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From Rights to Arrangements

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Election law is fast becoming a "discipline." No longer do we see it as an ad hoc agglomeration of largely unconnected bits and pieces of doctrine from other disciplines, like constitutional law. Indeed, we now devote competing casebooks to it;[1] give it its own slot in the curriculum; appoint experts in it to the faculties of major law schools; and fund conferences where these same experts can regularly applaud themselves and their many good works while fattening their frequent flyer accounts. By any traditional measure, the field is booming and needs no boosters. Even some good writing appears in it.

So what, if anything, has this consolidation of election law accomplished? Has emancipating doctrinal categories like campaign finance and reapportionment from the First Amendment and the Equal Protection Clause and then lumping them together with each other worked anything more than an aesthetic reconfiguration? Does the servitude of these doctrines to a new discipline really change them? If it does, does it change them for the better? Perhaps all our professional effort has just exchanged one set of unhelpful disciplinary boundaries for another.

The rise of this discipline has made a difference—a profound one, in fact. Consolidating the pieces has not just created a new forum in which to discuss the same old issues, but has changed the way many of us look at those issues. By refocusing attention away from some relationships to new ones, the development of election law as a discipline has worked a great and helpful change. The purpose of this brief symposium contribution is to suggest that this restructuring

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1. *See* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (1998); DANIEL H. LOWENSTEIN, ELECTION LAW: CASES AND MATERIALS (1995).

has improved analysis in two ways. First, it has broadened our understanding of how various electoral rules affect individual interests, and second, it has led us away from a largely rights-based, individual-centered view of politics, to a more pragmatic and structural view of politics as a matter of institutional arrangements. In the latter view, we analyze electoral rules, whether they concern redistricting, ballot access, or campaign finance, not only by how they directly affect traditional individual rights, like free speech, but also by how they affect the overall dynamic and health of our political system and the relationships among its major players.

The difference is one of emphasis. The first view, a more traditional approach, focuses on the immediate—though possibly oblique—effects of rules on long-recognized individual rights. The second view focuses more on the rules' structural implications, on how the rules advantage and disadvantage different types of institutional players relative to each other, and how the rules change incentives for various types of political behavior. Although a traditionalist might complain that this new focus overlooks the primary role of the individual in politics, an institutionalist would respond that it is the structure that both enables and constrains individual political activity. *Buckley v. Valeo*,[2] one of the central cases of the election law canon, illustrates how individualism and institutionalism differ and how institutionalism offers the fuller account of politics. *Buckley* shows, if only by example, the kinds of changes disciplinary reorganization can make.

After Watergate, Congress extensively amended the Federal Election Campaign Act to regulate many forms of campaign spending,[3] including individual contributions to and expenditures on behalf of political candidates.[4] In reviewing these particular provisions, the *Buckley* Court developed the basic constitutional framework for judging nearly all campaign finance reform. First, and most importantly, the Court located the dispute within existing conceptual and doctrinal categories. *Buckley* was clearly a First Amendment case.

2. 424 U.S. 1 (1976) (per curiam).

3. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1976) (amending Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972)).

4. *See* 18 U.S.C. § 608 (Supp. IV 1970).

Although the case raised associational issues, it centrally concerned free speech:

> The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. 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." Although First Amendment protections are not confined to "the exposition of ideas," "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates" . . . . "[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."[5]

The case fell not only within the ambit of the First Amendment, but within the very core of its concern for political speech.

The Court was not just waving the flag. Campaign finance restrictions do implicate traditional speech interests. The reformers admitted as much when they tried to distinguish *Buckley* as a special kind of free speech case. They argued that *Buckley*, like *United States v. O'Brien*,[6] the draft card burning case, involved conduct primarily and speech only incidentally.[7] Their admission, however, although perhaps necessary, gave up too much. By classifying the case in terms of the First Amendment, the Court brought the whole conceptual apparatus of free speech doctrine to bear on the issues—whether it fit them or not. The case was framed almost exclusively

5. 424 U.S. at 14-15 (citations omitted) (quoting Roth v. United States, 354 U.S. 476, 484 (1957); Winters v. New York, 333 U.S. 507, 510 (1948); Mills v. Alabama, 384 U.S. 214, 218 (1966); and Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

6. 391 U.S. 367 (1968).

7. *See Buckley*, 424 U.S. at 16-19.

as involving a single type of participation right. Other interests were left out.

Consider how moving campaign finance issues to a different conceptual framework, like election law, changes things. Seeing campaign finance issues through an election law lens still makes the participation rights of political speakers an object of concern. Speech about candidates and issues is, after all, an important part of election law.[8] This new lens, however, invites us to see speaking rights as only one of several important interests. By highlighting connections between campaign finance and issues of voter and candidate participation—such as poll taxes; one-person, one-vote; and ballot access—this lens brings into focus several other issues that the free speech framework largely ignores. To a small degree, of course, these issues appear in the background of *Buckley* itself, but they are barely visible.[9] Seeing campaign finance as part of the new election law discipline has the effect of bringing previously peripheral concerns full front and center.[10]

First, this new approach encourages us to view campaign finance as implicating not just a narrow right of individual political speech, but also a broader right of individual electoral participation. The Court has rejected many formal and informal restrictions on who can participate in elections,[11] political party nominating events,[12] and the even more informal processes leading up to party nominating events.[13] While the Court has never found a general right to vote in

8. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

9. *See Buckley*, 424 U.S. at 30-35 (discussing impact on incumbency rates and minority parties).

10. This is not to say that *Buckley* would necessarily have come out differently under this new approach. The bottom line might have remained the same. The reasoning, however, would have been much more responsive to the full range of individual and institutional interests at stake.

11. *See* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 622 (1969) (invalidating a New York statute that excluded from participation in school district elections voters who neither owned real property within the school district nor had children enrolled in the school district); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (invalidating poll tax).

12. *See* Nixon v. Herndon, 273 U.S. 536 (1927) (invalidating white primary).

13. *See* Terry v. Adams, 345 U.S. 461 (1953) (invalidating unofficial, pre-party primary).

the Constitution, it has found in equal protection a right not to be denied the vote to the extent others have it.[14] The Court has, for example, struck down poll taxes under the fundamental rights strand of equal protection because

> [v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax . . . .
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> . . . .
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> Wealth . . . is not germane to one's ability to participate intelligently in the electoral process. . . . To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor.[15]

Many reformers, of course, have pressed this connection.[16] Just as the state cannot condition the right to vote on payment of a fee, it cannot, they argue, condition the right to speak on having a certain amount of money. The Court would certainly strike down a state licensing fee for political speech. These reformers then stir in the logic of the Court's right-to-appointed-counsel cases. Just as the Court held that states could not allow market inequalities to make certain differences in the criminal justice system,[17] the reformers argue that the state cannot allow some people's inferior position in the economic market to place them at a severe disadvantage in the public electoral process.

These reformers are right. *If* we locate campaign finance issues within the fundamental rights strand of equal protection, we will come close to placing an affirmative obligation on the state to maintain very rough equality among election speakers. Many will object, of course, that campaign finance differs crucially both from requiring a license to speak and from not providing an indigent criminal defendant with a court-appointed attorney. In the first case, the state is not passively relying on market inequalities but actively constructing

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14. *See* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 622 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

15. *Harper*, 383 U.S. at 666-68 (footnote omitted).

16. *See* Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160 (1994); Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273 (1993).

17. *See* Douglas v. California, 372 U.S. 353, 355 (1963); Griffin v. Illinois, 351 U.S. 12, 16-19 (1956).

a hurdle of its own. In the second, some might think the underlying right needs more protection. The point here, however, is not to decide which side is right, but only to show that shifting the lens through which we view campaign finance from the right to free speech to the right to participate highlights completely different issues. It radically transforms the terms of the debate, but does not necessarily settle it.

Second, we could see campaign finance issues as implicating one-person, one-vote concerns. In the 1960s, the Supreme Court decided that different election districts for the same class of political office within a single political jurisdiction could not contain substantially different numbers of people.[18] Federal election districts, it later held, had to achieve almost exact mathematical equality,[19] while state legislative and local districts were given somewhat more leeway.[20] The Court reasoned that the Equal Protection Clause requires each citizen to have an equal say in candidate elections.[21] Giving one district of 200,000 people the same number of representatives as a district of 100,000 people clearly violated this notion of political equality.[22]

Reading campaign finance issues in light of these cases gives campaign finance issues a new spin. The question becomes less whether campaign finance regulation trenches on an individual's right to speak and more whether allowing some people or entities to spend more money on elections gives them more power over ultimate political outcomes. Like the analogy to the right of participation cases, this approach stresses that spending implicates voting just as much as speech. But, just as before, this shift in perspective may deepen analysis without necessarily answering the bottom-line question. One might believe that even if this type of inequality is bad, correcting it would only worsen the problem.

This shift of perspective has much intuitive appeal, if only because the new perspective fits some of the experience it describes

18. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (state legislative districts).

19. *See* Karcher v. Daggett, 462 U.S. 725, 727 (1983).

20. *See* Mahan v. Howell, 410 U.S. 315, 324-25 (1973).

21. *See Reynolds*, 377 U.S. at 561-68.

22. *See id.* at 562-64.

better than the old one. The free speech framework, for example, explains only a small part of why people make contributions and independent expenditures. This framework views such spending more as a way for the speaker to express ideas than as a way to get a candidate elected.[23] This view leads the Court to distinguish contributions and independent expenditures from each other in an odd way. Viewed in a purely expressive manner, contributions—money given to a group to spend at its own discretion—represent second-rate speech. They signal only the fact that a particular contributor likes a particular candidate, but not what their shared ideas are or how strongly the contributor likes the candidate.[24] In other words, they express a bond between the contributor and the candidate, yet reveal almost nothing about that bond. Independent expenditures, on the other hand, do communicate the speaker's own ideas because the speaker controls how the money is spent.[25] For this reason, they represent a kind of first-rate speech. The distinction between contributions and independent expenditures, the most troubling, often criticized, but significant feature of the Court's reasoning in *Buckley*, thus springs directly from the free speech lens the Court uses to see the case. To the Court, independent expenditures deserve more protection than contributions not because they are more important to the spender or to the candidate, but because their direct expressive content is richer.

This may be true, but it completely misses the point of why people make contributions and independent expenditures. People primarily spend money on candidates to help them win, not to ventilate the contributors' own ideas. If the free speech view of spending were really pertinent, for example, people would make expenditures

23. *See Buckley*, 424 U.S. at 19-23.

24. As the Court put it:

> A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate.

Id. at 21.

25. *See id.* at 19-20.

and seldom make contributions. Expenditures, after all, pack a much greater direct expressive punch.[26] But people typically make independent expenditures only when they have "maxed out" on contributions, that is, made the maximum the law allows. And the reason is clear. People want their candidates to win. When I contribute to someone, I care less about whether the candidate expresses my own ideas in the campaign than whether I can count on having the winning candidate's vote in the legislature. Campaign speech is important to me mostly insofar as it helps get my candidate elected. The one-person, one-vote framework captures this insight nicely. If we see spending more like voting—as a way of getting a candidate elected, not as a way of better promoting the speaker's own thoughts in the general marketplace of ideas—contributions and expenditures make much more sense and it is easy to understand why people prefer contributions over independent expenditures. Contributions are simply a more effective way of getting a candidate elected. The candidate knows best how to spend to win.

Finally, we can view campaign finance in light of the ballot access cases. In most of these cases, minor parties or independent candidates challenged rules that made it difficult for them to get a place on the ballot.[27] Although the Court has justified many of these laws as necessary for an orderly election process,[28] many commentators have suggested a different motivation. They see these rules as ways for the two existing major parties to keep out competition.[29] By creating high barriers to entry, the two major parties can maintain duopoly power over the political process.

Although the courts have downplayed these kinds of concerns in campaign finance, commentators on both sides of the debate have seen obvious connections. Some deregulationists claim that campaign finance regulation serves to entrench incumbents of both

26. *See id.*

27. *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997).

28. *See id.* at 358; Burdick v. Takushi, 504 U.S. 428, 433 (1992).

29. *See* Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331; Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

major parties.[30] Reformers, on the other hand, argue that *inadequate* regulation can entrench incumbents against challenge.[31] The point here is not to take sides in this debate, but to point out that the ballot access framework puts these larger concerns that the free speech framework overlooks full front and center.

The ballot access analogy also points to a different kind of weakness in the free speech paradigm. Unlike the right to vote and one-person, one-vote analogies, which brought into focus other individual interests that the free speech paradigm ignored, the ballot access analogy raises concerns that run beyond the individual. It points to the larger institutional effects that various campaign finance regimes can have. How does a particular regulatory regime affect the competitiveness of non-incumbents? How does it affect the competitiveness of minor parties and independent candidates? Just as important, how does it affect the legislative process? Does it systematically advantage certain groups within the legislature? The Court's traditional free speech focus deals awkwardly, if at all, with these important concerns. It also causes us to overlook much of the significance of political intermediaries, players like political action committees, political parties, corporations, unions, and public interest groups, all of which play important roles in our politics. The free speech paradigm sees them primarily as ways of aggregating individual expression, which misses the critical monitoring and disciplining functions these intermediaries perform.[32]

Interestingly, academics on both sides of the campaign finance debate are more sensitive to these issues than are the courts. As the field of election law develops, scholarly analysis seems to be moving away from an almost exclusive focus upon individual speech, instead focusing on other types of individual interests and on the larger effects on institutional arrangements. Prominent deregulationists,

30. *See* Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258 (1994); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049 (1996).

31. *See* Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1400-03 (1994).

32. *See* BeVier, *supra* note 30, at 1276 (discussing monitoring role); Samuel Issacharoff & Daniel R. Ortiz, *Governing through Intermediaries*, VA. L. REV. (forthcoming 1999) (discussing monitoring and disciplining functions).

like Lillian BeVier and Bradley Smith, argue that campaign finance regulation will have deleterious structural effects,[33] while reformers like Ronald Dworkin and Cass Sunstein talk about how campaign finance regulation can improve the structural arrangements of our political system.[34]

Will the courts move from seeing campaign finance regulation as an awkward step-child of the First Amendment to seeing it as implicating the same kinds of individual and structural concerns that other election law cases do? There is hope, but progress will be slow and fitful. The old picture has a deep hold on us. We need nothing less than a fundamental shakeup of current conceptual and doctrinal categories. Still there is precedent. Consider the influence of law and economics on private law. Although we still teach tort, contract, and property in separate courses, in many law schools, concerns like incentive effects, activity levels, and the Coase Theorem[35] organize them all. This thinking has gradually crept into the cases. Similarly, many deep cultural assumptions have also crept into constitutional doctrine despite the Constitution itself. The party system, for example, appears nowhere in the Constitution and is, in fact, deeply antithetical to the Framers' original beliefs.[36] Yet the Court now sees it as an institution worthy of particular constitutional respect.[37] Doctrine will clearly lag behind, but we may hope that as election law develops as a discipline, it will lead the courts, and the courts will follow.

33. *See* BeVier, *supra* note 30, at 1267; Smith, *supra* note 30, at 1050.

34. *See* Sunstein, *supra* note 31, at 1390-91; Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. OF BOOKS, Oct. 17, 1996, at 19.

35. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

36. *See* ISSACHAROFF ET AL, *supra* note 1, at 187-89.

37. *See* Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986).