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THE FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974: THE CONSTITUTIONALITY OF LIMITING POLITICAL ADVERTISING BY THE NON-CANDIDATE

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I. INTRODUCTION

On January 1, 1975, the Federal Election Campaign Act Amendments of 1974 became fully effective.[1] This legislation was passed at a time when the events of Watergate were providing a new impetus toward reform of election campaigns and campaign financing.

The Amendments were proposed because of dissatisfaction with the Federal Election Campaign Act of 1971[2] and a perceived need for new and more comprehensive controls over campaign financing.[3] Congressional committees considering the bills received extensive testimony on a variety of methods for providing complete, comprehensive and enforceable controls over campaign financing.[4]

The Amendments finally enacted impose overall spending limitations on each candidate for a federal elected office.[5] They also provide that no individual citizen may contribute a total of more than $1,000 to a single candidate or make contributions totaling more than $25,000 during an election period.[6] The amount a candidate may contribute to his own campaign is also limited.[7] The Amendments restrict contributions from political committees, other than principal campaign committees, to no more than $5,000 per candidate.[8] Other

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1. Pub. L. No. 93-443, 88 Stat. 1263 (Oct. 15, 1974) [hereinafter cited as 1974 Amendments]. The act, officially titled the "Federal Election Campaign Act Amendments of 1974," was signed on October 15, 1974. The Amendments were considered in the U.S. House of Representatives on August 8, 1974, as H.R. 16090. 120 CONG. REC. H. 7892-7967 (daily ed. Aug. 8, 1974). The Amendments were considered in the U.S. Senate on April 11, 1974, as S. 3044, 120 CONG. REC. S. 5829-64 (daily ed. Apr. 11, 1974), and were passed as S. 3044 in the Senate on October 8, 1974 and in the House of Representatives on October 10, 1974. For the complete text of the law, see 1 U.S. CODE CONG. & AD. NEWS 1436 (1974).

2. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified in scattered sections of 2, 18, 42, 47 U.S.C.).

3. *See* S. REP. No. 689, 93d Cong., 2d Sess. 2-4 (Feb. 21, 1974) [hereinafter cited as SENATE REPORT]. *See also* 3 U.S. CODE CONG. & AD. NEWS, *supra* note 1, at 5618-95, for the Senate Conference Report.

4. *See, e.g.*, SENATE REPORT.

5. 1974 Amendments § 101(a) (18 U.S.C. § 608(c)(1)).

6. *Id.* § 101(a) (18 U.S.C. §§ 608(b)(1), (3)).

7. *Id.* § 101(b) (18 U.S.C. § 608(a)(1)).

8. *Id.* § 101(a) (18 U.S.C. § 608(b)(2)).

sections of the Amendments provide for public financing of candidates in a presidential primary[9] and a Federal Elections Commission for civil enforcement of the 1971 Act and the 1974 Amendments.[10]

The $1,000 contribution limitation, standing alone, could be easily circumvented by individuals making "independent" expenditures for advertisements supporting or attacking a candidate. In regard to this independent expenditures loophole, the Senate Rules Committee concluded:

> Whether campaigns are funded privately or publicly . . . controls are imperative if Congress is to enact meaningful limits on direct contributions. Otherwise, wealthy individuals limited to a $3,000 direct contribution [$1,000 as enacted] could also purchase one hundred thousand dollars' worth of advertisements for a favored candidate. Such a loophole would render direct contribution limits virtually meaningless.[11]

The 1971 Act attempted to close this loophole by forbidding the news media to charge for advertisements in support of a candidate unless the candidate approved the advertisements. Independent expenditures for candidate-approved advertising were treated as candidate expenditures and added to the amount the candidate had already spent.[12] This provision was held unconstitutional as a prior restraint on the freedom of the press.[13]

In the 1974 Amendments, Congress chose a different approach. Subsection 608(e) of amended Title 18 provides that a person may not make any expenditure advocating the election or defeat of a "clearly identified" candidate that, when cumulated with his expenditures relating to that candidate during that calendar year, exceeds $1,000.[14]

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9. *Id.* § 408 (INT. REV. CODE OF 1954, §§ 9031-42). This financing is on a 50% matching basis. To be eligible for funds the candidate must collect at least 20 contributions from as many different states and the total must exceed $5,000.

10. *Id.* § 310.

11. SENATE REPORT 18.

12. 47 U.S.C. § 803(b) (Supp. II, 1972).

13. ACLU v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973), *prob. juris. noted sub nom.* Staats v. ACLU, 417 U.S. 944, *order stayed,* 418 U.S. 910 (1974). The district court declared Title I, § 104(b) of the 1971 Federal Election Campaign Act facially unconstitutional. 366 F. Supp. at 1054. The court held that the Act "establishes impermissible prior restraints, discourages free and open discussion of matters of public concern and as such must be declared an unconstitutional means of effectuating legislative goals." *Id.* at 1051. The district court enjoined enforcement of the Act, but the court's order was stayed pending disposition of the case on appeal before the Supreme Court.

14. 1974 Amendment § 101(a) (18 U.S.C. § 608(e)) provides:

(1) No person may make any expenditure (other than an expenditure made by or on behalf of a candidate within the meaning of subsection (c)(2) (B)) [expendi-

Under subsection 608(e) independent expenditures will neither be controlled by the media nor counted toward the candidate's own expenditure limits; but individuals are only allowed an expenditure of $1,000 and a $1,000 direct contribution to the candidate. It may be, however, that independent expenditures will be considered direct contributions if such expenditures are actually made by direction of the candidate, rather than being truly independent in nature.

A "clearly identified candidate" means a candidate who is identified in the given presentation by name, photograph, or drawing, or a candidate whose identity is apparent by "unambiguous reference."[15] Neither political spending by a corporation's or labor union's discretionary fund nor spending as an authorized agent for a candidate or his committee is considered an expenditure for the purposes of subsection 608(e).[16] Rather, only personal, "independent" expenditures are subject to subsection 608(e)'s limitations.

Violation of subsection 608(e) invokes the criminal penalties of subsection 608(i),[17] which provides:

> (i) Any person who violates any provision of this section shall be fined not more than $25,000 or imprisoned not more than one year, or both.[18]

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tures by the candidate's authorized committe or agent] relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000.

(2) For purposes of paragraph (1)—

(A) "clearly identified" means—

(i) the candidate's name appears;

(ii) a photograph or drawing of the candidate appears; or

(iii) the identity of the candidate is apparent by unambiguous reference; and

(B) "expenditure" does not include any payment made or incurred by a corporation or a labor organization which, under the provisions of the last paragraph of section 610, would not constitute an expenditure by such corporation or labor organization.

15. 1974 Amendments § 101(a) (18 U.S.C. § 608(e)). The vagueness of the latter criterion for being a "clearly identified" candidate may be a viable basis for successful constitutional attack on subsection 608(e). *See* pp. 285-86 *infra.*

16. 1974 Amendments § 101(a) (18 U.S.C. § 608(a)). *See also* 18 U.S.C. § 610 (Supp. III, 1973).

17. 1974 Amendments § 101(a) (18 U.S.C. § 608(i)).

18. *Id.* If the mens rea element of willfulness is read into § 608(i), there would appear to be no sanction for "negligent," as opposed to reckless, knowing or purposeful, violation of the provision. Since criminal statutes historically are quite narrowly construed, § 608(e) may therefore have no effective criminal enforcement potential; violations would have to be egregious in nature for willfulness to be found.

Conversely, if § 608(e) is viewed as a "regulatory" provision, no mens rea element would be read into § 608(i). Thus, violating the technical requirements of § 608(e) would result in criminal liability—regardless of the violator's actual intent. Such strict criminal liability would certainly have a chilling effect upon speech by

In addition to this criminal penalty, the newly created Federal Elections Commission is given primary jurisdiction with respect to the civil enforcement of amended section 608.[19] The Commission is given the power to conduct investigations, subpoena witnesses, hold hearings, and initiate civil proceedings to enforce the Act.[20]

The Senate report concluded that subsection 608(e) would avoid the constitutional infirmities that were found in the 1971 Act and was "the best compromise of competing interests in free speech and effective campaign regulation."[21] In considering whether this congressional enactment can withstand an almost certain attack on its constitutionality, this article examines the tests that the courts may use and the competing governmental and individual interests involved.

II. Legislative History of Subsection 608(e)

The language of subsection 608(e) was derived from subsection 101(a) of H.R. 16090 and subsection 304(a) of S. 3044.[22] The texts of subsections 101(a) and 304(a) were substantially alike. The conference committee adopted the House provision in its entirety[23] and added the Senate bill's definition of expenditure, which excluded corporate and

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prospective "independent expenditure" speakers, compromising the constitutional integrity of § 608(e).

19. 1974 Amendments § 208(a) (2 U.S.C. § 437c).

20. *Id.* (2 U.S.C. §§ 437c, d).

21. Senate Report 19.

22. H.R. 16090, 93d Cong., 2d Sess. § 101(a) (1974) provided in part:

(e)(1) No person may make any expenditure (other than an expenditure made by or on behalf of a candidate under the provisions of subsection (c)) relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000.

S. 3044, 93d Cong., 2d Sess. § 304(a) (1974) provided in part:

(c)(1) No person may make any expenditure . . . advocating the election or defeat of a clearly identified candidate during a calendar year which, when added to all other expenditures made by that person during the year advocating the election or defeat of that candidate, exceeds $1,000.

(2) For purposes of paragraph (1)—

(A) "clearly identified" means—

(i) the candidate's name appears;

(ii) a photograph or drawing of the candidate appears; or

(iii) the identity of the candidate is apparent by unambiguous reference;

(B) "person" does not include the national or State committee of a political party; and

(C) "expenditure" does not include any payment made or incurred by a corporation or labor organization which, under the provisions of the last paragraph of section 610 would not constitute an expenditure by that corporation or labor organization.

23. *See* H.R. Conf. Rep. No. 1438, 93d Cong., 2d Sess. 56-57 (1974). *See also* 3 U.S. Cong. Code & Ad. News, *supra* note 1, at 5618 (Senate Conference Report).

labor organization payments which would not be expenditures under section 610.[24] The conference committee did not incorporate the Senate bill's definition of person, which excluded any national or state political party committee insofar as subsection 608(e) was concerned.

The House and Senate adopted different rationales regarding the bill's constitutionality. The House position was that when balanced against the governmental interest in improving the electoral process, a limited—but not absolute—ban of political speech was constitutionally permissible. The House report noted:

> The committee is mindful that an absolute proscription of independent campaign-related spending may well offend the guarantees of the First Amendment and would be poor public policy in inhibiting the free expression of views on vital issues. However, it is believed that a reasonable limitation on such spending, in the context of an overall effort to maintain the integrity of the electoral process, is feasible and Constitutionally permissible.[25]

The Senate report, on the other hand, advanced the argument that if contributions could be constitutionally limited to preserve the integrity of the electoral process, then independent expenditures could also be regulated. The report conceded that limiting individual expenditures poses more vivid first amendment issues than does limiting individual contributions to candidates. But the committee reasoned that it would exalt "constitutional form over substance" to preclude a huge contribution to a candidate and yet allow an individual to avoid such prohibition by placing the advertisement himself.[26] The Senate committee's rationale thus presumed the constitutionality of contribution limitations—a presumption that may or may not be warranted.

The Senate report emphasized that because subsection 608(e) did not impose prior restraints on the news media or require candidate approval before independent expenditures were made, subsection 608(e) avoided the constitutional infirmity found in the 1971 Act.[27] In considering first amendment pitfalls other than prior restraints, the Senate report conceded that "independent expenditures pose a difficult question," but pointed out that subsection 608(e) did not limit a citizen's ability to communicate his views unless the communication advocated

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24. Thus, expenditures for political speech from a corporation's or labor union's discretionary fund to which an employee contributed are not counted as "independent expenditures" by that employee.

25. H.R. REP. No. 1239, 93d Cong., 2d Sess. 6-7 (1974) [hereinafter cited as HOUSE REPORT].

26. SENATE REPORT 19.

27. *See* ACLU v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973).

a specific candidate.[28] The committee also emphasized that the $1,000 could be expended in any manner a citizen chose. Therefore, the committee reasoned, subsection 608(e) did not impose a total prohibition on speech.

III. Congressional Authority To Enact Campaign Expenditure Limits

Congressional authority to enact federal campaign expenditure limitations can be found in several distinct constitutional provisions.[29] Legislative power to regulate congressional elections is provided by article I, section 4 of the Constitution:

> SECTION 4. 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.

This legislative authority has been broadly defined. Speaking for the unanimous Court in *Smiley v. Holm*,[30] Chief Justice Hughes interpreted the article's "Times, Places and Manner" clause as

> comprehensive words [that] embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices,[31] counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.[32]

Article I, section 4 grants federal regulatory power over congressional elections only. Congressional authority to enact campaign reform

28. Senate Report 18.

29. Finding a specific constitutional provision supporting the congressional power to enact the Amendments may well be an unnecessary exercise. *Cf. Ex parte* Yarbrough, 110 U.S. 651, 666 (1884), where the Court said it was "a waste of time to seek for specific sources of the power to pass these laws," since the right to protect governmental elections was viewed as an inherent attribute of sovereignty. *See Ex parte* Siebold, 100 U.S. 371 (1879). *See also* Rosenthal, *Campaign Financing and the Constitution*, 9 Harv. J. Legis. 359, 362-63 & nn. (1972).

30. 285 U.S. 355 (1932).

31. "Corrupt practices" is a term of art encompassing far more activities than its literal reading might imply. *See generally* Federal Corrupt Practices Act of 1925, 43 Stat. 1070; United States v. International Union, UAW, 352 U.S. 567 (1957).

32. 285 U.S. at 366.

legislation under article I, section 4 does not extend to presidential elections. However, constitutional authority for such legislation can be derived from the "necessary and proper" clause of article I, section 8, paragraph 18.

The Supreme Court has taken an expansive view of the congressional power to regulate elections under the necessary and proper clause. In *Burroughs v. United States*[33] the Court stated:

> To say that Congress is without power to pass appropriate legislation to safeguard . . . 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.[34]

Burroughs involved an attack on a provision in the Federal Corrupt Practices Act of 1925 that required certain political committees to report their expenditures on the behalf of candidates.[35] It was strongly urged that Congress lacked the constitutional authority to enact such legislation. The Court, however, found such legislative power arising from the necessary and proper clause.[36] Although the actual holding of the *Burroughs* decision affirmed only the constitutionality of disclosure laws, the Court's recognition of the broad power of Congress to regulate elections through the necessary and proper clause would seem to affirm Congress' power to pass each of the 1974 Amendments.[37]

In addition to article I, section 4 and the necessary and proper clause, the commerce clause[38] may provide an independent basis for congressional authority to enact campaign reform legislation. In recent years, the courts have gone to remarkable lengths to find interstate commerce affected by particular activities.[39] Given the fact that elec-

33. 290 U.S. 534 (1934).

34. *Id.* at 545.

35. 43 Stat. 1071.

36. 290 U.S. at 545.

37. Interestingly, the *Burroughs* court did not view the legislative power arising under the necessary and proper clause as being derived from any constitutional provision to which the necessary and proper clause could logically refer. Rather, the legislative power apparently arose from the general mandate to secure "good government," and the electoral reform provision at issue was a necessary and proper effort to guarantee this general need. Note also that the necessary and proper clause could refer to article I, section 5 (enabling each house to be the judge of the elections of its own members), as well as article I, section 4, insofar as congressional elections are concerned.

38. U.S. CONST. art. I, § 8, provides: "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ."

39. *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971).

toral expenditures often involve interstate purchases, and therefore interstate commerce, the present sweeping purview of the commerce clause could provide the constitutional basis for enactment of the 1974 Amendments.

Finally, it may be argued that the fourteenth amendment provides another source for such congressional power. Assuming that massive political contributions and expenditures impair the political equality of the less affluent,[40] failure to rectify such imbalance could well be a denial of equal protection.[41]

The contention could be made that primaries, as opposed to general elections, are beyond the purview of congressional authority. In *Newberry v. United States*[42] the Court stated that primaries "are in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors."[43] Therefore the *Newberry* Court held that limitation of primary expenditures by senatorial aspirants was beyond the legislative power of Congress. *Newberry,* however, was effectively overruled in *United States v. Classic,*[44] which held that primaries were part of the electoral process referred to in article I, sections 2 and 4, and were therefore proper subjects of federal regulation. The thrust of the *Classic* Court's reasoning was that since Congress has the power to legislate as to elections, and primaries are part of that electoral process, then a fortiori congressional power to regulate primary activity exists. Thus, it is highly probable that future courts will hold primaries, as well as general election activities, to be within the realm of federal regulatory power.

IV. The Test for Determining the Constitutionality of Subsection 608(e)

In order to ascertain the constitutionality of subsection 608(e), it is necessary to analyze the specific first amendment interests involved. The first amendment has long been viewed as embodying that bundle of free speech rights vital to democratic self-government, free speech being "the matrix, the indispensable condition, of nearly every other form of freedom."[45] The Court stated in *Mills v. Alabama:*[46]

40. *See* Katzenbach v. Morgan, 384 U.S. 641 (1966). *But see* Oregon v. Mitchell, 400 U.S. 112 (1970) (it may be necessary to show that the poor, as a class, are discriminated against in terms of electoral power).

41. *See* Rosenthal, *supra* note 29, at 365.

42. 256 U.S. 232 (1921).

43. *Id.* at 250.

44. 313 U.S. 299 (1941).

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

46. 384 U.S. 214 (1966).

> 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 and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.[47]

It has been forcefully argued that in protecting the free discussion of political matters and in promoting decision making by an informed electorate

> the point of ultimate interest is not the words of the speakers, but the minds of the hearers. The final aim [of the first amendment] . . . is the voting of wise decisions. The voters, therefore, must be made as wise as possible. . . . They must know what they are voting about. And this, in turn, requires that so far as time allows, all facts and interests relevant to the problem . . . must be given in such a way that all the alternative lines of action can be wisely measured in relation to one another.[48]

The Supreme Court has apparently adopted this interpretation, which emphasizes the first amendment right to be informed about political matters.[49] In *New York Times Co. v. Sullivan,*[50] the Court's decision, requiring actual malice for actionable libel of public officials whose activities were of general public concern, clearly indicated that the listeners' right to know was of primary importance. Moreover, in *Red Lion Broadcasting Co. v. FCC* the Court validated the "fairness doctrine" and explicitly stated that "the right of the viewers and listeners, not the right of the broadcasters, . . . is paramount."[51] Finally, in *Mills v. Alabama* the Court emphatically concluded that "*no* test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election."[52] Again, the right of the listeners to information on matters of public concern was held paramount.[53]

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47. *Id.* at 218-19.

48. A. MEIKLEJOHN, POLITICAL FREEDOM 26 (1965).

49. *See generally* Redish, *Campaign Spending Laws and the First Amendment,* 46 N.Y.U.L. REV. 900, 909 (1971).

50. 376 U.S. 254 (1964).

51. 395 U.S. 367, 390 (1969).

52. 384 U.S. 214, 220 (1966) (emphasis added).

53. In *Mills* the Court found that the right of the hearers outweighed the state interest in forbidding election-day appeals to the voters. *Id.* at 220.

In sum, then, *Mills, Red Lion* and *New York Times* indicate that the Court perceives protection of listeners' rights to full information on matters of public concern as a primary purpose of the first amendment. Viewed from that perspective, the first amendment does not provide absolute protection of unlimited speechmaking. The first amendment should logically protect complete presentation of all opinions on a given issue, but should not protect deafening speech which blots out all other points of view.[54] The position that the first amendment right to free speech is not an absolute right, insofar as the speaker is concerned, has been adopted by the Court.[55] As a result, the Court has utilized two other distinct tests in analyzing first amendment claims.

The first methodology, the clear and present danger test, was originally propounded in *Schenck v. United States*.[56] Though subject to marginally differing formulations,[57] the test basically provides that speech may be constitutionally impaired only when it presents an imminent threat to fundamental governmental interests.

The nature of the clear and present danger test appears consonant with insuring the "preferred status" of the first amendment,[58] assuming that the right to free speech is viewed in terms of a speaker's right to say whatever he wishes in any and all contexts. However, the clear and present danger test is not consistent with the Court's present view of the first amendment's protections as being primarily oriented towards

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54. *See* Associated Press v. United States, 326 U.S. 1 (1945).

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> At the outset we reject the view that freedom of speech . . . as protected by the First and Fourteenth Amendments [is absolute], 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.

Konigsberg v. State Bar, 366 U.S. 36, 49 (1961) (footnote omitted). "[A]lthough the rights of free speech . . . are fundamental, they are not in their nature absolute." Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring). *See also* Adderly v. Florida, 385 U.S. 39 (1966).

56. 249 U.S. 47 (1919).

57.

> "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (footnote omitted). "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." Thomas v. Collins, 323 U.S. 516, 530 (1945). "[F]reedoms of speech . . . are susceptible of restriction only to prevent grave and imminent danger to interests which the State may lawfully protect." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943). *See* Comment, *Free Speech Implications of Campaign Expenditure Ceiling*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 214, 221 n.52 (1972).

58. *Cf.* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

guaranteeing full and fair information flow to listeners in a manner which promotes balanced and judicious analysis of issues. For example, the clear and present danger test would provide constitutional protection for speech that drowns out all other opinions—though the underlying policies of the first amendment would be thwarted by protecting such speech.

Because the test precludes consideration of any possible governmental interest in regulating speech, short of protection against civil disorders, the test is of little use in the area of election reform.[59] Where, as in subsection 608(e), the governmental and individual interests are both ostensibly oriented towards promoting a first amendment purpose, the clear and present danger test's automatic treatment of the governmental interest as being subservient to the individual's interest seems inappropriate at best. If the first amendment is to promote full and fair discussion and analysis of all issues of public concern, it must guarantee discussion from *all* points of view. Thus, the content of the speech should not be controlled, but the mechanics of making such speech may be regulated to maximize the benefits to the hearers.[60]

The second methodology used by the Court in analyzing first amendment claims has been an ad hoc balancing test. In applying this test, the Court balances the nature of the first amendment speech affected against the importance of the governmental regulation. It also considers the availability of less restrictive alternatives to the legislation at issue. It must be noted that the interest in speech enjoys a presumption of outweighing the governmental interest against which it is balanced.[61]

Professor Emerson has suggested that the test, as applied to measures designed to "purify" the political process, can be delineated in the following manner:

> [T]he burden of proof is on the proponents of the regulation to establish (a) that the control is clearly necessary to correct a grave abuse in the operation of the system and is narrowly limited to that

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59. When the political milieu is peaceful, all speech is protected, regardless of its ultimate effect of better informing or totally confusing the hearer electorate. However, in volatile situations, when full and diverse discussion of political matters may indeed be most necessary, the clear and present danger test operates to quash the minority's right to speak at all. Thus, when dissenting speech could be most effective the clear and present danger test allows silencing of speakers to maintain civil order. *See* MEIKLEJOHN, *supra* note 48, at 44.

60. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949) (loudspeaker noise ordinance upheld as constitutional). *But see* Saia v. New York, 334 U.S. 558 (1948).

61. *See, e.g.*, United States v. CIO, 335 U.S. 106, 140-45 (1948) (Rutledge, J., concurring).

> end, and that this objective cannot be achieved by other means; (b) *that the regulation does not limit the content* of expression; (c) *that the regulation operates equitably* and with no undue advantage to any group or point of view; (d) *that the control is in the nature of a regulation, not a prohibition,* and does not substantially impair the area of expression controlled; and (e) that the regulation can be specifically formulated in objective terms and is reasonably free of the possibility of administrative abuse.[62]

The ad hoc balancing test is not without its negative characteristics. Its predominant fault may well be that it allows the subjective values of the judge applying the test to influence the relative weights of each interest in the balance. Moreover, the subjective nature of the test could allow a judge to place on the scales his personal opinion as to the importance of the speech's content.

The balancing test may thus be "nothing more than a way of rationalizing preformed conclusions" in the mind of the judge applying the test.[63] While some aberrant decisions under a balancing test may later be reversed, in certain situations this relief comes too late.[64] The balancing test's very nature precludes it from being a "bright line" test—and the constitutionality of any proposed action or legislation necessarily becomes more difficult to predict. Given such relative unpredictability, there may be a slight chilling effect upon the desires of individuals and legislatures to test the outer parameters of the first amendment's protections.

Use of the ad hoc balancing test does, however, seem appropriate in situations where the conflicting governmental and individual interests are both ostensibly oriented towards promoting first amendment goals, as in the case of subsection 608(e).[65] In such delicate policy areas, a balancing test appears to be the most effective vehicle for taking into account all relevant factors, notwithstanding the test's in-

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62. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 634 (1970) (emphasis added).

63. *Id.* at 718.

64. For example, if an expenditure for a campaign advertisement is enjoined by a lower court, a successful appeal may come after the election.

65.

> When both interests converge [*i.e.*, both the governmental and individual interests are based on promoting the first amendment's purposes], the test really weighs the extent to which the regulation serves each first amendment interest. To be valid, therefore, the regulation must infringe to the least possible extent on the constitutional interest while being necessary to effect the governmental interest, even though both interests have a constitutional foundation.

Ferman, *Congressional Controls on Campaign Financing: An Expansion or Contraction of the First Amendment?*, 22 AM. U.L. REV. 1, 25 (1972) (footnote omitted).

herent dangers of subjective, as opposed to objectively reasoned, decision making. More precisely,

> a balancing analysis allows a weighing of the relative first amendment merits, as well as a consideration of the multiple dangers to a democratic political system resulting from unrestricted campaign expenditures. Moreover, traditional objections to balancing should be minimized here because spending restrictions affect primarily the amount rather than the content of speech.[66]

Additionally, the availability of less restrictive alternatives can be taken into account when using a balancing test. This aspect seems particularly significant in the area of election reform because there may be more than one way to correct an abuse.

Since, in all probability, future court rulings on the constitutionality of subsection 608(e) would adopt the ad hoc balancing test as the proper methodology for analysis of the issue, it is necessary now to evaluate the competing interests of the government, and of the individuals who wish to make independent expenditures beyond the $1,000 limit.

V. The Governmental Interests Embodied in Subsection 608(e)

The ultimate goal of the first amendment can be viewed as achieving a more perfect democratic self-government—achieving not merely wise decision making by the electorate, but also complete implementation of those decisions through the electoral process. Full and fair information flow to the electorate will theoretically guarantee that voters will make the wisest possible decisions. To have any impact on our process of government, however, these popular decisions must be translated into governmental action. The mechanism by which such decisions are implemented is the electoral process, and the greater the integrity of that process, the more effective the implementation of the electorate's decisions. The governmental interest in subsection 608(e) is to help promote the integrity of that electoral process.

Without the independent expenditure ceiling found in subsection 608(e), the integrity of the electoral process is compromised in a variety of ways. If campaign costs remain astronomically high, able candidates with relatively limited resources will be lost to the system.[67]

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66. Comment, *Free Speech Implications of Campaign Expenditure Ceilings*, 7 Harv. Civ. Rights-Civ. Lib. L. Rev. 214, 224 (1972).

67. Candidates who have been forced to withdraw from political races due to lack of funds include Eugene Nickerson, who withdrew from the 1969 New York gubernatorial race, and Senator Fred Harris, who withdrew from the presidential primaries in 1971.

Unlimited spending could cause our political system to be closed to all but wealthy or well-financed candidates. This result, forced by hard economic realities, is contrary to our basic precept of equality of opportunity to participate in the electoral process—the precept that ours is an open political system in which every segment of the electorate may be represented. Malfeasance by wealthy office holders is certainly not presumed. However, as John Stuart Mill observed:

> We need not suppose that when power resides in an exclusive class, that the class will knowingly and deliberately sacrifice the other classes to themselves; it suffices that, *in the absence of its natural defenders, the interest of the excluded is always in danger of being overlooked,* and, when looked at, is seen with very different eyes from those of the persons whom it directly concerns.[68]

When legislating to open the political system, it is quite arguable that Congress should have the same power to eliminate de facto wealth barriers as it would to eliminate de jure wealth discrimination.[69]

A second governmental interest is insuring the integrity of governmental officials after their election. Even if a candidate is able to solicit the required funds to participate in the political process, the obligations that such a candidate feels to those who financed his campaign may limit his ability to represent all of his constituents. Favoritism to special interest groups is clearly contrary to the "representative concept of equal access to governmental decision-makers."[70] The equality of the voting rights of each citizen is severely compromised if the positions of wealthy contributors become "more equal" than those of other constituents in the eyes of politicians. The net result of a system that allows the wealthy to exert disproportionate influence on elected officials is decreased confidence in the democratic system, which undermines the legitimacy of representative government itself.[71] If the permissible amount of an individual campaign contribution is lowered and enforced, candidates will have to have a broad base of financing rather than a narrow base composed of a few wealthy individuals or special interest groups.

A third justification for the limit on individual expenditures is that it helps to promote campaigns that focus more on issues and less on voter recognition of a candidate's name. Subsection 608(e) does

68. J. S. MILL, *That the Ideally Best Form of Government Is Representative Government* in CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 44-45 (C. Shields ed. 1958) (emphasis added).

69. *Cf.* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

70. Comment, *supra* note 66, at 217.

71. *Cf.* Kramer v. Union Free School Dist., 395 U.S. 621, 626 (1969).

operate as a restraint on the absolute quantity of expenditures for speech by a given individual. However, a universal limitation on the maximum amount of independent expenditures prevents an individual from flooding the media with speech supporting his position or a particular candidate. Thus, candidates[72] and their supporters are prevented from "destroying, by sheer volume rather than by reason, the effectiveness of informational advertising presented by opposing candidates" and their supporters.[73] This attempt by subsection 608(e) to guarantee both fair and balanced presentation of all sides of issues could well lead to more effective electoral decision making, an underlying purpose of the first amendment.

Finally, the limitation of independent expenditures by subsection 608(e) is vital to insure the overall efficacy of the 1974 Amendments. If subsection 608(e) were not present, candidates and their supporters could evade the limitations on candidates' expenditures and supporters' contributions through the guise of "independent" expenditures on candidates' behalf. Striking down subsection 608(e) as unconstitutional would thus severely compromise the entire effort towards substantive electoral reform.[74] The fact that the Senate and House com-

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72. *See* 1974 Amendments § 101(a) (18 U.S.C. 608(c)(1)) as to expenditure limitations upon the candidates themselves.

73. Comment, *supra* note 66, at 228. *See also* Associated Press v. United States, 326 U.S. 1, 20 (1945).

74. The report of the Senate committee contained this section in reference to independent expenditures:

> The bill retains the limits on independent expenditures already adopted by the Senate in S. 372. The Committee finds these limits are both necessary and constitutional. "Independent expenditures" refer to sums expended on behalf of a candidate without his authorization, as distinct from contributions of money, goods or services put at the disposal of his campaign organization.
>
> For example, a person might purchase billboard advertisements endorsing a candidate. If he does so completely on his own, and not at the request or suggestion of the candidate or his agent's [*sic*] that would constitute an "independent expenditure on behalf of a candidate" under section 614(c) of the bill. The person making the expenditure would have to report it as such.
>
> However, if the advertisement was placed in cooperation with the candidate's campaign organization, then the amount would constitute a gift by the supporter and an expenditure by the candidate—just as if there had been a direct contribution enabling the candidate to place the advertisement, himself. It would be so reported by both.
>
> While independent expenditures pose a difficult question, it should be emphasized that *the need to control them does not arise from public financing.* Whether campaigns are funded privately or publicly such controls are imperative if Congress is to enact meaningful limits on direct contributions. Otherwise, wealthy individuals limited to a $3,000 direct contribution could also purchase one hundred thousand dollars' worth of advertisements for a favored candidate. Such a loophole would render direct contribution limits virtually meaningless.
>
> Admittedly, expenditures made directly by an individual to urge support of a

candidate pose First Amendment issues more vividly than do financial contributions to a campaign fund. Nevertheless, to prohibit a $60,000 direct contribution to be used for a TV spot commercial but then to permit the would-be contributor to purchase the time himself, and place a commercial endorsing the candidate, would exalt constitutional form over substance. Your Committee does not believe the First Amendment requires such a wooden construction.

If Congress may, consistent with the First Amendment, limit contributions to preserve the integrity of the electoral process, then it also can constitutionally limit independent expenditures in order to make the contribution limits effective.

At the same time, the bill avoids some of the constitutional issues in this area encountered by previous legislation. The 1971 Federal Election Campaign Act deals with such independent efforts by requiring candidate approval before the media may accept advertisements from any source which promote his candidacy. See *ACLU v. Jennings,* CA. No. 1967-72 (Three-judge court, D.C. Dist. Col.) In contrast, the Committee bill does not require this candidate "sign off." Nor does it include unauthorized expenditures in the total spending limit imposed on the candidate.

Limiting the amount of independent expenditure someone may make in support of a candidate, *but not counting* such amounts for purposes of the overall spending limit of the candidate, is the best compromise of competing interests in free speech and effective campaign regulation.

It controls undue influence by a group or individual. Yet it avoids the dilemma of either giving candidates a veto over such independent expression or subjecting the candidate to the independent decisions of his supporters, even if he prefers using his permitted expenditure in other ways.

Thus, the bill preserves to everyone some right of political expression, which they can undertake *regardless* of whether the candidate has already used up his permitted expenditures *and regardless* of whether the expression they wish to make on the candidate's behalf "fits in" with his campaign plan.

Finally, your Committee has been careful to preserve inviolate every citizen's ability to communicate to anyone his views on political issues. Expenditures made by a person or group to communicate such views, if the communication does not advocate specific candidates, count neither as direct contributions, nor as independent expenditures on behalf of a candidate.

SENATE REPORT 18-19.

The House committe report contained this summary:

As noted, the bill places strict limitations on contributions to, and expenditures by, candidates for Federal office and their campaign organizations. The committee recognizes that, if these limitations are to be meaningful, campaign-related spending by individuals and groups independent of a candidate must be limited as well.

Persons acting independently have in the past publicized support of, or opposition to, particular candidates by means of general media exposure, the publication of "honor rolls" relative to legislative issues, and the like. If these costs are incurred without the request or consent of a candidate or his agent, they would not be properly chargeable to that candidate's spending limits. A contrary result would accord a candidate's supporters undue influence over the direction of the campaign or, conversely, invite Constitutional "prior restraint" problems in requiring the candidate's advance approval of independent spending in his behalf. While independent expenditures may occur quite apart from the official campaign effort, they can and often do have a substantial impact on the outcome. Absent a limitation on this activity, well-heeled groups and individuals could spend substantial sums and thus severely compromise the limitations on spending by the supported candidate himself.

The committee is mindful that an absolute proscription of independent cam-

mittees both considered and evaluated the first amendment implications of subsection 608(e) and concluded the subsection was essential provides a strong argument that there is no effective alternative.[75]

VI. The Individual's Interests in Political Advertising Vitiated by Subsection 608(e)

Insofar as individual first amendment interests are concerned, there are a variety of rationales available to attack the constitutionality of subsection 608(e). On its face, the provision greatly curtails the individual's ability to speak as much, or as often, as his finances will allow. If subsection 608(e) thereby precludes effective speech, the provision may operate as a prohibition rather than a regulation. Furthermore, the provision may indirectly restrict the content of speech. If an individual can only spend $1,000 on speech supporting or attacking a candidate, then some listeners are deprived of the content of speech that would have been allowed had subsection 608(e) not existed. If under the balancing test the content of speech cannot be abridged and controls must be in the nature of a regulation rather than a prohibition, subsection 608(e) is arguably unconstitutional.[76] Whatever constitutional rationale is applied, the threat to first amendment values is the same: because the spending ceiling per speaker may reduce the overall flow of political speech, there is a restriction upon the listener's

paign-related spending may well offend the guarantees of the First Amendment and would be poor public policy in inhibiting the free expression of views on vital issues. However, it is believed that a reasonable limitation on such spending, in the context of an overall effort to maintain the integrity of the electoral process, is feasible and Constitutionally permissible.

Accordingly, the bill would permit independent expenditures advocating the election or defeat of a "clearly identified candidate" of up to an aggregate of $1,000 in any calendar year. The candidate would be so identified by name, likeness, or other unambiguous reference. In the case of advertisements referring to more than one candidate, costs would be allocated for purposes of the limitation. Of course, expenditures for the communication of views not advocating the election or defeat of a candidate would be counted neither as independent expenditures nor as direct contributions to any candidate. Nor would any communication by a nonpolitical membership organization or corporation to its members or stockholders, and any news story, commentary or editorial distributed through the facilities of all media outlets other than those controlled by a political organization or candidate be counted as an "independent expenditure" or as a political expenditure, generally, since these activities are exempted from the definition of "expenditure" in the bill.

The committee is convinced that this approach makes possible the adequate presentation of candidate-related views by independent groups and at the same time safeguards the integrity of the candidate spending limits. In this way, the bill effectively reconciles the interests of Congress in promoting both free speech and the effective regulation of Federal election campaigns.

HOUSE REPORT 6-7.

75. *See* note 74 *supra*.

76. *See* text accompanying note 62 *supra* (Emerson formulation of the balancing test).

right to the fullest possible amount of political information with which to make informed decisions.

It is also significant that the first amendment protects the emotive and cognitive aspects of expression;[77] besides the actual message conveyed, the manner in which the message is presented may be a crucial element of the speech. In the case of many independent expenditures, the speech's emotive element includes the size and expense of the political expenditure. A huge expenditure on the behalf of a candidate shows the obvious high regard in which that candidate is held by the speaker—and is therefore a strong expression of support in itself. Thus, limiting the size of independent expenditures on speech would restrict the emotive content of a large independent expenditure. Furthermore, allowing only small advertisements may deter a speaker from making his independent expenditure at all. For instance, an individual precluded from purchasing a full-page advertisement in a local newspaper may decide that a smaller advertisement would have too little emotive impact to justify any expenditure whatsoever. Thus, a limitation of independent expenditures, while not abridging the cognitive element of a given expression, may possibly curtail its emotive aspects and thereby eviscerate its content. In this context, the independent expenditure limitation may violate the first amendment's absolute protection of the content of speech.[78]

Moreover, the $1,000 expenditure ceiling imposed by subsection 608(e) may inherently curtail the widespread dissemination of speech by foreclosing use of the mass media.[79] If the only way effectively to communicate one's views to the electorate is by use of the mass media, and the minimum cost of such advertising exceeds $1,000, one is prohibited from making effective speech. This would be a very real possibility in a large metropolitan area where television time or newspaper space is expensive. In such an area, even a speaker who wishes to

77. *See, e.g.*, Cohen v. California, 403 U.S. 15, 25-26 (1971); Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503, 514 (1969). *See generally* Ferman, *supra* note 65.

78. *See* text accompanying note 76 *supra*.

79. While it is possible that several individuals could pool their funds and gain a higher expenditure limit enabling them to procure mass media time, such attempts could result in the pool being treated as a political committee under § 301(d) of the Federal Election Campaign Act of 1971. The pool "committee" would be subject to the Act's multifarious disclosure requirements, but apparently would not be subject to any expenditure limitations save those implied by § 608(e) ($1,000 times the number of "committee" members). While formation of such a committee might enable the individual speaker to gain access to mass media time, he might be required to defer to the will of the majority of the "committee's" members as to the content of speech to be made. Hence, the individual's ability to gain access to the mass media and speak as he desires could still be foreclosed.

address only a portion of the city will have to pay media rates that reflect the total audience, an audience that includes voters he is not concerned about. Restricting access to the only effective medium for speech may violate the first amendment, for the listeners will be denied the relevant information necessary for fully informed decision making.[80]

Another significant factor concerning the mass media must be noted. Limiting independent political advertising may increase the reliance of listeners on the mass media for information regarding candidates. The power of the small, non-elected group of media executives to affect indirectly the decisions of the electorate is thereby increased.[81]

Subsection 608(e) is also open to attack on the ground that it gives undue advantage to particular groups. While subsection 608(e) is, on its face, non-discriminatory, political realities cause its practical effect to be clearly inequitable and therefore quite possibly unconstitutional.[82] It is important to note that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike."[83]

An incumbent has obvious name recognition advantages, as would a person well known for extrapolitical activities.[84] Moreover, the incumbent has various perquisites of office, such as the frank, that give him additional advantages over an unknown challenger. To surmount such advantages, a challenger will probably need more advertising than an incumbent. Limiting expenditures of candidates and individuals means that an increased number of individuals will have to make independent expenditures to produce a given volume of advertising. This effect will impose a much greater burden on challengers than on incumbents or other well known persons. Subsection 608(e) thereby discriminates against unknown challengers, and operates in favor of incumbents and other publicly known figures.

Subsection 608(e) also operates to the disadvantage of minor party candidates. Major parties have established organizational and name recognition advantages that, in large part, can only be neutralized by greater initial publicity expenditures on the behalf of minor party candidates. However, independent expenditures supporting minor

80. *Cf.* Gregory v. Chicago, 394 U.S. 111 (1969), where the Court found that being barred from demonstrating in the geographical area where speech would have been most effective violated the first amendment.

81. In a recent case the Court declared unconstitutional Florida's right to reply statute, which required a newspaper to provide equal space to candidates attacked by the newspaper. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

82. *See* text accompanying note 62 *supra.*

83. Jenness v. Fortson, 403 U.S. 431, 444 (1971).

84. Examples of candidates well-known for extrapolitical activities include John Glenn and Ronald Reagan.

party candidates are subject to the same dollar limitations as those supporting major party candidates. Minor parties may thereby be precluded from making expenditures necessary to make their candidates politically effective. Thus, the disadvantaged political situation of minor party candidates is solidified and insured by subsection 608(e). If minor parties are viewed as necessary to guarantee the diversity of viewpoints conducive to better informed decision making by the electorate, then subsection 608(e)'s practical discrimination against minor party candidates contravenes the first amendment.[85]

Though minor party candidates generally are discriminated against by the operation of subsection 608(e), the subsections' "unambiguous reference" clause[86] may impose special burdens on the candidates of "one-man" political parties, such as George Wallace's American Independent Party. The $1,000 ceiling on independent expenditures clearly would not apply to spending on the behalf of a multi-candidate, major party. Therefore huge independent expenditures promoting a major party (as opposed to expenditures promoting individual candidates of that party) could be made.

However, in the case of "one-man" parties, a party-oriented political advertisement could be viewed as promoting a "clearly identified" candidate. If the party was effectively identified with one person, an advertisement for that party might well be an advertisement "unambiguously referring" to that sole important candidate. Such a construction would mean that expenditures promoting such minor political organizations would be subject to subsection 608(e)'s $1,000 limitation, while expenditures promoting major parties could be unlimited. Thus, a major party's candidates could indirectly benefit from massive "independent" expenditures promoting only the party, while the benefits of massive independent party expenditures would be denied the candidate of a one-man party.

The same discriminatory result might well occur with one-issue candidates. A speaker could make unlimited independent expenditures calling for support of all candidates taking a certain position on a given issue, thus indirectly benefitting all such candidates. However, if support were advocated for all candidates taking a particular stance on an issue, and one candidate were particularly identified with that position, then the speaker would arguably be subject to subsection 608(e)'s limitation. Thus, a multi-issue candidate could be placed at an ad-

85. *Cf.* Williams v. Rhodes, 393 U.S. 23 (1968), where the Court struck down affirmative burdens placed on minor, but not major, parties. *But cf.* Jenness v. Fortson, 403 U.S. 431, 444 (1971), upholding differing requirements that created approximately equal burdens for both major and minor parties.

86. *See* note 15 and accompanying text *supra.*

vantage over a one-issue candidate, for he could indirectly benefit from massive "independent" expenditures made on the behalf of his various positions, while a one-issue candidate could not.

One must also note the chilling effect of subsection 608(e). Because the "unambiguous reference" clause is subject to the interpretations discussed above, speakers who have previously expended $1,000 on behalf of a minor party candidate or one-issue candidate risk criminal liability if they make additional expenditures in support of that party or issue. The vagueness of subsection 608(e)'s definitions may thus deter political speech and produce indirect censorship of its content. Promulgation of subsequent regulations under subsection 608(e) may not mitigate the provision's constitutional infirmity.[87] Whether the difficulties inherent in subsection 608(e) are viewed in terms of discriminatory effect, or in terms of vagueness and overbreadth leading to a chilling effect upon the exercise of first amendment rights, the net result is that subsection 608(e) is arguably unconstitutional.

Finally, the actual efficacy of expenditure limitations must be considered in balancing their worth against the infringement of individual first amendment rights. It has been persuasively argued that the amount of money spent in elections does not determine the winner unless the race is extremely close, and that the amount of campaign funds raised is more the result of contributors' expectations that a candidate is likely to succeed than a cause of electoral victory.[88] The trend towards repeal of state legislation limiting campaign expenditures[89] may reflect a judgment that, because expenditure limitations attach to a result rather than a cause of political success, limitation of campaign expenditures does *not* lead to increased equalization of political opportunity.

Additionally, "the most important effect of money in a political campaign is not that the candidate with the most money will win, but that the candidate with the lesser amount of money will not be able to present his case to undecided voters."[90] Expenditure limitations arguably tend to inhibit the challenger who, to start his campaign rolling,

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87. In ACLU v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973), the court, in declaring the statute and regulations promulgated pursuant to it unconstitutional, compared the restrictions to a license. It noted: " '. . . a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license without *narrow, objective, and definite standards* to guide the licensing authority, is unconstitutional.' " *Id.* at 1052, *quoting* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1967) (emphasis added).

88. *See* Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51 N.C.L. REV. 389, 460-62 (1973).

89. *See* H. ALEXANDER, MONEY IN POLITICS 190 (1972).

90. Lobel, *Federal Control of Campaign Contributions*, 51 MINN. L. REV. 1, 3 (1966).

needs relatively greater expenditures than incumbents or other well-known figures. Once an individual has become a viable candidate, expenditure limitations have little further effect upon the election's results. Thus, spending limitations, while possibly impairing first amendment rights of the listeners composing the electorate, arguably will not lead to increased equality of political opportunity and improved integrity of the electoral process. Rather, by curtailing the initial name recognition and identification efforts of challengers, and by imposing special burdens on minor party candidates, subsection 608(e) tends to protect incumbents and major party candidates.

Apart from the questionable effectiveness of subsection 608(e) in contributing to increased equalization of political opportunity, there may be less restrictive alternatives than limiting speech expenditures—alternatives that would be of equal if not greater utility in opening the political system. Alternative methods of equalizing political opportunity, such as providing free broadcast time or mailing privileges for all candidates, would obviate the need to limit expenditures on speech and thus avoid invasion of areas protected by the first amendment. These alternatives would promote the full and fair dissemination of information, resulting in a better informed electorate, and would also provide greater opportunities for challengers to enter the political arena. In terms of their effect on first amendment rights, these alternatives would seem preferable to the provisions of subsection 608(e).[91]

VII. Conclusion

It is difficult to predict how courts will resolve the question of subsection 608(e)'s constitutionality, for the issue will necessarily rest on subjective weighing of the various interests involved. However, the Supreme Court has apparently indicated disapproval of absolute bans on expenditures by corporations and labor unions. Two Supreme Court decisions have involved section 304 of the Taft-Hartley Act, which makes it unlawful for any corporation or labor union "to make a contribution or expenditure in connection with any election for Federal office," or "in connection with any primary election or political convention or caucus held to select candidates" for such office.[92]

In both cases, the Court assiduously avoided reaching the first amendment issue. In *United States v. CIO*,[93] the Court construed the section so as not to bar publication of the particular campaign article

91. *See* Ferman, *supra* note 65, at 22.
92. *But see* 1974 Amendments § 103 (18 U.S.C. § 611).
93. 335 U.S. 106 (1948).

involved, and in *United States v. International Union, UAW*,[94] the Court held that consideration of the first amendment issue was to be "delayed" until a full trial record was available.[95] Though the Court did not reach the first amendment issue in either case, in *United States v. CIO* the Court's remarkably narrow interpretation of the statute had the practical effect of rendering the provision impotent. Moreover, the dissent of Justice Douglas, in *United States v. International Union, UAW*,[96] vehemently attacked section 304 as not "narrowly drawn" and as "abolishing First Amendment rights on a wholesale basis."[97] Justice Douglas further characterized the provision as a "broadside assault on the freedom of political expression guaranteed by the First Amendment."[98]

It should be noted, however, that a distinction could conceivably be drawn by a court between absolutely barring independent expenditures and subsection 608(e)'s $1,000 limitation. Independent expenditure limitations could be viewed as constitutional if, but only if, the level of permissible spending allows the presentation of an adequate volume of contrasting ideas. The spending ceiling would then theoretically curtail only superfluous rather than meaningful speech, with the former being viewed as undeserving of constitutional protection.[99] Assuming that the $1,000 independent expenditure limitation actually operated to bar only superfluous speech, the individual listeners' first amendment rights would not be severely vitiated, and hence would not outweigh the governmental interest. However, the line between superfluous and meaningful speech is difficult, if not impossible, to draw.

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94. 352 U.S. 567 (1957).

95. The Court did find that labor union expenditures in favor of congressional candidates were within the purview of the Act. However, the Court made it clear that the decision was based solely on statutory construction. The Court indicated determination of the statute's constitutionality would only be necessary if a conviction resulted on remand. *Id.* at 589-92.

96. 352 U.S. 567 (1957) (Warren, C.J., Douglas & Black, dissenting).

97. *Id.* at 597. However, Justice Douglas did concede that "[i]f Congress is of the opinion that large contributions by labor unions have had an undue influence upon the conduct of elections, it can prohibit such contributions." *Id.* at 598 n.2. Justice Douglas also indicated prospective deference to congressional enactment of disclosure requirements, stating, "[I]n expressing their views on the issues and candidates, labor unions can be required to acknowledge their authorship and support of those expressions." *Id.* Nevertheless, Justice Douglas expressly refused to extend his judicial approval to expenditure limitations. He stated, "Undue influence . . . cannot constitutionally form the basis for making it unlawful for any segment of our society to express its views on the issues of a political campaign." *Id.*

98. *Id.* at 598.

99. "Superfluous speech" is defined as speech whose informational content has a marginal utility approaching zero, insofar as the listeners are concerned. *See* Comment, *supra* note 66, at 228 n.83.

What may be vapid repetition to one hearer may be another's first introduction to the particular thought expressed.

It may also be contended that present political advertising is a combination of purely factual and image-oriented promotion, and that image promotion advertisements, or "visuals," are inherently superfluous speech. But even if it is assumed that image promotion advertisements are superfluous speech, there is no evidence to indicate that the proportion of factual or informational content in political advertisements will increase due to expenditure limitations. Hence, what is excluded in fact by section 608(e) may be factual information rather than the arguably less important image promotion.

Finally, underlying any "superfluous speech" argument in support of the constitutionality of subsection 608(e) is the premise that the government has the right to determine what speech is "relevant" or "meaningful." Such a premise is fundamentally at odds with the judgment inherent in the first amendment that the populace should be allowed the fullest amount of information possible in order to engage in wise decision making. The people should decide what is superfluous or irrelevant; the government should not be permitted to select the information upon which popular decisions are based.[100]

Judicial determination of the constitutionality of subsection 608(e) will necessarily depend on the subjective balancing of many of the factors discussed in this article.[101] However, it is this author's opinion that subsection 608(e) is unconstitutional. This conclusion is based predominantly upon a personal conclusion that the $1,000 figure chosen by Congress is too small, in many instances, to permit effective speech—and this outweighs the governmental interests supporting the constitutionality of subsection 608(e).

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

101. *See* Redish, *Campaign Spending Laws and the First Amendment,* 46 N.Y.U.L. REV. 900, 921 (1971):

> [I]t is quite possible that the courts will conclude that the interest in removing the electoral process from the hold of the financial elite more than justifies what might be considered . . . a comparatively limited and neutral inhibition upon the free expression of information and opinion.

But see Deras v. Meyers, 43 U.S.L.W. 2495 (Ore. May 14, 1975). The *Deras* court held the state had not demonstrated governmental interests in campaign spending limitations sufficient to outweigh individual interests in unfettered communications. The decision was available only in summary form at the time this article went to press. It is unclear from the summary how significant the decision will be.