THE DANGERS, AND PROMISE, OF *SHRINK MISSOURI*

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Whenever someone makes the kind of biographical introduction Judge Kozinski just offered, a member of the audience inevitably bounds up afterwards and asks, "So, you clerked for both Scalia *and* Brennan? Which one made the mistake?" I always find myself replying, self-consciously, "They both did." Mistake or not, the truth is that then-Judge Scalia pretty much knew what he was getting when he hired me. He made it a point of telling me that I was his token liberal. Why would he hire a liberal? To his credit, I'm sure it was largely because he wanted to be sure he always heard the arguments against the positions he was taking. On top of that, Justice Scalia has always enjoyed a good debate. Plus, I always suspected he got a kick out of watching my fellow clerks tear me to shreds.

The truth is it was a great deal of fun for me, too. When Justice Scalia said "black," I said "white." When he said "good," I said "bad." When he said "right," I said "left." But for most of my clerkship, I wondered whether my contrariness was adding any real value to the Chambers.

It was only toward the end of my clerkship that I discovered the answer was "yes." By then Judge Scalia had become Justice Scalia, but I continued working for him at the D.C. Circuit, helping him complete some of the cases that were still pending when he was elevated. Justice Scalia was eager to clean his plate once and for all, but there was one case that proved to be problematic. Although he had circulated the majority opinion a while earlier, one of his more liberal colleagues continued to agonize over whether to join it or dissent. Eventually Justice

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Scalia lost patience waiting. He returned to his old stomping grounds and paid the dallying judge a visit to apply his formidable powers of persuasion. After a bit of unsuccessful advocacy, Justice Scalia threw up his arms in exasperation and exclaimed, "For God's sake, even my rad-lib-Comm-symp law clerk thinks I am right, so I must be right!"

I kept thinking of this story throughout Eugene Volokh's eloquent presentation. I am familiar with Professor Volokh's large and impressive body of work, though I disagree with most of it. So when I was invited to debate Professor Volokh about the Constitution and campaign finance reform, I was prepared for the worst. I was expecting to have to rebut the kinds of arguments that I hear from so many other Federalist Society aficionados. Arguments like the ostrich-headed position that contributions, even very high ones, don't actually corrupt politicians. Or that every dollar spent putting money into the pocket of a politician is as protected as the spoken word itself. Or that, because of these two propositions, limits on contributions are unconstitutional. (By the way, that is what *Nixon v. Shrink Missouri Government PAC*[1] was about. It was not, as Professor Volokh's introductory comments seem to suggest, about limits on the amounts an individual can spend on campaign-related speech.)

In short, I came here loaded for bear. Imagine my pleasure when I realized that I actually agree with most of what Professor Volokh has said. He agrees with me that contributions can corrupt. He agrees that it is permissible to limit contributions. He does not even take issue—at least not explicitly—with my position that it should be permissible to limit the amounts that candidates spend on their campaigns.

So the next time I face an argument against any of these principles, all I have to do is say, "For God's sake, Eugene Volokh, the poster child of the Federalist Society, agrees with me, so I must be right!"

The major point of disagreement between Professor Volokh and myself revolves around identifying the most dangerous element of the opinions that came out of the *Shrink Missouri* case. For Professor Volokh, the prize goes to an aspect of Justice Breyer's majority opinion. I disagree. I do not find Justice

1. 120 S. Ct. 897 (2000).

Breyer's analysis particularly troubling—a point I will return to later—but, more importantly, there are far more dangerous elements in the case. For me, the single most dangerous opinion is the dissent issued by Justice Thomas, and joined by Justice Scalia, with second place going to Justice Kennedy's opinion, which seems tentatively to lean their way.

In his dissent, Justice Thomas takes a policy argument—one that until recently was considered somewhat farfetched—and raises it to the level of constitutional command. At the heart of Justice Thomas's dissent is the notion that we should lift all limits on the flow of money into politics.[2] Both contributions and spending should be entirely unregulated, he believes. This means anyone—corporations and unions, non-people and people—can contribute unlimited amounts of money directly into the pockets of candidates. And, as Justice Thomas sees it, this latitude is not just a policy preference, but a matter of constitutional right.

Professor Volokh and I agree that that is incorrect, and the Supreme Court overwhelmingly agreed. But it is important to explain *why* it is incorrect. What could be wrong with a world with no limits? In short, everything. Almost every criticism one might muster about the current campaign finance system—that it locks candidates in a money chase, that it stifles competition, and that it corrupts candidates—will only worsen in a world with no contribution limits.

Start with the money chase—the treadmill of fundraising that candidates feel compelled to get on once they decide to run for office. Removing all limits on contributions will not cure the money chase; it will make it worse. The 2000 election cycle shattered all previous spending records, because campaign fundraising is stuck in an arms-race mentality. Raising the contribution limit or lifting it entirely will only add zeroes to the totals.

Second, consider competition. Proponents of the Thomas perspective seem to think that lifting all limits will increase competition. The theory goes that if only we allowed

2. *See, e.g., id.* at 922 (Thomas, J., dissenting) ("In my view, the Constitution leaves it entirely up to citizens and candidates to determine who shall speak, the means they will use, and the amount of speech sufficient to inform and persuade. *Buckley*'s ratification of the government's attempt to wrest this fundamental right from citizens was error.").

contributors to make massive contributions, challengers could unseat incumbents just by raising a few million from a handful of angels. That is a nice fantasy, which would work fine if only challengers were permitted to raise million-dollar contributions. But let's not fool ourselves. Incumbents will be far more adept at raising million-dollar contributions than challengers. After all, incumbents are the ones who can offer special interests something in return. So competition will not increase. My sense is that competition would actually decline, because the minimum price of admission—the minimum level that any candidate would have to raise in order to be viable—will increase.

Finally, consider corruption. Candidates are already beholden to the moneyed interests who pay for their campaigns. If we let politicians raise any amount from any contributor, candidates will be wholly owned by their contributors. We might as well let donors slap STP Oil stickers on their candidates.

So allowing unlimited contributions would exacerbate all the worst problems with our current campaign finance system. But then it would create new problems, problems that would introduce a touch of irony. Justice Kennedy's dissent hints at the irony. He echoes the common objection to my position: why don't you trust the voters? Why not just give them all the information and let them make their own wise decisions? Isn't that what the First Amendment is about?[3]

So now, having made a complete mess of our campaign financing system, the idea is to leave it to the voters to clean it up. Remember, under Thomas's logic, the world of no limits is a matter of constitutional command. The prohibition on contribution limits would apply not just to presidential races or Senate races, which are high profile, but also to races for Congress, governor, state supreme court, state legislature, and dog catcher—in other words, all races, state, local and federal. How exactly is your average voter to go about gathering the requisite information in all of those races? Certainly not from the press, which often does not even report on the candidates themselves, much less the names of their contributors.

Justice Kennedy supplies a hypothesis: Just rely on the

3. *See id.* at 915-16 (Kennedy, J., dissenting).

miracles of modern cyberspace. He evidently imagines a website that everyone logs onto and figures out just how dirty their candidates are.[4] But even that will not work. First of all, most of us don't have the time to do that at every level of election. More to the point, even for those voters with the time and energy to expend tracking down their candidates' money trails, this information is virtually worthless. Imagine one particular Jane Q. Voter who happens to have nothing better to do than look up campaign contributions. She logs on. She sees Candidate Jones. She scrolls down the list of contributors. She doesn't recognize most of them by name and doesn't recognize the companies they work for. Finally, she notices a contribution she doesn't like. "Eureka!" she exclaims, "I won't vote for Candidate Jones." So this wonderful world of disclosure worked, right? Not so fast. She now looks up Candidate Smith, the challenger. And she learns that the same vilified contributor made an even bigger contribution to Smith—or maybe the contributor's CFO or his company gave. So now what does she do? She literally and figuratively logs off.

This is the fundamental problem with the dissenting opinions. Voters are not interested in looking up in some huge data base just how corruptible their candidates are; they would prefer to rely on rules that guarantee the integrity of all candidates.

In my mind, the nightmare scenario of unlimited contributions is far more worrisome than the esoteric issue Professor Volokh has extracted from Justice Breyer's opinion: his supposed flirtation with the "constitutional tension method."[5]

As a threshold matter, I am not entirely sure that Justice Breyer is guilty of adopting the sort of analysis that so troubles Professor Volokh. Justice Breyer does say this is a complex area. And it is. He also observes that there are First Amendment interests on both sides.[6] And there are. But I just do not think, as Professor Volokh does, that these observations are tantamount to a wholesale abandonment of classic First

4. *See id.* at 915 (Kennedy, J., dissenting).

5. *See* Eugene Volokh, *Freedom of Speech and Speech About Political Candidates: The Unintended Consequences of Three Proposals*, 24 HARV. J.L. & PUB. POL'Y 47 (2000).

6. *See Shrink Mo.*, 120 S. Ct. at 911 (Breyer, J., concurring).

Amendment doctrine. Professor Volokh seems to envision some standard off-the-rack First Amendment analysis, all departures from which are dangerous exceptions.[7] I don't share that sense. The Supreme Court changes First Amendment doctrine from one area to the next depending upon context. Professor Volokh's model is a model that we apply to the speaker on the street corner. But the Supreme Court has developed entirely different rules in different contexts—different rules for cable TV, for broadcast TV, and for commercial speech, to name a few.

Viewed this way, it is not at all strange, or worrisome, to develop a different set of First Amendment rules in the specific context of regulations governing the flow of money into politics. Spending money to express an idea is not equivalent to the expression of the idea itself; money is simply a means of amplifying the message. It is perfectly natural to envision a First Amendment that treats the regulation of money differently from the direct regulation of ideas, as in fact the Supreme Court has continuously done.

For related reasons, I am not entirely sure that the constitutional tension method is quite as dangerous in this context as Professor Volokh suggests it is. Professor Volokh's parade of horribles from prior applications of the constitutional tension method[8] all came from cases in which government declared a particular idea to be dangerous—and therefore out of bounds. That is not the case in campaign finance. A cap on spending is not an attempt to suppress any particular viewpoint, much less to suppress any particular candidate. It is at most an effort to diminish the volume, in a manner of speaking. It is a way of ensuring that no one voice can crowd out all the others. There is a big difference between a government decree that it will not tolerate the expression of a particular idea and a government measure that encourages the fair competition of all ideas.

This is the critical distinction that *Buckley v. Valeo*[9] missed. So let me turn now, as Professor Volokh did, to *Buckley* itself. In my view, *Buckley* made three mistakes.

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7. *See* Volokh, *supra* note 5, at 51-52.
8. *See id.* at 53-54.
9. 424 U.S. 1 (1976).

Buckley's first mistake was in its assessment of the relationship between money and speech. I agree with Professor Volokh that we ought to abandon the rhetorical device of asking whether "money equals speech."[10] It's a red herring. The *Buckley* Court never said that money equals speech. It said that money is the fuel for speech.[11] Without money, after all, you can't even buy a ream of paper on which to print leaflets. Consequently, any effort to regulate the flow of money into politics necessarily calls the First Amendment into play. That, by the way, is not the same as saying that the free-speech interest always prevails, but only that it must be considered and weighed against other interests that the state might offer for infringing on speech. That much was unexceptionable.

Buckley's flaw, though, was in leaping from that observation to the conclusion that every dollar spent or contributed is as protected as the spoken word itself. The Supreme Court was right to draw that conclusion—up to a point. It was right about the first dollar or the first $100. It may even have been right about the first $10,000 or the first $100,000. But at some point the Supreme Court was wrong, maybe at the millionth or the hundred millionth dollar. At some point, the spending of money becomes an exercise in raw power—the power to shut others out of the marketplace of ideas entirely. At that point, the government's interest in regulating the flow of money becomes stronger.

Buckley's second critical mistake was to dismiss the interest in promoting equality as a permissible reason for regulating the flow of money into politics, particularly as a justification for imposing spending limits.[12] Equality is actually the wrong word, and the Supreme Court probably went wrong precisely because it used the wrong word. "Equality" envisions a utopian world in which all voices are equal, all candidates are equal, and all inputs into the political process are equal. Instead, the Supreme Court should have had in mind a world in which one side cannot so dominate the debate as to muscle out the other side. What is at stake is whether a government can impose reasonable rules of engagement in connection with

10. *See* Volokh, *supra* note 5, at 57.
11. *See Buckley*, 424 U.S. at 19.
12. *See id.* at 54.

elections.

Keep in mind that *Buckley* rejected three types of spending caps—caps on how much of other people's money a candidate could raise and spend,[13] caps on what a candidate could spend of his or her own independent wealth,[14] and (the only one that Professor Volokh mentioned[15]) caps on independent expenditures.[16] When it comes to the caps on what a candidate can spend, all we are talking about are reasonable rules of engagement—the kinds of limits that are already customary in many other arenas. In every arena in which adversaries compete to sway an audience, we have reasonable rules of engagement—Robert's Rules of Order. From the Congress to the Supreme Court of the United States, we have rules to prohibit one party from so dominating the debate that the other party can't play. These rules do not necessarily equalize, but they do prohibit the kind of lopsided dominance that often occurs in our elections. It seems to me that the same First Amendment that tolerates Robert's Rules of Order in government would tolerate at the very least a high limit on what candidates can raise and spend.

As an aside, a brief comment is warranted on the one brand of spending limit that Professor Volokh did talk about quite a bit—a limit on the spending by independent individuals to promote or attack candidates. I agree that *Buckley* was right to reject a $1,000 expenditure cap.[17] But to the extent that *Buckley* has been taken to stand for the proposition that spending limits are categorically impermissible, I believe it may have been wrong. Again, I can imagine a point at which the spending of vast sums of money by a particular political player could be an exercise in the same kind of raw power I have already mentioned. I would agree, however, that this is the hardest of the three types of restrictions to uphold. In my view, it is also the least important.

Finally, there is the contribution-expenditure distinction,[18] which I believe is the Achilles' heel of *Buckley*. It is a distinction

13. *See id.* at 29.
14. *See id.* at 54.
15. *See* Volokh, *supra* note 5, at 60.
16. *See Buckley*, 424 U.S. at 19.
17. *See id.* at 19-20.
18. *See id.* at 22, 28.

that has now been rejected by six members of the Supreme Court: three on one side, two on another, and Justice Kennedy, who is not sure how he is going to come out. *Buckley* is a rotting tree just waiting to fall; the only question is which way. Will it fall on top of me? Or will it fall on top of Professor Volokh?

The majority in *Buckley* believed that contributions are less worthy of protection than spending and that there were more powerful reasons, in the name of corruption, for limiting contributions than for limiting spending.[19] The Supreme Court was wrong on both counts.

As to the value of the two activities, a contribution is just as imbued with speech value as is spending. Both are financial transactions that fuel speech or that make statements in and of themselves. On the corruption side, the Supreme Court was under the misimpression that the only way to corrupt a candidate was by an interested donor putting money directly in his pocket. But there is a strong sense in which unlimited fundraising by a candidate is also corrupting. As the candidate moves beyond his circle of close supporters, the candidate, at some point, has to start compromising for each additional contribution. The arms-race mentality necessarily drives candidates into the arms of donors who are not their ideological supporters, but who want something in return. I don't believe that the First Amendment condemns us to such a state of affairs.

That brings me back to the question with which we started: what does the First Amendment mean in the context of elections? At the risk of being accused of being a "Constitutional Tension Methodist" (or whatever the appropriate moniker may be), whenever I think of that question I cannot help but resort to another provision of the Constitution. The first words, actually: "We the People."[20] "We the People" adopted the Constitution as a charter of our self-governance. Not, "We the business corporations, unions, business enterprises, and People." Not, "We, the wealthiest who get to buy ourselves access to the those who are supposed to represent the rest of the People." But "We the People." We ought to keep that in mind when we talk about what

19. *See id.*
20. U.S. CONST. pmbl.

regulations we, the people, are allowed to adopt in order to ensure the integrity of the single most important mechanism of our self-government—our elections.

PANEL II:

THE ROLE OF GOVERNMENT REGULATION IN THE POLITICAL PROCESS

PANELISTS:

JAN WITOLD BARAN
SAMUEL ISSACHAROFF