Real Campaign Reform

By Erik S. Jaffe and Robert A. Levy

It was McCain-Feingold in the Senate, Shays-Meehan in the House, and the Bipartisan Campaign Reform Act (BCRA) of 2002 in the statute books. Now, in the courts, it is *McConnell v. Federal Election Commission* — a consolidation of 10 separate challenges by no less than 80 parties represented by 50 high-octane law firms. Yet not a single party really hit the mark with its challenge. Yes, the BCRA is unconstitutional. But the real culprit is not the new law; it is a 26-year-old Supreme Court case, *Buckley v. Valeo*, in which the Court somehow decided the First Amendment allows restrictions on political speech in the form of campaign contributions and express election advocacy. That is the same First Amendment, according to the Court, that prevents restrictions on flag burning and Internet pornography.

The plaintiffs in the 2002 case, led by Sen. Mitch McConnell (R-Ky.), include the National Rifle Association, Republican National Committee, California Democratic Party, U.S. Chamber of Commerce, and the AFL-CIO. Astonishingly, none of them confronts the pivotal holdings of Buckley. Instead, they seem content to fight a rear-guard action — adopting *Buckley*'s dubious premises, and then chipping away at the most offensive portions of the BCRA. But free political expression will not be restored through such halfway attacks. The challengers underestimate the ingenuity and persistence of the reformers, who are bent on mischief and will be back again and again – taking advantage of *Buckley* to circumvent the First Amendment. There is only one sure-fire solution: *Buckley* must be overturned, uprooted, and replaced by an unequivocal pronouncement from the Supreme Court that reinvigorates political speech.

Contributions and expenditures One of *Buckley*'s more egregious inconsistencies is the assertion that campaign contributions get less First Amendment protection than campaign expenditures. There is much debate over the question of whether money should be considered protected speech. In fact, the question itself is misstated. While the contribution or expenditure of money is not by itself speech — except in a limited symbolic sense — a contribution or expenditure for the exclusive purpose of generating speech is so entwined with the resulting speech that it is, and should be, protected to the same extent as the speech itself. As with many rights, exercising the right to speak almost always costs money, especially to reach a large audience. The right to speak thus encompasses the right to pay for speech or its distribution, just as the right to legal counsel encompasses the right to hire a lawyer, and the right to free exercise of religion includes the right to contribute to the church of one's choice.

In each of those cases, the expenditure or contribution of money is protected, not because "money is speech" or "money is a lawyer" or "money is religion," but because spending money is part of the exercise of the right to speak, to counsel, or to religious freedom. For that reason, government limits on spending for speech unavoidably restrict the underlying freedom of speech itself.

The Supreme Court in *Buckley* noted that contributions spent by the candidate on communication "involve speech by someone other than the contributor." But there is no difference between contributions and expenditures for First Amendment purposes. In both cases, speech is mediated through other parties — private groups, advertising agencies, policy experts, or the like. Rarely does an expenditure involve a speaker voicing his opinions personally. Proponents of the BCRA seized upon *Buckley*'s inconsistent treatment of contributions and expenditures to extend the regulation of expenditures. Yet, the similarity between the two suggests not that expenditures be regulated, but that regulation of contributions must be scrutinized with greater rigor. Most often, restrictions on contributions, like restrictions on expenditures, violate the Constitution.

The *Buckley* Court not only diluted the First Amendment standard for regulating contributions, it also mistakenly characterized direct contributions as posing a threat of corruption. The image of a contributor handing a large check to a candidate may seem troublesome at first blush, but receipt of money is fully disclosed and the money itself can be spent only on political speech and related activities. Unlike payola — which is surreptitiously received, then spent on private pleasures like cars, boats, and jewels — campaign contributions are used only for publicly disclosed and constitutionally favored political speech. What a candidate gains from a contribution is a greater ability to communicate. If his message is well received, he may be elected. In that sense, however, the benefit from a contribution is no different than the benefit of direct votes or other political support.

At its core, politics is about a bargain between the candidate and the electorate. The candidate promises to promote policies that voters favor. In return, voters help to elect that candidate. Constitutionally, it does not matter whether the voters' end of the bargain consists of a single vote, a public endorsement, payment for an ad that urges others to support the candidate, or the contribution of money to the candidate so that he may garner support as he chooses. All of those activities have the same end: getting

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the candidate elected. Ultimately, they operate through the same means: political speech that persuades people to vote for the candidate. The exchange of supportive political speech for desired conduct in office is not corrupt; it is the essence of democracy.

Instead of preventing corruption, the real purpose of the regulations upheld in *Buckley* and expanded in the BCRA is to remove money from politics, thereby removing speech from politics, and protecting incumbents from upstart challengers.

Issue advocacy A second *Buckley* inconsistency is the distinction between issue advocacy and express advocacy. Under the 1976 ruling, the artificial line between issue advocacy, which is not regulated, and express advocacy, which is treated as a contribution and hence forbidden to labor unions and most corporations, turns on whether the speech urges people to "vote for," "vote against," "elect," or "defeat" a clearly identified candidate. That distinction makes no sense. It was intended to carve out a narrow exception to the general rule that expenditures, unlike contributions, were immune from regulation. Without that exception, so it was argued, corporations and unions would circumvent the ban on direct contributions by spending money on unregulated expenditures. The *Buckley* Court's solution was to prohibit expenditures that paid for speech containing magic words like "elect" or "defeat" – that is, speech directed at electing specific candidates rather than promoting issues.

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When a corporation or union expressly advocates the election or defeat of a candidate, that act — no less than issue advocacy — lies at the heart of the First Amendment. The Court's willingness to scrutinize limits on express advocacy under the same lenient standard applied to contributions was never coherent. Even if an ad with the magic words were deemed more valuable to the candidate than other forms of speech — and thus more susceptible to corruption — that would simply command vigilance in uncovering and punishing corruption if it occurred. But heightened vigilance does not translate into preemptive regulation. And if regulations are nonetheless enacted, courts should not apply a lesser standard in determining whether they pass constitutional muster. Restrictions on express advocacy, like restrictions on issue advocacy, ought to be strictly scrutinized. That means government regulations must serve a "compelling" interest and employ the "least restrictive means" of satisfying that interest.

Unaccountably, the BCRA moves in the opposite direction. Rather than reject *Buckley*'s diminished regard for express advocacy, the BCRA eliminates the requirement for the bright-line magic words and bans all corporate and union broadcast ads that merely mention a candidate within 60 days of an election or 30 days of a primary.

Appearance of corruption Much of the difficulty in recent campaign finance law stems from an overbroad view of government's interest in regulating corruption. Any attack on the BCRA must therefore challenge *Buckley*'s assertion that government has a compelling interest in preventing "corruption or the appearance of corruption." Government's compelling interest should be limited to quid pro quo bribery of actual or potential office-holders — that is, the exchange of political promises or deeds by the candidate in return for personal favors, unrelated to political expression, from his supporters. Contributions and expenditures exclusively dedicated to generating political speech may not be equated with bribes, and the value of speech in persuading or informing the public may not constitutionally be considered corrupt.

Our democratic system in general and the First Amendment in particular assume that politicians and the public may be influenced by the political speech of competing interest groups and individuals. A system under which influential speech costs money entails some risk that politicians will place their self-interest ahead of their constituents. Yet, however imperfect that system may be, it is the one the Constitution established. It may not simply be redefined as "corrupt" to bypass the First Amendment.

Rarely has government been able to prove actual corruption from campaign contributions. Instead, to justify its regulations, government insists that we must prevent a "perception" of corruption that might shake confidence in our democratic institutions. But mere public suspicions or misperceptions afford no basis for ignoring our constitutional scheme. Rather, the proper answer is either more speech, the election of candidates voluntarily practicing the public's notion of virtue, or — if the existing system cannot hold the public's confidence — a constitutional amendment.

As for money, it is just a symptom. Overweening government has wormed its way into nearly every aspect of our lives. Our pervasive regulatory and redistributive state creates huge incentives for profiteering. Because of the big government problem there is a big money problem. By cutting government down to size, we can minimize the influence of big money. Restoring the Framers' notion of enumerated, delegated, and thus limited powers will get the state out of our lives and out of our wallets.

Until then, we need to restore free political speech by razing the defective structure that *Buckley* put in place. Inevitably, the BCRA will fall. Good riddance. But the BCRA's demise, without *Buckley*'s reversal, will simply buy time until the reformers find a new and more convoluted path around the First Amendment. R

EPA's $32 Trillion Negligible Risk

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It is no surprise that federal agencies often tailor their interpretation of the facts and the law to support various policy goals. It should also be no surprise that the agencies sometimes "retailor" those interpretations if they conflict with other policy goals. For an example, consider the Environmental Protection Agency and its opposing appraisals of ozone.

Ozone is unusual among the substances targeted under the Clean Air Act (CAA) in that it has two distinct roles, both of which are separately regulated. It acts as a shield that blocks most of the sun's harmful ultraviolet-B radiation (UVB) from reaching the ground — a benefit that the CAA seeks to maintain. But ozone that is close to the ground – "tropospheric ozone" — is also a major constituent of smog – an air pollutant the CAA strives to reduce. That dichotomy is reflected in an EPA brochure entitled "Ozone: Good Up High, Bad Nearby."

Ozone regulation For the EPA of the early 1990s, one of the chief priorities was the prevention of ozone depletion from the release of chlorofluorocarbons and other manmade compounds. The agency promulgated numerous stringent rules banning a host of putative ozone-depleting compounds.

To buttress those rules, the agency grossly overstated the risks of ozone depletion and the benefits of the measures. Its Regulatory Impact Analysis (RIA) concluded that, by preventing a 10-percent decline in ozone and a concomitant rise in ground-level UVB, the agency was preventing millions of UVB-induced skin cancers. EPA's estimate of monetized benefits from the rules ranged from $8 trillion to $32 trillion dollars, easily eclipsing anything else the agency has ever done. And, despite study after study conceding that the predicted long-term UVB increase has not been measured, and no clear evidence of a link between ozone loss and increasing skin cancer incidence, no one at the agency has ever suggested that the dubiously high estimate of benefits was wrong.

A few years later, EPA chose to tighten the then-already-strict National Ambient Air Quality Standard (NAAQS) for tropospheric ozone. The agency argued that the new standard would better protect the public against asthma attacks and other respiratory problems associated with inhalation of ozone. However, EPA admitted that the marginal benefits from such reductions are small; the agency's Clean Air Scientific Advisory Committee conceded that the new rule would not be substantially more protective of public health than the old. EPA's initial estimate of respiratory-related benefits was zero to $1.5 billion annually.

Lost benefit Reducing tropospheric ozone will also allow more UVB to reach ground level, which will produce adverse effects that may counterbalance or even outweigh the benefits from EPA's projected reduction of respiratory ailments. Using figures from both EPA and the Department of Energy, it seems that the new NAAQS requirements will lead to thousands of additional cases of skin cancers.

According to the CAA, EPA is to set NAAQS based on "all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." Although the plain meaning of "all identifiable effects" would indicate that both the respiratory and UVB concerns must be taken into account when deciding whether to lower the existing ozone NAAQS, EPA chose to ignore its own claims about the UVB effects. The agency asserted that it is precluded by the CAA from taking the beneficial effects of a pollutant into account, and added that such effects are nonetheless too speculative and trivial to justify changing the standard.

The agency's arguments failed when the final rule was challenged in the United States Court of Appeals. In the 1999 court decision *American Trucking Associations, Inc. vs. EPA*, the court flatly rejected the assertion that the positive effects of ozone in blocking UVB should be ignored. The court noted that "it seems bizarre that a statute intended to improve public health would, as EPA claimed at argument, lock the agency into looking at only one half of a substance's health effects in determining the maximum level for that substance." The court directed that "EPA must consider positive identifiable effects of a pollutant's presence in the ambient air in formulating [the NAAQS]."

EPA published its proposed response in November of 2001. While purporting to comply with the court's order, the agency decided not to change the ozone standard. EPA repeated its earlier assertion that the UVB effects are "too uncertain" and "would likely be very small from a public health perspective." In so doing, the agency disavowed its own evidence correlating the new standard with increased skin cancers, but offered no new studies in support. The agency anticipates a final version soon.

In sum, the same phenomenon — ozone's role in blocking UVB — was the reason for regulating in one context and an impediment to regulating in another. EPA hyped ozone loss into a multi-trillion dollar crisis when it served the agency's interests, and then tried to trivialize it when it did not. R

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