

BUCKLEY, RUPERT MURDOCH, AND THE PURSUIT OF EQUALITY IN THE CONDUCT OF ELECTIONS

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The American people are frustrated with the way that electoral campaigns are conducted in this country. More and more money is devoted to political campaigns.¹ And, the high cost of campaigning for public office drives office-seekers to devote more and more time to fundraising. Such fundraising pressure creates genuine risks that candidates will adjust their policy positions to accommodate the demands—real or perceived—of those providing the contributions. At the very least, fundraising pressure allows monied interests to buy access to officeholders that others do not fairly enjoy.

Moreover, voters are further frustrated by the nature of political discourse in this country—by its superficial form and its lack of substance. With all the money that is spent for television advertisements, campaign speech ends up involving little more than a series of rhetorical “sound bites” with insufficient attention to the complexities of public policy issues and the details of legislative proposals.

In addition, the public fears—perhaps reasonably, perhaps not—that election outcomes are determined not on the basis of the comparative merits of the candidates and their policy positions, but on the basis of the capacity of candidates to outspend their opponents.² Fi-

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1. Since 1976 the aggregate costs of House and Senate general election campaigns increased more than sixfold (from \$99 million in 1976 to \$626 million in 1996) while the cost of living went up less than three times. The average winning House Candidate spent \$7,200 in 1976 and \$661,000 in 1996. The average winning Senate Candidate spent \$609,100 in 1976 and \$3.6 million in 1996. Kenneth Weine, “The Flow of Money in Congressional Elections” (The Brennan Center for Justice at New York University, 1997) at 17.

2. There are competing claims as to whether or not campaign spending dictates the outcome of elections. According to Elizabeth Drew, politicians’ access to money is vital and, in more cases than not, decisive. She cites the 1982 senatorial election campaign in which winners outspent the losers in 27 of the 33 races. In five of the six, where the margin of victory was four percent or less, the winners spent twice as

nally, observers of our political system remain concerned that the current regime of campaign financing reinforces the competitive advantages enjoyed by incumbents.³

Similar frustrations are often expressed by professional politicians and office-seekers. Such office-seekers often find themselves on an endless merry-go-round of fundraising events. Driven by the high costs of conveying their messages on television and through the mail, coupled with an unsurprising desire to gain a competitive advantage over their opponents, candidates must raise and spend an increasing amount of time and energy to raising campaign monies—time and energy that could be better employed developing and implementing substantive policies.⁴

These frustrations have led to renewed demands for campaign finance reform. Such reform commonly seeks to accomplish two goals: first, to reduce the unfair influence that those with money acquire under the current system; and second, to equalize the electoral competition and to create “fair fights” between and among candidates.

much as the losers. In contrast, Jonathan D. Salant states that excessive campaign financing does not always ensure a victory. He cites John Dyson’s \$6 million effort to win the Democratic Senate nomination against Alfonse D’Amato in 1986. In 1994, both Oliver North who spent \$21 million on his campaign and Michael Huffington who spent a record \$30 million were also defeated by their opponents. Salant argues that the key is not how much money candidates spend on elections but how they spend it. See ELIZABETH DREW, *POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION* 25 (1983); Jonathan Salant, *Big Money Does Not a Win Make*, CONG. Q. WKLY. REP., Oct. 26, 1996, at 3082.

3. See Marty Jezer, Randy Kehler & Ben Senturia, *A Proposal for Democratically Financed Congressional Elections*, 11 YALE L. & POL’Y REV. 333, 338-340 (1993) (providing statistics from the 1992 congressional elections, when House of Representatives incumbents spent 300% more on election campaigns than the insurgents, and Senate incumbents spent 400% more on election campaigns than insurgents); cf. Jamin B. Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL’Y REV. 273, 290-291 (1993) (stating that, in addition to spending more money, incumbents save money by using office resources such as unsolicited mass mailings to constituents, speechwriters, press secretaries and local district offices, for political campaigns). Raskin and Bonifaz estimate that an incumbent congressman receives \$200,000 per two-year period through these political self-subsidies. See *id.* In the 1994 campaign, 26 senators raised a total of \$25.5 million more than their opponents. In preparation for the 1998 election, 30 senators have raised an average of \$1.4 million. This is 28% more than the \$1.1 million averaged by incumbents in advance of the 1992 elections. See Jonathan Salant, *Incumbents Filling ‘98 Coffers Earlier Than Ever*, CONG. Q. WKLY. REP., Feb. 22, 1997, at 491-94; Ceci Connolly, *Incumbents’ Cash Advantage Over Other Challengers Continues*, CONG. Q. WKLY. REP., July 23, 1994, at 2070.

4. See Vincent Blasi, *Free Speech and the Widening Gorge of Fundraising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1302-1305 (1994); see also DAVID PRICE, *THE CONGRESSIONAL EXPERIENCE: A VIEW FROM THE HILL* 26 (1992).

Many of those urging reform insist that these goals can only be achieved if spending limits are imposed upon candidates and their supporters. But in *Buckley v. Valeo*⁵ the Supreme Court held that Congress's efforts, under the 1974 Federal Election Campaign Act, to impose spending limits in connection with federal elections impermissibly restricted the First Amendment rights of individuals to engage in political expression.

Consequently, current demands for campaign finance reform are frequently accompanied by the claim that the Supreme Court's decision in *Buckley* was seriously flawed; that the decision misreads and misapplies First Amendment doctrine; and that it stands as the principal obstacle to meaningful reform. Critics such as Professors Ronald Dworkin and Burt Neuborne have argued that the Supreme Court should seriously reexamine *Buckley*.⁶ Senator Bill Bradley has gone further, suggesting that *Buckley* should be overturned by constitutional amendment.⁷ In identifying the "structural crisis of American politics," Professor Jamin Raskin also invites a reexamination of *Buckley*, its analytic premises and its impact on our political institutions.⁸

It is almost certainly the case that any discussion of campaign finance reform—whether applied to candidate elections or to ballot proposals—must take account of *Buckley*. And *Buckley* may, indeed, be flawed in some important respects. But, it is also a mistake to believe, as some have urged, that *Buckley* rests upon a serious misunderstanding of the First Amendment or that it singularly stands in the way of an electoral system uninfluenced by money.

Accordingly, the first matter that I should like to discuss is the *Buckley* decision itself, and in particular whether the Supreme Court's decision in that case is out of step with First Amendment precedent and whether the decision serves as the principal impediment to meaningful and effective campaign reform. My answer to the first of these questions is that *Buckley* is well-grounded in precedent. My answer to the second question is that it is not the *Buckley* decision but the complex reality of political communication in this country that renders it virtually impossible to achieve either complete competitive equality among candidates or the elimination of the capacity of monied inter-

5. 424 U.S. 1 (1976).

6. See Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. OF BOOKS, Oct. 17, 1996, at 19; Burt Neuborne, *One Dollar, One Vote?*, THE NATION, Dec. 2, 1996, at 21.

7. See Bill Bradley, *Congress Won't Act. Will You?*, N.Y. TIMES, Nov. 11, 1996, at A15.

8. See Raskin & Bonifaz, *supra* note 3, at 314-31.

ests to acquire access that others do not equally enjoy. A proper sense of that reality is essential to any serious discussion of campaign finance reform. And that reality involves, in part, a recognition that our political landscape is populated by a broad range of institutions including the press, corporate entities, trade associations, issue-advocacy organizations, community groups, political parties, candidates and voters, all of whom participate in public debate about policy issues. That reality also involves, in part, a recognition that—given the outlets for political and ideological expression—those with money will inevitably find ways to speak more loudly or more frequently than those without.

The second matter that I shall address is whether meaningful campaign finance reform can be achieved under the current analytic framework imposed by *Buckley*. My answer to this question is that, although the complete eradication of money as a factor within our electoral system is not possible, limited reforms driven by more modest ambitions than were recognized in the enactment of the Federal Election Campaign Act remain possible even without overturning *Buckley*.

My final point is that, even if significant campaign reform were possible in connection with candidate elections, such reforms would be far more difficult—if not impossible—to implement in connection with ballot initiatives.

I

In 1974, in the wake of the Watergate scandal, Congress enacted an elaborate statutory scheme designed to reform significantly the rules governing the financing of federal election campaigns.⁹ The bedrock of Congress's reform effort involved the imposition of monetary limitations on campaign contributions and expenditures. These measures were subsequently reviewed by the Supreme Court. In *Buckley*, the Court essentially held that the statutory limits on campaign expenditures violated the First Amendment while the restrictions on campaign contributions remained valid.¹⁰

The voiding of spending limits rested upon two seemingly unarguable propositions: first, that a "core purpose" of the First Amendment is to protect citizen discussion of public affairs, including the qualifications of candidates seeking public office; and second, that

9. Federal Elections Campaign Act Amendments of 1974 Pub. L. No. 93-443 (codified as amended at 2 U.S.C. §§ 431-456 (Supp. 1974)).

10. 424 U.S. at 3.

“[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”¹¹

Critics of *Buckley* have concluded that the Court’s First Amendment analysis was deeply flawed. Professor Neuborne has accused the *Buckley* Court of creating a “constitutional straitjacket” that erroneously equates money with speech.¹² Professor Dworkin has argued that *Buckley* was a “mistake, unsupported by precedent and contrary to the best understanding of prior First Amendment jurisprudence.”¹³

In fact, the *Buckley* Court did not insist that money equals speech. But, the Court did recognize that political expression and money are inextricably bound together and that restrictions on campaign spending necessarily curtail, at the least, the quantity of expression. This conclusion seems well-grounded in reality and not, in any respect, at variance with settled First Amendment jurisprudence.

Indeed, on this matter, the *Buckley* decision remains consistent with a long line of cases where the Court has recognized that money and speech are closely related and that laws restricting the financial components of communicative enterprises will necessarily burden the underlying expression of those enterprises. For example, *Grosjean v. American Press Co.*¹⁴ involved an effort by Louisiana Governor Huey Long to retaliate against the big city newspapers that had been critical of his administration. Long persuaded the Louisiana Legislature to impose a tax on newspapers with a circulation in excess of 20,000 copies per week. Not by coincidence, the tax applied to those newspapers that were most critical of Long. The newspaper publishers sued claiming that the tax violated the First Amendment. The Supreme Court agreed—concluding, in part, that by burdening the newspapers’ financial interests Louisiana had also burdened impermissibly their free speech interests.¹⁵ *Grosjean* has been followed by a series of cases holding that discriminatory tax burdens on the press would be found to violate First Amendment rights.¹⁶

11. *Id.* at 19.

12. Neuborne, *supra* note 6, at 21.

13. Dworkin, *supra* note 6, at 24.

14. 297 U.S. 233 (1936).

15. *Id.*

16. See *Arkansas Writers’ Project, Inc. v. Ragland*, Comm’r of Revenue of Arkansas, 481 U.S. 221 (1987); *Minneapolis Star v. Minnesota Comm’r of Revenue*, 460 U.S. 575 (1983); *cf. Murdoch v. Pennsylvania*, 319 U.S. 105 (1943).

Similarly, in *New York Times v. Sullivan*,¹⁷ the Court held that defamation actions brought by public officials against critics of official behavior were subject to First Amendment constraints.¹⁸ In reaching this conclusion, the Court implicitly recognized the close correlation between money and speech and concluded that potential exposure to damage awards in public official defamation cases would inevitably inhibit robust discussion of public issues.

In *Meyer v. Grant*,¹⁹ the Court reviewed a Colorado statute that prohibited the payment of money to persons circulating petitions for ballot initiatives. In holding the prohibition unconstitutional, the Court observed:

The refusal to permit appellees to pay petition circulators restricts political expression in two ways: First, it limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes less likely that appellees will garner the number of signatures necessary to place the matter on the ballot²⁰

More recently, in *Simon & Schuster v. Members of New York State Crime Victims Board*,²¹ the Court reviewed the New York "Son-of-Sam" law. Under the statute, persons who were convicted or accused of crimes and who received monies from a published portrayal or an aired account of their crimes were required to transmit the monies to the State Crime Victims Board to be held in an escrow account for crime victims. New York defended the statute, in part, by arguing that criminals remained free, under the law, to tell their crime stories; they would simply be restricted in profiting from their portrayal. Again, the Supreme Court recognized the close interplay between money and speech and concluded that by limiting the financial incentives for the speaker, New York was burdening the underlying expressive activity and that, under the circumstances, New York's statutory regime could be upheld only if "narrowly tailored" in the pursuit of compelling interests.²² Upon further finding that the New York statute could not survive such scrutiny, the Court held the "Son-of-Sam" law unconstitutional.²³

In sum, the Court has noted, in a variety of circumstances, that speech and money are often closely related and that limitations on the

17. 376 U.S. 254 (1964).

18. *See id.* at 279-80.

19. 486 U.S. 414 (1988).

20. *Id.* at 422-23 (citation omitted).

21. 502 U.S. 105 (1991).

22. *Id.* at 123.

23. *See id.*

financial components of expression can burden expression itself. The application of that observation to the campaign finance regime at issue in *Buckley* can be regarded neither as empirically insupportable nor as doctrinally aberrant. Indeed, if the *Buckley* Court erred at all with respect to this matter it was in its failure to treat limitations on contributions as it did limitations on spending. The conclusion, advanced by the *Buckley* majority, that contributions—in contrast with campaign expenditures—involve only an indirect form of political expression forms the weakest facet of the Court's opinion.

Moreover, in voiding the statutory spending limits, the *Buckley* court did not simply conclude that the statute burdened “core political speech” and that, consequently, the spending limits were unconstitutional *per se*. Rather, the Court noted that the statute imposed serious burdens on political expression but that those seeking to justify spending limits might, nonetheless, come forward with powerful countervailing interests that could be effectively advanced by such restrictions and that under such circumstances the limitations would be sustained.²⁴

In this regard, the Court explored two basic justifications for the limitations on campaign spending imposed by the Federal Election Campaign Act. The first justification was described as a concern about corruption or the appearance of corruption. As suggested above, the concern involved a fear that money well spent would, at the least, buy access to public officials and could, indeed, purchase inappropriate influence over actual policymaking.²⁵ The second justification involved an interest in equalizing speech so that elections could proceed as “fair fights” between or among the contestants.²⁶ The *Buckley* Court rejected each of these interests as inadequate to justify the spending limits imposed by the statute.²⁷ In so doing, the Court emphasized the ineffectiveness of the expenditure limitations as instruments for ending the influence of money or for equalizing electoral contests.

To appreciate how the Court arrived at this conclusion one must consider, at the outset, the breadth of the campaign finance statute under review. The statute did not attempt to limit only expenditures by candidates or by political parties. Rather, the Federal Elections Campaign Act attempted to reach virtually the entire political community—including issue-advocacy organizations, corporate entities, la-

24. See *Buckley*, 424 U.S. at 44-45.

25. See *id.* at 43-47.

26. See *id.* at 48.

27. See *id.* at 39-59.

bor organizations and individual proponents of policy positions—and sought to limit any “expenditure . . . relative to a clearly identified candidate.”²⁸ In reviewing this provision, the Court examined the claim that the term “relative to” a candidate was vague and that it swept too broadly.²⁹ On this issue, the Court noted that “[b]ecause First Amendment freedoms need breathing space to survive, government may regulate only with narrow specificity.”³⁰ The Court further found that the term “relative to” did not satisfy this constitutional standard.³¹ Concluding that the term placed individuals and groups that engage in issue-oriented expression at risk, the Court observed that “the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application”³² and that the language of the statute “blankets with uncertainty whatever may be said [and] compels the speaker to hedge and trim.”³³

Consequently, the Court concluded that in order to avoid constitutional invalidation the statutory spending limitations must be held applicable “only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.”³⁴ And the Court went on to observe that “so long as persons and groups eschew [express advocacy] . . . they [must remain] free to spend as much as they want to promote the candidate and his views.”³⁵

But, after narrowing the spending limits provision in this fashion, the Court further concluded that the provision could not effectively advance the interests that the statute was intended to pursue. The Court reasoned that

[i]t would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have difficulty devising expenditures that skirted the restrictions on express advocacy . . . but nevertheless benefited the candidate’s campaign. Yet, no substantial societal interest would be served by a . . . provision designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited

28. *Id.* at 41.

29. *Id.*

30. *Id.* at 41, n.48 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

31. *Id.* at 42.

32. *Id.*

33. *Id.* at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

34. *Id.* at 44.

35. *Id.* at 45.

sums of money in order to obtain improper influence over candidates for elective office.³⁶

One might, perhaps, respond to the Court's reasoning on this issue by suggesting that the Court gave up too easily and that the federal judiciary does not generally invalidate federal statutes—especially statutes of this importance—merely because some persons might successfully skirt the restrictions. But such a response fails to appreciate how fundamentally ineffective the statute would have been as an instrument to reduce the influence of monied interests—even if it had been upheld by the *Buckley* Court.³⁷

To demonstrate this point, imagine if the *Buckley* Court had upheld the spending limits imposed by the Federal Election Campaign Act. Under the statute most individuals were limited in the amount they could spend to advocate the election or defeat of a candidate for federal office. But the statute exempted the “institutional press” from the spending limits.³⁸ The statute never attempted to bar newspapers from spending money on editorials or on columns that would take positions supporting some candidates or opposing others. And even *Buckley*'s sharpest critics would likely concede that if the statute had tried to limit newspapers in this fashion, such a limitation would violate the First Amendment.

Thus, the statute at issue in *Buckley* created an Orwellian regime in which all potential speakers were treated equally, except that some were treated more equally than others. Most individuals were limited in their campaign spending but Rupert Murdoch and his press colleagues were not. This regime invites an obvious question: If it is a First Amendment violation to tell Rupert Murdoch that he cannot publish an editorial in the *New York Post* supporting or opposing a candidate, by what logic is it permissible or even appropriate to tell Murdoch's next door neighbor that she cannot purchase an advertisement in the *New York Times* in order to express support for or opposition to a candidate? The distinction cannot turn on the fact that Murdoch owns a printing press while the next door neighbor does

36. *Id.*

37. See *United States v. National Treasury Employee Union*, 115 S. Ct. 1003, 1017 (1995) (“When the government defends a regulation on speech it must do more than simply ‘posit the existence of the disease sought to be cured.’ . . . It must demonstrate that the recited harms are real, . . . and that the regulation will in fact alleviate these harms in a direct and material way.” (quoting *Turner Broadcasting Sys. Inc. v. Federal Communications Commission*, 114 S. Ct. 2445, 2470 (1994) (Kennedy, J., plurality))); see also *Carver v. Nixon*, 72 F.3d 633, 638 (8th Cir. 1995) (citing the above-quoted language in *National Treasury* with approval).

38. See *Buckley* at 51, n.56; 2 U.S.C. § 437a.

not.³⁹ But once you allow Rupert Murdoch to spend as much as he chooses to support or oppose candidates—as apparently we must do under the First Amendment—the entire regime of spending limits begins to unravel.

Even if one were to draw the line at newspapers and even if one were to say that Murdoch and his colleagues are entitled to unlimited speech but other individuals and entities are not, in this situation the lack of uniformity in the enforcement of spending limits would undermine the capacity to achieve either the equality or the anti-corruption goals of the statute. The interest in equalizing the competition between candidates and the delicate equipoise between competing forces would be immediately distorted by giving a local newspaper unlimited opportunities to support or oppose candidates, while effectively prohibiting the candidates or their supporters from responding with equal intensity and frequency either in the local newspaper—if it would choose to accept an oppositional advertisement—or in some other forum.

Even the interest in guarding against corruption is undermined by permitting only the Murdochs to engage in unlimited electoral advocacy. Consider, in this regard, that Murdoch owns not only the *New York Post*, but other newspapers, a television network and other news outlets. If Murdoch has an unlimited right to support or oppose candidates in editorials and columns; and if such expression effectively buys access to politicians; such access will be purchased not only on behalf of the editorial staff of the newspaper that published the editorial but on behalf of the entire conglomerate. Other newspapers and news magazines have similarly elaborate, interlocking corporate relationships. Indeed, there appear to be far less than six degrees of separation between top level corporate executives these days. Seen in these terms, the interest in guarding against corruption is also eroded by permitting the print media to engage in unlimited electoral advocacy, as we are required to do under the First Amendment.

It remains possible, however, to fashion a conceptual model for campaign reform that is different from that offered by the 1974 Federal Election Campaign Act. Under such a model, no restrictions would limit spending by general members of the public, but spending limits would be imposed upon the electoral contestants, namely, the competing candidates and their political parties. Indeed, there is precedent in everyday experience for the proposition that, in regulating

39. This distinction is reminiscent of the A.J. Liebling quip that “[f]reedom of press is guaranteed only to those who own one.” A.J. LIEBLING, *THE PRESS* 32 (2d rev. ed. 1975).

some limited expressive events, government may restrict and thereby equalize speechmaking opportunities. For example, in the traditional town meeting, when an agenda is set, it is not uncommon to limit and to equalize the amount of time that each resident can speak on each of the issues at hand. The town meeting constitutes a narrow and ordered expressive event where equalizing the speechmaking opportunities for each resident would seem entirely consistent with the First Amendment. Similarly, when lawyers argue cases before appellate tribunals, the courts typically give each side an equal opportunity to speak. In these specialized fora, no serious objection could be made by a litigant claiming a First Amendment right to prattle on endlessly in oral argument before the court.

In like regard, one might argue that an electoral contest is a specialized expressive event and that, accordingly, the direct contestants may be permitted to compete but only on the condition that they abide by specified rules of the contest—including spending limits. Such an approach differs markedly from that undertaken by the 1974 statute,⁴⁰ at issue in *Buckley*, which not only tried to equalize speech among the contestants but also tried to limit the speech of the community-at-large.

But even a more limited conceptual model is not without constitutional and practical difficulties. First, in *Buckley* the Court addressed a provision of the federal statute that limited the amount of personal or family money that candidates could spend on their own campaigns. The Court found such restrictions unconstitutional. This conclusion rested, in part, upon the perception that, as a matter of logic, candidates cannot be found to corrupt themselves with their own money and also upon the observation that “the use of personal funds reduces the candidate’s dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the [statute’s] contribution limitations are directed.”⁴¹ In addressing the interest in achieving equality among candidates, the Court suggested that with so many other sources of funding available, a limitation on personal expenditures by candidates would not likely yield equality or “fair fights” among contestants.⁴²

In advancing this latter argument, the *Buckley* Court identified the principal problem that would be encountered even by a campaign

40. In some sense the 1974 statute did embrace this more limited conceptual model to the extent that it conditioned public financing upon an agreement by the candidates to abide by spending limits. See 2 U.S.C. § 431 *et seq.* (Supp. 1974).

41. *Buckley*, 424 U.S. at 53.

42. See *id.* at 54.

finance scheme that focuses exclusively upon the direct participants in the electoral contest and that seeks—in the interest of equalizing the competition—to impose spending limits only on the candidates and their political parties. Such an approach might well be consistent with a conception of specialized expressive events where contestants are given an equal but not unlimited opportunity to speak. Such an approach might well even-out the competition with respect to candidate-controlled speech. And this achievement may represent a marginal improvement over the current situation.

But, such an approach will not equalize speech within the broader marketplace. Rupert Murdoch will continue to spend as much as he can afford in support of the candidates of his choice. Monied interests will continue to find ways to express their views. And those with money will continue to enjoy more speechmaking opportunities than those without. Moreover, inasmuch as elections are generally competitive enterprises, when spending limits are reached by the candidates, “independent” expenditures will be “encouraged.” And, even without coordination between campaigns and big spenders, the candidates will notice who is speaking and what is being said provided that the speaker has a large enough megaphone. Accordingly, Rupert Murdoch will continue to enjoy access to politicians because his money—when coupled with his ownership of a printing press—will permit his views to reach a wide audience and, for this reason at the least, politicians will take note of what Murdoch is saying.

For all of these reasons, it is not *Buckley* that serves as the principal obstacle to a statutory system of spending limits designed to eliminate the influence of monied interests and to equalize electoral competitions. Practical realities flowing, in large measure, from the broad variety of institutions, organizations, and individuals that debate political issues in our country render it virtually impossible to “close all the loopholes” in pursuit of the goal of equality or the goal of eliminating the influence of monied interests.

II

But, allowing that *Buckley* remains an unavoidable fixture of our constitutional landscape and that Rupert Murdoch remains an inescapable ingredient of our political culture, some campaign reforms are, nonetheless, possible. Such reform efforts—rather than focusing on spending limits—should look to a variety of other mechanisms including public financing, free television time, and franking privileges for all candidates. The best way to reduce the undesirable influence of money is to reduce the financial dependency of candidates.

Currently, this dependency is driven by the overwhelming costs of communicating with the electorate. For candidates seeking national and statewide offices, the principal medium of communication is television. The cost of television advertising will generally exceed 30% of a candidate's budget.⁴³ At the local level, mailing is the principal medium of communication and, even at this level, the costs are significant. But, if we reduce these costs through public financing, free television time, and franking privileges for all ballot-qualified candidates, we can thereby reduce the dependency of candidates on money and the influence of monied interests on politicians.

Public financing and franking privileges are comparatively easy to accomplish—all that is necessary is money. Proposals for free television time are more complicated. During the most recent presidential election, the national television networks responded to the need for free air-time by offering the presidential candidates snippets of time to air political advertisements.⁴⁴ This offer represents a modest step in the right direction. But, in order to ease significantly the monetary pressure on candidates and to reduce realistically the undesirable consequences of such pressure, substantially more free television time is needed—and not only for presidential candidates but for other office-seekers as well.

The television networks, as private entities with obligations to shareholders, are not likely to contribute large amounts of air-time voluntarily. And the question of whether such air-time can be compelled, as a condition of licensure, remains unresolved—with Supreme Court precedent pointing in conflicting directions.

43. Depending on the particular race, 30% to 90% of federal campaign budgets is devoted to television advertising. Two-thirds of the funds raised for presidential campaigns are now spent on television advertising time; 42% of funds in Senate races and 30% of funds in House races are also spent on television advertisements. Political candidates spent \$400 million on television commercials last year compared with \$25 million in 1972. See Dan Balz, *Clinton Presses Broadcasters to Give Candidates Free Time; Requirement Urged as Price for New Digital Licenses*, WASH. POST., Mar. 12, 1997, at A7; FCC Chairman Reed E. Hundt, *Democracy in a Digital Age*, Address at the Annenberg Public Policy Center, University of Pennsylvania (Sept. 12, 1997), <<http://www.fcc.gov/Speeches/Hundt/spreh745.html>>.

44. See Jeffrey Taylor, *Clinton and Dole Accept Fox Offer for Free TV Time*, WALL ST. J., Sept. 12, 1996, at B9; Ed Bark, *Free Campaign Air Time Proposals are Paying Clinton, Dole to Speak During CBS News Slots*, DALLAS MORNING NEWS, Sept. 28, 1996, at 18A. For a discussion of free air time proposals in the 1996 presidential election, see Chris McConnell, *Free-TV Coalition Seeks Roadblock for Candidates; Group for Standardized Approach to Free Airtime*, BROADCASTING & CABLE, Sept. 9, 1996, at 19.

In *Columbia Broadcasting System v. Democratic National Committee*,⁴⁵ two organizations that opposed the United States involvement in the Vietnam War tried to place advertisements on television stations expressing opposition to the War and were denied the opportunity to do so. In rejecting the advertisements, the broadcasters insisted that they maintained a general policy of not selling advertising time to groups wishing to speak out on policy issues. The broadcasters further asserted that they had a First Amendment right to maintain such a policy. The Supreme Court ultimately found in favor of the broadcasters. In so doing, the Court acknowledged that “[b]alancing the various First Amendment interests involved in the broadcast media and determining what best serves the public’s right to be informed is a task of great delicacy and difficulty.”⁴⁶ The Court went on to conclude that this delicate balance was struck by Congress in its imposition of a “fairness doctrine” but that broadcasters retained “significant journalistic discretion,”⁴⁷ and, also, that the “fairness doctrine” did not confer upon any member of the public a right “to broadcast his [or her] own particular views on any matter.”⁴⁸

But, in 1971, Congress enacted a measure that bestowed upon individual candidates for federal elective office a right to purchase paid political broadcasts on behalf of their candidacies. And in *Columbia Broadcasting System v. Federal Communications Commission*,⁴⁹ the Supreme Court upheld this provision in the face of a claim by broadcasters that the measure intruded impermissibly on their First Amendment right to decide upon the content of programming and advertising that was to be aired.⁵⁰

But, even if the major networks cannot be compelled by law to provide free air-time, other resources can be deployed. Currently unused portions of the electromagnetic spectrum can be developed to create television channels—in the nature of C-SPAN channels—exclusively for candidates.⁵¹ “Public Access” cable channels provide

45. 412 U.S. 94 (1973).

46. *Id.* at 102.

47. *Id.* at 111.

48. *Id.* at 113.

49. 453 U.S. 367 (1981).

50. *See id.* at 397.

51. In April 1997, federal regulators offered 1600 television stations an extra channel on the UHF and VHF television dial. The new channels will allow television stations to begin broadcasting a digital high definition television signal known as HDTV. The Federal Communications Commission requires that the stations return the channels in 2006. The channels will then be auctioned, potentially raising billions of dollars from the sales. The licenses issued by the FCC to broadcasting systems will also be subject to concrete and commensurate public interest obligations which may

further resources. Last term's Supreme Court decision regarding cable television reconfirmed the special constitutional status of the "public access" channels.⁵² In awarding monopolistic or near-monopolistic franchises to the cable companies, state and local governments have retained a limited number of these channels for public use as "electronic soapboxes," largely free from cable company editorial control. These channels can readily serve as instruments for providing candidates at the federal, state and local level with substantial amounts of free television time.

A fair question remains as to whether these channels will command sufficient viewers to render these proposals meaningful. Several considerations provide a basis for optimism. First, the public is tired of the twenty-second sound bites that pass for political discourse in this country. Therefore, any candidate that uses the "access" channels to engage in serious substantive policy discussions is likely to provoke public interest and thereby acquire a political advantage. Second, given the imitative nature of competitive politics, if one national candidate effectively utilizes this medium other candidates are likely to follow. There are, of course, no guarantees. But, if effectively employed, "candidate access" channels—in combination with significantly reduced mailing rates—can ease the fundraising pressures on office-seekers and begin the process of restoring public confidence in our political system.

III

The burden of my argument to this point has been to demonstrate that *Buckley* is not at variance with well-settled First Amendment doctrine; that cultural realities and economic inequalities rather than the *Buckley* decision serve as the obstacles to a truly egalitarian system for choosing office-holders; and, accordingly, that it is not possible to eliminate entirely the influence of money within the political process, but that some modest reforms are capable of reducing the financial dependency of candidates. The final point that needs to be addressed involves an examination of Professor Raskin's goals and remedial pro-

include free air time for political candidates. See Dan Carney, *Billion-Dollar Battle Takes Shape Over Unused TV Channels*, CONG. Q. WKLY. REP., Feb. 17, 1996, at 391-92; Joel Brinkley, *Lobbyists for TV Angle to Elude Rules to Return Free Channels*, N.Y. TIMES, June 25, 1997, at A1; FCC Chairman Reed Hundt, *Statement on President Clinton's Call for FCC Action to Require Free Air Time for Candidates* (Mar. 11, 1996), <<http://www.fcc.gov/Speeches/Hundt/st031197.html>>.

52. See *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996).

posals in connection with referendum elections.⁵³ On this matter I conclude that campaign reform measures—however inadequate they may be—operate far more effectively in connection with candidate elections than in connection with referendum elections.

In this regard, consider Professor Raskin's general remedial approach as well as some of his specific proposals. As an over-arching theme, Professor Raskin urges that his ideal system "would give opposing parties in an initiative election equal resources for their campaigns and require them to participate in a series of public debates."⁵⁴ He would do so in the interest of eliminating the capacity of monied interests to dominate the debate and in the further interest of achieving a "fair fight."

But how would Professor Raskin accomplish these goals? In the interest of equalization, would he tell Rupert Murdoch that his newspaper cannot publish an editorial on one side or another of the controversy? Would he say that Murdoch could publish the editorial only if he or his editor agrees to attend a public debate to defend his position? If Professor Raskin were to acknowledge that such restrictions directed against a newspaper would be unconstitutional, by what logic could such restrictions be directed against a citizens' committee opposed to nuclear energy? In fact, Professor Raskin's efforts to equalize speech become unbalanced—just as did the 1974 Federal Election Campaign Act—when its restrictions are applied to the citizenry-at-large but not to the Rupert Murdochs.

Professor Raskin's public financing proposal is similarly flawed. And it is flawed, despite the fact that it is well-intended, because the First Amendment demands that any significant regulation of political speech must advance compelling interests, that the means of regulation be precisely and effectively instituted. In this regard, how would the state identify the parties that would receive the money? The proponents of a measure might be identified on the basis of the initiative committee. But is the initiative committee to be recognized as the only authorized supporter of the ballot measure? Is the initiative committee to be the only recipient of government funds? An even more difficult problem arises when the state tries to identify the opponents of a ballot measure. In short, far more difficult problems arise with public financing as applied to referendum elections than exist when such measures are applied to candidate contests.

53. See Jamin B. Raskin, *Direct Democracy, Corporate Power, and Judicial Review of Popularly-Enacted Campaign Finance Reform*, 1 N.Y.U. J. LEGIS. & PUB. POL'Y 21.

54. *Id.* at 32.

Professor Raskin's proposal to limit campaign contributions in referendum elections raises other problems as well. His argument that corporate interests have corrupted ballot elections confuses the traditional corruption concerns with the traditional equalization argument.⁵⁵ In fact, major corporations may have corrupted the ballot elections. But, they have done so by dominating the debate. So understood, Professor Raskin's corruption argument is nothing but a dressed-up version of his equalization argument. And, in this regard, contribution limitations or even enforced spending limits will not work to equalize the speech, for the reasons suggested above. As long as Rupert Murdoch can remain outside of Professor Raskin's regulatory system and say as much as he wants, the equalization goal is rendered unstable. And if Murdoch can say as much as he wants, why not Murdoch's next door neighbor and why not Professor Raskin, and soon the entire equalization scheme begins to break apart.

Finally, Professor Raskin's efforts to impose a total prohibition on corporate spending and contributions are a source of concern. Does Professor Raskin mean to include within that prohibition various environmental groups or public interest organizations merely because they assume the corporate form? My guess is that Professor Raskin does not maintain such an interest and that he intends to exclude non-profit corporations from his prohibition and to include only profit-making public corporations that aggregate wealth without regard to the shareholders' support for the corporation's political ideals. But, if that is the case, does Professor Raskin mean to include the New York Times Corporation and to prohibit *The New York Times* from writing editorials on ballot issues? What about the Westinghouse Corporation or General Electric? Would Professor Raskin prohibit CBS or NBC from taking editorial positions on ballot proposals?

In the end, I think Professor Raskin presents quite a bleak picture. He effectively demonstrates the capacity of monied interests to dominate the debate and to affect the outcome of referendum elections. But, for the reasons discussed, his reformative suggestions raise serious practical and, therefore, constitutional problems.

Lawmaking by referendum is commonly criticized on the ground that such a mechanism lacks the mediating virtues of Madisonian republicanism and on the claim that it promotes democratic excesses in derogation of the interests of minority groups and individuals. But when the disturbing political reality—aptly described by Professor Raskin as one of monied domination in referendum elections—is cou-

55. *Id.* at 35-36.

pled with the inutility of Professor Raskin's proposed reforms, a conjunction is created that provides yet another reason beyond the common criticisms for concluding that ballot measures are an unwise mechanism for general lawmaking.