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## Politics and the Constitution: Is Money Speech?\*

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Lawyers are often surprised to learn that Alexander Meiklejohn, whose name is so often invoked in epic battles over the meaning of the First Amendment, was not a lawyer. He was a philosopher and educator of the first rank. Perhaps this background positioned him to discern, as he did with unique clarity, the central meaning of freedom of speech under our Constitution. In all events it made him especially sensitive to the Supreme Court's role as teacher to the nation. "[T]he court," he wrote,

holds a unique place in the cultivating of our national intelligence. Other institutions may be more direct in their teaching influence. But no other institution is more deeply decisive in its effect upon our understanding of ourselves and our government.<sup>1</sup>

In this spirit I wish to examine this Term's most important First Amendment decision, *Buckley v. Valeo*.<sup>2</sup> For I am concerned lest the Court's teaching in that case distort our understanding of ourselves and our government.

### I. *Buckley v. Valeo*: Campaign Financing and the First Amendment

Under review in the *Buckley* case was the complex law passed in 1974 to reform the way we finance our federal election campaigns.<sup>3</sup> I

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1. A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 32 (1960).

2. 424 U.S. 1 (1976).

3. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, [1974] U.S. CODE CONG. & AD. NEWS 1436 (amending Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3) [hereinafter cited without cross-reference as 1974 Act].

focus here on only one part of that reform—the limits placed on campaign contributions and campaign expenditures.<sup>4</sup> Congress imposed rather strict ceilings on contributions to candidates for federal office in order to prevent large contributors from, in effect, buying favorable governmental decisions. Individuals cannot give more than \$1,000 to a candidate per election,<sup>5</sup> nor can they give more than \$25,000 overall.<sup>6</sup>

Congress also imposed restrictions on campaign expenditures. It limited to \$1,000 the independent expenditures an individual or organization could make in support of a “clearly identified” candidate.<sup>7</sup> The term “independent expenditures” means expenditures undertaken without the cooperation or control of the candidate.<sup>8</sup> It was Congress’s judgment that large independent outlays might circumvent the contribution limitations and themselves result in a form of political bribery.<sup>9</sup> Congress also placed certain higher limits on how deeply a candidate could dig into his own pocket to finance his campaign.<sup>10</sup>

Sections 101-302 of the 1974 Act dealt with private financing of federal election campaigns. Sections 403-408 made changes in the scheme of public financing of presidential elections. Further amendments were made in 1976. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, [1976] U.S. CODE CONG. & AD. NEWS (90 Stat. 475) [hereinafter cited without cross-reference as 1976 Act].

4. There were three other major portions of the 1974 law. One portion set new requirements for recordkeeping and disclosure on the part of candidates, their committees, and those individuals who make independent expenditures advocating the election or defeat of identified candidates. 2 U.S.C. §§ 431-437b (Supp. IV 1974) (modified 1976). Another provided for the public financing of both presidential primary and general elections and of party nominating conventions. I.R.C. §§ 9001-9042 (amended 1976). A third part established a Federal Elections Commission to oversee the administration of the law. 2 U.S.C. §§ 437c-438 (Supp. IV 1974) (modified 1976).

The Supreme Court upheld the disclosure requirements and the public financing provisions, but it ruled that the appointment of some of the members of the Commission by congressional leaders violated the separation-of-powers principle of U.S. CONST. art. II, § 2, cl. 2, which authorizes the President to appoint “Officers of the United States.” 424 U.S. at 84, 108, 140. This defect was remedied by the 1976 Act § 101(a)(1), 2 U.S.C.A. § 437c(a)(1) (Sept. 1976 Pamphlet).

5. 18 U.S.C. § 608(b)(1) (Supp. IV 1974) (modified 1976; to be recodified at 2 U.S.C. § 441a).

6. 18 U.S.C. § 608(b)(3) (Supp. IV 1974) (modified 1976; to be recodified at 2 U.S.C. § 441a). Contributions by political committees were also restricted under the 1974 law. 18 U.S.C. § 608(b)(2) (Supp. IV 1974) (modified 1976; to be recodified at 2 U.S.C. § 441a) (limiting political committees, as defined therein and in 18 U.S.C. § 591(d) (Supp. IV 1974), to a contribution ceiling of \$5,000 per candidate per election).

7. 18 U.S.C. § 608(e) (Supp. IV 1974) (repealed 1976).

8. Expenditures “authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate,” *id.* § 608(c)(2)(B)(ii) (modified 1976; to be recodified at 2 U.S.C. § 441a), were regarded as expenditures by the candidate, 18 U.S.C. § 608(c)(2)(A), (B)(ii) (Supp. IV 1974) (modified 1976; to be recodified at 2 U.S.C. § 441a), and as contributions by the individual or group that made the actual expenditure. 424 U.S. at 46-47 & n.53.

9. See S. REP. NO. 93-689, 93d Cong., 2d Sess. 18-19, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5587, 5604-05.

10. In campaigns during a calendar year, a candidate for federal office could not make use of his personal funds or those of his immediate family in excess of the follow-

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And finally, Congress enacted overall ceilings on the total amount a candidate and his committees could spend in advancing his candidacy.<sup>11</sup>

Congress passed these provisions in response to political abuses which culminated in the 1972 presidential campaign and its aftermath, commonly called Watergate.<sup>12</sup> Congress found that these excesses were fueled by money collected for political purposes.<sup>13</sup> There can be no question that under the Constitution Congress properly assumed responsibility for combating federal election abuses. Repeatedly the courts have recognized that Congress maintains a strong, vital interest in protecting the political process from distortion and corruption.<sup>14</sup>

Congress, of course, knew there were difficult First Amendment questions involved in limiting campaign contributions and expendi-

ing limits: \$50,000 for presidential and vice presidential candidates; \$35,000 for senatorial candidates; and \$25,000 for candidates for United States Representative. 18 U.S.C. § 608(a) (Supp. IV 1974) (repealed 1976). If the individual were a candidate for United States Representative from a state that is only entitled to one Representative, the relevant limit was \$35,000. *Id.* § 608(a)(1)(B) (repealed 1976).

11. The expenditure limits were \$10 million for a candidate for the presidential nomination of a political party and \$20 million for a candidate for election to the office of President. *Id.* § 608(c)(1) (repealed 1976). Expenditures on behalf of a candidate nominated by a political party for the office of Vice President of the United States were counted toward the \$20 million limit for the presidential candidate. *Id.* § 608(c)(2)(A) (repealed 1976). The total expenditure limits for candidates to other federal offices generally varied with the size of the voting age population of the relevant jurisdiction. *Id.* § 608(c)(1)(C)-(F) (repealed 1976). Expenditure limits were to be adjusted yearly to reflect rising prices. *Id.* § 608(d) (repealed 1976).

The 1976 amendments removed all the major contribution and expenditure provisions from Title 18 and placed them, in slightly modified form, in Title 2 of the United States Code. 1976 Act §§ 112, 201. In response to the Supreme Court's *Buckley* decision, however, Congress did make one major modification in these provisions. The expenditure ceilings, which the Court declared unconstitutional, were omitted from 2 U.S.C.A. § 441a (Sept. 1976 Pamphlet), the section that replaces 18 U.S.C. § 608 (Supp. IV 1974)—with one significant exception that corresponds to a curious wrinkle in the *Buckley* decision.

Without even discussing possible problems under the doctrine of unconstitutional conditions, *see generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968), the Supreme Court left standing the requirement in the 1974 Act § 404(a), 408(c), I.R.C. §§ 9004, 9035 (amended 1976), that presidential candidates who voluntarily accept public funding must agree to abide by the ceilings on total campaign outlays. 424 U.S. at 108-09. These voluntary expenditure ceilings continue under the 1976 Act § 112, 2 U.S.C.A. § 441a(b) (Sept. 1976 Pamphlet), and have been broadened to require that presidential candidates accepting public funding agree to limit spending from personal funds to \$50,000 in both the primary campaign and the general election. 18 U.S.C. §§ 301(a), 305(a) (Supp. IV 1974) (to be codified at I.R.C. §§ 9004, 9035).

12. For a detailed account of these abuses, *see, e.g.*, FINAL REPORT OF THE SENATE SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES OF THE U.S. SENATE, S. REP. NO. 93-981, 93d Cong., 2d Sess. (1974) [hereinafter cited as FINAL REPORT]. A comprehensive "Bibliography of Watergate Source Materials" may be found in WATERGATE SPECIAL PROSECUTION FORCE, REPORT 265-73 (1975).

13. *See, e.g.*, FINAL REPORT, *supra* note 12, at 212.

14. *See, e.g.*, *United States v. Classic*, 313 U.S. 299, 317-20 (1941); *Burroughs v. United States*, 290 U.S. 534, 545 (1934); *Ex parte Yarbrough*, 110 U.S. 651, 657-67 (1884).

tures.<sup>15</sup> Money does facilitate communication of political preferences and prejudices. It is also clear that money influences the outcome of elections. Generally speaking, the more money spent in behalf of a candidate, the better the candidate's chances of winning. Indeed, a veteran of political campaigns has declared that money is the mother's milk of politics.<sup>16</sup>

But the real questions are these: To what extent does this kind of mother's milk poison the political process? To what extent does it distort the truth-seeking process that lies at the heart of the First Amendment conception?<sup>17</sup> And most importantly, what may the people, acting through Congress, do about it?

The Supreme Court answered these questions by saying that Congress, in passing the campaign reform law, tried to do too much. The Justices left the statute's contribution limits in place, but they struck down all the spending ceilings—on independent expenditures in behalf of a candidate, on personal funds spent by a candidate in his own campaign, and on total outlays by the candidate. Asserting that today “virtually every means” for effectively communicating ideas requires the expenditure of money,<sup>18</sup> the Court found that these provisions placed substantial, direct restrictions on the ability of individuals to engage in protected political expression.<sup>19</sup> The Court concluded that, unlike the contribution limitations, the expenditure ceilings failed sufficiently to serve the governmental interest in preventing corruption;<sup>20</sup> therefore, the burden they placed on “core First Amendment expression” was unconstitutional.<sup>21</sup>

15. See, e.g., FINAL REPORT, *supra* note 12, at 571.

16. TIME, Jan. 5, 1968, at 44 (statement of Jesse Unruh, former Speaker of the California Assembly, now California State Treasurer).

17. The First Amendment conception of which I speak is perhaps best stated by Justice Holmes, dissenting in *Abrams v. United States*, 250 U.S. 616, 630 (1919):

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

18. 424 U.S. at 19.

19. *Id.* at 58-59.

20. Proponents of the expenditure limitations had argued that the ceilings also served to equalize the abilities of individuals and groups to influence the outcome of elections and the abilities of candidates to bring their messages before the public. The Court rejected these objectives as constitutionally illegitimate and unlikely to be achieved by the expenditure limitations. *Id.* at 48-49, 54, 56-57.

21. *Id.* at 47-51, 53-54, 55-59. The Court was also careful to note that the Act had to be tested against the First Amendment's guarantee of freedom of association. See, e.g., *id.* at 15, 22-23, 24-29. The only extended discussion of this First Amendment right, however, appears in the Court's discussion of contribution limitations. *Id.* at 24-29. The

I take issue with the Court's answers, but not primarily because of the result reached in this particular case. Rather, I am deeply concerned with the lesson the Court taught in the course of reaching its result. Throughout its discussion of contributions and expenditures, the Court persisted in treating the regulation of campaign monies as tantamount to the regulation of political expression. The Court told us, in effect, that money is speech.

This, in my view, misconceives the First Amendment. It accepts far too narrow a conception of political dynamics in our society. It accepts without question elaborate mass media campaigns that have made political communication expensive, but at the same time remote, disembodied, occasionally even manipulative. Nothing in the First Amendment prevents us, as a political community, from making certain modest but important changes in the kind of process we want for selecting our political leaders. Nothing bars us from choosing, as I am convinced the 1974 legislation did choose, to move closer to the kind of community process that lies at the heart of the First Amendment conception—a process wherein ideas and candidates prevail because of their inherent worth, not because prestigious or wealthy people line up in favor, and not because one side puts on the more elaborate show of support. Nothing in the First Amendment bars us from those steps, for nothing in the First Amendment commits us to the dogma that money is speech.

## II. Money As Speech: The Legal Argument

### A. *The Court's Precedents*

No one disputes that the money regulated by the campaign reform legislation is closely related to political expression. And no one disputes that the First Amendment applies with special force to the political arena.<sup>22</sup> The legal question is thus not whether the restrictions on giving and spending are subject to First Amendment scrutiny at all. The question is what degree of scrutiny should apply. There are basically two choices<sup>23</sup>—and I am painting here with a very broad brush. The first is to treat campaign contributions and expenditures

right of free association played only a limited role in the Court's consideration of the three types of expenditure ceilings and in its decision to strike them down. *Id.* at 22-23. The dispositive factor was the Court's view that expenditure ceilings abridge the right of free expression. *See id.* at 39, 47-51, 52-53, 55, 58-59.

22. *See, e.g.,* *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971); *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

23. *See* 424 U.S. at 15.

as equivalent to pure speech. If this approach is proper, then the giving and spending restrictions enacted in 1974 should be treated in the same way as laws imposing a prior restraint on speech or censoring particular points of view. Such laws are subject to the most rigorous scrutiny known to constitutional law, and rightly so.<sup>24</sup> Nothing distorts the truth-seeking process so much as prior restraint or government censorship. Even ideas utterly false serve the purpose of testing and strengthening views with a better claim to the truth.<sup>25</sup> For this reason only the most intensely compelling governmental interests can sustain such restrictions.

The second legal alternative is to treat political giving and spending as a form of conduct related to speech—something roughly equivalent to the physical act of picketing or to the use of a sound-truck.<sup>26</sup> Alert and careful judicial scrutiny is still warranted, for an ostensibly neutral regulation of conduct may merely disguise an attempt at silencing a particular viewpoint. Nevertheless, a carefully tailored regulation of the nonspeech element—the picketing or the soundtruck—can survive without being required to pass the rigorous test applied to restrictions on pure speech. The regulation is constitutional if it serves an important governmental interest and if that interest is unrelated to suppression of speech.<sup>27</sup>

When the campaign finance reform law came before the United States Court of Appeals for the District of Columbia Circuit—the court on which I serve—we found the second approach to be the proper one. We held<sup>28</sup> that political giving and spending were not pure speech, that they should be treated as speech-related conduct under principles announced in the leading case of *United States v. O'Brien*.<sup>29</sup> And we found the contribution and expenditure limits constitutional.<sup>30</sup> The

24. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Near v. Minnesota*, 283 U.S. 697, 713-16 (1931). See generally Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648 (1955).

25. See J. S. MILL, *Essay on Liberty*, in ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 1, 15-21 (B. Blackwell ed. 1946); Bagehot, *The Metaphysical Basis of Toleration*, in 2 THE WORKS OF WALTER BAGEHOT 339, 343, 350 (F. Morgan ed. 1891).

26. See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Cameron v. Johnson*, 390 U.S. 611 (1968); *Adderley v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Kovacs v. Cooper*, 336 U.S. 77 (1949). See generally *Schneider v. State*, 308 U.S. 147, 160 (1939).

27. See *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

28. *Buckley v. Valeo*, 519 F.2d 821, 840-41 (D.C. Cir. 1975), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976).

29. 391 U.S. 367 (1968).

30. 519 F.2d at 843-44, 851-60.

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law, we thought, was carefully tailored to serve the government's undeniably important interest in purifying elections.<sup>31</sup>

In the *O'Brien* case the Supreme Court approved the conviction of a war protester under a statute that banned the burning of draft cards. O'Brien claimed that in publicly burning his draft card he was merely exercising his right to free expression against the Vietnam War. But the Court held that his act was not pure speech; that an important governmental interest was served by preservation of draft cards; and that his expression-related conduct in burning the draft card was subject to the restrictions Congress had enacted.<sup>32</sup>

O'Brien used the burning of his draft card as a vehicle for expressing his political convictions. So too the use of money in political campaigns serves as nothing more than a vehicle for political expression. It may not have the same overt physical quality that burning a draft card or picketing at the statehouse has, but it remains a mere vehicle. Restrictions on the use of money should be judged by the tests employed for vehicles—for speech-related conduct—and not by the tests developed for pure speech. Our court therefore held that campaign giving and spending, like draft-card burning, were speech-related conduct.

The Supreme Court disagreed. "The expenditure of money," it wrote,

simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.<sup>33</sup>

I am bound to say that this passage performs a judicial sleight of hand. The real question in the case was: Can the use of *money* be regulated, by analogy to conduct such as draft-card burning, where there is an undoubted incidental effect on *speech*? However, what the Court asked was whether *pure speech* can be regulated where there is some incidental effect on *money*. Naturally the answer to the Court's question was "No." But this left untouched the real question in the

31. *See id.* at 842-44. The Supreme Court has emphasized the importance of the governmental interest in maintaining federal elections free from corruption. *See, e.g.,* *Burroughs v. United States*, 290 U.S. 534, 545 (1934); *Ex parte Yarbrough*, 110 U.S. 651, 666-67 (1884).

32. 391 U.S. at 382.

33. 424 U.S. at 16.

case. The Court riveted its attention on what the money could buy—be it communication, or communication mixed with conduct. Yet the campaign reform law did not dictate what could be bought. It focused exclusively on the giving and spending itself.<sup>34</sup> In short, the Court turned the congressional telescope around and looked through the wrong end.

Perhaps I can clarify the difference by an example. Suppose a state enacts a law banning all political advertisements in newspapers during the week preceding an election. Such a law targets the communication itself. It should be subject to rigorous scrutiny. And it should be struck down.<sup>35</sup> If the state attorney general were to argue that the law is justified on the ground that there is a nonspeech element present, simply because somebody has to spend money to place a political advertisement, he would of course lose.

But such a statute is not comparable to the campaign finance law at issue in *Buckley*. The 1974 law targeted the money itself, utterly divorced from the kind of communication—or other campaign services—the money would buy. Congress was not trying to justify suppression of pure speech by seizing on money as a nonspeech element. It was trying to justify a straightforward regulation of the excessive use of money as a blight on the political process. Like draft-card burning, however speech-related, this was a vice Congress had authority to control.<sup>36</sup>

34. Justice White was able to see the distinction clearly. *Id.* at 259-64 (White, J., dissenting in relevant part).

35. Cf. *Mills v. Alabama*, 384 U.S. 214 (1966) (Alabama statute banning publication on election day of editorial supporting candidate violates First Amendment).

36. After rejecting *O'Brien's* applicability to the *Buckley* case on the ground that campaign contributions and expenditures are speech, not conduct, the Supreme Court went on to contend that even if they were speech-related conduct, their regulation by the 1974 law was unconstitutional under *O'Brien*. 424 U.S. at 17. *O'Brien* required that a regulation of speech-related conduct not be aimed at "the suppression of free expression." 391 U.S. at 377. The *Buckley* Court held that the 1974 law was aimed at suppressing communication because Congress meant it, in part, to reduce the quantity of speech on the part of wealthy individuals and interest groups. 424 U.S. at 17.

This rather mechanical application of the *O'Brien* test is unsatisfactory. Congress meant the statute to reduce the quantity of *spending* on the part of wealthy individuals and candidates, but it was unconcerned with the type or quantity of *speech* that might result when people operated within the new limits. More importantly, the "suppressing communication" test is concerned primarily with statutes that are aimed at suppressing a particular viewpoint—statutes which discriminate on the basis of content. *O'Brien* itself makes this interpretation clear. In explaining the test, the *O'Brien* Court took as its example the case of *Stromberg v. California*, 283 U.S. 359 (1931). 391 U.S. at 382. The California statute in *Stromberg* ostensibly regulated conduct—the use, in certain circumstances, of "any flag, badge, banner, or device," 283 U.S. at 361—but it did not do so evenhandedly. It denied the use of any flag or device to those who intended thereby to demonstrate their "opposition to organized government." *Id.* Demonstrators not opposing organized government could use any flag or banner they wished. *See id.* at 369-70.

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Let me approach the question from another angle. The main evil against which rigorous First Amendment scrutiny is designed to guard is content discrimination—discrimination based on the message itself. As the Supreme Court held in unmistakable terms in 1972:

[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . [O]ur people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control.<sup>37</sup>

There has been no showing that the 1974 ceilings on contributions and expenditures discriminate against certain viewpoints.<sup>38</sup> In fact, one could argue that money limitations, if properly drafted and administered, are uniquely manageable as content-neutral controls on political abuses.<sup>39</sup>

Let me reiterate, however, one important qualification. I am not saying that Congress has a free hand so long as it targets money. There

Statutes of this type are invalid because they use the regulation of conduct as a subterfuge for suppressing a certain message. *O'Brien* condemns statutes which are, in this sense, aimed at suppressing communication. See 391 U.S. at 382. The 1974 law thus did not run afoul of *O'Brien*. As the *Buckley* Court itself recognized, the campaign reform statute did “not focus on the ideas expressed” by those subject to its limits. 424 U.S. at 17. It was content-neutral and, properly understood, did not aim at suppressing communication.

37. *Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972). For a recent discussion of content discrimination, see Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975). See also T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 633-34 (1970).

38. The plaintiffs in *Buckley* argued that candidates who challenge incumbents are uniquely burdened by the contribution and expenditure limits. Brief of the Plaintiffs at 149-61, 175-83, *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975). Even if true, this is not quite the same as discrimination based on content of ideas; not all challengers, by any means, represent one particular viewpoint. In any event, the evidence of such a burden is far from conclusive. See 424 U.S. at 33-34 (no such showing in record relative to contribution limits of \$1,000). But see *id.* at 31 n.33 (suggesting possibility of more serious problem when contribution limits are combined with 1974 Act's limitations on expenditures by groups and individuals, on candidate's use of personal and family resources, and on overall campaign expenditures, but not resolving question).

39. The capacity for abuse is directly related to the size of the contribution or expenditure. Thus ceilings operate in a straightforward manner to curb the capacity for abuse; they are tailored rather precisely to the problem Congress sought to remedy. At the same time, all candidates—popular and unpopular, majority and minority—use money in roughly the same way. It is, to say the least, not immediately apparent how ceilings—so long as they apply evenly across the board—could be designed so as to cast a disproportionate burden on minority or disfavored points of view. Money restrictions, therefore, contrast sharply with laws which seem evenhanded but which in reality make things especially hard for the weak and unpopular—for example, laws banning leafletting, laws curtailing speaking in public places, or indeed, to borrow Anatole France's classic example, laws prohibiting rich and poor alike from sleeping under bridges. A. FRANCE, *THE RED LILY* 91 (W. Stephens trans. 1894). See Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 30.

are delicate links between political giving and spending, on the one hand, and political speech, on the other. Every regulatory scheme concerning campaign finances requires careful judicial review to make sure that Congress maintains a close relation between the important ends sought and the precise means chosen. Some measures may be more clearly justified than others. For example, a far more compelling case can be made for contribution limitations than for the overall candidate spending ceilings, since the former are more closely tied to the paramount goal of preventing political corruption.<sup>40</sup> Thus, I am not suggesting that courts, when faced with regulations like these, be less than vigilant. But the sensitive judicial task is not aided by a blunderbuss formula that equates money and speech.<sup>41</sup>

40. This of course was not the only goal of the 1974 law. In some contexts other goals were equally compelling. For example, as Mr. Justice Marshall eloquently demonstrates in his partial dissent, the limits on spending by a candidate from his personal funds, 18 U.S.C. § 608(a) (Supp. IV 1974) (repealed 1976), were tailored to serve the nation's vital interest in "promoting the reality and appearance of equal access to the political arena," 424 U.S. at 287-90. I agree fully with Mr. Justice Marshall that § 608(a)'s limits should have been conceived as limits on the *contribution* a candidate may make to his own campaign, *id.* at 286-87, and therefore are justified on much the same grounds as those the Court found persuasive with respect to the general contribution limits.

As I shall discuss more fully below, another important objective of the campaign financing reform was to stimulate more direct, personal forms of political speech. Indeed, that those nearing their contribution limits could still engage in more direct communications efforts was an important factor in the Court's decision to uphold the contribution ceilings. I pause here only to ask why that same logic could not have been taken one small step further, with the result that the ceiling on independent expenditures would also have been recognized as constitutional.

The Court upheld the contribution limits because, the opinion explains, those limits constitute only a "*marginal restriction* upon the contributor's ability to engage in free communication." *Id.* at 20-21 (emphasis added). This is so because people who would otherwise give amounts greater than the statutory limits are hardly bottled up once they reach the ceiling. Many avenues of communication remain open to them since, the Court states, they can "expend such funds on *direct political expression*." *Id.* at 21-22 (emphasis added). In other words, the spender could buy the newspaper ad or TV commercial or handbills directly, instead of giving the money to the candidate for the candidate to choose how to spend it. If he avoided collaboration with the candidate, his spending in this fashion would not count as a contribution. *Id.* at 46-47 & n.53. There would be no limits on his spending to advocate the candidate's election, because the Court struck down the limits on independent expenditures.

But exactly parallel reasoning should have led the Court to sustain the limits on independent expenditures. Properly viewed, those limits constitute nothing but a "*marginal restriction*." They do nothing but push the spender a little closer still to "*direct political expression*." Under the statutory provisions for ceilings on independent expenditures, one who has spent his limit—and \$1,000 is a generous limit—hardly has his free expression bottled up. Nothing prevents him from devoting future efforts to volunteer activity, door-to-door canvassing, or organizing meetings. And what is this if it is not *direct political expression*? It may not be the form of political expression which the Supreme Court had in mind—expensive things like TV commercials and newspaper ads. But it is no less a real outlet for political expression simply because it is *more direct*.

41. The *Buckley* defendants also contended that the money restrictions were valid under a line of cases permitting government regulation of the time, place, and manner of speaking. *See, e.g.,* *Adderley v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Kovacs v. Cooper*, 336 U.S. 77 (1949). The Court rejected this argument.

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### B. *The Court's Premise*

The premise apparently underlying the Court's treatment of money restrictions as restraints on free expression was that "in today's mass society" the use of money is essential for "effective political speech."<sup>42</sup> But does the First Amendment condemn us to accept helplessly all the implications of the so-called "mass society"? Must we adopt the mass society's definitions of effectiveness? I think not.

Consider this: A half-minute spot commercial can reach into thousands of homes, although with a cursory message. This is the essence of effectiveness in the mass society. And it costs money—lots of it. A lesser amount of money, however, might suffice to purchase the paid staff and supplies necessary to sustain a small army of volunteer canvassers,<sup>43</sup> perhaps enough to reach all the same homes on a meaningful, personal basis.

Which is truly more effective, the spot commercial or the volunteer activity? It depends on whose standards one uses: those implicit in the

424 U.S. at 17-18. The logic of the Court's position, however, is not immediately apparent, for the 1974 law does, on its face, look like a regulation of the manner of speech. The statute says, in effect, speak in a frugal rather than lavish manner.

But the Court did not see the limits in this way: "The critical difference between this case and those time, place, and manner cases is that the present Act's contribution and expenditure limitations impose *direct quantity restrictions* on political communication and association . . ." *Id.* at 18 (emphasis added). The Court went on in a footnote to emphasize the difference it perceived between the campaign law's money limits and the decibel limits imposed on a soundtrack operator and upheld in *Kovacs*: "The decibel restriction upheld in *Kovacs* limited the *manner* of operating a soundtrack, but not the *extent* of its proper use." *Id.* at 18-19 n.17 (emphasis in original).

The Court, in other words, erected a new distinction between statutes that regulate manner of speech and those that may be said to regulate quantity of speech. Statutes of the former type are permissible; statutes of the latter type are, at a minimum, subject to the most stringent scrutiny.

But the distinction simply does not bear up under analysis. The time, place, and manner cases dealt with restrictions that can just as easily be read as quantity restrictions. In *Kovacs*, for example, the soundtrack operator was surely faced with a quantity restriction. Operating at an unrestricted decibel level, he might have been able to reach all the citizens of his target area by, say, driving down every third street. Operating within the ordinance at a lower volume might have required driving down every street. The quantity of his speech, if one chooses to view it in that fashion, has been reduced by two-thirds. He can reach only a third of the people he could otherwise reach in a given amount of time. Regulations of time and place of expression can generally be seen as working similar quantity restrictions. The Court's rationale for distinguishing the time, place, and manner cases is unconvincing.

42. 424 U.S. at 19.

43. The 1974 law is structured so as to provide added inducements for volunteer activity. An individual who devotes his time without pay is not required to place a monetary value on that time in order to count it against any contribution or independent expenditure ceiling. In other words, a person can volunteer his time without limit. 18 U.S.C. § 591(e)(5)(A) (Supp. IV 1974). Moreover, the first \$500 of expenses incidental to such volunteer activity is also exempt from the ceilings. *Id.* § 591(e)(5)(B)-(D), (f)(4)(D), (f)(4)(E). The Court expressly approved these inducements, noting "Congress' valid interest in encouraging citizen participation in political campaigns." 424 U.S. at 36-37.

mass society, or those implicit in the First Amendment. It is certainly possible to argue that the volunteer, face-to-face communication is more effective in a sense highly relevant to the First Amendment: it promotes real interchange among citizens concerning the issues and candidates about which they must make a choice.

The Supreme Court seemed to recognize that "effective political speech" is a multi-dimensional concept. It depends, the Court suggested, on "the number of issues discussed, the depth of their exploration, and the size of the audience reached."<sup>44</sup> Viewed in this light, the effectiveness of political speakers is not necessarily diminished by reasonable contribution and expenditure ceilings. The giving and spending restrictions may cause candidates and other individuals to rely more on less expensive means of communication. But there is no reason to believe that such a shift in means reduces the number of issues discussed in a campaign. And, by forcing candidates to put more emphasis on local organizing or leafletting or door-to-door canvassing<sup>45</sup> and less on full-page ads and television spot commercials, the restrictions may well generate deeper exploration of the issues raised. Finally, even to the extent that smaller audiences result from diminished use of the most expensive and pervasive media—and the campaigning so far gives no substantial indication that this happens—the effectiveness of a given speaker does not decline in relation to that of his opponents. All similarly situated competitors face the same constraints. Within those limits effectiveness still depends on the creativity of the speaker—and on the soundness of his ideas.

44. 424 U.S. at 19 (footnote omitted).

45. Because these activities require a large amount of volunteer effort, some commentators have suggested that contribution and expenditure ceilings discriminate unfairly in favor of those who have a lot of free time. See, e.g., Winter, *Money, Politics and the First Amendment*, in H. PENNIMAN & R. WINTER, *CAMPAIGN FINANCES: TWO VIEWS OF THE POLITICAL AND CONSTITUTIONAL IMPLICATIONS* 57-58 (1971). This strikes me as a particularly weak claim of discrimination.

In a system dominated by contributions of money, rather than of free time, all but the fabulously wealthy must make hard choices about how they will apply limited financial resources. For most people, making a large contribution means foregoing or postponing something else—an expensive vacation, perhaps, or a new car. In a system where contributions of free time are more important, people are still faced with choices about the application of a limited resource, a temporal resource. A person *can*, if the candidate's success is important enough to him, forego or postpone or rearrange business commitments or outside activities that consume time in order to volunteer for the campaign. I see no reason why the temporal choice should be considered inequitable when the financial choice is not.

If the concern is for those at the margin who really cannot squeeze out additional free time—those who must work long hours simply to provide food and shelter for their families—I would only observe that such people are hardly disadvantaged by contribution and expenditure ceilings. They surely are not the ones whose political spending is cut short by the 1974 law.

If there is a problem latent in expenditure ceilings, it stems not from any disparities in effectiveness among rival campaigns, but from the fact that there are, of course, no dollar limitations on nonpolitical speech. If campaign money ceilings were so low that political speech really were in danger of being drowned out by commercial or other apolitical speech, then those ceilings might well be unconstitutional. But no one has claimed, and no one could credibly claim, that the reasonable ceilings enacted in 1974 pose such a threat.<sup>46</sup> There will be time enough to remedy the problem if at some point the political dialogue truly becomes submerged.<sup>47</sup> In the meantime, we would do well to focus our concern on the danger that certain individual candidates will find *their* speech drowned out by well-heeled opponents who can vastly outdistance them in the spending race—exactly the danger that the overall expenditure limits were meant to minimize.

### III. Money As Speech: The Pluralist Underpinnings

Though the equation of money and speech is supported by neither the precedents nor the premise relied on by the Court, the notion may well derive from a more basic source. If so, it is important that we explore it. We can, I believe, identify this source by analyzing carefully the position of the *Buckley* plaintiffs, the opponents of the 1974 law, in order to discern the image of the political process that underlay their opposition to limitations on giving and spending. The image they embraced makes it natural to conclude that money is speech, but I think we shall see that it differs significantly from the image of the political process the First Amendment bids us to accept.

In their brief before the court of appeals, the plaintiffs argued strongly that money is essential to effectiveness in the political contest.<sup>48</sup> Again and again they asserted their central theme:

It is . . . too crabbed a notion of the political process to restrain people from demonstrating the intensity of their convictions on particular issues. Indeed, it is hard to see how a democratic nation can have a stable government if it does not permit intensity of feeling as well as numbers of adherents to be reflected in the

46. See, e.g., 424 U.S. at 21-22 (no such problem in connection with contribution limits of \$1,000).

47. The Court has shown its readiness to act when reductions in degree result in differences in kind. Compare *Kusper v. Pontikes*, 414 U.S. 51, 59-61 (1973) with *Rosario v. Rockefeller*, 410 U.S. 752 (1973). See 424 U.S. at 30.

48. Brief of the Plaintiffs, *supra* note 38, at 102.

political process. . . . Campaign contributions represent a means by which intensity can be shown . . . .

Of course, those who contribute money to a candidate hope to further their political, social and economic views. . . .<sup>49</sup>

Now it is true that a government which hopes to maintain stability must preserve for its citizens some means of demonstrating intensity of feeling. The plaintiffs, however, evidently interpret intensity not from the standpoint of the potential contributor, but from the standpoint of the candidate or official who is the target of the intensity. I say this because it is brutally obvious that the size of a contribution provides a hopelessly inadequate measure of intensity as felt by the giver. Consider the wealthy man who regularly contributes \$5,000 to a particular incumbent, simply to keep open his channels of communication. Compare him to the student who scrapes together \$100 for a candidate in whom she passionately believes. Intensity is all with the student, but if one looks only at the dollar totals, this fact is completely obscured. The contribution ceiling in the 1974 law in no way prevents the student from demonstrating her genuine intensity of feeling.

Thus, when the plaintiffs complain that a \$1,000 contribution limit thwarts the expression of intensity, they must be viewing intensity from the standpoint of the recipient—the candidate. *He* certainly will feel the heat more intensely from a \$5,000 contributor than from a \$100 contributor, whatever the subjective feelings of the two contributors themselves. And, the plaintiffs argue, the First Amendment requires that Congress not impede contributors from making candidates feel this kind of intensity.

Consider, then, the picture the plaintiffs' brief paints for us of the way political decisions are made. Campaign monies should be unrestricted because they are a means by which people intensify the pressure to get governmental decisions to come out their way. There is competition among various viewpoints, and candidates and others who want to see certain governmental policies adopted roll up their sleeves and plunge into the competition with all the resources at their command. The prospect of large contributions may, for example, influence a legislator to vote a particular way. Or sizeable media expenditures may swing an important electoral race through advanced techniques of salesmanship. People band together and pool their funds

49. *Id.* at 105. Obviously the plaintiffs' observation is not limited to contributions; it extends to expenditures as well: "[T]hose making the expenditures seek to communicate with the public to promote views they think should become governmental policy or for persons whom they believe will, as public officials, share those views." *Id.* at 100.

in order to bring pressure on the decisionmakers or to elect different decisionmakers in their place. The key to effectiveness is not the soundness of the program advocated, or even the number of voters who support the program, but rather the intensity of the pressure imposed.

This picture of the political process that emerges from the plaintiffs' arguments corresponds closely to a picture familiar to political science as the special interest or pluralist model.<sup>50</sup> This correspondence should not be surprising, even though it has received relatively little attention. Pluralist thinking has dominated political science for years,<sup>51</sup> and it traces its roots to Tocqueville,<sup>52</sup> and even back to Madison's celebrated *Federalist No. 10*.<sup>53</sup> The pluralist view is a powerful conception, and it explains much about how our government works. I do not demean its value when I say nonetheless that it has certain shortcomings. Let me set forth the pluralist outlook in its strongest form, so that we may clearly see the problems.

To the pluralist, the political process consists precisely of the pull-

50. Some writers have made even more explicit the pluralist underpinnings of their attack on campaign finance reform laws. See, e.g., Sterling, *Public Financing of Campaigns: Equality Against Freedom*, 62 A.B.A.J. 197, 200 (1976); Sterling, *Control of Campaign Spending: The Reformers' Paradox*, 59 A.B.A.J. 1148, 1153 (1973). See also Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51 N.C. L. Rev. 389, 462 (1973) ("The fact that people vote with dollars as well as ballots is to be celebrated in a democracy rather than bemoaned.") Compare the unrestrained enthusiasm of one early writer, quoted prominently, with minor, inadvertent alterations, in an important pluralist textbook, W. BINKLEY & M. MOOS, *A GRAMMAR OF AMERICAN POLITICS: THE NATIONAL GOVERNMENT* 2 (3d ed. 1958):

[M]en and women who touch practical politics . . . know that men and women now may have as many votes in government as they have interests for which they are willing to sacrifice time and thought and money. . . .

. . . . The ruling classes are those who use their craft societies, medical associations, farm bureaus, labor unions, bankers' associations, women's leagues and the like to influence government. Of course, it takes time and intelligence and a little money, but not much. For fifty dollars a year [membership dues] the average family ought to be able to buy half a dozen powerful votes in government, each vote ten times as powerful as the vote guaranteed by the Constitution.

W. WHITE, *POLITICS: THE CITIZEN'S BUSINESS* 15, 16-17 (1924).

For a dramatically contrasting view, albeit one with serious problems of implementation and limitation, see Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815, 821, 825-36, 853-54 (1974) (giving of large contributions is form of multiple voting invalid under "one person, one vote" doctrine; courts could, regardless of statutory limits, hold unconstitutional any financing system permitting large contributions).

51. See, e.g., A. BENTLEY, *THE PROCESS OF GOVERNMENT* (1908); R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956); R. DAHL, *WHO GOVERNS?* (1961); E. HERRING, *GROUP REPRESENTATION BEFORE CONGRESS* (1929); E. LATHAM, *THE GROUP BASIS OF POLITICS* (1952); C. LINDBLOM, *THE INTELLIGENCE OF DEMOCRACY* (1965); A. ROSE, *THE POWER STRUCTURE* (1967); D. TRUMAN, *THE GOVERNMENTAL PROCESS* (2d ed. 1971).

52. See A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 174-80 (J. Mayer & M. Lerner eds. 1966).

53. *THE FEDERALIST* No. 10, at 57 (J. Cooke ed. 1961). See D. TRUMAN, *supra* note 51, at 4-7. But see note 72 *infra*.

ing and hauling of various competing interest groups. Organized groups, not individuals, constitute the only relevant political units.<sup>54</sup> They rise and decline, coalesce and fragment, confront countervailing groups and aid complementary groups. Through lobbying, publicity, campaign contributions, independent expenditures, and other methods—all of which cost money—they bring pressures to bear which ultimately determine the outcome of governmental decisions. They thereby achieve a form of “functional representation,” based upon intersecting economic and social groupings, which cuts across our usual conception of political representation based upon “one person—one vote.”<sup>55</sup>

The pluralist model tends to be a highly mechanistic conception. The clash of competing groups comes to be seen as the only factor of importance in politics. Force collides with counterforce, pressure meets counterpressure, and the strongest force or the most intense pressure determines the outcome of the governmental process. Some pluralist writers even talk wistfully about the possibility of reducing the political process to a mathematical chart. If only our techniques were sophisticated enough, they suggest, groups pursuing interests could all be measured and then graphed as vectors. And trends in public policy could then be predicted because they automatically conform to the resultant, the mathematical sum of all the private vectors.<sup>56</sup>

Other pluralists go so far as to equate this resultant vector with the “public interest.” The very term, they imply, has no meaning apart from the outcome of the pressure group process. Individual assertions as to where the public interest lies are all inherently suspect. Only the group process can be relied upon as “the practical test of what constitutes the public interest.”<sup>57</sup>

By this pluralist line of reasoning, the First Amendment’s highest function is to let group pressure run its course unimpeded,<sup>58</sup> lest we skew the process that determines for us the public interest. Giving and spending money are important ways for groups to bring pressure—to magnify intensity—and thereby to make the process work. Restrictions on giving and spending can be nothing but unwarranted impediments

54. See, e.g., A. BENTLEY, *supra* note 51, at 208; E. HERRING, *supra* note 51, at 5-6. See generally Hale, *The Cosmology of Arthur F. Bentley*, in *THE BIAS OF PLURALISM* 35-50 (W. Connolly ed. 1969).

55. See generally E. HERRING, *supra* note 51, at 8-12.

56. W. BINKLEY & M. MOOS, *supra* note 50, at 6 (quoting Childs, *Pressure Groups and Propaganda*, in *THE AMERICAN POLITICAL SCENE* 205, 225 (E. Logan ed. 1936)).

57. W. BINKLEY & M. MOOS, *supra* note 50, at 7. See Stokc, *The Paradox of Representative Government*, in *ESSAYS IN POLITICAL SCIENCE* 77, 80-83 (J. Mathews & J. Hart eds. 1937); Wilson, *The Pragmatic Electorate*, 24 *AMER. POL. SCI. REV.* 16, 33 (1930).

58. See Brief of the Plaintiffs, *supra* note 38, at 101-02.

in the path of the process. It follows, in the pluralist view, that all such restrictions are unconstitutional.

Such is the theory. But time has eroded at least the more exuberant forms of pluralist thinking. Recent years have seen scores of books and articles questioning the theory's assumptions or its application.<sup>59</sup> Two major critiques deserve emphasis.

First, pluralists countenance a system which gives undeserved weight to highly organized and wealthy groups.<sup>60</sup> For the pluralist, this imbalance is a virtue to be embraced, not a flaw to be redressed. Under an unrestrained pluralist system, a clustering of people with common interests, even if it is a majority, cannot prevail if it is without organization and without significant funds.<sup>61</sup> And of course we know of instances in our current system where the popular will is thus thwarted—where public opinion polls tell us that a majority prefers a certain policy, and yet that majority seems unable to carry out its wishes against the opposition of a highly organized, narrowly based group able to spend its money freely. Gun control provides an obvious example.<sup>62</sup>

A number of encouraging reform efforts of recent years may be seen as attempts to rectify this systemic imbalance.<sup>63</sup> The public interest law movement, for example, often sees itself as a means for giving diffuse but significant groups a more effective voice.<sup>64</sup> The flowering of so-called citizens' or public interest lobbies is part of the same development. And the campaign reform legislation reviewed in the *Buckley* case can also be seen in this light. In a sense, it is an attempt to expand participation in the pluralist pulling and hauling. The

59. For a sampling of the most penetrating critiques of the pluralist viewpoint, see H. KARIEL, *THE DECLINE OF AMERICAN PLURALISM* (1961); T. LOWI, *THE END OF LIBERALISM* (1969); G. MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (1966); Connolly, *The Challenge to Pluralist Theory*, in *THE BIAS OF PLURALISM*, *supra* note 54, at 3. See also S. LAZARUS, *THE GENTEEL POPULISTS* 167-89 (1964).

60. I have pursued this line of criticism elsewhere in a somewhat different context. Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 *HARV. L. REV.* 769, 789 (1971).

61. See Note, *The New Public Interest Lawyers*, 79 *YALE L.J.* 1069, 1070-71 n.3 (1970). Indeed, some critics argue forcefully that the system may prevent such diffuse groups even from achieving effective articulation of their grievances. Their grievances will be seen not as potential issues for the public but merely as troubles afflicting private individuals. See Connolly, *supra* note 59, at 14.

62. See *N.Y. Times*, June 5, 1975, at 20, col. 4 (67% of those polled favored registration of all firearms; results consistent with surveys over three decades showing steady support for such gun control legislation); M. HINDELANG, C. DUNN, A. AUMICK & L. SUTTON, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1974* 183-88 (1975) (summaries of polls showing similar strong support for gun control and detailing response to particular gun control proposals).

63. See S. LAZARUS, *supra* note 59, at 267-74.

64. See Note, *supra* note 61, at 1070-71 n.3.

well-organized are deprived of certain financial advantages. The decisionmakers are then better able to respond to the interests of the under-organized, free from imperative obligations to special interest money-providers.

There is a second and more basic critique of the pluralists' view. Their mechanistic conception tends to drain politics of its moral and intellectual content.<sup>65</sup> Rather than seeing the political process as a battle of ideas, informed by values—as the means by which the citizens apply their intelligence to the making of hard public choices<sup>66</sup>—pluralists tend to view politics as a mere clash of forces, a battle of competing intensities, a universe of vectors.

Forces can be measured by science; resultant vectors can be computed by mathematics. Alexander Meiklejohn diagnosed the shortcomings of this kind of thinking with his usual penetrating insight. He wrote:

In the understanding of a free society, scientific thinking has an essential part to play. But it is a secondary part. We shall not understand the Constitution of the United States if we think of men only as pushed around by forces. We must see them also as governing themselves.<sup>67</sup>

The First Amendment sees people in this way. Although our political practice may often fall woefully short, the First Amendment is founded on a certain model of how self-governing people—both citizens and their representatives—make their decisions.<sup>68</sup> It is a model that restores considerations of justice and morality to the political process—considerations absent from the pluralist approach.<sup>69</sup>

Self-governing people do not simply let the organized groups of the day play out their battle of influence and then vote the way of the prevailing forces. They are more responsible, more independent than that. Instead, they see the group process as a way of calling forth the various positions. They listen to all—the weak and timid voice of the under-organized as well as the sometimes bombastic, sometimes so-

65. See T. Lowi, *supra* note 59, at 46-54, 57-58, 68-72, 155-56, 281-82.

66. See A. MEIKLEJOHN, *supra* note 1, at 75, 109.

67. *Id.* at 12-13. Meiklejohn has made explicit his critique of pluralist thinking elsewhere. *Id.* at 162-63. See also *id.* at 73-75.

68. See generally *Whitney v. California*, 274 U.S. 357, 375-78 (1927) (Brandeis, J., concurring), *overruled*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). "The purpose of constitutional protection of speech is to foster peaceful interchange of all manner of thoughts, information, and ideas. Its policy is rooted in faith in the force of reason." *Kunz v. New York*, 340 U.S. 290, 302 (1951) (Jackson, J., dissenting).

69. See T. Lowi, *supra* note 59, at 289-91.

phisticated, but always elaborate communication of the affluent highly-organized. They do their best to filter out the decibels so that they may penetrate to the merits of the arguments. They retire and consider the positions. And then they choose the course which seems wisest. It may be the course of the noisy or the course of the quiet. At times it may be the course advocated by an apparent minority. But it is a course chosen on the merits.

Thus, what the pluralist rhetoric obscures is that *ideas*, and not intensities, form the heart of the expression which the First Amendment is designed to protect.<sup>70</sup> Money may register intensities, in one limited sense of the word, but money by itself communicates no ideas. Money, in other words, may be related to speech, but *money itself is not speech*. Courts ought to judge restrictions on giving and spending accordingly.

The 1974 campaign reform law moves us closer, even if but a small distance, toward the idealized First Amendment model of self-government sketched out above. Herein lies the key to the statute's importance. Here is why, far from stifling First Amendment values, it actually promotes them. The ceilings on giving and spending take from wealthy citizens, candidates, and organizations only certain limited political advantages totally unrelated to the merits of their arguments—advantages which all too frequently *obscure* the merits of the arguments. In place of unlimited spending, the law encourages all to emphasize less expensive face-to-face communications efforts,<sup>71</sup> exactly the kinds of activities that promote real dialogue on the merits and leave much less room for manipulation and avoidance of the issues.

I can hear the pluralists' rejoinder. You are deeply unrealistic, they might charge. You swallow an 18th-century idealized vision of a process and ignore the play of organized groups and private interests. And indeed if they are right that the "public interest" is nothing more than the outcome of the group process, then we should release our

70. Cf. Freund, *Commentary*, in A. ROSENTHAL, *FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS* 72, 74 (Citizens' Research Found. 1972):

The right to speak is, I submit, more central to the values envisaged by the First Amendment than the right to spend. We are dealing here not so much with the right of personal expression or even association, but with dollars and decibels. And just as the volume of sound may be limited by law, so the volume of dollars may be limited, without violating the First Amendment.

....

....[Large contributors] are operating vicariously through the power of their purse, rather than through the power of their ideas, and again I would scale that relatively lower in the hierarchy of First Amendment values.

71. See note 43 *supra*.

grasp on the First Amendment ideal and let the pulling and hauling proceed without hindrance.

But we need not accept the pluralists' proposition. We simply are not so helpless that we must blindly equate the outcome of the group pressure process with the public interest.<sup>72</sup> To return to our gun control example, it is certainly possible to assert—indeed, the case is compelling—that the pluralist process has thwarted the public interest for years.

Realism consists in acknowledging the group process and allowing for it. Group activity is an essential and desirable part of the American system, and indeed the First Amendment recognizes this: it protects the right of assembly and the right of association. But it is simply not true that the play of influence, of competing intensities, is *all there is* to politics. The play of ideas, the sifting of good ideas from bad, of truth from falsehood, of justice from injustice—all these are essential parts of our system as well. One cannot deny this without denying the very essence of the First Amendment. One cannot deny this without letting realism descend to cynicism.

The Framers were not so cynically realistic when they established our form of government. Had they been, we might not have had a First Amendment. A government dedicated to liberty was more a

72. For a thorough development of this point, see Barry, *The Public Interest*, in *THE BIAS OF PLURALISM*, *supra* note 54, at 159.

Some of the pluralist writers who have equated the public interest with the outcome of the group process are listed in note 57 *supra*. Even so perceptive a pluralist writer as Robert Dahl, although he avoids the simple equation of the earlier writers, joins with other pluralists in concluding, based on his relentlessly empirical approach, that the concept "public interest" is fundamentally meaningless. See R. DAHL, *A PREFACE TO DEMOCRATIC THEORY*, 25-27, 69 n.5 (1956). Cf. D. TRUMAN, *supra* note 51, at 50-51 (a totally "inclusive interest" within a nation does not exist).

Dahl elaborates these views in the course of analyzing Madison's famous definition of "faction," which is set forth in *The Federalist No. 10*. Madison's essay is often regarded as a precursor of pluralist thinking, but the passage containing the definition makes it clear that Madison did not regard the "public interest" concept as meaningless, nor did he regard the essentially moral quest for its attainment as an unworthy or futile enterprise. Moreover, the passage suggests—and the full essay makes clear—that he considered interest group competition as an evil to be rendered tolerable, not as a democratic safeguard to be embraced:

By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, *adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.*

*THE FEDERALIST* No. 10, at 57 (J. Cooke ed. 1961) (emphasis added).

Lowi demonstrates that the moral dimension of Madison's definition is often lost when pluralists invoke Madison as a spiritual forebear. David Truman, he points out, quotes the definitional passage but leaves off the crucial italicized clause, thereby removing from "faction" the pejorative connotation Madison intended and incidentally obscuring Madison's moral concern. T. LOWI, *supra* note 59, at 296 (discussing D. TRUMAN, *supra* at 4).

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visionary than a realistic enterprise in those days. The world had scarcely known such a creature. But the Framers persevered. And the power of that vision of self-government which they wrote into the Constitution and the Bill of Rights has earned the respect even of realists. As Meiklejohn put it: “[T]he adoption of the principle of self-government . . . set loose upon us and upon the world at large an idea which is still transforming men’s conceptions of what they are and how they may best be governed.”<sup>73</sup> “No institution,” Charles Black has written, “can be as perfect, in men or work, as its ideal model, [but] the very mark of the truly living institution is that it has an ideal model which is always there nudging its elbow.”<sup>74</sup> The 1974 law, in its own modest way, escalated the nudge to a gentle shove.<sup>75</sup> If we are realistic, and not cynical, we will hold fast to such fragments of progress toward the ideal the Framers held out to us.

73. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 264.

74. C. BLACK, *THE PEOPLE AND THE COURT* 50 (1960).

75. The court of appeals opinion in the *Buckley* case came to a close on a similar note:

[T]hese latest efforts on the part of our government to cleanse its democratic processes should at least be given a chance to prove themselves. Certainly they should not be rejected because they might have some incidental, not clearly defined, effect on First Amendment freedoms. To do so might be Aesopian in the sense of the dog losing his bone going after its deceptively larger reflection in the water.

519 F.2d at 897-98.