

CAUGHT IN A POLITICAL THICKET: THE SUPREME COURT AND CAMPAIGN FINANCE

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It was hardly a case to warrant front page coverage. It broke no new constitutional ground, and indeed it followed precedent almost slavishly. Nor did it affect practical politics in any way, for the statutory provision the Court struck down—one limiting the independent expenditures of PACs and others in publicly funded presidential elections—had never been enforced. But there it was, *Federal Election Commission v. National Conservative Political Action Committee (FEC v. NCPAC)*,¹ not only in the front pages of our newspapers, but honored as well by a fleeting minute on the television news.

Some of this attention certainly resulted from misunderstanding. A number of reporters confused the limits on independent spending with the limits on PAC contributions to candidates and proclaimed an opening of the floodgates.² A good part of the attention, however, began in hope. For those concerned about the consequences of sharply rising levels of campaign spending, there was hope that somehow, somewhere, a restraint on that rise might be found. Among the critics of *Buckley v. Valeo* there was the related hope that the Supreme Court might, in view of all that had happened in American campaign finance, reconsider its narrowing of Congress's power to regulate campaign spending. All of those hopes, moreover, had been raised by a broad hint from the Court that it might be prepared to modify the *Buckley* precedent. But the hint and the hopes proved illusory, only one of the mysteries of the last ten years in the constitutional law of campaign finance.

So passed the latest episode in the Supreme Court's ill-starred effort to reconcile the first amendment with the widely-felt need to

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1. *FEC v. NCPAC*, 105 S. Ct. 1459 (1985).

2. So great was the confusion that the FEC was forced to rush assurances to journalists that contribution limits remained intact. Common Cause also issued a "press advisory" to try to clarify the Court's ruling.

regulate campaign finance. In its own felicitous phrase the Court found itself trapped in a political thicket—but not the thicket of American politics per se so much as the barbed forest of its own misconceptions about American politics. Most distressing of all, in *FEC v. NCPAC* the Court gave no indication that it realized either the trap or its cause.³

I. THE NEW ERA IN CAMPAIGN FINANCE

Congress inaugurated the modern era of campaign finance in the 1970's. Largely in response to the greater spending and the larger media role in elections, it passed the Federal Election Campaign Act (FECA) in 1971. This act is now remembered chiefly for its futile attempt to roll back the new tide of media-based politics. Those reform efforts, however, were soon overtaken by the events of Watergate and all of its related tales of perjury, abuse of executive power, political "dirty tricks," and the "laundering" of illegal political contributions. The Watergate trauma led to substantial amendments to the FECA in 1974, which completely recast the original work; both literally and contextually the FECA was more a product of 1974 than of 1971.

It was that amalgam of pre- and post-Watergate legislation that the Supreme Court had before it for argument in late 1975. The legislation was enormously diverse and complex, for it was an ambitious attempt to restructure campaign finance. Concerning *presidential* campaigns, it established:

- a program of public financing for the post-convention campaign; if a candidate chose to accept funding from the U.S. Treasury, he also had to agree to raise and spend no additional monies.
- subsidies for the parties and their quadrennial nominating conventions.
- a program of financing would-be Presidents in their attempts to get their parties' nominations, with requirements for raising individual contributions to get matching public funds.

In *congressional* campaigns, there was to be no public funding, but instead an extensive system of regulated private funding, with provisions for:

- limits on sums that parties, political committees (PACs), and individuals could contribute to candidates.
- limits on the sums that could be spent "independently" on behalf of or in opposition to a candidate. Such "independent" spending had to be without the help or connivance of the candidate aided.
- limits on the total sums that candidates for Congress could spend in the primary and/or general election.

3. The phrase "political thicket" is Justice Felix Frankfurter's. *Colgrove v. Green*, 328 U.S. 549, 556 (1946).

- limits on the amounts that candidates could spend from their own personal fortunes or those of their immediate families.
- extensive reporting of their receipts and expenditures by candidates, parties, and PACs.

Concurrently, Congress created the Federal Election Commission (FEC), the first agency it had ever created for the specific task of receiving reports of campaign spending, verifying them, and making them and their aggregates available to the American public.

Within little more than a year after passage of the 1974 amendments, a substantial challenge to virtually every section of the FECA and its amendments was argued before the Supreme Court. The challenge was no accident, for Congress had provided amply for it in the 1974 amendments. It authorized challenges by virtually anyone (“any individual eligible vote in any election for the office of President”), for certification of constitutional questions to the appropriate court of appeals, and for subsequent appeal directly to the Supreme Court (“no later than 20 days after the decision of the court of appeals”). Congress declared that it was to be “the duty of the court of appeals and of the Supreme Court . . . to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified”⁴ Expedition was accomplished when the Court announced its decision in *Buckley v. Valeo*,⁵ on January 30, 1976. The statute, of course, had never been in effect for either a congressional or a presidential election.

The plaintiffs in *Buckley*—four individuals and eight groups—if not the proverbial strange bedfellows, were at least unexpected allies. James Buckley, the Conservative senator from New York, joined Eugene McCarthy, pied piper of the anti-war movement, and the New York Civil Liberties Union made alliance with the American Conservative Union. In what must surely be one of the longest per curiam decisions in its history, the Court upheld all of the provisions for voluntary public funding of presidential campaigns, both before and after the conventions, as well as the spending limits that are attached to such aid. It also upheld the subsidies to the parties. But on the issues surrounding the regulation of congressional finance, the Court—to the amazement of many observers—upheld the limits on contributions to candidates but struck down all limits on spending: spending by candidates from their own funds or from funds given to them, and independent spending for or against a candidate by any individual or group. It also upheld the reporting

4. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 315(a), (b), (c), 88 Stat. 1263, 1285-86 (1974).

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

requirements.⁶

Central to the Court's holdings was the premise that campaign spending determines the quantity of political speech and is therefore protected by the first amendment:

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. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.⁷

The Court decided that expenditure limits are "substantial rather than merely theoretical restraints on the quantity and diversity of political speech."⁸ A limit on contributions to candidates or committees, on the other hand,

entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.⁹

Finally, associational freedoms were also at stake. "Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals."¹⁰

The Court defined the legitimate interests served by the legislation narrowly, even grudgingly. It accepted the appellees' suggestion of a governmental interest in "the prevention of corruption and the appearance of corruption."¹¹ But it explicitly rejected their assertion of a governmental interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections."¹² Indeed, noted the Court, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."¹³ Only Justice White would have upheld the limits on expenditures.

And so, unwittingly, the Supreme Court became one of the prime architects of the "new era" in American campaign finance.

6. This is not an exhaustive list of all the issues in *Buckley*. For instance, the Court dealt at some length with the constitutionality of the FEC itself.

7. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

8. *Id.* at 19.

9. *Id.* at 20-21.

10. *Id.* at 22.

11. *Id.* at 25-27.

12. *Id.* at 48.

13. *Id.* at 48-49.

Congress ended the domination of the large contributor as it began the new reign of the small contributor and the political action committee.¹⁴ It also instituted the first system of full and open disclosure of the transactions of campaign finance, and with it, greatly expanded media attention to money in politics. For its part the Court, by striking down limits on contributions, cleared the way for a striking increase in the sums of money spent on elections. Although public funding of presidential elections continued, it has not been extended to congressional campaigns, and the movement for public funding in the states has lost momentum.¹⁵ Indeed, the American Presidency remains the only office in the country for which the candidates may choose *full* public funding of the campaign.

The cost of congressional campaigning rose from \$99 million in 1976 to \$374,000,000 in 1984. Discounting for inflation, the increase was 109 percent.¹⁶ While there were 1,146 PACs in 1976, there were 4,009 by the end of 1984. Independent expenditures in the presidential and congressional elections of 1976 were approximately \$2,000,000; by 1984 they had ballooned to \$23,400,000. Every scrap of data we have suggests that similar, if less dramatic, trends developed in the campaigns for state and local offices. *Buckley's* logic struck down statutes attempting to set limits on campaign spending in about two-thirds of the states. Harder to measure, public cynicism grew apace. Unlimited spending combined with unlimited reporting—sometimes sensational and poorly informed as well—fed every populist fear and suspicion.

II. *FEC v. NCPAC*: DOUBTS AND THEN CERTAINTY

The statutory fragment at issue in *FEC v. NCPAC* had a brief but tantalizing history. It had been part of the original statute creating public funding for presidential campaigns. This act provided that no political committee (i.e., PAC) could make independent expenditures in excess of \$1,000 in support of a presidential candidate who had accepted public financing.¹⁷ In all of the litigation at the time of the initial challenge in *Buckley*, the Court had failed to rule on its constitutionality. The Justices had, though, ruled that the

14. Contrary to the impression one gets from the media, individual contributors (other than the candidate and his or her immediate family) still account for well over half of the campaign receipts of congressional candidates.

15. At one time in the last decade as many as 15 states had a limited program of public funding for campaigns for some state offices; the total in mid-1985 was 12.

16. All of my campaign finance data (unless otherwise noted) come from the official reports of the Federal Election Commission.

17. 26 U.S.C. § 9012(f) (1982).

statutory limits on independent expenditures in congressional elections were unconstitutional, and most observers assumed that the logic of that holding would apply to Section 9012(f) of the Internal Revenue Code. But not the FEC.

Operating at least publicly on the assumption of the clause's constitutionality, the FEC sought to enforce it in the 1980 presidential election. (The newly formed FEC had been either too surprised or too unprepared to deal with independent spending in the 1976 presidential election.) In 1980, along with Common Cause, it forced the issue; it lost its test in the District Court for the District of Columbia, which ruled that the clause was manifestly unconstitutional under the logic of *Buckley*. The Supreme Court heard the appeal and, to the enormous surprise of the "campaign finance bar," deadlocked on it, four-to-four in *Common Cause v. Schmitt*.¹⁸ In just two sentences the Court announced the vote (but not the line-up), the nonparticipation of Justice O'Connor, and the consequent affirmation of the decision below that held the section unconstitutional.

The outcome in *Schmitt* was clear, but its significance was not. Were four Justices signalling a desire to pull back from *Buckley*? Had all of the changes in American campaign finance since early 1976 altered their constitutional calculus? Or were the four simply convinced that this limit on independent expenditures was somehow different from the one the Court struck down in *Buckley*? The answer to those questions will probably never be known, for when the FEC persisted and brought the issue back to the Court in 1984 in *FEC v. NCPAC*, the Court held 9012(f) unconstitutional. And only one new recruit, Justice Thurgood Marshall, joined Justice Byron White, the single Justice in *Buckley* who would have upheld limits on independent spending.

Justice Rehnquist's opinion for the majority was little more than a reaffirmation of *Buckley* and several subsequent elaborations upon it. "Reaffirmation" may not be quite the right word, however, for the Rehnquist rhetoric was in fact a shoring up, even a hardening of the *Buckley* position.

III. THE ONLY DEFENSIBLE INTEREST: PREVENTING CORRUPTION

The heart of the jurisprudence deriving from *Buckley* is in the definition of the legitimate interests a legislature may pursue in regulating the constitutionally protected flow of campaign money. Af-

18. 455 U.S. 129 (1982).

ter some uncertainty, the Court made its position clear in *FEC v. NCPAC*: "We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are [sic] the only legitimate and compelling government interests thus far identified for restricting campaign finances."¹⁹ The phrase—corruption and the appearance of corruption—has a ring that most Americans will like. But its apparent clarity is deceptive, and its origin is at best clouded. Worst of all, it is irrelevant to the issues of contemporary campaign finance.

The Court seems to have in mind one kind of corruption: the "buying" of subsequent legislative votes with campaign contributions. The Justices talk repeatedly about *quid pro quos*,²⁰ and more recently the phrase "exchange of political favors" has appeared.²¹ Indeed, that understanding became the chief justification for striking down the limits on independent expenditures in FECA. "The absence of prearrangement and coordination of an expenditure with a candidate or his agent," said the *Buckley* opinion, "not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."²² This logic naturally led to the later decision to strike down the regulation of contributions in local referendum campaigns. No legislators or other policy makers are being elected; hence no one can be corrupted.²³

But while the *quid pro quo* is the nub of the matter, it is perhaps not the totality of it. Even in *Buckley* bits of hedging language crept into the Court's opinion. "But laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action."²⁴ In dealing with the disclosure sections of the FECA, moreover, the Court referred to Congress's effort "to achieve through publicity the maximum deterrence to corruption and undue influence possible."²⁵ What is the correctable evil? Is it only corruption or may it also be mere influence, or some intermediate sin of "undue influence"? And when is the arranging of a *quid pro quo* not bribery?

In *FEC v. NCPAC*, however, Justice Rehnquist ended the shilly-shallying: "Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obliga-

19. *FEC v. NCPAC*, 105 S. Ct. 1459, 1469 (1985).

20. *E.g.*, *Buckley*, 424 U.S. at 26-27, and *NCPAC*, 105 S. Ct. at 1469.

21. *FEC v. NCPAC*, 105 S. Ct. at 1469.

22. *Buckley v. Valeo*, 424 U.S. at 47.

23. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

24. *Buckley v. Valeo*, 424 U.S. at 27-28.

25. *Id.* at 76.

tions of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.”²⁶ Clarity was reasserted, but the price was irrelevance. There may be instances of legislators or would-be legislators accepting campaign contributions in return for promised votes on bills or promised pressure on public agencies—but no one thinks that such transactions are in any sense common, at least in the Congress. The real issue, rarely articulated very precisely, is one of excessive influence. The concern behind campaign finance legislation is not about corruption; it is about the danger that major contributors to successful candidates will receive in return some excessive measure of influence in the making of public policy. That influence may be in the form of “access”—open doors and sympathetic ears—or it may be in some extra weight of information or consideration on the scales of decision in policymaking. Indeed it may merely arise from the election of officials already sympathetic to the campaign contributor’s values or ideology.

To be sure, defining the issue as influence doesn’t remove all of the ambiguities. In the apt words of the New Jersey Supreme Court, influence “is a term with amoebic contours.”²⁷ Nor does it help to add adjectives such as excessive, improper, or undue.²⁸ One of the legitimate purposes of political activity, after all, is to achieve political influence. In terms of campaign politics—whether money, labor, or knowledge is volunteered—influence is best and most easily achieved by electing like-minded politicians to public office. Similarly, political activity after the election—lobbying or citizen contact, for example—also aims at influence. And the purpose of the activity generally is to influence how public officials act, perhaps even to make sure that they will act in ways that they might not otherwise have chosen. Political persuasion, in other words, has a political purpose; it is not an end in itself, a mere art form or civic ceremony.

If influence is the object of democratic politics, its uneven distribution is an unexceptional fact. Some candidates win elections and others lose; some groups persuade and some do not. The issue, rather, is the very uneven distribution of a political resource: money. The demand is not that all runners win the race or even

26. *FEC v. NCPAC*, 105 S. Ct. at 1469.

27. *New Jersey Chamber of Commerce v. New Jersey Election Law Enforcement Commission*, 82 N.J. 57, 76, 411 A.2d 168, 177 (1980).

28. “Undue influence” is a familiar term in other bodies of law, especially the law of wills. The distinctions employed there (which seem to hinge on free will) are of no help in legislative politics.

enter it, but that all runners begin from the same starting line. At bottom, therefore, the central issue in the politics of regulating campaign finance is the mobilization of maldistributed political resources.

IV. THE EXCLUSION OF ALTERNATIVE INTERESTS

Early in its lengthy disquisitions in *Buckley* the Court noted that the appellees had offered three governmental interests to justify the restrictions of the FECA on contributions. The first, of course, was the prevention of corruption and the appearance of corruption. Beyond that, the appellees advanced two "ancillary" interests. The Court summed them up this way:

First, the limits serve to mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections. Second, it is argued, the ceilings may to some extent act as a brake on the skyrocketing cost of political campaigns and thereby serve to open the political system more widely to candidates without access to sources of large amounts of money.²⁹

Since the invocation of the "corruption" interest sufficed to sustain limits on contributions, the Court did not appraise the ancillary interests in this context. It was forced to do so, though, in the process of striking down the limits on *expenditures*. In dealing with the alleged interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections," the Court's prose was absolute and magisterial:

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'"³⁰

And so ended the Court's consideration of governmental interests beyond those in its single, favored formulation.

One wonders why the Justices found it necessary to specify the legitimate governmental interests. The Court's custom has long been to leave the legitimate legislative interests open and unspecified, especially in early cases articulating a newly defined first amendment right. The first and classic statement of the "clear and present danger" doctrine, for example, did not undertake to describe all "the substantive evils that Congress has a right to pre-

29. *Buckley v. Valeo*, 424 U.S. at 25-26.

30. *Id.* at 48-49. The Court was quoting *New York Times v. Sullivan*, 376 U.S. 254, 266, 269 (1964), which in turn was quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945) and *Roth v. United States*, 354 U.S. 476, 484 (1957).

vent.”³¹ The Court’s usual approach, in other words, has been a case-by-case resolution. To the best of my knowledge, one finds an exclusive definition of legitimate interests only in the area of campaign finance.

Of all the potentially legitimate interests spurned or ignored by the Supreme Court, in *Buckley* and thereafter, none is more appealing than the legislative interest in preserving the integrity of the electoral process. It has an estimable history in constitutional jurisprudence, and it relates easily to regulating political money. It shifts judicial attention from the nexus between campaign finance and governmental decision to that between campaign finance and the outcome of the election, from whether money “buys” influence in legislative and executive offices to whether it determines who sits in those offices in the first place.

The Court’s very first decision on campaign finance legislation, *Burroughs v. United States*,³² dealt with Congress’s requirement in the Federal Corrupt Practices Act of 1925 that certain political committees in presidential campaigns report publicly the names and addresses of their contributors and the sums of their contributions. The Court upheld the requirement, and Justice Sutherland’s opinion for the majority is peppered with references to Congress’s interest in protecting the integrity of the presidential election.

To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny the nation in a vital particular the power of self protection.³³

.....

Congress reached the conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections.³⁴

Moreover, Sutherland quoted extensively from *Ex parte Yarborough*,³⁵ a case upholding the legislation implementing the fifteenth amendment. For example:

That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration.

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31. *Schenck v. United States*, 249 U.S. 47, 52 (1919). *Cf.* *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968).

32. 290 U.S. 534 (1934).

33. *Id.* at 545.

34. *Id.* at 548.

35. 110 U.S. 651 (1884).

If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption.³⁶

Burroughs is, in short, a tantalizing bit of judicial history. The Court clearly had elections on its mind, and it spoke in terms of the legitimate interest of Congress in assuring their integrity. It spoke of "the corrupt use of money to affect elections," not simply of the corruption that results from money in elections. The emphasis was on affecting, even corrupting, the election itself. Of course, the Court spoke at a time (1934) when the buying of votes, the casting of votes from the graveyard, and the rigging of electoral counts were embarrassingly frequent in American politics.³⁷ It is both the clear meaning of those words "to affect elections" and the history of American electoral corruption that the Supreme Court ignored when it quoted *Burroughs* in its *Buckley* decision.

In the more than forty years between *Burroughs* and *Buckley* the Court began increasingly to refer to the legislative interest in protecting the "integrity of the electoral process." The phrase appears—in one variant or another—as early as 1957, more or less in passing. In upholding the statute that prohibited corporations and unions from contributing directly to candidates in federal elections, the Court noted that "what is involved here is the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process. This case thus raises issues not less than basic to a democratic society."³⁸ Then, quite strikingly, in the five years before *Buckley* the Court referred in at least seven cases to the legitimate interest of the states in protecting the integrity of elections. The Justices did not always deem this interest controlling, but they invariably conceded its importance. As the Court noted in a 1973 case upholding New York's requirement that voters register with the party of their choice thirty days before the primary: "It is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal."³⁹ In a case dealing with the constitutionality of filing fees for would-be candidates, the opinion was even more expansive: "a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies."⁴⁰

36. *Id.* at 657-58.

37. See, e.g., E. SIKES, STATE AND FEDERAL CORRUPT-PRACTICES LEGISLATION (1928). This variety of electoral corruption also gave rise to a common body of state and local legislation on vote buying, on "treating" voters, on closing taverns on election day, and on campaigning near a voting place.

38. *United States v. UAW-CIO*, 352 U.S. 567, 570 (1957).

39. *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973).

40. *Bullock v. Carter*, 405 U.S. 134, 145 (1972). The other five cases were: *Hill v. Stone*, 421 U.S. 289 (1975); *Cousins v. Wigoda*, 419 U.S. 477 (1975); *American Party of*

Not surprisingly, therefore, the court of appeals relied heavily on that interest in upholding all of the FECA in *Buckley*. In upholding the disclosure sections, for instance, the judges noted that the major disclosure provisions of the act "exact disclosure only when plainly and closely related to a substantial governmental interest long recognized by the courts: protection of the integrity of federal elections."⁴¹ The majority opinion of the Supreme Court in *Buckley*, however, mentioned this interest only once, and then very much in passing.⁴² Perhaps it was merely a surviving fragment in the cobbling together of the Court's long per curiam opinion. Indeed, in *Buckley* the Court seems to have begun a quiet muting and narrowing of its commitment to the "integrity of electoral processes." The key to its disappearance—at least in the campaign finance cases—may well be in the 1982 case, *FEC v. National Right to Work Committee*,⁴³ which involved the reporting status of the defendant under the FECA. In the majority opinion appear these phrases:

[In an earlier case] we specifically affirmed the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption. These interests directly implicate "the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process."⁴⁴

If those words have any clear meaning, it is that the "integrity of the electoral process" seems to have been swallowed up by or subsumed under the Court's favored interest: preventing corruption and its appearance. In any event it is completely absent in the *FEC v. NCPAC* opinion. Only Justice White's dissent honors it. Why it fell into disfavor is but another of the mysteries in the recent jurisprudence on campaign finance.

Finally, there remains that cluster of interests the Court explicitly rejected in *Buckley*: the equalizing interests. To state such interests in terms of the positions of individuals in the political system misstates the point. When government acts to limit individual rights, it acts on behalf of collective interests. The purpose is not to make groups or candidates equal; it is to uphold society's interest in evenly-matched debate, in the full and broad recruitment of candidates, in responsible campaigning, and in the availability of viable

Texas v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974); and Kasper v. Pontikes, 414 U.S. 51 (1973).

41. *Buckley v. Valeo*, 519 F.2d 821, 869 (D.C. Cir. 1975).

42. *Buckley v. Valeo*, 424 U.S. 1, 58 (1976).

43. 459 U.S. 197 (1982).

44. *Id.* at 208 (quoting *United States v. UAW-CIO*, 352 U.S. 567, 570 (1957)).

alternatives for voters to choose between. It is those interests that many legislators have thought were seriously compromised by the uneven distribution of the major resource in campaigning. One may think of these interests as an aspect of the broader interest in preserving the integrity of elections. Or one may think of them as an aspect of preserving democratic processes. It pretty much comes down to the same thing.

V. THE PROBLEMS OF PROOF

Let us return to the Court's single legitimate interest: prevention of real or apparent corruption. "Corruption" is obviously difficult to define. Equally troublesome is the problem of how to prove its existence. The proof problem can be divided into two related issues. How thoroughly will the Supreme Court review the evidence on which the Congress and state legislatures act? And second, with what kinds of evidence and by what standards of proof will one be able to persuade the Court?⁴⁵

The first question is much easier to answer. We can be sure that the Court will review legislative determinations very thoroughly. That is its customary stance when first amendment freedoms are at risk. Parties to a number of cases have urged the Court to defer to legislative judgments about these quintessentially political questions. The language in several opinions indicates their failure:

If appellee's arguments were supported by record or legislative findings . . . , these arguments would merit our consideration.⁴⁶

In addition, the record in this case does not support the California Supreme Court's conclusion⁴⁷

If I found that the record before the California Supreme Court disclosed sufficient evidence to justify⁴⁸

Even though the Justices—excepting Justice White⁴⁹—have little experience in the kinds of campaigns governed by the FECA, they have shown no inclination in any case in the last decade to defer to greater legislative expertise.

Thus, to the second issue: the kinds of evidence and proof. To show corruption in the narrow sense, involving a quid pro quo, one

45. There has been little scholarly attention to these issues. A significant exception is Thorsness, *Independent Expenditures: Can Survey Research Establish a Link to Declining Citizen Confidence in Government?*, 10 HASTINGS CONST. L.Q. 763 (1983).

46. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978).

47. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981).

48. *Id.* at 301 (Marshall, J., concurring).

49. Justice White coordinated the presidential campaign of John F. Kennedy in the Mountain States in 1960.

must offer evidence of specific behaviors and understandings. (The question of mere “appearances” we will take up shortly.) Such evidence is very rare; one seldom hears even unsubstantiated allegations of this kind of corruption. If one thinks more broadly of “improper” or “excessive” influence, one confronts new problems of both definition and proof. Those problems were all too apparent in the argument in *FEC v. NCPAC*.

Supporters of the restrictions on independent spending at issue in that case confronted three imposing hurdles. They had to argue the corrupting nature of a kind of expenditure that the Court earlier had held could not, because of the absence of donor-candidate relationship, lead to corruption. Furthermore, the supporters of 9012(f) had to show, if not some exchange involving a quid pro quo, at least some convincing kind of impropriety. Finally, they had to involve the President of the United States rather than some part of a large and diverse congressional contingent.

Small wonder, then, that the attempts to surmount these hurdles—in the record, briefs, and oral argument—were unconvincing. There were stories of ambassadorships for wealthy contributors, of contributors rubbing shoulders with cabinet members at “confidential” policy briefings, of cabinet appointments for such successful fundraisers as James Edwards and Raymond Donovan. The trial court in *FEC v. NCPAC* was scornful of this “evanescent” evidence, noting especially that in the evidence on the political motivation of appointments “there is nothing even remotely resembling corruption involved.”⁵⁰

Even without the constraints under which argument had to be made in *FEC v. NCPAC*, however, no scholar or journalist has yet established a causal relationship between campaign contributions and governmental preference for private economic interests. The financing of legislative campaigns offers the easiest case, and the most common approach is typified by Common Cause’s revelations a few years ago that a large number of Congressmen who received campaign contributions from the automobile and truck dealers’ PAC had voted to veto—legislative vetoes still being legal then—a proposed rule of the Federal Trade Commission that would have forced car dealers to put stickers on their used cars listing their various shortcomings. Indeed, it is not especially difficult to show that, in some key and visible votes, members of the Congress support the position of people who give them money. Who would expect it to

50. 578 F. Supp. 797, 830, 828 (E.D. Pa. 1983). The court, it should be noted, was applying a narrow concept of corruption, one it undoubtedly believed was mandated by *Buckley*.

be otherwise? The analytical problem is one of determining cause and effect; that is, do the votes follow the money, or does the money follow the votes?⁵¹

Political scientists have another criticism of such studies, even of those that by sequences of events make a strong case for concluding that, at least in some instances, the vote has followed the money.⁵² It is that they are "anecdotal"; the relationships are established or even merely alleged only in a very small number of dramatic, titillating instances. Uncounted are the occasions in which there is no dramatic relationship or in which contributors, PACs for instance, lose in the congressional vote. Scholars have not found it easy to cope with the problem of trying to establish relationships between money and votes in larger numbers of roll calls in a congressional session. The most successful attempts have found only a small positive relationship.⁵³

Hopes, including judicial hopes, for a clearly established causal nexus between campaign money and governmental preference simply cannot be fulfilled. In the absence of compelling proof, scholars and journalists have great interpretive freedom. The result, for the courts, will be a bewildering range of judgment. Already, in fact, that range is present among the comments on Supreme Court decisions beginning with *Buckley*. Most of the harshest critics proceed from the conviction that corruption, or at least gross impropriety, is already rampant. PACs rather than parties or individual contributors, they believe, are the chief corruptors. Their data and conclusions are drawn heavily from Elizabeth Drew's reporting⁵⁴ and the studies of such Washington groups as Common Cause and Ralph Nader's Congress Watch.⁵⁵ (Common Cause has organized a fund-raising campaign against PACs, "People Against PACS," roundly declaring that Congress is "UP FOR GRABS to the highest PAC bidders.")

51. Sorauf, *Political Action Committees in American Politics*, in TWENTIETH CENTURY FUND, *WHAT PRICE PACS?* 27 (1984).

52. The reader should keep in mind that even when the vote follows the money there is not necessarily a case of bribery. There must be additional evidence of an explicit prior arrangement.

53. See, e.g., J. KAU & P. RUBIN, *CONGRESSMEN, CONSTITUENTS, AND CONTRIBUTORS: DETERMINANTS OF ROLL CALL VOTING IN THE HOUSE OF REPRESENTATIVES* (1982). The classic analysis of the determinants of congressional voting in the political science literature is J. KINGDON, *CONGRESSMEN'S VOTING DECISIONS* (2d ed. 1981).

54. E. DREW, *POLITICS AND MONEY* (1983).

55. See, e.g., Nicholson, *Political Campaign Expenditure Limitations and the Unconstitutional Condition Doctrine*, 10 HASTINGS CONST. L.Q. 601 (1983); Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982).

The conclusions of political scientists are more restrained.⁵⁶ They frame the money-influence nexus as a part of the broader problem of explaining legislative behavior. Any number of influences or pressures may shape a legislator's vote on an issue: the voting constituency (the "folks back home"), the party leadership and caucus in the legislature, the party outside of the legislature, the President or governor, expert research and opinion, public opinion generally, individual or group lobbying, the personal values and outlooks of the legislator, and the contributors to the campaign treasury. Just where and with what effect that last source of influence enters the calculus of legislative decision is hard to pinpoint with much accuracy, but many scholars would agree with Larry J. Sabato: "PAC contributions do make a difference, at least on some occasions, in securing access and influencing the course of events on the House and Senate floors. But those occasions are not nearly as frequent as anti-PAC spokesmen, even congressmen themselves, often suggest."⁵⁷ The occasions of substantial PAC influence, Sabato adds, tend to be those issues that are relatively invisible, narrow, and specialized—in short, those issues of which the other sources of influence are unaware or about which they are unconcerned. And so it is with campaign contributions more generally. There is "some" influence, but perhaps not "undue" or "excessive" influence, let alone "corruption."

If the empirical case on actual influence is uncertain, the one on "appearances," while more substantial, also raises problems. In the first place, whose perceptions does the Supreme Court have in mind? Most commentators assume that the Court is talking about general public opinion.⁵⁸ By making that assumption one also transforms the question into one of confidence in democratic institutions—no less, that is, than the issue of the mass support necessary for the legitimacy of democratic institutions.

Informal, anecdotal evidence abounds that large numbers of Americans see a corrupting link between campaign contributions and the policies of government. Anyone who has spoken at any public forum on American campaign finance can report the fears

56. See, e.g., Malbin, *Looking Back at the Future of Campaign Finance Reform*, in *MONEY AND POLITICS IN THE UNITED STATES* 232 (M. Malbin ed. 1984); L. SABATO, *PAC POWER* (1984).

57. L. SABATO, *supra* note 56, at 135.

58. There is, however, a troubling indication that at least one federal judge has the judiciary in mind. Consider this sentence: "Even large expenditures made by political committees not attached to any business or union create little appearance of corruption since there is little the president can do to benefit such committees financially." *FEC v. NCPAC*, 578 F. Supp. 797, 838 (E.D. Pa. 1983).

that emerge in the question or discussion period.⁵⁹ Many members of Congress report the same fears; Representative Matthew F. McHugh (Dem.-N.Y.) is typical:

I don't have to tell you about the skepticism, if not cynicism, that prevails in our body politic. The average citizen sees increasing amounts of money going to political campaigns because of a special interest and concludes, in many cases, at least, that this is corrupting the process. It may not be true, but the perception is certainly there and that is as important as the reality itself. If we ignore that, we ignore what's happening in the minds of people in our political system.⁶⁰

For a more systematic analysis of public opinion, one must rely on polls. The courts had substantial poll data before them in deciding *FEC v. NCPAC*. There was first of all a Louis Harris poll from mid-1983. It asked respondents to indicate how much they would trust (e.g., "a great deal" to "not at all") a specific kind of PAC if that PAC were to "support and give money to" a presidential candidate in 1984. Substantial majorities responded that they would have little or no trust in NCPAC, labor PACs, or business and corporate PACs. Then from a specially-commissioned poll conducted by the Roper organization, the plaintiffs introduced five questions asked of a national sample of adults. The questions included ones about possible contributors to presidential campaigns, reasons for wanting limits on contributions (of the eighty-five percent who favored limits, sixty percent said the reason was "too much influence"), and support for public funding of presidential campaigns. The final question is worth quoting in full:

Since 1971 [sic] nearly every presidential candidate has chosen to receive Federal funds rather than raise his money from outside sources. But in recent elections some private interest groups have spent very large sums of money on television advertising to support a particular candidate. Some people say this is quite all right and very different from giving the same amount of money directly to the candidate. Others says it is a purely technical way of getting around the 1971 law and should be stopped. Do you think it is all right or should be stopped?

While twenty-five percent of the respondents thought it "all right," sixty-five percent thought it "should be stopped."⁶¹

To no avail. The trial court in *FEC v. NCPAC* dismissed it all as irrelevant. Said the court: "Only distrust in the integrity of government engendered by the conduct proscribed by section 9012(f)'s prohibitions can save the statute."⁶² Even the fifth and last question

59. For something of the experience the reader can examine the transcript of one such session in 10 HASTINGS CONST. L. Q. 466 (1983).

60. H. ALEXANDER & B. HAGGERTY, PACs AND PARTIES 59 (1984).

61. These two surveys are fully summarized in the trial court's opinion in *FEC v. NCPAC*. They are reported in full as a joint stipulation of fact in the Joint Appendix submitted by the parties before the Supreme Court.

62. *FEC v. NCPAC*, 578 F. Supp. 797, 825 (E.D. Pa. 1983).

of the Roper poll (quoted above) failed to move the court. Its results, the court thought, were “suggestive” but “fatally incomplete. The poll does not follow up on the question and ask why those so responding believe independent expenditures should be stopped.”⁶³ As an afterthought the court also suggested in a footnote that the question at issue was “leading and argumentative” and that polls generally raise “complicated hearsay problems.” Only because the poll data did not survive under other provisions of the Federal Rules of Evidence did the court not test them against the hearsay rule.⁶⁴ The Justices simply agreed with the trial court that “the evidence falls far short of being adequate for this purpose.”⁶⁵

By the standards of the two courts in *FEC v. NCPAC* one can safely say that poll data will never “prove” the appearance of corruption. The fundamental mistake of the judges was to assume that the mass public has an “opinion” on specific sections of specific statutes. Since many newspaper reporters and headline writers do not grasp the distinction between campaign contributions and independent expenditures, it seems safe to conclude that neither do most American adults. Public opinion will be about larger issues—about “big money” in a generalized system of campaign finance. It will not be about 9012(f). The appearance of corruption for the public will involve a somewhat disorderly set of perceptions and attitudes about political institutions generally; about PACs, corporations, and labor unions themselves; about the sums of money spent in campaigns; and even about the substance and events of the campaigns.

Most students of American opinion and politics would, I suspect, find the survey data in *FEC v. NCPAC* far more convincing than the courts did, especially in the context of a broader loss of confidence in American institutions. For example, the University of Michigan’s Institute for Social Research has for some years been asking national adult samples: “Would you say the government is pretty much run by a few big interests looking out for themselves or that it is run for the benefit of all people?” In 1964 only twenty-nine percent chose the “few big interests” option; in 1982 some sixty-one percent did.⁶⁶ No one suggests that such a loss of confidence in politicians and legislatures is the result only, or even chiefly, of campaign money. Indeed, even the direction of the relationship is unclear; perhaps loss of confidence in politics and gov-

63. *Id.* at 827.

64. *Id.* at 827 n.42.

65. *FEC v. NCPAC*, 105 S. Ct. at 1470.

66. Miller, *Is Confidence Rebounding?* PUB. OPINION, June-July 1983, at 17. On confidence more generally, see also S. LIPSET & W. SCHNEIDER, *THE CONFIDENCE GAP* (1983).

ernment makes people suspect the worst in campaign finance. But it seems clear that we have here a set of related data that are "of a piece" and that point to campaign finance as one element in a growing cynicism about American political institutions.

In sum, we have a divergence here between reality and the appearance of reality. But appearances and perceptions are a potent reality in themselves. Many people see only the flickerings on the wall of the cave. Their understandings about the impact of cash contributions to candidates or independent spending in a campaign will contribute to their evaluation of the American political system and thus to their conclusions about whether to trust it, obey it, and work within it.

Unhappily, in its confusion about the nature of mass beliefs and their measurement, the Supreme Court has added another serious misunderstanding to its initial failure to grasp the important issues in the relationship between contributor and policymaker. Indeed, in its standards of proof both for corruption and for the appearance of corruption the Court has made it virtually impossible to prove the conditions under which it will permit additional regulations of American campaign finance. The Justices seem to be looking for immediate, irrefutable causal evidence, but it is unlikely that anyone can find it for them.

VI. THE OUTER LIMITS OF ADVOCACY

To test the validity of statutory restrictions on the first amendment rights of campaign spenders the Supreme Court has framed a vague and irrelevant question that admits of no easy, or perhaps even satisfactory, answers. Advocates and legislatures are seriously constrained. They are especially constrained in trying to get outside of the Court's doctrines, whether by urging it to soften its position or by calling its attention to the changing realities of American campaign finance.

Consider the problem of the plaintiffs in *FEC v. NCPAC*—the Federal Election Commission, the Democratic party, and the Democratic National Committee—and their chief friend, Common Cause. Should they have urged the Court to reconsider *Buckley*? On the one hand, there was the signal of the four-to-four vote in *Common Cause v. Schmitt*. Yet there was also the need to salvage a specific and limited statutory clause, even in the face of the Court's having struck down a limit on other independent spending in *Buckley*. The advocates' choice is clear from the record and transcript of oral argument: they chose not to attack *Buckley*, despite the tantalizing tie vote in *Schmitt*. Only Common Cause tried to move the

Court beyond *Buckley*. While not attacking the precedent directly, its brief argued that the lower court had given an excessively literal meaning to the concept of corruption.⁶⁷ (The Supreme Court, of course, did not agree.) Common Cause also tried to convince the Court that it might depart somewhat from *Buckley* without abandoning it:

[T]he *Buckley* court was concerned primarily with the independent efforts of individuals and informal groups, rather than the full scale, professional shadow campaigns waged by appellees and similar political committees. . . . [T]he Court recognized that new patterns of conduct and new evidence of threats to the electoral process posed by purportedly independent spending might well cause the First Amendment balance to be struck differently.⁶⁸

The argument, once more, was to no avail.

The nub of the problem is this: to go beyond the logic of *Buckley* one must escape the Court's definition of the one legislative interest, and then one must escape the Court's conviction that there is only one policy issue, and thus one interest, that justifies the regulation of campaign money. The first of those "escapes" I have discussed already; the second of them, the more drastic one, needs elaboration here.

For most observers there are two overriding policy issues in today's campaign finance: the impact that spenders have on the eventual making of public policy, *and* the impact of money on the campaign itself and the result of the election. The Court's recognition of a governmental interest in preventing corruption and the appearance of corruption addresses, however unsatisfactorily, the former of these issues. But it leaves the electoral problem untouched. Moreover, it is the electoral issues that are increasingly salient, and nowhere is that clearer than in the case of independent expenditures. The Supreme Court is largely correct that these expenditures do not raise serious questions of direct influence on political decisionmaking.⁶⁹ But they do raise troubling questions about the integrity of American elections. In the 1984 campaigns, for example:

—One citizen, Michael Goland of Los Angeles, spent (independently) more than \$1,100,000 to defeat Senator Charles Percy of Illinois in his primary and general election campaigns for reelection. Goland's motives have never been made clear, but speculation centers on the possibility that he may have thought Percy insuffi-

67. Brief of Common Cause as Amicus Curiae at 31, *FEC v. NCPAC*, 105 S. Ct. 1459 (1985).

68. *Id.* at 41.

69. When NCPAC threatens members of Congress with campaigns to urge their defeat if they stray from its legislative preferences—as it has done sometimes—it does indeed raise an issue of policy making.

ciently supportive of Israel. No other individual has ever intervened to that extent in a campaign for the Congress.

—In the Senate race in Texas, won by Republican Phil Gramm, a total of \$731,643 was spent independently by eighteen different groups and individuals. These totals, too, are without precedent.

—Overall, independent expenditures in federal elections in 1984 totalled \$23,400,000, with \$17,500,000 in the presidential race and \$6,000,000 in campaigns for the House and Senate. The comparable figures for 1980 were \$14,200,000, with the two components at \$12,000,000 and \$2,200,000.

Behind those facts are a number of important issues. The major one is responsibility. If a candidate's own campaign offends any voters, they can respond by voting for that candidate's opponent. If an independent campaign offends them, they have no recourse. Nor is there recourse for a candidate who finds that an independent campaign intended to help his campaign is in fact hurting it.

Recent trends in all aspects of campaign finance—including those of independent expenditures—suggest another issue in the integrity of elections: competition. For example, the amounts of money available to incumbents, and available early in the election cycle, are one reason they win reelection in such large numbers. In the 1984 congressional campaigns those general election candidates who were incumbents spent \$187,000,000; their challengers spent only \$93,100,000. (Political action committees, incidentally, gave seventy percent of their contributions in 1983-84 to incumbent members of the House and Senate running for reelection.)

Competitiveness is a concept that applies to parties as well as to individual candidates. In recent years Republican Party committees active in national campaigns have been raising from three to five times as much money as comparable Democratic committees. The Republican Party raised \$300,200,000 in 1983-84, the Democrats \$96,700,000. In addition, independent expenditures heavily favor Republican candidates; of the \$17,500,000 spent in the 1984 presidential campaign for example, ninety-one percent was in support of the Republican candidate, Ronald Reagan. Democratic candidates for Congress do maintain parity with the Republicans by reason of their advantage in incumbency, but Democratic candidates for open seats in the House in 1984 spent an average of \$359,843, Republicans an average of \$401,196.

The funding inequalities may well have reduced electoral competition in the states and congressional districts. Any reduction of competition surely affects the health of our democracy, for without campaigns and elections that present well-defined and viable alternatives, the right to vote loses its central importance. Indeed, the major scholar working in the field, Gary Jacobson, concludes that while levels of campaign funding tend not to be related to the suc-

cesses or failures of incumbents, they do affect the chances of challengers running against them—the larger the campaign treasury, the greater the share of the two-party vote in the election.⁷⁰ Challengers obviously depend on ample campaign resources to overcome the advantages of incumbency.

Once again, public perceptions are important. Many Americans undoubtedly think that money can “buy” victory at the polls, even though scholars may find the subject more complex than that. The independent expenditures of the National Conservative Political Action Committee (NCPAC) in 1983-84 afford an especially apt illustration of the image-reality gap. NCPAC reported expenditures of \$19,500,000 for the 1983-84 election period, a figure that was widely reported in the media with no explanation and with the implicit suggestion that all of the massive sum went directly into the campaign. In fact, NCPAC reported independent expenditures of \$10,200,000 and contributions of \$130,000, a total of \$10,330,000 in political expenditures. But the careful probings of Michael Malbin discovered that eighty-five percent of the reported independent expenditures actually went for direct mail and fund raising expenses; so the remaining fifteen percent of the \$10,200,000 in independent spending comes only to \$1,530,000. That figure, when added to the total of direct contributions, yields a “real” political spending figure of \$1,660,000. No doubt the \$19,500,000 total appeared in far more newspapers than the \$1,660,000 total.⁷¹

Here again the question is whether appearances are more important than reality. The media focus on “big money,” on large political organizations (i.e., PACs), and on mounting levels of campaign spending. Even well-informed citizens have no way of knowing that PAC contributions still account for less than thirty percent of the receipts of congressional candidates and that individual contributors still account for well over half. Nor do they know what a gross expenditure total, such as NCPAC’s \$19,500,000, really means. And nothing in their reading or experience gives them a sense of the complexity of congressional decisionmaking.

On the Supreme Court, only Justice White has shown some inclination to take the problem of appearances seriously. In his dissent in the Berkeley referendum case he ventured closer to the issue than has any of his colleagues:

Perhaps, as I have said, neither the City of Berkeley nor the State of California

70. G. JACOBSON, MONEY IN CONGRESSIONAL ELECTIONS (1980).

71. I am not aware of any newspaper that reported the latter figure. Malbin’s research and the facts reported here are all contained in Brownstein, *On Paper, Conservative PACs Were Tigers in 1984—But Look Again*, 17 NAT’L J. 1504 (1985).

can "prove" that elections have been or can be unfairly won by special interest groups spending large sums of money, but there is a widespread conviction in legislative halls, as well as among citizens, that the danger is real. I regret that the Court continues to disregard that hazard.⁷²

VII. CONCLUSION

Problems begin at the beginning, and so it was with *Buckley*. The Court found itself rushed to a premature adjudication of the many parts of the FECA before even one election had been held under its provisions. As Laurence Tribe has written: "One consequence of this expedited review was that the Supreme Court, working in a factual vacuum, was forced to indulge in more than a little empirical speculation about such issues as the circumvention of expenditure limits and the impact of those limits on campaign speech."⁷³ In view of the immaturity of the issues in 1976, not to mention the paucity of data available to the Justices, one would have expected the Court to proceed with tentativeness and narrowness of purpose. Circumspection was all the more strongly dictated by the fact that the statute at hand aimed to alter fundamentally the activities it regulated.

And so the Justices marched into the thicket of American electoral politics. They had been there before, but never recently in the most tangled patch of it all: the exceptionally complex system of American campaign finance. Its practices are arcane, its regulations convoluted, its mysteries unknown even to many candidates themselves. The Justices, with one exception, had little experience in all of this, and in an important way they never really developed a feel for it. Despite all the arguments and stipulations in *FEC v. NCPAC*, for example, they never grasped the idea of a flow of money, which if stopped at one outlet would build up pressure at others. In their obsession with corruption of officials and their unconcern for the well-being of the electoral process, moreover, they framed a jurisprudence that was strangely, even quaintly, at odds with contemporary political realities.

Worse, perhaps, the Court never developed ways of relating its doctrine to realistic burdens of proof. It set—and allowed trial courts to set—standards of empirical proof for the governmental interests behind legislation that were beyond reason and beyond the standards of informed scholarship. In addition, by looking always for a direct, one-to-one, independent-to-dependent variable, causal

72. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 311 (1981) (White, J., dissenting).

73. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 800 n.1 (1978).

relationship, it betrayed some lack of sophistication about the enormous complexity of social causation. To draw standards of proof for such relationships from the Federal Rules of Evidence is simply to misunderstand completely the causal problem at hand.

On one matter in these cases, however, the Court was on much firmer ground: the importance of “appearances.” Public confidence in a political system is both as important and as fragile as it is in an economy or a banking system. If the appearance of corruption—or of excessive influence—reduces confidence in political institutions, it ultimately sacrifices a necessary condition for a politically active and law-abiding citizenry and, thus, a necessary condition for the health of the institutions themselves.

Acceptable legal proof of those appearances will be hard to find, however, if *FEC v. NCPAC* is any measure. So the gap between reality and the image of reality seems destined to endure. But not without a striking irony. Popular perceptions will continue to be shaped by the extensive media coverage of campaign finance. This sensational reporting results largely from the disclosure provisions of the FECA; to collect data about big financial transactions of any kind and then to make them easily available is inevitably to excite the attention of the media and thus to crank up its great imagemaking machines.

In retrospect one wonders whether that four-to-four vote in *Common Cause v. Schmitt* reflected twinges of doubt about the certainties of *Buckley*. Were some of the Justices, no strangers to the mass media, beginning to develop concerns about appearances? Whether it was a signal or not, it produced no assault on *Buckley*, and it is not easy to imagine what circumstances might lead to such an assault. Meanwhile, Congress is left with the mangled torso of its major legislation on campaign finance and with the frustration that always accompanies a paucity of options. Most important, the gap between the reality of campaign finance and the mass perception of that reality remains. So, too, does the gap between that perception—with its fears, its sense of inequity, and its growing cynicism—and the Supreme Court’s celebration of the new constitutional rights that prevent Congress from addressing the problem.

To emphasize appearances is, of course, to concede a major role to illusion and emotion. All political reform movements, however, are fueled by simplistic explanations of reality; one would be hard put to think of a reform movement in American history without a devil theory. The creation of “devils” is a useful mode of social explanation for many adults, and exorcism of these devils is an important way of reestablishing the credibility and legitimacy of

political institutions. The Supreme Court has failed to recognize that important fact about mass democratic opinion and consent in the past when it has stymied reform movements. That failure, in turn, is one very persuasive reason for deference to legislative assessments of political beliefs and appearances.