

University of Chicago Law School

## Chicago Unbound

---

Journal Articles

Faculty Scholarship

---

2015

### The Equality Taboo

David A. Strauss

Follow this and additional works at: [https://chicagounbound.uchicago.edu/journal\\_articles](https://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

#### Recommended Citation

David A. Strauss, "The Equality Taboo," 2015 University of Chicago Legal Forum 509 (2015).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# The Equality Taboo

David A. Strauss<sup>†</sup>

## INTRODUCTION

The constitutional law governing campaign finance is, to a remarkable extent, the product of a case decided almost 40 years ago. The case, of course, is *Buckley v. Valeo*.<sup>1</sup> *Buckley* established two principles that continue to dominate the law today. The first is that, under the First Amendment, equality is not a legitimate objective of laws regulating campaign finance. The only legitimate objective is reducing the appearance or reality of corruption.<sup>2</sup> The second principle is a distinction between contributions to a campaign and independent expenditures in support of a candidate; regulation of the latter is much more likely to be unconstitutional.<sup>3</sup>

What's remarkable about *Buckley's* continued domination is not that the case was decided so long ago. It is not particularly uncommon for decades-old precedents to play such an important role. Even among First Amendment cases, some storied decisions that antedated *Buckley* continue to set the terms of debate in their respective areas—*New York Times v. Sullivan*,<sup>4</sup> limiting defamation actions against public officials, and *New York Times v. United States*,<sup>5</sup> the famous Pentagon Papers case,

---

<sup>†</sup> Gerald Ratner Distinguished Service Professor of Law at The University of Chicago Law School. I am grateful to the participants in *The University of Chicago Legal Forum* symposium for their comments on an earlier version of this paper, and to the Burton and Adrienne Glazov Faculty Fund at The University of Chicago Law School for financial support.

<sup>1</sup> 424 U.S. 1 (1976).

<sup>2</sup> *See id.* at 25–27, 48–49.

<sup>3</sup> *Id.* at 23 (“[A]lthough the Act’s contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.”). *See id.* at 19–23.

<sup>4</sup> 376 U.S. 254 (1964).

<sup>5</sup> 403 U.S. 713 (1971).

which protected the right to publish government secrets. *Buckley's* continuing influence is remarkable not for its longevity but for two other reasons. One is that both campaign finance and the regulatory landscape have changed dramatically since 1976, when *Buckley* was decided. Vastly more money is spent on elections today than was spent then.<sup>6</sup> Various vehicles for spending money on elections—the campaigns themselves, of course, and political parties, but also PACs and super PACs—have been developed since then or are used in different ways today. Congress and state legislatures have responded with different kinds of regulation, although many of those laws have been invalidated because of *Buckley*.<sup>7</sup>

The second reason that *Buckley's* continuing importance is surprising is that, in a word, *Buckley* is no *New York Times v. Sullivan* or Pentagon Papers case. Unlike those decisions, *Buckley* was not built to last; its central principles rest on weak foundations. *Buckley's* distinction between contributions and expenditures, which has been criticized for many reasons, does not bear the weight the Court put on it. More important, though, the Court in *Buckley* dismissed the government's interest in promoting equality much too quickly and unequivocally. In a passage that has become famous, or perhaps notorious, the *Buckley* Court said: “[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.”<sup>8</sup> The interest in equality required a less peremptory treatment than that.

The distinction between contributions and expenditures has maintained its significance to this day, although there are many signs that it is eroding.<sup>9</sup> Meanwhile, *Buckley's* anathema on

---

<sup>6</sup> Over \$6 billion was spent on federal elections in 2012. See, e.g., *The Money Behind Elections*, OPEN SECRETS, available at <https://www.opensecrets.org/bigpicture/>, archived at, <http://perma.cc/CZ3W-HH37>.

<sup>7</sup> On the history of campaign finance regulation, see, e.g., ROBERT E. MUTCH, *BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM* (2014).

<sup>8</sup> 424 U.S. at 48–49.

<sup>9</sup> See, e.g., *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1462–63 (2014) (Thomas, J., concurring in the judgment) (“Contributions and expenditures are simply two sides of the same First Amendment coin, and our efforts to distinguish the two have produced mere word games rather than any cognizable principle of constitutional law.”); *Nixon v. Shrink Mo. Gov’t Pac*, 528 U.S. 377, 407 (2000) (Kennedy, J., dissenting) (“*Buckley*, . . . by accepting half of what Congress did (limiting contributions) but rejecting the other (limiting expenditures) created a misshapen system, one which

equality as an objective has not only survived but is stronger than ever. Because of *Buckley*, the consistent pattern for several decades has been for defenders of laws regulating campaign finance to insist that those regulations were concerned with corruption even if those laws were, more or less obviously, designed to bring about greater equality.<sup>10</sup> Sometimes that effort succeeded; usually it did not.<sup>11</sup> Meanwhile, the opponents of campaign finance regulation have increasingly narrowed the definition of corruption in order to minimize the possibility that regulations will be upheld.<sup>12</sup>

The problem with the *Buckley* Court's treatment of equality is not that the Court had some concerns about allowing equality to be an objective of campaign finance regulation. The Court was justified in having some concerns. The problem is that *Buckley* went beyond doubts about equality and treated equality as, in principle, an illegitimate justification for restricting campaign-related spending. The equality justification was not just something that, for example, would have to overcome a presumption of invalidity; it was "wholly foreign to the First Amendment."<sup>13</sup> But promoting equality is not, in principle, an illegitimate reason for regulating expression. The opposite is true: in principle, equality is a worthwhile aspiration for a system of free expression.

The problem with equality as a justification for regulation occurs not at the level of principle but at the level of practice and implementation. What, exactly, would equality look like in the domain of campaign finance? How would one bring about that state of affairs? And, crucially, under what circumstances, if any, could Congress or a state legislature be trusted to bring

---

distorts the meaning of speech.").

<sup>10</sup> See generally RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* (forthcoming January 2016).

<sup>11</sup> Probably the clearest example is *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which upheld a restriction on campaign related expenditures by corporations. *Austin* asserted that the restriction was concerned with "corruption," see *id.* at 660, but defined corruption in a way that made it essentially equivalent to equality. The Court said as much in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 350 (2010), and overruled *Austin*. 558 U.S. at 365.

<sup>12</sup> See, e.g., *id.* at 360 ("Ingratiation and access . . . are not corruption."); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 359–60 (2010); *Fed. Election Comm'n v. National Conservative Political Action Committee*, 470 U.S. 480, 497 (1985) ("The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.").

<sup>13</sup> *Buckley*, 424 U.S. at 49.

about that state of affairs, assuming it could be adequately specified? Those are important and difficult issues. But *Buckley* did not treat the equality justification as raising important and difficult issues; it treated it as a taboo. Peremptorily dismissing equality as a justification, in the way that *Buckley* did, is not an adequate way of dealing with the genuinely difficult issues that that justification presents.

For *Buckley* to treat equality that way was a venial sin. One of the great virtues of the common law-like evolution of constitutional principles that is characteristic of our system is that a case-by-case development can reveal that matters initially thought to be simple are, in fact, more complex. Clear-seeming rules become more qualified and complicated and, often, better for it. But the trend since *Buckley* has had the opposite effect. Rather than correcting *Buckley*'s too-simple treatment of equality, subsequent cases have made the problem worse. Especially in recent years, the Court has continued to treat equality as totally off-limits, while making sure that the interest in combatting corruption will not be used as a means of promoting equality.<sup>14</sup> The taboo against allowing equality to play any role is the single most unfortunate feature of the constitutional law governing campaign finance today.

In Part I, I will try to show why *Buckley*'s treatment of equality was too superficial. First I will discuss why equality is in some ways a worthwhile aspiration—even a vital goal—for a system of free expression. The easiest way to see the point is to consider formal, structured discussions—debates, arguments in court, and the like. In those settings, there is at least a presumption that both sides get equal time and equal access to the decisionmaker. A deviation from equality, if it were allowed at all, would require a justification. Certainly a deviation that resulted entirely from one side's greater financial resources would, at least in general, be unacceptable.

On the other hand, there are serious problems in trying to implement comparable notions of equality in unstructured, open political debate in society. In that context, unlike a formal debate, it is usually difficult even to identify the "sides" that we would want to treat equally. Then if we could solve that

---

<sup>14</sup> See, e.g., *McCutcheon*, 134 S. Ct. at 1440–42; *Ariz. Free Enterprise Club's Freedom PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Citizens United*, 558 U.S. at 336–65; *Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008).

problem, it would not be easy to determine what equality among different speakers consisted of. But these are problems of implementation; they are potentially very serious, but they do not make equality any less of an aspiration in principle, and they do not make the pursuit of equality through campaign finance regulation “wholly foreign” to the First Amendment, as *Buckley* says.

In Part II, I will consider whether political campaigns can be assimilated to formal, structured debates—in which equality is not just an acceptable goal but is relatively easy to implement and presumptively imperative—or are instead, as *Buckley* apparently assumed, more like open debate in society, in which implementing a principle of equality presents serious problems and even dangers. I will argue that political campaigns have enough in common with structured debates to make it worth trying to implement a principle of equality. This is especially true because candidates and their supporters spend money specifically in order to gain votes, and equality in voting is a central constitutional principle. Significant difficulties remain, but given the importance of equality as an aspiration, courts should be willing to incur some costs and risks in allowing legislatures to try different ways of promoting equality in political campaigns. I will conclude by suggesting that courts should discard *Buckley*’s equality taboo and instead proceed in a common law-like fashion to try to identify forms of equality-promoting regulations that seem acceptable.

### I. THE VIRTUES AND VICES OF EQUALITY

As is often the case with taboos, it’s not that the taboo against equality is completely irrational. There is something to be said for it, possibly even a lot to be said for it. But there are also good reasons for rejecting the taboo. And as is also often the case with taboos, the biggest problem is that the taboo has prevented the candid discussion of the pros and cons, and cut off a process of trial-and-error experimentation that might have captured some of the benefits and minimized the costs of allowing the government to pursue equality in campaign finance regulation.

### A. The Virtues: Equality in Structured Debates

The principal problem with the Court's treatment of equality as a taboo is that equality is in some ways the opposite of "wholly foreign to" a system of free expression. It is, to the contrary, an ideal. Instinctively one would say that in a system of free expression, all speakers should have an equal opportunity to be heard: whether a point of view prevails should depend entirely on its merits and should not be affected by inequalities in the resources available to its proponents. The central idea of a system of free expression is that a person's ability to win converts should depend on the persuasiveness of her speech. Speakers may be unequal in the sense that some have better ideas, or are more persuasive, than others. But in all other ways, they must be treated equally. Anything that gives certain speakers an advantage, beyond the merits of their speech, creates an unacceptable inequality and should be rejected.

More concretely, in a formal (or even informal) debate, it is natural, and intuitively fair, to divide the time equally between or among the parties. A deviation from equal time requires a justification. In oral argument before the Supreme Court itself (as before many other courts and similar institutions), each side gets an equal amount of time, and an advocate who wants to keep speaking after her time is up will be told that she may not do so because the other side must have equal time to speak.<sup>15</sup> That certainly looks like "restrict[ing] the speech of some . . . in order to enhance the relative voice of others."

When campaign finance restrictions promote equality by limiting the amount of money people can spend, the concern is that people with more money will have an advantage.<sup>16</sup> That seems like an especially reasonable equality-related concern. Again, in an ordinary debate or discussion, one can imagine reasons for allowing one side more time than another, consistent with the principle that everyone should have an equal opportunity to persuade. It might be better, or at least acceptable, to allow more time to a side that has a more complex

---

<sup>15</sup> See SUP. CT. R. 28.4.

<sup>16</sup> See, e.g., Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160 (1994) (discussing the disproportionate influence of wealthy citizens in the fundraising process).

position to present, for example, or if one side were interrupted more frequently by hecklers or questioners.

But it is hard to imagine a debate or discussion in which time would be auctioned off in such a way that the amount of time each speaker had depended on his or her ability to pay. When a legislature restricts political campaign expenditures in order to promote equality, it is trying to prevent the equivalent of such an auction. It is trying to avoid a system in which the side with more money can buy more advertising time on television, for example—the analogue to winning an auction for more time in a courtroom hearing or a public debate. Why should that kind of aspiration to equality be rejected out of hand, in the way that *Buckley* rejected it?

It is important to distinguish, in this connection, between ability to pay and willingness to pay. Willingness to pay for an opportunity to speak—assuming equal resources—reflects how strongly a person holds the view she wants to advocate. It might not be inconsistent with equality to allocate time on that basis. Arguably a person who holds a view very strongly has a greater legitimate interest in expressing that view, just because self-expression is an important value, compared to someone whose belief in the opposing view is only lukewarm. If that is so, then treating people equally might require giving the person with the intensely held view a greater opportunity to express that view. Also, it is conceivable (although not obviously true) that the intensity with which a view is held is a good indication of whether the view is correct on the merits. But even if that is not true, perhaps, in a democracy, respect for one's fellow citizens requires that one pay more attention to views that they hold intensely; if so, that would be an argument for allowing them greater opportunities to express those views.

If resources were equal, then an auction would reflect differences in willingness to pay, that is, in intensity. The quasi-auction that campaign finance restrictions try to prevent, by contrast, allows the opportunity to speak to vary with disparities in resources, not just willingness to pay. It is not obvious why preventing that kind of auction is “wholly foreign to the First Amendment.” The opposite seems more nearly true: allowing speech to be allocated in that way seems inconsistent with the principles of free expression.



## B. The Problems: Equality in Open Political Debate

In all of these ways, promoting equality seems to be at least consistent with, and maybe even a necessary component of, a sound system of free expression. That is enough to suggest that the equality justification should have gotten more thorough consideration in the Supreme Court's opinions. But at the same time, it is not hard to see why the *Buckley* Court reacted with such instinctive hostility to the idea that equality could justify restrictions on expression. The examples I gave—formal debates and courtroom proceedings—are highly structured events. It seems completely unworkable, or worse, to try to extend the norms of events like those to freewheeling debate over political and social issues in society at large.

To begin with, in a courtroom or a debate, the two (or more) sides are easily identified, and each speaker is associated with one of them. When there is large-scale debate in society over some issue of domestic or foreign policy, identifying the "sides" in that way will be at least arbitrary and more likely impossible. There will be gradations of opinion and qualifications in the positions taken by various participants. People apparently on the same general "side" of a debate about policy—for example, whether a certain statute should be enacted—might disagree about specifics, or in their willingness to compromise, or in the priority they attach to achieving that policy objective compared to others.

Even if one could, in an open debate in society about a political issue, identify the competing positions and their advocates in some way, that would only be the beginning of the problems with promoting equality. It is inconceivable that we would tell a person who wanted to write a blog post about a political or social issue, for example, that she could not do so because her side has already been heard from enough. For one thing, a speaker in that situation would be entitled to assert that she has a right to speak even if others have already spoken for the same position. The idea that a person loses the right to speak on a political or social issue because lots of others agree with her, and have already spoken, certainly does seem "wholly foreign to the First Amendment."

Even beyond that, though, what would it mean to say that one side has been heard from enough? That is, what would equality even consist of, in a society-wide discussion of political

issues? If certain positions are very unpopular, do their proponents have to be given extra time, or extra resources, in order to assure equality? Or, more implausible still, must some of the proponents of the more popular position be silenced in order to ensure equality? In a formal debate, or a courtroom, both sides get equal time, irrespective of the merits, the number of adherents, or anything like that. But when it comes to debates about political or social policy, it is easy to think of positions that are unpopular because they deserve to be unpopular. Not many people these days will publicly advocate racism or genocide. The idea that the speech of the opponents of those deservedly unpopular positions can be restricted, in order to ensure equality, is bizarre.

Of course some unpopular positions might be correct and might in that sense “deserve” more advocates. But then there is the problem that someone will have to make that judgment: is this a deservedly unpopular position that should not have more advocates, or a position that, while unpopular, should be given a stronger defense? In certain settings—say, a conference of scientists considering a disputed scientific issue—it is plausible, or even a good idea, to have someone with the power to make a decision like that: to rule out certain positions as obviously wrong while soliciting stronger advocacy for positions that are not getting as good a defense as they should get. But when we are dealing with open debate in society about some political or social issue, the only entity that can make that decision authoritatively is the government. And for the government to make those judgments—deciding how much is to be said in support of a position on the basis of its assessment of the correctness of that position—is directly contrary to the central premise of a system of free expression, which is that the government must follow, not dictate, decisions made by free discussion.

## II. EQUALITY IN POLITICAL CAMPAIGNS

### A. A Workable Conception of Equality?

*Buckley's* “wholly foreign” dictum assimilated political campaigns to the second scenario I described—freewheeling society-wide debate over political or social issues—rather than to a more structured debate or hearing. That was an

understandable thing to do, particularly when *Buckley* was decided. At that time, the law governing campaign finance had undergone very substantial changes.<sup>17</sup> The Court, and the nation generally, did not have a lot of experience with campaign finance regulation on that scale. In any event, a political campaign looks less like a formal debate or hearing and more like a society-wide free-for-all about a controversial political issue. And allowing the government to promote equality in that situation does seem highly questionable, even dangerous.

On the other hand, some of the characteristics of political campaigns should have prompted the Court to consider more seriously—if not in *Buckley*, then in later cases—the possibility that equality is a legitimate objective of campaign finance regulation. An election does have something in common with a debate or a hearing. There are candidates, and voters will choose one or another. In that way, it is possible—as it is in a formal debate or in courtroom proceedings, even if it is often not in a general political controversy—to identify the competing positions with some clarity. One can say, for example—and commentators routinely do say—that one side is much better funded than the other.

Because the different positions can be easily identified in campaigns as in highly structured proceedings, it is possible to establish a plausible benchmark for what constitutes equality in political campaigns—something that is not really possible in open political debate. Just as the usual rule in formal debates and courtroom proceedings is that each side gets equal time, one can say that equality in political campaigns, to a first approximation, is equal funding. Of course this is very far from being the only plausible conception of equality; there are many problems with it. But “equal time” in more structured proceedings—which can also be criticized as reflecting an unrealistic notion of equality—is an appealing approach because it is a plausible account of equality and it is relatively easy to implement. The same is true of equal funding.

One other characteristic of campaign finance should have caused the Court to consider equality more seriously as a

---

<sup>17</sup> See, e.g., *The Federal Election Laws: A Brief History*, FEDERAL ELECTION COMMISSION, available at <http://www.fec.gov/info/appfour.htm>, archived at <http://perma.cc/L7RH-CDVX>. The FEC commented about the 1970s: “In one decade, Congress has fundamentally altered the regulation of Federal campaign finances.” *Id.*

justification for regulation. Campaign finance is ultimately about voting, and equality in voting rights is a central theme in the law.<sup>18</sup> The distinctive feature of campaign finance—both contributions to campaigns and independent expenditures in support of campaigns—is that money is being spent in order to win votes. It is generally a crime for a political campaign to divert contributions into uses other than those related to gathering votes,<sup>19</sup> and a limit on independent spending is directed precisely at expenditures that are aimed at getting voters to vote for a certain candidate.<sup>20</sup> Of course it may not be easy to distinguish between expenditures that are designed to produce votes for a candidate and expenditures that are designed to influence a broader public debate about political or social issues. That is one among several legitimate concerns about allowing equality as a justification for campaign finance regulation. But assuming that the class of campaign-related expenditures can be satisfactorily identified, those expenditures are, in practice, an effort to translate money into votes. In campaign finance, an inequality in funding is, other things equal, an inequality in the ability to get votes.<sup>21</sup> People who give more money to a campaign, or who spend more in support of a campaign, are doing so precisely in order to deliver more votes to that campaign.

There is nothing novel or “wholly foreign” to our system in insisting on equality in voting. On the contrary: “one person, one vote” is a foundational principle. The Supreme Court cases that introduced that phrase were relatively late arrivals on the

---

<sup>18</sup> See *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (“The concept of ‘we the people’ under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.”); Amber L. Cottle, Comment, *Silent Citizens: United States Territorial Residents and the Right to Vote in Presidential Elections*, 1995 U. CHI. LEGAL F. 315 (1995) (discussing a trend in which the Court and Congress have reinforced each other’s efforts to achieve broader equality in voting rights).

<sup>19</sup> See 2 U.S.C. § 439(a).

<sup>20</sup> See 2 U.S.C. § 431(17)(a) (“The term ‘independent expenditure’ means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate.”).

<sup>21</sup> See, e.g., Gary C. Jacobson, *The Effects of Campaign Spending in Congressional Elections*, 72 AMERICAN POLITICAL SCIENCE REVIEW 469–491 (1978); Donald Philip Green & Jonathan S. Krasno, *Salvation for the Spendthrift Incumbent: Reestimating the Effects of Campaign Spending in House Elections*, 32 AMERICAN JOURNAL OF POLITICAL SCIENCE 884–907 (1988); Randall W. Partin, *Assessing the Impact of Campaign Spending in Governors’ Races*, 55 POLITICAL RESEARCH QUARTERLY 213–33 (2002); Alan Gerber, *Estimating the Effect of Campaign Spending on Senate Outcomes Using Instrumental Variables*, 92 AMERICAN POLITICAL SCIENCE REVIEW 401–411 (1998).

constitutional scene: they were the decisions in the early 1960s that declared unconstitutional the gross malapportionment of state legislatures.<sup>22</sup> But the more general idea of political equality has been around from the start, and the trend toward political equality in U.S. history is unmistakable.<sup>23</sup> The franchise has been expanded repeatedly since the founding: by the abolition of property qualifications,<sup>24</sup> the prohibition of discrimination against racial groups<sup>25</sup> and women,<sup>26</sup> the extension of voting to eighteen-year-olds,<sup>27</sup> and by the reapportionment decisions.<sup>28</sup> In general, equality in voting rights is not just an acceptable justification for government action; it is mandatory.<sup>29</sup> The connection between campaign finance and voting does not, of course, demonstrate that equality is a legitimate objective of campaign finance regulation. The problems that arise in assuring equality in political debates do not disappear. But the tradition of political equality again suggests that the Court should have taken more seriously the argument that equality is a legitimate objective of campaign finance regulation.

## B. The Pitfalls

At least two problems remain: defining equality in the context of campaign finance regulation, and, most important, deciding whether Congress and state legislatures can be trusted with the power of implementing some conception of equality. In a formal debate or hearing, equality generally means giving both sides equal time. But equality seems to be a hopelessly elusive notion in open political debate. And it is certainly not easy to

---

<sup>22</sup> See *Reynolds*, 377 U.S. 533, 554–61 (1964).

<sup>23</sup> See generally the essays collected in *VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY: ESSAYS ON THE HISTORY OF VOTING AND VOTING RIGHTS IN AMERICA* (Donald Rogers, ed., 1992); ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000).

<sup>24</sup> See, e.g., KEYSAR, *supra* note 23, at 24–27.

<sup>25</sup> U.S. CONST. amend. XV.

<sup>26</sup> U.S. CONST. amend. XIX.

<sup>27</sup> U.S. CONST. amend. XXVI.

<sup>28</sup> See *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>29</sup> See *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (“[O]nce the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.”).

define equality when it comes to political campaigns, notwithstanding the resemblances between political campaigns and formal debates or hearings. One could, to press the point about the indefiniteness of the definition, enumerate various sources of inequality that will always be present: some candidates will be more charismatic, some campaigns will be better organized, and so on. But these forms of inequality have their counterpart in structured proceedings like debates and hearings, and they do not trouble us there. So it seems reasonable to set them aside in dealing with campaign finance regulation, too.

I suggested earlier that equality of financial resources provides at least a benchmark conception of equality for political campaigns. But one could challenge this idea, too, in several ways. Some candidates might attract more contributions, or more money might be spent on their behalf, because people believe in them more strongly. Why is that an impermissible inequality? Or, one might say, why limit the demand for equality to financial resources? Candidates' resources will differ in other ways. Some candidates will benefit more from volunteer labor and other in-kind contributions and expenditures, and one might question why financial inequality is a greater problem than inequality in access to in-kind resources. Some candidates will get more endorsements or endorsements from more influential figures; should that count as a kind of inequality? Perhaps most important, incumbents ordinarily enjoy enormous advantages. Is that an impermissible form of inequality?

Another deeper problem is that any conception of equality will be implemented by a fallible and, quite possibly, self-interested legislature. In an odd way, this both mitigates and exacerbates problems caused by the indefiniteness of the definition of equality in political campaigns. It mitigates that problem because it means that the courts do not have to come up with a definition of equality themselves. The question for the courts is whether to uphold campaign finance regulations that are enacted by a legislature as a means of promoting equality. So, were the Court to reconsider *Buckley's* dictum about inequality,<sup>30</sup> the issue for the Court would not be whether it could give a satisfactory account of what equality in campaign

---

<sup>30</sup> See *Buckley*, 424 U.S. at 48–49.

finance consists of. Congress, or a state legislature, would adopt, implicitly or explicitly, a conception of equality as the basis for a regulation of campaign finance, and the Court would decide if the legislature had acted in an acceptable way.

Consider, for example, the most common proposal for promoting equality in campaign finance: a system of vouchers, in which each citizen would be entitled to make contributions to a campaign and expenditures on behalf of a candidate totaling a certain fixed amount. But no one would be allowed to spend or contribute more than that out of his or her own funds. There are variations in the voucher systems that have been proposed, but that description captures the essential features.<sup>31</sup>

This system reflects a plausible conception of equality. It takes inequality in financial resources out of the picture, at least if its restrictions can be enforced. It does allow citizens to express the intensity of their preferences, to a degree; they do not have to spend all of their vouchers, or they can divide them among competing candidates. Except for the variations that result from those differences in intensity, campaigns will be funded equally.

One could criticize this kind of system on several grounds. Notably, it does nothing about non-financial inequalities, because it allows candidates to benefit from in-kind contributions and expenditures. (In theory, perhaps, in-kind contributions and expenditures—such as volunteer labor—could count against the voucher limit. But that might be a difficult rule to implement.) Most important, it does nothing to offset the benefits of incumbency. Again, the system could, in theory, be adjusted to try to offset the benefits that incumbents enjoy, perhaps by setting lower voucher limits for incumbents. But it would be hard to specify the magnitude of those limits in any noncontroversial way.

The courts would not have to work out the specific design of this system; legislatures would do so. But if the *Buckley* dictum about equality stands, then any version of this system is at least arguably unconstitutional. The restriction on cash donations

---

<sup>31</sup> For various proposals, see, e.g., Hasen, *supra* note 10; LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 265–72 (2011); BRUCE ACKERMAN & IAN AYERS, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* 12–24 (2002); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1206–08 (1994).

certainly restricts the speech of some in order to enhance the relative voice of others. But why should this approach be dismissed out of hand in that way?

Equality is, in principle, a worthwhile aspiration. That is the lesson of the analogy to formal debates and courtroom proceedings. It is also the lesson of "one person, one vote."<sup>32</sup> In fact, it is difficult to see what the argument against equality in principle would be; the problems, as I've said, come at the level of defining what equality would mean and then deciding what institutions, if any, could be trusted to implement that notion of equality. Beyond that, inequalities that are the result of differences in ability to pay (as opposed to willingness) seem especially unjustified, again in principle. In these ways, a voucher system, although it raises some serious questions, is a plausible attempt to achieve a worthwhile form of equality.

What all of this means is that when the courts have to decide whether, say, a voucher scheme is constitutional, they have to determine whether the risks are so great that the legislature should not be allowed to try to make things more equal. And there are risks. Any regulation of campaign finance that limits independent expenditures has to distinguish between money spent in support of a campaign and money spent in support of a position on a political issue.<sup>33</sup> In a voucher system, vouchers need not be used for the latter, even though speech on a political issue might very well help persuade people to favor a particular candidate. And, of course, people interested in spending money will look for opportunities to evade restrictions on campaign spending in just this way. But enforcing a requirement that vouchers be used for spending that supports campaigns may have the effect of spilling over and limiting other forms of political speech.

Voucher systems also present risks that are common to any regulation of campaign finance that is designed to promote equality. For example, there is a risk that ignoring non-financial resources will create a bias toward candidates from a certain party or candidates who take certain positions. Perhaps, for

---

<sup>32</sup> See *Wesberry*, 376 U.S. at 18; *Gray*, 372 U.S. at 384; *Reynolds*, 377 U.S. at 560–61.

<sup>33</sup> See, e.g., the definition of "electioneering communication" discussed in *Citizens United*, 558 U.S. at 321.



example, labor unions,<sup>34</sup> or politically-involved religious groups,<sup>35</sup> are important sources of volunteer campaign workers, so candidates who favor their positions will have an advantage if financial expenditures and contributions are limited but in-kind aid is not. And, of course, there is a great risk that campaign finance regulations will be a means of protecting incumbents.<sup>36</sup> The people who enacted those regulations were, by definition, incumbents, and it would actually be surprising if they did not try to protect themselves from electoral challenges to some degree.

### III. CONCLUSION

The *Buckley* dictum, and the Court's rigorous adherence to it in more recent cases, treats these genuine issues as insuperable obstacles to any measure that promotes equality. That is a mistake. At the very least, the case for reaching such a categorical conclusion has not been made. Once we accept certain foundational principles—that equality is a worthwhile objective; that inequalities that are the result of citizens' varying resources are, in principle, unjustifiable; and that “one person, one vote” means that equality in influencing voters in an election is especially important—it is worth incurring some risks and some costs to try to achieve political equality and avoid unjustifiable inequalities.

Crucially, there are ways for courts to get a sense of how great those risks and costs are. If, for example, incumbent protection is the problem—and it seems to be the most troubling problem—it should be possible to get some sense of whether a particular restriction, like a voucher system, really does have

---

<sup>34</sup> See Steven Greenhouse, *Labor Unions to Have 128,000 Campaign Volunteers*, N.Y. TIMES (Nov. 1, 2012), available at <http://thecaucus.blogs.nytimes.com/2012/11/01/labor-unions-to-have-128000-campaign-volunteers/>, archived at <http://perma.cc/24RB-DRLY>.

<sup>35</sup> See JOHN CLIFFORD GREEN, *THE FAITH FACTOR: HOW RELIGION INFLUENCES AMERICAN ELECTIONS* 163–64 (2007) (looking at the 2004 election as compared to the 1952 election and concluding “Catholics and Evangelicals had become the major sources of campaign volunteers” for Republicans).

<sup>36</sup> See, e.g., Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045, 1080 (1985) (“Research strongly suggests that anything that makes it harder to raise funds will be detrimental to challengers and correspondingly strengthen the position of incumbents. Contribution limitations, therefore, probably increasingly insulate incumbents from changing political opinion in and strong challenges from their local constituencies.”).

the effect of making it much more difficult to displace an incumbent. If states are allowed to experiment with different kinds of campaign finance regulation, the courts can get evidence from their experiences. If a particular form of regulation has been in place for a while, there should be a historical record that reveals its effects.

In these ways, the equality taboo can be, and should be, replaced by the kind of frankly experimental approach that often characterizes the common law. Maybe at the end of the day the line-drawing issues will prove to be too great, and the risks of incumbent protection and other problems are too substantial. In that case, the experiment will have to be abandoned. But the forty years of nearly rigid adherence to *Buckley's* dictum have deprived the courts, and all of us, of the opportunity to see if that is true. Taboos are not always bad, but they should be held up to the light of logic and evidence before they are accepted. That has not happened with the equality taboo in campaign finance regulation.

