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FREEDOM OF SPEECH AND EQUALITY OF POLITICAL OPPORTUNITY: THE CONSTITUTIONALITY OF THE FEDERAL ELECTION CAMPAIGN ACT OF 1971

JOEL L. FLEISHMAN†

INTRODUCTION

At the end of 1971, a Democratic Congress and a Republican President enacted into law¹ the first major federal election campaign reform legislation since 1925.² Behind the new law stretched two decades of congressional hearings,³ much scholarly research,⁴ blue ribbon citizen commissions,⁵ a President's Commission,⁶ lobbying by public inter-

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¹Revenue Act of 1971, Pub. L. No. 92-178, tit. VII-VIII, 85 Stat. 560-74 [hereinafter cited as Revenue Act]; Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 [hereinafter cited as Campaign Act].

²Federal Corrupt Practices Act of 1925, ch. 368, tit. III, 43 Stat. 1070 (codified in scattered sections of 2, 18 U.S.C.). Indeed, because the 1925 Act was itself mainly a codification of preexisting legislation dating from 1907-1911, the 1971-1972 legislation constitutes the first substantive overhaul of federal election law since it was first enacted.

³According to Senator Hugh Scott, congressional committees have "held no less than 23 sets of hearings" on election reform since 1906. 117 CONG. REC. S1913 (daily ed. Feb. 16, 1971). The most recent ones are: *Hearings on H.R. 8627, H.R. 8628 (and related bills) Before the Subcomm. on Communications and Power of the House, on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. (1971); *Hearings on S. 382 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration*, 92d Cong., 1st Sess. (1971); *Hearings on H.R. 8284 Before the Subcomm. on Elections of the House Comm. on House Administration*, 92d Cong., 1st Sess. (1971).

⁴The most influential study is Alexander Heard's *THE COSTS OF DEMOCRACY* (1960), which is as readable as it is authoritative. Heard's pioneering initiative has been augmented over the past dozen years by the careful and thoughtful work of his former junior colleague, Herbert E. Alexander, in a series of articles and books which have been established him as the nation's foremost student of campaign finances and their regulation. *See, e.g.*, H. ALEXANDER, *FINANCING THE 1964 ELECTION* (1966); H. ALEXANDER, *FINANCING THE 1968 ELECTION* (1971); H. ALEXANDER, *MONEY FOR POLITICS: A MISCELLANY OF IDEAS* (1963); H. ALEXANDER, *MONEY IN POLITICS* (1972); H. ALEXANDER, *MONEY, POLITICS AND PUBLIC REPORTING* (1960); H. ALEXANDER, *RESPONSIBILITY IN PARTY FINANCE* (1963); H. ALEXANDER & J. BIBBY, *THE POLITICS OF NATIONAL CONVENTION FINANCES AND ARRANGEMENTS* (1968); H. ALEXANDER & L. DENNY, *REGULATION OF POLITICAL FINANCE* (1966); *CONTRIBUTIONS OF NATIONAL-LEVEL POLITICAL COMMITTEES TO INCUMBENTS AND CANDIDATES FOR PUBLIC OFFICES, 1968* (H. Alexander & C. Jones ed. 1971). *See also* D. ADAMANY, *FINANCING POLITICS* (1969); D. DUNN, *FINANCING PRESIDENTIAL CAMPAIGNS* (1969).

⁵COMMITTEE FOR ECONOMIC DEV., *FINANCING A BETTER ELECTION SYSTEM* (1968); TWENTIETH CENTURY FUND, *VOTERS' TIME* (1969); TWENTIETH CENTURY FUND, *ELECTING CONGRESS—THE FINANCIAL DILEMMA* (1970).

est groups,⁷ and congressional efforts⁸ aimed at reform of the law. Ahead of it loom certain efforts to evade it,⁹ amend it,¹⁰ repeal it,¹¹ and

⁷PRESIDENT'S COMM'N ON CAMPAIGN COSTS, FINANCING PRESIDENTIAL CAMPAIGNS (1962).

⁸The National Committee for an Effective Congress has long been active in the effort to bring about campaign finance reform. Its National Director, Russell Hemenway, has testified at many hearings on the subject. NCEC is reported by Alexander to have authored the 1970 Act, which President Nixon vetoed. H. ALEXANDER, *MONEY IN POLITICS* 267 (1972).

⁹In 1953, the Senate Subcommittee on Privileges and Elections proposed to raise political committee expenditure limitations from 3 million dollars to 10 million dollars, and to increase the limits on congressional campaign expenditures, but the Senate failed to act. In 1955, the same Senate subcommittee recommended the extension of the reporting requirement to political committees operating exclusively within a single state, but the Senate failed to act. In 1956, majority leader Lyndon B. Johnson and minority leader William F. Knowland jointly introduced comprehensive reform legislation, with the co-sponsorship of eighty-three Senators, but it was killed in committee. In 1960, the Senate passed the Hennings Bill, extending the candidate reporting requirement to primaries and the political committee reporting requirement to those committees spending 2,500 dollars or more in any federal election campaign, limiting individual political contributions to 10,000 dollars in a single year, raising congressional campaign expenditure limitations, and imposing a twenty-cents-per-vote limit on presidential campaign expenditures, but the House failed to pass it. In 1961, the Senate passed a weaker bill—the Cannon Bill—but again the House failed to act. In 1963, the Senate incorporated a fifty dollar tax deduction for individuals (one hundred dollars for married couples filing joint returns) into the Revenue Act, but it was deleted in conference. In 1964, both Houses passed legislation to repeal the "equal time" provision of section 315 of the Federal Communications Act, as it applied to presidential elections, but it was also deleted in conference. In 1966, both Houses passed, and the President signed, the Long Act, which provided for a one dollar tax check-off to be paid into a Presidential Election Campaign Fund, but it was repealed in 1967. In 1966, both Houses passed, and the President approved, the Williams amendment, which prohibited corporate advertising in political program books, but in 1967 this legislation was modified to permit corporations to purchase advertising in the quadrennial national political convention program books. In 1967, the Senate unanimously passed President Johnson's campaign reform bill, but again the House failed to act. Finally, in 1970 both Houses passed the Political Broadcasting Act of 1970, but President Nixon vetoed it. For a discussion of the substantive provisions of these proposals, and an explanation of why they came as far as they did and no farther, see H. ALEXANDER, *supra* note 7, at 198-229, 252-79.

¹⁰See N.Y. Times, March 26, 1972, § 1, at 1, col. 1. Note also the action of the House Administration Committee on April 26, 1972, ordering the Clerk of the House—the supervisory officer for the House of Representatives' campaign reports—to increase the cost of duplicating disclosure statements from ten cents to one dollar a page. The chairman of the House Administration Committee, Congressman Wayne Hays, urged that his committee take over the role of "supervisory officer" which the Act had assigned to the Clerk of the House. COMMON CAUSE, May 1972, at 2.

¹¹S. 3178, 92d Cong., 2d Sess. (1972) (to repeal the "equal-time" provision for presidential campaigns); H.R. 14213, 92d Cong., 2d Sess. (1972) (introduced by Congressman Talcott, "to repeal the lowest unit rate provisions" of the new act); H.R. 14804, 92d Cong., 2d Sess., (introduced by Congressman O'Neill, to provide publicly subsidized television time for presidential candidates, 118 CONG. REC. H42122-23 (daily ed. May 4, 1972)); H.R. 14959, 92d Cong., 2d Sess. (1972) (introduced by Congressman Veysey, to establish a Federal Elections Commission, 118 CONG. REC. E5589-90 (daily ed. May 22, 1972)); H.R. 15167, 92d Cong., 2d Sess. (1972) (introduced by Congressman McCloskey to reinstate the \$5,000 ceiling on individual campaign contributions, 118 CONG. REC. E5725-27 (daily ed. May 24, 1972)); H.R. 15276, 92d Cong., 2d Sess. (1972)

to challenge its constitutionality.¹²

Institutional inertia, interest group deadlock, and officeholders' self-interest were not the only causes of a half-century of inaction. Popular election is the source of all authoritative governmental power in a democracy,¹³ and one does not tamper lightly with the keystone of the political arch, even when it is patently cracking. It is therefore not surprising that a consensus on change was so long in crystallizing.

It is undeniable, however, that cracks *had* formed in the keystone. The congressional campaign limits—a maximum of 25,000 dollars for Senate candidates and 5,000 dollars for House candidates—were openly avoided by the use of campaign committees, which are not subject to the statutory limits. The attempt to limit the amounts spent in presidential campaigns by imposing a three million dollar ceiling on political committees' expenditures was evaded by creating a multiplicity of committees. The 5,000 dollar ceiling on individual campaign contributions was also openly evaded by making 5,000 dollar contributions to a number of separate committees. Compliance with the reporting provisions was casual at best; and because of the difficulty of obtaining access to the information supposed to be disclosed, the public rarely had either timely or adequate information on which to make informed voting judgments on election day.¹⁴ And these were only the more "legal" ways of avoiding the intent of the 1925 law.¹⁵

(introduced by Congressman Devine "to exclude corporations and labor organizations" from prohibition on political activity by government contractors, 118 CONG. REC. H5191 (daily ed. June 1, 1972)); H.R. 15511, 92d Cong., 2d Sess. (1972) (introduced by Congressman Hays to reduce the number and frequency of reports under the new Act).

¹²H.R. 14054, 92d Cong., 2d Sess. (1972) (introduced by Congressman Devine); see COMMON CAUSE, May 1972, at 2; "T.R.B.," THE NEW REPUBLIC, May 27, 1972, p. 2.

¹³See A. ROSENTHAL, FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS (1971); Barrow, *Regulation of Campaign Funding and Spending for Federal Office*, 5 U. MICH. J.L. REFORM 159 (1972); Penniman, *Financing Campaigns in the Public Interest*, in CAMPAIGN FINANCES (American Enterprise Institute for Public Policy Research 1971); Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U.L. REV. 900 (1971); Comment, *Free Speech Implications of Campaign Expenditure Ceilings*, 7 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 214 (1972); Note, *Campaign Spending Regulation: Failure of the First Step*, 8 HARV. J. LEGIS. 640 (1971).

¹⁴See generally Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256.

¹⁵H. ALEXANDER, *supra* note 7, at 203; A. HEARD, *supra* note 4, at 168.

¹⁶Among the less "legal" stratagems were the use of "dummy contributors," designed to conceal the actual identity of the source of contributions. A similar aim could be achieved by using such pass-through recipient committees as the Republican and Democratic senatorial and congressional campaign committees, which in turn "anonymously" contribute the funds to the congressional candidate of the donor's choice. Of course there were also the time-honored practices of

Congressional approval of the 1971 Act did not stem primarily from public embarrassment over the spectacle of such feeble-letter law. Rather it almost surely came about because of a growing anxiety—indeed a near panic—over rapidly mounting campaign costs. Between 1956 and 1972, it has been estimated that the total amount of money spent in all elections in the United States increased from 155 million dollars to 400 million dollars.¹⁶ As the cost of running for office steadily rose, many Americans, voters and officeholders alike, came to fear that public office, which the American credo proclaims as open to all, was rapidly being priced out of the reach of all but the wealthy or well-connected. That fear has undoubtedly acquired confirmation and widespread public acceptance as a result of both visibly expensive candidacies such as those of Nelson Rockefeller for Governor of New York,¹⁷ Robert F. Kennedy and Richard Ottinger for Senator from New York, Milton Shapp for Governor of Pennsylvania, and Howard Metzenbaum for Senator from Ohio, and widely publicized withdrawals from candidacy, allegedly for insufficient funds, such as those of Eugene Nickerson¹⁸ from the 1969 gubernatorial race in New York and Senator Fred Harris¹⁹ from the presidential race in the spring of 1971. There is little doubt that this fear was father to the 1971 legislation.²⁰

A second but less compelling worry was that the need for more campaign dollars would increasingly make all candidates dependent upon campaign donations offered by moneyed interests with policy axes to grind. In other words, the search for more funds would drive candidates to accept election campaign support from those wishing to obtain post-election policy favors in return. While this pressure is certainly not new, it is undeniably aggravated by spiraling campaign costs.

The extent to which these fears are well-grounded deserves serious

directly purchasing services needed by a candidate, such as postage or airline tickets, and donating contributions in cash, neither of which could be easily traced, therefore invariably going unreported.

¹⁶D. DUNN, *supra* note 4, at 32, and sources cited therein; see NEWSWEEK, Dec. 13, 1971, at 23; TIME, Oct. 23, 1972, at 24.

¹⁷H. ALEXANDER, *supra* note 7, at 47.

¹⁸Hearings on Political Broadcasting Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 31 (1970).

¹⁹N.Y. Times, Nov. 11, 1971, at 21, cols. 1 & 2.

²⁰See, e.g., Hearings on H.R. 8248 Before the Subcomm. on Elections of the House Comm. on Administration, 92d Cong., 1st Sess. (1971); Hearings on S. 382 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 92d Cong., 1st Sess. (1971).

consideration.²¹ For the moment, it is sufficient to point out that they overcame several decades of inertia and resistance and resulted in new campaign finance provisions that restrict individual political activity for the sake of an alleged social good. Because of the teeth in the new legislation, questions posed by the legislation must be faced for the first time.²² To what degree may an individual's political liberty be restricted in attempting to safeguard the purity of the election process?

THE 1971 LEGISLATION

There are two Acts which are pertinent to the discussion: The Federal Election Campaign Act of 1971²³ and Titles VII²⁴ and VIII²⁵ of the Revenue Act of 1971. While this article is addressed only to the former, the provisions of the latter are contextually important. Both Acts changed existing law in several important ways.

The Campaign Act broadened regulatory coverage beyond general and special elections to include primaries, caucuses, and conventions,²⁶ bringing within the scope of that extended coverage candidates for all federal offices—the Presidency, the Vice Presidency, the United States Senate, the United States House of Representatives, and Resident Commissionership.²⁷ Furthermore, it extended the requirement of registration by “political committees,” which had been limited under preexisting laws to those operating in two or more states²⁸ in presidential elections, to include every political committee that “anticipates receiving contributions or making expenditures during the calendar year in an aggregate amount exceeding \$1,000,”²⁹ presumably only in elections for federal office.³⁰

²¹See text accompanying notes 389-427 *infra*.

²²As we shall see in text accompanying note 164-65 *infra*, the Supreme Court has never passed squarely on the first amendment constitutionality of any campaign finance legislation.

²³Campaign Act, 86 Stat. 3.

²⁴Revenue Act, tit. VII, 85 Stat. 560-62.

²⁵Revenue Act, tit. VIII, 85 Stat. 562-74.

²⁶Campaign Act § 201, 86 Stat. 8, *amending* 18 U.S.C. § 591 (1970); Campaign Act § 301(a), 86 Stat. 11.

²⁷Campaign Act § 102(3), 86 Stat. 4; Campaign Act § 201, 86 Stat. 8, *amending* 18 U.S.C. § 591 (1970); Campaign Act § 301(c), 86 Stat. 11. Preexisting law regulated only the candidacies for membership in the Senate and House of Representatives; presidential campaigns were limited, to the extent that they actually were, by the \$3,000,000 limitation on “political committee” expenditures.

²⁸Federal Corrupt Practices Act § 302(c), 2 U.S.C. § 241(c) (1970).

²⁹Campaign Act § 303, 86 Stat. 14.

³⁰Unlike the preexisting statutory definition of a political committee which expressly limited

The new Act retains essentially the same contribution recordkeeping and reporting requirements—detailed records of all contributions exceeding ten dollars³¹ and reports of all contributions exceeding one hundred dollars³²—but to all the bits of information previously required to be furnished it adds the donor's "occupation and principal place of business, if any."³³ Furthermore, it raises from fifty dollars to one hundred dollars the reporting requirement for contributions or expenditures made other than directly to political committees or candidates.³⁴ Of much greater significance is the affirmative duty placed on supervisory officers, the Clerk of the House of Representatives for House candidates, the Secretary of the Senate for Senate candidates, and the Comptroller General for presidential candidates, to make the reports available for public inspection and copying by hand or by duplicating machine "not later than the end of the second day following the day during which it was received."³⁵ In addition, the supervisory officer is required to publish an annual report that is to include, among other things, the names of contributors of more than one hundred dollars.³⁶ Also, for the first time federal law requires that reports and statements pertaining to campaigns for federal office representing all or part of a state also be filed with the Secretary of State of the respective state.³⁷

Three changes were made with respect to contribution limitations. In place of the 5,000 dollar ceiling on individual political contributions³⁸ in federal elections, the Campaign Act establishes a new kind

itself to committees in elections for President, the new Act nowhere limits itself to those political committees involved in federal elections. As such committees are required to register with "supervisory officers," and as such supervisory officers are named only for the three major categories of federal elections with which the Act deals, one might infer that only federal election political committees are covered by the Act. But section 306(c) delegates to the supervisory officer the *discretionary* power to "relieve any category of political committee of the obligation to comply with Section 304 if such committee (1) primarily supports persons seeking State or local office, and does not substantially support candidates and (2) does not operate in more than one State or on a statewide basis." Campaign Act, § 306(c), 86 Stat. 16. This suggests that Congress intended all political committees, even those for local and state offices, to be covered by the Act. It is doubtful whether Congress has constitutional authority to supervise state and local elections. *See* text accompanying notes 106-14 *infra*.

³¹Campaign Act § 302(c)(2), 86 Stat. 13.

³²Campaign Act § 304(b)(2), 86 Stat. 15.

³³Campaign Act §§ 302(c)(2), 304(b)(2), 86 Stat. 13, 15.

³⁴Campaign Act § 305, 86 Stat. 16.

³⁵Campaign Act § 308(a)(4), 86 Stat. 17.

³⁶Campaign Act § 308(a)(7), 86 Stat. 17.

³⁷Campaign Act § 309(a), 86 Stat. 18.

³⁸18 U.S.C. § 608 (1970).

of contribution limitation: a limit on the amount a candidate may contribute to his own campaign, or obtain from members of his immediate family.³⁹ The ceilings are 50,000 dollars for presidential candidates, 35,000 dollars for senatorial candidates, and 25,000 dollars for House candidates.⁴⁰ The other changes were intended to codify existing case law. One permitted banks to make bona fide bank loans to credit-worthy borrowers for political purposes, thus ensuring that courts would not regard such loans as contributions.⁴¹ The other gave statutory approval to "voluntary" funds collected by corporations and labor unions to be used for partisan political purposes.⁴² Apparently through oversight, the Congress neglected also to amend the prohibition on political contributions by government contractors⁴³ to permit the use in federal elections of money from such "voluntary" funds even if the corporation or labor union is also a government contractor.⁴⁴ A bill to rectify the error⁴⁵ was passed by the House⁴⁶ but died in the Senate's rush to recess for the election.⁴⁷

The major change of the Campaign Act deals with expenditure limitations on candidates for federal office.⁴⁸ As has been noted, preexisting law imposed limits on the amount candidates for the Senate and

³⁹Campaign Act § 203, 86 Stat. 9-10, *amending* 18 U.S.C. § 608 (1970). "Family" is defined to include a spouse, child, parent, grandparent, sister, and spouses of such persons. *Id.*

⁴⁰*Id.*

⁴¹Campaign Act § 205, 86 Stat. 10, *amending* 18 U.S.C. § 610 (1970). This incorporates the holding in *United States v. First Nat'l Bank*, 329 F. Supp. 1251 (S.D. Ohio 1971).

⁴²Campaign Act § 205, 86 Stat. 10. There was an extensive floor debate on this point. *See* 118 CONG. REC. H88-9 (daily ed. Jan. 19, 1972) (remarks of Representative Crane); *id.* at H94-95 (remarks of Representative Hansen). Both Congressmen had wished to have the Act include an express proviso that such funds could not be raised by any kind of pressure on members or employees.

⁴³18 U.S.C. § 611 (1970). This section was reenacted by Campaign Act § 206, 86 Stat. 10-11, with only slight changes which made more specific the times within which such contributions, or offers or invitations to contribute, are illegal.

⁴⁴This apparent conflict between campaign Act § 205, 86 Stat. 10, *amending* 18 U.S.C. § 610 (1970), and Campaign Act § 205, 86 Stat. 10-11, *amending* 18 U.S.C. § 611 (1970), has already occasioned a civil suit by Common Cause to prevent TRW, Inc., a large government contractor, from maintaining and using its TRW Good Government Fund for political purposes.

⁴⁵H.R. 15276, 92d Cong., 2d Sess. (1972); *see* 118 CONG. REC. H5191 (daily ed. June 1, 1972) (remarks of Congressman Devine).

⁴⁶N.Y. Times, Oct. 3, 1972, at 32, col. 7.

⁴⁷COMMON CAUSE, Nov. 1972, at 2.

⁴⁸Campaign Act §§ 103-04, 86 Stat. 4-7, *amending* 47 U.S.C. §§ 312, 315 (1970). It should be noted that the Act makes the broadcast spending limitation and maximum rate provisions available in state and local campaigns if a state expressly provides by law that it wishes to make its elections subject to the Act in this regard. Campaign Act § 104(c), 86 Stat. 7, *amending* 47 U.S.C. § 315 (1970).

House could spend,⁴⁹ but they were unrealistically low and openly avoided. There were no ceilings on the amount that presidential candidates could spend, except for the slight inconvenience caused by the three million dollar "political committee" limitation.⁵⁰ The 1971 Act repealed the latter provision⁵¹ and substituted new expenditure limitations on the amount all federal candidates can spend *for communications media*.⁵² The overall media limitation for each candidate in each phase of the election process is ten cents per voting age resident in the jurisdiction which the candidate is seeking to represent or 50,000 dollars, whichever is greater.⁵³ In addition to the overall media expenditure limitation, the Act limits broadcast spending to sixty percent of the amount available for overall media spending.⁵⁴ All amounts spent "in behalf of" a candidate are deemed to have been spent by the candidate.⁵⁵ Furthermore, to put teeth into this limitation the Act makes it illegal for any person to sell media space, time, or services without obtaining a certification by the candidate or his agent that such expenditure does not exceed his statutory limit.⁵⁶

In addition to the media expenditure ceilings, the Campaign Act establishes maximum rates that broadcast stations, newspapers, and magazines may charge for political advertising by candidates for federal offices.⁵⁷ During the forty-five days before a primary or run-off primary and the sixty days preceding a general or special election, broadcast stations may charge for political advertising no more than "the lowest unit charge for the same class and amount of time for the same period."⁵⁸ At all other times, they are limited to their rates for comparable use of the station by other users.⁵⁹ Newspapers and magazines are limited to the maximum rate they charge for comparable use of the equiva-

⁴⁹Federal Corrupt Practices Act of 1925, ch. 368, tit. III, 43 Stat. 1070 (codified in scattered sections of 2, 18 U.S.C.); see text accompanying note 14 *supra*.

⁵⁰18 U.S.C. § 609 (1970).

⁵¹Campaign Act § 204, 86 Stat. 10.

⁵²Campaign Act § 104, 86 Stat. 5. "Communications media" is defined as including "broadcasting stations, newspapers, magazines, outdoor advertising and telephones." Campaign Act § 102(1), 86 Stat. 3.

⁵³Campaign Act § 104(a)(1)(A), 86 Stat. 5.

⁵⁴Campaign Act § 104(a)(1)(B), 86 Stat. 5.

⁵⁵Campaign Act § 104(a)(6), 86 Stat. 6.

⁵⁶Campaign Act § 104(b), 86 Stat. 6-7.

⁵⁷Campaign Act § 103, 86 Stat. 4, amending 47 U.S.C. § 315 (1970).

⁵⁸Campaign Act § 103(a), 86 Stat. 4, amending 47 U.S.C. § 315(b) (1970).

⁵⁹*Id.*

lent space for other purposes.⁶⁰

Title VII of the Revenue Act⁶¹ establishes tax incentives for political contributions for the first time in the nation's history. The incentives are available in federal, state, and local elections and can be claimed for contributions to candidates, committees, or political parties.⁶² A single taxpayer may claim, in the alternative, either a tax credit of one-half of the amount of contributions up to a maximum credit of twelve and a half dollars,⁶³ or a tax deduction of one-half of the amount of contributions up to a maximum deduction of fifty dollars.⁶⁴ Taxpayers filing joint returns may claim up to twice the maximum for single taxpayers. Title VII was made effective with the 1972 tax year.⁶⁵

The Presidential Campaign Fund Act, Title VIII of the Revenue Act,⁶⁶ which was not made effective until January 1, 1973,⁶⁷ provides for a tax check-off in the amount of one dollar for a single taxpayer or two dollars for taxpayers filing joint returns,⁶⁸ to be paid into a Presidential Election Campaign Fund within the Treasury. Taxpayers may designate a particular political party to receive their tax check-off.⁶⁹ While the Act provides for the creation of the Fund and obviously contemplates the establishment of accounts within the Treasury, no money can in fact be paid into such accounts except by express appropriations measures to be enacted by Congress in the future.⁷⁰ This Act, therefore, will not be operative until Congress takes additional action.⁷¹

The Act divides eligible recipients into three categories: candidates of major parties, defined as parties whose candidates for President received twenty-five percent or more of the total popular vote in the preceding election;⁷² candidates of minor parties, defined as parties whose candidates received between five percent and twenty-five percent

⁶⁰Campaign Act § 103(b), 86 Stat. 4, amending 47 U.S.C. § 312(a) (1970). The differential in rate ceilings represents a conference compromise between the House of Representatives, which had proposed the "comparable use" formula for all media, and the Senate, which had proposed the "lowest unit rate" for all media. See H.R. REP. NO. 92-752, 92d Cong., 1st Sess. 22-23 (1971).

⁶¹Revenue Act, tit. VII, 85 Stat. 560-62.

⁶²Revenue Act § 701, 85 Stat. 560-61, to be codified at INT. REV. CODE OF 1954, § 41(c).

⁶³Revenue Act § 701, 85 Stat. 560, to be codified at INT. REV. CODE OF 1954, § 41(b)(1).

⁶⁴Revenue Act § 702, 85 Stat. 561-62, to be codified at INT. REV. CODE OF 1954, § 218.

⁶⁵Revenue Act § 703, 85 Stat. 562.

⁶⁶Revenue Act, tit. VIII, 85 Stat. 562-74.

⁶⁷Revenue Act § 801, 85 Stat. 572, to be codified at INT. REV. CODE OF 1954, § 9013.

⁶⁸Revenue Act § 802, 85 Stat. 573, amending INT. REV. CODE OF 1954, § 6096(a).

⁶⁹*Id.*

⁷⁰Revenue Act § 801, 85 Stat. 567, to be codified at INT. REV. CODE OF 1954, § 9006(a).

⁷¹And Congress may, as it did with respect to the Long Act, fail to take such additional action.

⁷²Revenue Act § 801, 85 Stat. 563, to be codified at INT. REV. CODE OF 1954, § 9002(6).

of the total popular vote in the preceding presidential election;⁷³ and candidates of a new party, defined as a party which is neither "major" nor "minor."⁷⁴ The candidate of major parties are eligible to receive fifteen cents per eligible voter, determined as of June of the year preceding the election year.⁷⁵ The formula for candidates of minor parties is more complicated. A minor party's candidate is eligible to receive the same proportion of Campaign Fund payments to major party candidates as its total popular vote in the preceding election bears to the average total vote received in that election by the major party candidates.⁷⁶ In other words the minor party payment formula is as follows:

$$\frac{\text{Election Fund Payment to a Minor Party}}{\text{Election Fund Payment to a Major Party}} = \frac{\text{Popular Vote for Minor Party}}{\text{Average Vote for Major Party}} \quad /027$$

If the minor party is fielding the same presidential candidate in the current election as it did in the preceding election, it is also entitled to have its total popular vote in that election taken into account in computing the amount it is eligible to receive in the current election.⁷⁷

A minor party may also qualify its candidates for payment on a formula based on the votes it receives in the current election.⁷⁸ That formula is the same as the one by which funds are allocated to the candidates of a new party that receives more than five percent of the popular vote in the *current* election. The formula is as follows:

$$\frac{\text{Fund Payments to Minor or New Party}}{\text{Fund Payments to a Major Party}} = \frac{\text{Popular Vote for Minor or New Party in Current Election}}{\text{Average Vote for Major Party in Current Election}} \quad 036$$

The critical provision of the Presidential Election Campaign Fund Act is the ceiling that it places on expenditures in presidential elections. The Act makes eligibility for *any* payments to the candidates of any party contingent on their agreement not to incur campaign debts in excess of the amount to which *major* party candidates are entitled under the Act.⁷⁹ Major party candidates are permitted to raise funds privately

⁷³Revenue Act § 801, 85 Stat. 563, *to be codified at* INT. REV. CODE OF 1954, § 9002(7).

⁷⁴Revenue Act § 801, 85 Stat. 565, *to be codified at* INT. REV. CODE OF 1954, § 9002(8).

⁷⁵Revenue Act § 801, 85 Stat. 565, *to be codified at* INT. REV. CODE OF 1954, § 9004(a)(1).

⁷⁶Revenue Act § 801, 85 Stat. 565, *to be codified at* INT. REV. CODE OF 1954, § 9004(a)(2)(A).

⁷⁷Revenue Act § 801, 85 Stat. 565-66, *to be codified at* INT. REV. CODE OF 1954, § 9004(a)(2)(B). The statute is not at all clear as to how those popular votes are to be taken into account. It is obvious, however, that it was intended that such payments were to be reduced by the amounts under § 9004(a)(2)(A) and, therefore, were presumed to be larger.

⁷⁸Revenue Act § 801, 85 Stat. 566, *to be codified at* INT. REV. CODE OF 1954, § 9004(a)(3).

⁷⁹Revenue Act § 801, 85 Stat. 565, *to be codified at* INT. REV. CODE OF 1954, § 9003(b)(1), (c)(1).

only to the extent that actual payments from the Fund are less than the amounts to which they are entitled under the distribution formulas.⁸⁰ Minor and new party candidates can raise private funds up to the amounts which major parties are permitted to spend.⁸¹

It is important to recognize what the Acts do not do. They do not impose any ceiling on overall expenditures in campaigns for federal office. They do not repeal or suspend the "equal time" provision of the Federal Communications Act.⁸² They do not provide free or publicly subsidized broadcast time for political candidates.⁸³ They do not provide reduced-rate mailing privileges for federal candidates,⁸⁴ and they do not provide for an independent Federal Elections Commission.⁸⁵ These are some of the more important omissions, the significance of which will be considered below.⁸⁶

CONGRESSIONAL AUTHORITY TO REGULATE ELECTIONS

While it is generally assumed that Congress has ample constitutional power to regulate federal elections,⁸⁷ it would be instructive to examine the cases on which such assumptions rest since there is no express constitutional grant of power to Congress to regulate presidential elections,⁸⁸ and the authority for congressional power to regulate congressional elections appears to be fairly narrow.⁸⁹

In the only Supreme Court case directly in point, *Burroughs and Cannon v. United States*,⁹⁰ the Court held congressional power over the

⁸⁰Revenue Act § 801, 85 Stat. 571, to be codified at INT. REV. CODE OF 1954, § 9012(b)(1).

⁸¹Revenue Act § 801, 85 Stat. 572, to be codified at INT. REV. CODE OF 1954, § 9012(b)(2).

⁸²The Senate version of S. 382, 92d Cong., 1st Sess. § 315(a) (1971), did contain such a provision, but it was dropped in conference. See H.R. REP. NO. 92-752, 92d Cong., 1st Sess. 21 (1971).

⁸³The Udall-Anderson Bill, H.R. 5092, 92d Cong., 1st Sess. (1971), would have contained such a provision.

⁸⁴The Anderson-Udall Bill, H.R. 5093, 92d Cong., 1st Sess. (1971), would have done so for congressional candidates.

⁸⁵The Senate version of S. 382, 92d Cong., 1st Sess. § 310 (1971), did contain such a provision, but it was deleted in conference. See H.R. REP. NO. 92-752, 92d Cong., 1st Sess. 34-35 (1971). Such an agency would also have been established by the Scott-Mathias Bill, S. 956, 92d Cong., 1st Sess. (1971) and the Gravel-Pearson-Randolph Bill, S. 1 & S. 9, 92d Cong., 1st Sess. (1971).

⁸⁶See text accompanying notes 472-75 *infra*.

⁸⁷See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 635-40 (1970); A. ROSENTHAL, *supra* note 12, at 12-19; Lobel, *Federal Control of Campaign Contributions*, 51 MINN. L. REV. 1 (1966); Note, *Statutory Regulation of Political Campaign Funds*, 66 HARV. L. REV. 1259 (1953).

⁸⁸U.S. CONST. art. II, § 1.

⁸⁹See text accompanying notes 95-104 *infra*.

⁹⁰290 U.S. 534 (1934).

presidential election process sufficiently broad to sustain a requirement that presidential election political committees operating in two or more states keep full records of contributions and expenditures and report them to the Clerk of the House of Representatives.⁹¹ The Court relied on the rationale that since presidential electors exercise functions under and perform duties by virtue of the Constitution, and since the President is charged with the "executive power of the nation," presidential elections are too important to the "welfare and safety of the whole people" for Congress to be unable to protect them "from the improper use of money."⁹² It then proceeded to quote two full pages from the decision in *Ex parte Yarbrough*,⁹³ despite the fact that that case dealt with congressional power to regulate *congressional* elections,⁹⁴ which involves an entirely different constitutional position.

The power of Congress to regulate congressional elections is much more explicit, but some stretching is required in order to validate its extension to matters involving contributions and expenditures:

The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.⁹⁵

What is required is an expansive definition of "Manner," and the Court has obliged repeatedly. Starting with *Ex parte Siebold*⁹⁶ in 1879, in which "Manner" was held to include authority to provide for election marshalls to supervise congressional elections, the Court has sustained a series of congressional acts regulating congressional elections. In *Ex parte Yarbrough*,⁹⁷ it sustained provisions protecting voters from intimidation, threat, force, or hindrance with respect to the exercise of their votes. In two cases, *United States v. CIO*⁹⁸ and *United States v. UAW*,⁹⁹ the Court refused to consider the constitutionality of the provision barring labor union political contributions or expenditures,¹⁰⁰ never discuss-

⁹¹Federal Corrupt Practices Act §§ 302-05, 2 U.S.C. §§ 241-44 (1970).

⁹²290 U.S. at 545.

⁹³110 U.S. 651 (1884).

⁹⁴290 U.S. at 546-47.

⁹⁵U.S. CONST. art I, § 4.

⁹⁶100 U.S. 371 (1879).

⁹⁷110 U.S. 651 (1884). In addition, see *United States v. Mosley*, 238 U.S. 383 (1915), holding the same provisions to include the right to have one's vote counted and reported honestly.

⁹⁸335 U.S. 106 (1948).

⁹⁹352 U.S. 567 (1957).

¹⁰⁰In the *CIO* case the Court held a front page editorial in the *C.I.O. News* by Philip Murray,

ing the question of congressional authority, and in only one case has the Court invalidated a congressional enactment under the "Times, Places, and Manner" clause. In *Newberry v. United States*,¹⁰¹ it held that congressional power did not extend to the regulation of primaries.¹⁰² It then proceeded essentially to reverse itself in *United States v. Classic*,¹⁰³ which involved the altering and false certification of votes in a congressional primary.¹⁰⁴

The Court has given a broad scope to congressional power in regulating congressional elections¹⁰⁵ and it would appear too late for the Court to define "Manner" to exclude the reporting requirements on contributions and expenditures, despite the fact that a persuasive argument can be made for the narrow definition. The thread that runs through the cases in point involves threats, physical violence, coercion, bribery, and fraudulent acts that occurred in the voting process *itself*, and it is quite a jump from that kind of corrupt practice—the kind that is inherently wrong—to the governmental scrutiny and restriction of activities which are not only not wrong in themselves, but which are actively encouraged, such as contributing to political candidates.

It is equally clear that Congress has no direct plenary power to regulate state and local elections.¹⁰⁶ But if the election is one at which both federal and state officials are to be chosen, it is within the power of Congress to regulate¹⁰⁷ even if the allegedly illegal act involved was intended primarily to influence the non-federal election.¹⁰⁸

Congress may, however, preempt authority to regulate some dimensions of state, local, and federal elections by deriving the regulatory

the president of the CIO, endorsing a candidate for Congress, not to be within the scope of the criminal provision. In the *UAW* case, the Court reversed a district court dismissal of an indictment of the UAW for purchasing television time for broadcasts in behalf of congressional candidates and remanded for trial on the merits.

¹⁰¹256 U.S. 232 (1921); *cf.* *United States v. Gradwell*, 243 U.S. 476 (1916).

¹⁰²It did so because primaries were unknown at the time of the Constitution.

¹⁰³313 U.S. 229 (1941).

¹⁰⁴The Court tried to distinguish *Newberry* by pointing out that only four justices in that case had held squarely that "elections" did not include primaries on the ground that primaries were unknown at the time of the Constitution. A fifth justice had so held for different reasons. *See United States v. Classic*, 313 U.S. 299, 317 (1941). Suffice it to say that it is not a convincing distinction. *See also* two other primary cases, *Terry v. Adams*, 345 U.S. 461 (1953), and *Smith v. Allwright*, 321 U.S. 649 (1944).

¹⁰⁵285 U.S. 355, 366 (1932).

¹⁰⁶*Oregon v. Mitchell*, 400 U.S. 112 (1970); *Blitz v. United States*, 153 U.S. 308, 314 (1894); *United States v. Reese*, 92 U.S. 214 (1875).

¹⁰⁷*Ex parte Yarbrough*, 110 U.S. 651, 661 (1884).

¹⁰⁸*In re Coy*, 127 U.S. 731 (1888).

power from the nature of particular kinds of actors or particular kinds of state and federal transactions, rather than from any broad congressional power to regulate elections themselves. Thus Congress has successfully prohibited specific kinds of individuals and organizations over whom it has some authority by virtue of other reasons—federal employment,¹⁰⁹ employment by other governmental units with federal funds,¹¹⁰ federal officeholding,¹¹¹ activity occurring on federal premises,¹¹² federal regulation under the interstate commerce clause,¹¹³ or federal chartering¹¹⁴—from engaging in certain kinds of political activity, including that affecting non-federal elections.

In addition, the Supreme Court may find that other constitutional provisions affect state and local elections. The equal protection and appropriate legislation clauses of the fourteenth amendment have been used directly to invalidate discriminatory electoral provisions in such areas as primary elections on the basis of race,¹¹⁵ election literacy tests,¹¹⁶ election poll taxes,¹¹⁷ malapportionment of state legislative voting districts,¹¹⁸ discrimination against minor parties' access to the ballot in presidential elections,¹¹⁹ and discrimination against candidates for a state constitutional convention.¹²⁰ Congress also has the power to prevent any denial or abridgment of the right to vote on account of race, color, or previous condition of servitude under the fifteenth amendment,

¹⁰⁹United Pub. Workers v. Mitchell, 330 U.S. 75 (1947); *Ex parte Curtis*, 106 U.S. 371 (1882). *But see* National Ass'n of Letter Carriers v. United States Civil Serv. Comm'n, 346 F. Supp. 578 (D.D.C. 1972).

¹¹⁰Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947).

¹¹¹United States v. Wurzbach, 280 U.S. 396 (1930); *Brehm v. United States*, 196 F.2d 769 (D.C. Cir. 1952).

¹¹²United States v. Thayer, 209 U.S. 39 (1908).

¹¹³Egan v. United States, 137 F.2d 369 (8th Cir.), *cert. denied*, 320 U.S. 788 (1943), involving a public utility holding company.

¹¹⁴United States v. First Nat'l Bank, 329 F. Supp. 1251 (S.D. Ohio 1971), held the congressional prohibition unconstitutional to the extent that it prohibited national banks from making bona fide loans to creditworthy borrowers for political purposes.

¹¹⁵Terry v. Adams, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944).

¹¹⁶Katzenbach v. Morgan, 384 U.S. 641 (1966).

¹¹⁷Harper v. Board of Elections, 383 U.S. 663 (1966).

¹¹⁸*E.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964).

¹¹⁹*Williams v. Rhodes*, 393 U.S. 23 (1968). This is admittedly a different situation because it involved a presidential election. But the case holding is technically in point in that it invalidated a state law dealing with elections on the ground that it violated the equal protection clause. *Cf. Jenness v. Fortson*, 403 U.S. 431 (1971). *See also Hadnott v. Amos*, 394 U.S. 358 (1969).

¹²⁰*Shakman v. Democratic Organization*, 435 F.2d 267 (7th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971); *Weisberg v. Powell*, 417 F.2d 388 (7th Cir. 1969).

and its exercise has been sustained recently.¹²¹

Congress has exercised its authority to regulate various facets of elections for over 125 years. In 1842 it enacted a law requiring the election of congressmen by geographical districts.¹²² In 1866 it established the mode and time of electing senators.¹²³ Then in 1870 it enacted a comprehensive code of regulations governing the manner of conducting congressional elections, including provisions against false registration, bribery, voting without legal right, making false election returns, interfering with election officers, and so on.¹²⁴ Apparently dissatisfied with the results, Congress repealed the entire code in 1894.¹²⁵

Following considerable public concern over the influence of corporate money in elections, Congress in 1907 passed the first prohibition against corporate political involvement.¹²⁶ Every corporation was prohibited from making any money contribution in federal elections, and any corporation organized under federal law was prohibited from making such a contribution in any election, whether local, state, or federal. Three years later Congress enacted the first contribution and expenditure disclosure law, which was applicable only to committees operating in two or more states in congressional campaigns and to individuals who made direct expenditures of more than fifty dollars in such elections.¹²⁷ In 1911 an expenditure ceiling in nomination and election campaigns was imposed on all congressional candidates, the first ever to be enacted by Congress.¹²⁸ That act also required all congressional candidates to file reports on their campaign finances and proscribed the offering of employment as an inducement to obtain support in elections.¹²⁹ All of these provisions were reenacted and codified in the Federal Corrupt Practices Act of 1925,¹³⁰ which made only one significant change: it expanded the proscription on corporate contributions from "money" contributions to contributions of "anything of value." In 1939 Congress passed the

¹²¹South Carolina v. Katzenbach, 383 U.S. 301 (1966).

¹²²Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491.

¹²³Act of July 25, 1866, ch. 245, 14 Stat. 243.

¹²⁴Act of June 1, 1870, ch. 114, §§ 19-22, 16 Stat. 144-46; Act of July 14, 1870, ch. 254, §§ 5-6, 16 Stat. 255-56.

¹²⁵Act of Feb. 8, 1894, ch. 25, 28 Stat. 36. For one explanation of the reasons, see *United States v. Gradwell*, 243 U.S. 476, 484-85 (1917).

¹²⁶Act of Jan. 26, 1906, ch. 420, 34 Stat. 864.

¹²⁷Act of June 25, 1910, ch. 392, 36 Stat. 822.

¹²⁸Act of Aug. 19, 1911, ch. 33, 37 Stat. 25.

¹²⁹*Id.*

¹³⁰Ch. 368, tit. III, 43 Stat. 1070 (codified in scattered sections of 2, 18 U.S.C.).

Hatch Act, which prevents federal employees from engaging in partisan political activity.¹³¹ The following year it placed a contribution and expenditure ceiling of three million dollars on political committees operating in two or more states in a presidential campaign and required such committees to report all expenditures and contributions to the Clerk of the House. The same act imposed the first limit on individual contributions: 5,000 dollars in any calendar year with respect to any nomination or election for federal office.¹³²

In 1943, in the War Labor Disputes Act¹³³ Congress temporarily extended to labor unions the ban on corporate political contributions in federal elections. Finally, in 1947 the Labor Management Relations Act made the labor union contribution prohibition permanent and expanded it (as well as the corporate prohibition) to include a ban on direct political expenditures as well.¹³⁴ The same act broadened the prohibitions to include activities in connection with primaries, conventions, and caucuses.¹³⁵ There the laws remained until 1971.

Even though Congress has assumed a great deal of authority to deal with some aspects of the election process, the exercise of that authority is not unlimited, but is subject to the provisions of the Bill of Rights. The chief constitutional restraint that bears on the 1971 legislation is the first amendment, and it would be useful to explore briefly the guidelines which courts and scholars have developed for interpreting it.

THE FIRST AMENDMENT

The first amendment embodies individual rights which constitute the core of our form of democratic society:¹³⁶

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.¹³⁷

There are generally considered to be two primary schools of inter-

¹³¹Act of Aug. 2, 1939, ch. 410, 53 Stat. 1147.

¹³²Act of July 19, 1940, ch. 640, §§ 13, 20, 54 Stat. 770, 772.

¹³³Act of June 25, 1943, ch. 144, § 9, 57 Stat. 167.

¹³⁴Act of June 23, 1947, ch. 120, § 304, 61 Stat. 159.

¹³⁵For a fuller summary of the background of these legislative provisions see *United States v. UAW*, 352 U.S. 567 (1956) (Frankfurter, J.).

¹³⁶Meiklejohn, *supra* note 13. In addition, see *Schneider v. State*, 308 U.S. 147, 161 (1939): "[The first amendment lies] at the foundation of free government by free men."

¹³⁷U.S. CONST. amend. I.

pretation of the first amendment: those who hold the rights guaranteed to be absolute and self-defining and those who balance those rights with any social or individual interests involved.¹³⁸ This dichotomy, although widely utilized, fails to make clear what its language suggests, obscures more than it illuminates, and makes analysis even more difficult than it must be.¹³⁹ Because it nonetheless *is* used by courts and scholars alike and provides a convenient shorthand way of referring to the general alternative positions, it is a good starting point for a short discussion of the first amendment.

The foremost judicial absolutist was the late Justice Black, who put his position as follows:

I do not subscribe to that [balancing] doctrine for I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field. The history of the First Amendment is too well known to require repeating here except to say that it certainly cannot be denied that the very object of adopting the First Amendment, as well as the other provisions of the Bill of Rights, was to put the freedoms protected there completely out of the area of any congressional control that may be attempted through the exercise of precisely those powers that are now being used to "balance" the Bill of Rights out of existence.¹⁴⁰

Despite this language Justice Black was not really a thoroughgoing absolutist.¹⁴¹ Only those laws which are aimed directly at curtailing the guaranteed freedoms are subject to his absolutist ban, not those which are aimed at other activity and only incidentally affect first amendment freedoms:

There are, of course, cases suggesting that a law which primarily regulates conduct but which might also indirectly affect speech can be upheld if the effect on speech is minor in relation to the need for control of the conduct. With these cases I agree. . . . But [they did not] even remotely suggest that a law directly aimed at curtailing

¹³⁸See, e.g., Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 4-6 (1965).

¹³⁹Meiklejohn, *supra* note 13, at 248-52. See also Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Freund, *Mr. Justice Black and the Judicial Function*, 14 U.C.L.A.L. REV. 467, 471 (1967).

¹⁴⁰*Konigsberg v. State Bar*, 366 U.S. 36, 61 (1960) (dissenting opinion).

¹⁴¹Meiklejohn, *supra* note 13, at 251.

speech and political persuasion could be saved through a balancing process.¹⁴²

The majority of the Court has never adopted Justice Black's view and, indeed, has expressly rejected it.¹⁴³ It has usually first divided the precedents into two classes: those which are considered outside first amendment protection generally and those which are within it but require balancing of individual and governmental interests.¹⁴⁴

In performing its balancing act, the Court has allocated to one or another side of the balance several formulations of the criterial weights it was employing. Sometimes it will elevate the rights side of the balance by declaring it to be in a "preferred position,"¹⁴⁵ to require "breathing space to survive,"¹⁴⁶ or to "rest on firmer foundation."¹⁴⁷ At other times, it will raise the governmental or social interest side of the balance by stressing the "overriding and compelling" interest of the state,¹⁴⁸ the incidental, rather than direct impact on the protected freedom, or the "clear and present danger"¹⁴⁹ involved in failing to defer to it. While it has been suggested that the "clear and present danger" test has been

¹⁴²*Barenblatt v. United States*, 360 U.S. 109, 141-42 (1959) (dissenting opinion). On Justice Black's "directly-indirectly" distinction, see Freund, *supra* note 139, at 471-72.

¹⁴³*Brennan, supra* note 138, at 5; *Konigsberg v. State Bar*, 366 U.S. 36, 49 (1960) (footnote omitted): "At the outset we reject the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are 'absolutes,' not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment."

¹⁴⁴*Konigsberg v. State Bar*, 366 U.S. 36, 49-51 (1960); see Emerson, *supra* note 139, at 912: "The formula is that the court must, in each case, balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression."

¹⁴⁵*Kovacs v. Cooper*, 336 U.S. 77, 88 (1949); *Thomas v. Collins*, 323 U.S. 516, 530 (1945). But see *Kovacs v. Cooper, supra* at 90 (Frankfurter, J., concurring): "My brother Reed speaks of the 'preferred position of freedom of speech' though, to be sure, he finds that the Trenton ordinance does not disregard it. This is a phrase that has uncritically crept into some recent opinions of this Court. I deem it a mischievous phrase, if it carries the thought which it may subtly imply, that any law touching communication is infected with presumptive invalidity." The phrase probably entered literature in Mr. Justice Stone's dissent in *Jones v. Opelika*, 316 U.S. 584, 608 (1942). See also Cahn, *The Firstness of the First Amendment*, 65 YALE L.J. 464 (1956).

¹⁴⁶*NAACP v. Button*, 371 U.S. 415, 433 (1963).

¹⁴⁷*Thomas v. Collins*, 323 U.S. 516, 530 (1945).

¹⁴⁸*Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963).

¹⁴⁹*Schenck v. United States*, 249 U.S. 47, 52 (1919). In addition, see *Dennis*, 341 U.S. 494, 510 (1951), where the Court, quoting Judge Learned Hand, said: "'In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' 183 F.2d at 212. We adopt this statement of the rule."

abandoned¹⁵⁰ and has little validity today,¹⁵¹ the weighing which it labeled is still very much the current practice.

At still other times, the Court looks at neither the individual nor the governmental interests involved, but at the means chosen to achieve the governmental interest. At such times, the Court focuses on the "chilling effect" of the means chosen upon the exercise of protected rights¹⁵² by determining whether those means are suitably limited to the achievement of the valid governmental interest. It seeks to determine if the means chosen are "precise"¹⁵³ and have a narrowly specific focus,¹⁵⁴ or are vague, overbroad, and unlimited and indiscriminate in their sweep.¹⁵⁵ It also probes to see if there are "less drastic means" of serving the legitimate state interest involved.¹⁵⁶ A persuasive argument has been made to the effect that it is in this "means test" that the crux of the "balancing" occurs:

A scale which puts in one pan the public interest in some legitimate end of government—national security, civil peace, or preservation of the machinery of justice—rather than the interest in a particular means to that end will rarely tip in favor of competing values. Since the court has in fact allowed first amendment values to prevail even when the end pursued by the government was urgent, it must do its balancing at the margin—that is, it must balance no more than the state's interest in the added effectiveness of the chosen means against the individual interest in the use of less drastic ones . . . By some process or another,

¹⁵⁰See Meiklejohn, *supra* note 13, at 249.

¹⁵¹See Brennan, *supra* note 138, at 8; McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182, 1209-11 (1959); *Brandenburg v. Ohio*, 395 U.S. 444, 450-54 (1969) (Douglas, J., concurring).

¹⁵²Mr. Justice Brennan, dissenting in *Walker v. City of Birmingham*, 388 U.S. 307, 345, said: "We have molded both substantive rights and procedural remedies in the face of varied conflicting interests to conform to our overriding duty to insulate all individuals from the 'chilling effect' upon exercise of First Amendment freedoms generated by vagueness, overbreadth and unbridled discretion to limit their exercise." See also *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) ("to chill that free play of the spirit which all teachers ought especially to cultivate and practice"); Comment, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 822-26 (1969).

¹⁵³*Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

¹⁵⁴*NAACP v. Button*, 371 U.S. 415, 430 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940).

¹⁵⁵*Keyishian v. Board of Regents*, 388 U.S. 589 (1967); *Elfbrandt v. Russell*, 389 U.S. 11 (1966); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Shelton v. Tucker*, 364 U.S. 479 (1960). See also Comment, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

¹⁵⁶*Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *accord*, *United States v. Robel*, 389 U.S. 258 (1967).

then, the Justices must estimate how much less effective various alternative means would be, how much more they would cost—not merely in terms of the resources they would require, but also in terms of their effects upon other non-first amendment social values—and measure against accompanying gains these losses to expression, association, and belief.¹⁵⁷

Sometimes, especially of late, the Court, seemingly growing sensitive to the accusation that it is balancing away protected rights, declares that it is not balancing at all:

In making this determination we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way “balanced” these respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict.¹⁵⁸

This new formula of “narrow accommodation” is certainly descriptive of what the Court does once, on balance, it finds the governmental interest worthy of protection. However, if this new test is applied without a prior “balancing,” it opens the door to almost any kind of restriction on first amendment rights, because once the interests on both sides of the balance are accorded validity, any means can be “narrowly accommodated” to an end.

Despite all the rhetoric about “balancing,” the Court seems to engage in a four-step analysis. First, it classifies the individual right being asserted into one of three classes: (1) absolutely unprotected speech, such as non-public affairs libel and whatever the Court chooses to call “obscenity”; (2) absolutely protected speech, such as that pure and simple speech directly banned by sedition laws; and (3) presumptively protected speech, such as all other kinds of speech, association,

¹⁵⁷Comment, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 467-68 (1969).

¹⁵⁸*United States v. Robel*, 389 U.S. 258, 268 n.20 (1967). The language of “accommodation” has been used before. See *United States v. Rumely*, 345 U.S. 41, 44 (1953) (Frankfurter, J.): “Accommodation of these contending principles—the one underlying the power of Congress to investigate, the other at the basis of the limitation imposed by the First Amendment . . .” But in no place other than *Robel* does the Court explicitly oppose the concepts of “accommodation” and “balancing.” Note also that Mr. Justice Brennan, dissenting in *Uphaus v. Wyman*, 360 U.S. 72, 84 (1959), described the task similarly: “But where the exercise of the investigatory power collides with constitutionally guaranteed freedoms, that power too has inevitable limitations, and the delicate and always difficult accommodation of the two with minimum sacrifice of either is the hard task of the judiciary and ultimately of this Court.”

petition, and assembly. Secondly, with respect to presumptively protected speech, it evaluates and weights the particular freedom for which protection is sought. Thirdly, it evaluates and weights the governmental interest being asserted against it. Finally, it attempts to measure the means chosen in two ways: by evaluating the extent of their negative impact on the rights claimed and by assessing their reasonable relationship to, and comparative efficiency in serving, the legitimate governmental interest. Because this seems a little clearer formulation of what the Court actually does in first amendment cases, this is the framework to be applied to the provisions of the Campaign Act.

THE FIRST AMENDMENT AND POLITICAL FREEDOM

If free speech is "the matrix, the indispensable condition of nearly every other form of freedom,"¹⁵⁹ free political speech is its crown and guarantor. Indeed, Alexander Meiklejohn has urged that the first amendment rights constitute the quintessence of democratic self-government and that the people have reserved to themselves absolute freedom in the exercise of those rights and have forbidden their government to intrude on that free exercise in any way.¹⁶⁰ The Supreme Court has spoken similarly concerning the purposes of the first amendment:

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.¹⁶¹

It would seem, therefore, that first amendment protection of participation in politics would be ironclad against *any* intrusion; but even the absolutists would not grant it a complete immunity from governmental regulation.¹⁶² While the absolutists would clearly not permit as much regulation as the balancers, the rationale employed by both schools of interpretation would be the same. All would argue that while political freedom constitutes perhaps the most preferred exercise of the first amendment rights, the government's obligation to maintain the purity

¹⁵⁹*Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (Cardozo, J.).

¹⁶⁰Meiklejohn, *supra* note 13, at 255-56.

¹⁶¹*Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).

¹⁶²See text accompanying note 142 *infra*.

of the election process has an equally elevated status. That governmental power, however it is constitutionally derived, can be rationalized in a variety of ways: as necessary to safeguard the effectiveness of the citizen's own first amendment political rights, as self-protection by the government, or as merely self-evident.¹⁶³ Thus the abridgement of some first amendment rights, which, when directed to non-political ends would be quickly struck down, may find a valid governmental purpose in the protection of the integrity of elections. This is, of course, not to say that any means employed by Congress would be justified by the compelling nature of the governmental interest; the character of the means used is the determining factor in the analysis. The exceedingly difficult task for the courts is to determine which kinds of political freedom can be constitutionally circumscribed in which ways and to achieve which governmental purposes.

Let us examine in that light two of the central features of the Campaign Act: the contribution disclosure requirements and the monetary limitations imposed on candidates in the amount he or his family can contribute to his campaign and in the amount he can spend on communications media in his campaign.

DISCLOSURE OF POLITICAL CONTRIBUTIONS

The Right of Privacy in the Exercise of First Amendment Freedom

The Precedents for the Right. That there is a first amendment right to free and unhindered political expression and activity can hardly be doubted. What is at issue here is the amplitude of that right and the extent to which compelled disclosure entrenches upon it. Is the making of a political contribution constitutionally protected from government scrutiny and from forced disclosure to the public? Is it, in other words, within the protection of a right to privacy of political belief or of a right to privacy of political association? In view of the obviousness of the question and the fact that contribution disclosure has been part of the Federal Corrupt Practices Act for nearly fifty years, it is astonishing that the Supreme Court has not addressed it directly in a single case,¹⁶⁴ not even in the leading corrupt practices case of *Burroughs and Cannon v. United States*.¹⁶⁵ While there are, therefore, no cases directly in point, there are six different major lines of cases which involve the immunity

¹⁶³See *Ex parte Yarbrough*, 110 U.S. 651, 661-62 (1884).

¹⁶⁴T. EMERSON, *supra* note 87, at 635.

¹⁶⁵290 U.S. 534 (1934).

of the first amendment freedoms of speech, press, assembly, petition, and religion from official inquiry, regulation, and disclosure and which bear closely on our question. In defining the scope of a right to privacy for campaign contributions, cases that have arisen in the following areas must be considered: (1) the privacy of political speech, belief, and association (governmental regulation of and inquiry into the personal and organizational affairs of those suspected of using or advocating violence or the violent overthrow of the government or of those who are agents of foreign powers); (2) privacy of association for socioeconomic change (the NAACP cases); (3) privacy of political and religious speech (the municipal and state licensing of public speeches, soliciting, and handbill distribution); (4) privacy of the press; (5) privacy of speech and petition (the lobbying cases); and (6) privacy of political activity (the corrupt practices cases).

The first group of cases grew out of attempts by Congress and state legislatures to deter through disclosure the activities of Communists, agents of foreign principals, and members of the Ku Klux Klan. The legislative means to this end have included registration statutes,¹⁶⁶ provisions making membership in certain organizations illegal or attaching severe burdens to such membership, and legislative investigations of "subversive" activities. The registration statutes, with the exception of those involving the attempt by Southern states to compel disclosure by the NAACP,¹⁶⁷ have been upheld against first amendment attack.¹⁶⁸ When the registration necessarily results in revelation of conduct punishable under the criminal laws, however, the Court has invalidated the registration requirement on the ground that it violated the fifth amendment privilege against self-incrimination.¹⁶⁹ The provisions conditioning eligibility for public employment or for certain public benefits on oaths

¹⁶⁶Voorhis Anti-Subversive Activities Act, 18 U.S.C. § 2386 (1970); Foreign Agents Registration Act, 22 U.S.C. §§ 611-21 (1970); Communist Control Act, 50 U.S.C. §§ 841-44 (1970); Subversive Activities Control Act of 1950 (McCarran Act), ch. 1024, §§ 7-9, 64 Stat. 993-96; Alien Registration Act of 1940 (Smith Act), ch. 439, tit. III, 54 Stat. 673-76 (now 8 U.S.C. §§ 1301-06 (1970); N.Y. CIV. RIGHTS LAW §§ 53-54 (McKinney 1948) (the Walker Law, providing that certain organizations, which require an oath as a condition of membership, must register and file a list of members; directed at the Ku Klux Klan).

¹⁶⁷See text and accompanying notes 174-76 *infra*.

¹⁶⁸Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (sustaining the registration provisions of the Smith Act); Viereck v. United States, 318 U.S. 236 (1943) (sustaining the Foreign Agents Registration Act, but limiting the required disclosure only to those activities actually engaged in on behalf of a foreign principal); New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1929) (sustaining New York's Walker Law, discussed note 166 *supra*).

¹⁶⁹Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965).

of nonadvocacy of violent overthrow or nonmembership in organizations advocating violent overthrow were generally sustained in the earlier cases,¹⁷⁰ but more recently have been struck down as overbroad in their infringement of first amendment rights.¹⁷¹ Legislative investigations of subversion have similarly found a mixed response in the courts, with half the leading cases sustaining the particular inquiry¹⁷² and half

¹⁷⁰*E.g.*, *In re Anastaplo*, 366 U.S. 82 (1961), sustaining the refusal of the Illinois State Bar to admit Anastaplo to membership on grounds of his refusal to answer questions about membership in the Communist Party, an organization on the Attorney General's list.

¹⁷¹*United States v. Robel*, 359 U.S. 258 (1967) (invalidating as overbroad the provision of the Subversive Activities Control Act making it illegal for a member of the Communist Party to be employed in an enterprise designated by the Secretary of Defense as a "defense facility"); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (invalidating as overbroad New York statutory provisions barring state employment to members of organizations listed as subversive); *Dennis v. United States*, 384 U.S. 855 (1966) (reversing on procedural grounds convictions of union officers for conspiring to obtain access to NLRB services by filing false Communist Party non-membership affidavits); *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (invalidating an Arizona affirmative loyalty oath for state employees which had been interpreted by the Arizona legislature to prohibit membership in the Communist Party); *United States v. Brown*, 381 U.S. 437 (1965) (invalidating as a bill of attainder 29 U.S.C. § 504 (1970), a law making it a crime for a Communist Party member to serve as an officer or employee of a labor union); *Baggett v. Bullitt*, 377 U.S. 360 (1964) (invalidating two Washington state oaths—one an affirmative oath to "promote respect for the flag" and governmental institutions, "reverence for law and order and undivided allegiance to the government," *id.* at 362, and the other a disclaimer of being a "subversive," or member of a subversive organization); *Cramp v. Board of Pub. Instruction*, 368 U.S. 278 (1961) (invalidating a Florida provision requiring state employees to swear that they had never lent "aid, support, advice, counsel or influence to the Communist Party," *id.* at 279); *Shelton v. Tucker*, 364 U.S. 479 (1960) (invalidating an Arkansas law requiring all public school teachers to file annually an affidavit listing all organizations—political, religious, fraternal, and social—to which they had belonged or contributed within five years); *Speiser v. Randall*, 357 U.S. 513 (1958) (invalidating a California statute requiring a non-overthrow oath as a prerequisite to obtaining a veteran's property tax exemption); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956) (invalidating a provision of New York City Charter Amendment relating to questions about plaintiff's official conduct); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (invalidating an Oklahoma non-membership oath that was required irrespective of knowledge of the purpose of the organization).

¹⁷²*Braden v. United States*, 365 U.S. 431 (1961) (sustaining a contempt conviction for defendant's refusal to answer many of the questions put to him by the House Committee on Un-American Activities); *Wilkinson v. United States*, 365 U.S. 399 (1961) (sustaining a contempt conviction for defendant's refusal to answer all questions put to him by the House Committee on Un-American Activities, on grounds that the questions were clearly within the scope of a valid legislative inquiry authorized by Congress); *Uphaus v. Wyman*, 360 U.S. 72 (1959) (sustaining a contempt conviction for refusal to reveal to the Attorney General of New Hampshire the names of guests at a "World Fellowship" camp, on the grounds that there was a legitimate state interest in protecting itself from subversion and a sufficient nexus between defendant and the area being investigated); *Barenblatt v. United States*, 360 U.S. 109 (1959) (sustaining a contempt conviction of a university instructor for refusal to answer questions put by the House Committee on Un-American Activities regarding his present and past membership in the Communist Party, on grounds that those activities were legitimately within the scope of congressional inquiry and that there was probable cause for the committee to seek to question him in relation to them).

of them invalidating it.¹⁷³ All of these cases presented issues involving the freedom and privacy of political belief and association, and in all of them the Court recognized the existence and importance of those rights, even when it found an overriding governmental interest sufficient to warrant intrusion upon them.

The NAACP cases¹⁷⁴ presented the same issues in purer form, except that the association for which privacy from governmental intrusion was being sought was socioeconomic rather than political in nature.¹⁷⁵ Because of the socioeconomic nature of the association, it is all the more significant that the Court invariably protected its privacy, going so far as to create, in the view of some commentators, a new first amendment right of freedom of association.¹⁷⁶ The fact that the Court was able to reach its conclusions because it found a nonexistent or insufficiently compelling governmental interest to balance against the privacy of association should not seriously diminish the significance of the private right it proclaimed.

¹⁷³*DeGregory v. New Hampshire*, 383 U.S. 825 (1966) (reversing a contempt conviction for refusal to answer questions put by the Attorney General of New Hampshire about past Communist activities); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963) (reversing a contempt conviction of the president of the Miami branch of the NAACP for refusal to give branch membership lists to a Florida Legislative Investigation Committee); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (reversing a contempt conviction for refusal to answer questions put by the Attorney General of New Hampshire regarding recent lectures); *Watkins v. United States*, 354 U.S. 178 (1957) (reversing contempt conviction for refusal to answer questions about the activities of others who had been associated in the Communist Party functions in the past, but who had ceased activity).

¹⁷⁴*NAACP v. Button*, 371 U.S. 415 (1963) (invalidating a Virginia anti-barratry statute under which NAACP feared prosecution for urging its members to bring court suits for violations of their rights); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961) (sustaining the refusal of the NAACP to furnish the Louisiana Secretary of State a membership list required annually by statute of certain kinds of organizations doing business in Louisiana); *Bates v. City of Little Rock*, 361 U.S. 516, 527 (1960) (unanimously sustaining the refusal of two local NAACP branches to comply with occupation license tax ordinances insofar as they required any organizations operating within the cities involved to furnish to the city clerk a statement listing those paying dues, assessments or contributions on grounds that the cities "failed to demonstrate a controlling justification for the deterrence of free association which compulsory disclosure of the membership lists would cause," *id.* at 527); *NAACP v. Alabama*, 357 U.S. 449 (1958) (unanimously sustaining the refusal of the NAACP to comply with an order to furnish its membership lists, on the ground that the state had shown an insufficient legitimate interest required to override the deterrence to freedom of association which would be caused by revealing the membership lists). *See also* *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960).

¹⁷⁵The Court viewed both kinds of organizations as entitled to protection. *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958).

¹⁷⁶Emerson, *Freedom of Association and Freedom of Expression*, 74 *YALE L.J.* 1, 1-3 (1964), and authorities cited therein. *See also* Robison, *Protection of Associations from Compulsory Disclosure of Membership*, 58 *COLUM. L. REV.* 614 (1958).

The issue presented by the licensign cases is also closely related to the question of privacy of first amendment rights. But while registration or legislative inquiry occurs *after*, or concurrent with, the exercise of a first amendment freedom, licensing occurs *before* its exercise. Both licensing and registraiton imply that government permission must be obtained for the exercise of a freedom not in principle within government's power to give or deny, and both involve governmental intrusion on the privacy of the exercise of first amendment rights, but the prior restraint of licensing is obviously the more onerous. In these cases the Court has had to decide whether the government could require an individual to obtain a license as a prerequisite to engaging in activities presumably protected by the freedoms of speech, assembly, petition, and religion. While the cases have turned mainly on the latitude of discretionary authority to refuse permission and have found fault with licensing because it is a prior restraint, the disclosure to public authority inherent in licensing has been implicit in the Court's concern. Only a few of the leading cases have sustained the licensing;¹⁷⁷ most have invalidated it.¹⁷⁸ The privacy dimension of the handbill-distribution-licensing cases surfaced in *Talley v. California*,¹⁷⁹ the most recent case in the

¹⁷⁷*Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Cox v. New Hampshire*, 312 U.S. 569, 575-76 (1941) (sustaining a statute which required a license and fee for parades; it had been narrowly construed by the state courts to permit refusal only for "considerations of time, place, and manner so as to conserve the public convenience").

¹⁷⁸*Staub v. City of Baxley*, 355 U.S. 313 (1958) (invalidating an ordinance requiring a permit from the mayor and city council in order to solicit union membership); *Kuntz v. New York*, 340 U.S. 290 (1951) (invalidating an ordinance requiring a permit from the police commissioner in order to hold public religious meetings on the streets, as applied to a Baptist minister whose earlier license had been revoked because he allegedly ridiculed other religions at one of his services); *Thomas v. Collins*, 323 U.S. 516 (1945) (invalidating a Texas statute that required labor organizers to register with the Secretary of State, from whom one would receive an "organizer's card" in order to solicit members); *Largent v. Texas*, 318 U.S. 418 (1943) (invalidating an ordinance requiring a permit from the mayor, who could refuse it if he deemed it "proper or advisable," *id.* at 419 n.1, to do so); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (invalidating a statute requiring a license from the secretary of the public welfare council, who had discretion in determining whether the cause was "religious," as applied to members of Jehovah's Witnesses who were selling and giving away pamphlets); *Schneider v. New Jersey*, 308 U.S. 147 (1939) (invalidating ordinances that banned the distribution of literature in the public streets and invalidating an ordinance requiring a license to be obtained from the chief of police, who had wide discretion to refuse); *Hague v. CIO*, 307 U.S. 496 (1939) (invalidating an ordinance requiring a permit to be obtained for meeting in public places, which could be refused only "for the purpose of preventing riots, disturbances, or disorderly assemblage," *id.* at 502 n.1, where the ordinance had in fact been used arbitrarily to suppress free discussion of public issues); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (invalidating an ordinance requiring the city manager's permission for distributing literature as applied to a member of Jehovah's Witnesses wishing to distribute religious tracts).

¹⁷⁹362 U.S. 60 (1960).

sequence, which invalidated on privacy grounds a Los Angeles ordinance prohibiting distribution of "any handbill in any place under any circumstances," unless it had printed on it the names and addresses of the persons who prepared, distributed, or sponsored it. The Court noted that it had already held similar absolute bans unconstitutional¹⁸⁰ and regarded the addition of an identification requirement as a condition of distribution as "tend[ing] to restrict freedom to distribute information and thereby freedom of expression."¹⁸¹ The Court then went on to emphasize the potential importance of anonymity in expression and concluded that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."¹⁸²

The fourth category is that of registration of the press, with the concomitant infringement of the privacy of editors and owners. In the Post Office Appropriations Act of 1912,¹⁸³ Congress conditioned the granting of "the privileges of the mail" to newspapers, magazines, and other periodicals on their filing with the Postmaster General and their publishing semi-annually in their pages, the names of their editors, officers, and owners. This condition was attacked in *Lewis Publishing Co. v. Morgan*,¹⁸⁴ as a violation of freedom of the press:

The compulsory disclosure to the public of the circulation of a newspaper is calculated to impair its influence and violate the privacy of its business. By compelling a public disclosure of the editors and owners of newspapers, the right to disseminate ideas impersonally is distorted.¹⁸⁵

In deciding that the condition constituted regulation of the mails rather

¹⁸⁰*Schneider v. New Jersey*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938). Compare *Saia v. New York*, 334 U.S. 558 (1948) (invalidating an ordinance prohibiting the use of sound amplifiers in public places without the permission of the chief of police, on grounds of the absence of standards for the exercise of his discretion) with *Kovacs v. Cooper*, 336 U.S. 77 (1949) (sustaining an ordinance absolutely prohibiting the use of sound trucks on any city street). But see *Breard v. City of Alexandria*, 341 U.S. 622 (1951) (sustaining an ordinance prohibiting house-to-house solicitation for commercial purposes without obtaining advance approval of house occupants, as applied to magazine subscription solicitors); *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (sustaining an ordinance which prohibited distribution of commercial advertising on public streets, when a non-commercial, public interest-oriented part of the handbill had been added in order to evade the ordinance). See also *Martin v. City of Struthers*, 319 U.S. 141 (1943) (invalidating an ordinance forbidding knocking on doors and ringing doorbells in order to deliver handbills, when applied to a member of Jehovah's Witnesses).

¹⁸¹362 U.S. at 64.

¹⁸²*Id.* at 65.

¹⁸³Ch. 389, § 2, 37 Stat. 553-54.

¹⁸⁴229 U.S. 288 (1913).

¹⁸⁵*Id.* at 292 (argument for appellant).

than of the press, the Court utilized the right-privilege distinction, which has been discredited by subsequent decisions.¹⁸⁶ In view of *Lamont v. Postmaster General*,¹⁸⁷ *Lewis Publishing* must be regarded as of exceedingly doubtful vitality.

The lobbying cases involve the privacy of exercise of the freedoms of petition and speech. In *United States v. Rumely*¹⁸⁸ and *United States v. Harriss*,¹⁸⁹ the only two cases to reach the Supreme Court, the issue was presented in quite different circumstances. *Rumely* reviewed a contempt conviction arising out of a congressional investigation of lobbying, while in *Harriss* the defendants were charged with failure to register and report contributions and expenditures under the Federal Regulation of Lobbying Act.¹⁹⁰ The defendant in *Rumely* was Secretary of the Committee for Constitutional Government, which was engaged, as Justice Frankfurter put it, "in the sale of books of a particular political tendentiousness,"¹⁹¹ and he had refused to reveal to the House Select Committee on Lobbying the names of those who had made bulk purchases of tracts from his organization. The defendants in *Harriss*, however, had been engaged to contact members of Congress either personally, through hired lobbyists, or through a letter-writing campaign. Both cases turned, therefore, on the question of what constitutes "lobbying," and in both the Court construed it as narrowly as possible to mean " 'lobbying in its commonly accepted sense,' that is, 'representations made directly to Congress, its members, or its committees.' "¹⁹² *Rumely's* activities were consequently outside the scope of the Committee's authorizing resolution and immune from inquiry, just as some of the *Harriss* defendants were outside the scope of regulation of the Act. The Court went to such pains because to give the word a "broader application to organizations seeking to propagandize the general public"¹⁹³ might infringe the exercise of the first amendment.¹⁹⁴ To require

¹⁸⁶Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

¹⁸⁷381 U.S. 301 (1965) (holding that the use of the mails cannot be conditioned upon unconstitutional burdens; the burden in that case was self-identification by post-card in order to receive foreign communist propaganda).

¹⁸⁸345 U.S. 41 (1953).

¹⁸⁹347 U.S. 612 (1954).

¹⁹⁰2 U.S.C. §§ 261-70 (1970).

¹⁹¹345 U.S. at 42.

¹⁹²*Id.* at 47, quoting from the lower court opinion in the same case, 197 F.2d 116, 175 (D.C. Cir. 1952).

¹⁹³*United States v. Harriss*, 347 U.S. 612, 621 (1954).

¹⁹⁴*See id.* at 630-33 (Douglas, J., dissenting); *United States v. Rumely*, 345 U.S. 41, 46 (1953).

those engaged in *direct* lobbying of Congress, however, to reveal "the real principals behind those who come to Congress (or get others to do so) and speak as though they represent the public interest, when in fact they are undisclosed agents of special groups,"¹⁹⁵ is justified since it enables members of Congress to evaluate accurately the pressures brought to bear upon them.¹⁹⁶

The final group of cases is comprised of those dealing with the regulation of the heart of political activity: the election and campaign process. These involved regulation of the kinds of activities which are either not within the scope of first amendment protection, such as bribery and intimidation of voters, or simply concern general supervisory authority over elections. It is worth noting again that *Burroughs and Cannon v. United States*,¹⁹⁷ the one case sustaining the power of Congress to require registration of political committees and disclosure of political contributions, did not consider the impact of such disclosure on the privacy of first amendment exercise. In only one group of corrupt practices cases—those dealing with the constitutionality of the state¹⁹⁸ and federal¹⁹⁹ laws requiring political handbills to be signed—has the question of first amendment privacy been raised, but in all of them (none of which reached the Supreme Court) the statutes have been sustained.²⁰⁰ The only case raising a similar issue to reach the Supreme Court was *Talley v. California*,²⁰¹ but the handbill that caused the ordinance there to be struck down was not one that dealt with a political campaign. While the Court's reasoning would certainly embrace political handbills within the scope of its language and while Justice Clark's dissent there relied on the existence, and the implied constitutionality of, the bans on anonymous political handbills,²⁰² the Court must be said never to have decided the issue.

Extending the Right to Campaign Contributions. As an initial as-

¹⁹⁵*United States v. Harriss*, 347 U.S. 612, 632 (1954) (Douglas, J., dissenting).

¹⁹⁶*Id.* at 625. The Court did not consciously describe what it was doing as "balancing," because that word was not to come into vogue with the Court for another several years. But a careful reading of the case makes it absolutely clear that "balancing" is what the Court actually did.

¹⁹⁷290 U.S. 534 (1934).

¹⁹⁸In 1960 thirty-six states had such statutes. *Talley v. California*, 362 U.S. 60, 70 n.2 (1960) (Clark, J., dissenting).

¹⁹⁹18 U.S.C. § 612 (1970).

²⁰⁰*United States v. Scott*, 195 F. Supp. 440 (D.N.D. 1961); *Canon v. Justice Court*, 61 Cal. 2d 446, 393 P.2d 428, 39 Cal. Rptr. 228 (invalidating the statute on other grounds); *State v. Babst*, 104 Ohio St. 167, 135 N.E. 525 (1922).

²⁰¹362 U.S. 60 (1960).

²⁰²*Id.* at 68.

sumption, legitimate political activity, peacefully pursued according to the laws prescribed therefor, is privileged and not subject to governmental registration, disclosure, or scrutiny. Justice Frankfurter put it this way in his concurring opinion in *Sweezy*:

But the inviolability of privacy belonging to a citizen's political loyalties has so overwhelming an importance to the well-being of our kind of society that it cannot be constitutionally encroached upon on the basis of so meagre a countervailing interest. . . .

In the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority. It cannot require argument that inquiry would be barred to ascertain whether a citizen had voted for one or the other of the two major parties, either in a state or national election.²⁰³

Thus not only the secrecy of the ballot itself,²⁰⁴ but also a citizen's political loyalties are protected. The importance of that right to privacy of political affiliations is underscored by the Court's creation of an independent right of privacy of association:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech. . . . It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Compelled disclosure of membership in an organization engaged in

²⁰³*Sweezy v. New Hampshire*, 354 U.S. 234, 265-66 (1957). It goes without saying that the absolutists would go even further and would not give any weight to a countervailing governmental interest: "Moreover, we believe . . . that First Amendment rights are beyond abridgement either by legislation that directly restrains their exercise or by suppression or by impairment through harassment, humiliation, or exposure by government." *Bates v. City of Little Rock*, 361 U.S. 516, 528 (1960) (Black & Douglas, JJ., concurring).

²⁰⁴For the history of the development of privacy surrounding balloting in this country, see Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusion in Political Affairs*, 47 MICH. L. REV. 181, 181-92 (1948).

advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly when a group espouses dissident beliefs.²⁰⁵

It is clear that the Court views the right to privacy in association as involving more than political associations.²⁰⁶ If the Court will protect the privacy of organizations less directly related to the central meaning of the first amendment from infringement by registration and disclosure statutes²⁰⁷ and legislative investigations,²⁰⁸ then *a fortiori* it should protect the privacy of avowedly political organizations.

It can be argued that contributing money to an association is not the same as being a member of it and that the former act goes beyond the membership that is protected by the privacy of political association that has been given protection by the Court. But, in *Bates* and *Rumely*,²⁰⁹ the Court extended first amendment protection also to contributors and pointed out in *NAACP v. Alabama*²¹⁰ that it was the individual's right to express his ideas freely *through* organizations that was being protected, not any rights of the associations themselves.²¹¹ If the Court has protected organizations from disclosure of contributions, it follows that it should also protect individuals contributing to a political campaign, even if the loose and *ad hoc* association for a political campaign does not formally constitute an association.

Extending first amendment protection to contributions indicates that making a contribution is considered by the Court to be a kind of speech, or at the narrowest, an activity that furthers and is necessary to the protection of free speech and association. It is obvious that the latter could not exist without the funds required to sustain it.

There are three major exceptions to the protection of the privacy of political associations. The first is that kind of political association which is not in fact a legitimate political party, such as the Communist Party.²¹²

²⁰⁵*NAACP v. Alabama*, 357 U.S. 449, 460-62 (1958).

²⁰⁶*Id.* at 461.

²⁰⁷*Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); *NAACP v. Alabama*, 357 U.S. 449 (1958).

²⁰⁸*Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

²⁰⁹*Bates v. City of Little Rock*, 361 U.S. 516 (1961); *United States v. Rumely*, 345 U.S. 41 (1953).

²¹⁰357 U.S. 449 (1958).

²¹¹*Id.* at 459. See also Emerson, *supra* note 176, at 4-5.

²¹²*Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 547 (1963).

In making the distinction between legitimate and illegitimate political parties, the Court pointed out what it considers to be the distinguishing nature of the illegality involved:

It is argued that if Congress may constitutionally enact legislation requiring the Communist Party to register, to list its members, to file financial statements, and to identify its printing presses, Congress may impose similar requirements upon any group which pursues unpopular political ideology. Nothing which we decide here remotely carries such an implication. The Subversive Activities Control Act applies only to *foreign-dominated* organizations which work primarily to advance the objectives of a world movement controlled by the government of a *foreign* country. . . . It applies only to organizations directed, dominated, or controlled by a *particular* foreign country. . . .²¹³

The distinction is reinforced by comparing the Court's protection of a member of the Progressive Party in *Sweezy*²¹⁴ with its unwillingness in the same context to extend protection to a sometime affiliate of the Communist Party in *Uphaus*.²¹⁵ Similarly, the Foreign Agents Registration Act was upheld but limited to those activities specifically undertaken for a foreign principal.²¹⁶

The second exception involves organizations expressly committed to the pursuit of their aims by unlawful means. The Communist Party's alleged dedication to change through violent overthrow was even more influential than the element of foreign control; the Court intended chiefly to protect the government and the society not from a point of political view but from an illegal mode of change—that which utilizes secrecy and violence. It was this same disapproval of change by force rather than through persuasion which underlay the Court's willingness to sustain registration of the Ku Klux Klan. And, indeed, it was also the characteristic of violence that permeated the rationale of *Ex parte Yarbrough*,²¹⁷ the case on which the Court chiefly relied in *Burroughs and Cannon*, the leading case in government regulation of corrupt practices, and the *only* case to sustain disclosure requirements.

Stripped of its technical verbiage, the offense charged in the in-

²¹³Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 104 (1961).

²¹⁴354 U.S. 234 (1957).

²¹⁵360 U.S. 72 (1959). See also Comment, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084, 1100 (1961).

²¹⁶Viereck v. United States, 318 U.S. 236 (1943); see Comment, 70 YALE L.J., *supra* note 215, at 1092.

²¹⁷110 U.S. 651 (1884).

dictment is that the defendants conspired to intimidate Berry Saunders, a citizen of African descent, in the exercise of his right to vote for a member of the Congress of the United States, and in the execution of that conspiracy they beat, bruised, wounded and otherwise maltreated him; and in the second count that they did this on account of his race, color and previous condition of servitude, by going in disguise and assaulting him on the public highway and on his own premises. . . . 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 to arrest attention and demand the gravest consideration.

If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from *violence* and *corruption*.

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*.²¹⁸

When the political association is not dedicated to violent means, the privacy of its political activity has been generally protected.²¹⁹

The third major exception to political privacy involves the tactics individuals use in attempting to influence elections or the political process. When there are willful attempts to defraud, deceive, or corrupt the political process, the Court will not protect the privacy of the actors. As we have already noted, “insidious corruption” was the companion of “violence” in *Ex parte Yarbrough*.²²⁰ The fact that *Burroughs and Cannon*²²¹ relied principally on *Yarbrough*, coupled with the fact that the first amendment issue was never raised in it, must vitiate somewhat the force of its holding. “Corrupt practices” is a term of art which, until *Burroughs and Cannon*, had a well-settled meaning connoting such offenses as bribery, graft, dishonesty, intimidation, purchase of office, and intimidation of subordinates for political purposes. These are inherently wrong and especially crude forms of a kind of corrupt practices that are

²¹⁸*Ex parte Yarbrough*, 110 U.S. 651, 657-58 (1884) (emphasis added).

²¹⁹See Comment, 70 YALE L.J., *supra* note 215, at 1100.

²²⁰110 U.S. 651 (1884).

²²¹290 U.S. 534 (1933).

evil in themselves. While the reporting of contributions may be justified as a means of protecting the public from the brazen kinds of corruption, the making of contributions themselves is presumptively honest and generally encouraged by public policy. Unlike the true "corrupt practices," contributing may or may not be wrong depending on the motive of the giver, the motive that prompted the receiver, and post-election official actions, if any, that were caused by them.

Closely related to such corrupt practices is the element of deception, which was the dominant force in the Court's decision in *Harris*²²² to sustain, but construe narrowly, the Federal Regulation of Lobbying Act.²²³ Even Justice Douglas, in dissenting, conceded that the deception factor would induce him to sustain a narrowly drawn act to achieve disclosure:

I do not mean to intimate that Congress is without power to require disclosure of the real principals behind those who come to Congress (or get others to do so) and speak as though they represent the public interest, when in fact they are undisclosed agents of special groups.²²⁴

The same tendency to deceive and defraud is the reason for the general favor which the anonymous political handbill bans have found in the lower courts. The kind of evil at which they are aimed—the prevention of non-attributed false charges and smears—is of a much different order of magnitude and likelihood of occurring than that evil which the disclosure of political contributions is designed to prevent.

Finally, it was also the deception theme which led the Court to sustain the press disclosure requirement in *Lewis Publishing*.²²⁵ The Court quoted as follows from the Senate Committee Report on the point:

The extremely low postage rate accorded to second-class matter gives these publications a circulation and a corresponding influence unequalled in history. It is a common belief that many periodicals are secretly owned or controlled, and that in reading such papers the public is deceived through ignorance of the interest the publication represents.²²⁶

²²²See text accompanying note 15 *supra*.

²²³*United States v. Harriss*, 347 U.S. 612 (1954).

²²⁴*Id.* at 632 (Douglas, J., dissenting). See also *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 174-75 (1961) (Douglas, J., dissenting).

²²⁵*Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913).

²²⁶*Id.* at 312, quoting S. REP. No. 955.

Absent the element of deception, therefore, whatever slight vitality there is remaining in *Lewis*²²⁷ should be of no weight in support of contribution disclosure generally.

If the distinction between the neutral nature of political contributions and the "grosser forms" of corruption is valid, and in view of the tenuous nature of the constitutional authority for federal regulation of the substantive dimensions of elections, the Court should be wary of creating in compulsory disclosure of contributions a general exception to the privacy it has afforded peaceful political activity.

So far as the privacy of first amendment rights is concerned, the determining calculation is the extent to which disclosure of political contributions constitutes a deterrent to free exercise. The first amendment exists not only to provide freedom from prior restraint by government, but also to prevent any deterrence caused by fear of subsequent official or private retribution.²²⁸ Justice Douglas has stated in *Louisiana v. NAACP* that where "disclosure of membership lists results in reprisals against and hostility to the members, disclosure is not required."²²⁹ In most of the cases involving the NAACP, the threat to members and contributors was more hostile and potentially more violent than any consequence of political contribution disclosure would be. But that is not the issue. The question is whether the anticipation of the consequences of contribution disclosure might reasonably deter citizens from financially supporting the candidates of their choice, and there is some evidence in support of an affirmative answer.²³⁰

What is involved is not so much a fear of official reprisals, although that is certainly a matter of real concern. It is the fear of harm to social, business, employment, and professional relations from private kinds of retribution; these are just as much a part of the deterrence that is to be protected against as are official reprisals.²³¹ In all cases, it is the governmental action forcing disclosure that is the source of the harm.²³²

²²⁷See text accompanying note 187 *supra*.

²²⁸*Griswold v. Connecticut*, 381 U.S. 479 (1965); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 556-57 (1963); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). See also Comment, 70 *YALE L.J.*, *supra* note 215, at 1104-05.

²²⁹366 U.S. 293, 296 (1961). See also *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 169 (1961) (Douglas, J., dissenting).

²³⁰A. HEARD, *supra* note 4, at 360-62.

²³¹*NAACP v. Alabama*, 357 U.S. 449, 463 (1958).

²³²The chilling effect of statutes banning anonymous advocacy or requiring affirmative disclosure of views and affiliations arises not merely from the possibility that public

The greatest threat is to contributors whose job may be lost or whose advancement may be harmed by disclosure. Public employees who wish to give to opposition candidates are particularly vulnerable, as are middle and lower level employees of businesses and industries whose employers are supporting other candidates. But disclosure works also to deter giving by merchants and professionals who fear customer or client disapproval.

The more intense the feelings on both sides, of course, the greater the deterrence:

A particularly pernicious aspect of disclosure legislation is its selective deterrence. On its face a disclosure law may be impartial, aimed at all groups and viewpoints. This apparent impartiality may, however, mask actual discrimination against unpopular ideas. The major sources of deterrence are social and economic pressure; these are most effective when they reflect, and are reinforced by, the majority sentiment of the community.²³³

What is true for organizations seeking to change policy, such as the NAACP, is equally true for organizations seeking to change governmental policymakers and officeholders. In politics, there are always "ins" and "outs" in a natural state of opposition so that if all contributors are known to the public, the risk of reprisal is clearly present. That risk is particularly high the more heated the contest or the greater the disproportion of strength among the contestants. It obviously required considerable courage for an Alabamian to contribute openly to Vice-President Humphrey in 1968 or for Northern supporters of Governor Wallace to contribute openly to his primary campaigns in 1972. The same deterrent operated throughout most areas of the Second District of North Carolina to reduce contributions to Mayor Howard Lee's congressional primary campaign in 1972,²³⁴ as it undoubtedly would in campaigns of any other black challengers of long-entrenched Southern incumbents. This forces challengers to rely on out-of-state financial support, which, when publicized, becomes a political liability. Nor is

officials will misuse the information revealed. If the fear is principally of private reprisals and community pressure—much of which is not actionable in tort—then there is no damaging official action to be reviewed other than enforcement of the disclosure requirement itself.

Note, 83 HARV. L. REV., *supra* note 155, at 877-88.

²³³Comment, 70 YALE L.J., *supra* note 215, at 1108; see Note, *Disclosure as a Legislative Device*, 76 HARV. L. REV. 1273, 1273-74 (1963).

²³⁴Interview with Howard Lee, Mayor of Chapel Hill, N.C., April 5, 1972.

there any question about the extent of deterrence to opposition support in one-party jurisdictions, such as to Republican candidates in many parts of the South and to Democratic candidates in some parts of the North. The result is that the greater the need for opposition, the greater is the risk of associating for political purposes with challengers. The greater the risk, the more deterrence there is to giving, and the greater is the need for privacy.²³⁵

It is not only a question of economic reprisals. Disclosure exposes public-spirited givers to public suspicion of their motives, raising a suspicion that they are attempting to buy influence or special favors. It exposes them to harassment by reporters and to solicitation by businesses, philanthropies, and other candidates. Alexander Heard summed up the consequences as follows:

The climate of politics in the United States exposes contributors to harassment by the press and exploitation by the opposition. Even persons with no need or intent to evade the law are led to give under false names. . . . Solicitors report that persons whom they approach for contributions often say, in effect, "If you won't get my name in the papers and have a lot of reporters calling me up in the middle of the night, I will give you something." After being interviewed by a federal investigator in 1956, the donor of a legitimate, publicly reported campaign gift declared he would give no more if doing so were going to provoke investigations

Those who advocate full disclosure argue that any gift unable to stand the light of day should not be made. Or, at least, persons making it should pay the penalty of public reaction. However this may be, in addition to the rascals, there are many citizens who feel that contributing is like voting, a personal matter and nobody else's business.²³⁶

If contributing money to political campaigns is equivalent or ancillary to free political speech, then the aim of the Campaign Act to disclose contributions is a direct assault on first amendment privacy, rather than a mere incidental effect. Even if it is true that making a political contribution is "speech plus," the deterrence caused by disclosure threatens to deprive a candidate, particularly a minority candidate, of the financial support he needs in order to be able to speak out and

²³⁵This is one of the reasons given by the American Civil Liberties Union for vigorously opposing the Justice Department's attempt to require it to register as a "political committee" under the Act. It would have to reveal the names of its contributors and members, which would expose them to reprisals. See *N.Y. Times*, Oct. 3, 1972, at 32, col. 7 (city ed.).

²³⁶A. HEARD, *supra* note 4, at 360-61.

be heard. It is necessary, therefore, to conclude that there is a central first amendment right of privacy of political speech and association at stake. That conclusion, however, does not settle the issue, for it is necessary to consider the nature of the governmental interest being asserted as justification for invading its exercise.

The Legitimacy and Weight of the Governmental Interest in Compelling Disclosure

The citizen's act of voting and the election campaign which is designed to influence it are of central importance in a democracy. The rules governing elections are the primary rules by which we live together in society and by which the governed determine who their governors will be and what policies they will pursue. Elections are democracy's primary means of resolving group competition and of apportioning the costs and benefits of life in society among competing interests. They are the basic mechanism whereby the citizens make value judgments—the final and most authoritative means for democratic choice-making. No democratic process is more important or powerful, and, therefore no point of influence is more attractive to those who would skew post-election policy to their private advantage. In addition, no aspect of democracy is more vulnerable. Consequently, nothing with which Congress might concern itself domestically is of greater importance than legislation enacted to ensure the fairness, honesty, and basic integrity of elections.

The governmental interest in compelling disclosure of contributions has three major aims. First, it seeks to guard against covert purchase of policy favors by special interests and the use of political contributions as a means of obtaining post-election preferential treatment in the distribution of personal and official favors. Secondly, it seeks to guard against large donors' undue influence on policy, irrespective of any intent to buy favors, since large political contributions will gain for their donors, at the very least, preferential access to policymakers. Thirdly, disclosure aims at informing the public of the nature of the interests that are supporting particular candidates. Knowledge of who is supporting whom and in what amounts is at least as pertinent to a citizen's capacity to choose wisely as the candidates' public records, the speeches they make, the proposals they advance, or the platform on which they run. Indeed, financial support has the stuff of reality about it and can be much more predictive of post-election official performance and policy decisions than other kinds of information on which citizens are expected to base their votes.

One does not need to take the side of the social justifiers of free speech²³⁷ in order to assert that first amendment protection of speech has a dual function: it serves not only to ensure that each individual is free to speak out, but also to enhance the likelihood that the public can hear all facets of everything that is pertinent to the decisions it must make. The public's first amendment rights as hearers are just as important as their rights as speakers.²³⁸ The disclosure of information about political contributions serves those rights in that it increases substantially the scope and reliability of public knowledge about those competing to run the government. It gives the public and the press an indispensable fund of information to use in choosing among candidates and in finding hidden motives which may be latent in official government decisions after the election. It would be a cynical and perverse misuse of the greatest bulwark of freedom to employ the privacy of political speech and association so as to frustrate the public's right to hear all that is pertinent to its performance of the most sacred democratic rite.²³⁹

The legitimacy and weight of the governmental interest involved here is no less crucial to government than the interest of governmental self-preservation which moved the Court to sustain disclosure in the Communist Party and subversive cases.²⁴⁰ If the Court is willing to override the privacy of political speech and association in order arguably to serve governmental self-preservation, unquestionably causing loss of employment and exposure to public and private reprisals and obloquy, it must surely be willing to do so in order to protect the integrity of the bedrock act of democracy when the likelihood of real harm is not as great and the extent of injury nowhere near as severe.

The nature of the governmental interest involved here is the same as that which led the Court to sustain the Foreign Agents Registration Act. As Justice Black said, dissenting in part because he and Justice Douglas felt that the Court gave too *narrow* an interpretation to the statute:

Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin

²³⁷See Ernst & Katz, *Speech: Public and Private*, 53 COLUM. L. REV. 620 (1953).

²³⁸Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); see *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

²³⁹Nutting, *supra* note 204, at 204.

²⁴⁰*Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 96 (1961).

so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment.²⁴¹

It is also essentially the same governmental interest which led the Court to sustain the Federal Regulation of Lobbying Act despite its threat to privacy of speech and petition. Indeed, the Court made the comparison explicit:

Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent.

Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much. It acted in the same spirit and for a similar purpose in passing the Federal Corrupt Practices Act—to maintain the integrity of a basic governmental process.²⁴²

Even Justices Black, Douglas, and Jackson, dissenting because of the vagueness of the statute's coverage, expressed the view that a properly narrow statute to serve that end would be constitutional.²⁴³

The public interest involved in most of the handbill and solicitation cases—the prevention of littering or the protection of the public from annoyance—was too weak to justify the infringement of the first amendment by overbroad delegations of power which gave officials too wide a discretion to refuse the permits.²⁴⁴ The *Talley*²⁴⁵ decision is explained by the fact that the public interest in the prevention of anonymous false charges, fraud and libel, which might otherwise be weighty, was asserted *not* as a *justification* for an otherwise valid ordinance but as a means

²⁴¹*Viereck v. United States*, 318 U.S. 236, 251 (1943).

²⁴²*United States v. Harriss*, 347 U.S. 612, 625 (1954).

²⁴³*Id.* at 632 (Douglas & Black, JJ., dissenting), 636 (Jackson, J., dissenting).

²⁴⁴See text accompanying notes 177-80 *supra*.

²⁴⁵*Talley v. California*, 362 U.S. 60 (1960).

of *saving* an ordinance that was otherwise void on its face because of clear overbreadth. If the issue is ever presented to the Court squarely in a narrowly drawn statute explicitly dealing with political handbills, the Court would probably put its opinion much as the district court did in the *Scott* case:

The Congress determined that in certain specified instances the writers of pamphlets must disclose their identity. And why was this done? So that the electorate would be informed and make its own appraisal of the reason or reasons why a particular candidate was being supported or opposed by an individual or groups. Is there anything sinister in requiring disclosure of identity to the end that voters may use their ballots intelligently?²⁴⁶

There are two keys to the Court's decision in the NAACP cases, one of which—deterrence—we have already discussed. The other is the fact that the governmental interest asserted in behalf of disclosure was a sham interest, entirely lacking in substantiality. The Court's decisions, therefore, were doubly easy—the absence of a legitimate public interest to be served by disclosure and great harm to be caused to private interests by compelling it. While the factor of deterrence is likely to be present in any cases involving contribution disclosure, the governmental interest is quite substantial, too, making the competing interests much more difficult to accommodate.

Finally, even if the first amendment was not raised in *Burroughs and Cannon*, the Court's statement of the governmental interest at stake in contribution disclosure remains persuasive:

The Congressional act under review seeks to preserve the purity of presidential and vice presidential elections.

. . . The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. 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 to the nation in a vital particular the power of self protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.²⁴⁷

²⁴⁶United States v. Scott, 195 F. Supp. 440, 443 (D.N.D. 1961).

²⁴⁷290 U.S. at 545-48.

Over twenty-five years later, in another context, the Court described that interest as involving a situation "in which secrecy or the concealment of associations has been regarded as a threat to public safety and to the effective, free functioning of our national institutions [and in which Congress] has met the threat by requiring registration or disclosure."²⁴⁸

We have, therefore, a competition between a preferred individual right of free exercise and an equally preferred, weighty public interest, which is itself related to the first amendment, in safeguarding the integrity of the central democratic choice process. This forces us inevitably to consider the extent to which the means chosen by Congress are narrowly drawn and no wider than necessary to achieve that end.

The Appropriateness of the Congressional Means

In examining the means adopted by Congress in the Campaign Act, the Court will undoubtedly employ a closer standard of scrutiny than it would were the individual rights involved not within the scope of first amendment protection. As the Court stated recently, "It has become axiomatic that 'precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'"²⁴⁹ In other words, the Court will take great pains to see whether the means chosen have been tailored to fit the ends precisely. The conclusion should be that they do not. The disclosure requirements are not reasonably and specifically related to their ends, nor are they the least drastic means available.²⁵⁰

The Act requires reporting and public disclosure of the name of each contributor of in excess of one hundred dollars, his mailing address, occupation, and principal place of business, if any.²⁵¹ As discussed earlier,²⁵² however, the legitimate governmental interest is in disclosing the names of those contributions in amounts sufficient to raise the possibility of post-election undue influence. This Act, therefore, casts a net with much finer mesh than is required to catch those givers which it might legitimately expose. Because great amounts of money are spent

²⁴⁸*Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961).

²⁴⁹*United States v. Robel*, 389 U.S. 258, 265 (1967), quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963), and citing *Aptheker v. Secretary of State*, 378 U.S. 500, 512-13 (1964), and *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). See also *Thomas v. Collins*, 323 U.S. 516 (1945).

²⁵⁰Comment, 83 HARV. L. REV., *supra* note 155, at 879.

²⁵¹Campaign Act § 304(b)(2), 86 Stat. 15.

²⁵²See text accompanying notes 237-39 *supra*.

in even the smallest contested congressional election, it would take a contribution several times the minimum amount in the Act to raise an inference of undue influence.

The Act must also be found overbroad because the means chosen constitute a direct invasion of the protected rights themselves. The real danger of harm is to the little contributor. He is the one most likely to be deterred by, and least able to defend himself against, whatever pressures may be brought against him by his employers, clients, customers, business associates, and friends. The wealth which enables large contributors to afford large donations is likely to give them a sufficiently strong position either to resist the deterrent pressures or to fight against the reprisals if and when they actually occur. The big contributor can take care of himself. The little contributor who cannot is likely either to be deterred from giving or to suffer harm from doing so.

For both of these reasons—broader means than are justified by the legitimate ends and the potential harm to those unnecessarily brought within its reach—the disclosure provisions should be declared unconstitutional. Compelled disclosure should be limited to those contributions in sufficiently large amounts as might reasonably be coercive or indebteding to candidates.²⁵³

Whatever constitutional doubt is raised by the size of those contributions required to be reported could be erased by raising that amount to a higher figure.²⁵⁴ The proper figure should be somewhere between five hundred dollars, which was the amount set in 1949 by the Federal Regulation of Lobbying Act,²⁵⁵ and one thousand dollars. The higher figure would seem to be more advisable, because costs of all kinds of activities have risen considerably in the past twenty-four years and the nature of a political contribution is inherently less likely to be colored by a special immediate interest than are lobbying activities, which are directed to a specific legislative end. A less acceptable alternative would

²⁵³The court described the test as follows: "In a series of decisions, this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *See also* *United States v. Robel*, 389 U.S. 258, 268 (1967); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

²⁵⁴*See* A. ROSENTHAL, *supra* note 12, at 50: "In any event, a reasonably high floor on the amount over which contributions would have to be reported would go far to overcome constitutional objections."

²⁵⁵2 U.S.C. §§ 261-63 (1970).

be to maintain the reporting threshold as it is, but to require public disclosure of only those contributions over the amount of one thousand dollars. The deterrent effect would still be present, because donors would still fear leakage of their identity, but the likelihood of reprisal would be considerably diminished.

In assessing the disclosure requirements, the Court would also be likely to consider any of those characteristics which tend to lessen the effectiveness of the Act. It would do so as a test of congressional *bona fides* and to ascertain whether the means chosen were discriminatory in any way.

As to the first point, the failure of Congress to provide for an effective reporting and policing mechanism, such as a Federal Elections Commission,²⁵⁶ must certainly be taken into account. In order for disclosure to be effective, there must be (1) quick and continuous reporting *before* election day so that people can take the information into account in casting their votes; (2) unimpeachable supervision beyond the influence of those being supervised so that people can have faith in the accuracy of the reports; and (3) full information and the possibility of obtaining any information omitted or questionable in the candidates' reports. Congress chose instead to require only periodic reports²⁵⁷ and to leave supervisory authority in congressional hands,²⁵⁸ thereby making the information published suspect of being manipulated by Congress. Congress did not choose even to delegate supervisory power over congressional elections to the Comptroller General, who was given such authority over presidential elections²⁵⁹ and who reports primarily to Congress. Thus there is both a likelihood of the public's obtaining less accurate and full information on congressional campaigns and a certainty of less strict and unbiased supervision in such campaigns.

Another omission of the Act also discriminates in favor of congressional candidates while at the same time frustrating full disclosure of possible undue influence. By failing to prohibit the use of committees supporting more than one candidate, such as the senatorial and congressional campaign committees, as shields to hide the connection between those "earmarking" their contributions and specific congressmen for whose campaigns the contributions are in fact to be used, Congress

²⁵⁶See H.R. REP. NO. 92-752, 92d Cong., 1st Sess. (1971).

²⁵⁷Campaign Act § 304, 86 Stat. 14-16.

²⁵⁸Campaign Act § 301(g), 86 Stat. 12.

²⁵⁹*Id.*

continues to enable many large special interests to exert their influence on specific congressmen without the possibility of public knowledge and scrutiny.

In sum, the congressional means are both broader than and frustrating to the legitimate ends of campaign disclosure. The larger the amount of money given, the greater is its potential for shaping public decisions to private ends. The larger the amount of money, the greater is the extent to which the donor goes beyond mere speech and can be said to waive his right to privacy. The larger the amount of money, the greater is the capacity of the donor to protect himself from reprisals.

On the other hand, the smaller the contribution, the less is its potential for undue influence. The smaller the contribution, the less reasonable it is to regard it as a waiver of privacy. The smaller the contribution, the greater is the need to shield the donor and the greater is the risk of deterrence and of potential harm.

To the extent that a proper public policy on political giving can be formulated, it must have as its goal the encouragement of larger numbers of small gifts and smaller numbers of large gifts. A constitutionally valid means should have embodied that goal, but the Campaign Act must be said not to have done so.

LIMITATIONS ON CONTRIBUTIONS AND EXPENDITURES

The Right to Quantitatively Unlimited Freedoms of Speech and Press

The Case Precedents for the Right. We begin with the assumption that the first amendment reserves to the speaker and writer sole discretion over the amount and content of his speech and writing. Because this right to determine what one does or does not say, free from official coercion, is the foundation for any subsidiary right to its private exercise, most of the cases discussed above²⁶⁰ must be viewed as lending support to the existence of the primary right. To those decisions which dealt with the invasion of first amendment privacy must now be added another group of cases which deal more explicitly with government attempts to limit, rather than restrain through exposure, the exercise of first amendment rights.

It should be noted that only a very few of the cases considered deal with governmental limitations on the *amount* of political activity, which is the crux of our concern. They generally involve absolute bans either

²⁶⁰See text accompanying notes 161-236 *supra*.

on certain kinds of political activity²⁶¹ or on political activity by certain kinds of people.²⁶² To the extent that courts sustain absolute bans with respect to some kinds of political activity, the inference must be that they would also sustain limitations short of absolute bans of those activities. It does not necessarily follow, however, that because the courts approve bans on specific kinds of political activity or political activity by specific groups of people, they would sustain limitations on general political activity of candidates or their supporters.

There are no cases dealing directly with general contribution limitations, but there are six separate lines of cases that are pertinent to any consideration of contribution and expenditure limitations: (1) cases involving statutory prohibition of political contributions and expenditures by labor unions; (2) cases involving statutory prohibition of political contributions and expenditures by corporations; (3) cases involving statutory prohibition of political activity by public employees; (4) cases involving statutory and administrative regulation of broadcasting programming; (5) cases involving regulation of or imposition of liability on newspapers; and (6) cases involving statutory regulation of political finances and proscription of corrupt practices in political campaigns.

Three labor cases have reached the Supreme Court, and in all of them the Court avoided the issue of whether Congress could constitutionally prohibit labor unions from making contributions or expenditures in connection with political campaigns.²⁶³ In *United States v. CIO*²⁶⁴ the Court construed the statutory prohibition against union contributions as not including an editorial by President Philip Murray in the official CIO newspaper endorsing and urging support for a particular congressional candidate, expressly doing so in order to avoid the serious constitutional questions raised by the ban. In *United States v. UAW*, the district court had dismissed an indictment charging the union with using union funds to purchase broadcasting time for particular congressional candidates. On appeal, the Supreme Court refused to face the constitutional issues until the facts had been established by a trial.²⁶⁵

²⁶¹An example of this is the ban on intimidation of voters.

²⁶²An example of this is the ban on corporate, labor, or public employee political activity.

²⁶³Such contributions are now prohibited by 18 U.S.C. § 610 (1970).

²⁶⁴*United States v. CIO*, 335 U.S. 160 (1948). The district court had dismissed the indictment on grounds that it was an unconstitutional violation of the first amendment. 77 F. Supp. 335 (D.D.C. 1948).

²⁶⁵*United States v. UAW*, 352 U.S. 567 (1957). On remand, the jury found the union not guilty. See Lane, *Analysis of the Federal Law Governing Political Expenditures by Labor Unions*, 9 LAB. L.J. 725, 732 (1958).

In both bases, the Court implied that the prohibition might involve unconstitutional restraints on political speech.²⁶⁶ In *Pipefitters Local 562 v. United States*,²⁶⁷ the Court never mentioned the constitutional issue, construing the statutory language and finding an error in the judge's jury charge. There are three other Supreme Court cases²⁶⁸ which addressed the tangential question of whether unions might spend for particular political purposes money raised by assessment over the objection of a member. The Court decided that unions can do so if they refund to the objecting member the pro rata portion of his dues which is attributable to the objectionable political activity.²⁶⁹

In four lower court cases dealing with the labor political ban,²⁷⁰ the courts followed *United States v. CIO* in construing the alleged expenditure to be outside the statutory definition.²⁷¹

Despite the sixty-five-year existence of the ban on corporate political contributions or expenditures, there is no Supreme Court case construing it.²⁷² However, since the corporate ban is contained in the

²⁶⁶*United States v. UAW*, 352 U.S. 567, 589 (1957); *United States v. CIO*, 335 U.S. 106, 121 (1948).

²⁶⁷92 S. Ct. 2247 (1972), *modifying* 434 F.2d 1116 (8th Cir. 1970).

²⁶⁸*Railway Clerks Union v. Allen*, 373 U.S. 113 (1963) (sustaining an employee objection and setting out permissible remedies); *International Ass'n of Machinists v. Street*, 367 U.S. 746 (1961) (sustaining an employee's objection to certain specific political expenditures); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956) (sustaining the constitutionality of the provision of the Federal Railway Labor Act permitting union shop agreements, over objection that unions engage in political activity and therefore compulsory membership violates an individual member's first amendment rights).

²⁶⁹In *International Ass'n of Machinists v. Street*, 367 U.S. 740, 747-48 (1961), the Court distinguished *Hanson* by pointing out that the record there contained no evidence of any actual political activity on the part of the union.

²⁷⁰*United States v. Painters Local 481*, 172 F.2d 854 (2d Cir. 1949); *United States v. Anchorage Central Labor Council*, 193 F. Supp. 504 (D. Alas. 1961); *United States v. Warehouse Workers Local 688*, 29 U.S.L.W. 2202 (E.D. Mo. 1960); *United States v. Construction Laborers Local 264*, 101 F. Supp. 869 (W.D. Mo. 1951).

In the *Painters* case, payments were for radio and newspaper advertising opposing candidates for President and Congress, while in *Construction Laborers* three union employees who devoted considerable time to political activity were regarded as not being either "contributions" or "expenditures." In the *Anchorage* case the television broadcasts were held to have been paid out of voluntary funds, although the court did go on to say the Act was constitutional. In *Warehouse Workers* the fund involved was also held to be voluntary.

See also Rauh, *Legality of Union Political Expenditures*, 34 S. CAL. L. REV. 152 (1961); Note, *Section 304, Taft-Hartley Act; Validity of Restrictions on Union Political Activity*, 57 YALE L.J. 806 (1948).

²⁷¹434 F.2d 1116, 1122-23 (8th Cir. 1970).

²⁷²See Haley, *Limitations on Political Activities of Corporations*, 9 VILL. L. REV. 593 (1964); King, *Corporate Political Spending and the First Amendment*, 23 U. PITT. L. REV. 847 (1962);

same section of the criminal code as the labor ban,²⁷³ the Supreme Court cases involving the latter necessarily touched on the corporate ban. There are several lower court decisions which do deal explicitly with the corporate ban. In *United States v. United States Brewers' Association*,²⁷⁴ a case which arose nine years after the original provision was enacted, the district court declared the statute constitutional against first amendment attack, but cited no precedents, gave no reasons, and indeed, stated in a tone of surprise that "so far as we are aware, it has never been claimed that this general restriction upon political contributions was an infringement of the freedom of speech or of the press."²⁷⁵ In *United States v. Lewis Food Company*,²⁷⁶ the Ninth Circuit, without reaching the first amendment issue, reversed a district court dismissal²⁷⁷ of an indictment on the ground that the alleged acts were not within the scope of the statute's prohibition.²⁷⁸ In a very recent case, *United States v. First National Bank of Cincinnati*,²⁷⁹ however, the district court declared that the provision violated the first amendment on the ground that it deprived creditworthy borrowers of their freedom of association and violated the fifth amendment on the ground that it constituted a taking of the bank's right to make bona fide loans without any compelling justification. No question of its first amendment right was presented because the bank had not itself made a contribution to a political campaign.²⁸⁰

Four cases involving the prohibition of varying kinds of political

Lambert, *Corporate Political Spending and Campaign Finance*, 40 N.Y.U.L. REV. 1033 (1965); Comment, *Control of Corporate and Union Political Expenditures: A Constitutional Analysis*, 27 FORDHAM L. REV. 599 (1959); Note, *Corporate Political Affairs Programs*, 70 YALE L.J. 821 (1961).

²⁷³18 U.S.C. § 610 (1970).

²⁷⁴239 F. 163 (W.D. Pa. 1916) (overruling demurrers and requiring defendants to plead to the indictments for conspiring to make money contributions in a congressional election).

²⁷⁵*Id.* at 169.

²⁷⁶366 F.2d 710 (9th Cir. 1966).

²⁷⁷236 F. Supp. 849 (S.D. Cal. 1964).

²⁷⁸The defendant had placed an advertisement listing the names of congressmen and senators, along with a rating for each on the basis of their "free enterprise," "constitutional government" and "freedom under God" voting records.

²⁷⁹329 F. Supp. 1251 (S.D. Ohio 1971).

²⁸⁰As already noted at note 41 *supra*, the Campaign Act includes an exception to its ban on corporate political contributions for bona fide bank loans. See also *Egan v. United States*, 137 F.2d 369 (8th Cir.), *cert. denied*, 320 U.S. 788 (1943), sustaining § 12(h) of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 791(h) (1970), which banned political contributions, although not expenditures.

activity by public employees have reached the Supreme Court,²⁸¹ but in only two of them has the first amendment issue been discussed in the Court's decision.²⁸² In *United Public Workers v. Mitchell*,²⁸³ the Court sustained the constitutionality of a general ban on the ground that the congressional judgment of a need for political neutrality should be given deference by the Court even if it "trenches to some extent upon unfettered political action."²⁸⁴ *Oklahoma v. Civil Service Commission*,²⁸⁵ decided the same day, also sustained the constitutionality of a related ban on political activity by federally-financed state officials, but simply relied on *Mitchell* without any further discussion of the constitutional question. For the next twenty years, the holdings in these two cases were regarded in lower court decisions as dispositive of the question of the first amendment constitutionality of the bans.²⁸⁶ Recently, however,

²⁸¹*Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127 (1947) (sustaining the removal of a member of the Oklahoma State Highway Commission who was serving also as Chairman of the Democratic State Central Committee); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947) (sustaining a discharge of a roller in the United States Mint for serving as a ward executive committeeman and taking part in election day campaigning); *United States v. Wurzbach*, 280 U.S. 396 (1930) (sustaining a conviction of a Congressman for receiving from other federal employees political contributions to be used in his own campaign); *Ex parte Curtis*, 106 U.S. 371 (1882) (denying a petition for a writ of habeas corpus from a federal employee convicted of receiving political contributions from other federal employees). See generally Bruff, *Unconstitutional Conditions upon Public Employment: New Departures in the Protection of First Amendment Rights*, 21 HASTINGS L.J. 129 (1969); Esman, *The Hatch Act—A Reappraisal*, 60 YALE L.J. 986 (1951); Rose, *A Critical Look at the Hatch Act*, 75 HARV. L. REV. 510 (1962); Note, *The Hatch Act—A Constitutional Restraint of Freedom?*, 33 ALBANY L. REV. 345 (1969); Note, *Political Activity and the Public Employee: A Sufficient Cause for Dismissal*, 64 NW. U.L. REV. 736 (1970).

²⁸²In *Ex parte Curtis*, 106 U.S. 371, 376 (1882), there was a strong dissent by Mr. Justice Bradley on first amendment grounds, but the Court never discussed those issues in its opinion.

²⁸³330 U.S. 75, 94 (1947), construing 5 U.S.C. § 7324(a) (1970), which prohibits officers and employees of the executive branch from taking "an active part in political management or in political campaigns," defined as "those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President."

²⁸⁴330 U.S. at 102.

²⁸⁵330 U.S. 127 (1947), construing 5 U.S.C. § 1502(a)(3) (1970), which prohibits state or local officers and employees from taking "an active part in political management or in political campaigns," defined in 5 U.S.C. § 1501(a)(5) (1970) as in note 283 *supra*.

²⁸⁶*Northern Virginia Regional Park Authority v. Civil Serv. Comm'n*, 437 F.2d 1346 (4th Cir. 1971) (sustaining the constitutionality of 5 U.S.C. § 1502(a)(3) (1970), as applied to the director of a regional park authority who ran for the state legislature); *Kearney v. Macy*, 409 F.2d 847 (9th Cir. 1969), *cert. denied*, 397 U.S. 943 (1970); *Englehardt v. Civil Serv. Comm'n*, 304 F.2d 882 (5th Cir. 1962), *aff'g* 197 F. Supp. 806 (M.D. Ala. 1961) (sustaining the Commission's finding of a violation of the Hatch Act by the Alabama State Highway Director who served also as Chairman of the State Democratic Executive Committee); *Palmer v. Civil Serv. Comm'n*, 297 F.2d 450 (7th Cir. 1962), *cert. denied*, 369 U.S. 849 (1962); *Fishkin v. Civil Serv. Comm'n*, 309 F. Supp.

lower courts have begun questioning the continued vitality of the *Mitchell* and *Oklahoma* decisions²⁸⁷ and in some cases have gone so far as to declare them no longer to be good law.²⁸⁸

The power of Congress to regulate the content of broadcasting, primarily through delegation to the Federal Communications Commission (FCC), has been sustained by the Court against first amendment attack.²⁸⁹ To protect stations from the consequences of their decreasing control over aspects of public affairs broadcasting, the Court has extended to broadcasting,²⁹⁰ and broadened somewhat,²⁹¹ the immunity

40 (N.D. Cal. 1969), *appeal dismissed*, 396 U.S. 278 (1970); *Wisconsin State Employees Ass'n v. Wisconsin Natural Resources Bd.*, 298 F. Supp. 339 (W.D. Wis. 1969) (sustaining state agency policy prohibiting employees from running for any partisan elective office, as applied to a poultryman on the state game farm). It should be noted that while these cases all deal with different sections of the Hatch Act, the principle involved is the same—to ensure the political neutrality of public employees, and to protect employees from political intimidation by their superiors and colleagues.

²⁸⁷*Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971) (invalidating a Macon, Georgia, ordinance prohibiting contributions of money and support to political candidates for any office, as well as public identification with them, by city officers and employees, as applied to firemen who put bumper stickers on cars supporting a candidate for the state legislature, on grounds of overbreadth and vagueness); *National Ass'n of Letter Carriers v. Civil Serv. Comm'n*, 346 F. Supp. 578 (D.D.C. 1972) (explicitly invalidating *Mitchell*, on grounds of overbreadth and vagueness arising out of the breadth of the § 7324(a)(2) definition as "those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determination of the Civil Service Commission under rules prescribed by the President"; the court pointed out that there were some 3,000 rulings included in that incorporation by reference); *Mancuso v. Taft*, 341 F. Supp. 574 (D.R.I. 1972) (invalidating a Cranston, R.I., ordinance banning any political candidacy by public employees, as applied to a city policeman, on grounds of overbreadth and vagueness); *cf. Gray v. City of Toledo*, 323 F. Supp. 1281 (N.D. Ohio 1971) (invalidating a Toledo, Ohio, ordinance banning any political candidacy by public employees, as applied to a city policeman, on grounds of overbreadth because the ordinance was not confined to "partisan" political activity, which the court held it might legally proscribe).

²⁸⁸*See, e.g., Hobbs v. Thompson*, 448 F.2d 456, 472 (5th Cir. 1971); *Mancuso v. Taft*, 341 F. Supp. 574, 581 (D.R.I. 1972).

²⁸⁹*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (sustaining the "fairness doctrine," and an FCC order to a station compelling it to allow a person attacked on a broadcast to have a chance to respond); *NBC v. United States*, 319 U.S. 190 (1943) (sustaining a variety of FCC regulations dealing with relationships between networks and affiliates, based on public interest criteria); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) (sustaining the public interest criteria by which the FCC evaluates licensing and renewal applications). *See also Head v. New Mexico Bd. of Optometry*, 374 U.S. 424 (1963) (sustaining a state law requiring approval of the Board for all broadcast advertising by optometrists; no first amendment question was raised in the state court proceedings, and the Supreme Court refused to permit any to be raised on appeal).

²⁹⁰*Farmers Union v. WDAY, Inc.*, 360 U.S. 525 (1959).

²⁹¹*Rosenblum v. Metromedia, Inc.*, 403 U.S. 29 (1971), extending to a broadcaster, who reported an account of an arrest using unflattering descriptions of the plaintiff, immunity from a libel suit. There were five separate opinions—three concurring and two dissenting—and no major-

from libel suits which it bestowed on newspapers in *New York Times Co. v. Sullivan*.²⁹² The FCC, as the repository of congressional power over broadcasting, has rendered a number of opinions dealing with the scope of a station's compulsory responsibility under the fairness doctrine,²⁹³ and several recent circuit court of appeals decisions have sustained the FCC's application of the fairness doctrine to a variety of issues.²⁹⁴

The immunity of newspapers from government regulation and, increasingly, from libel suits arising out of public affairs comment and reporting has been firmly established by the Supreme Court in a line of important decisions.²⁹⁵ With the exception of the early disclosure case

ity on the grounds for decision. Three justices (Brennan, the Chief Justice, and Blackmun) applied the *New York Times* standard of knowing or reckless falsity, and believed it covered an action by a private individual in an event of public or general interest. Mr. Justice Black re-asserted his *New York Times* view that libelous statements by news media are privileged even if made knowingly. Mr. Justice White expressed the view that broadcasters are privileged in reporting and commenting on official actions of public officials with respect to private persons.

²⁹²376 U.S. 254 (1964).

²⁹³*E.g.*, Nicholas Zapple, 23 F.C.C.2d 707 (1970) (holding that the obligation to broadcast the other side without paid sponsorship does not extend to political campaigns); Television Station WCBS-TV, 9 F.C.C.2d 921 (1967) (requiring the broadcaster to carry anti-smoking advertisements as the other side of the public controversy over smoking, in response to the vast paid advertising for cigarettes, on request even if no paid sponsor can be found); Cullman Broadcasting Co., 40 F.C.C. 576 (1963) (requiring stations which broadcast one side of a public question on a paid broadcast to broadcast the other side, if requested, even if a paying sponsor cannot be found). See generally Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. CIN. L. REV. 447 (1968); Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON. 15 (1967).

²⁹⁴*Green v. FCC*, 447 F.2d 323 (D.C. Cir. 1971) (noting that the "fairness doctrine" is not to be confused with the doctrine of "equal time," and holding that a station's reasonable treatment of an issue does not require it to allow a particular anti-war protest group to respond to spot advertisements in behalf of army recruiting); *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970) (sustaining FCC order and rules establishing subscription television, even though the rules prohibited STV from carrying certain kinds of programs); *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968) (sustaining FCC order requiring stations which carry cigarette advertising to devote a significant amount of broadcast time to presenting the case against cigarette smoking); *cf. Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971), *cert. granted*, 92 S. Ct. 1174 (1972) (No. 71-864) (holding unconstitutional under the first amendment an FCC rule permitting stations to refuse to sell any advertising time to groups or individuals wishing to speak out on controversial public issues; this decision considerably expands the "fairness doctrine"); *Retail Store Employees Local 880 v. FCC*, 436 F.2d 248 (D.C. Cir. 1970) (requiring FCC to consider whether radio station had violated "fairness doctrine" by refusing to broadcast commercials for striking union, while continuing to broadcast commercials for employer). See also *United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (reversing an FCC order denying a public interest group intervention in a renewal proceeding).

²⁹⁵*Ocala Star-Banner v. Damron*, 401 U.S. 295 (1971) (reversing a libel judgment arising out

of *Lewis Publishing Co. v. Morgan* discussed above, and similarly discredited cases withholding the use of the mails from politically unpopular newspapers,²⁹⁶ there appears to be no federal case sustaining direct government regulation of newspapers.²⁹⁷

Finally, in addition to the corrupt practices cases cited and discussed above,²⁹⁸ there are several state court decisions sustaining statutory requirements prohibiting candidates from spending more than the statutory maximum in campaigns²⁹⁹ and compelling candidates to appoint campaign treasurers³⁰⁰ and to channel all contributions and expenditures through such treasurers.³⁰¹ On the other hand, there are cases invalidating, on grounds of freedom of speech and press, statutes

of a false newspaper story that the plaintiff, the Mayor, and a candidate for county tax assessor, had been charged with perjury in a federal court); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971) (reversing a libel judgment arising out of a published column to the effect that plaintiff, a candidate for United States Senator, was a "former small-time bootlegger," on grounds that a charge of criminal conduct is always relevant to a candidate's fitness for office, again relying on *New York Times*); *Mills v. Alabama*, 384 U.S. 214 (1966) (invalidating a state statute forbidding editorial comment on political races on election day, on grounds of freedom of the press); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (reversing a libel judgment on freedom of the press grounds, holding that publications are immune from libel actions arising out of comment or reporting on public officials, even if in a paid advertisement, and even if untrue, unless printed with actual knowledge of their untruth); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (invalidating a statute which taxed newspapers according to the volume of advertising); *Near v. Minnesota*, 283 U.S. 697 (1931) (invalidating a Minnesota statute which permitted the abatement, as a public nuisance, of "a 'malicious, scandalous, and defamatory newspaper, magazine or other periodical,'" *id.* at 701-02, as a violation of freedom of the press).

²⁹⁶229 U.S. 288 (1913).

²⁹⁷See *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971) (implying that even a monopoly newspaper has an absolute right to accept, reject or revise advertising copy, and that it is not subject to any "fairness doctrine"); *Chicago Joint Bd. v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970) (holding that a newspaper has an absolute right to refuse editorial advertisements from unions protesting imported clothing even if, *inter alia*, the paper carried retail store advertising for such clothing). *But see Zucker v. Panitz*, 229 F. Supp. 102 (S.D.N.Y. 1969) (holding that a public school newspaper was a part of the curriculum and, therefore, could be required to accept a paid advertisement opposing the war); *Chronicle & Gazette Publishing Co. v. Attorney General*, 94 N.H. 148, 48 A.2d 478 (1946), *appeal dismissed*, 329 U.S. 690 (1947) (upholding a New Hampshire law forbidding newspapers and broadcasting from charging higher rates for political advertising than for commercial advertising); *City of Baltimore v. A.S. Abell Co.*, 218 Md. 273, 145 A.2d 111 (1958) (invalidating Baltimore tax on newspaper and radio advertising); *City of Corona v. Corona Daily Independent*, 115 Cal. App. 2d 382, 252 P.2d 56, *cert. denied*, 346 U.S. 833 (1953); *Ulman v. Sherman*, 22 Ohio N.P. (n.s.) 225 (1919) (sustaining a right of access to newspapers, apparently the only U.S. case doing so); *Barron, Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

²⁹⁸See notes 197-202 *supra* and accompanying text.

²⁹⁹*State ex rel. La Follette v. Kohler*, 200 Wis. 518, 228 N.W. 895 (1930).

³⁰⁰*Secretary of State v. McGucken*, 244 Md. 70, 222 A.2d 693 (1966).

³⁰¹*Smith v. Ervin*, 64 So. 2d 166 (Fla. 1953).

prohibiting anyone other than a candidate from spending money for political purposes outside his home county³⁰² and generally manifesting a reluctance to construe the candidate-accountability provisions strictly.³⁰³

Extending the Right to Protection Against Limitations on Campaign Contributions and Expenditures. We have noted that the Court, in supporting its assertion that first amendment freedoms are not unlimited, divides speech into protected and unprotected categories.³⁰⁴ It is exceedingly unlikely that the Court would create a new category of unprotected speech, particularly for political speech and association, since it has been continually shrinking the vitality of the pre-existing categories of obscenity,³⁰⁵ libel,³⁰⁶ "fighting words,"³⁰⁷ and "speech plus."³⁰⁸ With the possible exception of the last, those categories would

³⁰²State v. Pierce, 163 Wis. 615, 158 N.W. 696 (1916).

³⁰³Ervin v. Capitol Weekly Post, 97 So. 2d 464 (Fla. 1957) (construing the candidate-accountability provision not to include expenditures for newspaper ads in behalf of a candidate before his formal announcement); Veal v. Thompson, 287 Ky. 742, 155 S.W.2d 214 (1941) (sustaining a judgment refusing to impute to a candidate knowledge of and intent to commit violations of the corrupt practices laws by his supporters); Daniel v. Gregg, 97 N.H. 452, 91 A.2d 461 (1952) (holding that omissions from candidate's financial reports required to be filed were either without his sanction and knowledge or insufficiently serious to disqualify him from running).

³⁰⁴See, e.g., Konigsberg v. State Bar, 366 U.S. 36, 49-50 (1961).

³⁰⁵E.g., Jacobellis v. Ohio, 378 U.S. 184 (1964); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959); Roth v. United States, 354 U.S. 476 (1957). *But see* Mishkin v. New York, 383 U.S. 502 (1966); Ginzburg v. United States, 383 U.S. 463 (1966).

³⁰⁶E.g., Rosenblatt v. Baer, 383 U.S. 75 (1966) (extending immunity to columnist from libel action brought by county recreation area supervisor); Garrison v. Louisiana, 379 U.S. 64 (1964) (extending immunity to district attorney from libel action brought by criminal court judges whom he criticized); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (extending immunity to newspaper from libel action brought by a city commissioner libeled in a paid advertisement). *But see* Beauharnais v. Illinois, 343 U.S. 250 (1952) (group libel). *See also* Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Ocala Star-Banner v. Damron, 401 U.S. 295 (1971), discussed *supra* note 295.

³⁰⁷Terminiello v. Chicago, 337 U.S. 1 (1949) (invalidating Chicago ordinance on breach of the peace as defined by a trial court judge to include speech which "invites dispute"). *But see* Feiner v. New York, 340 U.S. 315 (1951) (affirming conviction for disorderly conduct involving a street corner speech which stirred the crowd to angry muttering and pushing); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (sustaining a statute forbidding "any offensive, derisive or annoying word to any other person . . . lawfully in any . . . public place," *id.* at 569, as interpreted to mean words causing a breach of the peace by the addressee).

³⁰⁸Teamsters Local 695 v. Vogt, 354 U.S. 284 (1957) (sustaining an injunction against labor picketing to induce an employer to urge employees to join the union, which the appellate court found to be against state public policy); Hughes v. Superior Court, 339 U.S. 460 (1950) (sustaining an injunction against picketing aimed at persuading a business to hire employees on a racial quota equivalent to the racial proportions of its customers, which state courts had found was contrary to California public policy); Teamsters Local 309 v. Hanke, 339 U.S. 470 (1950) (sustaining an injunction against labor picketing of a business, operated by the owners without employees, in order to obtain a union shop agreement); Building Serv. Employees Local 262 v. Gazzam, 339

indeed be strange bedfellows for an activity that the Court has called "the essence of self-government."³⁰⁹ And to argue that the presence of money converts political speech into political "speech plus" would be inconsistent with the characteristics of the body of "speech plus" cases and would deny protection entirely to most forms of political campaigning. Justice Douglas commented on this point in his dissent in the *UAW* case:

The making of a political speech up to now has always been one of the preferred rights protected by the First Amendment. It usually costs money to communicate an idea to a large audience. But no one would seriously contend that the expenditure of money to print a newspaper deprives the publisher of freedom of the press. Nor can the fact that it costs money to make a speech—whether it be hiring a hall or purchasing time on the air—makes the speech any the less an exercise of First Amendment rights.³¹⁰

There are also cases which sustain prohibitions on speech in certain places³¹¹ and speech by means of sound amplification devices,³¹² as well as the handbill and solicitation licensing cases discussed above.³¹³ At most, these holdings permit some reasonable burdens on the manner, mode, time, or location of speech. They do *not* support the proposition that either the content or the amount of speech itself can be regulated

U.S. 532 (1950) (sustaining an injunction against labor picketing of a small hotel to get the owner to sign a contract with union as bargaining agent after employees had previously decided against unionization, on grounds that it was contrary to state statute for an employer to coerce employees in the choice of a bargaining agent); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) (sustaining an injunction against union picketers who were attempting to induce a wholesaler to stop selling to non-union peddlers, which state courts had found to be a conspiracy in restraint of trade).

³⁰⁹*Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

³¹⁰*United States v. UAW*, 352 U.S. 567, 594 (1957).

³¹¹"The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." *Cox v. Louisiana*, 379 U.S. 536, 554 (1965); see *Cameron v. Johnson*, 390 U.S. 611 (1968) (prohibiting picketing at courthouse); *Adderley v. Florida*, 385 U.S. 39 (1966) (prohibiting demonstrations at jails); *Cox v. Louisiana*, 379 U.S. 559 (1965) (upholding a statute against picketing near courthouse). *But see Brown v. Louisiana*, 383 U.S. 131 (1966) (permitting sit-in in public library); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (permitting silent picketing at state capitol). See generally Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

³¹²*Kovacs v. Cooper*, 336 U.S. 77 (1949) (sustaining an ordinance prohibiting sound trucks on city streets or in public places). *But see Saia v. New York*, 334 U.S. 558 (1948) (invalidating an ordinance banning sound amplification devices except "[p]ublic dissemination . . . of items of news and matters of public concern," *id.* at 559 n.1, as permitted by the chief of police).

³¹³See text accompanying notes 177-82 *supra*.

by government. Indeed, the hesitancy with which the Court permitted even these incidental restrictions on speech suggests how loath it would be to limit expression directly in quantity or in content.

As we have seen, the validity of the labor and corporate political contribution bans has never been determined by the Court;³¹⁴ it has noted the presence of serious constitutional questions raised by the bans, but has managed to avoid addressing them.³¹⁵ The Court may no longer have the chance to address the constitutionality of the labor-corporate bans, because the Campaign Act legitimates "voluntary" labor and corporate funds for partisan political activity.³¹⁶ This leaves only the question of whether involuntary funds may be spent for such purposes; so far as unions are concerned, it has already been answered in the affirmative, subject to the rebate requirement.³¹⁷ The ban on the partisan political use of corporate funds themselves still exists, however, and would likely be sustained. Non-partisan political expenditures from corporate or exacted union funds (such as for voter registration and get-out-the-vote campaigns) and partisan communications addressed to corporate shareholders, union members, and their families are expressly allowed by the Campaign Act.³¹⁸

Had the Court been willing to confront the absolute labor contribution and expenditure ban, it would probably have found it unconstitutional; five Justices have stated their belief that it was,³¹⁹ and eight more have professed concern about it.³²⁰ Most likely it would have sustained a *limitation* on the amount rather than an absolute ban.³²¹ However, even if the Court had sustained the labor-corporate ban, a limitation on the amount contributed or spent by a *candidate* could not be sustained on the same reasoning. Congressional power over individuals is in no way nearly as wide as it is over corporations, labor unions, and other associations of individuals. Moreover, the rationale of the labor-corporate ban was to prevent aggregations of organizational wealth

³¹⁴See notes 263-80 and accompanying text *supra*.

³¹⁵United States v. CIO, 335 U.S. 106, 121 (1948).

³¹⁶Campaign Act § 205, 86 Stat. 10, *amending* 18 U.S.C. § 610 (1970).

³¹⁷International Ass'n of Machinists v. Street, 367 U.S. 740, 769 (1961).

³¹⁸Campaign Act § 205, 86 Stat. 10, *amending* 18 U.S.C. § 610 (1970).

³¹⁹Four justices in United States v. CIO, 335 U.S. 106, 129 (1948)—Rutledge, Black, Douglas, and Murphy—and Warren in United States v. UAW, 352 U.S. 567, 593 (1957).

³²⁰These eight were the other members of the Court in both cases. See Lane, *supra* note 265, at 736.

³²¹United States v. UAW, 352 U.S. 567, 598 n.2 (1957) (Douglas, J., dissenting); United States v. CIO, 335 U.S. 106, 146 (1948) (Rutledge, J., concurring).

from being used in an election so as to exert undue influence on a candidate become officeholder. The crucial element of undue influence is entirely lacking when it is the candidate himself whose contributions or expenditures Congress is attempting to limit. The labor-corporate ban cases are, therefore, no authority for the constitutionality of an expenditure or contribution limit on candidates themselves.

The public employee cases present a slightly different situation in that Congress arguably had the power to attach to public employment conditions which reasonably limited an employee's political activity. The nexus for the power over the person being controlled was the fact of public employment and not the nature of the act being regulated. In any event, the characterization of public employment as a privilege to which conditions may be attached, rather than a right, has been generally discredited in a series of cases,³²² and a number of lower courts³²³ have recognized its demise by refusing to follow the holding in *United Public Workers v. Mitchell*,³²⁴ which was based on the distinction. Professor Emerson, perhaps the nation's leading first amendment scholar, has declared that "[i]t is a safe assumption that *United Public Workers* retains little vitality today."³²⁵

The same reasoning would seem to suggest that *Ex parte Curtis*,³²⁶ which sustained the conviction of a federal employee for receiving funds for political purposes from other federal employees,³²⁷ would be decided differently today. The evil to which the bans on giving political money to other governmental employees³²⁸ and on soliciting or accepting such money³²⁹ are addressed is the use of one's dominant position

³²²"It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *accord*, *Van Alstyne*, *supra* note 186. *See also* *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Cramp v. Board of Pub. Instruction*, 368 U.S. 278 (1961); *Shelton v. Tucker*, 364 U.S. 479 (1970); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

³²³*See* note 287 *supra*.

³²⁴330 U.S. 75 (1947).

³²⁵T. EMERSON, *supra* note 87, at 587. *See also* Bruff, *supra* note 281, at 157: "It is extremely doubtful that the provision upheld in *Mitchell* would be held constitutional today since it squarely controverts the *New York Times* policy of freeing political debate. At any rate, the statutory provision *Mitchell* upheld surely fails to meet the standard of *Shelton* [*Shelton v. Tucker*, 364 U.S. 479 (1960)] and *Robel* [*United States v. Robel*, 389 U.S. 258 (1967)]."

³²⁶106 U.S. 371 (1882).

³²⁷This is still a crime under 18 U.S.C. § 602 (1970).

³²⁸18 U.S.C. § 607 (1970).

³²⁹18 U.S.C. § 602 (1970).

over subordinate employees to obtain funds for political purposes. To the extent that the prohibition remains wider than that, it is very likely to be held violative of the first amendment rights of public employees.³³⁰ In the absence of actual or potential intimidation, as was present in *United States v. Wurzbach*,³³¹ such a broad infringement of political speech and association could not be sustained under the Court's current "less drastic means" test.³³² The Court's generous deference to congressional judgment in *Curtis* ninety years ago³³³ and in *Mitchell* twenty-five years ago³³⁴ has long since been displaced by stringent scrutiny in first amendment cases.³³⁵ If it were called on to decide *Curtis* today, the Court would probably speak in much the same language Mr. Justice Bradley used in dissenting in that same case:

I do not believe that Congress has any right to impose such a condition upon any citizen of the United States. The offices of the government do not belong to the Legislative Department to dispose of on any conditions it may choose to impose. . . . They belong to the United States, and not to Congress; and every citizen having the proper qualifications has the right to accept office, and to be a candidate therefor. This is a fundamental right of which the legislature cannot deprive the citizen, nor clog its exercise with conditions that are repugnant to his other fundamental rights. . . . It prevents the citizen from cooperating with other citizens of his own choice in the promotion of his political views. To take an interest in public affairs, and to further and promote those principles which are believed to be vital or important

³³⁰As currently written, these provisions do not make it illegal for a public employee to make political contributions to challengers—those who are seeking office, but not yet elected. It would seem exceedingly difficult to justify that distinction.

³³¹200 U.S. 396 (1929).

³³²See text accompanying notes 155-57 *supra*.

³³³The evident purpose of Congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the just scope of legislative power, and it is not easy to see why the act now under consideration does not come fairly within the legitimate means to such an end.
106 U.S. at 373.

³³⁴"The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the generally existing conception of governmental power." 330 U.S. at 102.

³³⁵In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.
Shelton v. Tucker, 364 U.S. 479, 488 (1960).

to the general welfare, is every citizen's duty. . . . To deny to a man the privilege of associating and making joint contributions with such other citizens as he may choose, is an unjust restraint of his right to propagate and promote his views on public affairs.³³⁶

It also seems clear that newspapers and magazines are protected by the first amendment from any governmental effort to limit the amount of advertising space that can be legally bought by a candidate or his supporters. The Campaign Act prohibits newspapers and magazines from selling space to a candidate for federal office without a written certification that the value of the space purchased will not exceed the dollar limitations imposed by the Act.³³⁷ Violation of this provision subjects a person to a five thousand dollar fine or five years imprisonment.³³⁸ Leaving aside for a moment the question of whether the candidate's rights are broad enough to protect him from being prosecuted for *buying* space in excess of his limit,³³⁹ it would seem unlikely that Congress could prohibit newspapers and magazines from *selling* any space to the candidate or his supporters. Under the holdings in *Near*, *Grosjean*, and *Mills*,³⁴⁰ to the extent that the provision prevents the press from selling space *in excess* of the dollar limit or without the required candidate's authorization, it is an unconstitutional infringement of freedom of the press. To the extent that it requires the press to obtain a written certification before selling space *within* the allowed amount, it is also unconstitutional, because the burden it places on the press is a prior restraint to selling advertisements. One can also assume that the limitation of the rates charged by newspapers and magazines for political advertising to those charged "for comparable use of such space for other purposes"³⁴¹ would be invalid for the same reasons. There is only one state case sustaining newspaper rate-setting for political campaigns, and the Supreme Court declined to review it.³⁴² It is hard to see how congressional establishment of newspaper advertising rates could be reconciled with the immunity of the press from governmental regulation of *any* kind.³⁴³

³³⁶106 U.S. at 376-77.

³³⁷Campaign Act § 104(b), 86 Stat. 6.

³³⁸Campaign Act § 106, 86 Stat. 8.

³³⁹Campaign Act § 104 (a)(2), 86 Stat. 6.

³⁴⁰See note 295 *supra*.

³⁴¹Campaign Act § 103(b), 86 Stat. 4.

³⁴²*Chronicle & Gazette Publishing Co. v. Attorney General*, 94 N.H. 148, 48 A.2d 478 (1946), *appeal dismissed*, 329 U.S. 690 (1947).

³⁴³See *Ocala Star-Banner v. Damron*, 401 U.S. 295 (1971); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

It is easier to find precedents for limiting the amount of broadcast time a candidate can buy and a station can sell.³⁴⁴ Courts have been willing to sustain governmental intervention in the broadcast media,³⁴⁵ such as licensing and the imposition of a "fairness doctrine" in programming, although similar intervention has been struck down when attempted in the print media.³⁴⁶ While broadcast regulations were originally made and sustained on the basis of the need to allocate a limited number of frequencies, governmental power over broadcasting has been repeatedly held to be more extensive than that required to regulate technological matters alone³⁴⁷—wide enough to ensure that broadcasters' substantive programming serves primarily the public's first amendment right to hear and see multi-sided treatment of public issues. That power is premised on the broadcasters' trusteeship of the airwaves for the public benefit.³⁴⁸ The courts, therefore, have subordinated broadcasters' first amendment rights to the "right of the viewers and listeners . . . which is paramount."³⁴⁹

All of these cases, however, sustain the government's power to compel broadcasters to *expand* their programming. With one general exception there are no cases involving attempts to *restrain* a broadcaster from selling time or from devoting more than a specified amount of time to a particular area of coverage. There would seem to be a considerable difference between the government's power to add to programming and the power implied in the political advertising limitations to diminish programming. The former has been sustained to promote fairness of treatment and to increase the scope and richness of public discourse on public questions. By providing a forum for those who might not otherwise be able to speak out, the governmental power to augment programming serves the public's freedom to speak as well as its freedom to hear. Public rights are elevated over the rights of broadcasters when they act to narrow discussion and to restrain speech. It does not follow, however, that the Court would be willing to subordinate the freedom of a broadcaster to limitations that are at best only arguably in the public interest and at worst patent restrictions on the amount of political speech. This

³⁴⁴A. ROSENTHAL, *supra* note 12, at 40.

³⁴⁵See cases cited notes 288-95 *supra*.

³⁴⁶See *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971); *Chicago Joint Bd. v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970).

³⁴⁷*NBC v. United States*, 319 U.S. 190, 215 (1943).

³⁴⁸See *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 651-55 (D.C. Cir. 1971), *cert. granted*, 92 S. Ct. 1174 (1972) (No. 71-864).

³⁴⁹*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

interpretation of the nature of FCC power over broadcasting is consistent with the congressional denial to the FCC of "the power of censorship over . . . communications and signals" and with the Congressional prohibition against interfering "with the right of free speech by means of radio communication."³⁵⁰ In order to sustain the broadcasting expenditure limitations, the Court would have to construe those limitations, which are inherently constricting, as *expanding* the public's right to hear and see.³⁵¹ This would be reminiscent of Orwellian "double-think" and would infringe both the candidates' right to unrestricted free speech and the broadcasters' right to freedom from negative governmental restraint.

The only governmental control of the subject matter of speech which courts have sustained is that regulating the advertising of products that may be injurious to health or that policing unfair or deceptive advertising practices. The most recent example is the ban on cigarette advertising enacted by Congress in 1969³⁵² and held constitutional by a lower court early in 1972.³⁵³ That category can be easily distinguished from political broadcasting because it is motivated entirely by a profit-seeking interest, involves a clear danger either to public health or of public deception, and embraces subject matter that is far afield from the protected area of political discussion.

In the realm of public affairs, then, the rule in broadcasting is fairly clear. In order to promote wider and freer discussion of public issues, the Court will compel broadcasters to give access to unrepresented views on public questions,³⁵⁴ will prevent broadcasters from banning advertisements about controversial public matters,³⁵⁵ and will protect broadcasters from libel suits growing out of coverage of public matters or of public officials' actions.³⁵⁶ While the courts, therefore, are perhaps willing to sustain legislation that creates a floor on public affairs program-

³⁵⁰47 U.S.C. § 326 (1970).

³⁵¹For such an argument *see* Comment, *Free Speech Implications of Campaign Expenditure Ceilings*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 214, 228-29 (1972).

³⁵²Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331-40 (1970).

³⁵³*National Ass'n of Broadcasters v. FCC*, ___ F. Supp. ___ (1972).

³⁵⁴*See* cases cited note 293 *supra*.

³⁵⁵*Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971), *cert. granted*, 92 S. Ct. 1174 (1972) (No. 71-864).

³⁵⁶*Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (reversing libel judgment arising out of derogatory reference in connection with a news report about plaintiff's arrest); *Farmers Education & Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959) (reversing libel judgment arising out of broadcast carried by a station under the equal-time provision of § 315).

ming in broadcasting, they should be less willing to sustain a ceiling.³⁵⁷ Although Congress thus could not put a limit on political broadcasting, Congress *can* impose maximum political advertising rates in broadcasting, even though it has never asserted general ratesetting power over licensees. It could be argued, as it was in *National Association of Theatre Owners v. FCC*,³⁵⁸ that there is an important distinction between utility-like common carriers, whose rates Congress has permitted the FCC to regulate,³⁵⁹ and "broadcasting" stations, whose rates Congress has not submitted to FCC supervision. The fact that Congress did not assume and delegate that power does not mean that it believed broadcast rate-setting to be outside its authority. On the contrary, when the equal-time provision was enacted in 1952, Congress provided that time charges could not exceed the rates for comparable uses for other purposes,³⁶⁰ and there is no reason to think that the plenary power to set rates for broadcasting is any less than the comparable congressional power to set rates for common communication carriers. The rationalization of political broadcasting rate-setting could be found in the effect that lower rates have in increasing the amount of time that political candidates could purchase, thereby coming squarely within the rule of *Red Lion Broadcasting Co. v. FCC*.³⁶¹

While there are many cases sustaining congressional power to regulate federal elections,³⁶² not one of them has sustained limitations on

³⁵⁷There appears to be only one case that presents a troubling exception to this generalization. In the recent District of Columbia Circuit decision, *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970), the court sustained an F.C.C. rule regulating "pay-television" experiments, which prohibited subscription television stations from broadcasting any advertising, feature films released within two years of proposed broadcast, sporting events broadcast live on commercial television within two years of proposed broadcast, and serials. That case appears to be distinguishable because of the infant and precarious nature of pay-television experiments, as well as the desire of the FCC to protect the economic viability of commercial television. Despite the Supreme Court's denial of certiorari, the case does not seem determinative of the issue. The court's reliance on both *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), and *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), both of which coerced positive actions by the stations, seems misplaced. Furthermore, the court's argument that the restrictions could be justified because pay-television would give the public "more rather than less diversity of expression in its television programming," 420 F.2d at 208, goes rather to the justification for pay-television than to a rationale for sustaining program restrictions.

³⁵⁸420 F.2d 194, 202-03 (D.C. Cir. 1969).

³⁵⁹47 U.S.C. §§ 201, 203 (1970).

³⁶⁰47 U.S.C. § 315 (1970).

³⁶¹395 U.S. 367 (1969).

³⁶²*United States v. Classic*, 313 U.S. 299 (1941); *Burroughs and Cannon v. United States*, 290 U.S. 534 (1934); *Smiley v. Holm*, 285 U.S. 355 (1932); *Newberry v. United States*, 256 U.S. 232 (1921); *United States v. Gradwell*, 243 U.S. 476 (1917); *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Ex parte Siebold*, 100 U.S. 371 (1879).

the amount and content of political speech. Court-sustained congressional regulations of elections has taken either a neutral, supervisory form (such as establishing dates, fixing methods of conducting or policing elections, and disclosure of campaign contributions and expenditures) or the form of laws proscribing gross kinds of corruption. *Newberry v. United States*³⁶³ dealt with a violation of the expenditure limitations in a senatorial primary, but the case turned on congressional power to regulate corrupt practices in primaries, which the majority held Congress did not have. Three justices concurred for reasons of error in the jury charge and obviously believed the expenditure limit was constitutional, although they did not discuss it substantively or consider any first amendment conflict with it. While several opinions have included *dicta* asserting congressional power to supervise the use of money in federal elections, such as *Yarbrough's* reference to "the free use of money in elections,"³⁶⁴ and *Burroughs and Cannon's* reference to "the improper use of money,"³⁶⁵ the context in which such assertions were made suggests that the Court had in mind the character of the particular use of money rather than the amount of money spent. Those cases and others³⁶⁶ held that Congress has the power to prevent bribery, purchase of office, and gross corruption in general or to compel disclosure of all contributions and expenditures in order to guard against improper influence of large amounts of money on officeholders. There is no necessary implication that Congress may limit the amounts spent in elections.

Expenditure limitations have been part of federal law for more than sixty years,³⁶⁷ and twenty-nine states have some form of expenditure limits in their corrupt practices legislation.³⁶⁸ The poverty of case law dealing with such limits is undoubtedly attributable to the simple fact that the limits have not heretofore been enforced. *State v. Kohler*,³⁶⁹ a 1930 Wisconsin decision, is the only case construing such limitations. It sustained a statute limiting the amount which might be spent by candidates and their personal campaign committees. The opinion in

³⁶³256 U.S. 232 (1921).

³⁶⁴110 U.S. at 667.

³⁶⁵290 U.S. at 545.

³⁶⁶See cases cited note 200 *supra*.

³⁶⁷See text accompanying notes 128-32 *supra*.

³⁶⁸BOOK OF THE STATES 1970-71, at 44-47 (Council of State Governments 1970). Four of these 29 states impose limitations only on primaries. *Id.* The limitations of 13 states include amounts spent in behalf of candidates, while 37 states do not go beyond limiting the candidate himself. *Id.*

³⁶⁹200 Wis. 518, 228 N.W. 895 (1930).

Kohler is an early example of balancing in which the court addressed the first amendment implications of expenditure limitations. One case throughout all the years of political expenditure control laws, however, is not strong support for the constitutionality of legislation that trenches so directly into first amendment freedoms.

There are other state court cases which have sustained statutes requiring that candidates appoint campaign treasurers through whom all campaign contributions and expenditures be channeled.³⁷⁰ The British candidate-accountability statute,³⁷¹ which was the first law of its kind and which forbids expenditures except by the candidate or his authorized agent, would be clearly unconstitutional in this country. Most comparable United States statutes do not expressly forbid expenditures by others but require that if they are made on behalf of candidates, they must be reported as part of his contributions or expenditures. The prior restraint involved in simple accountability statutes can probably be justified by the fact that, without them, the public's first amendment right to know who is spending large amounts in whose behalf would effectively be frustrated. The Florida law,³⁷² which is the leading United States candidate-accountability statute, appears to have been successful in furthering disclosure,³⁷³ but unlike the Federal Campaign Act, it does *not* include limitations on the amount of expenditures. For that reason the Florida statute and other candidate-accountability or "agency" statutes do not directly invade first amendment political expression, even if they do violate the privacy of political speech. The tendency of candidates under such statutes is to approve expenditures initiated by others unless the material involved is, in the candidate's judgment, seriously damaging, in which event the "supporter" is free to publish it with a prominent disclaimer. When expenditure limitations are coupled with candidate-accountability, however, as in the Federal Act,³⁷⁴ the pressure on candidates to use their allotted limits for those expenditures which say exactly what they wish to have said is vastly increased. Candidates would, therefore, correspondingly increase their censorship over the speech of supporters and independents, especially when the phrase "by or on behalf of" candidates is broadly con-

³⁷⁰See cases cited notes 301-03 *supra*.

³⁷¹Representation of the People Act, 11 & 12 Geo. VI, c. 65, § 42(1) (1948).

³⁷²FLA. STAT. ANN. § 99.161 (1960).

³⁷³See Rody, *Ten Years of Florida's "Who Gave It—Who Got It" Law*, 27 LAW & CONTEMP. PROB. 434 (1964).

³⁷⁴Campaign Act § 104(a)(1)-(3), 86 Stat. 5-6.

strued.³⁷⁵ Such control over non-candidate supporters, whether exercised directly by the law itself restraining supporters' activities³⁷⁶ or indirectly by the pressure of expenditure limitations on the candidates' willingness to approve and charge to his limit expenditures initiated by others, is clearly unconstitutional. And it is that likelihood of candidate censorship over supporters which, when added to the limitations imposed on the amount of the candidates' own speech, makes the Federal Campaign Act a double-barreled assault on freedom of speech. If the candidate refuses to allow the proposed publication to be charged to his limit, he is infringing the political expression of others, either by suppressing it entirely, burdening it with a disclaimer requirement, or subjecting its maker to criminal sanctions for violating the Campaign Act's candidate-accountability provisions. The expenditure limitations will inevitably tend, therefore, to encourage candidates to refuse permission pro forma, thereby giving their supporters the legal justification for establishing and multiplying "independent" committees. In the unlikely event that the candidate grants his approval of the proposed publication, he effectively loses the initiative in shaping his campaign, which no canny politician would find tolerable. Hence, so long as expenditure limitations are part of the statutory scheme, candidate-accountability must be regarded as an extremely serious threat to matters protected by the first amendment.

Furthermore, it is difficult to deny that "limit" has essentially the same meaning as "abridge," which the first amendment expressly forbids. Professor Ralph Winter has put the point exactly:

A limit on the amount an individual may contribute to a political campaign is a limit on the amount of political activity in which he may engage. A limit on what a candidate may spend is a limit on his political speech as well as on the political speech of those who can no longer effectively contribute money to his campaign. In all the debate surrounding the First Amendment, one point is agreed upon by everyone: no matter what else the rights of free speech and association do they protect explicit political activity. But limitations on campaign spending and contributing expressly set a maximum on the political activity in which persons may engage. . . . The First Amendment prohibits the setting of a legal maximum on the political activity in which an individual may engage. This is the case whether or not the maximum is imposed in the name of equalizing opportunity or whether

³⁷⁵See note 303 *supra*.

³⁷⁶*State v. Pierce*, 163 Wis. 615, 158 N.W. 696 (1916).

an actual discriminatory effect can be shown. Even under a “balancing” test, such regulation is invalid because there is no countervailing interest (for example, preserving public peace) to “balance” against the restriction on speech. In other words, the restriction is imposed not to preserve some other legitimate interest of society but solely for the sake of restricting the speech itself—for the sake, indeed, of affecting the political outcome. But that is precisely what the First Amendment is all about.³⁷⁷

Eight members of the House Administration Committee agreed with Professor Winter, quoting his hearings testimony in their minority report.³⁷⁸ The same conclusion was reached by the Wisconsin Supreme Court in invalidating a statute prohibiting citizens from spending money in political campaigns outside their own county:

We are by no means unmindful of the high and admirable purposes which inspired the authors of the Corrupt Practices Act. There is no member of this bench who is not in the fullest sympathy with any legislation which will tend to reduce to an absolute minimum the danger of corruption and coercion during political campaigns, but when such a law goes beyond regulation, and absolutely prohibits that which the Constitution expressly protects, the Court can do nothing but say so.³⁷⁹

There is a second defect in the limitation rationale: the government arrogates the right to determine how much speech is permissible. Professor Emerson has posed the following question:

If the government can equalize the amount of speech uttered in a campaign, by controlling the volume of expenditures for expression, why cannot it equalize the amount of speech uttered on any subject? Is it the implication of the *Burroughs* decision that the government has almost unlimited power to allocate resources available for expression, or to regulate access to the marketplace of ideas?³⁸⁰

These sources suggest that any limit placed on the amount which a person can speak, which takes out of his exclusive judgment the decision of when enough is enough, deprives him of his free speech. It cannot be described as other than an “authoritative” determination of how much

³⁷⁷Winter, *Money, Politics and the First Amendment*, in *CAMPAIGN FINANCES* 45, 60 (American Enterprise Institute for Public Policy Research 1971).

³⁷⁸H.R. REP. NO. 92-564, 92d Cong., 1st Sess. 23 (1972).

³⁷⁹*State v. Pierce*, 163 Wis. 615, 621, 158 N.W. 696, 698 (1916).

³⁸⁰T. EMERSON, *supra* note 87, at 639.

speech is enough, which is exactly what the first amendment forbids the government to do.³⁸¹

Expenditure limitations have a third flaw: by definition they constrict the amount of political information available to the public.³⁸² The more money spent in publicizing political speech, the more information will be available to voters in choosing among competing candidates. Any quantitative limitation on political campaigning inherently constricts the sum of public information and runs counter to our "profound national commitment that debate on public issues should be uninhibited, robust, and wide-open."³⁸³ Indeed, the public's first amendment rights not only protect the media from negative governmental restraints,³⁸⁴ but also are sufficient to permit Congress to expand that public discourse in those media over which it has direct control.³⁸⁵ And if "it can hardly be doubted that the constitutional 'guarantee' has its fullest and most urgent application precisely to the conduct of campaigns for political office,"³⁸⁶ how can any contraction of the public's fund of discourse be squared with the Congress' obligation always to expand it?³⁸⁷

One way in which it might conceivably be squared is to introduce an equality-of-communications-access criterion and to argue that equal limitations for opposing candidates for the same office prevent "either side from flooding the media with a single point of view . . . [and] prevent one candidate from destroying, by sheer volume rather than by reason, the effectiveness of informational advertising presented by op-

³⁸¹See *United States v. Associated Press*, 52 F. Supp. 364, 372 (S.D.N.Y. 1943) (L. Hand, J.).

³⁸²There is therefore an effect in restricting expenditures for the publicizing of political views not inherently present in restricting other types of expenditures, namely, that it necessarily deprives the electorate, the persons entitled to hear, as well as the author of the utterance, whether an individual or a group, of the advantages of free and full discussion and of the right of free assembly for that purpose.

The most complete exercise of those rights is essential to the full, fair and untrammelled operation of the electoral process. To the extent they are curtailed the electorate is deprived of information, knowledge and opinion vital to its function.

United States v. CIO, 335 U.S. 106, 144 (1948) (Rutledge, J., concurring).

³⁸³*New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

³⁸⁴See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Ocala Star-Banner v. Damron*, 401 U.S. 295 (1971); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *Mills v. Alabama*, 384 U.S. 214 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

³⁸⁵See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), sustaining the "fairness doctrine" and an FCC order to a station compelling it to allow a person attacked on a broadcast to have a chance to respond.

³⁸⁶*Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

³⁸⁷See *Redish*, *supra* note 12.

posing candidates.”³⁸⁸ This argument, however, assumes that someone—presumably Congress—knows how much information is the right amount and reflects a basic distrust in the capacity of individual citizens to discount the greater volume of political advertising in reaching their decisions.

Another way is to argue that limitations in fact expand public political discourse by preventing so much political campaigning that the public is forced either to suffer repeated bouts of sensory overload or to tune out the superfluous increment. Each person’s sensory limit is different, however, and some members of the public—presumably those most interested in politics—will remain hungry for more information after those with a lower information threshold have tuned out. Those who are sated easily and have tuned out gain nothing from limitations. Justifying limitations as means of protecting the public from confusion therefore gains nothing for the public at great cost to free speech.

On the basis of the foregoing, therefore, it can be concluded that candidates, their supporters, and others wishing to participate in elections have a presumptively protected right to decide without government regulation how much money to spend in elections and for what purposes. Because a very strong argument can be made that contribution and spending limits directly and inevitably infringe that right, it may be that the Court would not even consider the governmental interest asserted to justify them, holding instead that there can be no “balancing” when first amendment rights are themselves directly, rather than incidentally, circumscribed. The gravity of the need to preserve the integrity of democracy’s ultimate decision-making process suggests, however, that the Court would insist on weighing that interest, and it is therefore necessary to examine carefully the social interest furthered by these provisions of the Campaign Act.

The Legitimacy and Weight of the Governmental Interest in Limiting Contributions and Expenditures

The legislative history of the Campaign Act suggests that the chief goal of the contribution and expenditure limitations is to imbue the federal election process with a greater measure of equal political opportunity.³⁸⁹ The legislation is premised on the conviction that campaign

³⁸⁸Comment, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV., *supra* note 351, at 228.

³⁸⁹S. REP. NO. 92-96, 92d Cong., 1st Sess. (1971); S. REP. NO. 92-229, 92d Cong., 1st Sess. (1971); H.R. REP. NO. 92-564, 92d Cong., 1st Sess. (1971).

costs are, as the Senate Commerce Committee declared in reporting the bill, so high and "rapidly escalating" as to pose "a real and imminent danger to the integrity of the electoral process."³⁹⁰ The nature of that danger is, in the words of witnesses before the House Committee on Administration, "that a system which sets no overall limits on campaign spending in federal elections may lead to a closed, insulated, self-perpetuating system, dominated by special interests and unresponsive to the public will and which often creates the impression that only the rich can run for public office, and that a candidate can buy an election by spending large amounts of money in a campaign."³⁹¹ The present system, the House Committee went on,

works an inequitable hardship on the candidate who cannot compete with the resources of great wealth, but of even greater significance, it is unfair to the electorate which is entitled to have presented to it for its evaluation and judgment candidates from all walks of life and not just those persons who, because of their wealth, can conduct a campaign which resorts to techniques which are more appropriate to merchandizing a product than to familiarizing the public with a candidate's qualities as a potential public official and his program for the country.³⁹³

By placing a ceiling on media expenditures and on candidates' personal and family contributions, therefore, the Act attempts to enhance the citizens' equality of opportunity to compete for public office and to assure the public the opportunity to choose among the best available candidates irrespective of financial condition.

In short, high campaign costs are presumed to have three major consequences: deterrence of office-seekers, undue financial advantage, and undue financial influence. They allegedly deter some able and otherwise presumably willing candidates from running, thereby denying the public some talented servants as well as infringing the rights of the would-be candidate. They allegedly give an undue electoral advantage to those candidates from wealthy families or with wealthy friends and interest groups. They allegedly create the need for candidates to indenture themselves to wealthy interests eager to gain advantage at public expense.

There is no question but that these are serious and legitimate concerns. If democracy means anything, in elegant theory as well as in

³⁹⁰S. REP. NO. 92-96, 92d Cong., 1st Sess. 20 (1971).

³⁹¹H.R. REP. NO. 92-564, 92d Cong., 1st Sess. 4 (1971).

³⁹²*Id.*

everyday usage, it means that public office should not be only open but accessible to all citizens with the drive to seek it and the capacity to fill it. Few Americans could find fault with this ideal or doubt that our political process will be healthier and our public policies wiser and more equitable the more we approximate it in practice. The question we must consider is not whether this ideal is worthy, but whether it is in fact in danger and, if it is, whether contribution and expenditure limitations constitute the best means of protecting it.

It must be noted that the concern about deterrence of office-seekers, undue financial advantage, and undue financial influence is not new. Long before election costs reached anywhere near their present level, the Supreme Court of Wisconsin expressed similar concerns in sustaining Wisconsin's expenditure limitation provision in 1930:

It is a matter of common knowledge that men of limited financial resources aspire to public office. It is equally well known that successful candidacy often requires them to put themselves under obligation to those who contribute financial support. If such a candidate is successful, these obligations may be carried over so that they color and sometimes control official action. The evident purpose of the act is to free the candidates from the temptation to accept support on such terms and to place candidates during this period upon a basis of equality so far as their personal ambitions are concerned, permitting them, however, to make an appeal on behalf of the principles for which they stand, so that such support as may voluntarily be tendered to the candidacy of a person will be a support of principle rather than a personal claim upon the candidate's consideration should he be elected. . . . It may be replied that the act seeks to throw democracy back upon itself, and so induce spontaneous political action in place of that which is produced by powerful political and group organizations.³⁹³

The fact that such limits have been no more effective in reducing expenditures in Wisconsin than they have anywhere else they have been tried³⁹⁴ should suggest that the causal relationship between limits and equal political opportunity is illusory. Yet the public belief in that commonsense relationship continues to persist and has led to a national attempt to impose limits without any serious exploration of the dynamics of election finance, and while one-third of those states that had

³⁹³State *ex rel.* La Follette v. Kohler, 200 Wis. 518, 565, 228 N.W. 895, 912 (1930).

³⁹⁴D. ADAMANY, *supra* note 4, at 120-21.

limitations have decided to repeal them.³⁹⁵

Discourse on the subject continues to be dominated by simplistic statements that assume, rather than examine, basic premises.³⁹⁶ If we are to infringe the preferred freedoms of the first amendment, we need to be certain that the facts justifying the infringement are accurate, that they constitute a threat to other constitutionally protected rights, and that the proposed remedy will safeguard the latter while effectively eliminating the former. Are campaign costs now, or likely to become in the future, so high that they pose a threat to equal political opportunity? Is it possible to achieve equal political opportunity by legislating campaign monetary equality and, specifically, media spending equality?

It should be stated at the outset that these questions are not primarily legal ones. Professor Rosenthal has analogized the right to run for office to the right to vote for office-seekers, of course without in any way maintaining that they are in fact actually equivalent.³⁹⁷ While recent cases have sought to ensure the equality of voting and of equal weighting of votes within jurisdictions,³⁹⁸ there is quite a difference between voting, that condition of equality which is indispensable in a democracy, and equality of candidacy, a condition of equality which never exists in life. A vote is a simple, discrete, finite occurrence, the exercise of which is an incident of citizenship. By its nature it depends only on the citizen's own volition, subject to minimal residency, registration, and civil eligibility requirements. The closest analogy is a right to an equal opportunity *to qualify* to run for office, which is constitutionally protected,³⁹⁹ but it is in no way equivalent to a right to competitive equality, since by its nature the competitive position of candidates *vis à vis* one another depends on a multiplicity of factors, such as political talent, experience, and knowledge, far beyond the effective power of any democratic governmental control. Competition for office is premised on the existence of such inequalities; indeed, the existence of those inequalities is one of the main reasons for choice of public officials in a democracy by citizen vote rather than by lot. But while those chosen among

³⁹⁵H. ALEXANDER, *supra* note 7, at 190.

³⁹⁶*See, e.g.,* Barrow, *supra* note 12.

³⁹⁷A. ROSENTHAL, *supra* note 12, at 24.

³⁹⁸*City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) (invalidating property ownership as a prerequisite of voting in bond and school tax elections); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (same); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (same); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (invalidating the poll tax); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

³⁹⁹*Bullock v. Carter*, 405 U.S. 134 (1972).

may be inherently unequal and incapable of being made equal, the choice itself acquires its democratic and equal character by the equally-weighted votes of citizens.

It can be countered that while most candidate characteristics are inherently unequal and constitute the reason for choice, financial resources are neither an inborn characteristic of people nor incapable of being equalized. Carrying the point even further, it can be contended that it is only as such secondary and *unnatural* inequalities as financial resources are equalized that the primary and inherent personal inequalities can be given full weight by the voters.

This contention certainly seems persuasive, but it misperceives the nature of political campaign funding. The amount of money a candidate can raise for an election is ordinarily more a reflection of the extent of his potential support than it is a means of obtaining support. It is a direct function of perceived political promise. Likely winners can raise more money than likely losers. Large resources for campaign use are attracted by a candidate's other characteristics—the ones that are inherently unequal—and not *vice versa*. The frequency and public reporting of opinion polling on comparative candidate strengths make it increasingly easy for campaign donors to have reliable data on which to determine whether and to whom to give. If there is any doubt about that relationship, one need only contrast Senator McGovern's difficulty in obtaining funds before Wisconsin, when he was a perceived loser, with his financial attractiveness after his victory there,⁴⁰⁰ or Senator Muskie's ease in obtaining funds when he appeared the likely Democratic candidate with his inability to raise funds after his series of primary defeats.⁴⁰¹

The fact is, as Professor Dahl pointed out, that the resources a candidate brings into his pursuit of office include many assets in addition to money.⁴⁰² A candidate's general intelligence, time available, personal contacts, issue association, prior name-recognition, public reputation, past record, political organization, and political talent and skills play a substantial role in his capacity to win elections. Money is obviously important, too, but as Professor Key observed, it "is not the sole currency of politics."⁴⁰³ It is much more in the nature of an instrumental resource rather than a primary resource, and the capacity to raise it depends in large part on the candidate's other political resources.

⁴⁰⁰N.Y. Times, April 26, 1972, at 28, cols. 6 & 7.

⁴⁰¹N.Y. Times, April 10, 1972, at 30, cols. 1 & 2.

⁴⁰²R. DAHL, WHO GOVERNS? 226 (1961).

⁴⁰³D. ADAMANY, *supra* note 4, at 7-12.

Obviously, this relationship between money and political success is a complex and dynamic one, subject to probability estimates by the public. Conceivably, the candidates most likely to win should attract the largest amount of money, and winning would be confirmation of the prediction rather than a consequence of high spending. But we know that the highest spenders do not always win.⁴⁰⁴ In the 1970 elections, those statewide candidates spending more for political broadcasting, for example, won only marginally more frequently than their opponents, although larger spenders did better in the House races:⁴⁰⁵

CANDIDATES OUTSPENDING OPPONENTS

	Winners		Losers	
Governor	19	54.3%	16	45.7%
Senate	20	57.1%	15	42.9%
House	229	64.7%	125	35.3%

CANDIDATES WHO WERE INCUMBENTS

	Winners		Losers	
Governor	17	70.8%	7	29.2%
Senate	24	80.0%	6	20.0%
House	379	96.7%	13	3.3%

In four out of the five races for Senate and six out of the eleven races for governor which did not involve incumbents, the largest spender lost.⁴⁰⁶ In five of the last six Presidential elections, the Republicans outspent the Democrats, but won in only three. In those three (1952, 1956, and 1968), they outspent the Democrats by fifty percent or more,⁴⁰⁷ but in all of them the non-financial factors that enabled them to raise so much more than the Democrats in the first place were probably of much greater consequence in producing victory than was their preponderance in campaign expenditures.

These figures suggest that the closer the race is on the basis of non-financial factors, the greater the influence the amount of money spent

⁴⁰⁴A. HEARD, *supra* note 4, at 6.

⁴⁰⁵*Broadcast Spending: No Election Guarantee*, 29 CONGRESSIONAL Q. 1621 (1971).

⁴⁰⁶*Id.* at 1623-24.

⁴⁰⁷CONGRESSIONAL QUARTERLY SERV., *POLITICS IN AMERICA 1945-1968*, at 114 (1969).

will have on the outcome. But the closer the races are on such factors, the easier it is for *both* candidates to raise money. It is only in the lopsided contests that one candidate (the likely winner) has a superior fundraising advantage over his opponent. But it is only an advantage and will not necessarily be reflected in spending figures, because the same factors that make it easier for him to raise money make it unnecessary for him to do so. He is going to win anyway, whether he outspends his opponent or not.

In races in which the outcome is lopsided, therefore, we would expect to find that the highest spenders had won much more frequently than they lost, not because they spent more but because they were much more likely to win in the first place.⁴⁰⁸ This is exactly what we do find: in more than ten percent of the 1970 House races, there was no general election opposition; in about forty percent, the winner won by sixty-five percent or more; in about forty percent, the winner's margin was ten to thirty percent; and in fewer than twelve percent of the races was the winner's margin less than ten percent.⁴⁰⁹ This substantially explains the reason that the House races appear to be more greatly influenced by higher spending. The relatively small amount of money usually spent in a congressional campaign (in no 1970 case more than sixty thousand dollars for broadcasting)⁴¹⁰ is more easily raised than the much larger sums required for statewide elections. Even financially unattractive candidates, therefore, can frequently raise the funds necessary to wage a highly visible campaign, and indeed, if they are to have a chance at winning against an incumbent, they have to spend more than he does. If many congressional elections matched highly determined but financially unattractive challengers against confident and financially attractive incumbents, therefore, one would expect to find a larger proportion of higher spenders losing, because campaigns, costing less, are undertaken more easily against greater odds. The fact that we do not see explained by incumbents' unwillingness to allow themselves to be outspent.

The main points are that the amount spent in elections does not determine the winner unless the race is otherwise very close, and that the amount raised for campaigns is more an indication of the likelihood of success than a cause of electoral victory. If this is an accurate sum-

⁴⁰⁸N.Y. Times, Nov. 5, 1972, at 52, col. 1.

⁴⁰⁹Penniman, *supra* note 12, at 14.

⁴¹⁰*Broadcast Spending: No Election Guarantee*, *supra* note 405, at 1625, 1627, 1629.

mary, the concerns about both deterrence of candidates and undue financial advantage would appear to be unfounded. If a candidate appears likely to win, he will be able to attract the funds necessary to wage a campaign. The inability of Senator Fred Harris and Nassau County Executive Eugene Nickerson to raise funds for their respective races for the Democratic nominations for President⁴¹¹ and Governor of New York⁴¹² was a symptom of their perceived poor chances of winning against Senator Muskie and Arthur Goldberg respectively, rather than a major cause in itself.

The advantage enjoyed by candidates with a higher likelihood of winning cannot, therefore, be described as undue. It is mainly the reflection of a preponderance of public support, and it thus represents a prediction of probable success. The fact that people vote with dollars as well as ballots is to be celebrated in a democracy rather than bemoaned. That those with surplus disposable wealth choose to give for political campaigns is no less commendable because they give more generously to those expected to win. Donors contribute for a variety of reasons, but there is nothing either illegal or improper in the simple fact that they prefer to support likely winners rather than losers. Obviously there is a sliding scale at work here. The more intense the prospective donor's belief in a candidate or his program or the more intense his dislike of the candidate's opponent, the less likely he will withhold financial support because of the candidate's poor chance of winning. This phenomenon ensures that candidates who may appear financially unattractive to the public as a whole, but who stand for intensely held or widely shared beliefs among a sub-group in the population, will nonetheless be able to make a credible entry into the campaign list. In other words, a candidate will be able to raise sufficient funds to prime his candidacy and to show the skeptics, as well as the public to whom he is unfamiliar, how well-suited he is for their votes and wider financial support. This seems to be precisely what occurred in the McCarthy, Wallace, and McGovern candidacies.

Although we have seen that there is little substance to the fears of deterrence of candidates or undue financial advantage, it might still be argued in principle that because the election process is of such central importance to democratic government, irrespective of deterrence and

⁴¹¹N.Y. Times, Nov. 11, 1971, at 21, cols. 1 & 2.

⁴¹²Hearing on Political Broadcasting before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 31 (1970).

undue advantage, it is improper to allow money to play so large a role in elections. Does not the involvement of large sums of money tend to contaminate the election process?

Most of the scholars of election finance agree that such is *not* the case. Despite the public's perception to the contrary (eighty percent of Americans would like to see ceilings imposed on campaign spending),⁴¹³ the experts believe that United States elections are underfinanced by comparison with those of other countries and with appropriate indices of our own spending for other goods and services.⁴¹⁴ Furthermore, election expenditures as a proportion of national income and wealth have not risen at all; rather, they have declined. Political expenditures were four percent of the gross national product in 1952 but only 3.5 percent in 1968.⁴¹⁵ The percentage increase in national income during the same period was twice that of the increase in political expenditures.⁴¹⁶ In comparison with political expenditures per voter in other industrial democracies, expenditures in the United States ranked behind Israel, Italy, Japan, and Germany and only slightly ahead of the United Kingdom.⁴¹⁷

It is true, however, that political spending has risen faster than the consumer price index and has increased considerably more than the rise in the voting age population.⁴¹⁸ This can be explained, however, as a function of the greatly increased expenditures in the general category of which political broadcasting, the major component responsible for rapidly increasing political expenditures,⁴¹⁹ is itself one subsidiary spending category. National television advertising tripled from 1956 to 1970, rising from 1.2 billion dollars to 3.7 billion dollars.⁴²⁰ This was a slightly greater increase than occurred in campaign expenditures as a whole, and was only slightly less than the increase in political broadcasting itself, which quadrupled during the same period.⁴²¹ This suggests that the polit-

⁴¹³See H.R. REP. No. 92-564, 92d Cong., 1st Sess. 5 (1971).

⁴¹⁴Hearings on H.R. 13721, H.R. 13722, H.R. 13751, H.R. 13752, H.R. 13935, H.R. 14047, H.R. 14511, and S. 3637 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 92 (1970). See also HEARD, *supra* note 4, at 375-87.

⁴¹⁵Penniman, *supra* note 12, at 8.

⁴¹⁶D. ADAMANY, *supra* note 4, at 58.

⁴¹⁷*Id.* at 57.

⁴¹⁸D. DUNN, *supra* note 4, at 44.

⁴¹⁹R. MACNEIL, *THE PEOPLE MACHINE* 228-39 (1968).

⁴²⁰41 TELEVISION FACTBOOK 73-a (1972).

⁴²¹D. DUNN, *supra* note 4 at 32.

ical broadcasting increase from 1952 to the present has been substantially caused by the increasing use of television generally as a means of communication within the society.⁴²² Furthermore, future increases are not likely to be as large as those immediately past, because the use of political broadcasting has probably reached the saturation point. Its rate of future increase would seem likely to slow markedly to a rate more closely related to the increase in the consumer price index. As a result, the imposition of the proposed ceilings, which were pegged at or slightly higher than the level of *current* expenditures, will have little effect. The largest increase in political broadcasting costs is very likely behind us and the Act requires only minor reduction. If high political broadcast costs are the target, the barn door has been closed too late.

As Herbert Alexander has pointed out numerous times,⁴²³ the total amount spent for all kinds of expenses on all political campaigns is less than the combined advertising of the top two manufacturing firms in the nation.⁴²⁴ Finally, and most important, as a *proportion* of total campaign expenditures, actual political broadcasting expenditures for time purchased have risen only slightly in the last four elections: 6.5 percent in 1956, 8 percent in 1960, 12 percent in 1964, and 13 percent in 1968.⁴²⁵ Yet this category of expenditure is the *only* one on which the Act places a ceiling, and the fact that federal supervision over broadcasting obviously makes it more easily and reliably controlled does not justify singling out this one area for limitation, particularly when it constitutes the primary speech dimension of the election campaign.

Spending limitations are often justified as a means of limiting the "undue influence" of money in campaigns. The term itself is terribly vague and suggests an implicit reference to some standard of what is not "undue."⁴²⁶ What varieties of influence on officeholders are

⁴²²41 TELEVISION FACTBOOK 76-a to 77-a (1972).

⁴²³See *Hearings on H.R. 13721, H.R. 13722, H.R. 13751, H.R. 13752, H.R. 13935, H.R. 14047, H.R. 14511, and S. 3637, supra* note 414.

⁴²⁴Procter and Gamble (\$199,000,000) and General Motors (\$129,200,000). ADVERTISING AGE, July 24, 1972, at 55.

⁴²⁵See D. DUNN, *supra* note 4, at 32.

⁴²⁶See *United States v. CIO*, 355 U.S. 106, 145 (1948) (Rutledge, J., concurring):

It is not necessary now to consider whether restricting the rights of individuals, singly or in organized relationships, to publicize their political views, rights often essential to their survival and always to their well-being, can be accommodated, in some instances, with the Amendment's purpose or justified because in legislative judgment those persons, unless restricted, acquire "undue influence" in the electoral process. For "undue influence" in this connection may represent no more than convincing weight of argument fully presented, which is the very thing the Amendment and the electoral

“undue”? Is not the influence of his family, or his old and close friends, his special policy concerns also “undue” in comparison with the influence of strangers, individual voters, or matters about which he does not particularly care? Is the influence of money on politicians any greater or more dangerous?

Whatever is meant by “undue,” it can be controlled much more effectively and in ways more consonant with democratic practices by requiring full disclosure of donors. That is the device most used to guard against other kinds of undue influence, and there is no reason to believe that it would be less effective in preventing the “undue” influence of money in elections, if full and timely disclosure is effected.

In principle, then, it is far from clear that the governmental interest that expenditure and contribution limitations are designed to serve is sufficiently compelling to warrant the incursion of such limitations on first amendment freedoms. It would seem obvious that the interest involved does not pass the test described by Mr. Justice Rutledge:

The loss inherent in restrictions upon expenditures for publicizing views . . . forces upon its authors the burden of justifying the contraction by demonstrating indubitable public advantage arising from the restriction outweighing all disadvantages, thus reversing the direction of presumptive weight in other cases.⁴²⁷

Whatever doubt remains about the Campaign Act’s unconstitutionality in principle, however, should be dispelled on examination of the particular means chosen.

The Appropriateness of the Congressional Means

Because of the presumptive first amendment protection of the activities constrained by the expenditure and contribution limitations, the standard by which the congressional means are tested for constitutionality is very stringent. As discussed earlier,⁴²⁸ the means chosen must be designed logically to achieve the ends;⁴²⁹ they must not “broadly stifle fundamental personal liberties when the end can be more narrowly

process it protects were intended to bring out. And one may question how far legislators may go in accurately assessing undue disproportionate weight as distinguished from making substantially accurate findings and conclusions concerning corruption.

⁴²⁷United States v. CIO, 355 U.S. 106, 140-45 (1948). See also Shelton v. Tucker, 364 U.S. 479 (1960); Thomas v. Collins, 323 U.S. 516, 529-30 (1945); Schneider v. Town of Irvington, 308 U.S. 147, 161 (1939).

⁴²⁸See text accompanying notes 249-50 *supra*.

⁴²⁹Thomas v. Collins, 323 U.S. 516, 530 (1945).

achieved," and they "must be viewed in the light of less drastic means of achieving the same basic purpose."⁴³⁰ Under all three of these tests—rational relation, minimal infringement, and comparative harmfulness—the expenditure and contribution limitations clearly fail. These provisions are likely to be inefficacious in remedying the alleged evils of undue financial influence, undue financial advantage, and deterrence of candidates; indeed, they increase the imbalance in favor of incumbents. Furthermore, because the *alternative* of public subsidy does not infringe the free speech of candidates and their supporters, more directly serves the goal of equal political opportunity, and more effectively addresses the most serious problem of financial barriers to seeking public office, the limitation of expenditures and contributions must be regarded as unconstitutional.

Discrimination in General. A limitation of media expenditures not only singles out the speech dimension for special assault, but also discriminates very strongly in favor of candidates with preexisting reputations, extensive name-recognition by the public, wide public association with particular issue positions, preexisting news media editorial support, and preestablished political organizations. In other words, a candidate who is already well-known and who has a working political organization is not seriously hampered in his campaign because the Act does not limit the amount of money spent on paid campaign workers,⁴³¹ telephones (other than automatic telephone banks), postage, and printing—all the usual means of energizing a political organization. Furthermore, the Act places no limit on volunteer workers, which gives a decided advantage to candidates supported by groups whose members can be easily mobilized for canvassing and voter registration, such as student groups, labor unions, and trade associations. Moreover, candidates who have strong organizations but little natural talent for television campaigning are favored over candidates who have little preexisting political organization and name recognition but who are good television campaigners and who might be able, but for the media limitation, to compensate for other lacks by spending more in media campaigning. If it is true that the most effective use of commercial advertising is in the introduction of new brands and products,⁴³² it would follow that the most effective

⁴³⁰Shelton v. Tucker, 364 U.S. 479, 488 (1960).

⁴³¹The only limitation applies to expenditures for broadcast time and the agent's commissions thereon; newspaper, magazine and outdoor billboard space; and automated telephone banks. Campaign Act §§ 103-04, 86 Stat. 5-6.

⁴³²Telser, *Advertising and Competition*, 72 J. POL. ECON. 537 (1964).

use of political advertising would be to introduce new candidates to the public. In effect, candidates who already rank high on the prime election resources are further advantaged by a media limit which prevents their opponents from outspending them through the single most effective means of becoming known to the public.

The media expenditure limit discriminates similarly against the candidates of parties with significantly fewer registered voters. In traditionally one-party districts, the only way the minority party candidate has even a remote chance of effectively overcoming his opponent's disproportionately high registration advantage is by more intensive use of media. To hold the candidates of both parties to the same limit tends to solidify the institutional bias rather than to diminish it.⁴³³

In addition, the candidate contribution limitations discriminate against wealthy candidates at the same time that other provisions of the Act are easing restrictions on political contributions by labor unions and corporations and removing the ceiling on contributions by non-candidate donors. One of the purposes of the media expenditures limit was to diminish the need of candidates to become indebted to special interests. Yet not only does the Act facilitate the making of large contributions by special corporate and labor interests, it also forces a candidate to seek support from others by placing ceilings on the amount a candidate can contribute to or raise from his family for his own campaign and thereby creates the potential for increased influence by wealthy special interests.

Finally, discrimination is inherent in the imposition of nationwide expenditure limits irrespective of varying needs for and costs of media from place to place. The limits are essentially irrelevant in urban congressional campaigns in very large metropolitan areas, where television is a less useful campaign tool. A single district often contains so small a fraction of the metropolitan television audience, and the advertising rates, being based on total metropolitan population, are so high that political television advertising is an economically inefficient means of reaching it. Besides, the districts are compact enough and population density sufficiently high to lend themselves to other modes of campaigning, such as mailings, local meetings, and personal canvassing, that are not covered by the expenditure limit. Hence the Act places a burden on

⁴³³This was the logic of the proposal by John Walker, the 1972 Republican candidate for Lieutenant-Governor of North Carolina, that he and Jim Hunt, his opponent, agree on a spending limit formula which permitted him to spend five times the amount his opponent could spend.

congressional candidacies in many parts of the country that it does not in fact impose on metropolitan candidacies.⁴³⁴

Discrimination in Favor of Incumbents. We have already noted that spending limits favor those candidates with large accumulations of such political resources as public familiarity, working organizations, and press attention.⁴³⁵ By definition incumbents constitute the largest group of candidates with preexisting reputations and followings. Media campaigning is less crucial to them than to their challengers. Indeed, the more senior an incumbent in years of service, the less he needs to spend on media in order to win. A recent study by the Association of the Bar of the City of New York revealed that half of the responding congressional incumbents reported spending no money at all on television advertising during their most recent contested election and that heavy television campaign usage was reported by senior senators and congressmen only half as frequently as it was by junior members of Congress.⁴³⁶ It should come as no surprise, therefore, that a Congress dominated by incumbents should single out for limitation those elements of campaign expenditure that are least important to their own campaigns. But it is not only that they need broadcasting less, but that their challengers need it infinitely *more*. Limitations on media spending, therefore, while being relatively harmless to incumbents, can be disastrous to the chances of challengers. It is for this reason that incumbents looking to their own self-interest tend to favor media limitations over other forms of expenditures limits.⁴³⁷ Indeed, a reading of the hearings on the proposals that became the 1971 Act suggests that the dominant motive behind the media expenditures limit was, as Russell Hemenway, director of the National Committee for an Effective Congress, observed, a fear of "the media blitz."⁴³⁸

The discriminatory impact of media expenditure limits on challengers was repeatedly noted in the hearings. Congressman Harvey (Republican from Michigan) asserted that "[t]he whole theory of putting a limit on the amount you can spend really lessens the opportunity for a challenge or lessens the possibilities of a challenger being successful."⁴³⁹

⁴³⁴See S. REP. NO. 92-96, 92d Cong., 1st Sess. 85 (1971).

⁴³⁵See note 431 and accompanying text *supra*.

⁴³⁶SPECIAL COMM. ON CONGRESSIONAL ETHICS, ASS'N OF THE BAR OF THE CITY OF NEW YORK, CONGRESS AND THE PUBLIC TRUST 140-41 (1970).

⁴³⁷D. DUNN, *supra* note 4, at 59.

⁴³⁸Hearings on H.R. 8284 Before the Subcomm. on Elections of the House Comm. on House Administration, 92d Cong., 1st Sess. 69 (1971) [hereinafter cited as 1971 Hearings].

⁴³⁹*Id.* at 35.

Congressman Frenzel (Republican from Minnesota) put the point even more concretely:

This is the section of the bill that almost guarantees successful reelection of incumbents. It is difficult to argue against incumbents in this Congress. Challengers have a mighty small constituency here, nevertheless every election includes at least half challengers.

In the election of 1970, 93 percent of incumbents that sought reelection were re-elected. Incumbents already have enormous advantages which need not be increased by excessive low-spending limitations.

A \$50,000 limitation for a Congressional campaign may sound generous to incumbents whose re-election does not require spending of amounts anywhere near that figure. For the challenger the limitation imposes nearly impossible problems. With today's costs there is no way a challenger can make himself known over a well-identified incumbent under these restrictions.⁴⁴⁰

This overt discrimination against challengers is made even more burdensome by the failure of the Act to equalize innumerable publicly subsidized advantages enjoyed by incumbents running for reelection. Incumbents have free mailing privileges which entitle them to mail at taxpayer cost anything short of an out-right political appeal for support. Even during a campaign, an incumbent congressman can and does mail materials, often free government publications, to constituents with an enclosed personal message without any cost to his campaign. If he exceeds his printing allowance in so doing, he can deduct the excess cost from his income for tax purposes; a challenger can deduct nothing.⁴⁴¹ Congressman Frenzel remarked on the magnitude of these advantages as follows:

Some Congressmen generate sometimes 100,000 letters to people who have written them before or whose names are known to the Congressman on subjects of which the Congressman is aware that particular constituent is interested in. It seems to me that this is a very potent political weapon to which the challenger has no counterpart. He has no way to challenge this weaponry.⁴⁴²

There are countless other publicly subsidized incumbent expenses, such as 125,000 dollars in staff allowances, 4,800 dollars for district

⁴⁴⁰H.R. REP. No. 92-564, 92d Cong., 1st Sess. 34 (1971); see 1971 *Hearings* 19.

⁴⁴¹See I.T. 4095, 1952-2 CUM. BULL. 90.

⁴⁴²1971 *Hearings* 65.

office space rental and equipment, 35,000 minutes of long-distance telephone service, 480,000 heavy-duty brown envelopes, 700 dollars worth of stamps and some transportation allowances.⁴⁴³

While such tax-supported expenses cannot be directly spent for political purposes, it is impossible to sort out, even in an election campaign, those activities that are primarily politically oriented from those that are primarily oriented to representation of constituents.

All of these incumbent advantages were left unlimited by the 1971 Act, and no provision was enacted to extend their benefits to challengers. Instead, challengers were further disadvantaged in relation to incumbents by the media expenditure limit. It is not difficult to understand why Congress chose this particular mode of regulation. As Professor Winter observed, "[M]any of those who are most anxious for legislation benefit from the activities that are left unregulated."⁴⁴⁴

Finally, the *coup de grace* of incumbency benefit is the retention by congressmen of supervision over the administration of the regulation of their own campaigns. While the Senate version of the Act would have placed supervisory responsibility for House and Senate campaigns in the Comptroller General, an independent officer even if responsible to Congress, the Conference Committee accepted the House version, which retained such responsibility respectively in the Clerk of the House and the Secretary of the Senate.⁴⁴⁵ Even before the ink on the Act had time to dry, such objective supervision as the House Clerk might have given to the Act was challenged by Representative Wayne Hays, Chairman of the House Administration Committee, who proposed that his committee take over supervision from the Clerk.⁴⁴⁶ One need not be cynical to question the objectivity of the supervision likely to be provided. Whatever benefits for incumbents the Act failed expressly to provide or to retain would most certainly be supplied by such administration of the Act.

In view of all of these incumbent advantages, it is difficult not to sympathize with Congressman Frenzel's questioning of expenditure limitations:

What I am trying to find out from some witness is what is so bad about campaign spending. I am trying to find somebody to show me there is

⁴⁴³Penniman, *supra* note 12, at 17.

⁴⁴⁴Winter, *supra* note 377, at 59.

⁴⁴⁵S. REP. No. 92-580, 92d Cong., 1st Sess. 34-35 (1971).

⁴⁴⁶It should be noted that Mr. Hays himself failed to file his own campaign report by the first deadline. COMMON CAUSE, May 1972, at 2.

an abuse here. I have tried to take a very unpopular position of being for a nonincumbent trying to take on the guy who has all the advantages of name recognition, popularity, access to the media, a limited franking privilege, et cetera, et cetera. This poor guy has to arise from nowhere and take on such distinguished people as these you see before you. This is a very difficult task and history shows they are very unsuccessful at it. . . . When you establish a spending limitation you literally insure that incumbents are not going to be defeated because the only weapon the [non-] incumbent has against name recognition, access to media, franking, et cetera, is to get his name known, get around and have people get the idea he is important or smart.

So it seems to me unless you can prove we are doing something just awful in campaign spending, you are going to create a far larger evil by seeking limitations.⁴⁴⁷

The Campaign Act Fails to Achieve Its Objectives. In addition to the overtly discriminatory effects of the Campaign Act, it fails to pass the rational relation test in a more fundamental way. By any sanguine estimate, the Act simply will not control the level of overall campaign expenditures, it will not even control the level of media expenditures, and it will not reduce the extent of deterrence to impecunious would-be candidates. Finally, its enforcement mechanism will not provide the public with reliable, even-handed, non-partisan administration of federal elections.

It has already been noted that the Act does not limit overall campaign expenditure levels.⁴⁴⁸ Even if candidates abided strictly by the media limitations, they would be holding constant a category of expenditure which, as we have seen, comprised only thirteen percent of total political spending in 1968. With any serious competitive pressure on a candidate to spend more than his opponent in order to win a closely contested election, it would be a fairly simple matter to increase spending for other, non-regulated purposes, such as for paid campaign workers, professional campaign management, mailings, brochures, and polling. These categories, which represent eighty-seven percent of political spending, have no ceiling. This permits campaign costs to continue to escalate, thus not alleviating any grounds for concern about undue financial advantage, deterrence of candidates, and undue financial influence.

Furthermore, media expenditures are not effectively controlled.

⁴⁴⁷1971 Hearings 85.

⁴⁴⁸See note 431 and accompanying text *supra*.

First, the Act does not limit general party efforts in behalf of all party candidates.⁴⁴⁹ It thus leaves local, district, state, and national party organizations free to spend without limit in support of all candidates, so long as no particular race is singled out for special emphasis.

Secondly, a large category of media-related expenses themselves is not embraced in the ceiling. The limit applies only to expenditures for time and space, and the commissions paid to time buyers on such purchases, and does not restrain expenditures for related expenses. Thus the production costs (for writing, photographing, editing, professional producers and directors, and media consultants) and promotional costs are left absolutely free to rise, and they have been estimated to represent expenditures amounting to from twenty-five to thirty-three percent of time charges.⁴⁵⁰ This omission from coverage seems likely to cause shifts of funds into media categories other than actual space or time expenditures.

Thirdly, the media limitations will not effectively limit direct expenditures for media because the limitations depend for their effectiveness on an unconstitutional exercise of a veto by candidates over their supporters. If the limitations are to be effective, the candidate has to be able to forbid his supporters from buying time or space. If he *does* forbid such expression and they abide by his decision, he clearly violates their first amendment rights. If they do not abide by his decision and use the time or space with the appropriate disclaimer of candidate responsibility, the limit is vitiated. In either fashion the rights of supporters to free political speech are violated, by suppression in the first instance and by a substantial previous restraint in the second.

There seems to be little doubt that a candidate veto over supporters would be unconstitutional.⁴⁵¹ As Professor Rosenthal observed, "I have not encountered any proposal that would provide really effective limits on campaign expenditures without giving rise to the most serious doubts as to the constitutionality of the restraints placed upon his supporters."⁴⁵² This is not to say that a case cannot be made for candidate control:

⁴⁴⁹Thus party expenditures for media urging votes for all Democratic or Republican candidates, but mentioning none by name, are not within the scope of the Act; only specific candidates have limits.

⁴⁵⁰H. ALEXANDER, *supra* note 7, at 256.

⁴⁵¹*Cf.* A. ROSENTHAL, *supra* note 12, at 66 (statement of Professor Bickel), 75 (statement of Professor Freund).

⁴⁵²*Id.* at 37-38.

A person seeking office . . . owes to the public the duty of supervising the conduct of his campaign so that it is honest and fair. It should not be possible for him to evade this duty simply by delegating the conduct of his campaign to others, or by ignoring the questionable practices of committees formed to support him. The public interest demands that a candidate be responsible for the conduct of those working in his behalf, and the law should aid him in the performance of this duty by making it impossible for assistance to be given him except with his knowledge and consent.⁴⁵³

Such wistful yearning for a neat British-like centralization of responsibility in the candidate flies not only in the face of the first amendment, but also ignores the extraordinarily decentralized nature of American politics. In statewide, national, and congressional-district races, the practice has always been for city and county committees to take their own initiatives in campaigning, including the writing of advertising copy and the raising of funds to purchase the time or space to run it. This permits local supporters to emphasize local concerns in campaign advertising and leaves ample room for creative and varying local initiatives. The requirement that a district or statewide candidate or his agent approve such local efforts in his behalf will stifle local initiative. In a statewide campaign with as many as several hundred local managers submitting copy, the approval process is likely to be an administrative catastrophe as well as a funeral for imagination.

An analogous tradition of individual political initiative has long been part of American campaigning. Many individual citizens, some with large amounts of money and some with little, prefer taking their own public stands in their own words to working through an official campaign structure. In 1968, for example, Stewart Mott took several newspaper advertisements in behalf of his "Coalition for a Republican Alternative" in order to persuade Governor Rockefeller to oppose the Vietnam war and to contest Nixon for the Presidency.⁴⁵⁴ His effort did not have Rockefeller approval, yet it can hardly be denied that it aided the Rockefeller candidacy. In 1972 Mott similarly placed advertisements implicitly supporting Senator McGovern against Senator Muskie in the New Hampshire primary, again without the approval of the former.⁴⁵⁵ More recently, David Merrick placed an advertisement at the

⁴⁵³Comment, *Campaign Contributions and Expenditures in California*, 41 CALIF. L. REV. 300, 307 (1953).

⁴⁵⁴Alexander & Myers, *A Financial Landslide for G.O.P.*, FORTUNE, Mar. 1970, at 107.

⁴⁵⁵N.Y. Times, Feb. 24, 1972, at 26, col. 1.

bottom of the front page of the *New York Times* which said, "In 1972 it's hard to vote Democratic." While his intent is clear, the text required no approval from Nixon, and was not chargeable to his limit. Professor Daniel Pollitt, of the University of North Carolina Law School, wrote the *Times* and enclosed a check, seeking to insert a similar advertisement which said, "In 1972, Nixon makes it easy to vote Democratic." The *Times* refused to run the ad unless it were approved by McGovern or run with the one-line disclaimer, which would have doubled the cost.⁴⁵⁶ Under the 1971 Act these advertisements could have appeared with the disclaimer, but they would nonetheless have helped a specific candidate without being charged to his limit.⁴⁵⁷

If a candidate veto is constitutionally impermissible, the essential means of making spending limits effective collapses. The Senate Commerce Committee recognized this fact in its report:

To contend that limitations would be constitutionally sound with respect to candidates, but to maintain otherwise where their supporters are concerned, would construe the power of Congress to protect the election process far too narrowly. Such a construction would permit boundless evasion of the purpose of the legislation and in effect render it nugatory.⁴⁵⁸

It is improbable that candidates will fail to utilize the multi-committee device at national, state, and local levels to evade the media limits just as presidential candidates evaded the preexisting three million dollar political committee limit. That likelihood has clearly been enhanced by a recent Internal Revenue Service ruling permitting evasion of the gift tax on political contributions of more than three thousand dollars annually through the donation of many three thousand dollar contributions by the same donor to separate political committees.⁴⁵⁹ Furthermore, it would appear that such "independent" committees would be free to spend as much as they wished so long as their advertisements carried the required disclaimer of candidate responsibility. So long as there existed no direct evidence linking the candidate or his treasurer with the "independent" committee activities, courts would not

⁴⁵⁶Interview with Professor Daniel Pollitt, University of North Carolina School of Law, October 11, 1972.

⁴⁵⁷See notes 12 and 235 *supra* for a description of a similar controversy involving an American Civil Liberties Union advertisement in support of those congressmen who opposed President Nixon's anti-busing legislation.

⁴⁵⁸S. REP. NO. 92-96, 92d Cong., 1st Sess. 32 (1971).

⁴⁵⁹Rev. Rul. 72-355, 1972 INT. REV. BULL. NO. 29, at 4.

be likely to pierce the committee veil in order to charge his limit for their expenditures.⁴⁶⁰

The Campaign Act ignores these questions entirely, providing simply that "[a]mounts spent for the use of communications media on behalf of any legally qualified candidate . . . shall . . . be deemed to have been spent by such candidate."⁴⁶¹ The regulations promulgated by the Comptroller General provide simply that "[a] use of communications media is deemed to be 'on behalf of the candidacy' of any such candidate if the use (1) involves his participation by voice or image or advocates his candidacy; or (2) identifies the candidate, directly or by implication, or advocates his candidacy."⁴⁶² The only conclusion permitted by these provisions is that candidates will be limited in fact only to the extent that they lend their active and open efforts to campaign advertisement in their behalf. Short of such open involvement or rare scrupulousness on the part of candidates, the media limitations are not likely to limit supporters.

An equally simple evasion device is available in the anti-candidate committee. The Comptroller General's Regulations do address this problem directly, providing that "[a]n expenditure for the use of communications media opposing or urging the defeat of a Federal candidate, or derogating his stand on campaign issues, shall not be deemed to be an expenditure . . . on behalf of any other Federal candidate and shall not be charged against any other Federal candidate's applicable expenditure limitation . . . unless such other Federal candidate has directly or indirectly authorized such use or unless the circumstances of such use taken as a whole are such that consent may be reasonably imputed to such other candidate."⁴⁶³ It is hard to see how any other conclusion would be practical, but it is equally hard to escape the conclusion that, so treated, anti-candidate committees offer still another attractive means of frustrating the media expenditure limit. The Senate version of the Act envisioned that such expenditures would be chargeable to the candidate presumably benefiting from the advertisement,⁴⁶⁴

⁴⁶⁰See *Newberry v. United States*, 256 U.S. 232, 294-95 (1921) (Pitney, J., concurring in part). In addition, see *Mariette v. Murray*, 185 Minn. 620, 242 N.W. 331 (1932); *Daniel v. Gregg*, 97 N.H. 452, 91 A.2d 461 (1952) (per curiam), construing expenditure limitations to require more than the candidate's knowledge and tacit approval. See also Note, *Minnesota Corrupt Practices Act: A Critique of the Fixed Campaign Expenditure Limitations*, 40 MINN. L. REV. 155, 163 (1956).

⁴⁶¹Campaign Act § 104(a)(6), 86 Stat. 6, amending 18 U.S.C. § 608 (1970).

⁴⁶²37 Fed. Reg. 6158 (1972).

⁴⁶³*Id.*

⁴⁶⁴S. REP. NO. 92-96, 92d Cong., 1st Sess. 30 (1971).

but that version lost out in conference, and the Act does not expressly require anti-candidate media expenditures to be so charged.⁴⁶⁵

In any event, an attempt to charge the expenditures of anti-candidate committees to the limit of the candidate presumably benefiting would be just as great an infringement of the latter's free speech as prevention of the former's expenditure would be. There are enough *bona fide* opposition committees to make it unreasonable to assume that anti-candidate committees are simply negative campaigns in behalf of the favored candidate.⁴⁶⁶ Even in two-way races, where the anti-candidate committee's activities will almost certainly benefit the other candidate, the benefiting candidate may very strongly prefer not to have a particular negative campaign or any negative campaign waged against his opponent, but still be unable constitutionally to prevent the campaign from occurring.⁴⁶⁷ What then is the rationale for charging his limit for an expenditure that he cannot prevent, even if it benefits him, and that he would not make, even if it were within his power?

A third means of avoiding the media limit is the "issue" committee, typically the creation of a friendly or antagonistic interest group which has strong views on a policy stand of a particular candidate. It would not have been possible for Senator Beall to prevent the National Rifle Association from taking anti-Tydings advertisements in the 1970 Maryland senatorial election; for policy reasons, the NRA would have had a special vendetta against Tydings no matter who his opponent was. Yet its campaign obviously benefited Beall and, indeed, was the chief factor in his election.⁴⁶⁸ Under the Act the NRA expenditures would not have

⁴⁶⁵S. REP. NO. 92-580, 92d Cong., 1st Sess. 28 (1971).

⁴⁶⁶The British law is different, but of course it is unconstrained by the dictates of a first amendment. In *Rex v. Hailwood*, [1928] 2 K.B. 277, defendant, in a three-way race, had printed and distributed leaflets urging the public to "[v]ote anything but Conservative." He was convicted of violating § 34 of the Representation of the People Act which required that no one other than the election agent of a candidate shall "incur any expenses on account of . . . issuing advertisements . . . for the purpose of promoting or procuring the election of any candidate at a parliamentary election, unless he is authorized in writing to do so by such election agent." Representation of the People Act, 7 & 8 Geo. 5, c. 64, § 34(1) (1918); *cf.* *Rex v. Tronoh Mines, Ltd.*, [1952] 1 All E.R. 697, 700 (Central Crim. Ct.), where the court held that endorsing all Conservative candidates was not attributable to a particular Conservative candidate.

⁴⁶⁷For example, the Justice Department has chosen to regard the Committee to Impeach President Nixon as a political committee required to register under the Campaign Act. Presumably its activities are thought to benefit Senator McGovern, and its advertisements would be chargeable to his expenditure limit unless they contained the appropriate disclaimer. Yet it is questionable, at least, whether he would prefer such advertisements to appear at all. *See* N.Y. Times, Aug. 18, 1972, at 12, col. 3 (city ed.).

⁴⁶⁸N.Y. Times, Nov. 8, 1970, at 35, col. 1.

been chargeable to Beall. Similar issues are presented more subtly in corporate political campaigns, such as those by Warner-Swasey⁴⁶⁹ and on behalf of conservative social and economic policies, which frequently benefit the candidate who is identified in the public mind as the defender of those policies. Such issue campaigns are not subject to the Act's expenditure limits. Nor, as Professor Winter points out, is it easy to understand why, if it is thought constitutionally possible to regulate candidate expenditures in elections, it would not logically be possible to regulate the amount spent in issue campaigns:

If Congress can limit the television time purchased by a Senatorial candidate, it can also limit the time purchased by groups seeking passage of particular legislation by the Senate. TV campaigns on behalf of proposed legislation such as the McGovern-Hatfield amendment ought surely to be as susceptible to regulation as TV campaigns to reelect Senator McGovern or Senator Hatfield.⁴⁷⁰

The media limits, therefore, will not and constitutionally cannot prevent a variety of media activity that directly affects the outcomes of elections. In exchange for the infringement of candidates' free political speech, all we receive is a ramshackle regulatory structure which, on balance, does not in fact limit anything of consequence and probably leaves us worse off than before. Furthermore, the limit does not in any way remedy whatever financial deterrence to office-seeking presently exists because it does not provide a subsidy to non-wealthy candidates. To the extent that undue financial advantage and undue financial influence exist, the Act does not alleviate their impact, both because it pegs the limits substantially at current spending levels and because it leaves more than eighty percent of campaign expenditures uncontrolled. If spending is already so high that infringement of first amendment freedoms is justified, how can freezing spending at current levels be regarded as rationally directed at the abuse?

Finally, the enforcement mechanism included in the Act is essentially the same for House and Senate candidates as applied under preexisting law. The failure to create a strong, neutral agency, such as an independent federal elections commission with the power to compel missing finance data, to punish violations of the law, and to issue final

⁴⁶⁹See, e.g., U.S. NEWS AND WORLD REPORT, Jan. 3, 1972, at 1; *id.*, Jan. 17, 1972, at 1; *id.*, Feb. 14, 1972, at 1; *id.*, Feb. 28, 1972, at 1.

⁴⁷⁰Winter, *supra* note 377, at 60.

election certificates,⁴⁷¹ ensures that federal election laws will be as spasmodically enforced as heretofore.⁴⁷² This can only serve to encourage gradually increasing failure to conform to the requirements and a return to the pre-Campaign Act presumption that the provisions are not law that is to be obeyed.

Enforcement will continue to be politically selective, directed against the party out of power in the executive branch.⁴⁷³ The provision for enforcement *after* the election guarantees that violations of the law will have minimum impact on the election outcome. The fact of violation becomes known too late for the people to take it into account in voting, and the weight of victory is too heavy to be upset after the fact. Similarly, the failure to provide a really effective system for publishing full contributor lists and other relevant data before the election ensures that such information cannot be taken into account by the voters, which is the primary reason for disclosure requirements in the first place. Finally, an enforcement mechanism without the power to certify election victors has no leverage over those whom it is supposed to police. The power to certify the winner would give credibility to the power of its sanctions to produce the desired information and to prevent illegal behavior. Without such power, no threats of fines or imprisonment are likely to have any impact at all. And the fact that the enforcers under the Act are those whom the Act is supposed to police⁴⁷⁴ renders the likelihood of any coercive enforcement utterly laughable.

These are the congressional means that have been offered to achieve the socially desirable goal of diminishing undue financial advantage, undue financial influence, and financial deterrence to candidates in federal elections and that are supposed to justify direct regulation of the political speech of candidates. It is difficult to imagine any means that would have been less rationally related to those ends. If these means are compared to non-infringing alternative means which appear to be

⁴⁷¹This would not necessarily conflict with the final constitutional power of each House to judge the "Elections, Returns, and Qualifications of its own Members." U.S. CONST. art. I, § 5.

⁴⁷²Fewer than four dozen prosecutions for all kinds of corrupt practices violations have been reported. No candidate—winner or loser—has ever been prosecuted for violation of the spending limits. So far as can be determined, the only prosecutions of candidates have been for accepting political money from other federal employees. There have been only eighteen corporate prosecutions since 1907, fourteen of which took place in 1969 and 1970. Less than a dozen labor unions have been prosecuted since 1943.

⁴⁷³A REPORT BY THE LAWYERS' REVIEW COMMITTEE TO STUDY THE DEPARTMENT OF JUSTICE (1972).

⁴⁷⁴See text accompanying notes 472-73 *supra*.

likely to be effective in serving the social goal involved, their unconstitutionality becomes apparent.

Less Drastic and More Effective Means of Equalizing Political Opportunity. It was not intended that this article explore the constitutionality of alternatives to those adopted by the Campaign Act, but it is impossible to conclude this discussion of the Act without at least mentioning means which appear to be less drastic. They are offered here in a tentative, exploratory and hypothetical way for purposes of comparison with the present legislation. A thorough consideration of their constitutionality will be reserved for a subsequent analysis.

Because it does not entail restrictions on speech, a strategy of positive public subsidization—the establishment of floors rather than ceilings on expenditures—is infinitely preferable to a strategy of negative restraint. While there are obviously difficult equal protection problems in designing such a strategy, there are a variety of possible formulas for such support that appear feasible and constitutional and that, most importantly, appear to have no negative first amendment consequences.⁴⁷⁵ If the chief goal of campaign finance legislation is equality of access to the political arena, it can be more effectively served by establishing a floor under equal political opportunity than by imposing a ceiling on it. Constraining those who have funds or have been able to raise funds does not ease the plight of those without funds in the first place. Furthermore, even if one's main concern is slowing the increase in political costs, it may be more effective to rely on market forces to achieve that result than on active legal intervention. As Herbert Alexander observes, "To oppose limitations is not necessarily to argue that the sky's the limit [because in] any campaign there are saturation levels and a point where spending no longer pays off in votes per dollar."⁴⁷⁶

The dangers of undue financial influence and undue financial advantage are much more effectively addressed by reliance on stringent disclosure requirements for large contributions. Forty years ago, Louise Overacker observed that large campaign expenditures may have a negative impact on the electorate,⁴⁷⁷ and, more recently, a Twentieth Century Fund Study made the same point:

⁴⁷⁵Professor Rosenthal explicitly suggests subsidy alternatives as a less drastic means. A. ROSENTHAL, *supra* note 12, at 25. See also Barrow, *supra* note 293, at 533-42.

⁴⁷⁶H. ALEXANDER, *supra* note 7, at 234.

⁴⁷⁷L. OVERACKER, MONEY IN ELECTIONS 373 (1932).

If there were full public disclosure and publication of all campaign contributions and expenditures during a campaign, the voters themselves could better judge whether a candidate has spent too much. This policy would do more to protect the political system from unbridled spending than limits on the size of contributions and expenditures.⁴⁷⁸

In order for public disclosure so to operate, however, it must occur *before* the election. If, as suggested above,⁴⁷⁹ a federal elections commission were established, it could be endowed with the authority to issue—in exchange for cash paid—negotiable vouchers for all traceable political expenditures, such as at least those covered by the 1971 Act. The use of money to purchase political advertising could be made illegal, and the commission would have effective power to keep and publicly to issue a cumulative daily total of the amounts spent by candidates. In addition, if it were required that campaign contributions be paid only to the commission for credit to candidates' accounts, rather than directly to candidates or their committees, there would be a nearly foolproof means of obtaining full disclosure of contributions *before* the votes were cast. Such a voucher system would enable all political contributions and expenditures to be reported, whether authorized by a candidate or not, and whether designated for an organization opposing or favoring a candidate. As there would be no expenditure limitations involved, there would be a much smaller incentive to conceal the connection between candidates and "independent" committees.

The requirement that all political expenditures be paid for with federal commission vouchers would be inconvenient and might be regarded as a prior restraint on speech, so far as newspapers and television stations are concerned, but such prior restraint would be far less burdensome on speech than the restraint imposed by the current candidate-authorization requirement.

The existence of a strong, independent commission with such requirements would also facilitate the distribution of various forms of public subsidy to political candidates. Vouchers for the specific purposes recommended below could be much more easily and reliably distributed by a commission.

First, the tax incentives enacted in 1971⁴⁸⁰ could be increased. Providing for both a deduction, which benefits higher bracket taxpayers,

⁴⁷⁸TWENTIETH CENTURY FUND, ELECTING CONGRESS—THE FINANCIAL DILEMMA 18 (1970).

⁴⁷⁹See text accompanying notes 472-73 *supra*.

⁴⁸⁰See text accompanying notes 61-65 *supra*.

and a credit, which benefits all taxpayers, was a compromise that does not give as much incentive as is necessary to increase small political contributions.⁴⁸¹ Because the credit is a much more powerful incentive than the deduction, it should be the exclusive device, and it needs to be made available at two or three times the present minimum of twelve and a half dollars for individual taxpayers.

Secondly, non-frivolous⁴⁸² candidates for federal offices could be given free mailing privileges up to the amount available to incumbents beginning at an established date prior to primaries and general elections.

Thirdly, candidates for federal office could be given telephone, printing, office space, and staff travel allowances equivalent to those enjoyed by federal office incumbents.

Fourthly, the equal time provision of the Federal Communications Act⁴⁸³ could be repealed and replaced by an explicit requirement of access to broadcasting media for political candidates, scaled according to established eligibility criteria. In many multi-party or multi-candidate races, equal time for all means in reality no time for any.

Fifthly, a floor of publicly subsidized broadcast time could be made available to non-frivolous candidates. The Twentieth Century Fund recommendation for the creation of "Voter's Time" on prime time television is an excellent, workable proposal for Presidential elections.⁴⁸⁴ A similar plan for House and Senate candidates would be feasible and constitutional. It would certainly be within Congress' power to require stations to make a minimum amount of free prime broadcasting time available to federal candidates as a condition of their license. There are many other possible schemes for accomplishing the same ends, including the following: charging television stations a federal license fee, permitting the stations to deduct the fee on their tax returns, and using the funds produced by the fee to pay for free political time; requiring the stations to provide free time as a condition of the license, but permitting them to deduct the value on their tax return; public purchase of the

⁴⁸¹N.Y. Times, Nov. 5, 1972, at 52, col. 1.

⁴⁸²Serious candidates can be separated from frivolous ones by establishing subsidy qualification requirements in the nature of petition signatures of a certain percentage of eligible or registered voters. So long as the qualification threshold is not too high, from 5% to 10% for example, there would be no serious equal protection problem with these and following subsidies.

⁴⁸³47 U.S.C. § 315(a) (1971). The Senate version of the 1971 Act would have repealed this provision, but it lost out in conference. Professor Barrow makes a persuasive case for modification, rather than repeal, of section 315(a). Barrow, *supra* note 293, at 484.

⁴⁸⁴TWENTIETH CENTURY FUND, VOTERS' TIME 51-54 (1969).

broadcast time at full or reduced cost; or candidate purchase of the time at full or reduced cost, with a subsidy paid directly to the candidate. A less attractive alternative to some preestablished eligibility criteria might be the British practice of giving free time to candidates but requiring them to post bond for such time, which is forfeited if they fail to get one-eighth of the votes cast in the election. Such publicly subsidized broadcast time would enable unknown but serious candidates to prime their candidacy and would therefore serve much more effectively than the media expenditure limits to ease the deterrent effect of high political advertising costs. Most important, such subsidies do not seem to infringe the first amendment.

There are undoubtedly many other possible forms of subsidy that would directly address the goals of easing the dangers of deterrence, undue advantage, and undue influence. The important point is that, if properly designed, they would be both more effective and more likely to be immune from constitutional challenge.

Conclusion. Every major scholar and study of campaign financing has opposed contribution and expenditure limitations: Herbert Alexander,⁴⁸⁵ the President's Commission on Campaign Costs,⁴⁸⁶ the Committee for Economic Development,⁴⁸⁷ and the Twentieth Century Fund.⁴⁸⁸ They have regarded such limitations as being difficult to administer, incapable of dealing satisfactorily with the problems of supporters' rights, issue committees and anti-candidate committees, and inevitably discriminatory in favor of incumbents. Between 1965 and 1970, eight states repealed their laws limiting campaign expenditures⁴⁸⁹ and even Florida repealed its limit when it adopted its much heralded Dayton-Andrews Reporting Act of 1951.⁴⁹⁰ It is, therefore, difficult to avoid a similar prediction about the efficacy of the Federal Campaign Act. In addition, because of the serious, direct assault of media expenditure and contribution limits on first amendment freedoms, the questionable nature of the theory underlying the social interest these limits seek

⁴⁸⁵Hearings on S. 382 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 92d Cong., 1st Sess. 148 (1971).

⁴⁸⁶PRESIDENT'S COMM'N ON CAMPAIGN COSTS, *supra* note 6, at 17.

⁴⁸⁷COMMITTEE FOR ECONOMIC DEV., *supra* note 5, at 51-53.

⁴⁸⁸TWENTIETH CENTURY FUND, VOTERS' TIME 2-21 (1969); TWENTIETH CENTURY FUND, ELECTING CONGRESS—THE FINANCIAL DILEMMA 17-19, 44-45 (1970).

⁴⁸⁹H. ALEXANDER, *supra* note 7, at 159.

⁴⁹⁰Comment, *Loophole Legislation—State Campaign Finance Laws*, 115 U. PA. L. REV. 983, 998 (1967). See also Bicks & Friedman, *Regulation of Federal Election Finance: A Case of Misguided Morality*, 28 N.Y.U.L. REV. 975 (1953).

to achieve, and the faulty means chosen by Congress for its achievement, the unconstitutionality of the limitations seems inescapable.

Most dangerous of all is the power which the existence of expenditure limitations gives to the party in control of the Department of Justice. In a highly politicized Department such as that in the first Nixon administration,⁴⁹¹ the use of expenditure limitations to harass and intimidate the opposition by means of investigations, prosecutions, and press releases seems inevitable. It may very well be that such a Department would pursue such activities irrespective of the existence of the limitations, but it can hardly be denied that their availability provides another, and potentially most dangerous, weapon for utilization by single-mindedly political administrators. Perhaps that fact is the most persuasive reason of all for not permitting the government to have so powerful a control mechanism over the process by which it itself is selected.

POSTSCRIPT

As these words are written in the last moments of the 1972 campaign, the public outrage over campaign costs seems louder than ever. One cannot help wondering whether the Constitution is strong enough to protect the election process from invasion of the most fundamental of rights. Those who care about both political freedom and equal political opportunity must hasten to formulate some viable alternatives to the ill-advised 1971 legislation while its ineffectiveness is still uppermost in the public mind, and before its approach hardens into accepted dogma. Public confidence in our political institutions is at stake as never before.

Its primary choice process is far too important to the integrity of democracy to be put at the mercy either of unbridled selfish interests or of heavy-handed patchwork legislation that itself serves particular interests to the detriment of the public interest. A token is not enough, and an unconstitutional token is unseemly. Our democracy deserves better; if it is to survive this era of change and crisis, it must have better.

⁴⁹¹See A. REPORT BY THE LAWYERS' REVIEW COMMITTEE TO STUDY THE DEPARTMENT OF JUSTICE (1972).

