WHY *BUCKLEY*?*;* WHY A FIRST AMENDMENT? A RESPONSE TO PROFESSOR ALSCHULER

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Albert Alschuler's *Limiting Political Contributions After* McCutcheon, Citizens United, *and* SpeechNow[1] is a lengthy and thoughtful take on campaign finance regulation. In a nutshell, Professor Alschuler argues that under the precedent of *Buckley v. Valeo*[2]*, SpeechNow.org v. Federal Election Commission*[3] was incorrectly decided, and, further, that it would be beneficial to overrule *SpeechNow.* It is impossible in this short space to comment on the nuances of Professor Alschuler's article, or even all of its major points. But I wish to point out what I think is a misreading of the Supreme Court's jurisprudence in the field, and then to suggest in very general terms why I disagree with Professor Alschuler's normative response to the issues of money in politics. Space limitations require me to dramatically simplify and at times simply ignore arguments that Professor Alschuler makes over the course of 120 pages, and I ask the reader, and Professor Alschuler, to make allowance for that reality.

The most consequential campaign finance decision of the past ten years—at least in terms of its direct impact on elections—is not *Citizens United v. Federal Election Commission,*[4] but the Court of Appeals' decision in *SpeechNow.org v. Federal Election Commission*. In *SpeechNow,* the Court of Appeals held that contributions to organizations that make only independent expenditures cannot be limited. The decision is grounded in *Buckley,* which struck down limits on independent expenditures ("IEs"),[5] and *Citizens United,* which struck down limits on IEs by corporations.[6] While *Citizens United* reiterated the Court's longstanding position that the government's interest in limiting IEs is insufficient to overcome the First Amendment prohibition on regulating

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1. 67 FLA. L. REV. 389 (2015).
2. 424 U.S. 1 (1976).
3. 599 F.3d 686 (D.C. Cir. 2010) (en banc).
4. 558 U.S. 310 (2010).
5. 424 U.S. at 39–51.
6. 558 U.S. 310. *SpeechNow* also owes its pedigree to *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981). *California Medical* held that Congress could limit contributions by the medical association, an unincorporated association, to its own PAC. The decisive fifth vote came from Justice Blackman, who wrote, "a different result would follow if [the statute] applied to contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates." *Id.* at 203 (Blackmun, J., concurring).

speech,[7] some still argued that money donated to groups making IEs were "contributions" and so could be limited. *SpeechNow* disagreed. This 9-0 *en banc* decision, acceded to by the FEC and since followed by all other courts to consider the matter,[8] has led to the creation of Independent Expenditure Committees, or "Super PACs," that have dramatically changed the landscape of federal campaigns.[9] Professor Alschuler, however, essentially reargues the pre-*SpeechNow* position, both as a matter of proper understanding of *Buckley* and as a good thing for American governance.[10]

Buckley, of course, did not strike down limits on IEs because they were "expenditures," and it did not uphold limits on "contributions" because they were "contributions." Rather, *Buckley* struck down limits on IEs because such limits directly "limit political expression at the core of our electoral process."[11] The Court's decision was a rejection of the notions that speech itself could be "corrupting,"[12] or that any gratitude officeholders might feel to those who had supported their election was a form of "corruption" that could justify limits on the speech of those supporters.[13]

The Court upheld limits on "contributions" because the act of directly giving money to a candidate provided an opportunity for "*quid pro quo*" exchanges.[14] The opportunity for bargaining and the difficulty of proving

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7. *See also* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978), Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985). *But see* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990) (allowing limits on IEs by corporations on the basis of their "unique state-conferred corporate structure").

8. Republican Party of N.M. v. King, 741 F.3d 1089 (10th Cir. 2013); N.Y. Progress & Protection PAC v. Walsh, 733 F.3d 483 (2d Cir. 2013); Texans for Free Enter. v. Tex. Ethics Comm'n, 732 F.3d 535 (5th Cir. 2013); Wis. Right to Life State Political Action Comm. v. Barland, 664 F.3d 139 (7th Cir. 2011); Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684 (9th Cir. 2010); Carey v. Fed. Election Comm'n, 791 F. Supp. 2d 121 (D.D.C. 2011).

9. Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1665 (2012) ("The formal authorization of Super PACs at the federal level occurred as a result of FEC decisions in the summer of 2010.").

10. One question is why the FEC was allowed, for more than three decades, to insist that it could enforce limits on contributions to groups making only independent expenditures, especially after Justice Blackmun's concurring opinion in *California Medical.* The simple answer is that, prior to the effective date of the Bipartisan Campaign Reform Act in 2003, which constricted spending on "issue advertising," enough alternative avenues of spending were open that a major court challenge to contribution restrictions on IE groups did not seem worth the effort. Rather, spenders could, as anticipated in *Buckley v. Valeo*, avoid the FEC's rules simply by avoiding express advocacy in their public communications. 424 U.S. at 45. *See also, e.g.*, Fed. Election Comm'n v. Christian Action Network, Inc., 92 F.3d 1178 (4th Cir. 1996); Fed. Election Comm'n v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45 (2d Cir. 1980) (en banc).

11. 424 U.S. at 39 (internal quotation marks omitted).

12. At least to the extent that it could justify a broad prohibition on speech.

13. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 349, 359 (2010).

14. *Id.* at 359.

bribery are what create a compelling government interest in the enactment of prophylactic restrictions on otherwise protected political speech.[15] It is worth remembering that prior to FECA, officeholders could accept "campaign contributions" in cash, in brown paper bags, in any amount, with no effective requirement that they disclose having received that "campaign contribution."[16] Crucial to the *Buckley* Court's decision upholding contribution limits was the fact that supporters could still channel their energy into IEs.[17] In short, it's not the label ("contribution" or "expenditure"), but the purpose and function that determines *Buckley's* legal treatment.

Professor Alschuler relies on two points from *Buckley* that he contends would justify limiting contributions to independent expenditure groups. First, Professor Alschuler argues that a "contribution" deserves less protection because the "speaker" (i.e., the donor) gives up control of the message—it is "proxy speech."[18] This has always been one of the weaker arguments of *Buckley* simply because most speech, including what is clearly recognized as "independent expenditures," is conducted through "proxies." Both campaigns and independent spenders hire experts to help them craft and deliver a message. If, on the other hand, by "proxy speech" we mean that the donor has given up its control of the message, that is true of contributions to a candidate, but not necessarily true of contributions to a group that makes IEs. Indeed, SpeechNow is an excellent example. The group originally consisted of just five individuals, all known to one another, with each contributing to the effort in accordance with their respective abilities. To call this "proxy speech" is to strip the right of association of all meaning.

Professor Alschuler also notes that the *Buckley* Court stated that the actual act of contributing (as opposed to the communication that is disseminated thanks to the contribution) is merely a "general expression of support," and a "symbolic expression."[19] But even Professor Alschuler doesn't really believe this: A major point of his article is that money corrupts and "[c]ontributors might be surprised to learn that writing a check for the maximum permissible amount . . . is merely 'symbolic support.'"[20] Of course, all these arguments do appear in *Buckley,* but as makeweights. To allow them to bar or limit donations to independent groups would undermine *Buckley's* core holding that speech cannot be limited.

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15. 424 U.S. at 26–27; *see also* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1458 (2014).

16. *See History of Campaign Finance Laws*, EBSCOhost Connection, http://connection.ebscohost.com/politics/campaign-finance-reform/history-campaign-finance-laws (last visited Oct. 17, 2015).

17. 424 U.S. at 28.

18. Alschuler, *supra* note 1, at 474–75 (citing *Buckley*, 424 U.S. at 21).

19. *Id.*

20. *Id.* at 475, n.410.

Moreover, as a practical matter, it is not clear what anti-corruption purpose such an interpretation would serve. Sheldon Adelson, a regular bogeyman in this article,[21] would still be free to spend millions in personal IEs. The examples to which Professor Alschuler devotes entire appendices—presidential pardons and appointments of ambassadors—would be unimpeded, and indeed these examples all occurred during the pre-*SpeechNow* era.[22] The impact would be felt less by the megadonors that are the focus of Professor Alschuler's attention, than by smaller donors who gain a voice by associating with these larger donors through Super PACs. The actual SpeechNow.org is a paradigmatic example, consisting of a small group of like-minded individuals, most of whom had deep personal connections. Absent the group's single "megadonor," who made a six figure contribution, the others, who contributed amounts from a few hundred dollars to a healthy $10,000, would simply have lacked the financial resources to establish an effective media presence. And it can hardly be said that their joint speech constituted "proxy speech" or mere "symbolic" speech.

Professor Alschuler suggests that the need to make limits on contributions to candidates more effective in preventing corruption justifies restricting the ability of citizens to pool resources for independent spending. But barring such resource pooling would substantially reduce the opportunities for speech outside of direct contributions to candidates, and have the biggest effect on citizens of more modest means.*Buckley*'*s* reasoning suggests that contribution limits are a tolerable burden on First Amendment rights only because the option to make IEs exists. To hamper the ability of citizens to associate and pool contributions for the purpose of making IEs would cast severe doubt on the constitutionality of contribution limits; not, as Professor Alschuler would have it, the other way round.

Professor Alschuler's second point is that contributions to a group that makes independent expenditures can lead to *quid pro quo* corruption in a way that the IEs themselves do not. First, he argues that "[t]he rules forbidding coordination of expenditures do not prevent a candidate from discussing anything at all with a contributor to a Super PAC," and that nothing prevents a contributor to a Super PAC from speaking with a candidate "about how large a super PAC contribution will guarantee the donor's appointment as ambassador to Belize."[23] But this argument misses the point completely. Perhaps the current rules don't prohibit these things,

21. *See id.* app. at 493–97.

22. *Id.* app. at 498–501, app. at 502–04.

23. *Id.* at 475. We might note that same is true about donations to activist groups such as the Sierra Club, or think tanks such as the Center for American Progress, or support for the party's candidates in other races important to House or Senate control.

but they could.[24] As *McCutcheon v. Federal Election Commission* makes clear, the fact that Congress (or an administrative agency to whom it has delegated power) has not passed well-tailored, less restrictive regulations does not mean that poorly tailored, more restrictive regulations are acceptable.[25]

Second, Professor Alschuler argues that large IEs will often be more valuable to a campaign than smaller contributions. This is undoubtedly true, but so what? Yes, *Buckley* pointed out that there would be exceptions when IEs would not be helpful to a candidate,[26] and that is still the case today. But *Buckley* did not say IEs would never be helpful, and it nonetheless struck down limits on IEs. It did so in part because even if limits were allowed to stand, they would serve little anti-corruption purpose, being easily evaded.[27]

Thus, I believe that Professor Alschuler is wrong when he argues that, based on *Buckley, SpeechNow* was wrongly decided and that the Supreme Court, if the issue were presented, ought to reach a different conclusion.[28] Of course, if the Court did not want to follow *SpeechNow,* yet not purport to overrule *Buckley,* it could cite the types of reasons given by Professor Alschuler. But it would be a weak opinion, the kind that would not be, or at least should not be, respected by court watchers. There is a reason why *SpeechNow* was a 9-0 vote, and why every court to consider the question since has agreed that *Buckley* and *Citizens United* dictate the result in *SpeechNow*.

So that brings us back to the normative question—should the Court overrule *Buckley*, *Citizens United*, and numerous other Supreme Court and Court of Appeals decisions to allow greater constraints on IEs? I have written at great length why I think the answer should be "no," and indeed greater protection of speech rights, not less protection, should be preferred if we are to abandon *Buckley*.[29] There is little to be gained by, and frankly

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24. Actually, there are many reasons one might argue that such rules would be unconstitutional, but not, it would appear, in Professor Alschuler's scheme of things, which would generally allow substantial regulation of independent political activity. Obviously, if such restrictions were held to be unconstitutional, Professor Alschuler's argument that you could simply limit contributions to IE groups would fall apart.

25. McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1458–59 (2014).

26. Buckley v. Valeo, 424 U.S. 1, 47 (1976).

27. *See id.*

28. Alschuler, *supra* note 1, at 477.

29. For examples of my analysis of why greater protection of speech rights should be preferred if *Buckley* were to be abandoned see BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM (Princeton Univ. Press, 2001); Bradley A. Smith, *Separation of Campaign and State*, 81 GEO. WASH. L. REV. 2038 (2013); Bradley A. Smith, *The John Roberts Salvage Company: After* McConnell, *a New Court Looks to Repair the Constitution*, 68 OHIO ST. L.J. 891 (2007); Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45 (1997); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049 (1996). *See also* Lillian R.

no space for, a rehash here.

Rather, let me conclude with what troubles me about Professor Alschuler's article. Despite the obvious good faith, nuance, thoroughness, thoughtfulness, and considerable length, at no point does Professor Alschuler really consider what his world of regulation would look like. What constitutional rights and democratic interests might be harmed? What would be the dangers of the powers he would give to government to regulate speech? The world that existed in the brief period between the passage of FECA and *Buckley* was one in which the Nixon Administration brought criminal charges against a group of modestly prominent citizens for taking out an ad in the New York Times calling for Nixon's impeachment—before Watergate.[30] The world of campaign finance regulation *now* is one in which citizens are being subjected to pre-dawn raids with SWAT teams battering down doors because of their peaceful political activity and speech.[31] The history of "reform" is one of partisan enforcement and the use of the complaint process to harass political opposition,[32] and it remains so today.[33]

There is tendency in "reform" literature to pay quick lip service to the First Amendment interests at stake, then move rapidly on to denigrate those interests as "proxy speech," "corruption," or "sham"[34] speech, and to argue that it is vitally important that we overturn 200 years of little or no regulation to put in its place a state speech police—although, to be sure, the term "speech police" is never uttered. As I outlined years ago, we have little positive to show for the regulatory experiment that began in the 1970s.[35] Indeed, quite the opposite, we have done considerable damage to our electoral system and to our democratic values.[36] But where freedom has thrived, it has worked well,[37] putting to lie the claim that "freedom of

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BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258 (1994); Joel M. Gora, *Campaign Finance Reform: Still Searching for a Better Way*, 6 J.L. & POL'Y 137 (1997); Martin Shapiro, *Corruption, Freedom and Equality in Campaign Financing*, 18 HOFSTRA L. REV. 385 (1989).

30. *See* United States v. Nat'l Comm. for Impeachment, 469 F.2d 1135, 1136–37 (2d Cir. 1972).

31. State *ex rel.* Two Unnamed Petitioners v. Peterson, 363 Wis. 2d 1, 37 (2015).

32. *See, e.g.*, Allison R. Hayward, *Revisiting the Fable of Reform*, 45 HARV. J. ON LEGIS. 421, 422 (2008).

33. *See, e.g.*, Nathan L. Gonzales, *Parties Play Politics with FEC Complaints*, ROLL CALL (Aug. 26, 2015, 3:59 PM), http://blogs.rollcall.com/rothenblog/parties-playing-politics-fec-complaints/?dcz.

34. *See, e.g.*, Richard L. Hasen, *The Suprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265 (2000) (discussing laws requiring disclosure of sham issue advocacy).

35. *See* Smith, *Faulty Assumptions, supra* note 29, at 1050–51.

36. *See id.* at 1071–84.

37. *See* Matt Nese, *Do Limits on Corporate and Union Giving to Candidates Lead to "Good" Government?*, CTR. FOR COMPETITIVE POLITICS (Nov. 1, 2013),

speech and our desire for healthy campaigns in a healthy democracy" are somehow "in direct conflict."[38]

The First Amendment protects many things that most of us don't like: hateful speech, obscene speech, offensive speech, hyped commercial speech, and false speech (in most situations). But we understand that freedom, if not always pretty, generally works best. Generally, legal academics have taken it upon themselves to explain why free speech benefits us all in ways that are not always immediately apparent, at least when one is the victim of hate speech, or disturbed by pornography, or fearful that speech might incite a riot. It is, oddly enough, at the First Amendment's core—peaceful, truthful political speech—that academic scholarship of the past 40 years has devoted virtually all its energy to explaining why we should trim back on First Amendment protections and allow unprecedented government regulation. This is unfortunate, and has almost certainly damaged public support for free speech across the board. The world has changed a great deal in the last 40 years, but Daniel Polsby's ringing summation of *Buckley* remains true:

> Almost every country in the world . . . can display a constitution that guarantees freedom of expression to the people—to the extent, of course, that the people's representatives may deem proper . . . . [W]e can boast that our Constitution protects something far scarcer in history than that sort of freedom. And with the knowledge of the caliber of people who sometimes get their hands on our government, it is well that this is so.[39]

It is important to remember why we have a First Amendment in the first place.

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http://www.campaignfreedom.org/wp-content/uploads/2013/11/2013-11-20_Issue-Analysis-7_Do-Limits-On-Corporate-And-Union-Giving-To-Candidates-Lead-To-Good-Government.pdf (analyzing the relationship between states with restrictions on direct corporate and union contributions to candidates with Pew Center ratings of best-governed states); Matt Nese & Luke Wachob, *Do Lower Contribution Limits Produce "Good" Government*, CTR. FOR COMPETITIVE POLITICS (Oct. 1, 2013), http://www.campaignfreedom.org/wp-content/uploads/2013/10/2013-10-08_Issue-Analysis-6_Do-Lower-Contribution-Limits-Produce-Good-Government1.pdf (comparing state campaign finance laws to a 2008 Pew Center study); Matt Nese & Luke Wachob, *Do Lower Contribution Limits Decrease Public Corruption?*, CTR. FOR COMPETITIVE POLITICS (Aug. 1, 2013), http://www.campaignfreedom.org/wp-content/uploads/2013/08/2013-08-01_Issue-Analysis-5_Do-Lower-Contribution-Limits-Decrease-Public-Corruption1.pdf (comparing state campaign finance laws to levels of public corruption); Smith, *Faulty Assumptions*, *supra* note 29, at 1090.

38. Nancy Gibbs, *The Wake-Up Call*, CNN (Feb. 3, 1997), http://www.cnn.com/ALLPOLITICS/1996/analysis/time/9702/03/gibbs.html (quoting former U.S. House Speaker Richard Gephardt).

39. Daniel D. Polsby, Buckley v. Valeo*: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 43 (1976).