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Spending Limits and the Squandering of Candidates' Time

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Let me say first what an honor it is to participate in a conference intended to pay tribute to Judge Trager. Too often former deans do not receive credit commensurate with their labors and accomplishments. This gathering strikes me as a particularly fitting way to honor a man who has contributed a great deal to legal education.

Today I begin with a narrow agenda, a single idea, but an extravagant ambition. My narrow agenda is that I wish to address only the topic of campaign spending limits, and only the issue of their constitutionality in the face of First Amendment objections. The policy questions regarding whether spending limits are equitable, efficacious, and/or enforceable are deeply difficult and interesting but beyond my ken on this occasion.

My single idea is that spending limits are best justified on the ground that they protect candidates for office from having to devote an inordinate amount of their time to the task of raising money, time that would be far better spent in a variety of endeavors that directly serve the constitutionally ordained process of political representation.

My extravagant ambition is to persuade you that this "candidate time-protection" rationale for spending limits has the potential to radically transform the First Amendment calculus such that the Supreme Court could now uphold spending limits without repudiating any of the reasoning it used twenty-one years ago in *Buckley v. Valeo*[1] to strike them down.

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

Why, among the multifarious proposals for campaign finance reform, am I interested primarily in spending limits? It is not because I am offended by the sheer amount of political advertising on the airwaves in the weeks preceding an election. Nor do I favor spending limits because I think they would lead to more substantive messages or reduce the incidence of smear tactics; I doubt that either of these effects would ensue were candidates constrained by spending limits. My chief concern is with the way the very process of representation, and indeed the identity of the representatives themselves, has come to be dominated by the quest for contributions. And if the frenetic competition for campaign dollars is at the heart of the problem, no reform will succeed that leaves candidates free to spend all the money they can raise. If they can spend it, they will try to raise it, whatever the cost in time or distraction, if only for insurance against a feared challenge or difficulty down the road.

It is important to realize that this phenomenon of all-consuming fundraising is relatively recent, at least as a widespread phenomenon, indeed more recent than *Buckley* itself.[2] One might even say that a large part of the problem was *caused* by *Buckley*. Recall that the decision in *Buckley* invalidated spending limits while upholding rather severe contribution limits.[3] As a result, candidates needed as much money as ever to keep up with the competition but had to get that money in small units, inevitably in a more time-consuming manner. As the art of getting elected came to depend more and more on expensive electoral merchandising techniques—for example, tracking polls, focus groups, repetitive spot advertisements and demographically targeted direct mail—the quest for money quickened.[4]

The fact that the dimensions of the problem are new represents a constitutional opportunity. For *Buckley* was decided in a truly different electoral era. In 1976 the proponents of spending limits all but ignored the time-protection rationale. The Court's opinion

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[2] *See* HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM 54 (1992).

[3] *Buckley*, 424 U.S. at 29, 35-36, 38, 54-58.

[4] *See* ALEXANDER, *supra* note 2, at 78-81.

invalidating the limits did not discuss how a ceiling on spending might reduce the drain of fundraising. Rather, three other rationales were addressed and found wanting.

First, spending limits were defended on the ground that candidates, in need of ever escalating amounts of money, would be tempted to find ways to evade the low contribution limits. The Court found this claim insufficient because the link between spending limits and enforcement of the contribution limits seemed too attenuated to the Justices.[5]

Second, spending limits were defended as a means of opening up the opportunity to run for office to persons who lack either personal wealth or fundraising skills and connections. Fair play for impecunious candidates was the goal. The Court concluded that spending limits might facilitate certain candidacies but might also discourage others, particularly challenges that rely on heavy spending to overcome the advantages enjoyed by an incumbent already well known to the electorate.[6] The net effect was thus mixed and uncertain, and not a sufficient basis for regulating speech.

Third, spending limits were presented as a way to contain wasteful, excessive spending on campaigns. The Court understandably bristled at this suggestion, stating categorically that it is not the business of government to decide that Americans are hearing too much speech.[7]

It is significant that the Court never addressed the time-protection rationale for spending limits.[8] Not only is that rationale unburdened by adverse precedent and responsive to a problem that has grown exponentially since *Buckley* was decided, but the time-

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[5] *Buckley*, 424 U.S. at 55-56.

[6] *Id.* at 56-57.

[7] *Id.* at 57.

[8] In his dissent in *Buckley*, Justice White mentioned in passing the problem of time devoted to fundraising, *see id.* at 265, but the majority never considered the point. Nor did the briefs submitted to the Court in defense of spending limits devote any significant space to the time protection rationale. *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM L. REV. 1281, 1285-86 n. 15 (1994).

protection rationale also depends on a logic of harm that places it in a different and more favorable category, as a matter of First Amendment jurisprudence, than the rationales that failed in *Buckley*. Please let me explain.

As traditionally interpreted, the First Amendment erects a heavy presumption against restrictions on speech designed to eliminate or diminish the communicative impact of the message.[9] In this view, governments ordinarily cannot be trusted to evaluate messages. Even if they could be, the better, non-paternalistic way to control the undoubted harm that speech can do is to require audiences to do the heavy lifting of intellectual and moral evaluation.[10] This is particularly so when the partisan political advantage of the lawmakers or enforcement officials is likely to inform the assessment of speech-induced harm. When the *Buckley* Court held that government lacks the authority to try to balance electoral debate or limit excessive campaign advertising, the Justices drew heavily on this tradition of anti-paternalism.

The candidate time-protection rationale for spending limits does not rest on any kind of supposition regarding the communicative impact of the speech that is being regulated. Rather, the claim of harm concerns the process of *generating* the speech, to wit the harm to representation that occurs when candidates must spend so much of their time raising money. There is no distrust of audiences implicit in the limiting of spending for *this* purpose; the First Amendment's powerful anti-paternalism principle is not implicated.

In other contexts, the Supreme Court has recognized that the heavy presumption of unconstitutionality that stalks regulations designed to control the communicative impact of speech does not properly come into play when the concern is the harms that are caused by the activities that generate the speech in question. Non-obscene child pornography, for example, can be regulated on the basis of the risks to child actors that are endemic to the production

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[9] For a clear and comprehensive explanation of this principle see Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

[10] Justice Brandeis said it best: "[T]he fitting remedy for evil counsels is good ones." Whitney v. California 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

process, quite apart from any harm the finished product may do to viewers of such pornography.[11] Civil servants can be prohibited from certain forms of participation in election campaigns so as to prevent supervisors from coercing such participation or retaliating against workers who refuse to compromise their political independence.[12] Sanctions against illegal or unethical journalistic practices, such as breaching an explicit promise of confidentiality made to a source, can be enforced even if valuable news stories are lost or deterred as a result.[13]

These instances of regulating speech so as to prevent harms endemic to the process of generating the message do not raise the same kinds of concerns under the First Amendment as are presented by regulatory efforts aimed at the communicative impact of speech. Limits on campaign spending that are designed to protect the time of candidates fall into this category of laws that raise some degree of First Amendment concern, to be sure, but *not* the heavy presumption of unconstitutionality that properly governs efforts to control the communicative impact of speech. In this respect, the logic of *Buckley*, the logic of the anti-paternalism principle that lies at the core of the First Amendment tradition, is simply inapplicable.

By no means does this basic conceptual point complete the argument that is necessary to establish that campaign spending limits can be reconciled with the First Amendment. Many additional considerations need be taken into account, such as whether spending limits would really alter how candidates allocate their time and whether it is permissible under the First Amendment to limit the spending of candidates when other "independent" speakers with ideas relating to the election are not subject to spending limits.[14] Moreover, the single point I have developed here does not, by any stretch, demonstrate that spending limits can be justified as a matter of sound public policy quite apart from their consistency with fundamental First Amendment principles. In the

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[11] New York v. Ferber, 458 U.S. 747, 756-58 (1982).

[12] United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 566 (1973).

[13] Cohen v. Cowles Media Co., 501 U.S. 663, 669-71 (1991).

[14] I have canvassed some of those considerations in Blasi, *supra* note 8, at 1309-14, 1316-23.

brief time appropriate to this occasion, I have attempted only to convince you that the time-protection rationale goes far to vitiate the force of the *Buckley* precedent. That, as I said at the outset, is a narrow point but, given the stakes for our republican form of government, a profoundly important one.