WHY *BUCKLEY V. VALEO* IS BASICALLY RIGHT*

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Buckley v. Valeo[1] seems to be almost universally reviled: People either say the Court went too far in allowing restrictions on political contributions and expenditures, or not far enough. I want to do something radical, which is to say that the Court got it pretty much right.[2]

I. FIRST PRINCIPLES

A. *The Basic Right To Express Your Views*

To begin with, I think the Court was right to strike down the limit on independent expenditures, because that limit infringed core First Amendment rights.

Say you wanted to put a modest ad in a medium-sized newspaper saying "I'm outraged by Bush's stand on abortion, and urge everyone to throw him out of the White House." Under the Federal Election Campaign Act (FECA),[3] it probably would have been a *crime* for you to express yourself in this way. Placing an ad in any decent-sized newspaper would almost certainly cost more than $1000, the expenditure limit imposed by FECA.[4] FECA would likewise have barred you from printing up a couple of hundred T-shirts, spending over $1000 to set up a professionally-designed Web site, and of course buying radio or television time. The law didn't just ban "independent expenditures" in the abstract—it banned people from *speaking* when that speech was modestly expensive (as effective speech often is).

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1. 424 U.S. 1 (1976).

2. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (upholding Missouri statute limiting campaign contributions under First Amendment strict scrutiny).

3. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified in scattered sections of 2 U.S.C. and 18 U.S.C.).

4. 2 U.S.C. § 441a(a)(1)(A) (2000).

But isn't this restriction justified by the need to give "each citizen a fair and reasonably equal opportunity to command attention for [their] own views"?[5] Well, Barbra Streisand, by endorsing a candidate and "donating" to that candidate her name and all the publicity that goes with it, can surely command more attention than I can. So can the editorial board of *The New York Times*. So can journalists who write about candidates for the *Times*. But this doesn't justify barring Barbra Streisand, the *Times* editors, or the *Times* reporters from speaking this way.

Their rights to speak should not be sacrificed in the name of equality; and that includes their rights to speak when the speech requires spending money. *Times* editors and reporters, for instance, speak by using valuable newspaper space. Under any sensible accounting system, the value of Streisand's endorsement, or of several column-inches in a leading newspaper, would be worth much more than $1000. Each of us should likewise have the same right to spend our assets (which may be money rather than fame or access to the newspaper page) to express our views.

Actually, many rationales for restricting campaign-related speech would justify restricting newspapers and magazines. Professor Raskin,[6] for instance, commented that corporations should have no constitutional or statutory right to spend money to advance partisan political agendas.[7] Likewise, the League of Women Voters Education Fund's proposal would bar corporations from spending money to distribute "[a]ny paid communication with the general public that uses a federal candidate's name or likeness within 90 days of a primary or of a general election."[8] Most papers and magazines are owned by corporations.

I suspect these commentators would limit their proposals to somehow exclude corporations that are part of the media, just as FECA did,[9] but what would be the principled reason for this? If *The New Republic* is entitled to

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5. *See, e.g.*, Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 23 ("[E]ach citizen must have a fair and reasonably equal opportunity not only to hear the views of others as these are published or broadcast, but to command attention for his own views.").

6. Jamin Raskin, Symposium, *Federal Election Laws—Campaign Finance: Free Speech, Soft Money, Hard Choices* (Feb. 16, 2001) (remarks) (transcript available at Arizona State University College of Law) (suggesting that a ban on "direct[] political spending" by corporations should be constitutional).

7. *Id*.

8. LEAGUE OF WOMEN VOTERS EDUCATION FUND, 5 IDEAS FOR PRACTICAL CAMPAIGN REFORM 5 (1997).

9. 2 U.S.C. § 431(9)(B)(i) (2000) (excluding "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication" from the definition of "expenditure").

spend money to advance its partisan political agenda, why shouldn't other corporations be entitled to do the same?[10]

The Internet makes special treatment for the media especially problematic. Am I a media entity if I create a Web page? Most corporations have Web pages; does this make them media corporations? And if they or I buy an ad in a newspaper, or buy space on a billboard, aren't we at least temporary media entities, just as the newspaper corporation or billboard corporation are permanent media entities?

These campaign finance proposals don't just sacrifice free speech in the name of equality—they subordinate the free speech of some (non-media corporations and unknown individuals), while protecting the speech of others (the media and celebrities). This does not seem either libertarian or egalitarian.

B. The Classroom/Courtroom Analogy

Some respond that the government equalizes people's voices in many contexts: in the classroom, the courtroom, or a law school debate, for example.[11] But when the government is acting as educator or proprietor, it is entitled to control what is said. In the classroom, the teacher is in control; the teacher can interrupt a student's comments to interject an opposing viewpoint, or for many other reasons. The teacher can even refuse to call on the student in the first place. Likewise, in the courtroom, the judge is largely in control.

But when the government is acting as sovereign, it isn't supposed to be in control of public debate; there, each individual is in charge of deciding what he chooses to say. In public, you can say "Fuck the Draft" or buy newspaper ads supporting one litigant or another. That you would not be able to do the same in class or in court is irrelevant to your rights as a private citizen outside government-managed property. Unless we're willing

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10. I therefore disagree with *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 679 (1990), largely for the reasons given in Justice Scalia's dissent.

11. *Cf., e.g.*, Paul Eckstein, Symposium, *Federal Election Laws—Campaign Finance: Free Speech, Soft Money, Hard Choices* (Feb. 16, 2001) (remarks) (transcript available at Arizona State University College of Law) ("And, in fact, the government routinely limits and equalizes speech in official proceedings. Even in this, if you could call this an official proceeding. Nobody would think it violates the First Amendment, I take it, that Weinstein has told us we each have 15 minutes. And if I say no I want to speak for a half hour he will tell me to shut up and he will not be violating the First Amendment when he does that. Even closer to elections, I think, [is] what happens in courts. . . . Courts have . . . equalized the number of lawyers each side could have, the time they can talk in oral argument, the number of briefs people can file, the size of those briefs. Does anybody think that's [a] violation of the First Amendment? I don't think so.").

to dramatically restrict First Amendment protection across the board, we must recognize that the government acting as sovereign has dramatically narrower powers than the government acting as educator or proprietor.

II. NIXON V. SHRINK MISSOURI GOVERNMENT PAC

So those are what I see as the first principles of the First Amendment and campaign-related speech. Let me try to elaborate them by focusing on three opinions in one of the Court's recent campaign speech cases, *Nixon v. Shrink Missouri Government PAC*.[12]

A. Justice Breyer and Constitutional Tension

I start with Justice Breyer's opinion, which would support broad restrictions on the grounds that democracy and equality are themselves interests of constitutional stature: "[T]his is a case," Justice Breyer tells us, "where constitutionally protected interests lie on both sides of the legal equation."[13] This is a beguiling argument—but, like the classroom/courtroom analogy, I think it leads to a place where few of us would want to go.

As I suggested in another article,[14] let's compare Justice Breyer's argument in *Shrink Missouri* to Justice Frankfurter's opinion in *Dennis v. United States*,[15] which of course was written to justify a ban on Communist advocacy:

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12. 528 U.S. 377 (2000).

13. *Id*. at 400 (Breyer, J., concurring). As I'll explain in Part III, I actually do not disagree much with Justice Breyer's bottom line on contribution limits, the issue that was specifically at stake in *Nixon v. Shrink Missouri*. Justice Breyer, though, made clear that his analysis also applies to restrictions on independent expenditures, and there I think his framework would reach results that are quite unsound. *See id*. at 401 (stressing the significance of the government interest in "democratiz[ing] the influence that money itself may bring to bear upon the electoral process," an interest that has long been used as an argument for restrictions on independent expenditures); *id.* at 402 (quoting Buckley v. Valeo, 424 U.S. 1, 48–49 (1975)) (defending the notion that government may sometimes restrict the speech of some "in order to enhance the relative voice of others," a notion that has likewise long been used to defend restrictions on independent expenditures); *id.* (arguing that *Buckley* should be reinterpreted to "mak[e] less absolute the contribution/expenditure line"); *id.* at 405 (suggesting that if *Buckley* "denies the political branches sufficient leeway to enact comprehensive solutions to the problems posed by campaign finance," then *Buckley*—presumably referring to *Buckley*'s protection of independent expenditures—"would [have to be] reconsider[ed]").

14. Eugene Volokh, *Freedom of Speech and Speech About Political Candidates: The Unintended Consequences of Three Proposals*, 24 HARV. J.L. & PUB. POL'Y 47, 48–57 (2000). The remainder of this Part liberally borrows from that article.

15. 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring).

> [T]he principal dissent oversimplifies. . . . It takes a difficult constitutional problem and turns it into a lopsided dispute between political expression and government censorship. Under the cover of this fiction and its accompanying formula, the dissent would make the Court absolute arbiter of a difficult question best left, in the main, to the political branches.[16]

> . . . [T]his is a case where constitutionally protected interests lie on both sides of the legal equation.[17]

> For that reason there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words "strict scrutiny." Nor can we expect that mechanical application of the tests associated with "strict scrutiny"—the tests of "compelling interests" and "least restrictive means"—will properly resolve the difficult constitutional problem that campaign finance statutes pose. Cf. *Kovacs v. Cooper*, 336 U.S. 77, 96 (1949) (Frankfurter, J., concurring) (objecting, in the First Amendment context, to "oversimplified formulas") . . . .[18]

> Our judgment is . . . solicited on a conflict of interests of the utmost concern to the well-being of the country. This conflict of interests cannot be resolved by a dogmatic preference for one or the other, nor by a sonorous formula which is in fact only a euphemistic disguise for an unresolved conflict. . . .[21]

> . . . [T]he interest in speech, profoundly important as it is, is no more conclusive in judicial review than other attributes of democracy or than a determination of the people's representatives that a measure is necessary to assure the safety of government itself.[22]

> Just as there are those who regard as invulnerable every measure for which the claim of national survival is invoked, there are those who find in the Constitution a wholly unfettered right of expression. Such literalness treats the words of the Constitution as though they were found on a piece of outworn parchment instead of being words that have called into being a nation with a past to be preserved for the future. The soil in which the Bill of Rights grew was not a soil of arid pedantry.[23]

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16. *Id*.
17. *Id*.
18. *Id*.
19. *Id*.
20. *Nixon*, 528 U.S. at 401–02 (Breyer, J., concurring).
21. *Dennis*, 341 U.S. at 519.

> I recognize that [earlier cases] used language that could be interpreted to the contrary. . . . But those words cannot be taken literally. . . . In such circumstances—where a law significantly implicates competing constitutionally protected interests in complex ways—the Court has closely scrutinized the statute's impact on those interests, but refrained from employing a simple test that effectively presumes unconstitutionality.[19]

> Rather, it has balanced interests. And in practice that has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative). Where a legislature has significantly greater institutional expertise . . . [the Court] in practice defers to empirical legislative judgments . . . .[20]

> Nor is the argument . . . adequately [decided] by citing isolated cases. Adjustment of a clash of interests which are at once subtle and fundamental is not likely to reveal entire consistency in a series of instances presenting the clash. It is not too difficult to find what one seeks in the language of decisions reporting the effort to reconcile free speech with the interests with which it conflicts. The case for the defendants requires that their conviction be tested against the entire body of our relevant decisions.[24]

> [H]ow are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?—who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? . . . Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress.[25]

Both arguments are eloquent and powerful, but both would yield a First Amendment jurisprudence that's far less speech-protective than the one we have today. After all, the Constitution is full of "values" and "interests." It talks not just of democracy or equality, but also the war power, private property, federalism, religious freedom, and more. If democracy or equality interests, coupled with "defer[ence] to legislative judgments," can trump free speech, then so can these others.

In fact, this "constitutional tension method," as I call the rhetorical device employed by Frankfurter and Breyer, has indeed been used in the

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22. *Id*. at 544.
23. *Id*. at 521.
24. *Id*. at 528.
25. *Id*.

past to justify all sorts of speech restrictions: the Sedition Act, the World War I-era bans on antiwar advocacy, bans on advocacy of violent revolution, bans on bitter criticism of religion, bans on public commentary about pending court cases, bans on racist and sexist advocacy, and more.[26] If it is revived in the campaign speech contexts, it will gain power in the other contexts too.[27] Even those who support restrictions on campaign-related speech might hesitate to endorse a First Amendment exception that's as potentially broad as this one.

B. Justice Stevens and "Money Isn't Speech"

Let me turn now to Justice Stevens' opinion, which rests on the old saw that money isn't speech.[28]

Well, of course money isn't speech. But so what? The question is not whether the money is speech, but whether the First Amendment *protects your right to speak using your money*.

After all, money isn't lawyering, but the Sixth Amendment secures criminal defendants' right to hire a lawyer. Money isn't contraception or abortions, but people have a right to buy condoms or pay doctors to perform abortions. Money isn't education, but people have a right to send their children to private schools. Money isn't speech, but people have a right to spend money to publish *The New York Times*. Money isn't religion (at least not for most of us), but people have a right to donate money to their church.

A law that says "You may not spend your money to [hire a lawyer/get an abortion/educate your children]" is an unconstitutional burden on the constitutional right because it (1) singles out a constitutional right for a special burden, and (2) in practice makes it much harder to exercise the right. The same must be true for a law that says "You may not spend your money to [engage in speech/engage in expressive association]." Money isn't speech. But restricting speech that uses money is a speech restriction.

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26. *See* Eugene Volokh, *Freedom of Speech and the Constitutional Tension Method*, 3 U. CHI. L. SCH. ROUNDTABLE 223 (1996) (describing examples of each of these uses of the constitutional tension argument).

27. *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 541 (2001) (Rehnquist, C.J., dissenting) (using the constitutional tension as an argument in favor of punishing newspapers' publications of conversations that were illegally intercepted by unrelated third parties).

28. Nixon v. Shrink Mo. Gov't PAC, 520 U.S. 377, 398 (2000) (Stevens, J., concurring); *see also* Volokh, *supra* note 14, at 57.

C. Justice Thomas and Content-Neutral Donation Restrictions

Justice Thomas criticizes *Buckley* from the other side: even contribution limits, he reasons, are unconstitutional, for the same reason as expenditure limits. But here too I want to defend *Buckley*'s result, if not quite its reasoning.

Contribution limits, I think, are properly seen as something close to a content-neutral limit on conduct—the conduct of giving gifts to government officials. I can't give a sitting Representative or Senator $1000 for his election campaign, but I also can't give it to him just for his own pocket.[29]

Under the analysis applicable to simple content-neutral speech restrictions, these restrictions are constitutional. I have given the details elsewhere,[30] but the basic argument is this:

1. The restrictions are content-neutral, because their justification is unrelated to the content of any communication that is done with the money. In fact, the justification applies equally well even if the candidate does not use the gift for communication at all.
2. They serve an important government interest in preventing quid pro quo corruption.
3. They are not overinclusive with regard to the interest, because any substantial gift to a government official has the potential to be a hidden bribe; many such gifts end up not being bribes, but it's impossible to determine up front which are corrupting and which are not.
4. They leave open ample alternative channels for people to communicate, precisely because they leave people free to spend money themselves to praise the candidate or advocate his election.

Justice Thomas disagrees, reasoning that people should be able to decide for themselves exactly how they want to support their favorite candidate—via an independent expenditure or via a contribution.[31] But the Court has generally let the government limit people's means of expressing themselves, when this is done through content-neutral restrictions.[32] You can communicate through leaflets or newspapers, but not through sound-trucks, loud concerts, or burning draft cards.[33] Likewise, you can

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29. Volokh, *supra* note 14, at 62 & n.48.
30. *Id.* at 60–69.
31. *Shrink Missouri*, 528 U.S. at 425 (Thomas, J., dissenting).
32. *Buckley*, 424 U.S. 1, 259 (1976).
33. *See* Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (holding that you can use newspapers and leaflets, but barring soundtrucks from broadcasting in a loud and raucous manner); Ward v.

communicate through independent spending, but not through large gifts to candidates.

So I agree with Justice Thomas that independent expenditure limits are unconstitutional because (and here I return to the first principles) people do have the basic First Amendment right to express their views, and independent expenditure limits restrict this right *without leaving open ample alternative channels*. But the government may regulate people's behavior—even if the behavior facilitates speech—in order to diminish the risk of corruption, if the government does so without regard to the communicative impact of the behavior, and if it leaves open alternative channels. Contribution limits fit within this test, because independent expenditures offer an ample alternative channel (though not a perfect channel) for speaking.[34]

Buckley and *Nixon* thus by and large got the First Amendment analysis right. (There are interesting arguments why contribution limits, even if constitutional, are a bad idea, but that is outside the scope of my analysis.) Independent expenditures must remain constitutionally protected; campaign contributions may be restricted. Lots of people on both sides dislike this result, but despite twenty-seven years of criticism, it remains surprisingly persuasive.

Rock Against Racism, 491 U.S. 781, 791 (1989) (upholding a volume restriction on concerts); United States v. O'Brien, 391 U.S. 367, 376 (1968) (sustaining a conviction for burning a draft card).

34. *See* Volokh, *supra* note 14, at 64–66 (responding to arguments that independent expenditures are not an adequate alternative to contributions).