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Comments on Campaign Finance Reform

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Realistically viewed, the public does not care much about campaign finance. However, the commentators and politicians involved with the campaign process care a great deal. Yet, of those who have expressed any view at all about our topic, few still believe that the existing distinction between expenditures and contributions is satisfactory.[1]

I agree with Judge Winter's statement that, from the point of view of the speaker, the distinction between contributions and expenditures is pretty weak. This is because the choice between the two is made by a donor, who looks for the most efficient way to espouse political ideas and pursue her political goals. Accordingly, in his celebrated *Buckley* brief, Judge Winter correctly argued that if we restrict the manner in which a donor may express herself, it will directly limit the articulation of her political goals. The distinction between contributions and expenditures is becoming even more infirm. Most importantly, the distinction does not deal with the present campaing scheme because it permits both the operation of PACS[2] and the contribution of so-called "soft money."

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[1] *See, e.g.*, Ralph K. Winter, *The History and Theory of* Buckley v. Valeo, 6 J.L. & POL'Y 93 (1997); Burt Neuborne, *One Dollar, One Vote?*, THE NATION, Dec. 2, 1996, at 21.

[2] PACs are political action committees defined as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. §431(4)(a) (1997).

While few will defend the existing process, even fewer politicians and aspiring politicians seem prepared to enact any serious change, especially after they have been successfully elected. Instead, they take to the existing process like fish take to water. The on-going spotlight on the Clinton and Gore fundraising activities is a particularly salient example.[3] I believe that the Clinton/Gore activities have drawn such heavy attention from the national media for two reasons: first, Mr. Clinton failed to separate himself from the Democratic National Convention when exposure began. Second, his continuous moralizing about the need for meaningful campaign reform attracted significant attention.[4]

Suppose, however, that Mr. Clinton had taken a different approach, the one that he has now embraced. Imagine he said, "Yes, access to the White House is for sale. I needed to raise funds for my presidency. After costly midterm election losses, I needed to amass a considerable war chest to outstage Mr. Newt Gingrich and his 'Contract on America.' So, I did what any sensible politician would do, I provided special access and assistance to persons who would help me out. For some it flattered their egos;

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[3] Michael Kranish, *"Soft Money" Use Draws Critics, But No Probers*, BOSTON GLOBE, June 9, 1997, at A1 (discussing the extent of the Clinton—Gore exploitation of loopholes in federal campaign laws).

[4] For example, during his 1996 State of the Union address, President Clinton called on Congress to pass the McCain-Feingold campaign finance reform legislation "challeng[ing] Congress to curb special interest influence in politics by passing the first truly bipartisan campaign finance reform proposal in a generation." Russ Feingold, *President Clinton Endorses McCain-Feingold as Campaign Finance Reform Vehicle*, GOV'T PRESS RELEASES by Fed. Document Clearing House, Jan. 24, 1996, *available in* 1996 WL 5167139. Additionally, in his 1994 State of the Union address, Clinton urged Congress "to finish the job both houses began last year, by passing tough and meaningful campaign finance reform and lobby reform legislation this year." Fred Wertheimer, *Time to Deliver, Campaign Promises for Campaign Finance and Lobby Reform*, COMMON CAUSE, Mar. 22, 1994, at 37. *See also* Michael Ross, *Seven House Democrats Fault Clinton's Campaign Reform*, L.A. TIMES, May 21, 1993, at 18 (referring to President Clinton's campaign finance reform proposal, a major promise of his presidential campaign); *Viewpoints: House Shouldn't Spook at Campaign Finance Law*, NEWSDAY, Oct. 25, 1993, at 36 (discussing Clinton's vow to sign a meaningful campaign finance reform measure passed by the House).

for others it permitted them to make their points known to my administration. What is wrong with that?"

Now, what is wrong with that? At this juncture, numerous roads might be explored. One could examine this question in standard law and economics efficiency terms. Justice Breyer's plurality opinion in the recent Colorado Republican Party case draws upon these law and economics justifications.[5] However, I want to pass on this inquiry, not only because of time constraints, but because I believe that other avenues are more fruitful.

Instead, I would like to revisit the terrain, at least in part, that Burt Neuborne explored. However, I will begin from a very different set of premises. I reject any theory suggesting that lobbying is presumptively objectionable. Lobbying requires access and, in my mind, recurring access cannot be considered objectionable. Political access is like a controlled substance: a prescription is not only necessary, but it generally requires money. I accept the proposition that "money talks" and realize that equal access to money does not exist.[6] I believe that the combination of these factors, in large part, fuels the present consternation over campaign finance.

Some suggest the "real concern" is that incumbents will remain in office forever.[7] Perhaps they will, but will simply reshuffling or replacing incumbents result in meaningful political change? I do

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[5] Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n 116 S. Ct. 2309 (1996) (holding that the First Amendment prohibits the application of the party expenditure limitation of the Federal Election Campaign Act to expenditures that a political party has made independently, without coordination with any candidate).

[6] *See, e.g.*, James Bennett, *Justice Department Seeks Review of Spending Limits Ban*, N.Y. TIMES, June 16, 1997, at B9 (asserting that *Buckley* makes "bankrolling" a campaign a "rich man's game"); Burt Neuborne, *Court's Decision Has Been Disastrous For Democracy*, ST. LOUIS DISPATCH, Feb. 18, 1997, at 78 (stating that "in effect, the *Buckley* Court ruled that 'money talks'" and since all Americans do not have the wealth to donate to the political system, "big money talks so loudly that it drowns out the voices of average Americans").

[7] *See* Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1152 (1994) (arguing that the only way to pierce the protection scheme for incumbents is through campaign finance reform).

not understand what is wrong with the status quo, or why someone who presumptively thinks the status quo is the appropriate base line is put on the defensive?

What fuels the base line controversy is the assumption that the present system is structured so that the "under classes" or "outsiders" do not have adequate access. I do not want to repeat the thoughts of Judge Winter and Professor Blasi on the difficulties of equal access theories when applied in the First Amendment context. Assuming, however, that the "under classes" or "minority groups" do not receive equal access, what is the significance for the legal system? For a moment, I ask you to put the Constitution aside. What would the word "adequate" mean if campaign financing is restructured to ensure adequate access for all?

The concern over equal access is understandable, but it is an unworkable ideal. Equal access is tied to a far more pervasive concern—the nature of our representative democracy. Professor Neuborne expresses dismay at the fact that so few contribute to campaigns. Should he? Why does the fact that most Americans do not contribute to political campaigns mean anything? Perhaps it means that people are working hard to make ends meet and do not have much to contribute. It is puzzling, so I look forward to hearing more on the subject from Professor Neuborne, in addition to hearing his ideas pertaining to what constitutes the fundamental baseline by which a representative democracy is judged.

My colleague, Professor Blasi, on the other hand, prefers to address this issue in reference to James Madison and his contemporaries.[8] These historic figures believed in representative, as opposed to direct, democracy. But they did believe that representatives must act, ultimately, for the public good. They had some conception of what we call "interest group politics"; "factions" was Madison's label.[9] It is, however, safe to say that they did not foresee the dynamics of modern interest group politics, with numerous competing and conflicting interest groups. They certainly

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[8] *See* Vincent A. Blasi, *Campaign Finance: Spending Limits and Candidates' Time*, 6 J.L. & POL'Y 123 (1997).

[9] JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 49-52, 54-55, 67, 190, 199, 280, 316, 346 (1996).

had no conception of an America in which billions of dollars turn on the outcome of national legislation.

Madison and company lived in a far simpler world. Their views were deeply rooted in what Gordon, Wood and others have characterized as "deference" politics. Ultimate power rested with the people, but the people were governed by "the wise and the good." Madison believed that every society had groups that would seek to oppress others.[10] He thought that the fundamental division in America was between the "haves" and the "have nots." For Madison, the fundamental purpose of our Constitutional order was to protect those who owned property from those who did not.[11] When I speak of property, I do not mean the expansive fortunes of today, such as General Motors' wealth. In early America, George Washington was the richest man in the country and his worth was estimated to be about $1 million.

Protecting the "haves" from the "have nots" is not the goal of those who, like Professor Neuborne, want to reform present day campaign financing. Far from that goal, they are concerned with the lot of those who could be called the "losers" in our society.

However, one part of the Madisonian legacy certainly lives on as the apostolic tradition, that is, that the representatives of the people act for the common good. Thus we have the term "commonwealth," drawn from prior English history.[12] But, it is becoming increasingly difficult to discern what is the common good. The realities of complex group politics, huge accumulations of money and modern technology have created a landscape that would be unrecognizable to Madison and his comrades.

My colleague, Professor Blasi, emphasized that the Madisonian model had a component that has been overlooked, namely, that adequate representation requires representatives have adequate time.[13] Time is necessary for allowing representatives to consult with their constituents and deliberate on what the public interest requires. Furthermore, time is a far more pressing concern now

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[10] *Id.* at 44-45, 332-35.

[11] *Id.* at 314-15.

[12] William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1062, 1082 (1994).

[13] *See* Blasi, *supra* note 8.

then it was in 1789, when the national government was small and inactive by today's standards.

When considering whether to restructure campaign financing, should adequate time be a factor as Mr. Blasi implies? Undoubtedly, representatives spend a good deal of their time raising money, but it is unclear what they would be doing if they were freed from that burden. More importantly, fundraising does not necessarily overburden the candidates' time because today they have administrative staffing unknown to the founding generation. Even if time is being sacrificed, to what extent should concerns about representatives' time carry significant normative weight? Indeed, Professor Blasi's thesis suggests that there should be no limit on the size of contributions. After all, large contributions would save a large amount of time.

This brings me back to the question of reform. The present campaign finance rules remind me of a vessel out to sea, a ship christened "campaign finance money." Aboard the ship are our politicians and aspiring politicians. However, the ship has many leaks. These leaks allow huge sums of money to pour on board. Should the ship be scuttled?

I doubt we will see radical reform because most incumbents love their leaky little ships. In my opinion, the only realistic question is whether we should impose spending limits rather than leaving the system in its present form. In response to this question, the present Supreme Court is not likely to permit spending limits. Based upon my reading of the Court's decisions, I do not believe it is likely that it will endorse such limits, despite Mr. Blasi's time-saving rationales. Accordingly, I do not expect to see *Buckley v. Valeo*[14] overthrown.

Instead, we have to ask ourselves whether we want a constitutional amendment that would permit spending limits? Such an amendment is pending in Congress, and it has been endorsed, at least nominally by the democratic leadership of both houses.[15]

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[14] 424 U.S. 1 (1976).

[15] In 1997, the House of Representatives Minority Leader, Richard Gephardt, introduced a proposed amendment to the Constitution which would authorize Congress and the states to impose "reasonable regulations" on expenses and contributions intended to "influence" the outcome of state and federal elections.

But, what about its merits? Those who advocate in support of spending limits, believe they will somehow help our system of representative democracy. I do not share this belief. In fact, I would be surprised if limits helped, as long as we continue to count on our PAC expenditures and soft money. Perhaps we should reform in the opposite direction and embrace the whole hearted laissez-faire system advocated by Judge Winter.

This discussion leads us at last to the ultimate question, "why bother?" From an incumbent's point of view, the present system is not that far removed from Judge Winter's ideal laissez-faire world. However, explicit reform along this line does have one advantage—it would induce candor into the system. In our contemporary scene, candor is certainly no small value.

H.R.J. Res. 47, 105th Cong., 1st Sess. (1997).