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BY

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Financing Politics

Buckley v. Valeo: First Amendment Rights vs. Campaign Financing Laws

The financing of political campaigns was long ago considered to be one of the greatest unsolved problems of the American democratic system.¹ It was a topic that the Founding Fathers never contemplated, yet it is now essential to our form of government.

Over the years, there has developed a body of election law which covers the basic regulation of the electoral process. Despite the fact that many of the pertinent statutes were broad, incomplete, or ineffective, reforms in electoral laws have been slow in coming. The Federal Election Campaign Act of 1971 was the first major federal election campaign legislation since the Federal Corrupt Practices Act of 1925.²

However, in 1974 Congress substantially added to the scope of federal regulation in the realm of political campaigns. Reacting to the Watergate scandals, Congress drafted the 1974 Amendments to the Federal Election Campaign Act of 1971.³ This reform movement affected the entire nation and virtually all the states; as the National Association of Attorneys General state, "(it) is unprecedented in the history of our democracy."⁴ Thus, the Federal Election Campaign Act of 1971; subtitle H of the Internal Revenue Code; and the Federal Election Campaign Act Amendments of 1974 represent a major development in electoral reform.⁵ This paper will deal with the latter statute.
In assessing a particular statute, it is of the utmost importance that the overall goals of election reform are: a) spelled out b) scrutinized and c) consistent with the traditional conception of the American political process.

The electoral reform of the 1960's and 1970's focuses on laws regulating the ways which money is raised, handled and spent in American Political Campaigns. As Herbert E. Alexander states:

The way we regulate political finance affect numerous concerns central to the vitality of our democracy; to the integrity of the election process; to levels of public confidence in the election process; to the robustness of our public dialogue; to the freedom to criticize and to challenge effectively those in control of government; to the survival of political parties and the durability of the two-party system; to the participation by citizens in the political process; and to the effectiveness of groups in our pluralistic society.

He goes on further to suggest that the major problem for an election reformer today is: how can you apply democratic principles to elections in an age of media politics, seemingly dominated by money.

"The electoral process today has come to be a classic case of conflict between the democratic goal of full public dialogue in free elections and the conditions of an economic marketplace."

The Supreme Court case Buckley v. Valeo, in assessing the Federal Election Campaign Act Amendments of 1974, deals with these overall conflicts. However, after Buckley v. Valeo the reform problem still remains:

how to improve political dialogue, attract a more attentive and well-informed electorate, encourage citizens to participate in the political process as workers, contributors and voters, and yet diminish financial inequities among candidates and political
parties, reduce the dominance of big money, while opening opportunities for well-qualified persons to become candidates.

The purpose of this paper is to explore some of the implications and results of campaign reform. Specifically, I intend to examine the First Amendment problems inherent in the 1974 Amendments to the Federal Election Campaign Act of 1971; the discussion revolves around the decision in Buckley v. Valeo. This paper will examine this case extensively, however, no attempt will be made to deal with every issue decided by the Court.

I hold that the opinion in Buckley v. Valeo is inconsistent, thus useful for thought but not judicial precedent; is questionable on the contribution/expenditure distinction and on the independent expenditure interpretation; however, it gives weighty consideration to First Amendment freedoms, while staying within the bounds of the status quo of our free enterprise system.

To evaluate this contention, the major issues that will be dealt with in this lengthy per curiam opinion will be disclosure provisions; contribution limits; and expenditure limits. These classifications will be scrutinized and held up to various First Amendment tests. In order to accomplish these goals, the facts of Buckley v. Valeo; First Amendment analysis; and the debate revolving around the opinion of the Court must be laid out.

Buckley v. Valeo

The case Buckley v. Valeo challenged the constitutionality of the Federal Election Campaign Act Amendments of 1974. The Supreme Court opinion stated:
The statutes at issue summarised in broad terms, contain the following provisions: a) individual political contributions are limited to $1,000 to any single candidate per election, with an overall annual limitation of $25,000 by any contributor; independent expenditures by individuals and groups "relative to a clearly defined candidate" are limited to $1,000 a year; campaign spending by candidates for various Federal offices and spending for national conventions by political parties are subject to prescribed limits; b) contributions and expenditures above certain threshold levels must be reported and publicly disclosed; c) a system of public financing of Presidential campaign activities is established by subtitle H of the Internal Revenue Code; \[10\]

An article in the Columbia Law Review stated that there had never been such a major test of the constitutionality of a multifaceted piece of campaign reform legislation.\[11\] Therefore, the challengers in Buckley v. Valeo advanced many new arguments and constitutional issues.\[12\]

After assessing each major provision individually, the Court dividing 7-1 held that the Act's limitations on individual expenditures in support of federal candidates, and on the total amount of spending by a candidate were unconstitutional. The same was true for restrictions on the amount a candidate could spend of his own funds, only it was by a 6-2 vote. In contrast, a 6-2 majority allowed ceilings on contributions to the political campaign of others, and the provisions relating to public financing of Presidential campaigns. Similarly, by a 7-1 vote, the court upheld the Act's disclosure provisions relating to campaign contributions and expenditures.\[13\]

In essence, the Supreme Court held that: provisions limiting individual contributions to campaigns were constitutional despite First Amendment objections; that provisions limiting expenditure by candidates on their own behalf violated the candidate's right to
freedom of speech; that provisions limiting total expenditure in various campaigns were invalid; that provisions limiting the amount which any individual could spend, independently of a candidate, but relative to the candidate, impermissibly abridged freedom of speech; (and) that the reporting requirements under the Act were valid; . . ."14

Buckley v. Valeo: Money and the First Amendment

How is money tied to the First Amendment? An article in Ohio Northern University Law Review entitled, "Buckley v. Valeo: Federal Election Campaign Reform at the Expense of First Amendment Rights", clarifies this point. It states, "The fundamental issue before the Court in Buckley was whether money is speech, and therefore protected by the First Amendment."15 The author goes on to state that the Court resolved this issue by stating that money is speech26 and that the Court placed First Amendment rights "in a preferred position, finding political speech to be at the very core of the First Amendment."17 However, the author also notes the discrepancy between the standards of scrutiny subjected to a) limitations on expenditures by candidates; individual expenditure relative to a clearly defined candidate; and expenditures by candidates from personal or family sources; and b) the contribution limitations and the disclosure requirements. It is noted that critical scrutiny was applied to a) and that a "commensurate standard"18 was not applied to b).

This last statement seems to reflect a basic value disagreement as to the nature of money in the political process. It goes to the very core of the Buckley decision, where the
Court did not rely on the lower court's use of United States v. O'Brien.

The Ohio Northern University Law Review states that the lower court, using O'Brien, held that the 1974 Amendments "regulate money which is conduct, not speech, and any effect upon First Amendment rights was thus incidental." The actual opinion in that case went as such:

This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. We think it is clear that a government regulation is sufficiently justified if it is within the constitutional power of government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

This position could have a chilling effect on First Amendment rights, where expression may be dependent upon money. Going back to the distinctions between a) and b), it appears as if the Court has treated money in section a) as speech - a preferred position - and it has protected it under the First Amendment. On the other hand, in category b) the Court has treated money in conjunction with the O'Brien test. It looks as if the Court has sought for Congressional intent i.e. the elimination of corruption and the appearance of corruption, and declared that b) more so than a) would satisfy that purpose. Thus, money under category b) is given a less exacting scrutiny under the First Amendment - it is treated as speech and conduct.
The First Amendment

In discussing the First Amendment implications of Buckley v. Valeo, it is essential that one is familiar with First Amendment doctrines and interpretations.

The First Amendment of the Constitution reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.21

In his book, Understanding American Government, Professor Weissberg points to the fact that despite the clearness of the words "no law" only a few people - Supreme Court Justices Hugo Black and William Douglas are among these - have taken a somewhat absolutist position.22 Even Hugo Black, who expoused an absolute line, has made many exceptions.23

Hailman in his book Speech and Law in a Free Society has stated:

The real question that has engaged and challenged the thinking of judges, scholars, and activists has not been whether there should be any legal restraints on communication, but rather where the line should be drawn.24

Professor Weissberg has outlined three types of speech that scholars frequently distinguish between; each is given varying degree of protection under the First Amendment.

1) The first type of speech is called pure speech. Professor Weissberg states, "This is the peaceful expression of ideas before an audience that has voluntarily chosen to listen."25 This type of speech is protected under the First Amendment.
2) The second category can be labeled "speech plus" i.e., a poster communicating your ideas. This is seen as a form of speech, but since the behavior goes beyond mere speech, however, actions can be subject to some restrictions that would not apply to pure speech.  

3) The third type of speech is called symbolic speech. Here, action is taken by manipulating symbols to express one's opinion; defining this type is very troublesome.  

In addition to the various types of speech, there are several primary views of the First Amendment. The first is a rationalist view of the First Amendment as interpreted by Walter Berns. He argues that the Founding Fathers were rationalists, and they wanted the First Amendment to protect serious and "decent" disclosure of public affairs and not "vulgar" i.e. fuck the draft, types of speech.  

Similar to the rationalist view, Alexander Meiklejohn, who was one of the country's most recognized modern philosophers of the First Amendment, stated that there are two types of speech protected by the First Amendment; each is protected by separate provisions of the Bill of Rights. He states that the freedom of speech guaranteed by the First Amendment only protects communication which has to do with the process of self-government. This type of speech is almost absolute - citizens in a democracy must have the right to unrestrained freedom of discussion (regarding public affairs) so that good societal decisions can be made. In contrast, he distinguishes this from private speech - individual
expression not related to the political process. This type of speech is given protection by the due process clause of the Fifth Amendment. 29

The third view is expanded by Zechariah Chafee (a student of Mieklejohn). He was an influential figure in bringing about the acceptance by our legal system of a distinction between words which convey ideas and those which are more like acts and may be treated as such. 30

Now that the types of speech and the views of the First Amendment have been detailed, there are two more components which are necessary for a thorough First Amendment analysis of the case Buckley v. Valeo. These are 1) the two conceptions of the First Amendment and 2) the varying tests the Court has used under First Amendment cases. I will begin with the former.

At issue in Buckley v. Valeo is a conceptual difference in interpreting the meaning of the First Amendment. An article in the Wisconsin Law Review is very helpful in this regard. It states that when the meaning of the First Amendment is conceptualized, one must focus, to some extent, upon its goals. The author then shows the relationship between one's values and one's perception of these goals. If a person strongly values egalitarianism, the argument goes, the more likely he will view equalization of expression as an important First Amendment goal and will be more tolerant of mechanisms designed to accomplish that purpose. 31

On this point, Judge Skelly Wright has asserted that the Supreme Court's characterization of the use of money in politics as "pure speech" misconceives the First Amendment. He stated:
Nothing in the First Amendment prevents us, as a political community, from making certain modest but important changes in the kind of process we want for selecting our political leaders. Nothing bars us from choosing, as I am convinced the 1974 legislation did choose, to move closer to the kind of community process that lies at the heart of the First Amendment conception - a process wherein ideas and candidates prevail because of their inherent worth, not because prestigious or wealthy people line up in favor, and not because one side puts on the more elaborate show of support. Nothing in the First Amendment bars us from those steps, for nothing in the First Amendment commits us to the dogma that money is speech.32

Judge Wright's approach is reflected in the appellate courts's opinion in Buckley. It is argued that as a whole, the 1974 legislation enhances First Amendment values. By reducing disparity of wealth, the Act equalizes the relative ability of all voters to affect the electoral outcomes and it allows interested citizens to become candidates for federal offices.33

The Wisconsin Law Review claimed:

Implicit in the Appellate Court's approach was an acceptance of the position that the goal of the First Amendment is to present a "market place of ideas", and that this market place operates best when there is a free flow of ideas from various sources - not just from voices emanating from the affluent segment of society . . .34

Meikeljohn is noted for his contribution to this First Amendment right of access. He stated, "(t)he First Amendment . . . is not the guardian or unregulated talkitiveness, what is essential is not that everyone shall speak, but that everything worth saying shall be said."35 He also felt that the First Amendment's most important purposes was the facilitation of the discussion of public issues in order to permit citizens to perform the electoral function intelligently.36
The Supreme Court in *Buckley v. Valeo* rejected the access position. It refused to see the equalization goal as a competing First Amendment interest. In some instances, i.e. by allowing unlimited independent expenditures on behalf of a candidate, the Court took a very broad view of the First Amendment. Limitations in this area would interfere with the broad dissemination of ideas during campaigns. By taking this approach, the Court could not accept attempts to structure the market place of ideas to assure diversity. However, the Court did not, as we shall see later, accept the broader approach to the First Amendment in all areas that it scrutinized.

To conclude the discussion of the First Amendment, the tests that the Supreme Court has used in their First Amendment analysis must be presented. It is difficult to organize and make sense out of the numerous rules relating to the First Amendment, but, Professor Weissberg gives a concise listing of the three predominant positions. One, is the "clear and present danger" test outlined by Justice Holmes in *Schenck v. United States*. The issue here was whether words would quickly and directly bring about an end that Congress could prevent.

A second position that attempts to bring logical order to limitations on free speech emphasizes the "reasonableness" of the legislatively imposed restrictions. If the restriction does not offend a "reasonable man", then it is constitutional, if the government regulation is in an area that Congress has authority to legislate in.
Finally, some Supreme Court justices have formulated what has been called the preferred position of free speech guarantees. Basically, it is argued that freedoms of speech, the press, and religion are more fundamental than other freedoms because they provide the basis of our liberties. Thus, they can be infringed only under extreme conditions.

Buckley v. Valeo: The Decision in Light of the First Amendment

A) Disclosure Requirements

This part of the decision in Buckley seems to be sound; consistent with judicial precedent; and gives adequate weight to first Amendment freedoms. It is still open, nonetheless, to charges of overbreadth.

In general, defenders of the 1974 Act's disclosure provision argue that, where privacy is a significant value, it should not shield large contributors from public knowledge. Freedom of association, they argue, should not be used to allow personal wealth to unduely influence an election. In addition, it is held that disclosure of small contributions is necessary to insure that contributions in excess of the ceilings are not hidden by breaking them down into smaller payments.

Opponents of the disclosure provision charge that disclosure requirements destroy the time-honored right to political anonymity. Anonymity, they argue, is a pre-condition to fund-raising by controversial parties "and may often be required to permit free support of major parties as well." These disclosure
requirements apply to both contributions and expenditures.

In rebuttal, it is argued that the essence of campaign reform is providing knowledge of how a candidate finances his campaign and how much money he receives and spends. These facts must be made public so voters can "intelligently guard against the corruption inherent in large special or single-interest donations." Generally, the courts have held that such disclosure reflects the intent of the legislature and upholds public interest.

A book on campaign finance law by the National Association of Attorneys General concisely summarizes this area of disclosure. It notes that in *Buckley v. Valeo*, the Supreme Court upheld statutory requirements that campaign records be kept of all contributions over $10, and all contributions over $100 be reported with the address, occupation and place of business of the contributor. People making independent expenditures on behalf of a candidate must report expenditures over $100.

The book also states:

The Supreme Court has repeatedly found that compelled disclosure of group membership, in itself, can seriously infringe on privacy of association guaranteed by the First Amendment. The First Amendment right to group association is generally protected because it enhances advocacy, and disclosure of campaign contributions can infringe those political rights. Disclosure, however, has been held to further three substantial governmental interests. First it allows the electorate to know who is contributing to a candidate; second, it deters corruption and the appearance of corruption; and third, it is a means of enforcing contribution limits. The Court in Buckley noted Justice Brandeis' advice that (p)ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.
The Supreme Court upheld disclosure provisions except where contributions to a minor party might subject contributors to "threats, harassment, or reprisals from either government officials or private parties."\(^{47}\) It reasoned 1) compelled disclosure may be a significant encroachment on First Amendment freedoms, 2) the subordinate interest of the state must survive exacting scrutiny, 3) since the three government objectives mentioned are important, the intrusions on the First Amendment freedoms are justified.

Ralph K. Winters in *Watergate and the Law* questions the overbreadth of the disclosure provision for every contribution over $100 to a presidential campaign. He sees it as inconceivable that $100 could have an undesirable impact.\(^ {48}\) However, he ignores the argument that if you are going to have contribution limits, disclosure provisions are necessary to insure that contributions in excess of the ceilings are not hidden by breaking them down into smaller contributions.

In Summ, the ruling on the disclosure provisions seems to be consistent with overall goals of election reform: the specific goals of the 1974 Act are spelled out; the opinion gave consideration to the level of scrutiny and accommodated the objections; and these provisions do not offend the foundation of the American political process.

The analysis in the case of disclosure seems to be as such: 1) Dependent on the definition of a contribution, money in the case of disclosure, is treated as symbolic or vicarious speech
like the test in U.S. v. O'Brien. 2) A "reasonable" test of
the governments objectives was used. 3) That Zechariah Chafee's
ideas between words which convey ideas and those which are more
like acts were given heed. Therefore, disclosure provisions
were constitutional.

If this section is deficient, classification of money as pure speech - to be given strict scrutiny - and the contribution expenditure distinction. This will be discussed later. This opinion on disclosure was consistent with previous cases and precedents. As the Ohio Northern Law Review notes, disclosure per se was not challenged by the appellants in Buckley. The article states that the crux of the constitutional attack centered upon the application or the disclosure requirements to the associational rights of minority and independent candidates. The court addressed these fears and gave weighty considerations to First Amendment freedoms. We shall now see if this is also the case for contribution limitations and expenditure provisions.

B) Contribution Limitations

The part of Buckley which deals with contribution limits is inconsistent; mixes precedents; and can be viewed as being a major infringement of the First Amendment.

In the 1972 Presidential Campaign, there were several large contributors; some individuals gave over $1 million and there were similar contributions by some special interest groups. In response to the appearance of corruption and the possibility
that candidates would be unduely influenced by large contributions, Congress sought to prevent similar patterns of funding in future elections.\textsuperscript{51} Thus, the Federal Election Campaign Act Amendments of 1974 imposed a limit of $1,000 on the amount that an individual could contribute to a political candidate or a committee representing a candidate.\textsuperscript{52}

As previously mentioned, the Supreme Court in \textit{Buckley v. Valeo} discarded expenditure limits as violative of the First Amendment, yet the court upheld reasonable limits on the amount that an individual could contribute to a candidate's campaign or to his committee. It stated that making a political contribution affil­iates a person with a candidate, however, to place a limit on the amount that one person may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's freedom of speech. The Court held:

The quantity of communication by the contributor does not increase perceptibly 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 (and) thus involves little direct restraint . . . it permits a contribution. While contributions may result in political expression if spent by a candidate or an association to present news to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.\textsuperscript{53}

The opinion also stated that the need "to limit the actuality and appearance of corruption resulting from large individual contributions" was sufficient grounds to sustain the constitutionality of the $1,000 limit.\textsuperscript{54} Furthermore, "to the extent that large contributions are given to secure political quid pro quos from current
and potential officeholders, the integrity of our system of representative government is undermined; . . . the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one."55

Concerning contribution limits, the Court seemed to agree with the defenders of the Act who argue that expenditures of large amounts of money to influence an election is not "pure speech", but is a form of "action" which can be subjected to governmental regulations to further a compelling governmental interest - honest and fair elections. However, the Supreme Court did not embrace the egalitarian argument that the purpose of the ceiling was to enhance First Amendment values by ensuring that citizens have greater equality in expressing their political preferences.

Generally, the opponents of the contribution ceilings assert that limits imposed by the 1974 Act impinge upon freedom of speech. They argue that contributions in pursuit of political ends is core First Amendment activity which cannot be interfered with by the government.57

The opinion of the Court, which rejected this viewpoint, is based on several premises. Their argument goes as follows:
a) the Act's contribution limitations impinge on protected associational freedoms b) this entails only marginal restrictions on the contributor's ability to engage in free association c) the right to associate is fundamental d) government action which may curtail the freedom to associate is subject to the closest scrutiny e) after giving the Act's limits close scrutiny, the primary
purpose of the Federal Election Campaign Act i.e. to limit the actuality and appearance of corruption resulting from large individual financial contributions, is sufficient justification for the abridgement of the freedom of political association.

The Harvard Law Review feels that the opinion of the Court was also based on another assumption - that when the activity can be characterized as associational, it will be evaluated in a less critical manner. On the subject of scrutiny and precedents, the Columbia Law Review points out that, even though the Court has accepted the position that money is pure speech, it takes heed of the pure speech/action distinction when it evaluates the area of contribution limitations. In a separate opinion, Justice White points out:

The act of giving money to political candidates . . . may have illegal or other undesirable consequences: it may be used to secure the express or tacit understanding that the giver will enjoy political favor if the candidate is elected.

Similarly, the Yale Law Review claims that the Bukley Court concluded that contributions function as vicarious speech, therefore ceilings on contributions do not significantly curtail the contributor's individual expression and association - the core values of the First Amendment.

This is pointed out as being ironic, since the court previously rejected the O'Brien "symbolic speech" analysis, an approach intimating that speech can be regulated as conduct.

Archibald Cox sums up the Court's reasoning in the area of campaign contributions. Ceilings were appropriate because the
charge of actual or apparent corrupt influence is markedly greater in contributions (vs. expenditures) and there is little or no direct effect upon speech. 63

To conclude this section, contrubtion limits, if reasonable, appear to further the overall goals of election reform. The provisions of the 1974 Act are spelled out and tailored to those objectives. In addition, contribution limitations are not blatantly against the traditional conception of the American political process. However, how high of a limit should there be? What constitutes "reasonable"? The answer to these questions may determine whether or not there is a major infringement of the First Amendment. The Court, it is said (it is ironic at times), should not act like a legislative body.

The Court views the contribution as an act; then a second party takes the money and suddenly, when he spends it (expenditure), it becomes speech and thus transformed into political debate. I hold that this is absurd. There is political debate and speech by the contributor. I am not saying however, that contributions cannot be limited.

Once again, as witnessed in the opinion of the court, the ruling in Buckley v. Valeo is inconsistent; leans toward the doctrine espoused in U.S. v. O'Brien when it refused to follow that precedent; relies on a questionable contribution/expenditure distinction; and infringes on associational freedoms as the court rules. (I would claim freedom of speech.)

Next, we will analyze the expenditure provisions.
C) Expenditure Limitations

The expenditure provisions, despite the similarity to the contribution analysis, were struck down.

According to the National Association of Attorneys General, one of the goals of the Federal Election Campaign Act Amendments of 1974 was to reduce the amount of money spent in campaigns. In 1972, $400 million was spent in campaigns, up 33% from 1968. Therefore, the 1974 Amendments placed comprehensive restrictions on expenditures. These limits were declared unconstitutional in Buckley v. Valeo as being contrary to the guarantees of free speech. However, the court did agree to limits if they were tied to acceptance of public financing.

A report of the Committee of the National Association of Attorneys General summarizes the expenditure provisions:

The Act limited each Presidential hopeful to a total of $10 million expenditures for all primaries. Each party nominee was then allowed $21.8 million in expenditures in the general election campaign, candidates for the Senate were to be allowed the greater of $100,000 or 8¢ per eligible voter in the primary race. A slightly higher limit of the greater of $150,000 or 12¢ per eligible voter was allowed for Senate general elections, House races at both the primary and general level were limited to $70,000 each, except that Senate limits applied to any candidate for a House district which represented a whole state.....

In addition to limits placed on individual candidates, national parties were allowed to expend funds on behalf of their candidate. These expenditures were to be separate from the candidate's individual spending limits. In addition, an individual acting independently of a candidate or political committee could not spend more than $1,000 on behalf of or in opposition to a candidate's election.
The defendants in *Buckley v. Valeo*, arguing for expenditure provisions, relied on *U.S. v. O'Brien*, but the court held this case inapplicable. The Court also dismissed *Kovacs v. Cooper*, "which held that the government may adopt a reasonable time, place and manner regulations on speech to further an important governmental interest unrelated to the restriction of communication."67

The National Association of Attorneys General also state:

... Supporters of campaign finance reform have argued that legislation to restrain spending makes all citizens more equal politically, and that such an opportunity is a sufficiently compelling state interest to justify restrictions on conduct. The Supreme Court has balanced these two conflicting doctrines and held that the First Amendment is paramount in such conflicts.68

In *Buckley v. Valeo*, opponents of campaign expenditure limitations held that contributions and expenditures were at the core of political speech. The Court accepted the position that expenditures involve a free speech element, and ruled that the government interests were not compelling enough to override First Amendment considerations.69

The Oregon Supreme Court in *Devas v. Meyers* struck down expenditure limits because they violated the First Amendment. The opinion was as follows:

It is now well established that not even a compelling state interest in the regulation of the non-communicative aspects of expression can justify infringement of fundamental rights when less drastic means to the desired end are available... For example, ... some form of public subsidy for campaign expenditure.70
This approach is similar to the Court's opinion in *Buckley v. Valeo* in regards to expenditure ceilings restricting spending on the total amount a candidate could spend in the primary and general elections; the extent to which he could use personal funds; and on independent expenditures on behalf of a candidate.

First, I will deal with total expenditures. The Supreme Court used this logic: 1) expenditure limitations impose on associational freedoms 2) The right to associate is fundamental in nature 3) Government regulations which curtail the freedom to associate is given close scrutiny 4) However, the government's interest in preventing corruption is inadequate to justify the Federal Election Campaign Act's expenditure ceilings 5) Limitations on expenditures impose direct and substantial restraints on the quality of free speech.

The Ohio Northern University Law Review commented that the Amendment's limitations on the expenditures of candidates were struck down because they were substantial infringements on First Amendment freedoms. The Court said "(t)he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." 71

The Supreme Court explained the heart of its expenditure decision by saying:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of
of money . . . The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.\(^2\)

The whole scheme of expenditure regulation was unconstitutional because:

. . . 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. The First Amendment's protection of governmental abridgement of free expression cannot be made to depend on a person’s financial ability to engage in public discussion.\(^3\)

An expenditure limit on a candidate's personal funds was also held to be unconstitutional. Since the corruption element was missing, the governmental interest in equalizing financial resources would be the sole governmental interest remaining, but the "First Amendment . . . cannot tolerate . . . restrictions upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy."\(^4\) It is claimed that the government's interest in equalizing the expenditures might not work, since incumbents have name recognition, etc.\(^5\)

Third, the Supreme Court struck down the provisions limiting independent expenditures of more than $1,000, holding that such a restriction "precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection and freedom of association."\(^6\) It was also stated:

. . . the independent advocacy restricted by the provision does not presently appear to prevent danger of real or apparent corruptions comparable to those identified with large campaign contributions . . . The absence of prearrangement and
coordination of (such an) . . . expenditure alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.  

The two most controversial points of the expenditure decision are 1) the expenditure/contribution distinction and 2) the provision relating to independent expenditures. First, I will discuss 2); the distinction between expenditure/contribution will be the subject of the next chapter.

An article in the Wisconsin Law Review notes that the Supreme Court failed to view the equalization goal as a countervailing First Amendment interest. By striking down the expenditure restrictions, the Court did not accept the argument that without restrictions, the wealthy are able to drown out the voices of the less affluent in the political arena.  

The article also states that the limitations upon independent expenditures on behalf of candidates and upon overall campaign expenditures arguably could have been upheld on the theory that they were necessary to a) equalize the political process and b) prevent the appearance and reality of corruption - goals which the Supreme Court considered sufficient to sustain contribution limitations. This viewpoint however seems to imply that unequal spending and wealth differentials are inherently corrupt; but this condition is a basic foundation of our economic system (no, not corruption, but unequal spending and wealth differentials).

A valid point is raised, nonetheless, when it is commented that since the 1974 legislation has shut off the possibility of large contributions, the only way a wealthy individual or group
can use substantial amounts of money to "support" a candidate is to make "independent expenditures". 80

Archibald Cox points to the uncertain scope of the ruling that the First Amendment seems to secure an individual the right to spend unlimited amounts of money to support a candidate of his choice, as long as his expenditures are not coordinated with the candidate. 81

He also mentions, in the context of Presidential Campaign, that the issue has current importance. In the 1980 Presidential Campaign, both major party candidates were eligible for Federal funding, which came to $29.4 million for each candidate. They thereby committed themself and all authorized political committees to refrain from making expenditures or incurring obligations over this $29.4 million limit. The intent, Cox states, is to limit organized fundraising to this limit. 82

In 1980, Senator Harrison Schmitt of New Mexico announced the formation of an "independent" committee - it intended to spend $20 - $30 million in support of Reagan. Another group, composed of Nixon and Ford administration officials announced that it intended to spend around $18 million on behalf of Reagan also.

Responding to this, Common Cause and the Federal Election Commission brought actions to enjoin the expenditures of Schmitt's group. Cox notes that a three-judge district court dismissed the complaints, but the decision will be appealed to the Supreme Court. 83

It is argued in this type of situation, whose rights of speech are abridged by regulating "contributions" to an independent
committee? Those who donate are not engaging in communication. It is similar to a direct contribution to a candidate involving "only a marginal restriction" upon the contributor's ability to engage in "free communication" because "the transformation of contributions into political debate involves speech by someone other than the contributor." Thus, actions in the independent expenditure category can be just like contributions which could be regulated in Buckley v. Valeo.

The Chief justice and Justice White hold that the Court's distinction in this regard is a "specious one". They claim that few "independent expenditures are used in such a way that the spender is the 'speaker'." Justice White explained that the Court upheld contribution restrictions even though they placed a "low ceiling on what individuals may deem to be their most effective means of supporting or speaking on behalf of a candidate i.e. financial support given directly to the candidate."

The article in the Wisconsin Law Review concluded that reasonable limitations upon independent expenditures made on behalf of candidates does not prevent views from entering the market place of ideas. Limitations would interfere with the broad dissemination of ideas during campaigns. However, it is claimed, expressions which are helpful to a candidate will frequently be disseminated by the campaign, and those which are detrimental are likely to be disseminated by the opponent.
D) Expenditure/Contribution Distinction

The book, The Rights of Candidates and Voters, said that the Court in Buckley v. Valeo attempted to distinguish between contributions and expenditures. "(This distinction) is thought by many to be the weakest analytical aspect of the opinion." It is questionable whether a contribution of money to a candidate should be given more or less protection than a direct expenditure on the candidates behalf.

Commenting on the opinion in Buckley v. Valeo, Archibald Cox said:

The majority . . . sought to chart a constitutional distinction between the ceilings upon expenditures, which were held to violate the First Amendment, and the ceilings upon contributions, which were sustained. This is plainly the most difficult and important aspect of the case.91

Three Justices rejected the distinction between expenditures and contributions. The Chief Justice and Justice Blackmun used strict scrutiny under the First Amendments "pure speech" doctrine; thus, all ceilings were held to be unconstitutional. Justice White saw both as regulating of the giving and spending of money, so they could be regulated because of the non speech element. The integrity of government and public confidence were sufficient to justify indirect effects upon First Amendment interests.92

Buckley v. Valeo stood for a middle ground. The Columbia Law Review saw the Court's thesis as stating that expenditure limitations present far more substantial restraints on "the quality and diversity of political speech" than do limits on the amount
individuals or groups may contribute to a candidate or political committee. 93

The Harvard Law Review found, to reach different results for the Act's contribution and expenditure limitations, that the Court found it necessary to take questionable steps - it implicitly adopted a test for incursions on associational freedoms at variance with the test used when individual expression is impaired. 94 Thus, the argument goes, the majority was able to distinguish autonomous expression from "the transformation of contributions into political debate (which) involves speech by someone other than the contributor." 95 Furthermore:

This distinction ignores the functional similarity of contributions and uncoordinated political expenditures . . . In fact, the pooling of funds contributed by supporters and delegation of promotional decisions to the candidate will produce more cost-effective and articulate advocacy than could be achieved by individual expenditures. Thus, contribution limits should have received scrutiny as exacting as that afforded expenditure limits. But the Buckley court tacitly indicated that when activity can be classified as associational, it will be evaluated in an indeterminately less critical manner. 96

Last, the article says, the decision was decided:

Partly because independent expenditures were seen as unlikely to give rise to such reciprocal agreements, the Court struck down expenditure limits. However, Congress might equally have been concerned with more subtle and varied attempts to gain influence over candidates that even uncoordinated expenditures can represent. 97

In conclusion, the Ohio Northern University Law Review commented on Buckley v. Valeo:

Only where the most flagrant First Amendment intrusions were manifested did the Court sever the legislation. Consequently, the Court upheld needlessly
over broad contribution limitations and disclosure requirements, while they struck down as unconstitutional accompanying expenditure limitations, . . . 98

I disagree somewhat with this position. As a whole, I feel that the Court stuck to legislative intent and by keeping to an individual theory of rights, protected the balance of First Amendment freedoms. Also, by disallowing an egalitarian aspect of the First Amendment, the Court showed its prudence by accepting the realities of money and power in politics and the structure of our economic system.

Yet, as we have seen, the opinion is riddled with inconsistencies; does not stick to judicial precedent in the classification of money as speech; presents a questionable distinction between contributions and expenditures; gives different levels of scrutiny to different provisions while claiming that critical scrutiny is called for; and is shakey on the independent expenditure interpretation. There is room for improvement.
Financing Politics

Buckley v. Valeo: First Amendment Rights vs. Campaign Financing

Conclusion

As we said at the outset, the electoral process today has "come to a classic case of conflict between the democratic goal of full public dialogue in free elections and the conditions of an economic market place."\(^9\)

Alexander Heard, in a pamphlet entitled "Money and Politics" made a very important point:

Even though most would agree that everything possible should be done to limit the access and influence that go with large contributions, it is useful to remember two moderating aspects of United States politics. American society is composed of a number of conflicting interests that compete against each other in the political process. This is what politics is largely about, campaign contributions are but one of the many weapons in the contest, and they are often not the most effective and are never confined to any single interest group. Moreover, the power of those who control large concentrations of wealth takes many forms in addition to money spent in politics. In a society based on free enterprise, this power can never be entirely controlled, if indeed it should be.\(^99\)

Proposals in the realm of Campaign Financing are of critical importance. Some may alter the political process, and will have results transcending the issue at hand. I feel that the decision in Buckley v. Valeo, despite conceptual errors, allowed for significant public dialogue while accounting for the reality of the economic market place. It took into account the several moderating aspects of American politics. However, the decision will be challenged and revised according to the First Amendment guidelines used in this analysis.
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