

AGAINST THE SCRIBES: CAMPAIGN FINANCE REFORM REVISITED

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It is a pleasure to be back at my alma mater to talk about free speech and, in particular, to address those who would like to restrict campaign expenditures to assure a more equal representation of voices in our political discourse. The desire to restrict others' speech to create a better world with more influence from good people like oneself is an all-too-human impulse. I myself remember harboring the same sentiment in this very room and in other rooms on this campus when, as both an undergraduate and a law student, I wondered why Harvard could not be required to have a fairer proportion of views more like my own rather than force me to endure an almost unvarying pall of left-liberal orthodoxy. Nevertheless, here I argue that the understandable temptation—particularly seductive for intellectuals—to use the government to enforce a preferred pattern of speech would both violate the Constitution and damage the political health and economic prosperity of our republic.

I devote most of my discussion to defending the principal holding of *Buckley v. Valeo*¹ that limitations on campaign expenditures are subject to strict and generally fatal scrutiny under the First Amendment. I provide three levels of argument in favor of this proposition. First, I show that its holding is rooted in the neutral principles that must underlie any coherent conception of the First Amendment. Permitting restrictions on campaign expenditures by politicians and issue groups would in fact so distort neutrality that it would lead to a baleful dominance of our political life by those whose business is to

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

influence politics and culture—the axis made up by the press, the academy, and Hollywood. Second, I demonstrate that the holding is supported by the original understanding of the First Amendment. Third, I argue that it is supported by modern First Amendment doctrine. I then respond to some criticism of my position at the conference. Finally, I will advance some tentative thoughts about *Buckley's* second important holding—its validation of quite severe limits on how much money individuals may contribute to others' campaigns.

I. THE POLITICAL ECONOMY OF FIRST AMENDMENT NEUTRALITY

A. Campaign Expenditure Limitations and Neutral Principles

Under the provision of Federal Election Campaign Act of 1971 that was struck down by *Buckley*, a citizen who spent \$1,000 to place an independent advertisement opposing the election of a President could have been prosecuted as a felon and put in jail for five years.² We can dramatically illustrate the neutral principles at stake in such attempts to restrict campaign expenditures by interested individuals and associations by appealing to a simple hypothetical. Let us assume that Congress, in order to prevent undue influence of any members of the press on elections, declares that no media outlet can spend more than \$1,000 or even \$100,000 to cover any electoral campaign. This hypothetical statute precisely mirrors the restrictions involved in campaign expenditure limitations. Like a restriction on campaign expenditures, it regulates only money and the money it regulates is not any less related to speech than the money used for campaign expenditures. Moreover, like many other restrictions on campaign expenditures, this statute would also not explicitly discriminate on the basis of viewpoint. Yet almost universal denunciation would greet this statute—none more loud than from those in the press who support restrictions on campaign expenditures.

To permit Congress to restrict campaign expenditures and yet not to restrict press expenditures privileges some individuals because they happen to be in the media. It therefore would distort beyond recognition the neutral

2. See 2 U.S.C. § 431 (1976).

principles that must guide the First Amendment. To put it in a more personal way, why should I have to be in the media to use my resources to make my voice heard? Why should my First Amendment rights approximate the absolute when I own (or am employed by) a portion of the media and can thereby deliver my message continuously, but disappear when I want to rent the media to deliver my message?

I also use the comparison between restricting the political expenditures of the press and the political expenditures of those who produce material property for a living to show that restrictions on monetary campaign expenditures *by their nature* cannot equalize speech opportunities or influence, because restrictions on some kinds of information inputs to civic discourse will make other inputs more valuable. Those who would restrict monetary campaign expenditures merely take from one group and give to another: namely, the class of people whose influence derives from circumstances and characteristics not related to direct campaign expenditures. This fundamental truth also suggests that the only way to enforce neutral principles in the regulation of campaign expenditures is to prevent the government from making any distinctions between different kinds of resources deployed to support political speech, absent a very compelling interest to the contrary.

Campaign finance restrictions in fact will have very damaging effects on the diversity of our political discourse and, ultimately, on our prosperity. They create a monopoly politics with a pronounced leftward ideological tilt by imposing barriers to entry on all but the influential groups whose business already directly influences our political and cultural life. The primary beneficiaries of these barriers are members of the press, because their information inputs into our political and cultural life are not restricted by spending limitations.³ Restrictions on campaign expenditures would therefore make the press even more important political gatekeepers than they already are, because more messages would have to be refracted

3. See Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1078 (1996) ("[A]ttempts to exclude a particular form of power—money—from politics only strengthen the position of those whose power comes from other, nonmonetary sources, such as time or media access.").

through them rather than delivered through independent media buys.

In addition to the press, the whole class of people that manipulates symbols for a living (we can call them the “scribal class”) would gain influence through government decisions to limit the money those outside this class could spend. Academics, Hollywood luminaries, and pundits of all kinds who fabricate ideas for a living would gain at the expense of those who produce a lot of material goods for society

Moreover, campaign finance reform’s empowerment of the scribal class has an important partisan political effect. Studies show that members of the Washington, D.C. press corps voted for Bill Clinton over George Bush at a rate of over thirteen to one in 1992.⁴ Like the press, academics and Hollywood lean decidedly to the left.⁵ Members of the press would use that influence not only to advance a predominantly liberal agenda but to perpetuate their own power. For instance, in the last primary contest many in the press were in full swoon over Senator McCain, whose major issue was—surprise, surprise—campaign finance reform. Talk about a quid pro quo between candidates and their supporters! Although I believe that Senator McCain is a man of unimpeachable integrity, an unfriendly observer could view the support of McCain for campaign finance restrictions and support of the press for McCain as an exchange not different in kind from that which campaign finance reform advocates regularly denounce.

The scribal classes’ support for restricting everyone else’s political influence is not very surprising or even new. As a former classicist, I remember that in ancient times scribes tried to restrict access to writing and written texts in order to monopolize control over the written word.⁶ Human nature does not change; four thousand years later, campaign finance reform is fundamentally a manifestation of the same scribal will to power.

4. See Maggie Gallagher, *Is Media Biased Toward Clinton? Journalists Admit Views Color Coverage*, DALLAS MORNING NEWS, Nov. 3, 1996, at 5J.

5. See Neal Devins, *Bearing False Witness: The Clinton Impeachment and the Future of Academic Freedom*, 148 U. PA. L. REV. 165, 172 (1999) (detailing the “overwhelmingly left-liberal” leanings of historians and legal academics).

6. See ALAN K. BOWMAN & GREG WOLF, *LITERACY AND POWER IN THE ANCIENT WORLD* 6-17 (1994) (discussing the manner in which groups held power by controlling access to texts and writing).

More generally, restrictions on money make non-monetary characteristics that can be used to promote political candidacies, such as celebrity, good looks, and free time, more valuable.⁷ Retirees and recipients of government largesse will gain political advantages over those who produce a great deal of surplus for society. The time of the former groups is less valuable on the market, and therefore it will cost them less to make in-kind contributions (like handing out pamphlets and going door to door) than it costs the more productive whose time has a high market value.

Thus, even if reformers were right that a particularly good political theory of equality could trump the First Amendment, they have not show us why, in a world full of all sorts of inequalities, money is a uniquely bad axis of inequality. First, as Professor Bradley Smith has observed, money is the most direct means by which everyone—even those without celebrity or scribal talents—can make their influence felt.⁸ Thus money is more widely dispersed than the talents that the campaign expenditure prohibitionists would favor. Second, those with money are less skewed towards one party than those whose influence derives from the academy, Hollywood, or the press.⁹

B. Adverse Political and Economic Effects of Campaign Finance Limitations

It would also be unwise for the long term welfare of society to restrict campaign expenditures in a manner that would give those who produce little greater political influence than those who produce a lot. Indeed, campaign expenditure limitations could well have adverse effects on economic growth.¹⁰ In his recent book, *Power and Prosperity: Outgrowing Communist and*

7. See Smith, *supra* note 3, at 1079-80 (showing how celebrities would benefit).

8. See Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 90 (1997).

9. *Id.* at 94. I believe the reason for the greater diversity of views is that the wealthy, unlike the media, are involved in disparate enterprises.

10. Some might argue that campaign finance limitations could promote economic growth by taking away power from special interests. But as Michael Rappaport and I argue elsewhere, special interests also have other methods of leverage on political actors other than campaign contributions. See John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 466 (1999). Thus campaign limitations are likely simply to shift rent-seeking to groups with these other means of leverage rather than to reduce the total amount of rent-seeking.

Capitalist Dictatorships, Mancur Olson has shown that societies grow faster and have less conflict when the political power is diffused throughout the encompassing interest of society.¹¹ By "encompassing interest" Olson means all those involved in producing the social surplus of society.¹² If this group has power, they will be less likely to engage in rent-seeking because they would be essentially stealing from themselves.¹³ Thus, a structure in which the productive can make campaign expenditures may actually reinforce the power of the encompassing interest, at least as compared to a structure in which campaign finance prohibitions give power to those who are not materially productive.

I recognize the argument that the wealthy might themselves form a hegemony and entrench themselves at the expense of everyone else. But the wealthy, at least in the modern world, are a heterogeneous group, largely because they are involved in so many disparate enterprises that they cannot form a united political faction. Moreover, the rapid pace of technological change provides an even greater assurance that the wealthy will remain a fluid group. No sooner is one set of multimillionaires minted by one technology than a succeeding technology creates another set whose income derives from a competing innovation.

In contrast, if a narrow class, like the press and entertainment elite, has disproportionate power in society, it is likely to skew government policy in favor of its particular industries. Moreover, the scribal class may have an inherent interest in creating a society with more social conflict (and therefore less growth), because controversy sells media products and creates demand for social scientists and those in the helping professions as mediators of conflict.

Some might say that focusing on the structural conditions for prosperity in a discussion of campaign finance is anti-democratic or anti-egalitarian, but our Constitution in fact establishes a representative commercial republic, not a social democracy that seeks to level the influence of the wealthy. Olson, with his notion that society should be ruled by its

11. MANCUR OLSON, *POWER AND PROSPERITY: OUTGROWING COMMUNIST AND CAPITALIST DICTATORSHIPS* 15 (2000).

12. *See id.* at 16.

13. *See id.*

encompassing interest, captures the Framers' spirit for our age far more accurately than most academics. Moreover, Madison himself suggested representative government is not an end in itself but a means to protecting the fruits of labor of individuals of very unequal natural endowments from being expropriated.¹⁴ Such protection gives rise to the progress of civilization and ultimately helps the poor. I am not saying that Madison's theory of the purpose of representative government is positive law to be enforced through the First Amendment and other constitutional provisions. It is ironic, however, that those who would restrict political speech often do so in the name of an egalitarian social democracy nowhere contained in the Constitution and utterly at odds with the political theory of those who framed it.

Restrictions on campaign expenditures will also tend to dissipate the virtues of the media, such as they are. Limiting expenditures by individuals while allowing the press to spend freely on political coverage would present perverse incentives that would tend to change the norms of the press. The politically interested would have every incentive to buy and create new media, and in this Internet age of convergence, they would ultimately succeed. In the long run, this development might well completely change the nature of the press, as it would no longer even aspire to a semblance of objectivity but merely become a blunt instrument for propagating its owners' political views. Campaign finance reform would then not have created equality of influence—that is a will-o'-the-wisp—but it will have disturbed a useful product of spontaneous order created by the First Amendment: a press that, even with its biases, is distinct, at least some of the time, from candidates and interest groups.

II. SUPPORT IN THE ORIGINAL UNDERSTANDING FOR *BUCKLEY*

Buckley's principal holding needs bolstering in the original understanding. As it stands, the *Buckley* opinion on expenditure limitations is correct without being majestic and compelling because it ignores the powerful support to be found in the original understanding of the First Amendment and the

14. See THE FEDERALIST NO. 10, at 82-84 (James Madison) (Clinton Rossiter ed., 1961).

history of free speech in the Anglo-American tradition.

Indeed, the great virtue of *Buckley* comes from its understanding, however inchoate, of the first principle of originalism: the First Amendment means what it says. Congress (and after incorporation the states) cannot interfere with speech to advance its idea of the social good.¹⁵ The ordinary reader of English, uninitiated in the hermeneutics of the modern legal academy, may not think this is surprising. After all, the First Amendment begins "Congress shall make no law abridging the freedom of speech or of the press."¹⁶ Nevertheless, the plain meaning of this language remains bitterly contested on the Supreme Court itself. Justice Breyer has recently argued that government restrictions on campaign expenditures can serve First Amendment values by allowing other voices to be heard. According to Breyer, one must weigh the First Amendment benefits of such congressional restrictions against the losses.¹⁷ *Buckley* was on sound originalist grounds when it rejected such an approach by refusing to accept the equality justification for speech restrictions: "[t]he 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"¹⁸

Generalizing this point, we can say that the best part of *Buckley* is its denial that one can evade the prohibition of the First Amendment by claiming that restrictions on speech would improve the overall quality or quantity of political information available. At its core, *Buckley* recognizes that the First Amendment provides a shield against government intervention, not a matrix for government regulation. The First Amendment protects the spontaneous order of patterns of

15. But for the well-settled incorporation doctrine, I would be more sympathetic to restrictions on speech enacted by states as opposed to the federal government. Jurisdictional competition would exert at least some discipline on schemes that abrogated freedom, because at the margin people and capital could move elsewhere, yet states would still be permitted to experiment with different political structures. See Nelson Lund, *Federalism and Civil Liberties*, 45 U. KAN. L. REV. 1045 (1997) (arguing that jurisdictional competition is inherently superior to Supreme Court superintendence as a mechanism for properly balancing individual liberty and social order).

16. U.S. CONST. amend. I.

17. See *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 911-13 (2000) (Breyer, J., concurring).

18. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

information sharing that arise among free individuals against collective decisions to impose some preferred pattern of speech and debate, no matter how these decisions are dressed up in some fancy theory of the collective good.

Buckley is not as explicit as it might be about the reasons, other than the strongly prohibitory nature of the text itself, for its reading of the amendment as an individual right that resists submersion in claims of the collectivity. *Buckley* could have found much support for this view in the original understanding of the First Amendment. Although this point is almost wholly ignored in the scholarship of our modern scribes, the First Amendment was conceived as a property right of all individuals.¹⁹ James Madison, the drafter of the First Amendment, described it in this way when, in defending the Bill of Rights, he said that “man had a property right in his opinions and the free communication of them.”²⁰ Unfortunately, much of the Framers’ understanding was lost in the Progressive Era.²¹ Then as now, social democrats attempted

19. See John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 60-71 (1996).

20. James Madison, *Property*, in 14 PAPERS OF JAMES MADISON 266 (Robert A. Rutland et al. eds., 1983). More fully quoted, Madison stated:

[Property] in its particular application means ‘that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.’

In its larger and juster meaning, it embraces every thing to which a man may attach a value and have right; and which leaves to every one else the like advantage.

In the former sense, a man’s land, or merchandize, or money is called his property.

In the latter sense, a man has a property in his opinions and the free communication of them.

He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.

He has a property very dear to him in the safety and liberty of his person.

He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.

In a word, as a man is said to have a right to his property, he may be equally said to have property, he may be equally said to have a property in his rights

....

Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.

Id. (emphasis added).

21. See MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* 125 (1991) (discussing Progressive Era theories of the First Amendment).

to transform the First Amendment from a right of the individual into a collective right to govern itself.²² It is this latter conception of the First Amendment, rather than its original roots, on which modern advocates of campaign limitations rely. Happily, *Buckley's* holding permitting unlimited personal expenditures of personal funds to stand as a candidate does hint at the underlying individual rights conception of the First Amendment.²³

Similarly, the original understanding helps us to understand why the facile claim that money is not speech²⁴ provides no justification for regulating campaign expenditures. As Madison said, the First Amendment protects "the communication of opinions" as well as the holding of opinions.²⁵ Speech requires conduct and resources in order to be actualized in the material world; and the struggle for freedom of speech in late seventeenth century England, against the background of which the First Amendment was written, in fact concerned government restrictions on access to the indispensable resource at that time for communicating opinions—the printing press.²⁶ The rule that emerged was clear: government could not construct a set of special rules curtailing access to a printing press.²⁷ In essence, a special rule limiting campaign expenditures restricts citizens' rights to rent the printing press and their contemporary equivalents. Campaign expenditure limitations are thus flatly inconsistent with the historic core of the First Amendment's protections.

Buckley could also have added important structural arguments to such an exposition of the original meaning of the First Amendment. For important reasons, the Constitution more strictly limits congressional regulation of the property in our opinions than of material property rights.²⁸ For instance, the original meaning of the Takings Clause may provide a relatively narrow prohibition on regulations that take almost

22. See McGinnis, *supra* note 19, at 50-51.

23. See *Buckley*, 424 U.S. at 51-54.

24. See, e.g., *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 910 (2000) (Stevens, J., concurring).

25. See Madison, *supra* note 20, at 266.

26. See William T. Mayton, *The Illegitimacy of the Public Interest Standard at the FCC*, 38 EMORY L.J. 715, 725 (1989).

27. See *id.* at 720-22.

28. See McGinnis, *supra* note 19, at 78.

full value of property while failing to provide a substantial restraint on regulation or taxes.²⁹ The right of free speech, by contrast, does not allow regulation except in the most compelling circumstances. This distinction makes sense within the democratic political structure the Constitution establishes: because speech most threatens legislators and entrenched majorities by creating new possibilities of governing coalitions, it must receive an almost absolute protection against government interference.

The overall structure of the Republic established by the Constitution reinforces this understanding of the First Amendment. *Federalist No. 10*, for instance, envisions the large national republic as protecting against majority entrenchment, because such a republic would contain so many factions that they would replace one another with regularity.³⁰ The First Amendment renders this mechanism more effective by permitting each individual to connect with others and so gain the potential to become part of multiple factions. By making ruling coalitions very fluid through these multiple connections, the free transmission of information deprives everyone of the certainty of holding power. This purpose would obviously be undermined if these same coalitions could nevertheless pass laws to encourage patterns of speech that would be more likely to support their coalitions.

The pluralistic roots of the First Amendment should make us suspicious that any attempt to restrict expenditures for political speech is actually an attempt to entrench a legislative or popular majority. Those who would restrict campaign expenditures, whether they seek to create greater equality, to make people feel better about the political process, or to achieve some other objective not contained in the Constitution, reject the First Amendment's preference for speech arising from the spontaneous order of unfettered individuals over speech patterned to fit a model of a particular vision of social well-being.

29. Cf. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 783 (1995).

30. THE FEDERALIST NO. 10, at 83-84 (James Madison) (Clinton Rossiter ed., 1961).

III. SUPPORT IN DOCTRINE FOR *BUCKLEY*

I will have the least to say about First Amendment case law and doctrine supporting *Buckley* both because the opinion canvasses these points and because subsequent commentators have addressed them at length. In response to the argument that campaign finance limits restrict conduct—i.e., the expenditure of money—rather than speech per se and thus should be subject to more lenient review, the *Buckley* Court made two points to defend its application of strict scrutiny. First, it distinguished cases such as *United States v. O'Brien*,³¹ which apply a lower scrutiny to expressive conduct, as inapposite to campaign finance limitations.³² *Buckley* implied that political expenditures are inextricably intertwined with the speech they support.³³

Commentators have complained that this distinction between expenditures and other expressive conduct is incoherent.³⁴ After all, O'Brien's burning of his draft card was an inseparable part of his expression, too. Such criticisms of *Buckley's* first argument have some force. But regulating the expenditure of resources is unlike regulating many other kinds of conduct in that almost no speech is possible without some expenditures of money—be it simply money for paper or a sign. By contrast, O'Brien had many other alternatives by which he could have expressed his opposition to the war in Vietnam. Given the lack of alternatives to using some expenditures for speech, regulating expenditures seems perilously close to regulating speech itself. Indeed, the pervasive need for money to support political speech is one reason that the limitation on campaign expenditures appears the most comprehensive use of state power to silence political discussion since the Alien and Sedition Act.³⁵

Second, the *Buckley* Court held that the conduct in *O'Brien*

31. 391 U.S. 367 (1968) (upholding, against a First Amendment challenge, defendant's conviction under a law punishing the destruction or mutilation of draft cards).

32. See *Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

33. See *id.* at 16-17.

34. See Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1059 (1985).

35. See Daniel B. Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 6.

was in any event distinguishable.³⁶ In *O'Brien*, the government had reasons for prohibiting burning draft cards, such as the need to have draft cards for administering the selective service system that were unrelated to the interest in suppressing speech. By contrast, the interest in regulating campaign expenditures at issue in *Buckley* "arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful."³⁷

Here *Buckley* employs the consensus analysis of First Amendment scholars on how to treat government regulations of conduct related to speech. John Hart Ely has offered an excellent test to assess whether the state can regulate action in the material world that is related to speech: deference to regulation of conduct related to speech, according to Ely, is warranted only if the harm that the state is seeking to avert through such regulation is one that would arise even if the defendant's conduct had no communicative value.³⁸ Otherwise the government would be authorized to diminish the effectiveness of the kinds of communication it disfavors by adopting regulations focused on the resources and conduct needed to actualize particular forms of speech. Another way of saying this is that free speech principles can be protected only by applying the First Amendment strictly to any regulations targeted at the communication.

Once one accepts this doctrinal approach, *Buckley* is clearly correct in applying strict scrutiny to restrictions on campaign expenditures. Advocates of campaign finance limitations complain the excess expenditures either harm equality or create the appearance of undue influence. Both of these problems flow directly from the communicative value of campaign expenditures.³⁹

Thus, neutral principles, considerations of political economy, the original understanding, and current First Amendment doctrine all suggest that restrictions on campaign expenditures

36. See *Buckley*, 424 U.S. at 17-18.

37. *Id.* at 17 (quoting *United States v. O'Brien*, 391 U.S. 367, 382 (1968)).

38. See John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1497 (1975). The money expended on campaigning is obviously directly related to speech.

39. Professor BeVier was the first to make this point. See BeVier, *supra* note 34, at 1059.

are unconstitutional. It is not often in constitutional law that all sources of constitutional meaning point in single direction, but *Buckley's* holding is vindicated by all four.

IV. A RESPONSE TO MY CRITICS

I now turn briefly to critics of my position. In his interesting and provocative paper, Professor Michelman suggests that it is inappropriate to apply strict scrutiny to government regulation of campaign finance expenditures because the legislature's failure to regulate expenditures is likely to be motivated by the same interest in entrenching themselves in power as the campaign finance regulations themselves.⁴⁰ Thus, Professor Michelman suggests the First Amendment in this context should not privilege government inaction over government action by subjecting the latter to very intrusive judicial review. Professor Michelman is absolutely correct that inaction by the government can be a consequence of self-interest just as action can. Nevertheless, in my view and, more importantly, in the view of the Constitution, he is wrong to equate inaction with action as a premise for relaxing scrutiny of regulations that restrict speech.

The entire Constitution is based on the notion that more obstacles should be put in the way of government action than of government inaction. At the federal level, we require legislation to obtain bicameral support and presidential approval, the consequence of which is to impose a mild supermajority requirement for the consensus needed for governmental action.⁴¹ Similarly, the Bill of Rights is premised on the idea that citizens need particular protection against government action rather than government inaction. For instance, the First Amendment applies strict scrutiny to the regulation of sexually explicit materials, although no doubt government inaction in the area—i.e., the refusal to regulate such material—may be influenced by powerful interest groups like Hollywood producers.

The reason for the Constitution's fundamental difference in the treatment of government action and inaction is

40. See Frank I. Michelman, *The Constitutional Question*, 24 HARV. J.L. & PUB. POL'Y 17 (2000).

41. See DENNIS MUELLER, CONSTITUTIONAL DEMOCRACY 85 (1996).

straightforward. The Framers believed that bad action by the government in domestic affairs carried more risks than bad inaction. This view is intuitively right. Bad government action can have very large deterrent effects on good activities, because the government can put people in jail or fine them. By contrast, inaction by the government still permits individuals to coordinate in other ways to pursue the action that the government would have otherwise mandated.

This distinction is as central to campaign finance issues as it is to other areas of constitutional law. Because of their ability to restrict speech through the threat of jail and fines, legislators can far more effectively entrench themselves through government action than government inaction. By contrast, the spontaneous order created by protecting free speech allows for private coordination to counteract private undue influence on legislators—the kind of influence that occurs without government action to regulate campaign expenditures. Most obviously, the press can publicize such influence and editorialize against it. Candidates can use their own expenditures to denounce legislators beholden to special interests.

Moreover, it would be impossible to apply the same level of scrutiny to government inaction as government action. There are an infinite number of laws that have not been passed. Congress may have failed to pass all sorts of laws because they would be displeasing to special interests, but it is fanciful to scrutinize that which cannot be characterized. Professor Michelman's analogy of government inaction to action is thus deeply flawed both as matter of general constitutional theory and as applied to the campaign finance debate in particular.

In his remarks, Professor Issacharoff also implicitly criticized my presentation by suggesting that campaign finance matters were one area where the possibility of spontaneous order was irrelevant, because government by necessity had to establish official rules for elections.⁴² I wholly disagree. It is true that the mechanics of the election, like the rules for determining the winner and voter eligibility, must be chosen by the government as a matter of regulation. But electoral competition depends on

42. See Samuel Issacharoff, *Oversight of Regulated Political Markets*, 24 HARV. J.L. & PUB. POL'Y 91 (2000).

more than the rules for determining victory. A democratic process also requires information inputs from the press, the candidates, and the public. Therefore, the government has a choice whether to regulate the manner in which these information inputs are produced. The civic order can shape our electoral system or the electoral system can shape our civic order. Here the virtues of spontaneous order weigh as heavily against regulation as they do in other areas of political economy. Free political speech makes the bare mechanics of the electoral system float in a sea of spontaneous civic order.

Consider an analogy to contract law. The government may establish the simple rules of contract, but that does not negate the possibility of spontaneous order in the commercial world. As many contractual theorists have demonstrated, the legal ordering of contract sits within an often more powerful structure of social relations that facilitate the enforcement of contract.⁴³ Spontaneous order is no less important in our civic order than in our commercial order.

V. DOUBTS ABOUT *BUCKLEY'S* CONTRIBUTIONS LIMITS

I turn briefly to *Buckley's* holding on contribution limitations. Here the Court first held that contributions were speech by proxy and thus restrictions on speech were not subject to strict scrutiny. It did not, however, make clear what kind of scrutiny to which they were subject. I have some doubts about this aspect of the analysis, even if the holding can itself be justified. Contributions by individuals are clearly symbolic speech and, contrary to the Court's opinion, the amount contributed is part of the message of support.⁴⁴ Second, because of its failure to see the First Amendment clearly as a right of the individual (as Madison saw it), the *Buckley* Court discounted the First Amendment rights of each individual candidate to receive contributions. The *Buckley* Court suggested instead that even if a contribution limit hurt some particular candidate (as it necessarily does), the limitation nevertheless passed First Amendment scrutiny because "robust and effective discussion"

43. See Benjamin N. Klein & Keith Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981) (examining the value of repeat sales to consumers as a means of enforcing private contracts).

44. See Smith, *supra* note 8, at 49-50.

about candidates and issues would still be possible.⁴⁵

But the right to contribute involves the rights of individual candidates as well. A hypothetical involving the media once again makes the point clearly. Suppose a statute put a ceiling on the amount that one could contribute to a non-profit magazine. Like the contribution limit in *Buckley*, this limitation might still permit forums sufficient to assure "robust and effective discussion." Nevertheless, like expenditure limitations on the press, this contribution limit would be subject to strict scrutiny, because the limitation would not be unrelated to the communicative ability of particular non-profit magazines. Given neutral principles, strict scrutiny should also apply to campaign contribution limits.

Moreover, the incidence of these contribution limits raise serious questions about the neutrality of the rule. Celebrities are not precluded from endorsing candidates even if their endorsements are worth far more than \$1,000. Nor are interest groups restricted in their endorsements. Editorial pages can also endorse, although in the case of the *New York Times* this endorsement is worth a very large amount of money. Once again the contribution limits seem to penalize those involved in material production.

Functional considerations also suggest that contributions and expenditures should be subject to the same level of scrutiny because expenditures and contributions are both simply steps to obtaining resources to speak.⁴⁶ Both are equally valuable, and the government should be subject to strict scrutiny in either case.

Now it is true that those who advocate restricting contributions defend these limitations with an interest that could in some cases be compelling—combatting the appearance of corruption, for instance. If the appearance of corruption actually could be shown to be connected to some compelling social ill, like the decline in willingness of citizens to rally to the defense of the country, combating the appearance of corruption would be a serious interest that might justify

45. See *Buckley v. Valeo*, 424 U.S. 1, 28-29 (1976) (suggesting that "robust and effective discussion" of candidates and issues can take place even with contribution limitations).

46. See *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 638-639 (1996) (Thomas, J., dissenting).

infringements on First Amendment rights. But the appearance of corruption is used more as tag line than as avenue of serious empirical inquiry into the real dangers the appearance of corruption causes.

Moreover, people have been complaining about corruption in politics since the beginning of the republic. No one has shown that contribution limits have made individuals think politics less corrupt. The reverse may be true. The restraint on individual giving may exacerbate people's perception that large organized entities—classic special interests—wield even more power than ever before. Those who would take away our speech rights should at least proffer evidence to show that corrupt appearances present a serious danger that their reforms will avert.⁴⁷

Finally, even if one were more certain about the salience of corrupt appearances, alternatives less restrictive to speech are available to address such problems, particularly in an age where one can have instant disclosure. Such disclosure forces candidates who appear corrupt to pay an immediate electoral price for any corrupt appearance. If they were not harmed electorally by these disclosures, that would cast doubt on the claim that the public was as concerned with these appearances as those who would restrict campaign contributions profess to be.

Thus, at least on the evidence available, the case for the very severe contribution limits on individuals upheld in *Buckley* is far from overwhelming. I cannot resist noting one advantage for politics (and aesthetics as well!) that would immediately accrue if such limitations were removed. We would be able to receive the interesting messages that wealthy people can fund without having to put up with the less than personally compelling characteristics of individual billionaires. Without these limitations, Steve Forbes said he would have contributed his money to Jack Kemp⁴⁸ and we would then have enjoyed a friendly, experienced politician touting the virtues of the flat

47. Of course, it is not enough to show that our politics results in policies the reformers do not like. Far from justifying campaign finance limitations, disagreement with our social policies suggests that the real interest campaign finance reformers have is in suppressing the speech of their opponents.

48. See *Campaign Contribution Limits: Hearing Before the Senate Comm. on Rules and Admin.*, 106th Cong. 67 (1999) (statement of John R. Lott).

tax rather than a stiff and distant blue-blood who never held office. If Ross Perot had contributed his money to, well, almost anyone else holding his views, we would have had a more balanced messenger for the balanced budget and averted the risk of handing the republic to someone just this side of sanity.

VI. CONCLUSION

Being in the discourse business, modern scribes, like their ancient counterparts, are naturally attracted to the notion that political problems can be solved by shaping political discourse. But, as with other social problems, like violence on television or hate speech, the First Amendment tells us that shutting people up cannot be our first line of defense, particularly when other constitutional alternatives are available. If poor people should have more money for political contributions, tax credits are available. If special interest influence on government creates problems for modern democracy (and I believe that it does), we can create various structural reforms, like legislative supermajority rules, that will make it harder for special interests to triumph over the diffuse citizenry in the legislature.⁴⁹ Unlike limitations on expenditures and contributions, these reforms trample on no one's speech rights. Therefore, our free speech traditions demand that these reforms should be tried before campaign finance limitations are entertained.

I have also tried to show that restricting speech not only takes away essential rights but entrenches the already substantial influence of the scribes—a group that does not fully represent the diverse interests or views of our nation. Campaign expenditure limitations would skew civic discourse by largely screening out information inputs not congenial to their class interests and ideals. By contrast, the First Amendment allows a diverse citizenry to spend as much of their resources as they want to inform their fellow citizens of their ideals and their interests and to promote the candidates who would most effectively pursue them. In the long run, unfettered political free speech assures the kind of vigorous and creative debate that improves government policy and

49. See McGinnis & Rappaport, *supra* note 10, at 434–48 (setting out solution in some detail).

sustains economic growth. ·

DEBATE:

**THE *SHRINK MISSOURI GOVERNMENT PAC* CASE
AND THE FIRST AMENDMENT**

PARTICIPANTS:

EUGENE VOLOKH
E. JOSHUA ROSENKRANZ

