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**The Seventh Amendment:  
The Key to Reversing *Buckley v. Valeo***

**By William P. Kreml**

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# The Seventh Amendment: The Key to Reversing *Buckley v. Valeo*

William P. Kreml\*

## I. Introduction

Well, it happened again. In what has now become an all too familiar five-four majority on the United States Supreme Court, the conservative quintet of Justices Scalia, Kennedy, Thomas, Alito, and Chief Justice Roberts, struck down a key provision of the 2002 Bipartisan Campaign Reform Act, commonly known as the McCain-Feingold Act. The case, *FEC v. Wisconsin Right To Life (WRTL)*,<sup>1</sup> challenged the provision of the Act dealing with restrictions on independent “issue” advertising within 30 days of a federal primary election and 60 days before a general election, such advertising having the obvious intent to favor one candidate over another. The rationale of the Court’s decision unabashedly rested in the now thirty-one year old ruling in *Buckley v. Valeo*,<sup>2</sup> a case that is not only wrong, but is also increasingly damaging to America’s constitutional democracy.

In 1976, the United States Supreme Court misunderstood the American constitutional arrangement by ruling against campaign independent expenditure limits in *Buckley v. Valeo*. The ruling privatized the American electoral system and, as *FEC v. WRTL* once again demonstrates, continues to prevent meaningful campaign finance reform. In both decisions, the Court argued that permitting restrictions on campaign expenditures violated First Amendment protections of free speech, without focusing on other relevant provisions of the Constitution. To understand why these cases are so misguided, we need to review some constitutional, and political, history, particularly that of the largely overlooked Seventh Amendment.

It is traditional to label the creators of America’s political system as “The Founders.” The designation is inaccurate. There were two, not one, very different sets of Founders of the American constitutional arrangement, the first known as the federalists and the second as the anti-federalists. The federalists wrote the seven original articles of the Constitution at the 1787 Philadelphia Convention. The anti-federalists first opposed the Philadelphia document, and then compromised, consenting to support it in return for a Bill of Rights.

Yes, the Philadelphia Founders, George Washington, James Madison, Alexander Hamilton, Gouverneur Morris, and the others were extraordinary figures. But they made no greater contribution to our Republic than did George Mason, Richard Henry Lee, Elbridge Gerry, and Thomas Jefferson from afar. A complete collection of *The Anti-Federalist Papers*, which opposed the Constitution, was not published until 1981,<sup>3</sup>

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\* Distinguished Professor Emeritus, Department of Political Science, University of South Carolina - Columbia

<sup>1</sup> *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007).

<sup>2</sup> 424 U.S. 1 (1976).

<sup>3</sup> HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST* (1981).

whereas the argument for the Constitution was available in op-ed pieces in contemporary newspapers, and was available in its entirety less than one year after the Convention. Madison's *Federalist* No. 10 concern for "private rights" and the "monied interest"<sup>4</sup> is no more important than George Mason's assertion that "there is not the substance but the shadow only of representation"<sup>5</sup> in the Constitution's original seven articles. Mason was deeply concerned about democratic governance and the position of the American middle class. But the *Federalist*, written by Alexander Hamilton, James Madison, and John Jay and advocating something of an aristocracy of governance, is far more widely known.

## II. The Constitutional Bargain

The fact is that the two grand portions of the American Constitution, the original seven articles and the Bill of Rights, are antithetical documents. Structurally, the original seven constitutional articles did two things. They created the public institutions of the government, with their separation of powers, federalism, bicameralism, and such things as the staggering of terms of office across the executive and legislative branches. They also defined the relationship of citizens to the government. The qualifications for office, along with the electoral arrangements such as the apportionment of the House of Representatives and the formula for the Electoral College, lie here.

Without question, the arrangement of the original seven articles not only dispersed the powers of the new federal government, principally through the devices of a separation of powers and federalism, but it also favored the private sector in doing so. Madison's concern with the majority and the abuses of "faction" (a forerunner of party) grew out of the arguable abuses of legislative majorities in many states under the Articles of Confederation. The private contract, particularly the contract for debt, had been encumbered, by moratoriums, the printing of paper money, and the non-reappointment of judges who too frequently upheld debt contracts by siding with creditors in adjudicated disputes. The original seven constitutional articles were designed to prevent debtor favorable majorities from continuing such practices in the future.

But George Mason and the other anti-federalists felt that the Philadelphia Founders had gone too far. If there was only the shadow of representation in the first Founders' new arrangement, a Bill of Rights would need to redress the balance and provide for a modicum of popular, small "d" democracy. A brief review of the Bill of Rights reveals the aggregative, one might say pre-democratic or politically facilitative, nature of the Bill of Rights' provisions.

Apart from the anti-federalists' Establishment and Free Exercise Clauses which mark an area of agreement with the "no religious test" provision of the federalists' Article Six, the First Amendment deals with interactive political activity. The protection of the freedoms of speech, press, petition, and assembly all import a reaching out to the polity, the group. These are not singular activities. Similarly, the Second Amendment's

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<sup>4</sup> ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY. *THE FEDERALIST PAPERS* 43-4 (Garry Wills ed., Bantam Books, 1982).

<sup>5</sup> GEORGE MASON, *THE ESSENTIAL ANTI-FEDERALIST* 11 (E.B. Allen & Gordon Lloyd eds., 1985).

protection of the right to bear arms and to be a part of a state militia was an anticipatory response to an aristocratic government.

The Third Amendment, which prohibited soldiers from staying in a home without the homeowner's consent, is clearer still; it prevented the chilling effect that such a presence might have on communications among those who opposed the government. The Fourth Amendment's restrictions on searches and seizures of correspondence or financial records also protected communication while the Fifth Amendment protected a citizen from having to tattle, on himself or others who might have been anti-government actors. The Sixth Amendment granted counsel and assured the politically accused of a speedy trial, an impartial, local, jury, and the witness confrontation and specificity of accusation that protected oppositional political activity. The Eighth Amendment prohibited the use of torture to discover accomplices or to punish the immediate subject. The mere anticipation of torture may encourage revelations about accomplices and plans for many oppositionists. The Seventh Amendment deserves, and will receive, special attention.

Overall, the Bill of Rights is the more democratic document of the two grand portions of the American constitutional arrangement. Ironically, although its *locus* or place, rests with the individual citizen, the *telos*, or purpose, of the Bill is to preserve public interaction, sometimes to encumber contracts that may be onerous or unfair. Similarly, while the *locus* of the original seven articles of the Constitution, the federalists' side of the document, was government and the public sector, the *telos* of those articles favors the private sector.

### III. Private Citizens—Private Contracts

If the two structural arrangements of the Constitution reviewed above prescribed a) how the institutions of government were to interact with each other and b) how citizens were to interact with their government, a third layer of constitutional attention, one far less frequently written about, regulated a key relationship among citizens, specifically with regard to the debt contract. In a way, this third constitutional consideration is the most ideologically significant in the Constitution, largely because it confirms in another venue that both sets of constitutional Founders were deeply concerned with the institution of the contract, particularly the contract between debtors and creditors.

This third, private consideration in the Constitution has a history to it that is best revealed in three significant and closely linked events. The first event is Shays' Rebellion. Although immediately ignited by the higher taxes of a new, more conservative Massachusetts governor, the root cause of Daniel Shays' Western Massachusetts uprising lay in the terms of longstanding debt contracts on farms and small businesses. Debtors felt them to be burdensome. The rebellion against these debt contracts was put down, but not forgotten, by either side.

The second historical event marking the Constitution's third or private level of interaction lies in Alexander Hamilton's Federalist No. 80. As important as Madison's Federalist No. 10 was in advocating the government's protection for the private sector,

the father of American conservatism's No. 80 softened that protection a bit when he recognized that the judiciary also had a place in regulating private sector conduct. On the one hand, the Constitution provided for what Hamilton considered to be the indispensable insularity of the judicial branch from the legislature by incorporating life terms with good behavior, and preventing the reduction of judicial salaries. Further, it advocated the haymaker of judicial review that would overrule legislatures that might enact excessively debtor favorable encumbrances on contracts. Only a few years into the government, the federalist Chief Justice John Marshall obliged Hamilton on just that matter in the famous *Marbury v. Madison* case.<sup>6</sup>

On the other hand, Hamilton granted an extraordinary concession to the anticipated opponents of the Constitution in No. 80. Referring to the “Law *and* Equity” (my emphasis) jurisdictions of Article Three, Hamilton sought to assure the constitutional opposition that the equitable jurisdiction would remain inviolate, particularly in matters of debt. After contrasting the more rigid nature of formal law with the more flexible *jus* over *lex* qualities of the equity jurisdiction, Hamilton spoke directly to the debtor's plight:

*It is the peculiar province, for instance, of a court of equity to relieve against what are called hard bargains. These are contracts, in which, though there may be no direct fraud or deceit, sufficient to invalidate them in a court of law, yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties, which a court of equity would not tolerate.*<sup>7</sup>

This extending of the federalist hand to the debtor was intended to allay the fears of the frequently indebted middle class, made up of the farmer, the artisan, or the mechanic. By using the equity jurisdiction to recognize a judicial as well as legislative check on the private sector, Hamilton hoped to mollify constitutional opponents and gain acceptance for the Philadelphia document.

With the history of Shays' Rebellion and Hamilton's Federalist No. 80 concession behind them, what would the anti-federalists, the Constitution's opponents, do within the context of the Grand Handshake of constitutional acceptance in return for a Bill of Rights? The answer to that question lies in the most ignored of all the Bill of Rights provisions, the Seventh Amendment.

What does the Seventh Amendment say? It provides, principally, that “no fact tried by a jury shall be otherwise re-examined in any Court of the United States . . . .” In short, it completes the Shays–Hamilton No. 80–Bill of Rights triad by assuring debtors that a third form of contractual encumbrance would be available when debt contracts were onerous. Beyond legislative relief, even beyond equitable relief from a burdensome contract, the bulwark of the jury ruling, or the factual finding of “twelve good men and true” that the debt contract was somehow unfair, would remain inviolable under the new

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<sup>6</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>7</sup> THE FEDERALIST PAPERS, *supra* note 4, at 407.

Constitution. The anti-federalists feared that the Constitution's powerful federal judiciary would overturn such jury fact findings in federal courts. The judges in those courts were expected to be federalists, appointed by a federalist executive and confirmed by a federalist Senate, and indeed they came to be that. The Seventh Amendment, again, prevented the overturning of jury fact findings by such judges.

The anti-federalist triad is the best evidence of why the issue of contract encumbrance is so important to the issue of campaign finance reform. But there is one more piece to the puzzle. The Seventh Amendment, curiously, is more than the third leg of the anti-federalist triad; it is also a direct response to the core substantive provision of the original seven articles. Indeed, it is the second half of perhaps the neatest pairing in the Constitution, the first half of that pairing lying in Section 10 of the federalists' Article One and proscribing any "Law impairing the Obligation of Contracts."

The Philadelphia Founders, as above, were motivated by what had happened to creditors within many states under the Articles of Confederation and doing something about this contractual vulnerability was at the heart of the Philadelphia Founders' charge. But conversely, if the federalists were going to say something specific about contractual encumbrance from the creditors' side, as Section Ten, Article One surely does, the anti-federalists felt it proper to weigh in with equal specificity on the side of the debtor. The Seventh Amendment's jury, and its usually pro-debtor findings, would balance the federalists' provision.

To review, the core of the third layer of consideration in the constitutional arrangement is revealed both in the historical progression of Shay's Rebellion, Hamilton's Federalist No. 80 concession, and the Seventh Amendment, and the contrast of the "impairing the Obligation of Contracts" in Article One, Section Ten with the Seventh Amendment. Remember that for all the splendor of the first seven articles and the Bill of Rights it is essential to maintain the distinction between the procedural, "rules of the game" provisions within the Constitution on the one hand, and the substance, or "goals of the game" provisions on the other. Though the vast majority of constitutional language spells out the political rules, the battle between debtors and creditors, and the specific issue of to what degree the private contract should be encumbered, does peek through.

#### IV. The Seventh Amendment, *Buckley* and *WRTL*

I have explained that the entire Constitution, including the original seven articles and the Bill of Rights, is the product of two very different, in fact conflicting, ideals, and that the rights of creditors and debtors was a significant source of disagreement which was addressed both in the original seven articles and in the Seventh Amendment. But what does all of this mean for *Buckley v. Valeo* and, now, for cases like *FEC v. WRTL* that rely on *Buckley v. Valeo*? Answering that question requires that we examine the true nature of the campaign contribution or, better, the nature of two very different kinds of contributions, one large and one small. Just as two very different sets of motivations created the American constitutional order, so also there are two very different kinds of

campaign contributions. Large and small contributions might at first appear to fall along a continuum, but that's not so. The large contribution and the small contribution are constitutional opposites. In fact, the term "large campaign contribution" is an oxymoron. A large contribution is akin to a contract. The grander a contribution is, the more an expectation exists that something specific will be granted to the donor in return.

Put another way, the large contribution is unencumbered. It is not commingled with the contributions of other supporters who are not motivated by a similar expectation of gain, as the broad, personally or ideologically motivated small contribution typically is. The large contribution ensures a particular access, whether it be favorable legislation, favorable influence on a regulator or, perhaps most favored, the avoidance of public sector attention to a private sector activity altogether. Again, the large campaign contribution mimics a private deal. If the politician fails to act favorably, the large donor can withdraw support on the basis of a broken prior understanding. The regulation of such contributions furthers the underlying purpose of the Seventh Amendment.

In contrast, the small contribution is aggregative in nature. It makes no more political sense standing alone than would a petition with one signature. The small contribution is, by definition, encumbered. It is willfully part of an aggregation of political input, mixed with other political inputs of differing flavors and intensities, none of which result from expectations of a specific return. This kind of political input is precisely what the anti-federalists wanted, and fostered through the Bill of Rights.

It was the need for a rebalancing of large and small contributions, after the outsize contributions to the Richard Nixon campaigns of 1968 and 1972 and the initial burst of TV advertising budgets, that led to the congressional legislation which *Buckley v. Valeo* partly overturned. For the 1976 Supreme Court to have confused the true purpose of the Bill of Rights—to facilitate political participation—with what they wound up protecting in *Buckley*—unencumbered contributions by corporations and an elite few—was, at best, uninformed.

And so, with regard to *FEC v. WRTL*, what the Supreme Court once again improperly understood regarding large campaign contributions to political candidates, most of whom are incumbents after all, corrupts the American constitutional democracy and permits an aristocracy, or government by the few, to control public policy. The case is difficult, to be sure, in large part because *WRTL*'s motives were not monetary but fell within the political arena that contests cultural or social issues. Further, had the individuals who gave money to *WRTL* merely contributed small amounts to their favored candidate they might well have fallen within the Bill of Rights' protections of free speech.

But what makes the case so important, and so damning, is that the impact of *FEC v. WRTL* will wind up protecting the spending of very large amounts of money, in opposition to an unfavorable candidate, by corporations. Corporate interests, of course, are in exactly the same place regarding opposition to any encumbrances on the contribution contract today (whether that encumbrance be in furtherance of

environmental, civil rights, or working condition and wage considerations, for example) that the federalists and the drafters of Section Ten, Article One were regarding creditors' rights protections in 1787.

That Chief Justice Roberts, with Justice Alito, upheld Section 203 of McCain-Feingold (that provision having been upheld in *McConnell v. FEC*<sup>8</sup> as it specifically forbade corporate donations from the general fund) is not unimportant. Their opinion differs from Justices Scalia, Thomas, and Kennedy, who found Section 203 to be subject to strict scrutiny, and would have overruled *McConnell* on that point, and further limited Congress's prerogatives in campaign finance legislation. But by far the most important problem of *FEC v. WRTL* is that the specter of *Buckley* hangs over both majority side opinions.

The ultimate effect of *FEC v. WRTL* and the continued vitality of *Buckley* is that the large, unencumbered, more frequently than not corporate contribution contract lives happily ever after under the protection of the misguided 1976 case. The case assures a continuation of America's corporate dominated politics. The political imbalance of large money interests over the middle class that the anti-federalists responded to so eloquently in their justly revered Bill of Rights remains unchecked. *FEC v. WRTL* is a sad case indeed.<sup>9</sup>

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<sup>8</sup> *McConnell v. FEC*, 540 U.S. 93 (2002).

<sup>9</sup> More on the topic of campaign finance reform is available in my book, *THE TWENTY-FIRST CENTURY LEFT: COGNITIONS IN THE CONSTITUTION AND WHY BUCKLEY IS WRONG* (2006). This work examines cognitive forms in the Constitution, noting differences between what theorists call the analytic and synthetic forms in the original seven articles and the Bill of Rights respectively, as well as the legitimate dialectical pattern of historical progression that existed in the Warren Court. Those who are interested in this topic will find TCL at [www.caplalaw.com](http://www.caplalaw.com).