MARKET INTERMEDIARIES IN THE POST-*BUCKLEY* WORLD

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Buckley v. Valeo[1] is extraordinarily stable for such an unpopular decision.[2] For all the cacophony of the opinions, the questionable reasoning, and the frailty of the fundamental divide between contributions and expenditures, the world *Buckley* created still provides the blueprint for campaign finance law today. Indeed, if someone were to have read *Buckley* in the 1970s, went into a Rip Van Winkle[3] state for nearly forty years, and then read *Citizens United*[4] or *McCutcheon v. FEC*,[5] she would awaken with a faint smile of recognition. It is not that *Buckley*'s progeny could not have grown up any other way; it is simply that they bear a striking resemblance to their parent. I suspect that our latter-day Washington Irving character would, by contrast, have been startled if *Buckley*'s passing endorsement of the anticorruption interest in regulating contributions had been the means to enshrine a comprehensive regulatory regime dedicated to a concept of political equality. While that argument had a fleeting moment of success,[6] it was at best a love child of the original

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1 424 U.S. 1 (1976).

2 A cursory Westlaw search reveals some 5789 law review articles citing *Buckley*, of which the great majority are critical in at least some respect, including some of my own. For an exemplar of the anti-*Buckley* critique, see Burt Neuborne, *Campaign Finance Reform & the Constitution: A Critical Look at* Buckley v. Valeo, *in* BRENNAN CENTER FOR JUSTICE CAMPAIGN FINANCE REFORM SERIES (1998), *available at* http://www.brennancenter.org/publication/campaign-finance-reform-constitution-critical-look-buckley-v-valeo.

3 *See* Washington Irving, *Rip Van Winkle: A Posthumous Writing of Diedrich Knickerbocker*, *in* THE SKETCH BOOK OF GEOFFREY CRAYON, GENT. (Project Gutenberg 2000) (1820), *available at* http://www.gutenberg.org/files/2048/2048-h/2048-h.htm#link2H_4_0008 (last visited July 29, 2014).

4 558 U.S. 310 (2010).

5 134 S. Ct. 1434 (2014).

6 The high point came with *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (upholding a state law barring corporations from using general treasury funds for independent campaign expenditures). For a discussion of the knowledge of the Justices in the majority that the logic of *Austin* was at odds with with *Buckley,* see Elizabeth Garrett, *New Voices in Politics: Justice Marshall's Jurisprudence on Law and Politics*, 52 HOW. L.J.

Buckley vision. On this score, *McCutcheon* more faithfully picks up the central themes of *Buckley*, with its continued division between contributions and expenditures, and its limited vision of corruption as the sole predicate for permissible regulation under the First Amendment.

Most of the scholarly debates on *Buckley* (is money speech?—yet again?) have run their course. I join with Michael Malbin[7] and with Joey Fishkin and Heather Gerken[8] in thinking it is well nigh time to move on to examine the more fully institutional dimensions of the *Buckley* regime. The key here, as Pam Karlan and I argued over a decade ago,[9] is the structural mismatch *Buckley* created between the unlimited expenditures available to candidates and the constricted contributions through which they could fundraise in the first place. In any market domain, political markets being no exception, a gulf between supply and demand means the market cannot clear of its own devices. When supply and demand can't rationally align themselves, an opportunity opens for arbitrage and intermediaries serving as market-makers.

In roughly the first fifteen years after *Buckley* the market makers were political action committees (PACs). The contribution limits upheld in *Buckley* meant that candidates for office needed to spend extraordinary amounts of time ferreting out relatively small donations.[10] This was a markedly inefficient enterprise—giving a starving man at a smorgasbord only a tiny spoon with which to eat, in the metaphor that Karlan and I used.[11] PACs served as intermediaries

655, 672–78 (2009) (surveying the discussions in the archived papers of the author of *Austin,* Justice Thurgood Marshall—for whom Garrett served as a law clerk the year *Austin* was handed down).

7 Michael J. Malbin, McCutcheon *Could Lead to No Limits for Political Parties—With What Implications for Parties and Interest Groups?*, 89 N.Y.U. L. REV. ONLINE 92 (2014).

8 Joseph Fishkin & Heather K. Gerken, *The Two Trends That Matter for Party Politics*, 89 N.Y.U. L. REV. ONLINE 32.

9 Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999).

10 As inflation made contribution limits ever more restrictive, candidates necessarily had to seek out more, now relatively smaller, contributors. Combined with the absence of spending limits, money became the driving force of political life. *See* Craig M. Engle, John DiLorenzo, Jr. & Charles Spies, Buckley *over Time: A New Problem with Old Contribution Limits*, 24 J. LEGIS. 207, 218–20 (1998) (discussing the declining real value of capped contributions under inflation); *see also* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment after All*, 94 COLUM. L. REV. 1281 (1994) (arguing that candidates spend excessive time on fundraising and that protection of candidates' time is a legitimate objective of campaign finance regulation).

11 *See* Issacharoff & Karlan, *supra* note 9, at 1711 ("The effect is much like giving a

that could cobble together disparate contributions on behalf of the candidate and deliver them as a bloc, likely garnering both gratitude and access in exchange. But PACs did not expand the universe of potential donations outside the limits of the Federal Elections Campaign Act (FECA), or what is known in the trade as "hard money." Business groups, trade unions, law firms and others could form a PAC and solicit donations from their affiliates, but their only additional contributions were limited to the organizational and regulatory requirements of the PACs. Those PAC contributions were significant in helping to fill the coffers of the candidates. While PACs helped underwrite the cost of the electoral enterprise, they did not change the statutory limitations for the sources of money. Nonetheless, the association of PACs with specific interest groups made them the target of reform efforts to wipe out special interest money.

How quaint PACs now seem. The limit of PACs was the circumscribed domain of hard money, something that makes them quite innocuous by today's standards. By the mid-1990s, PACs gave way to a second phase that focused on expanding the amount of money available for campaigns from outside the FECA limits, what is known as "soft money."[12] This was the era of the famous White House coffees, overnights in the Lincoln Bedroom, and rides on Air Force One.[13] For Republicans, the corresponding inducements were outings with congressional leaders—the best one can do without the White House.[14]

The prime mechanism for spending soft money was to use state parties to extend their fundraising and assistance to federal candidates through FECA's "grassroots spending" loophole.[15] In turn,

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starving man unlimited trips to the buffet table but only a thimble-sized spoon with which to eat: chances are great that the constricted means to satisfy his appetite will create a singular obsession with consumption.").

12 *See* Anthony Corrado, *Giving, Spending and "Soft Money*,*"* 6 J.L. & POL'Y 45, 51–54 (1997-1998) (describing the transition from PACs to soft money contributions in the wake of the 1994 elections).

13 *See, e.g.*, Brooks Jackson, *Lincoln Bedroom Guests Gave $5.4 Million*, CNN ALL POLITICS (Feb. 26, 1997), http://www.cnn.com/ALLPOLITICS/1997/02/26/clinton.lincoln/.

14 *See* S. COMM. ON GOVERNMENTAL AFFAIRS, INVESTIGATION OF ILLEGAL OR IMPROPER ACTIVITIES IN CONNECTION WITH 1996 FEDERAL ELECTION CAMPAIGNS, S. REP. NO. 105-167, vol. 5, at 7968–75 (1998) (minority report) (describing the "Republican Eagles" program where Speaker Gingrich took certain high-level donors on trips), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-105srpt167/pdf/CRPT-105srpt167-pt5.pdf.

15 *See* Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 626 (2000) (discussing the "grassroots spending" loophole in the Federal Election Campaign Act (FECA), whereby "national parties . . . typically raise the

the state parties would engage in unregulated issue advocacy and save the national party money by spending national *soft* money on state candidates on which the national party would otherwise need to spend *hard* money. The state party reserved some of the national money they received for these purposes for solely state partybuilding.[16] Much of this state partybuilding was in turn marshaled in federal elections, such that in sum and substance the state parties became fundraising intermediaries for the national parties. By 2000 this was well established and the going rate for serving as the passthrough had gravitated to a 15% charge by the state parties.[17] Fifteen percent is a well-known rate for money laundering,[18] so there is some satisfaction in knowing that political money evasion had reached an efficient equilibrium. For all the disturbing features of the soft money era, it had one salutary effect: It was this regime that really strengthened the parties, and particularly the state parties. Under soft money rules, the parties had the funds and were in control. The money that stayed in the local party coffers, and even in the hands of the national parties, created a period of stronger party authority in politics.

Beginning in 2002, the *Buckley* era entered a third phase. All of a sudden, there was an explosion of independent expenditures by groups not affiliated with candidates, national parties, or state parties. Between 2000 and 2008, independent expenditures increased by at least 1258%.[19] This increase wasn't precipitated by *Citizens United*; it took place before any of the Court's decisions on campaign finance under Chief Justice John Roberts. The likeliest trigger for the

funds for grass-roots spending and then transfer them to state and local parties, with directions concerning how they are to be used to aid federal candidates").

16 *See* Stephen Ansolabehere & James M. Snyder, Jr., *Soft Money, Hard Money, Strong Parties*, 100 COLUM. L. REV. 598, 607 (2000) ("[W]e suspect that federal committees would likely attract [soft money contributions at or below hard limits that were, at the time, given to non-federal accounts] if non-federal accounts did not exist.").

17 *See id.* at 616 (examining state party expenditures and showing that of the "grassroots" money deposited with the Idaho state party, only 15% of it was used for state party "grassroots" activity while the remainder found its way back to national party expenditures).

18 *See* PETER REUTER & EDWIN M. TRUMAN, *Money Laundering: Methods and Markets*, *in* CHASING DIRTY MONEY: THE FIGHT AGAINST MONEY LAUNDERING 36 (2004) ("Experienced investigators refer to a general price range of 7 to 15 percent for laundering for drug dealers, but some reports are inconsistent with such estimates.").

19 In the 2000 election cycle, the Center for Responsive Politics reports that independent expenditures totaled $5,095,476, across all federal elections. The 2008 total was $64,122,607, representing a 1258% increase. Ctr. for Responsive Pol., *Total Outside Spending by Election Cycle*, OPENSECRETS.ORG http://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2014&view=Y&chart=N (last visited July 29, 2014).

redirection of money toward independent expenditures was the 2002 Bipartisan Campaign Reform Act (BCRA), known after its sponsors as the McCain-Feingold Act.[20] Correlation does not prove causation, and the effect of BCRA remains a contested issue among the cognoscenti. But BCRA was designed to drive away soft money and dry up money in the political parties. As Malbin shows,[21] that effect is readily visible in the state parties. If money in politics does indeed respond to a hydraulic logic, one needs to look to where the spigot was opened. This is an application of the command to follow the money. In the same period that the parties were drying up, independent expenditure groups—the shadow parties identified by Fishkin and Gerken—grew flush.[22]

The current trend is toward an expanded role for the shadow parties, as is well understood by political insiders and as was recently examined in the *New York Times*.[23] Certainly, presidential campaigns are able to amass large sums of hard money, and to run impressive modern campaigns on immense scales. But a result of the current legal environment is that the money moved away from the only people we *could* regulate—candidates and parties—into unregulated domains in the form of 501(c)(4) organizations and surging Super PACs.[24] While there has always been unregulated money, speaking euphemistically of the wads of cash that always appeared on Election Day, what is new is the combination of unregulated *independent* money alongside tightly regulated parties and candidates.

Even in the domain of hard money, there is now little meaningful role for the state political parties as such. Despite his critique of the "weaker parties" hypothesis, Malbin's empirical research into the state parties[25] confirms what I observed working as senior counsel for Barack Obama in 2008 and 2012, and what I am told was equally true in the well-funded 2012 campaign of Mitt Romney. The Obama campaign machine was built from the ground up in 2008, and then reassembled for 2012. It was, from top to bottom, a presidential campaign. The state parties were at best distant cousins. When the 2012 campaign ended, the organizational structure was redubbed

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20 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

21 *See* Malbin, *supra* note 7, at 99–100.

22 Fishkin & Gerken, *supra* note 8.

23 *See The 'Shadow' Republican Party*, N.Y. TIMES (Oct. 29, 2011), http://www.nytimes.com/interactive/2011/10/29/us/politics/the-shadow-republican-party.html (charting former party leaders' new positions at outside groups).

24 *See* Ctr. for Responsive Pol., *supra* note 19 (illustrating the growth of spending by outside groups since *Citizens United*).

25 Malbin, *supra* note 7, at 99–102.

Organizing for America and then spun off as a stand-alone 501(c)(4) organization, conspicuously not a political party. State-level presidential campaign organizations did not grow out of preexisting state parties. The campaign structures didn't exist: They were created on the fly for the 2008 presidential campaign, abandoned, then created anew in 2012. Even the presidential campaign became another shadow party, as Fishkin and Gerken describe.[26]

The move toward independent-expenditure groups is distressing. They have certain advantages that regulated parties do not, and they compete for scarce advertising time in contested elections—with the claimed effect of driving up the prices to the disadvantage of the formal parties, which do not enjoy the same pricing preferences as candidates.[27] Unlike actual political parties, these political actors are not a big tent that integrates campaigning, governing, and constituent services. There is no mediating filter of candidates who must appeal to diverse constituencies. There is no commitment to governing and the attendant messy world of compromise and conciliation.

Can this be redressed? Perhaps there are some measures that might be taken, even within the *Buckley* framework. First, we could raise the contribution limits for parties and candidates, and raise it substantially. Does anyone really think that it makes a difference in terms of corruption whether the limits are set at $2700 or $27,000? *McCutcheon* might be maligned for removing the aggregate contribution limits, but these are for money contributed to multiple candidates, presumably of the same party, and all within the current limits. Second, and perhaps as an alternative, we could raise the contribution limits to parties even more substantially (perhaps instead of raising the limits for individual candidates). Parties do not govern

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26 *See* Fishkin & Gerken, *supra* note 8, at 32.

27 This point is perceived by the campaigns but still subject to considerable dispute. *See* Alex Engler, *Las Vegas – Average Political Ad Costs $1,000; Candidates get 40% Discount During the Final Stretch*, SUNLIGHT FOUND. (Nov. 2, 2012, 1:47 PM), http://sunlightfoundation.com/blog/2012/11/02/las-vegas-average-political-ad-costs-1000-candidates-get-40-discount-during-the-final-stretch/ (finding that independent-expenditure groups are charged higher rates than candidates in preelection advertising markets); Julie Bykowicz, *TV Stations Charge 'Super-Gouge' Ad Rates for Super-PACS*, BLOOMBERG.COM (Aug. 14, 2012, 7:47 PM), http://www.bloomberg.com/news/2012-07-26/tv-stations-charge-super-gouge-ad-rates-for-super-pacs.html (same). The Obama campaign exploited this discrepancy to considerable effect. *See 2012 Shatters 2004 and 2008 Records for Total Ads Aired*, WESLEYAN MEDIA PROJ. (Oct. 24, 2012), http://mediaproject.wesleyan.edu/2012/10/24/2012-shatters-2004-and-2008-records-for-total-ads-aired/ ("Obama has [won] the air war in most media markets [because] his campaign is funding most of its own advertising, which entitles his campaign to the lowest rate . . . . By contrast, many ads supporting Romney are paid for by outside groups, which must pay whatever the market will bear . . . .").

and are poor vehicles for *direct* quid-pro-quo corruption. But they should be able to centralize moneygiving and coordinate with candidates seeking to further the party platform, rather than act as one-person entrepreneurs for radical shadow parties. As opposed to the crazy Supreme Court doctrine that worries about illicit corruption of the candidates by the parties,[28] a healthy political system needs coordination between parties and candidates: Parties need to "corrupt" candidates in the service of coherent politics and discipline in governance.

Will any of this make a difference? It is hard to say. The donor classes, to borrow Spencer Overton's phrase,[29] have gotten a taste for the ease of running politics on their own without candidates and parties—and genies are notoriously reluctant to get back in the bottle. But in the words of the inimitable Molly Ivins, the key to the swagger of Texas legislators in the old days was that "if you can't drink their whiskey, screw their women, take their money, and vote against 'em anyway, you don't belong in office."[30] That's the system that built our democracy, and maybe we can find a way to get some of that era of big parties and big politicians back.

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[28] *Compare* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996) (holding that the First Amendment prohibits application of FECA's party expenditure provision to an expenditure that a political party has made independently, without coordination with any candidate), *with* FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001) (holding that FECA's limits on parties' coordinated expenditures comport with the First Amendment's free speech and associational guarantees).

[29] *See* Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73 (2004).

[30] MOLLY IVINS, MOLLY IVINS CAN'T SAY THAT, CAN SHE? 1 (1st Vintage Books ed. 1992).