

Journal of Law and Policy

Volume 6

Issue 1

INAUGURAL DAVID G. TRAGER PUBLIC

POLICY SYMPOSIUM:

Campaign Finance Reform: Will Anything Work?

Article 7

1997

The History and Theory of *Buckley v. Valeo*

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Recommended Citation

Hon. Ralph K. Winter, *The History and Theory of Buckley v. Valeo*, 6 J. L. & Pol'y (1997).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol6/iss1/7>

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THE HISTORY AND THEORY OF *BUCKLEY v. VALEO**

Ralph K. Winter**

*Buckley v. Valeo*¹ was brought by a group of plaintiffs of divergent ideological and political viewpoints, including then-Senator James Buckley, then-former Senator Eugene McCarthy, the Conservative Party of New York, the New York Civil Liberties Union, and others.² They were represented *pro bono* by lawyers of similarly divergent political viewpoints, although they generally shared a libertarian ideological stance. These lawyers included Dean Joel Gora³ of this school as well as your humble speaker. The plaintiffs disliked the Federal Election Campaigns Act⁴ on the merits, and they were profoundly convinced that its principal provisions violated the First Amendment. Senators Buckley and McCarthy both viewed themselves as candidates who had successfully challenged the existing political order—albeit from different directions—and believed that campaign finance reform would limit the ability of similar candidates in the future to challenge status quo politics.

* This address is an adaptation of an earlier article by the author, *Political Financing and the Constitution*, published in the ANNALS OF THE AMERICAN ACADEMY OF POLITICAL SCIENTISTS, July 1986.

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¹ 424 U.S. 1 (1976).

² See CONGRESSIONAL QUARTERLY, CONGRESSIONAL CAMPAIGN FINANCES: HISTORY, FACTS AND CONTROVERSY 46 (Mary W. Cohn ed., 1992).

³ At the time of this Symposium, Joel Gora was an Associate Dean at Brooklyn Law School but has since returned to teaching. He is currently a Professor of Law at Brooklyn Law School.

⁴ 2 U.S.C. §§ 431-455 (1997).

Today the decision in *Buckley v. Valeo* is much maligned, and wrongly so, as having brought the nation to a situation where campaign financing, by so-called special interests, dominates our politics.⁵ However, the plaintiffs in *Buckley* and those who represented them were far more prescient about where we would be today than those who defended the campaign reform legislation of 1974. We said that the law would do far more to suppress campaign money that was intended to further speech about ideas and issues than it would to suppress campaign money collected from organized economic interests.⁶ We predicted that the legislation's impediments to fundraising would lengthen campaign seasons, as it did.⁷ We also predicted that the limitations on contributions would make life harder for those espousing new ideas to enter politics.⁸ Whether that has happened can hardly be measured exactly, but there are many, including former adversaries, who describe politics today as fitting that mold. Thankfully, many of the predictions, particularly with regard to the effects of limits on expenditures in congressional campaigns, could not be tested because the Supreme Court invalidated the provisions in question.⁹

The legal theories of the plaintiffs were textbook First Amendment principles. We believed that political speech is at the core of First Amendment protection.¹⁰ We pointed out that First Amendment protection has often been justified on the slippery slope argument that fringe speech and activities have to be protected because if they were not, regulation and prohibition would soon

⁵ See Editorial, *A Political Scandal: The Price of Power*, BOSTON GLOBE, Oct. 31, 1996, at A26 ("According to the National Voting Rights Institute, less than 1 percent of the population is giving 80 percent to federal campaigns."); Daniel J. Kornstein, *The Irony of Free Speech*, N.Y. L.J., Jan. 14, 1997, at 2 (book review) (discussing how the *Buckley* line of decisions have come under recent attack).

⁶ Brief for Appellants at 67-75, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

⁷ *Id.* at 60.

⁸ *Id.* at 67-75, 95.

⁹ See generally *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹⁰ Reply Brief for Appellants at 2, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

extend to mainstream speech.¹¹ We also believed that at the core of protected speech there had to be speech by and concerning candidates for elective office. It was our view that a Constitution that does not protect speech concerning candidates running for office could not capture enduring public support. Public confidence in the First Amendment would not be enduring if the symbol of First Amendment protection were to become, say, someone like Larry Flynt.¹²

It was our view that if the government is able to control the resources needed for communication, then government can control that communication.¹³ If government can control the use of money to purchase resources of communication, then it can control speech.¹⁴ We had no doubt, therefore, that serious First Amendment issues were raised by the Federal Election Campaigns Act.

We also believed that government regulation of campaign financing must be based on principled theories of the First Amendment, that is, if one is prepared to accept the regulation of campaign speech on a certain theory, then one must be prepared to accept the full consequences of that theory.

For example, those who would limit private campaign financing engaged in much hand-wringing over the amount of money spent on political campaigns.¹⁵ The unspoken assumption seems to be that spending is bad in and of itself. This is an odd theory. Sure, the numbers seem large but compared to what? The average six-month senatorial campaign budget in a state is probably less than the total of six months worth of faculty salaries at the best local law school.

¹¹ *Id.* at 17-18.

¹² Larry Flynt is the publisher of *Hustler* magazine. He is frequently associated with the First Amendment. See generally RODNEY A. SMOLLA, "JERRY FALWELL V. LARRY FLYNT": THE FIRST AMENDMENT ON TRIAL (1988).

¹³ Reply Brief for Appellants at 17, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

¹⁴ Brief for Appellants at 46-47, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

¹⁵ Brief for Appellee Attorney General and for the United States as *Amicus Curiae* at 29-30, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

The irrelevance of the numbers bandied about and the danger of limiting campaign spending is demonstrated by examining how the costs of politics are determined. Those costs are set in part by the number of political events that we, as a government, sponsor. If we multiply the number of primaries and caucuses and other political events, we necessarily multiply the amount of money needed for political campaigns. One of the oddities of the debate at the time of *Buckley* was that those who most strenuously decried the costs of campaigns were those who strenuously wanted to multiply the number of political events. Moreover, campaign regulation has significantly increased the cost of raising monies itself, thereby contributing to the cost of campaigns.

Most importantly, the costs of campaigns are set by the market price of resources necessary for political communication. That price is largely independent of politics. As the technology of communication becomes more sophisticated, the costs of communication increase. If all political advertising ceased, the cost of advertising generally would barely be affected. Limiting campaign spending does not, therefore, limit the costs of campaigns. It simply limits the amount of communication in which candidates can engage. In short, it reduces political speech and communication. This seems a rather odd consequence under a legal rule that generally says the more speech the better in the case of the arts, newspapers, and even commercial speech.¹⁶

Moreover, it is also quite apparent that the high spending campaigns that would feel the greatest bite from limits are also the most competitive campaigns. Elections with outcomes that are foregone conclusions would not be affected; close elections would be affected,¹⁷ a peculiar result under any theory protecting political speech.

¹⁶ See, e.g., *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976) (commercial speech); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (arts); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (newspapers).

¹⁷ See Gary C. Jacobson, *Enough is Too Much: Money and Competition in HOUSE ELECTIONS*, IN *ELECTIONS IN AMERICA* 173, 181 (Kay L. Scholzman ed., 1987) (stating that large amounts of spending by incumbents will increase their vote percentages only slightly, but that this may be decisive in close elections).

Another argument raised by our adversaries was that campaign finance reform would tend to bring about equality of political communication.¹⁸ Rarely has so sinister a proposition been so attractively packaged. We argued in *Buckley* that if equality is truly a goal justifying the suppression of speech, then virtually no political communication of consequence can have First Amendment protection. Once you limit the speech of one group as being too powerful, you necessarily enhance the relative importance of the speech of other groups. If the goal of equality is to be sincerely pursued, we must be prepared to suppress whatever speech seems to be significant at the time. The only possible equality is silence.

For example, if we limit the amount that candidates may spend in a campaign, they will crave free media attention even more than they do now. This will sharply enhance the power of those who own radio and television stations, networks, newspapers, and news magazines over elections, as well as the influence of those groups on officeholders. The power of the media will in fact be enormously increased. However, the media is controlled by a relatively tiny group that is far less numerous and diverse than are campaign contributors, who number in the millions.¹⁹ Moreover, it can hardly be said that the press will not favor candidates who take positions that enhance the press's power and income. Can we claim to be taking even incremental steps toward equality when those very steps will give vastly more power to those who own the networks, namely Time Warner, the Murdoch interests, General Electric, Disney, and Westinghouse?²⁰

¹⁸ See Brief for Appellees Attorney General and Federal Election Commission at 23, 36, 59, 61 & 75, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

¹⁹ See Bradley Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J., 1049, 1063 (1996) (discussing how an estimated 18 million people contribute to election campaigns); Alan Bash & David Lieberman, *Will Mergers Dilute News Coverage*, USA TODAY, Oct. 11, 1996, at 1D (discussing how a few large media companies can use their authority to promote private interests).

²⁰ See Karla Peterson, *Merger, They Wrote Ethics Patrol: After Mergers Who's Policing the News?*, SAN DIEGO UNION-TRIB., Sept. 7, 1997, at E3 (stating that Time Warner owns CNN, Rupert Murdoch controls the Fox Network, General Electric owns NBC, Disney owns ABC, and Westinghouse

This logic extends beyond candidates running for office, to organizations pursuing particular issues. Such groups almost always have wealthy patrons and sponsors and invariably depend upon money to pursue their goals. There is not a major civil rights group, civil liberties organization, public interest lobbying organization, public interest law firm, environmental group, public policy think-tank or New Right organization that cannot be accurately accused of using money to communicate on matters of public interest in a fashion that gives it more power than over ninety-nine percent of the rest of the citizenry.²¹

Political communication is not effective unless it is unequal and rises above the din of other voices. The goal of equality in political communication thus stands the First Amendment on its head, because it subjects every person or group engaging in effective political communication to censorship on the ground that it is exercising disproportionate power. Moreover, the laws that purport to bring about equality of political communication would have to be set, not by neutral patriot kings, but by office-holders with a palpable self-interest in disabling their opponents. Even to embark on this form of regulation would be to abandon what seems to me a fairly obvious purpose to be inferred from the First Amendment, namely that challengers must be protected from incumbent's natural tendency to think of their own political preservation first.

Our adversaries in *Buckley* also claimed that regulation of political financing is necessary to remedy a loss of public confidence in government; a view relied upon by the Supreme Court in upholding contribution limits.²² We viewed this as a bootstrap argument. Having persuaded the public that our government is for sale, advocates of campaign finance regulation use the very fact of that persuasion as a justification for the measures they support.²³

owns CBS).

²¹ See Frank J. Sorauf, *Politics, Experience and the First Amendment: The Case of American Campaign Finance*, 94 COLUM. L. REV. 1348, 1361 (noting that most Political Action Committees pursue a strategy of legislative access by giving campaign support to candidates).

²² *Buckley v. Valeo*, 424 U.S. 1, 25-28 (1976).

²³ See Tom R. Moore & Richard D. LaBelle III, *Public Financing of Elections: New Proposals to Meet New Obstacles*, 13 FLA. ST. U. L. REV. 863,

Public confidence in government is indeed important, but one should not ignore how dangerous this rationale is when used to regulate political communication. Many have argued quite as cogently that confidence in the moral fabric of society is undermined by certain films or plays.²⁴ Many others have argued for the stringent regulation of government employment on the grounds that the public has lost confidence in a government that they believe is staffed by subversives. The public confidence argument is simply a claim that the First Amendment must give way to public opinion, which amounts to constitutional law by polling.

In our view, the most compelling and only legitimate argument advanced by our adversaries was that the limitation or size of contributions would reduce corruption.²⁵ They argued that campaign contributions all too often involved *quid pro quos*.²⁶ They believed that elected officials not only agreed to listen to contributors (the inequality problem) and decide issues on their merits, but in fact committed themselves to adopting legislation or dispensing jobs in exchange for campaign money.²⁷ If this was so, such conduct would be illegal quite apart from any limit on contributions to candidates. We were skeptical of the evidence supporting the view that corrupt arrangements were behind any large number of contributions and resistant to the notion that the widespread

863-64 (advocating the enactment of numerous campaign finance laws because “[a]t the moment, there does appear to be a virtually court-confirmed constitutional right to buy elections”).

²⁴ See, Elizabeth Kolbert, *Americans Despair of Popular Culture*, N.Y. TIMES, Aug. 20, 1995, at §2, 1 (discussing public opinion polls and interviews indicating that Americans hold a negative view of popular culture and its impact on morality); Robert Mc Fadden, *Subway Fire Attack Prompts An Uproar Over Action Movie*, N.Y. TIMES, Nov. 28, 1995, at A1 (describing Bob Dole’s assault of *Money Train*, a motion picture whose fictional depiction of attacks on a subway clerk served as models for real crimes).

²⁵ Brief for Appellants at 63-64, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

²⁶ See Brief for Appellee Attorney General and for the United States as *Amicus Curiae* at 31, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

²⁷ See *id.* at 44.

suppression of speech was justified.²⁸ Usually, when important First Amendment values are at stake, notions of overbreadth and giving speech breathing room caution against broad limitations on speech. Moreover, if campaign contributions are so often bribes, why are there so few prosecutions. The answer given by our adversaries was that this form of corruption is difficult to detect.²⁹ If that is the case, then the justification for limiting contributions is also essentially unproven. Finally, we argued that disclosure of contributions was a remedy tailored to the problem.³⁰ It allows voters to decide whether the conduct of their representatives justifies their vote. In any event, the Court upheld the limits on contributions and *Buckley* is no barrier to campaign finance regulation designed to eliminate corruption.

As they say, the devil is in the details, and many of the First Amendment problems that inhere in campaign finance reform can be demonstrated by examining the details of regulation of independent expenditures, expenditures by candidates, and contributions to candidates. Independent expenditures are expenditures made by individuals or groups for the purpose of persuading voters to vote for a particular candidate.³¹ Such expenditures are not made in coordination with the candidate's campaign but are made independently in ways believed by those making the expenditures to be most effective.

We believed that constitutional protection of independent expenditures is essential to effectuate the core purpose of the First Amendment.³² Such expenditures constitute speech designed to persuade voters to believe and vote in a particular way, nothing more, nothing less. They constitute pure political advocacy,

²⁸ Brief for Appellants at 79, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

²⁹ See Brief for Appellee Attorney General and for the United States as *Amicus Curiae* at 44, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

³⁰ Brief for Appellants at 78, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

³¹ See 2 U.S.C. § 431(17).

³² See Reply Brief for Appellants at 16, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

functionally indistinguishable from the editorial endorsement of candidates by organs of the media or advocacy of policies by issue groups that support particular candidates.

It has been argued that independent expenditures may be a method of corrupting candidates by creating undesirable obligations.³³ This argument is utterly without merit. An independent expenditure by itself creates no obligation. Whatever obligation may be created arises only after the expenditure has persuaded persons to vote for the candidate. This is a crucial distinction because it can be argued that contributions to a campaign may create obligations by the very act of donation. Independent expenditures, however, create obligations by persuading voters, much as obligations are created by the endorsement of editorial writers, or any speech that persuades voters.

Moreover, if independent expenditures are to be regulated, a detailed speech code will be necessary. For example, if the press is to be exempted from the prohibitions, a workable definition of the press will be needed to prevent evasion of the prohibition. The speech code will also have to deal with the increasing use of political advertising by groups such as public employee unions.³⁴ If an advertisement attacks a governor's proposal for certain budget cuts, is that an independent expenditure to be regulated? Is the answer different if the expenditure occurs in the middle of a campaign? Is the answer different if the governor is mentioned by name? Myriads of close questions arise, none with any clear answer, but all with profound First Amendment implications.

Some claim there is a line to be drawn between issue discussion and campaign advocacy. However, in our view it made no sense to allow groups to discuss the merits of an issue, and to take a stand on one side of the issue, but not to identify which candidate also takes that stand and which does not. Why indeed would any

³³ See Brief for Appellee Attorney General and for the United States as *Amicus Curiae* at 67-77, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

³⁴ Organized labor has recently engaged in heavy political advertising; the AFL-CIO, for example, spent \$35 million in the last congressional campaign. See Patrice Hill, *Labor Set to Tone Down Assault on GOP*, WASH. TIMES, Oct. 26, 1996, at A11.

democracy forbid identifying candidates with issues? With regard to limits on expenditures by congressional candidates, there are various reasons offered in their support but the principal reason for their staying power as an idea is their attractiveness to incumbent members of Congress. Again, the devil is in the details. Limits on expenditures are a two-step legislative process. First, those in power must define what expenditures are to be limited. Second, those in power must set the level at which the defined expenditures can be made.

The law involved in the *Buckley* case defined spending as every penny spent by challengers for political purposes.³⁵ It defined expenditures as the abundant perquisites useful for political purposes that those in power provide to themselves.³⁶ In 1974, the year in which the limits were passed, over \$38 million was spent on the congressional frank³⁷—the heaviest use of the frank at that time being near the dates of primary and general elections.³⁸ In the same year, the total spent by challengers in all primary and general election campaigns was barely over twenty million dollars.³⁹ The incumbents who passed the 1974 Act, therefore, spent almost twice as much on franked mail alone as challengers spent on all of their political activities in both primary and general elections.

In addition to the frank, incumbents have other perks which are useful for political purposes. These include a staff, a variety of offices, access to inexpensive broadcast facilities, paid trips to the district, and so on. These resources are enormously useful for communicating with voters in order to generate electoral support. The act's limitations on expenditures, therefore, fell vastly more heavily upon challengers than upon incumbents.

³⁵ See 18 U.S.C. § 608 (1970 & Supp. IV 1974) (repealed 1976).

³⁶ See *id.*

³⁷ The congressional "frank" is a privilege that allows members of Congress to mail newsletters to their constituents, sponsored by taxpayer funds. See Guy Gugliotta, *Republican's Publicly Funded Radio Town Meeting Generates Static*, WASH. POST, Apr. 26, 1996, at A23.

³⁸ *Buckley v. Valeo*, 424 U.S. 1 joint app., 2:33 (1976).

³⁹ *Id.*

Of course, the level of expenditure limitations was set very low. The value of campaign money to a challenger is generally greater than it is to an incumbent, and generally, the lower the limitation, the greater the damaging effect on the campaigns of challengers. When the Federal Election Reform Act was being considered by Congress, John Gardner of Common Cause testified before Congress that low limits on expenditures tend to freeze out challengers. When he proposed a limit he believed to be minimally adequate, Congress listened. It soon reduced the limits significantly below what Mr. Gardner suggested.

The 1974 law limited expenditures to \$70,000 plus another \$14,000 to cover the increased cost of fundraising as a result of the limit on contributions.⁴⁰ This limit was set in the face of the fact that no challenger to a House incumbent in 1972 had succeeded in defeating that incumbent without spending more than \$70,000. The Act's expenditure limits required the reformers, who were disabled from seriously challenging low limits due to their rhetoric about the costs of campaigns, to enter into a Faustian bargain with incumbents. It was that bargain that the Court upset in *Buckley*. Those who are now seeking to overturn that portion of the *Buckley* decision, want to renew that bargain.

The standard argument for expenditure limits is that incumbents can raise more private money than challengers and thus limits on expenditures increase the power of challengers.⁴¹ Putting aside the fact that this argument leaves us with no explanation for why incumbents are so insistent on limits on expenditures in congressional campaigns, there are two answers. First, challengers start with the considerable disadvantage caused by the massive political resources the government provides for incumbents.⁴² Limits do nothing to offset that disadvantage, they merely limit the chal-

⁴⁰ See 18 U.S.C. § 608(c)(1)(E).

⁴¹ See Brief for Appellees Attorney General and the Federal Election Commission at 72, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

⁴² See Brief for Appellants at 86-104, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437); Reply Brief for Appellants at 38, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

lengers' ability to respond.⁴³ Second, every dollar of campaign money is generally worth more to challengers than to incumbents. In fancy language, every dollar of campaign money has a higher marginal utility to challengers than to incumbents.

The concept that one dollar of political financing may be of greater value to a new candidate than to an incumbent can be demonstrated by an example from the world of commerce. Hypothesize a middle-size city with one French restaurant that is well known. Its previous success affords it an ample budget for advertising. The success of a new, competing French restaurant will be determined more by whether it can purchase enough advertising to reach a critical mass of the public than by whether it is outspent, even grossly outspent, by its established competitor. Each advertising dollar spent by the older restaurant has far less potential for affecting opinions than those spent by the newer one. The older restaurant's advertising at best reinforces opinions among past customers while the newer restaurant's advertising exposes customers to a new option. Once the new restaurant reaches a critical mass of such customers, it will be viable until it wins or loses on the merits of its food and service. Thus, money used in reaching a critical mass with a new message generally produces more value than does money used to repeat the familiar.

In an analogous fashion, new political candidates are threatened less by the ample resources available to their adversaries than by the danger that they will not be able to accumulate a minimum critical level of financing for themselves. This may explain why incumbent officeholders are so willing to limit the use of private financing in congressional campaigns notwithstanding their advantages in that kind of fundraising.

There are other reasons for being concerned about limitations on expenditures. A necessary adjunct to limitations is centralized control over individuals spending their own money in coordination with a campaign. If an expenditure limitation is to be effective, it

⁴³ See Reply Brief for Appellants at 38, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437) (stating that regulating the content of challenger's speech inevitably presents them from achieving name recognition or gaining access to the media).

is necessary to prevent individuals from offering storefronts, handbills, or other useful campaign materials without including their value in the campaign's expenditures. Because counting and reporting these materials as the candidate's expenditures is administratively impossible, control over individual expenditures amounts to a prohibition. It should be noted that the effect of this control is in addition to the limits on contributions, which would in any event restrict an individual's gift of storefronts and the like to a total value of \$1,000. The effect of limits on expenditures is thus to cause campaigns to be more media-oriented and to preclude grass-roots participation by individuals.

In *Buckley*, the Supreme Court rejected the proffered benefits of expenditure limitations as wholly inadequate justifications for such an outright limitation on the quantity of speech, a decision eminently consistent with the mainstream of First Amendment law.⁴⁴

With regard to limits on contributions, a plausible case under the First Amendment can be made for permitting regulation. Our adversaries made three basic arguments in favor of the constitutionality of limits on individual contributions. First, they pointed out that a contribution is at best indirect speech by the donor because the candidate exercises total control over the use of money once the gift is complete.⁴⁵ Second, they argued that contributions by individuals give the rich an advantage over the poor in shaping public policy.⁴⁶ Third, they noted that contributions entail opportunities for corruption since they may create an obligation by the very act of giving.⁴⁷ In *Buckley*, the Supreme Court upheld the

⁴⁴ *Buckley v. Valeo*, 424 U.S. 1, 55-59 (1976).

⁴⁵ Brief for Appellee Attorney General and for the United States as *Amicus Curiae* at 25-27, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437); Brief for Appellees Attorney General and Federal Election Commission at 60-62, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

⁴⁶ Brief for Appellee Attorney General and for the United States as *Amicus Curiae* at 31-36, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437); Brief for Appellees Attorney General and Federal Election Commission at 23-27, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

⁴⁷ Brief for Appellee Attorney General and for the United States as *Amicus Curiae* at 43-45, *Buckley v. Valeo* 424 U.S. 1 (1976) (Nos. 75-436 & 75-437); Brief for Appellees Attorney General and Federal Election Commission at 18-21,

Act's limits on individual contributions on the grounds that preventing corruption or the appearance of corruption was a compelling governmental interest justifying such limits.⁴⁸

The decision of the Court is not without reason. We believed however, that there were cogent arguments supporting a different conclusion. It is true that contributions constitute indirect speech in the sense that their particular use is determined by the candidate rather than by the donor. However, it is also true that millions of people contribute to candidates for ideological reasons and that contributions are the only means by which they can participate in furthering the views they espouse.

Moreover, contributions, including large contributions, are made across the political spectrum. To be sure, those making them are well-to-do, but it is simply not a fact that their purpose is solely to protect the wealthy. There have been countless instances in which candidates who favored higher and more progressive taxes, have been the recipients of sizable amounts of campaign money donated by wealthy individuals. In the case of candidates pursuing political causes outside the mainstream, such contributions are critical. They are needed at an early stage as "seed money" so the campaigns will be sufficiently viable to appeal to a wider portion of the public for money and support. In the hope of scaring off potential challengers, incumbents can often warehouse large amounts of campaign money. Equally decisive is whether the challenger can raise enough at an early stage to make the campaign viable. Large private contributions are often essential to that end.

A limit on the size of individual contributions makes fund-raising more difficult and more costly and thus limits the total amount that may be spent in campaigns. The effect, therefore, is essentially the same as that of expenditure limitations which disadvantage challengers.

So far as corruption is concerned, it is difficult to perceive why full disclosure of contributions and their sources to the electorate

Buckley v. Valeo, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

⁴⁸ See Buckley, 424 U.S. at 26 ("It is unnecessary to look beyond the Act's primary purpose to limit the actuality and appearance of corruption . . . in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation.").

is not an adequate deterrent in light of the sketchy evidence that campaign money routinely results in *quid pro quo* arrangements.

Finally, whatever merits the arguments favoring limits on contributions have, they have little to do with the present law. No reason has ever been offered to explain, much less justify, an identical limitation on contributions for House, Senate, and Presidential races. There is also no rationale for the failure to adjust contribution limits for inflation, unless the real purpose is to limit candidate expenditures.

Turning back to the more general issues, in addition to our belief that profound dangers to First Amendment values lurked in the regulation of private political finance, we also believed that an affirmative case based on those values could be made for such financing.⁴⁹ A democratic system of government must allow proponents of change to seek change through that system. Government will not provide either financing or resources to the proponents of change. Political communication that is free of government regulation is a precondition to the pursuit of change, and free financing of that communication is a catalyst of that change. This is not to deny that status quo issues and candidates get the bulk of the available money. Even if that is generally true, there are in fact many notable exceptions. Critics of private political financing fail to take into account the fact that political money has different value to various issue groups and different candidates. History teaches that groups and candidates seeking change have difficulty raising substantial sums of money in small amounts and are in their infancy heavily dependent upon a few sources that contribute large amounts. Private political financing, therefore, is of critical importance to political change and is at the heart of those values protected by the First Amendment.

A most notable example of the use of private money as a catalyst for change was Eugene McCarthy's campaign for the Democratic presidential nomination in 1968.⁵⁰ Based on his

⁴⁹ See Brief for Appellants at 45, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

⁵⁰ See George F. Will, *Rules to Keep the Rascals In*, NEWSWEEK, Jan. 26, 1976, at 80 (noting that the ban on large contributions would have prevented McCarthy from contending for the Democratic nomination).

opposition to the war in Vietnam, McCarthy's campaign in New Hampshire, although not victorious, demonstrated President Johnson's vulnerability and revealed an antiwar constituency in the Democratic ranks that had not been previously verified.⁵¹ The McCarthy campaign was featured at the time as a children's crusade, staffed by volunteers sloshing through the snow to ring doorbells. In fact, it was a heavily financed campaign whose viability was assured by sizable early contributions from wealthy individuals followed by what was, by any standard, extravagant spending. In 1968, by the end of the New Hampshire campaign, Senator McCarthy had spent twelve dollars for every vote received, which was well over the present spending limits for candidates receiving public financing.⁵² Senator McCarthy's own experience as a political David, taking on an incumbent Goliath in a campaign written off by the experts, led him in later years to be among the most adamant opponents of the regulation of political financing.

As the plaintiffs in *Buckley* noted, other examples of the use of pools of private money for underdog candidates and causes abound. Senator McGovern's 1972 campaign for the Democratic presidential nomination relied heavily upon the early accumulation of large contributions from wealthy patrons.⁵³ Mayor Bradley's successful 1973 campaign in Los Angeles, as a black running in a largely white municipality,⁵⁴ and James Buckley's successful New York campaign in 1970, as a third-party senatorial candidate, were also made viable by early, large contributions.⁵⁵ The major civil rights and civil liberties organizations were for long periods of time supported by sizable gifts from wealthy individuals that enabled these groups to achieve the viability necessary for mass fundraising.

⁵¹ See Mary McGrory, *Visit to the Granite Planet*, WASH. POST, Feb. 11, 1996 at C1 (asserting that even though Lyndon Johnson did not lose to Senator Eugene McCarthy in 1968, McCarthy's antiwar insurgency did so well he might as well have).

⁵² See Will, *supra* note 50, at 80 ("McCarthy made history in New Hampshire by spending \$12 per vote received.").

⁵³ See Brief for Appellants at 19, 135-36, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

⁵⁴ *Id.* at 132-33.

⁵⁵ *Id.* at 15, 133.

Even now, the scope of their activity may depend upon large contributions.

It was our view, therefore, that private financing nurtures candidates and causes across the political spectrum and that large donors by no means pursue only the self-interest of the wealthy. Indeed, the point that drew us all together in *Buckley* was that the status quo, however well financed, is threatened by aggregations of private funds and that the regulation of such private financing threatens to cut off movements and candidates pursuing political change. The pursuit of such change is the stuff of democracy and of the First Amendment. Joel and I represented those democratic values in *Buckley* and are proud of it.

