatives, 1954-1996* (visited Sept. 22, 1997) <http://www.igc.apc.org/cvd/monopoly/ genelect.html> (on file with *Journal of Law and Policy*) (listing incumbent re-election rates to House of Representatives from 1954-1996, ranging from a high of 98.8% in 1968 to a low of 88.4% in 1964, with a 94.5% incumbent re-election rate in 1996).

the turnover rate in the House of Representatives. What kind of democracy was that, he jeered?

I answered that if we were allowed to create vacancies in Congress the same way that Stalin created vacancies in the Politburo, we would have lots of openings to fill as well. But he had a point. Our system is rigged to favor the *status quo*. Judge Winter admitted as much when he argued that the *status quo* often overpowers challengers.[10] Under *Buckley*, incumbents raise far more money than challengers, precisely because incumbents can sell privileged access to government power throughout their terms. It is unpersuasive, to put it mildly, to argue that *Buckley* aids change by permitting an occasional challenger to out-spend an incumbent, when the reality is that the vast bulk of incumbents out-raise and out-spend challengers—and always will.[11]

The only way to instigate real change in our political system is to change the way it is financed. I believe that Judge Winter's economics lesson is simply wrong. He argues, based on analogies with certain types of product advertising, that unregulated campaign spending actually benefits challengers because the marginal return on spending for unknown, or little known products is greater than for well-known products.[12] Thus, he argues, since each additional dollar spent advertising a new French restaurant is more valuable than the same dollar advertising the established one, challengers are benefitted by unlimited campaign spending.[13] But he ignores one thing. Incumbents generally have access to greater resources than any challenger. Incumbents always win, in part, because allowing a challenger to raise and spend enough to gain visibility almost never allows the challenger to raise enough to win, as long as the incumbent can raise and spend more. The only way challengers will

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[10] *See* Ralph K. Winter, *The History and Theory of* Buckley v. Valeo, 6 J.L. & POL'Y 93 (1997).

[11] *See* Center for Voting and Democracy, *Monopoly Politics: Open Seats and Money, 1996 U.S. House Elections* (visited Sept. 22, 1997) <http://www.igc.apc.org/cvd/monopoly/open2.html> (on file with *Journal of Law and Policy*) (chronicling relative spending of incumbents and challengers in 1996 Congressional elections).

[12] *See* Winter, *supra* note 10, at 104-05.

[13] *See* Winter, *supra* note 10, at 105.

ever have a fair chance to win in large numbers is if campaign financing is reformed to assure both sides relatively equal access to campaign resources.

I believe that *Buckley* and the rules it fostered are responsible for much of what is wrong with our current political structure. If *Buckley* were analytically sound, my concerns would be directed at a constitutional amendment, not at the Court's opinion. But *Buckley* is not analytically sound. It suffers from three major analytical flaws. First, at the core of *Buckley* is the assumption that a one-to-one correlation exists between spending money and protected political speech. The Court reasoned that since money fuels speech, any effort to control the spending of money necessarily inhibits speech. Thus, reasoned the Court, the identical First Amendment standards govern both efforts to censor political speech and efforts to regulate political spending.[14]

When relatively modest sums are involved, there is a good deal of wisdom in the Court's linkage of money and speech. But, even if one agrees that a close correlation exists between speech and the first dollar spent to fund it, or even the thousandth, or ten thousandth dollar, it does not follow that the one-to-one correlation between money and speech holds at the millionth, or ten millionth, or billionth dollar levels. The one-to-one correlation argument suffers from the fallacy of fungibility. Just because *Buckley* was decided correctly, because the spending ceilings were far too low, it does not follow that even extremely generous spending caps are invalid.

So, the first thing about *Buckley* that I hope people will re-think is the Court's insistence that regulating money should always be treated identically with censoring political speech, even at high levels of expenditure.

Buckley's second analytical flaw is the Court's attempt to draw a bright-line distinction between expenditures and contributions.[15] The distinction is logically untenable and pragmatically disastrous. It is logically untenable because the Court's insistence that a contribution is less of a First Amendment act than an expenditure

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[14] Buckley v. Valeo, 424 U.S. 1, 14-15, 23 (1976).

[15] *Id.* at 20-21, 23.

defies reality. When I contribute money to a candidate, I engage in an act of political association that is just as important as my decision to spend money on the candidate's behalf independently. It is simply wrong to treat the two as fundamentally different acts. Moreover, the Court's contention that expenditures do not risk corruption, but contributions pose such a risk, is not persuasive.[16] If I contribute $1,001 to a single candidate, the Supreme Court perceives a risk of corruption. If my wife spends $10 million on behalf of the same candidate, and creates a huge upsurge of support for him, the Court apparently believes that while there might be a *quid pro quo* for my $1,001, there is no chance of undue influence deriving from my wife's $10 million. Somehow, the Court believes that no risk of undue influence flows from the $10 million expenditure because the candidate and the supporter do not meet until after the money is spent. But everything we know about the political world tells us that politicians know who supports them, and if a supporter spends enough money, the candidate will bend over backwards to please him after the election.

The bright line between expenditures and contributions is, I believe, doomed. It cannot be abandoned too soon. The distinction has led to the worst of all possible worlds, in which demand for campaign money cannot be limited, but supply has been severely constrained. I agree completely with Judge Winter that no rational legislature would ever have enacted the regulatory scheme that emerged from *Buckley*. Go ask your neighborhood economist what happens when demand is uncontrollable, but supply is significantly restricted. You get a Black Market. That is exactly what has happened to our political system. Candidates are desperate for money and will do virtually anything to get it. If we close one loophole, another opens because, unless demand can be limited, you can never stop politicians from trying to get their money fix.

That is what happened in 1996 with "soft money."[17] Two hundred fifty million dollars, most of it from corporations, poured through a loophole that allowed virtually uncontrolled contributions

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[16] *Id.* at 33.

[17] *See* Anthony Corrado, *Giving, Spending and "Soft Money,"* 6 J.L. & POL'Y 45 (1997) (discussing the concept and development of "soft money").

to political parties.[18] Under *Buckley*, candidates are like superpowers, locked in an ever escalating arms race, but unable to put an end to the spiral because *Buckley* makes it impossible to cap campaign spending. Candidates must continue to raise funds, not necessarily because they wish to do so, but because they are afraid that their opponents will out-raise them. The current rules not only trap candidates in an often involuntary upward spending spiral, but they place enormous pressure on candidates to cut corners because the money is so desperately needed.

Buckley's third analytical flaw is its refusal to acknowledge that fostering equal political participation is a sufficiently compelling interest to justify some regulation of campaign spending. Time does not permit a full discussion of the many ways the unequal playing field mandated by *Buckley* corrodes democratic ideals. Suffice it to say that I believe that much of the cynicism that plagues American democracy flows from our collective knowledge that the financing rules are simply not fair. We know that the rich are more equal than the rest of us, and it saps our democratic faith.

The result is that *Buckley* is like a rotten tree. Give it a good, hard push and, like a rotten tree, *Buckley* will keel over. The only question is in which direction. Once the Court says that contributions and expenditures are to be in treated the same manner, the Court may say that both can be regulated, or neither. Frankly, any change would be welcome. I would rather see an entirely unregulated system than a system where we regulate supply, but can do nothing about demand.

Ideally, I hope that the Court will repudiate *Buckley* and hold that both expenditures and contributions may be subject to reasonable regulation. I agree with Judge Winter that if regulation is permitted, Congress may try to starve the election process by setting the limits too low, since unreasonably low limits will tend to help incumbents.[19] I agree that Congress must be told that if regulation is to be permitted, it must not result in an inadequately

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[18] *See, e.g.*, David E. Rosenbaum, *In Political Money Game, The Year of the Big Loopholes*, N.Y. TIMES, Dec. 26, 1996, at A1 (discussing gaps in campaign financing laws, including soft money).

[19] *See* Winter, *supra* note 10, at 103.

funded election process. But merely because the electoral process should be well nourished does not mean that we must endure an entirely unregulated regime of campaign spending.

Finally, I am going to ask you to participate in a thought experiment in order to illustrate the potential for reform. Go back in time 100 years, and imagine what democracy looked like. We used the *viva voce* vote, which permitted any eligible voter to cast a vote for any candidate by merely showing up at the polls and demanding to vote, often in public.[20] No registration. No official ballot.

The *viva voce* process was chaotic and often corrupt. But it was also fluid, unbelievably open, and virtually free from any governmental control. A voter would show up at the polls on election day. Party representatives would press their version of a "correct" ballot on the voter, who would take one ballot and place it in the ballot box, generally in full view of the party representatives. The process was subject to corruption—stuffing the ballot box with additional party ballots was a constant risk. Pressures associated with public voting were also a serious problem.

In response to the problems associated with the *viva voce* ballot, we adopted the Australian ballot, which placed real limits on voting and the process of running for office.[21] We adopted an official, government-defined, ballot. We imposed rules on whose name could appear on the official ballot. We required ballot secrecy. We imposed voter registration, thereby creating an official, government-defined, electorate. Many states restricted absentee ballots and some states would not even allow write-in voting.[22]

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[20] *See* Burson v. Freeman, 504 U.S. 191, 200 (1992) (discussing the use of the *viva voce* method of elections).

[21] *See id.* at 202 (discussing the American adoption of the Australian ballot, which included the adoption of an official ballot as well as the erection of polling booths). *See generally* L.E. FREDMAN, THE AUSTRALIAN BALLOT: THE STORY OF AN AMERICAN REFORM (1968) (providing a history of the Australian ballot and its adoption in the United States).

[22] Burdick v. Takushi, 504 U.S. 428, 441-42 (1992) (upholding Hawaii's absolute ban on write-in ballots). *See* David L. Permut & Joseph P. Verdon, Note, *Protecting the American Tradition of Write-In Voting After* Burdick v. Takushi, 9 J.L. & POL. 185, 186-87 (1992) (noting those states that completely prohibit write-in voting and those that restrict write-in voting in some manner).

When the Australian ballot reforms were adopted, there were howls of protest arguing that a secret ballot confined to officially designated candidates was undemocratic. The protests over the adoption of the Australian ballot in the 19th century sounded a lot like Judge Winter: "We can't agree to a governmentally-defined and sanctioned secret ballot because it would mean too much government regulation of what should be a fluid and open First Amendment process."[23]

Today, most of us do not even notice the restrictions because we are so inured to them. But the adoption of the Australian ballot had a real cost. It is much harder for a third party or an independent to run for office today than it was before the reforms. The process is much more cumbersome. Indeed, in my opinion, it is far too cumbersome.[24] The refusal of a few states to permit write-in voting is particularly indefensible. But, would anyone want to go back to the days of the *viva voce* vote? I think not. We are psychologically comfortable with the Australian ballot reforms because we are used to them, and because, on balance, we believe that democracy works better with them than without them. Indeed, virtually all states ban classic political speech within a fixed

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[23] FREDMAN, *supra* note 23, at 14-15 (describing debates over adoption of Australian ballot system, including the opposition of John Stuart Mill).

[24] The first Supreme Court case to provide constitutional protection to the right to run for office was *Williams v. Rhodes*. *See* 393 U.S. 23 (1968) (invalidating Ohio ballot access rules for third parties). Subsequent cases provide some protection for the right to run for office, but have upheld numerous ballot access and voter disqualification rules. *See, e.g.*, Timmons v. Twin Cities Area New Party, 117 S. Ct. 1364 (1997) (upholding anti-fusion law which precludes one party from placing a candidate on a ballot if that candidate has already been nominated by another party); Clements v. Fashing, 457 U.S. 957 (1982) (upholding limits on running for office); American Party of Texas v. White, 415 U.S. 767 (1974) (upholding Texas ballot access laws preventing current officeholders from running for seats in the state legislature); Storer v. Brown, 415 U.S. 724 (1974) (upholding California ballot access laws and remand signature requirement for additional fact-finding); Jenness v. Fortson, 403 U.S. 431 (1971) (upholding 5% signature requirement for ballot access). The most promising effort to provide constitutional protection for the right to run for office was in *Anderson v. Celebrezze*, where Justice Stevens, writing for the majority, urged the use of First Amendment analysis to test restrictions on participation in the democratic process. 460 U.S. 780 (1983).

distance from the polls, even though it is a content-based restriction on our most protected form of speech. The Supreme Court recently upheld the ban, which was part of the Australian ballot reforms, because it advances a compelling interest in fair elections.[25]

There is, I believe, no principled difference between the 19th century "Australian ballot" decision to impose significant regulation on the nomination and voting process, and a late 20th century decision to impose reasonable regulations on the entire campaign process. In each case, there are costs to democracy. But, in each case, the benefits appear to outweigh the costs. As a matter of pure analysis, therefore, Supreme Court recognition in *Burson v. Freeman*[26] that political speech can be banned from the polling areas because of a compelling interest in fair elections sets the model for reasonable regulation of the campaign itself—as long as the requisite showing of a compelling need and narrow tailoring is made.

The rules governing this symposium provide a model for the showing of a compelling need. The participants have accepted significant restrictions on their free speech rights. We have agreed to talk about particular topics. We have accepted time limits. We have agreed, tacitly, not to disrupt each other. Similarly, when I argue in court, I accept significant limits on what I can say, and how long I have to say it, in order to make the process work better. My classroom is also constrained by a host of structural restrictions on uncontrolled expression. In short, we routinely accept what I will call "structural limitations" on totally free speech in order to assure that a given speech-setting operates most effectively. Who would hold a meeting without some version of "Robert's Rules of Order?"

When we are planning the process that will culminate in the selection of a great deliberative assembly of the people, why is it not possible to impose structural rules on ourselves to assure that one person does not drown everyone else out and that everyone gets a fair chance to have his or her say? The *Buckley* rules forbid

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[25] *Burson*, 504 U.S. at 195 (upholding 100 foot exclusion zone).

[26] *Id.* at 206 (identifying the prevention of voter intimidation and election fraud as compelling state interests).

us to try. But an unregulated process allows only a small slice of the population—the three percent with enough money to make large contributions—to dominate the discussion, with much of the population playing the role of passive observer. In my opinion, that kind of democracy is not worthy of the Madisonian ideal. I simply do not believe that it violates Madison's First Amendment to search for a system of structural rules that will enable a more reasoned, a more open, and a more equal discussion leading up to the crucial vote.

In closing, my wife Helen has a pet aphorism, usually directed at me, that I am afraid is applicable to the hard-liners who say "absolutely no reform of the campaign finance system. It would be the end of the First Amendment." Helen says that the definition of a fanatic is a person who re-doubles his efforts when he loses sight of his goals. I believe that Madison's goal in inventing the First Amendment was the creation of a democratic polity that is equally open to all, not merely to the rich, or to organized special interests. My sense is that some reform of the campaign finance process is needed to make Madison's goal a reality. It seems perverse, therefore, to argue for a re-doubling of First Amendment efforts that would frustrate the very goals that underlie the First Amendment itself.