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## ***Buckley in a Nutshell***

The Constitution of the United States grants to Congress the power to regulate elections for national office<sup>1</sup> but forbids to Congress the power to regulate speech (and association).<sup>2</sup> Whenever Congress attempts to regulate political campaigns, therefore, the push for the power granted is constrained by the pull of the power denied.

*Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), is the leading case where the prohibition against regulating speech confronted the power to regulate elections. *Buckley* can be approached as a legal struggle between competing interpretations of the Constitution, or it may be seen as a fundamental philosophical struggle between differing ideas of equality and liberty — and the meaning of money for both.<sup>3</sup> That struggle continues to this day.

### **The Act's Challengers**

In *Buckley*, the Supreme Court reviewed the constitutionality of the Federal Election Campaign Act (FECA), which was “by far the most comprehensive reform legislation [ever] passed by Congress concerning the election of the President, Vice-President, and members of Congress.”<sup>4</sup> A politically diverse set of plaintiffs — including conservative Republican Senator James Buckley, liberal Democratic Senator Eugene McCarthy, the American Conservative Union, the Libertarian Party, and the American Civil Liberties Union — attacked the Act, alleging that on numerous points the FECA infringed on constitutionally protected rights.

### **The Act's Defenders**

FECA was defended by the Federal Election Commission, Common Cause, and others who argued that the Act was not about speech, but about *money* and *equality*. “We cannot too often stress that the legislation in suit is concerned with money, not speech,” wrote the defenders in one of their briefs. “The evil aimed at is not prolixity, but the undue influence and the gross disparities resulting from unlimited spending in electoral campaigns.”<sup>5</sup>

### **The Attempts to Justify FECA**

The Act's defenders advanced three governmental interests to justify FECA's limitations on expression, because even fundamental constitutional rights may be circumscribed under the Supreme Court's test if the government can show a compelling reason for the restriction and if the restriction is no broader than necessary to achieve an important governmental objective.

- First, it was said, FECA was designed primarily to prevent “corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions. . . .”<sup>6</sup>
- Second, FECA was intended to “mute the voices of affluent persons” and “thereby equalize the relative ability of all citizens” to influence elections.<sup>7</sup>
- And third, FECA was supposed to “brake . . . the skyrocketing cost of political campaigns” and thereby “open the political system more widely to candidates without access” to large sums of money.<sup>8</sup>

## **FECA Upheld in Part**

In its *Buckley* decision, the Supreme Court agreed with FECA's defenders, in part, and **did uphold** FECA with respect to —

- public financing of presidential elections,
- record keeping and disclosure requirements, and
- contribution limits.

The Court said FECA's contribution limits implicated the freedom of political association, a “basic constitutional freedom,” but that “[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.”<sup>9</sup> The Court found the government's interest in eliminating (or minimizing) corruption and the appearance of corruption was a “sufficiently important interest” to overcome a person's freedom to make an unlimited contribution. (The Court did not examine the other purported justifications for limits on contributions.) Therefore, FECA's limits on political contributions were held to be constitutional.

## **FECA Struck Down in Major Part**

In the larger sense, though, the Act's defenders lost their case because the *Buckley* court ultimately held that FECA was indeed about constitutionally protected free speech<sup>10</sup> and free association.<sup>11</sup> All three of the proffered justifications for limiting expenditures were held inadequate, and the Supreme Court **struck down** the limitations on —

- campaign expenditures,
- independent expenditures by individuals and groups, and
- expenditures by candidates from their personal funds.<sup>12</sup>

In its brief, the United States had told the High Court that “[t]he central question involved in expenditure limitations, which is quite different from that involved in contribution limitations, is whether a person can be prohibited from spending money to communicate an idea, belief, or call to action.”<sup>13</sup> When the “central question” is stated this way (and it seems an entirely fair and accurate way to state it), it is hard to see how the Court could have done anything except find expenditure limits unconstitutional.

The proffered justifications for FECA’s expenditure limits all were rejected. The asserted interest in eliminating corruption was insufficient because “independent advocacy . . . does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.”<sup>14</sup> The other two proffered justifications (restricting the speech of the richer to make the speech of the poorer relatively more influential, and opening up the political system to make it “more fair”) fared no better. The Court held that government cannot restrict the speech of some persons in order to enhance the speech of others,<sup>15</sup> nor can the government restrict speech to make the election process “more fair.”<sup>16</sup>

Section 601(e)(1) of the FECA provided, “No person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds \$1,000.” The court of appeals regarded this expansive provision as a minor “loophole closing” provision that prevented persons from circumventing the limit on contributions. This was the apparent position of Congress, also.<sup>17</sup>

The Supreme Court emphatically disagreed with both Congress and the lower court.

## **Drawing Distinctions Within the Opinion**

The *Buckley* court acknowledged (or created) four distinctions, and the decision cannot be understood unless the distinctions are recognized and understood:

- First, the Supreme Court said there is a constitutionally significant distinction between a contribution and an expenditure. A contribution is given to a candidate or political committee, and it carries with it the possibility of a political *quid pro quo* or the seeds of corruption. On the other hand, expenditures do not go to candidates and do not have the same potential for inducing corruption.
- Second, the Court distinguished between the First Amendment implications of contribution limits and expenditure limits. The “primary First Amendment problem” with the contribution limits was their effect on “freedom of political association,”<sup>18</sup> but the problem with the expenditure limits was their “direct and substantial restraints on the quantity of political speech.”<sup>19</sup>

- Third, the Court said there is a constitutionally significant difference between the harm done by contribution limits and the harm done by expenditure limits. “[A]lthough the Act’s contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.”<sup>20</sup>
- Fourth, the Court held that political expenditures constitute core political speech,<sup>21</sup> but that political contributions, although protected by the First Amendment, are not at the core but closer to the crust of the First Amendment.<sup>22</sup>

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## Endnotes

1. “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed [by] each State . . .; but the Congress may at any time by Law make or alter such Regulations. . . .” U.S. Const., Art. I, sec. 4. Congress also has broad power to legislate in connection with presidential elections. *Burroughs v. United States*, 290 U.S. 534 (1934).
2. “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . .” U.S. Const., Amend. 1. The amendment also protects a freedom of association. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).
3. *Buckley* seems to be a classic case pitting one conception of equality against a conception of liberty. In BeVier, “Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform,” 73 *Calif. L. Rev.* 1045, 1046 n. 5 (1985), Professor BeVier listed the views of some of the leading proponents of leveling: Tribe (“contribution and expenditure limitations promote speech by redressing distortion caused by wealth”), Cox (“increasing voice of financially powerful corporations means net loss of human freedom”), Lowenstein (“contribution limits in referendum contests [are] required to promote political equality”), Nicholson (“large political contributions violate the equal protection rights of voters of modest means”), Patton & Bartlett (“corporate contributions reduce ability of others to be heard in political arena”), and Wright (“campaign contributions reduce ability of others to be heard in political arena”).

It is questionable, of course, whether leveling the money does produce greater equality or “simply shift the locus of inequality. Candidates and potential speakers have unequal access to volunteer support, unequal opportunity to benefit from ‘issue’ groups that engage in publicity designed to increase the salience of an issue on which the candidate may have a well-known position, and unequal access to other nonmonetary sources of potential support. The total inequality may be the same after FECA as before; those who would seek to foster inequality simply must use different resources. And, of course, all of these forms of support can be exchanged for the candidate’s promises, express or implied, of favorable treatment.” Brief for the Attorney General as Appellee and United States as *Amicus Curiae* at 57 n. 34, *Buckley v. Valeo*.
4. The quotation is from the United States Court of Appeals for the District of Columbia Circuit, 519 F.2d at 831. Of course, FECA has roots that go back generations. An excellent history of campaign laws can be found in Epstein, “Corporations and Labor Unions in Electoral Politics,” 425 *Annals* 33 (1976).
5. Brief for the . . . Federal Election Commission at 47-48, *Buckley v. Valeo*.
6. 424 U.S. at 25-26. Text here and in footnotes 7 and 8 show the rationales for contribution limits. Similar rationales were advanced for limiting expenditures.

7. *Id.*

8. *Id.*

9. *Id.* at 25 (citations and internal quotation marks omitted).

10. “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. . . .’ This no more than reflects our ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’ In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in [1971], ‘it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.’” 424 U.S. at 14-15 (citations omitted).

11. “The First Amendment protects political association as well as political expression. The constitutional right of association explicated in *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), stemmed from the Court’s recognition that ‘[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.’ Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee ‘freedom to associate with others for the common advancement of political beliefs and ideas,’ a freedom that encompasses ‘[t]he right to associate with the political party of one’s choice.’” 424 U.S. at 15. “The Act’s contribution and expenditure limitations . . . impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. . . .” *Id.* at 22.

12. See, 424 U.S. at 143. Also, the method for appointing the members of the Federal Election Commission was held to violate the Appointments Clause.

13. Brief for the Attorney General as Appellee and for the United States as *Amicus Curiae* at 67, *Buckley v. Valeo*.

14. 424 U.S. at 46.

15. “It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by section 608(e)(1)’s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed ‘to secure “the widest possible dissemination of information from diverse and antagonistic sources,”’ and ‘to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’ The First Amendment’s protection against governmental abridgment of free expression cannot properly be made to depend on a person’s financial ability to engage in public discussion.” 424 U.S. at 48-49 (citations omitted). “Neither the voting rights cases nor the Court’s decision upholding the Federal Communications Commission’s fairness doctrine lends support to appellees’ position that the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society.” *Id. Id.* at 23. at 49-50 n. 55.

16. “The Court’s decisions in *Mills v. Alabama* and *Miami Herald Publishing Co. v. Tornillo* held that legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment. In *Mills*, the Court addressed the question whether ‘a State, consistently with the United States Constitution, can make it a crime for the editor of a daily newspaper to write and publish an editorial on election day urging people to vote a certain way on issues submitted to them.’ We held that ‘no test of reasonableness can save [such] a state law from invalidation as a violation of the First Amendment.’ Yet the prohibition of election-day editorials invalidated in *Mills* is clearly a lesser intrusion on constitutional freedom than a \$1,000 limitation on the amount of money any person or association can spend during an entire election year in advocating the election or defeat of a candidate for public office. More recently in *Tornillo*, the Court held that Florida could not constitutionally require a newspaper to make space available for a political candidate to reply to its criticism. Yet under the Florida statute, every newspaper was free to criticize any candidate as much as it pleased so long as it undertook the modest burden of printing his reply. The legislative restraint involved in *Tornillo* thus also pales in comparison to the limitations imposed by section 608(e)(1).” 424 U.S. at 50-51 (selected citations and footnote omitted).

17. In a statement that now seems stunningly indifferent to the rights of independent political speakers and the value of independent political speech, the Senate Committee on Rules and Administration wrote in its report:

“While independent expenditures pose a difficult question, it should be emphasized that . . . controls [on such expenditures] are imperative if Congress is to enact meaningful limits on direct contributions. Otherwise, wealthy individuals limited to a \$3,000 direct contribution could also purchase one hundred thousand dollars’ worth of advertisements for a favored candidate. Such a loophole would render direct contribution limits virtually meaningless. Admittedly, expenditures made directly by an individual to urge support of a candidate pose First Amendment issues more vividly than

do financial contributions to a campaign fund. Nevertheless, to prohibit a \$60,000 direct contribution to be used for a TV spot commercial but then to permit the would-be contributor to purchase the time himself, and place a commercial endorsing the candidate, would exalt constitutional form over substance. Your Committee does not believe the First Amendment requires such a wooden construction. If Congress may, consistently with the First Amendment, limit contributions to preserve the integrity of the electoral process, then it also can constitutionally limit independent expenditures in order to make the contribution limits effective.” S. Rep. 93-689, 93d Cong., 2d Sess. 18-19 (1974) (3 paragraphs combined).

18. 424 U.S. at 24-25.

19. *Id.* at 39.

20. *Id.* at 23.

21. “A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate’s increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech. The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.” 424 U.S. at 19 (footnote omitted) (2 paragraphs combined). See also, *id.* at 39 (“The [expenditure] restrictions, while neutral as to the ideas expressed, limit political expression ‘at the core of our electoral process and of the First Amendment freedoms.’”).

22. “By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor’s ability to engage in free communication. 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. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor’s freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.” 424 U.S. at 20-21 (footnote omitted).

