

Campaign Finance Reform: Searching for Corruption in All the Wrong Places

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Introduction

In the autumn of 2000, Harvey Bass, the owner of Harvey Bass Furniture and Appliance in the west Texas town of Muleshoe, painted “Save our Nation: vote Democrat; Al Gore for President” on the side of a leftover refrigerator shipping box. Bass left the homemade sign on the porch of his business on State Highway 214, to be seen by passersby. Soon another local resident, Bill Liles, “got tired of looking at it, especially the ‘Save our Nation’ part.” Liles and a friend, one Mark Morton, decided to make a sign supporting Gore’s rival, Texas Governor George W. Bush. The two decided that their sign “should be bigger and better.” They obtained a large plywood board, hired a professional sign painter, and mounted the finished product on the side of a cotton trailer obtained from another local resident, Don Bryant. They parked the trailer, with its sign, across the street from Mr. Bass’s store. “As word spread the sign became a topic of conversation at local gathering places. Mostly the Spudnut Shop on Main Street and the Dinner Bell Café on Highway 84. People started coming by and donating to help pay for the cost of the sign.”

This spontaneous burst of political activity ended when another Muleshoe resident, Don Dyer, filed a complaint with the Federal Election Commission against Liles, Morton, Bryant, and one of their “contributors.” Though Dyer apparently had no difficulty uncovering who was behind the sign, he complained that the sign lacked disclaimers required by the Federal Election Campaign Act. In due course the Commission’s General Counsel dutifully recommended that the Commission find “reason to believe” that the Muleshoe Four, as we might call them, had violated 2 U.S.C. § 441d(a), by failing to include a disclaimer on the sign stating who had paid for

it, and whether or not it was authorized by the candidate.¹ However, many other potential violations were not considered at all. For example, if the group spent in excess of \$250 (quite likely when one includes the cost of the wood, the in-kind value for the use of the cotton trailer, and the cost of hiring a professional sign painter) the group would also have violated 2 U.S.C. § 434(c)(1) by failing to file reports with the Federal Election Commission. If any of the men contributed in excess of \$200 in cash or in-kind value, even if it was later repaid from donations, they might also have violated the reporting requirements of 2 U.S.C. § 434(c)(2). If the group spent more than \$1,000 on the activity—unlikely in this case, but not at all impossible when one adds in the rental value of the trailer, in-kind contributions of gas to haul the sign, and other costs, and certainly an amount that similar spontaneous activity might exceed—then it would have also violated 2 U.S.C. §§ 432(a)-(h), 433(a)-(b), and 434(a) and (b) by failing to register as a political committee, name a treasurer, and file more detailed reports. In this case, if any individual donated in excess of \$50, it would have violated the limit on anonymous contributions, and if any individual had donated in excess of \$1,000, it would have violated 2 U.S.C. § 441a(a). If Mr. Bryant’s cotton trailer was titled in the name of a corporation—perhaps his own Subchapter S corporation—lending it to the group would have violated the prohibition on corporate contributions of 2 U.S.C. § 441b. Total statutory penalties could have easily exceeded \$25,000. The Commission eventually chose not to find “reason to believe,” but two of the six Commissioners dissented and even those voting to take no action on the complaint were forced to admit that the respondents had, in fact, violated the law.²

¹The case of the “Muleshoe Four” is Federal Election Commission Matter Under Review (MUR) 5156. A Statement of Reasons by Commissioner Scott E. Thomas is available on the Web at www.fec.gov/members/thomas/thomasstatement44.html. Other documents are on the public record.

²See MUR 5156, Statement of Reasons of Commissioner Daryl R. Wold, Mar. 22, 2002, at 4; Statement of Reasons of Chairman David M. Mason and Commissioner Bradley A. Smith, April 25, 2002. One dissenter felt strongly enough about the dismissal to write a lengthy dissent. See Statement of Reasons of Commissioner Scott E. Thomas, July 15, 2002, at 3. As to other potential violations, Commissioner Wold estimated that the cost of the sign would have been “a few hundred dollars, at most,” but did not consider other cost such as use of the trailer and costs for hauling. Wold, *supra* at 3, n.3.

At about the same time that Liles and Morton were preparing their sign, a group of law students in Columbus, Ohio, decided to launch an organization called "Law Students for Bush-Cheney." As they made preparations for their first meeting, the group's faculty adviser cheerfully mentioned their plans in a casual conversation with a lawyer familiar with federal election law. "Well, be careful not to spend more than \$250 advocating their election," said the latter, "or you'll have to file reports with the Federal Election Commission." Planning for the group ground to a halt.³

In the summer of 2000 Mike Ferguson's aging and ill parents established a trust fund, providing for substantial sums to go to each of their four children upon the attainment of 30 years of age, the completion of a bachelor's degree, and marriage. Shortly thereafter, Ferguson became the first of the siblings to qualify for trust distributions, and he promptly spent a substantial sum of this inheritance on his campaign for Congress. A prominent political operative for the opposing party then filed charges with the FEC, alleging that because the trust was not established until after the November 1998 start of the 2000 election cycle, the funds constituted an illegal contribution from Ferguson's parents to his congressional campaign. The Commission agreed and found probable cause that Ferguson had violated the law. Facing civil prosecution by the federal government, Ferguson agreed to pay a \$210,000 fine to the Federal Election Commission. Ferguson's case is not unique. In fact, in recent years the FEC has, with some regularity, fined parents for contributing too much to their children, children for contributing too much to their parents, and husbands for contributing too much to their wives.⁴

At a time when flag burning, Internet pornography, and commercial speech enjoy unprecedented First Amendment protection,⁵ why

³The formation of Law Students for Bush-Cheney was told to the author by Professor David Mayer of Capital University Law School. Professor Mayer was the group's faculty adviser. The lawyer in question is the author. The reporting violation is 2 U.S.C. § 434(c).

⁴MUR 5138, Mike Ferguson; *See also* MUR 4568 (mother and father-in-law made excessive contribution); MUR 5348 (excessive contribution by parents); MUR 4568 (excessive contribution by son of candidate); MUR 5049 (excessive contribution by spouse of candidate).

⁵*See* *United States v. Eichman*, 496 U.S. 310 (1990) and *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that burning the United States flag is a form of protected speech under the First Amendment and striking down laws prohibiting flag burning); *Reno v. ACLU*, 521 U.S. 844 (1997) (striking down Communications Decency Act, limiting pornography transmitted to minors over the Internet); *Greater New Orleans Broadcast*

would core grassroots political activity, or gifts from parents to children to use for political activity, be subject to civil and even criminal penalties?

Federal Election Commission v. Beaumont,⁶ decided near the close of last term, is a little case dealing with issues on the margin of the complex doctrine that the Supreme Court has thrown up in the area of campaign finance law. In a typical term, the case would draw notice from only a handful of campaign finance reform lobbyists, campaign lawyers, and First Amendment specialists. When decided in June of 2003, however, *Beaumont* drew much attention of a possible harbinger of things to come in *McConnell v. Federal Election Commission*.⁷ *McConnell* was the long-awaited constitutional challenge to the constitutionality of the Bipartisan Campaign Reform Act of 2002, popularly known as “McCain-Feingold” after its lead Senate sponsors. But *Beaumont*’s real value may be less as a leading indicator of the case to come than as a classic example of the intellectual confusion at the heart of the Court’s campaign finance jurisprudence.

Part I of this essay reviews the setting for and result of the Supreme Court’s landmark decision in *Buckley v. Valeo*.⁸ Part II discusses how *Beaumont* fits into the “patternless mosaic”⁹ of judge-made law that has followed *Buckley*. Part III attempts to set forth the options available to the Supreme Court, and the likely consequences of each.

Part I: Getting to *Buckley*: The Corruption of Politics

A. Early Days

Until perhaps 35 years ago, it was possible for a young man or woman to launch a campaign for the United States Congress without

Association v. United States 527 U.S. 173 (1999), *Rubin v. Coors Brewing Company*, 514 U.S. 476 (1995), and *Edenfield v. Fane*, 507 U.S. 761 (1993) (state must demonstrate real harm, not merely potential or perceived harm, before regulating commercial speech), and 44 *Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (government regulation of commercial speech must directly advance the interest asserted).

⁶123 S. Ct. 2200 (2003).

⁷*McConnell v. Federal Election Commission*, 251 F. Supp. 2d 176 (D.D.C. 2003); *prob. juris. noted*, 123 S. Ct. 2268 (2003). On September 8, 2003, a month before the usual opening of the term, the Supreme Court heard an unusually long four hours of oral argument in *McConnell v. FEC*.

⁸*Buckley v. Valeo* 424 U.S. 1 (1976).

⁹See Daniel H. Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment after Austin*, 21 *CATO J. L. REV.* 381 (1992).

contacting a lawyer. Indeed, before 1897 there were no state or federal laws directly regulating campaign finance. In 1896, however, Republican William McKinley's skilled campaign manager, Mark Hanna, had deftly organized the business community behind McKinley's candidacy. Spending a then unheard of \$7 million, mostly solicited from corporations, McKinley defeated prairie populist William Jennings Bryan. In response, Bryan's home state of Nebraska, plus three other pro-Bryan states with large Democratic majorities in their legislatures, Missouri, Florida, and Tennessee, passed laws barring corporate contributions to political campaigns. The federal government did not get involved until the passage of the Tillman Act in 1907, which banned corporate contributions in federal elections. The Tillman Act, however, and its various successors, never amounted to much. For example, there was not a single prosecution under the Federal Corrupt Practices Act, the primary law governing federal campaign finance, from its enactment in 1925 until its repeal in 1971. Disclosure reports were haphazardly completed, haphazardly filed, and almost impossible to find, let alone use—they gathered dust and mold in a file room in the Capitol. The ban on corporate contributions was routinely flaunted, in part by corporations simply reimbursing managers for their individual contributions. When Republicans seized control of Congress in 1947 after sixteen years of Democratic rule, one of their first acts was to attempt to stem the flow of union money that had become a bulwark of Democratic control since passage of the Wagner Act in 1933 by banning direct union contributions. Unions responded by establishing "political action committees" (PACs), funded by automatic checkoffs negotiated into union contracts. The end result was to institutionalize what had previously been ad hoc union involvement in politics. State laws were similarly flouted or ignored. For example, in California, donor disclosure sometimes consisted of nothing more than an unalphabetized list of donor names. Thus, the *de jure* laissez faire system that ruled from 1787 until 1907 was replaced by a *de facto* laissez faire system that lasted from 1907 until 1971.¹⁰

B. The Federal Election Campaign Act and Buckley v. Valeo

With the passage of the Federal Election Campaign Act of 1971 (FECA), and substantial amendments to that Act in 1974, the United

¹⁰See BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 22–31 (2001), and sources cited therein.

States embarked on what is now a thirty-year experiment with serious campaign finance regulation. The basic framework of FECA included reporting requirements for contributions and expenditures and a ban on direct corporate and union contributions. Individual contributions were limited to \$1,000 per election when made to candidates, \$5,000 per calendar year when made to a PAC, and \$20,000 per calendar year when made to a national party, with an aggregate cap of \$25,000 per calendar year. PACs, in turn, were limited to contributing \$5,000 to a candidate for office, or \$15,000 to a party. Spending by candidates was limited, and spending by individuals or groups independent of a candidate was limited to just \$1,000 if such spending was “relative to” a federal election. The Act also provided for taxpayer financing of the presidential elections. Finally, for the first time, an effective enforcement mechanism was established, through the creation of the FEC.¹¹

This framework was immediately challenged on First Amendment grounds,¹² reaching the Supreme Court in the landmark decision of *Buckley v. Valeo*.¹³ Here the Court eschewed a straightforward reading of the First Amendment (“Congress shall make no law . . . abridging the freedom of speech,”¹⁴), choosing instead to engage in one of the complex balancing tests that has so enamored the Court in the post-World War II era. The Court recognized that important First Amendment interests were involved, with the restrictions falling on political speech and association at the core of the First Amendment.¹⁵ Therefore, the Court held that any statutory regulation must be subject to an “exacting” and “rigorous” standard of review.¹⁶ Importantly,

¹¹ See *Buckley*, 424 U.S. 1, 7 (1976).

¹² The Supreme Court had earlier interpreted Article I, Section 4 of the Constitution (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations. . .”) and Article II, Section 1, Para. 4 (“The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their votes,”) as encompassing the ability of Congress to regulate campaigns for federal offices beyond the time, place, and manner of holding elections. See *Burroughs v. United States*, 290 U.S. 534 (1934) (presidential elections); *Newberry v. United States*, 256 U.S. 232 (1921) (congressional elections).

¹³ 424 U.S. 1.

¹⁴ U.S. CONST. amend. I.

¹⁵ *Buckley*, 424 U.S. at 14, 25.

¹⁶ *Id.* at 16, 29.

Buckley rejected the idea that the state could limit political participation, in the form of contributions and expenditures to promote some version of political equality. To allow the government to limit speech on the basis of such judgments would all but eviscerate the First Amendment because it would allow the government to restrict speech based on who had spoken too much, been heard too much, or was too persuasive. The theory was rejected in the strongest possible terms: “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.”¹⁷ But it went on to find that the government had a “compelling interest” in preventing the dangers of “corruption or the appearance of corruption” in government, and that large campaign contributions clearly posed that danger. Then it began dissecting the Act.

The Court held that a limitation on spending “relative to” a clearly identified candidate was a phrase both vague and overly broad. It had the potential to make almost all talk about issues and ideas subject to regulation, regardless of any potential danger of corruption, given that

the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.¹⁸

To avoid vagueness problems, the Court held that to be covered under the Act, political speech must be limited to communications that not only advocated the election or defeat of a candidate, as the Court of Appeals had held,¹⁹ but which “include explicit words of advocacy of election or defeat of a candidate.” In a footnote, the Court explained that this would limit application of the Act to communications containing such phrases as “ ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’

¹⁷*Id.* at 48.

¹⁸*Id.* at 42.

¹⁹*Buckley v. Valeo*, 519 F. 2d 821, 852–53 (D.C. Cir. 1975).

'reject.'"²⁰ Such phrases would eventually become known as "express advocacy, and subject to regulation." Political communications not using such phrases would eventually become known as "issue advocacy," and would not generally be subject to regulation.

The Court went on, however, to hold that even so construed, the Act's limitations on expenditures impermissibly burdened First Amendment rights. First, such limits directly served to suppress the amount of speech.²¹ Second, when expenditures were made independently of the candidate, it alleviated the danger that those expenditures would be made in return for an explicit quid pro quo from the candidate.²² This was not only because the lack of discussion between speaker and candidate made an explicit quid pro quo exchange less likely, but also because such independent expenditures might not be helpful, and might even be harmful, to a candidate.²³ Similarly, the Court found that limits on the candidate's own expenditures, whether from personal or campaign funds, simply were not tailored to address the problem of corruption, as the danger of corruption came in the exchange of favors for contributions, not in spending funds rightly obtained.²⁴

However, the Court upheld the Act's contribution limits. The Court recognized that contribution limits burdened the First Amendment rights of both speech and association. They implicate the former because contributions are made for the purpose of funding speech, and they implicate the latter because by contributing to a campaign or committee, citizens are exercising their rights of association to achieve political goals.²⁵ But the Court nonetheless discounted the

²⁰ *Buckley*, 424 U.S. at 43, n. 51.

²¹ *Id.* at 19–20, 47–51.

²² *Id.* at 47.

²³ *Id.* The phenomenon may be observed yet today. See e.g. Pam Belluck, *Feingold Defies Party and Retains Senate Seat*, N. Y. TIMES, Nov. 4, 1998, at B4 (describing how Senator Feingold asked Democratic National Senatorial Committee to stop running independent ads intended to assist his 1998 reelection bid). Indeed, the *Buckley* court might well have remembered this lesson from firsthand experience. A major problem for Barry Goldwater's 1964 presidential campaign, in which a young William Rehnquist was heavily involved as a strategist and sometime speechwriter, was trying to either control or disassociate from the campaign groups trying to act in support of Goldwater. See generally RICK PERLSTEIN, *BEFORE THE STORM: BARRY GOLDWATER AND THE UNMAKING OF THE AMERICAN CONSENSUS* 409–515 (2001).

²⁴ 424 U.S. at 53.

²⁵ *Id.* at 15–19.

First Amendment rights involved, arguing that the speech entailed in a contribution was merely the symbolic act of contributing, a “general expression” of support that did not significantly vary with the amount involved. And whether any further message would result from the contribution, argued the Court, depended on whether someone other than the contributor would turn the contribution into speech.²⁶ Both points are questionable, at best. For contributors, the goal is to speak not only through the act of contributing but also through the ultimate message that the contribution will help to finance. Most Americans cannot, for example, afford to pay for a full-page ad in a major daily newspaper, let alone commercial television advertising, but must pool their resources to buy time and have someone else do the actual speaking for the group.²⁷ In any case, the Court also found that contribution limits were justified by the interest in preventing, “the actuality and appearance of corruption,” as they directly targeted quid pro quo exchanges of campaign contributions for government favors.²⁸

Finally, the Court upheld a scheme of taxpayer financing for presidential elections, provided that participation was not mandatory or accompanied by mandatory limits on expenditures.²⁹

II. The Corruption of *Buckley v. Valeo*

A. *Buckley's* Definition

The *Buckley* decision turned on three key holdings. First, limits on contributions and expenditures burdened fundamental First Amendment rights, and were subject to “rigorous” and “exacting” scrutiny. Second, the government’s interest in promoting equality was not sufficient to justify suppressing political speech. Third, despite these First Amendment constraints, the government’s interest in preventing corruption or the appearance of corruption could justify some level of speech suppression.

Given the importance of the government interest in preventing corruption or its appearance, one might have expected the Court to devote considerable attention to defining the term, but it did not.

²⁶*Id.* at 21.

²⁷ See *id.* at 22; *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 415 (Thomas, J. dissenting).

²⁸ *Buckley*, 424 U.S. at 26.

²⁹*Id.* at 90–107.

The 143-page per curiam majority opinion devotes just three short paragraphs to the issue. The Court made clear that by “corruption” it meant more than personal enrichment in return for favors, noting that “laws making criminal the giving and taking of bribes deal only with the most blatant and specific attempts of those with money to influence government action.”³⁰ But what, then, did constitute “corruption,” if not bribery? The term was defined in a single sentence: “To the extent that large contributions are given to secure political quid pro quo’s from current and potential office holders, the integrity of our system of representative democracy is undermined.”³¹ That is, a direct promise of official action for campaign support would constitute “corruption.”

Given that definition, the Court’s distinction between expenditures, which generally may not be regulated, and contributions, which may be restricted, is not wholly nonsensical. Expenditure limitations directly limit the amount of political speech. Contribution limits, however, only limit the total amount of speech indirectly. True, if set low enough, they may limit the total amount of speech considerably. But they may not limit the total at all, if the candidate is still able to raise as much money as he desires to spend in smaller increments, and if his donors use excess funds they might have contributed to the campaign to make independent expenditures, either by themselves or through participation with other groups. In reality, contribution limits almost certainly do limit the total amount of speech, simply by discouraging some speakers, generally raising the costs of pooling funds, and imposing additional legal requirements on speech. But this need not happen in every single case, and the effect is probably less than it would be with direct expenditure limitations.

Perhaps more important, there is truth in the Court’s assertion that large expenditures, by themselves, cannot result in quid pro quo corruption. An independently wealthy candidate spending his own money is promising no quos in return for quid. Similarly, a candidate who raises large sums in small contributions is not likely to make quid pro quo promises to donors before he spends the

³⁰ *Buckley*, 424 U.S. at 27–28.

³¹ *Id.* at 26–27.

money—that promise would necessarily take place at the time the money is raised.

But to focus on the distinctions that might justify treating expenditure limitations and contribution limitations differently is to pass over the primary question: Regardless of how expenditures are treated, are limits on contributions justified? Overlooked in the Court's analysis is that contribution limitations themselves are hopelessly overbroad.

One need not assert that a large contribution can never influence an officeholder to grant a special favor in order to recognize that the vast majority of large contributions do not result in the quid pro quo granting of favors. For example, Steven Kirsch, a wealthy Silicon Valley entrepreneur, each year, directly and through his foundation, contributes large sums to a variety of groups on the political left such as the Center for Responsive Politics, People for the American Way, and the Natural Resources Defense Council.³² Kirsch's large soft money donations to the Democratic party, and contributions to liberal Democratic candidates for office, seem quite obviously to flow from the same ideological commitment. Likewise, the financial support that the DeVos family, founders of Amway, give to conservative causes and candidates is rather clearly based on ideological commitment, not the hope of some quid pro quo favor. Similarly, when Mike Ferguson's parents established a trust that eventually provided Ferguson with money he spent on his congressional campaign, they were not attempting to gain a political favor. In fact, had they sought a political favor, it would have made more sense to keep the money, with the threat of writing young Ferguson out of the will, than to give him the money and lose control over his conduct. Oddly enough, this course would have been perfectly legal.

It is difficult to determine when or whether an officeholder takes, or fails to take, action due to the effect of a large campaign contribution. Thus any studies of the issue are vulnerable to the critique that they simply failed to catch the "corruption" that is taking place. Nevertheless, literally decades of studies have consistently failed to find evidence that campaign contributions purchase special favors

³² See Kirsch Foundation 2003 Grants *available at* <http://www.kirschfoundation.org/done/2003.html#Anchor-Politica-29211>, viewed July 25, 2003.

on any type of systematic basis.³³ Supporters of the “contributions as corruption” thesis continue to produce anecdotal evidence of specific episodes of “corruption.”³⁴ Anecdotal evidence, however, is generally viewed by the Supreme Court as inadequate to support the infringement of a fundamental right such as speech.³⁵ But leaving that aside, the failure of serious study to find a cause-and-effect relationship and the continued reliance by regulatory advocates on anecdotal stories—which are often contested³⁶—supports the position that most large contributions are neither intended to nor result in the granting of political favors. Thus, while contribution limits may stop some episodes of quid pro quo corruption, they do so at the expense of limiting a great deal of speech that is unrelated to quid pro quo corruption. Most donors simply do not seek any particular action, or even access, in exchange for their contributions. Most donors never seek, let alone obtain, a meeting with the officeholder. And as the Court recognized that contribution limits do burden speech, albeit perhaps less so than spending limitations, this overbreadth should pose a serious constitutional problem.

An equally fundamental problem is that the Court did not attempt to explain why it chose the definition of “corruption” that it did, or why such behavior constituted “corruption.” The Court defined corruption not only to include the use of office for personal gain but also to include the exchange of “political” favors. But this is a very broad understanding of “corruption,” indeed. Traditionally, “corruption” meant the exchange of official favors for personal gain, not support for reelection. Politics is full of exchanges for political favors that are not generally described as “corrupt.” When a popular politician endorses a candidate on the understanding that he will

³³See Stephen Ansolabehere, John M. de Figueiredo, and James M. Snyder, Jr., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSPECTIVES 105, 113, Table 1 (2003) (summarizing results of 36 major studies). See also Bradley A. Smith, *supra* n. 10 at 127–28 (summarizing studies). Beyond compiling a quarter century of studies by others, Ansolabehere conducts added statistical analysis and concludes that, “after controlling for legislator ideology, these contributions have no detectable effects on the behavior of legislators.” Ansolabehere, *supra* at 117.

³⁴See e.g. LARRY MAKINSON, *SPEAKING FREELY: WASHINGTON INSIDERS TALK ABOUT MONEY IN POLITICS* (2003).

³⁵See e.g. *Board of Trustees v. Garrett*, 531 U.S. 356, 370 (2001).

³⁶Smith, *supra* n. 10, at 54, 126–27.

be appointed to some office in the event of victory, or at least have a say in patronage appointments, we have a political quid pro quo. When a union promises that its members will drive voters to the polls or engage in other get-out-the-vote activity if the candidate will promise to fight for tariffs on imported goods, there is a promise of official action in return for campaign assistance. When a popular singer or actor endorses a candidate or appears at a fund raiser on his behalf, with the understanding that she will be able to send political memoranda outlining her views to the White House or to testify at a Congressional hearing, we witness an exchange of favors for support. When a candidate urges voters in a town to elect him to office because he will fight to make sure that the Navy continues to build submarines in its obsolete shipyards, he is offering the voters a quo for their quid: "vote for me, and although it is not the most efficient use of taxpayer dollars, I will try to keep your government contracts." When a reporter implies a flattering story will be forthcoming in exchange for an exclusive interview, a quid pro quo exchange has occurred. The Court has never attempted to explain, in *Buckley* or elsewhere, why granting a political favor in exchange for funds that might help in a campaign, like any of the inducements discussed above, constitutes corruption. These funds may not be used for personal enrichment, but are used to attempt to convince voters of the candidate's merit. They are used for speech.³⁷ The question as to whether campaign contributions are truly different than other favors that may have some potential to result in political quid pro quos goes beyond the scope of this article.³⁸

³⁷ At the time *Buckley* was decided, a candidate or officeholder could keep leftover campaign funds and convert them to his personal use. Thus, at the time of *Buckley*, campaign funds could, at times, be used in much the same way as outright bribes for the personal gain of the officeholder. Since 1991, officeholders have not been able to convert leftover funds to personal use.

³⁸ Nor have commentators explored the issue as thoroughly as one might expect. For a smattering of some of the better literature, see John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69 (2000); David A. Strauss, *What is the Goal of Campaign Finance Reform?* 1995 U. CHI. LEGAL F. 141 (1995); Daniel Hays Lowenstein, *Campaign Contributions and Corruption: Comments on Strauss and Cain*, 1995 U. CHI. LEGAL F. 163 (1995); Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301 (1989); David W. Adamany and George E. Agree, *POLITICAL MONEY* (1975); Brief for Amici Curiae Cato Institute and Institute for Justice at 6–11, *McConnell v. Federal Election Commission*, 251 F. Supp. 2d 176 (D.D.C. 2003); *prob. juris. noted*, 123 S. Ct. 2268 (2003); see also Bradley A. Smith, *Hamilton at Wits End: The Lost Discipline of the Spending*

The key point for our immediate purposes is that the Court has never really attempted to clarify the evil it thinks limitations on campaign contributions prevent. Therefore, not surprisingly, its standard is malleable.

Finally, to compound the problem, the Court allowed that the mere “appearance” of corruption could serve as a proxy for corruption itself in justifying regulation. This is a standard the Court has not otherwise accepted in the First Amendment realm,³⁹ and with good reason—it has no objective meaning. The “appearance of corruption” can mean anything. What percentage of people must share this perspective? What if they mean different things by “corruption?” Suppose they continue to think politics is “corrupt” even if the law restricting contributions is passed? Suppose the appearance comes only from the mistaken belief that campaign contributions may be diverted to a candidate’s personal use? In the 1950s and 1960s, before the regulatory regime of FECA was ushered into place, and when public opinion polling showed trust in government was at its peak, roughly thirty percent of poll respondents thought that government was run for the benefit of a few big interests, and considered “quite a few” or “all” politicians to be corrupt.⁴⁰ It is almost impossible to conceive of a democracy in which a substantial percentage of the population did not tend to see the system, or at least the party holding power, as corrupt. If the “appearance of corruption” is sufficient to justify regulation, the practical effect is to eliminate the need for the government to show any justification for the regulation in question. In short, the appearance of corruption is not merely a blank check, but an endlessly refilled bank account for those who seek greater regulation.

In fact, no sooner had the Bipartisan Campaign Reform Act (BCRA) become law than the same groups and institutions that had

Clause vs. the False Discipline of Campaign Finance Reform, 4 CHAPMAN L. REV. 117, 128–36 (2001); Smith, *supra* n. 10 at 222.

³⁹See *Greater New Orleans Broadcast Association v. United States*, 527 U.S. 173 (1999) (harms needed to justify regulation of speech must be “real”); *Rubin v. Coors Brewing Company*, 514 U.S. 476 (1995) (proof of actual harm “critical”); *Edenfeld v. Fane*, 507 U.S. 761 (1993).

⁴⁰Karlyn Bowman and Everett Ladd, *WHAT’S WRONG: A SURVEY OF AMERICAN SATISFACTION AND COMPLAINT* (1998).

promoted its passage, in order to end “the appearance of corruption,” resumed their drumbeat. The *Washington Post*, for example, called for new regulation of campaign fundraisers, arguing that the lack of regulation was a “glaring omission.”⁴¹ Charles Lewis of the Center for Public Integrity complained about George W. Bush’s ability to raise funds in small contributions from individuals, saying, “they’re the most well-heeled interests, with vested interests in government,” while columnist Bob Hebert continued to call these small donors “fat cats.” Commentator Norm Ornstein called Bush’s success at raising money in small contributions “not healthy.”⁴² None of the three suggested that any quid pro quo had taken place, or was much of a possibility among such small contributors. But like the *Post*, all sought to describe, if not create, an “appearance of corruption.”

Three consequences flow from *Buckley*’s treatment of the “corruption” issue. First, by rejecting the equality argument as a justification for reform, *Buckley* requires equality advocates to shoehorn their arguments into the guise of anti-corruption arguments. Second, by creating a legal standard that encompasses a great deal of activity whose regulation rather obviously cannot be justified by the stated purpose of the regulation, it opened the door to regulating far more political activity than the Court may have intended. Finally, by failing to more precisely define the evil to be prevented, it opened up the system to manipulation.

B. Confusing Equality and Corruption

A particular conception of equality lurks behind many if not all efforts to regulate campaign finance. This definition equates speech to votes, and holds that the speech of some must be suppressed to guarantee some level of equal opportunity to speak. It is the definition unequivocally struck down in *Buckley* as “wholly foreign” to the First Amendment.⁴³ Nevertheless, it dominates the arguments

⁴¹Editorial, *Name Those Fundraisers*, Wash. Post, July 2, 2003, at A22 (and further arguing that with soft money eliminated, it is “even more critical now” that the individuals who help raise small contributions for a campaign by soliciting friends, neighbors, and acquaintances, be further regulated).

⁴²Norman Ornstein, *Next for CFR Backers: Fixing the Presidential Campaign System*, ROLL CALL, June 25, 2003, p. 7; Rich Lowry, *Campaign Finance Reform Benefits Bush*, SEATTLE POST-INTELLIGENCER, July 15, 2003 at B6 (quoting Lewis and Hebert).

⁴³*Buckley*, 424 U.S. at 48.

for reform in the academy,⁴⁴ and also appears frequently in Congress and in the more popular press.⁴⁵

Indeed, during the debate over BCRA in 2003, direct references to equality were as common as concerns about “corruption.” Senator Susan Collins expressed her support for the bill by noting her commitment to assuring that “all Americans have an equal political voice,” and her support for “a tradition where those who have more money do not speak any louder or have any more clout than those who have less money.”⁴⁶ Senator Paul Wellstone, a key cosponsor, complained about that portion of BCRA raising the individual contribution limit from \$1,000 to \$2,000, stating that

during the last election 4 citizens out of every 10,000 Americans made contributions greater than \$200. Only 232,000

⁴⁴For a small sampling of the literature, see e.g. Burt Neuborne, *Toward a Democracy Centered Reading of the First Amendment*, 93 NW. U. L. REV. 1055 (1999); Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627 (1999) (arguing for limits on institutional press to promote equality); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996) (arguing that individuals should be limited to contributing an amount given to them by the government); Ronald Dworkin, *The Curse of American Politics*, N. Y. REV. OF BOOKS, Oct. 17, 1996, at 19; Cass Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390 (1994); Edward Foley, *Equal Dollars per Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994) (arguing that the Constitution requires limiting all political contributions to an amount presented to each voter by the government, in order to promote equality); Jamin Raskin and Jon Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POLY REV. 273 (1993) (arguing that the 14th Amendment makes privately financed campaigns unconstitutional); Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1425 (1986) (“we may sometimes find it necessary to restrict the speech of some elements of our society in order to enhance the relative voices of others”).

⁴⁵For a few recent examples, see e.g. Bruce Ackerman and Ian Ayres, *Patriot Dollars Put Money Where Votes Are*, LOS ANGELES TIMES, July 17, 2003 at B15 (calling for reform to “allow ordinary Americans to compete effectively with the rich”); Neely Tucker, *Poor Say Campaign Reforms Help Rich*, ORLANDO SENTINEL, Dec. 6, 2002 at A3 (quoting Jon Bonifaz of National Voting Rights Institute that less than one percent of population contribute most campaign funds); Editorial, *Shays-Meehan Moment*, BOSTON GLOBE, Feb. 12, 2002 at A16 (“Elimination of soft money is only a start, but there can be no reform without it. Regular voters, too long drowned out by big money, are crying for an equal voice.”); CNN *Late Edition*, Feb. 10, 2002, remarks of Rep. Charles Rangel (Transcript # 021000CN.V47, available at Lexis) (supporting BCRA to “level the playing field”).

⁴⁶148 Cong. Rec. 2133 (2002).

Americans gave contributions of \$1,000 or more. That was one-ninth of 1 percent of the voting-age population. By bumping the spending limits up, I think we just simply further maximize the leverage and the influence, and, frankly, the power of the wealthiest citizens in the country.⁴⁷

Similar expressions were equally common in the House. For example, Rep. Fortney Stark called for a “level playing field.”⁴⁸ Rep. John Dingell voiced concern about the percentage of funds coming from a small number of donors.⁴⁹

But because equality is not a sufficient justification for the First Amendment infringements entailed, such sentiments had to be expressed as “corruption.” Thus, when Senator Jean Carnahan claimed that the new law would, “make it possible for the voices of ordinary Americans to be heard. No longer will wealthy special interest groups have an advantage over average, hard-working citizens,” she described this, in a ritual bow to *Buckley*, as “cleaning up” the system.⁵⁰ Similarly, Rep. John Lewis explained his support for the law by arguing that “it is time to let all our citizens have an equal voice,” but labeled this inequality “corruption.”⁵¹ Like many of his colleagues, Rep. Bob Borski complained about voices being “drowned out,” and called this egalitarian interest “corruption.” Still, there was no mistake but that the crux of his argument was egalitarian—it just wasn’t fair that so few could have more influence.⁵² And so it went throughout.

While the Court itself has not officially deviated from its *Buckley* holding that equality is not an adequate ground to uphold the suppression of speech, in fact it has held just that, and done so through the same slight of hand: simply by referring to inequality as “corruption.” This process started in *FEC v. Massachusetts Citizens for Life*, wherein the Supreme Court, in the course of striking down a portion of FECA on an as-applied basis, noted that corporate contributions “are not an indication of the popular support for the corporation’s

⁴⁷*Id.* at 2097.

⁴⁸*Id.* at 348.

⁴⁹*Id.* at 349.

⁵⁰*Id.* at 2100.

⁵¹*Id.* at 342 (2002).

⁵² *Id.*

ideas.”⁵³ Relying on this language, four years later the Court upheld a Michigan statute restricting independent expenditures by a corporation in *Austin v. Michigan State Chamber of Commerce*.⁵⁴ The Court argued that it was addressing

A different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.⁵⁵

But can this reasonably be called “corruption” at all? Before this pronouncement, it seems unlikely that anyone had ever seriously considered it “corruption” when the amount of one’s speech did not correlate with popular support for that speech. Certainly such a pronouncement is at odds with *Buckley’s* fundamental holding that limits on independent expenditures, or expenditures from a candidate’s personal funds, are not corrupting, since neither would necessarily correlate with public support for the ideas expressed. Nor is there any reason why the amount of speech should correspond to popular sentiment. Such an assertion misconstrues the entire purpose of the political campaign, which is to persuade and change minds. Political fund raisers have long noticed that a group’s fund raising often increases after a political defeat, as members and supporters devote more resources to promoting their vision to recapture lost ground or stave off further defeat. Certainly the mere disequilibrium between the determination of a speaker to speak and the level of preexisting support for the ideas expressed does not amount to a quid pro quo.

Austin’s rationale, then, hinges not on a concern for the granting of political favors in return for campaign contributions, but rather on the concern that corporations might have too much political influence generally—the quintessential argument for equality. Whether or not there are particular reasons for limiting the speech of citizens who join together using the corporate form, particularly where, as in *Austin*, the corporation is not in business for primarily

⁵³Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238, 258 (1986).

⁵⁴*Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990).

⁵⁵*Id.* at 660.

commercial purposes, is highly debatable. True, the citizens involved receive the benefits of limited liability and perpetual life, yet whatever benefits one group may gain from the corporate form are, of course, available to others, even individuals through the creation of Subchapter S corporations. Moreover, the Court has long held that the receipt of government benefits cannot be predicated on the recipient's relinquishing fundamental constitutional rights.⁵⁶ Certainly many other speakers have unfair advantages, often derived from the state. An individual may amass great personal wealth through business dealings conducted through the corporate form. Other individuals will benefit from elements of the tax code, or from the receipt of government contracts. For the government to enter into this fray and decide who has spoken too much and who too little is the element that the Court in *Buckley* correctly recognized as "wholly foreign to the First Amendment." Merely calling it "corruption" doesn't change the underlying constitutional problem. That the Court allowed such a broad, vague, changing definition of "corruption" stems from the underlying failure of the Court to identify precisely the alleged evil it sought to address.

C. *Defining Corruption Down*

A second problem with *Buckley* is that, by defining "corruption" to include an exchange of political favors in the normal ebb and flow of policymaking, mediating among interests, and seeking popular support, it allows a good deal of regulation of activity having little to do with either corruption or equality. This is true of both small time grassroots activity, such as that of Law Students for Bush-Cheney, and also for most large donors, of which the Fergusons are merely an easy case. These flaws first became evident in *Buckley* itself.

Buckley operated on the presumption that any large contribution could lead to "corruption" or "the appearance of corruption," even though the vast majority of contributions are clearly not corrupting, either in intent or in fact. As a result, *Buckley* concluded that contributions from immediate family members could be banned.⁵⁷ As a professor, and more recently as a member of the Federal Election Commission for more than three years, I have spoken to thousands of

⁵⁶ See e.g. *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

⁵⁷ *Buckley*, 424 U.S. at 53, n. 59.

people, and written numerous articles in which I routinely note the inappropriateness, if not absurdity, of the government's regulating contributions by immediate family members. I have never had a person approach me to suggest otherwise. This is not to say that they do not exist, but that clearly the risk of family contributions resulting in the quid pro quo exchange of political favors is simply not perceived by most Americans. Certainly, at a minimum, most family members have more persuasive means at their disposal.

Similarly, *Buckley* upheld reporting thresholds and contribution limitations generally at levels that would seem to offer little risk of corruption, such as the \$250 reporting threshold for independent expenditures.⁵⁸ Certainly there is some merit in the Court's determination not to micromanage legislative judgments. But as states pass increasingly restrictive laws, in some cases limiting contributions for statewide office to as little as \$400,⁵⁹ and requiring disclosure of amounts as low as \$10,⁶⁰ the courts must eventually be drawn into that fight. But if it is inevitable that the courts will at some point have to determine that a contribution threshold is too low to meet any legitimate anti-corruption rationale, why not make the determination earlier? A \$2,000 contribution, currently the limit under BCRA, is well under one-half of one percent of the amount generally necessary to run a serious campaign for a seat in the U.S. House, and much less for most senate seats. Even accepting that campaign contributions may be regulated due to the fear of political favors granted in return, it is hard to argue that such amounts could result in such quid pro quo exchanges.

A prime example of how the Court has allowed noncorrupting, egalitarian activity to be regulated is *Federal Election Commission v. National Right to Work Committee* (hereinafter NRWC),⁶¹ a case of no

⁵⁸For example, the \$1000 contribution threshold long in effect in FECA, 2 U.S.C. 441a(a), was, by 2002, less than two-tenths of one percent of the \$600,000 to \$1 million generally considered necessary to run a serious race for the U.S. House. Independent expenditures had to be reported once they topped just \$250, 2 U.S.C. 434(c), an amount that seemed to serve little purpose other than to harass grassroots politickers such as the "Muleshoe Four," see text *supra*.

⁵⁹See e.g. Vt. Stat. Ann. Tit 17, § 2805 (2001).

⁶⁰See e.g. Fla. Stat. § 106.07(1) (2002).

⁶¹*Federal Election Commission v. National Right to Life Work Committee*, 459 U.S. 197 (1982).

small importance for the decision in *Beaumont*. Pursuant to the law, a corporation may not make contributions to candidates or independent expenditures in support of candidates, but it may use its general treasury funds to pay the administrative fees of a political action committee, which may make contributions to candidates and independent expenditures.⁶² A nonprofit corporation with a PAC may only solicit contributions to the PAC from its “members.”⁶³ The National Right to Work Committee (NRWC), an incorporated nonprofit group formed to lobby for laws prohibiting compulsory unionism, had established a PAC into which it solicited individual contributions, subject to the limitations of FECA, and made contributions to candidates, also subject to the limitations of FECA. NRWC defined its members as anyone who had previously contributed to the organization.⁶⁴ The Supreme Court held that the people solicited by NRWC for contributions to its PAC were not “members” as defined in the law, and therefore that NRWC had violated FECA. The Court went on to hold that the statute did not violate the First Amendment rights of free speech and association of NRWC or its donors.⁶⁵

While the Court recited the magic words of “corruption” and “apparent corruption,” it chose not to actually analyze the words at all, merely noting that the Court would not “second-guess” Congress on the need for “prophylactic” protection.⁶⁶ But what was corrupt, and what was the “prophylactic” law preventing? The contributions to the PAC came in limited amounts, and the contributions from the PAC to candidates were in limited amounts. They were not, by definition, the large contributions that Congress determined posed some danger of corruption and so had outlawed under FECA. Moreover, because contributors are subject to an overall limit on contributions to PACs and candidates,⁶⁷ there existed no danger of evading the statute by creating numerous PACs into which donors might contribute. And because the contributions were voluntary,

⁶² 2 U.S.C. §§ 441b(a), 441b(b)(2)(C) (2002).

⁶³ 2 U.S.C. § 441b(b)(4)(C) (2002).

⁶⁴ *FEC*, 459 U.S. at 200–201.

⁶⁵ *Id.* at 203–210.

⁶⁶ *Id.* at 210.

⁶⁷ 2 U.S.C. § 441a(a)(3) (2002).

from individuals, there was not even the *Austin*-like specter of “accumulated corporate wealth.” Any exchange of political favors would merely have represented the determination of a candidate to respond to the large number of small contributors supporting the NRWC PAC, whose contribution could not, by law, exceed \$5,000. But if adopting a legislative position in exchange for the assistance of large numbers of people with one’s campaign—or alternatively, exchanging campaign support for a pledge to adopt one’s favored positions—is “corrupt,” what is left of pluralist democratic theory? However, by defining the issue as one involving “contribution limitations,” and having decided that contributions posed an inherent danger of corruption or the appearance of corruption, the Court found such grassroots rallying to be subject to limits despite the First Amendment.

Similarly in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*⁶⁸ the Court found “corruption” in the ordinary give and take of politics. In *Colorado Republican II*, the question before the Court was whether a political party had a constitutional right to coordinate expenditures with its candidates. Under *Buckley*, of course, expenditures could be made independently of a candidate without limit, and this holding had later been expressly extended to political parties.⁶⁹ However, such expenditures, if “coordinated” with a candidate’s campaign, were treated as contributions, and subject to limitation.⁷⁰ Here the parties sought to claim a right to make unlimited coordinated expenditures from contributions received subject to the limits of the law. As in *NRWC*, all of the funds were therefore solicited from individuals in amounts that, by definition, were not large contributions of the sort that would lead to “political favors.” The donors were united in contributing for the purpose of electing Republicans—indeed, the primary if not sole purpose of their association was to elect Republicans. How the Republican Party could “corrupt” individuals who already declared themselves members of the same group was generally unclear. The

⁶⁸*Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001).

⁶⁹*Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996).

⁷⁰*Buckley*, 424 U.S. at 46. See 2 U.S.C. § 431(17) (2002).

Court suggested that the parties might serve as “conduits,”⁷¹ but conduits of what? Of public support? Of small, individual contributions in amounts that Congress had determined were not corrupting? The Court didn’t say. Instead, it rotely upheld a “contribution” limitation, with no serious look at the alleged evil of the speech being suppressed.

What we see is that the Court, having decided in *Buckley* that some contributions create the danger of “corruption,” has been willing to uphold most anything that comes before it labeled as a “contribution limitation,” regardless of whether the particular type of transaction really raises a danger of corruption. Thus, at the extremes we find the FEC policing gifts from husbands to wives and from parents to children, and every day we find the agency pursuing violations against citizens who thought that they were doing their civic duty by being involved in political affairs, with no intent to corrupt anyone.

D. Manipulating the Rules

Perhaps the biggest problem with the Supreme Court’s failure to precisely define “corruption” is that the constitutional standard for protecting free speech and association has become subject to manipulation through the incantation of the magic words, “corruption or the appearance of corruption.”

Buckley argued that “large campaign contributions [are] the narrow aspect of political association where the actuality and potential for corruption have been identified.”⁷² And it described corruption as “political favors” given in return for financial campaign support. But as we have seen, *Buckley* failed to analyze why adopting an official position in exchange for speech supporting one’s campaign—for it recognized that that is what campaign contributions make possible—is corrupting at all, or if monetary support is corrupting in some way that other types of support are not, why that is. Thus, both legislatures and courts have found it relatively easy to manipulate the standards of *Buckley* to limit disfavored speech, either under rationales *Buckley* supposedly rejected, or by the discretionary labeling of some types of activities as “corrupt.”

⁷¹*Colorado Republican*, 533 U.S. at 459–60.

⁷²424 U.S. at 28.

For example, in the district court litigation of *McConnell v. Federal Election Commission*, litigating the constitutionality of the McCain-Feingold act, the three-judge panel, with each judge attempting to apply the principles of *Buckley* and its progeny, came to three differing conclusions about the constitutionality of the law. One judge found almost the entire law to be unconstitutional; a second found almost all of the law was constitutional; and the third found parts constitutional and other parts unconstitutional, often for differing reasons than those offered by whichever of his colleagues was in agreement on the provision at issue. Given that all three judges acted in good faith, we can see that the rules are open to judicial manipulation.⁷³

The Supreme Court itself has reached results at odds with the stated rationale of *Buckley*. We have seen, for example, that the Court in *Austin* allowed the suppression of speech to equalize voices merely by describing that quintessential equality argument as “a different type of corruption.” Similarly, we have seen how the Court was prepared, in *NRWC* and *Colorado II*, to accept limitations on political activity that bear little or no chance for corruption as *Buckley* attempted to describe it.

In *Nixon v. Shrink Missouri Government PAC*,⁷⁴ plaintiffs attempted to force the Court to flesh out the nature of “corruption.” Pointing to a paucity of evidence, plaintiffs argued that Missouri’s limitations on contributions were set at a level far below that needed to prevent “corruption” or “the appearance of corruption.”⁷⁵ In *Buckley* the Court had required the government to justify the law under a standard of “rigorous” and “exacting” scrutiny.⁷⁶ The Court had upheld contribution limits on the grounds that they were less of a burden on First Amendment rights than expenditure limits, and that the state interest in contribution limitations was more compelling than its interest in expenditure limitations. But at no point did the Court suggest that a lesser degree of scrutiny applied to contribution limitations. In *Shrink PAC* the Court rejected this exacting standard for

⁷³*McConnell v. Federal Election Commission*, 251 F. Supp. 2d 176 (D.D.C. 2003); *prob. juris. noted*, 123 S. Ct. 2268 (2003).

⁷⁴528 U.S. 377 (2000).

⁷⁵*Id.* at 384.

⁷⁶*Buckley*, 424 U.S. at 15–16, 29.

contribution limitations, instead adopting a new constitutional standard, not named, but which would allow a statute regulating contributions to survive constitutional scrutiny if “closely drawn.”⁷⁷ The Court went on to reject the notion that the state actually had to prove that “corruption” or its appearance existed, so long as its explanation had “plausibility.”⁷⁸ “Since contribution limitations could not satisfy the rigors of strict scrutiny (particularly since contribution limitations do not seem to be narrowly tailored to the problem of eliminating corruption), the Court simply lowered the bar.”⁷⁹

The ability to manipulate judicial results when one is not exactly clear what is the evil to be eliminated, or why, is seen in a remarkable *Shrink PAC* concurrence by Justice Breyer. Justice Breyer suggested that it might be possible to regulate expenditures by a candidate from his personal funds, as they “might be considered contributions to their own campaigns.”⁸⁰ Of course, this is just semantic word play. New labels are not a good substitute for a clear idea as to why the law is as it is. If expenditures by a candidate from his own funds are not corrupting, they are not corrupting, regardless of whether one chooses to call them expenditures or “contributions to his own campaign.” But if it is not clear why we have defined a particular type of exchange as “corrupting,” it is a simple matter to reach a desired result through word games.

The dangers of the Court’s imprecise analysis are greater still at the legislative level. Under *Shrink PAC*, if the state can come up with a plausible explanation for its speech limitations—the magic words “corruption or appearance of corruption” will do—it is free to limit most anything except expenditures by a candidate or expenditures made independently of a campaign, unless the latter are made by a corporation, in which case they too can be limited pursuant to *Austin*.

It has been amply demonstrated, however, that campaign finance laws are not neutral in application. Certain types of restrictions on contributions will benefit incumbents. Some groups will be harmed

⁷⁷*Nixon*, 528 U.S. at 387–88.

⁷⁸*Nixon*, 528 U.S. at 391.

⁷⁹J. Clark Kelso, *Book Review: Mr. Smith Goes to Washington*, 1 J. ELEC. L. 75, 78 (2002).

⁸⁰*Shrink PAC*, 528 U.S. at 405 (Breyer, J. concurring).

by a ban on “bundling” of contributions,⁸¹ others by limitations on voter “scorecards,” and this will often vary by the nature and make-up of the groups’ membership. On the one hand, “bundling” is a tactic that has proven very effective for the liberal women’s PAC Emily’s List, and for trial lawyers. Both groups represent high-income individuals with a high degree of political involvement. These individuals are sophisticated enough to understand how to maximize their political voice, and have disposable income to make contributions up to the limit. Scorecards, on the other hand, tend to work effectively for right-to-life groups or groups such as the Christian Coalition, whose members have lower incomes but a built-in distribution network through churches. Simply knowing how a particular group attempts to influence the political system allows lawmakers to target hostile groups for speech suppression.

We noted that the very first campaign finance laws were intended to strike at the Republican power base in the corporate community. Little has changed in the past 100 years. For example, after Emily’s List contributed mightily to Democrat Debbie Stabenow’s U.S. Senate victory in 2000, Michigan Republicans sought to ban the practice of “bundling,” used so effectively by Emily’s List.⁸² As the McCain-Feingold bill drew near to final Senate passage, sponsor Russ Feingold remarked on the Senate floor how the bill had changed over time, in part to build a coalition sufficient for passage.⁸³ As Senator Feingold’s remarks indicate, the very act of drafting campaign finance legislation and gathering supporters must involve decisions by individual legislators as to the relative political advantages of different provisions of the law. To give just one example, lawmakers apparently decided that it was important to preventing the appearance of corruption that any broadcast advertisements mentioning a candidate within 60 days of an election should be limited,⁸⁴ but that it would not create an appearance of corruption if the contribution limit for incumbent senators facing a wealthy challenger was raised

⁸¹ Bundling is the practice of directing members of a group to write checks directly to targeted campaigns, then delivering them to the candidate in a “bundle.”

⁸² See Chris Christoff, *State GOP Flexes Muscles of Power: Last Minute Legislation Gives Democrats Fits*, DETROIT FREE PRESS, Dec. 15, 2001, at 1A.

⁸³ 148 Cong. Rec. 2096 (2002).

⁸⁴ See 2 U.S.C. § 441b(c) (2002).

to \$12,000.⁸⁵ Of course, it should not be necessary for Congress to attack all potential sources of corruption in order to attack one of them. But the Court's lack of rigorous scrutiny for congressional action amounts to a green light to engage in speech regulation for the express purpose of silencing one's political enemies, or otherwise enhancing one's reelection prospects. In fact, in lobbying for passage of BCRA, advocates of the bill specifically tried to recruit Republican votes by noting that the law would harm Democrats as much or more than Republicans, and help incumbents at the polls.⁸⁶ It would seem that preventing this type of partisan self-dealing or rigging of the system is just what the First Amendment should aim to prevent.

III. *Beaumont* and the Future of Reform

A. *The Case*

All of these consequences are visible in *Federal Election Commission v. Beaumont*. Beaumont was an officer of North Carolina Right to Life, Inc. (NCRL), a not-for-profit corporation organized under North Carolina law. Its funding came almost entirely from donations from individual members, but it also accepted a small amount in corporate donations. NCRL used its general treasury funds to make both independent expenditures and contributions to candidates for state office, as allowed by North Carolina law. NCRL challenged the federal prohibition on contributions from its treasury to candidates for federal office.⁸⁷

NCRL based its challenge on *Federal Election Commission v. Massachusetts Citizens for Life*.⁸⁸ In *MCFL*, the Supreme Court had held that restrictions on independent expenditures by certain nonprofit groups violated the First Amendment. The Court held that limitations on corporate expenditures generally were "a substantial" restriction on political speech, notwithstanding the ability of a corporation to establish a "separate segregated fund," that is, a political

⁸⁵ See 2 U.S.C. § 441a(h) (2002).

⁸⁶ See e.g. Peter H. Stone, *Soft Money and the Senate*, BALTIMORE SUN, Jan. 7, 2001 at 1M (quoting McCain advisor Trevor Potter and Brennan Center lobbyist E. Joshua Rosenkranz.)

⁸⁷ *Federal Election Commission v. Beaumont*, 123 S. Ct. 1220 (2003).

⁸⁸ 479 U.S. 238 (1986).

action committee, or PAC.⁸⁹ The Court noted that the burdens of operating a separate PAC were significant, and that such burdens created a “disincentive for such organizations to engage in political speech.”⁹⁰ Further, the Court heartily rejected the notion that a non-profit, ideological group such as MCFL posed any threat of “corruption” at all:

It is not the case, however, that MCFL merely poses less of a threat of the danger that has prompted such regulation. Rather, it does not pose such a threat at all. Voluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form.⁹¹

The Court cited three “essential” features of MCFL: first, it was formed for the purpose of promoting political ideas, and did not engage in business activities; second, it had no shareholders or others with a claim to its assets or earnings; and third, it was not formed by a corporation, and had a policy against accepting corporate contributions.⁹²

Lower courts had over the years extended *MCFL*’s reach, holding that engaging in nonpolitical as well as political activities, failing to maintain a formal policy against accepting corporate contributions, receiving *de minimis* amounts of corporate donations, and engaging in incidental business activities did not prevent a group from qualifying for the “*MCFL* exemption” from the prohibition on corporate expenditures.⁹³ In each case, the courts chose not to focus solely on

⁸⁹*Id.* at 252.

⁹⁰*Id.* at 254.

⁹¹*Id.* at 263.

⁹²*Id.* at 263–64.

⁹³See *Federal Election Commission v. National Rifle Association*, 254 F. 3d 173 (D.C. Cir. 2001) (sponsorship of non-political activities, provision of non-political goods and services such as magazines and accident insurance to members, lack of policy against corporate contributions, and actual receipt of up to \$1000 in corporate contributions did not place incorporated advocacy group outside scope of *MCFL*); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F. 3d 705 (4th Cir. 1999), *cert. denied* 528 U.S. 1153 (2000) (lack of policy against corporate donations and receipt of up to 8% of organization’s revenue from corporations did not prevent corporation from claiming *MCFL* exemption); *Federal Election Commission v. Survival Education Fund*, 65 F. 3d 285 (2nd Cir. 1995) (lack of policy against corporate contributions and actual receipt of up to 1% of funds from corporations did not place group outside scope of *MCFL*); *Day v. Holahan*, 34 F. 3d 1356 (8th Cir. 1994), *cert. denied* 513 U.S. 1127 (1995) (lack of policy against corporate donations and engaging in “incidental” business activities did not put group outside *MCFL* exemption).

the corporate form of the organization, but rather conducted an inquiry into the actual threat of “corruption” posed by the nonprofit membership corporations at issue. Guided by *MCFL* and four U.S. Courts of Appeal, both the District Court and the U.S. Court of Appeals for the Fourth Circuit agreed that NCRL had a constitutionally protected right to make contributions to candidates.⁹⁴ The Court of Appeals, noting that NCRL posed neither a threat of quid pro quo activity, as outlined in *Buckley*, nor “distortion” as discussed in *Austin*,⁹⁵ held that contributions by such a group, like independent expenditures, fell within the *MCFL* exception to prohibitions on corporate activity.

Rather than analyze the case under *MCFL*, the Supreme Court considered *National Right to Work Committee* to be the controlling precedent. Interpreting *NRWC* as standing for “the practical understanding that [a] corporation’s capacity to make contributions was limited to indirect donations within the scope allowed to PACs,”⁹⁶ the Court held that under the lower level of scrutiny given to contribution limitations, the prohibition on corporate contributions extended to corporations eligible for the *MCFL* exception on the expenditure side. It reversed the Court of Appeals.

Beaumont neatly captures many of the contradictions and problems of the Supreme Court’s campaign finance jurisprudence. Most obvious is its malleability. First, the Court extended to contribution prohibitions its *Shrink PAC* holding that contribution limitations would no longer be subject to *Buckley*’s “rigorous” and “exacting” standard of review.⁹⁷ The Court argued that “it is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself.”⁹⁸ But of course, selecting the level of scrutiny often determines the outcome—as we have noted, there is strong reason to think that *Shrink PAC* would have come out the other way had the Court applied “exacting” and “rigorous”

⁹⁴*Beaumont v. Federal Election Commission*, 137 F. Supp. 2d 648 (E.D.N.C. 2000), *aff’d* 278 F. 3d 261 (2002).

⁹⁵*Austin*, 278 F. 3d at 272.

⁹⁶*Beaumont*, 123 S. Ct. at 2208.

⁹⁷*Id.* at 2210.

⁹⁸*Id.*

scrutiny, even after considering the differences between contributions and expenditures. Subjected to a higher level of scrutiny, it is equally doubtful that the statute in *Beaumont* could have withstood the Court's review. So the question is, is there a valid reason for subjecting the political activity of a small, voluntary, political non-profit group such as NCRL to the same level of scrutiny as the political activity of corporations such as Coca-Cola, or wealthy millionaires? This can only be determined if we understand why an exchange of political favors for contributions is evil—assuming such exchanges take place regularly enough that the law is not hopelessly overbroad in any case. For as we have seen, politicians routinely exchange political favors for campaign support. Is the problem merely that money is involved? But if any money creates the danger of corruption, why allow individual or PAC contributions? Is it that a large amount of money is involved? Is \$5,000—the maximum at issue in *Beaumont*—a large amount? Is the problem that the money comes from a corporation rather than an individual? If so, does it nonetheless make sense to treat NCRL the same as Coca Cola or Microsoft? Is a \$5,000 donation from NCRL inherently more capable of creating “corruption or the appearance of corruption” than a promise from a labor union to put 100 flushers and drivers on the streets on election day?⁹⁹ More “corrupt” than a promise made to unemployed workers to support higher unemployment benefits if elected? More “corrupting” than \$1 million in independent expenditures? The Court has no coherently stated theory as to why some exchanges of political promises for campaign support are “corrupt” and others are not. Hence, its rulings lack coherency and a sense of legitimacy. Similarly, lacking any strong notion of what evil the government is attempting to prevent, there is no particularly principled reason for picking either *MCFL* or *NRWC* as the controlling precedent. Either was available to the Court, and absent some thought as to why some types of contributions lead to exchanges that are particularly “corrupting,” whereas others do not, the Court's analysis as to why these contributions should be banned is unconvincing.

⁹⁹“Flushers” are people who look for eligible voters likely to support the preferred candidate, but who have not yet voted. Drivers then collect these people and take them to the polls.

Beaumont also exemplifies the specific problems of post-*Buckley* law. The Court expresses considerable angst about “political war chests” that corporations may amass, and follows *Austin’s* bastardized, equality-based definition of “corruption” to inherently include corporate activity, given that corporations may have “advantages” over other groups—even if those groups could themselves incorporate.¹⁰⁰ The Court did not much consider how a corporation such as NCRL might build a “war chest” (small, voluntary donations) or why the presence of a “war chest” is corrupting. And like the case on which it relies, *National Right to Work Committee*, the court expresses fears of quid pro quo corruption without suggesting that North Carolina Right to Life actually posed any such dangers. Indeed, the Court claimed that the “details of corporate form,” “affluence of particular corporations,” the absence of “the evil that contributions by traditionally economically organized corporations exhibit,” and the lack of “vast reservoirs of capital” were irrelevant to its determination that NCRL posed a threat of corruption.¹⁰¹ If this is truly so, what is the Court’s view of the danger posed by NCRL?

Finally, the Supreme Court tossed in another argument for good measure, one that was not briefed by the government, arguing that limits on corporate contributions protected shareholders from having their funds used to support candidates they opposed.¹⁰² In so doing, the Court quietly, but not explicitly, overruled *First National Bank of Boston v. Bellotti*.¹⁰³ *Bellotti* had 25 years earlier rejected that same argument because of the voluntary nature of corporate association, an argument with particular force when applied to an inherently political organization such as NCRL. *Beaumont* sent it packing.

B. *Beaumont*: Foretelling the Future

As we noted at the outset, *Beaumont* is not, by itself, a case of earthshaking proportions, at least not given the broader restrictions on political speech enacted by Congress and accepted by the *Buckley* paradigm. Any effort to extract from this small case a prediction of where the Court will go when it decides the challenge to the Bipartisan Campaign Reform Act is risky at best. Those who hope to see

¹⁰⁰ *Beaumont*, 123 S. Ct. at 2209.

¹⁰¹ *Id.* at 2208.

¹⁰² *Id.* at 2206.

¹⁰³ *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

the provisions of BCRA struck down have downplayed *Beaumont* for precisely these reasons. Nevertheless, *Beaumont* may be analyzed as part of a broader trend, and so analyzed, it does not bode well for defenders of unfettered political speech.

First, of course, is the lopsided 7-to-2 vote. Justice Kennedy's concurrence indicated, however, strong disagreement with the authorities on which the majority relied, and suggested that "were the whole scheme of campaign finance regulation under review," he might have joined Justices Thomas and Scalia in dissent.¹⁰⁴ Even then, the majority opinion successfully relies on *Austin v. Michigan Chamber of Commerce* without losing the support of Justice O'Connor, a dissenter in *Austin*. The opinion includes the de facto overruling of *Bellotti*. And the opinion's inclusion of a sweeping, largely inaccurate, and generally unnecessary review of congressional and judicial regulation in the field indicates an intellectual confidence in the Court's majority.

Much of the decision in *McConnell* may turn on whether or not the court considers large contributions to political parties, for purposes other than expressly advocating the election or defeat of a candidate, to pose a danger of corruption. With that in mind, it is interesting that the *Beaumont* majority refers to limits on "direct" corporate contributions at least 13 times, contrasting them with "indirect" corporate contributions in the form of administrative support for PACs. This, some argue, could at least suggest a willingness to strike down limits on corporate contributions or large individual contributions to political parties. The costs of PAC administration are not insignificant—many corporations and unions spend an amount upward of fifty percent of PAC revenue on administration. A PAC supported by corporation or union dollars is able to use 100 percent of its individual receipts for political contributions and expenditures. By comparison, under McCain-Feingold a political party must use a substantial percentage of its receipts merely to cover overhead and administration. Arguably, corporate and union support, or large donations, for such overhead expenses would be constitutionally protected because they are not "direct" support to candidates.

This theory faces two big problems, however. First, nothing in *Beaumont* suggests that the Court sees such "indirect" contributions

¹⁰⁴*Beaumont*, 122 S. Ct. at 2212 (Kennedy, J., concurring).

as a constitutional right. The Court plays them up in *Beaumont*, it seems, precisely to downplay the magnitude of the speech restrictions it upholds. But the Court's rationale offers no support for the idea that some outlet must exist for corporate speech, and the notion is certainly not essential to the holding. The second problem is the Court's emphasis on preventing the use of nonprofits as "conduits" for large contributors,¹⁰⁵ a concern also expressed in *Colorado Republican II*,¹⁰⁶ despite that in neither case was there evidence of such a problem on the record, and despite the fact that such "conduit" contributions are otherwise illegal under the FECA.¹⁰⁷ The Court could choose to see such administrative and overhead support as a mere "conduit" allowing greater "direct" contributions, and thus not protected by the First Amendment.

Another possibility is that the *Beaumont* Court's emphasis on "direct" contributions foreshadows a breakdown of the long-standing demarcation between contributions and expenditures generally. In line with Justice Breyer's concurrence in *Shrink PAC*, the Court's majority may be ready, if asked, to simply reclassify many expenditures as "indirect contributions," thus opening them to the lower standard of review for contributions already announced in *Shrink PAC* and seconded in *Beaumont*. This would pave the way for a backdoor overruling of *Buckley*'s distinction between contributions and expenditures.

Indeed, if there are tea leaves to be read in *Beaumont*, it may be that the Court already considers *Buckley* obsolete. As we have seen, *Buckley*'s requirement of "rigorous" and "exacting" scrutiny, at least as applied to contribution restrictions, has already been abolished through *Shrink PAC* and *Beaumont*. This leaves the *McConnell* plaintiffs with the arduous task of showing that the regulation is not "closely drawn." This is a near impossibility given the Court's willingness to rely, in both *Colorado Republican II* and *Beaumont*, on fears of "conduits" and "evasion," even absent record evidence of same. Here, too, *Beaumont* chips away at *Buckley*. In *Buckley*, loophole closing was generally frowned upon as a justification for regulation.¹⁰⁸

¹⁰⁵ 123 S. Ct., 2209–10.

¹⁰⁶ *Colorado II*, 533 U.S. at 458–460.

¹⁰⁷ See 2 U.S.C. § 441a(a)(8).

¹⁰⁸ See *Buckley*, 424 U.S. at 45–46 (disallowing restrictions on independent expenditures as a loophole closing measure).

In *Beaumont* and *Colorado Republican II*, it becomes the prime justification for regulation.

Meanwhile, the nebulous “appearance of corruption” standard will do as a sufficiently compelling government interest to justify suppression. *Buckley*’s core holding, that “corruption” or the “appearance of corruption,” not equality, justified suppression of political speech, appears to be foundering in the wake of *Austin*, *NRWC*, and *Beaumont*. *Austin* specifically upholds an equality rationale that *Buckley* rejected, at least where corporations are concerned, even while calling it “corruption,” whereas cases such as *NRWC* and *Beaumont* apply the corruption standard so rotely as to make it meaningless. Also fallen by the wayside is *Bellotti*’s rule that shareholder protection is not a valid basis for limiting corporate speech. Add to this *Colorado Republican II*’s view that political parties are little more than conduits for corruption, rather than the traditional view that parties are mediators in political struggles and builders of coalitions, and it is hard to see restrictions on soft money being stricken on constitutional grounds. In *NRWC*, *Austin*, and now *Beaumont*, the Court has expressed a view that corporate activity—even that of nonprofit membership corporations that merely bring together thousands of concerned citizens to participate in politics—can be regulated with little concern for overbreadth. This suggests that what may be McCain-Feingold’s most notorious provision, the prohibition of any corporate or union ad that so much as mentions a federal candidate within sixty days of an election,¹⁰⁹ may well pass the Court’s “closely drawn” scrutiny as well.

The lead plaintiffs in *McConnell* have argued that following *Buckley v. Valeo*, most provisions of BCRA should be struck down.¹¹⁰ They may find that they are trying to call back a ship that has already sailed.

IV. Conclusion

Before 1974, federal elections were substantially unregulated, first as a matter of law, and later as a matter of fact. *Buckley v. Valeo*, the

¹⁰⁹2 U.S.C. §§ 34(f)(3) and 441a(a)(7).

¹¹⁰*See generally* Brief for Appellants Senator Mitch McConnell *et al.*; Brief for Appellants Republican National Committee *et al.*, 251 F. Supp. 2d 176 (D.D.C. 2003); *prob. juris. noted*, 123 S. Ct. 2268 (2003). It should be noted that there are some 80 plaintiffs in the case, many of whom do challenge the doctrine of *Buckley*.

judicial response to the wave of regulation ushered in after 1972, attempted to strike a balance between concern over the role of money in politics and the First Amendment protections of free speech and association. Whether *Buckley's* distinctions between contributions and expenditures, between express advocacy and issue advocacy, and between voluntary tax financing and mandatory tax financing were correct is a subject of long debate. The years since *Buckley* have led to a series of further hairsplitting decisions by the high Court, yielding what one perceptive observer has described as a "patternless mosaic."¹¹¹ Not-for-profit corporations have more protection than for-profit corporations, but only when spending money, not when contributing it. However, within that mix, giant media conglomerates have more protection than membership organizations. Massachusetts Right to Life, Inc., was protected as an ideological corporation, while the Michigan Chamber of Commerce was given less protection as a "non-political" organization, a description that would have stunned most observers of Michigan politics. Spending on ballot measures has more protection than spending on candidate races.¹¹²

These patternless distinctions are reflected, with even less order, in the legislatures. McCain-Feingold, for example, places limits on a group such as the Sierra Club or NRA spending \$10,000 on broadcast ads, but would allow spending \$100,000 on billboards and print ads.¹¹³ *Shrink PAC's* lowered level of scrutiny, combined with the poorly thought-out magic words "corruption or appearance of corruption," are increasingly able to justify regulatory infringements on routine political activity. In such an atmosphere, incumbent self-dealing and efforts to gut the fund-raising ability of one's opponents run rampant. Meanwhile, the truest grassroots activity, such as that of the "Muleshoe Four," the Law Students for Bush-Cheney, or the Ferguson family, is caught up in a Byzantine web of regulation. This regulation is fostered, ironically enough, by a well-financed lobby that relies heavily on corporate contributions.¹¹⁴

¹¹¹Lowenstein, *The Root of All Evil*, *supra* n. 38, 382–386.

¹¹²See Smith, *supra* n. 10 at 134.

¹¹³See 2 U.S.C. § 441a(a)(7) and 434 (f)(3) (2002).

¹¹⁴Groups urging greater regulation of campaign speech were, in the late 1990s, spending approximately \$25 million a year, mostly in grants from large foundations, to promote their agenda. See Cleta D. Mitchell, *Who's Buying Campaign Finance Reform?* (2001); see also Bradley A. Smith, *The Gaggers and the Gag-making*, NATIONAL REVIEW, March 11, 2002 at 33 (discussing Mitchell report); and *id.* at 36 (providing example of contributions by large corporations).

Beaumont on its own is not particularly significant, but combined with other recent cases, most notably *Shrink PAC* and *Colorado Republican II*, it is significant indeed. Whatever its flaws, *Buckley* provided a reasonably broad area in which political speech could flourish. These protections for political speech are now being rapidly eroded. This trend will continue so long as a large segment of the public, and an apparent majority of the Supreme Court, see corruption, rather than virtue, in the routine give and take of democratic elections.