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Campaign Finance Reform: Still Searching Today for a Better Way

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CAMPAIGN FINANCE REFORM: STILL SEARCHING TODAY FOR A BETTER WAY

Joel M. Gora[*]

INTRODUCTION

I first encountered campaign finance reform as a young ACLU lawyer twenty-five years ago, in 1972. Three old-time dissenters came to the ACLU offices in New York with an incredible story. In May of that year the group had run a two-page advertisement in the *New York Times* advocating the impeachment of President Richard Nixon for the bombing of Cambodia and praising those few hardy—and clearly identified—Members of Congress who had sponsored an Impeachment Resolution.[1] The advertisement was turgid, wordy, legalistic and not very slick, but it embodied the essence of what the First Amendment stands for: the right of citizens to express their opinion about the conduct of their government, free from fear of sanctions or reprisals from that government. Nonetheless, before the ink on the advertisement was barely dry, the federal government had hauled the group into federal court.

How, we wondered, could this be possible? We were especially mystified since this was a time, the Spring of 1972, when *New York Times Company v. Sullivan* was protecting the most vigorous citizen criticism of government officials against libel suits,[2]

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[1] *See* United States v. National Comm. for Impeachment, 469 F.2d 1135, 1143-47 (2d Cir. 1972).

[2] 376 U.S. 254 (1964).

Brandenburg v. Ohio was protecting advocacy of violent revolution against criminal punishment[3] and, just the year before, The Pentagon Papers case was protecting the press against prior restraint on political speech.[4] What, in the face of these speech-protective rulings, could justify Congress to pass a law that was only slightly better than the Alien and Sedition Acts[5] in terms of stifling citizen criticism of government?

I. CAMPAIGN FINANCE REFORM: THE FLAWED WAY

We quickly learned the answer: the campaign finance "reforms" that had just gone into effect one month earlier in April 1972, a month before the advertisement appeared. Before the ink could dry on the new Federal Election Campaigns Act ("FECA") of 1971,[6] the Justice Department—Richard Nixon's Justice Department—used the provisions of that new campaign reform law to haul the little group into federal court.[7] The government claimed that the expenditure of funds on the advertisement was for the purpose of influencing the outcome of the elections, thus rendering these individuals a political committee. The government threatened them with injunctions against further speech unless they complied with the law, filed reports with the government and disclosed their contributors and supporters.[8] All of this was for simply sponsoring an advertisement publicly criticizing the President of the United States on a crucial issue of the day. We received an early wake-up call to the severe dangers that campaign reform laws could pose to political freedom and citizen issue advocacy, as well as some of the ferocious First Amendment problems these laws could raise.

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[3] 395 U.S. 444 (1969).

[4] New York Times Co. v. United States, 403 U.S. 713 (1971).

[5] 1 Stat. 596 (1798) (repealed 1801) (making it a crime to write, print, utter or publish any false, scandalous and malicious writing against the United States government).

[6] Federal Election Campaigns Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431-455 (1971)).

[7] *See* United States v. National Comm. for Impeachment, 469 F.2d 1135 (1972).

[8] *See id.* at 1137.

We also received an example of how cumbersome and contorted campaign funding restrictions could be. The 1971 law not only was used to regulate the ad hoc protestors as a partisan enterprise,[9] but also required the group to provide certification[10] to the *New York Times* that the money spent on the advertisement—which would be deemed in support of George McGovern, Nixon's Democratic opponent—would not cause McGovern to exceed the media expenditure limits that the new 1971 Act had put on federal presidential candidates.[11] Without McGovern's certification, which he would never give because the costs of the advertisement would diminish his own allowable media expenditures, it was a criminal offense for the *Times* to charge for the group's advertisement. Since the *Times* does not let people advertise in its pages free of charge, this meant that it would not be run at all. This was a neat little prior restraint. And all of this was the result of sponsoring an advertisement in a newspaper, on a vital political issue of the day, in a way that the government claimed was for the purpose of influencing the outcome of the election of President Nixon, who had been criticized, and of the several Members of Congress who had been praised.

Because of this interpretation, the ACLU had to file its own lawsuit[12] in order to secure its right to sponsor advertisements critical of President Nixon's handling of certain public issues during the election season without being subjected to the campaign

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[9] 2 U.S.C. § 431(4)(A) defines "political committee" as "any committee, club, association, or other group of persons which receives contributions . . . or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(9)(A)(i) defines "expenditure" as "any purchase payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." If an organization meets the definition of a "political committee," then under 2 U.S.C. § 434 the organization is required to file reports of receipts of expenditures, and the names of contributions and recipient candidates.

[10] 47 U.S.C. § 803(b) (1970 & Supp. III 1973) (repealed 1974).

[11] *Id.* The same certification would be required of the several members of Congress whom the advertisement supported.

[12] *See* American Civil Liberties Union, Inc. v. Jennings, 366 F. Supp. 1041, 1058 (D.D.C. 1973), *vacated sub. nom.*, Staats v. American Civil Liberties Union, Inc., 422 U.S. 1030 (1975).

finance laws.[13] The certification requirement provision was quickly struck down as the prior restraint it was[14] and the courts ruled that campaign laws could only be used against federal candidates and their political committees. The courts confidently assured issue-oriented organizations that they could continue to engage in public issue advocacy free from government restraint and that we could all breath a sigh of relief.[15] Right.

Within a year, we had the Watergate hearings and revelations of excessive campaign funding particularly by the Nixon Re-Election Committee. It should be remembered that almost all of those campaign funding practices occurred *before* the new disclosure provisions of the 1971 Act went into effect in April 1972.

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[13] *Id.* at 1042-45 (setting forth factual background of the case). A copy of the advertisement is provided in the opinion's appendix.

[14] *Id.* at 1054.

[15] *See* United States v. National Comm. for Impeachment, 469 F.2d 1135 (2d Cir. 1972); *Jennings*, 366 F. Supp. 1041. Both the *National Committee for Impeachment* court and the *Jennings* court unanimously condemned the use of campaign finance controls against issue advocacy groups and discussion. The *Jennings* court confidently observed that "groups concerned with the open discourse of views on prominent national issues may . . . comfortably continue to exercise these rights and feel secure that by so doing their associational rights will not be encroached upon." *Jennings*, 366 F. Supp. at 1057.

Despite these specific assurances, when Congress wrote the major reforms that would give rise to the *Buckley* litigation, Congress included a special separate provision precisely designed to regulate issue-oriented groups that published voter guides and "box score" information about incumbent office-holders up for reelection. *See* 2 U.S.C. § 437a (1970 & Supp. IV 1974) (repealed 1976).

That section was challenged as part of the litigation in *Buckley v. Valeo*, 424 U.S. 1 (1976), and the United States Court of Appeals for the District of Columbia Circuit, a court which upheld every other provision of the new law, unanimously struck down that section as an unconstitutional regulation of non-partisan issue discussions, even of campaign issues and candidate voting records, which, though they might influence the outcome of elections, are "vital and indispensable to a free society and an informed electorate." Buckley v. Valeo, 519 F.2d 821, 873 (D.C. Cir. 1975). That ruling was never appealed and the section was allowed to die. It is ironic that this constitutionally failed and flawed provision is very similar to ones currently being proposed in Congress. *See infra* notes 138-41 and accompanying text. *Plus ça change, plus ça la meme chose.*

Such questionable funding practices would have been the subject of complete disclosure thereafter. However, the new disclosure reforms were not given even one full election cycle to be tested before Congress was stampeded into enacting the sweeping 1974 restrictions on political activity that would give rise to the *Buckley*[16] litigation.

The 1974 Act was the mothership of government control of political funding and, therefore, of political speech. As Judge Ralph Winter and others have discussed, the 1974 law swept across the landscape of federal political activity and communication, severely restricting candidates, campaigns, contributors, independent political groups and even non-partisan issue-oriented groups like the ACLU, which had just been assured that their advocacy would be free of official restraint.[17] Enforcement of the new restrictions was placed in the hands of a commission totally controlled by the House and Senate[18]—a cynical breach of separation of powers that the *Buckley* Court would unanimously declare unconstitutional.[19]

The Act severely restricted a candidate's overall campaign expenditures[20] and thereby, campaign speech, even if the candidate's funding all came from small contributors, as was true for candidates like Ramsey Clark.[21] The Act severely limited the amount of money candidates were allowed to contribute to their own campaigns,[22] even though candidates could not possibly

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[16] Buckley v. Valeo, 424 U.S. 1 (1976).

[17] *See* Ralph K. Winter, *The History and Theory of* Buckley v. Valeo, 6 J.L. & POL'Y 93 (1997).

[18] *See* 2 U.S.C. § 437c(a)(1) (1970 & Supp. IV 1974) (amended 1976).

[19] *Buckley*, 424 U.S. at 140 (holding that the Appointments Clause bars Congress from appointing members to the Federal Election Commission (FEC) because the FEC has primary responsibility for law enforcement and such powers have been delegated only to the Executive Branch by Article II, Sections 2 and 3 of the Constitution. The Court held that, accordingly, the members of the Commission had to be selected through normal constitutional processes of nomination by the President and confirmation by the Senate).

[20] *See* 18 U.S.C. § 608(c)(A)-(B) (1970 & Supp. IV 1974) (repealed 1976).

[21] In his 1974 Senate campaign, Ramsey Clark, a former Attorney General, "relied entirely on contributions of $100 or less." Brief for Appellants 134, Buckley v. Valeo, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

[22] *See* 18 U.S.C. § 608(a)(1).

corrupt themselves. Ross Perot's funding of his $60 million Presidential campaign in 1992, which arguably changed the face of national politics for the 1990s, would have been a federal crime. So too would Steve Forbes' $30 million 1996 Republican primary campaign, which put the balanced budget issues on the front burners. Both campaigns raised vital issues and played important roles on our national scene, yet both would have been throttled and killed by the 1974 reforms. Had those two men used their money to run for the White House under those laws, they would have ended up in the Big House.

The new law, which placed a ceiling of $1,000 on independent expenditures by any person during a campaign, effectively silenced independent speakers in an unprecedented fashion.[23] The ceiling was about equal to the cost of a one-quarter page advertisement in the *New York Times*, relative to a clearly identified federal candidate. Spend a dime more to express your political opinion and go to jail.[24] Such an unprecedented restraint of independent citizen speech, the core of the First Amendment, was justified by reformers as a loophole closing device to ensure that contributors, limited to giving $1,000 directly to any candidate,[25] would not evade that limit by sponsoring a political advertisement in a newspaper.

Contributors of over $100 would have their names publicly disclosed[26] and those who gave as little as ten or fifteen dollars would have their names kept on file for possible later reporting to the government.[27] Additionally, all of those pesky non-partisan, issue-oriented groups that reported and commented on the legislative and public records of incumbents would likewise have to file reports with the government disclosing their contributors and

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[23] *Id.* § 608(e)(1).

[24] *See id.* § 608(i).

[25] *Id.* § 608(b)(1) (1970 Supp. IV 1974) (amended by 2 U.S.C. § 441a(a)(1) (1994)).

[26] 2 U.S.C. § 434(b)(2) (1970 & Supp. IV 1974) (requiring that the contributor's name, address, occupation and principal place of business were to be included in reports filed by the political committee); *id.* § 438(a)(4) (requiring that the political committee report be made available for public inspection).

[27] *Id.* § 432(c)(2) (amended 1980) (requiring that the treasurer of a political committee record the name, amount and date of any contribution over $10).

supporters.[28] All of this was to be monitored and enforced by a Commission handpicked by the leaders of the House and Senate.[29]

Finally, while the law provided for public funding of Presidential campaigns, the receipt of the funding came with extensive strings attached, and the formula for allocating the funding all but excluded minor and third party candidates from eligibility for the subsidies.[30]

As breathtaking as the law was in terms of the political communication and activity it sought to control, it was no less cynical in what it exempted from those campaign funding controls and limitations. The most outrageous exemption was for the costs of the frank,[31] which by itself, gave incumbent House Members more money to spend on political communication with their constituents than the amount a challenger could spend on his or her entire campaign.[32] So much for a level playing field.

Likewise, all of the expenses and perquisites of office that facilitate political and constituent communication, paid for by the public but benefitting incumbents as candidates, were also not counted against their spending limits.[33] All of the facilities and amenities of the House and the Senate that can be used to woo voters and supporters were not counted. The same holds true for the use of the White House and the Lincoln Bedroom.

In-house communications by corporations and labor unions, even with the most partisan content, were excluded from restriction.[34] So too were the corporate and union treasury expenses used to set up corporate and union political action committees

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[28] *See id.* § 437a (1970 & Supp. IV 1974) (repealed 1976). This was the provision invalidated by the Circuit Court in *Buckley*. *See supra* note 15 and accompanying text.

[29] *Id.* § 437c(a)(1) (1970 & Supp. IV 1974) (amended 1976).

[30] 26 U.S.C. § 9003(c) (1970 & Supp. III 1973).

[31] 39 U.S.C. § 3216 (1994). The congressional "frank" is the privilege that allows members of Congress to mail newsletters to their constituents, sponsored by taxpayer funds.

[32] Brief for Appellants 101, Buckley v. Valeo, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

[33] *Id.* at 101-04.

[34] 2 U.S.C. § 431(9)(B)(iii) (1976).

("PACs"),[35] which were legitimized by the 1974 Act.[36] In-kind contributions of skills and talents, regardless of their market value, were free from regulation; but persons who could not spare the time but could spare the dime, were severely limited in how much money they could contribute.[37] Finally, the press was statutorily, and appropriately, left totally free to editorialize and report on candidates and campaigns without any limitations or controls,[38] even though the press can have an enormous influence on the outcome of any election.

We in the ACLU at the time said that these were not real reforms. The reforms were a fraud, if not also an Incumbents Protection Act. They were an unprecedented, unconstitutional, unworkable and an unwise assault on political freedom in America. They would stifle and suppress individual and group advocacy pertaining to politics and government—the political expression at the core of the electoral process and of First Amendment freedoms; the very engine of democracy. Additionally, they would not secure equality of political opportunity because only some, but not all, political resources were controlled by the law. Wealthy groups and individuals, barred by the law from making unlimited contributions and expenditures,[39] would undoubtedly find other ways to bring their resources to bear on politics. But insurgent or new voices would be stilled by the deadening new limits on their few wealthy supporters and intrusive disclosure of even their most modest contributors. Ultimately, the laws would magnify the power of incumbency, increase the power of PACs and still not drive the fat cats from the political temple. Moreover, the logic of restricting

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[35] PACs are political action committees defined as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." *Id.* § 431(4)(a).

[36] *Id.* § 441b(b)(2)(C).

[37] *Compare id.* § 441a(a)(1)(A) (limiting contributions from individuals to $1,000), *with* 18 U.S.C. §591(e)(5)(A) (excluding from contributions the value of services provided without compensation by individuals who volunteer a portion or all of their time on behalf of a candidate or political committee).

[38] 2 U.S.C. § 431(9)(B)(i).

[39] *See* 2 U.S.C. § 441a(a)(1); 18 U.S.C. § 608(e)(1).

candidates' contributions and expenditures would inevitably evolve into attempts to control all sources of political speech that might influence the outcome of an election. Finally, letting government monitor and inspect campaign speech and political association in order to enforce all these restrictions would be a treacherous prospect for the First Amendment.

In short, the FECA's limits-based approaches to campaign finance problems were unconstitutional, unwise and unworkable.

Limits are unconstitutional because they cut to the heart of the First Amendment's protection of political freedom. The very essence of the First Amendment is the right of the people to speak, to discuss, to publish, to organize and to join together with others on issues of political and public concern. Yet the FECA provisions at issue in the *Buckley* case imposed sweeping and Draconian restraints on the abilities of citizens, groups, candidates, committees, parties and partisans to use their resources in order to make political contributions and expenditures to support and embody their freedom of speech and association.

Limits are unwise because they make it harder for challengers, insurgents and new voices to raise funds to participate in politics, while enabling more established individuals and groups to find numerous ways to circumvent the limits. Limits on giving and spending make it harder for those subject to the restraints to raise funds and easier for those outside the restraints to bring their resources to bear on politics. Limiting individual contributions to $1,000 per candidate while allowing PACs to contribute $5,000, makes it more difficult to raise money from individuals, thus making candidates more dependent on PACs and other organized sources of support. In *Buckley*, we contended that the FECA, enacted by Congress, approved by the President and enforced by the Federal Election Commission, beholden to both, was designed to restrain the speech and association of those who would criticize, challenge or oppose the elected establishment.

Limits are unworkable because groups and individuals will find other means by which to influence the political process with their resources. PACs, soft money and issue advocacy are all the direct result of campaign finance controls and limitations. It is commonly known that in *Buckley* the Court struck down limitations on expenditures, but upheld limits on contributions. As a result, with

overall spending limits voided as violative of the core of the First Amendment; with limits on how much wealthy candidates could spend on their own campaigns voided; with independent campaign committees, issues groups and the press free to use their resources to comment on candidates and causes *without limit*; with less well-heeled candidates sharply restricted in their ability to raise money from family, friends and other contributors—the stage was set for a two-decade period dominated by the advantages of incumbency, the rise of PACs, the increasing use of soft money and the growing activity of issue advocacy groups.

The rise of these factors demonstrates that our prediction twenty years ago was correct; the approach of limits on contributions and expenditures simply will not work. Limit the funding of the candidates equally, and the advantage of incumbency or celebrity will disturb the equilibrium. So too will the presence of powerful outside voices, independent political groups, labor unions, issue groups and the news media alter the balance. Limit wealthy contributors from giving money to candidates and they will still be able to buy newspapers, fund issue groups and give large amounts of soft money to voice their message to an extent far beyond the reach of the average person. Attempt to limit all the methods of influencing the electorate, claiming that wealthy contributors are buying influence, drowning out the voice of the people or preventing a level playing field, and you have a First Amendment meltdown. It is far better to deal with such disparities by providing floors to support political activity rather than constructing ceilings to restrict it.

The last twenty years have shown how right we were. The proposals on the front legislative burner today,[40] tired retreads of the same flawed approaches, unfortunately show how little we have learned.

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[40] Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. (1997). For an excellent analysis of how such limits-based approaches are fundamentally flawed under First Amendment principles, see Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663 (1997).

II. CAMPAIGN FINANCE REFORM: *BUCKLEY'S* WAY

In *Buckley*, the Court invalidated the limits on expenditures, but upheld the restraints on contributions.[41] Much of what the Court said still resonates today.

A. Protecting Speech

Responding to the argument that money is not speech, the Court quite sensibly reasoned that limitations on how much you could spend to speak were limitations on how much you could speak. The concept that withholding or restricting the funding for speech is tantamount to restricting that speech has since been heartily reaffirmed by the Court in a number of free speech settings. The Court has struck down a ban on paying people to collect signatures on election petitions,[42] overturned the Son of Sam statutory ban on receiving money to write about your crime,[43] and invalidated the federal ban on employees receiving pay for moonlighting speeches.[44] Those of us who have argued, successfully or not, that speech-based restraints on arts funding,[45] abortion counseling funding[46] or legal services litigation funding[47] were restraints on the speech so penalized, appreciate the inexorable and inextricable link between restrictions on funding and restrictions on speech. Moreover, these latter cases involved restrictions on the use of *government* funds, while the FECA

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[41] Buckley v. Valeo, 424 U.S. 1 (1976).

[42] Meyer v. Grant, 486 U.S. 414 (1988).

[43] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991).

[44] United States v. National Treasury Employees Union, 513 U.S. 454 (1995).

[45] Finley v. National Endowment for the Arts, 112 F.3d 1015 (9th Cir. 1997).

[46] Rust v. Sullivan, 500 U.S. 173 (1991).

[47] Legal Aid Society of Hawaii v. Legal Services Corp., 961 F. Supp. 1402 (D. Haw. 1997); Varshavsky v. Geller, Index No. 40767/91 (N.Y. Sup. Ct. 12/24/26).

involved restrictions on the use of *private* funds by individuals and groups.

In response to the claim, relentlessly repeated today, that campaign spending has skyrocketed and should be legislatively restrained, the Court stated that the First Amendment denied government the power to make that determination: "In the free society ordained by our Constitution, it is not the government but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign."[48] Essentially, as Justice Harlan stated in his classic First Amendment opinion, *Cohen v. California*, "that the air may at times seem filled with verbal cacophony is . . . not a sign of weakness but of strength."[49]

To the claim that the free speech of those with more resources should be restrained in order to enhance the political opportunity of those with less resources, the Court responded:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure the widest possible dissemination of information from diverse and antagonistic sources," and "to assure unfettered exchange of ideas for the bringing about of political and societal changes desired by the people."[50]

Seeking equality of political opportunity and influence through limitation of political speech is a fool's errand. Limit the funding of the candidates equally and the advantage of incumbency or celebrity will disturb the equilibrium, as will the presence of powerful outside voices such as independent political groups, labor unions, issue groups and the news media. Limit wealthy contributors from giving money to candidates and they will still be able to buy newspapers, fund issue groups and give large amounts of soft

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[48] Buckley v. Valeo, 424 U.S. 1, 57 (1976).

[49] Cohen v. California, 403 U.S. 15, 25 (1971).

[50] *Buckley*, 424 U.S. at 48-49 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964)).

money to get their message out in ways that the average person cannot equal. Attempt to limit all those voices and methods of influencing the electorate, on the claim that they are buying elections or drowning out the voice of the average person, and you do incalculable harm to the First Amendment.

Nor are these futile efforts at equalizing voices justified by reference to the special or parliamentary nature of elections. Elections are special, even sacred, in terms of democratic participation. But they are no less special or sacred for free speech concerns. Candidacies and campaigns are the primary vehicles for giving voice to popular grievances, raising issues and proposing solutions. An election is the time when political speech must be at its most robust and unfettered. As the Court recognized in a ballot access election case, electoral speech and activity "are at the core of our electoral process *and* of the First Amendment freedoms."[51] Nor should we accept the notion that becoming a political candidate can be conditioned on sacrificing some of one's political speech; the price of a place on the ballot is not to be the forfeiture of one's right to speak.

By the same token, the principle of one person/one vote[52] ensures that the votes of all voters will be counted equally, not that the speech all citizens can be restricted equally. It costs us virtually nothing to eliminate financial barriers to voting and absolutely nothing to guarantee that each person's vote will be given equal weight. It costs us dearly, however, to restrict the right of one person to speak, on the basis that those who cannot afford such speech will thus have some sense of equal political opportunity. The principle that guarantees each citizen will be given only one ballot, without charge, at the polling booth does not justify a rule which insists that no person can print more than ten leaflets to hand out outside. The equality concern pertaining to one person/one vote should not be transformed into a levelling free speech principle of one person/one paragraph. If some voters cannot afford transportation to the polls, for example, the enlightened democratic solution is to provide them with a ride, not to make everyone else

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[51] Williams v. Rhodes, 393 U.S. 23, 32 (1968) (emphasis added).

[52] *See generally* Reynolds v. Sims, 377 U.S. 533 (1964).

walk. We should address problems of disparities of wealth by subsidizing the have-nots, rather than restricting the haves. Free speech should certainly be no exception to this instinct. We will not strengthen democracy by restricting speech. The principle of one person/one vote is a rule for the ballot box, not for the soap box.

Finally, if "money talks," it talks all year long and not just on election day. Why only control funding during the campaign? What about the millions of dollars spent by powerful lobbying interests throughout the year? The National Rifle Association often spends far more money on direct mail and grass-roots lobbying to defeat gun control legislation than it contributes to Congressional candidates. Common Cause is consistently among the big spenders of lobbying organizations. Why should the wealthy supporters of those organizations have a greater financial ability to influence legislative outcomes than the average person? It seems that if one accepts the undue influence/equal political opportunity theory, then it is only prudence, not principle, which separates political candidates and their supporters, on one hand, from the media, lobbying groups, organizations and wealthy individual advocates on the other.

Finally, responding to the claim that a large range of political discussion could be restrained because it might influence the outcome of elections, the Court ruled that only those communications which contain explicit words of advocacy of election or defeat of a candidate, i.e. words which in express terms advocate the election of a clearly identified candidate,[53] could even be subject to the milder regulatory restraint of disclosure. Moreover, all speech which does not expressly advocate such a result is totally free of any permissible regulation: "[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views."[54]

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[53] *Buckley*, 424 U.S. at 42.

[54] *Id.* at 45. The Court also approved limiting the reach of the Act to groups whose "major purpose" is partisan advocacy. *See id.* at 79. The precise nature of that "major purpose" limitation on the FECA is currently pending before the Court in *FEC v. Akins*, 101 F.3d 731, (D.C. Cir. 1996), *cert. granted*, 117 S. Ct.

B. *Restricting Speech*

Unfortunately, the Court did not go far enough in protecting political funding, and it upheld limits on contributions either made to candidates or to committees that contribute to candidates.[55] It did so because of the concern with quid pro quo corruption, the appearance of corruption and the assumption that effective disclosure of large contributions would not be a sufficient democratic antidote.[56] That set the stage for the frustration and disparities of the last twenty years.

Severe contribution limits make it harder for challengers to raise money, which is why the overall disparity between incumbent and challenger spending is twice what it was before the reforms. This disparity is widened because incumbents receive the perquisites of office and free means of communication, while challengers have to raise hard dollars with severe contribution limits in place.

The disparity between contributions and expenditures means Steve Forbes can spend $30 million of his own fortune on his own campaign, but cannot write a check for that amount—subject to full disclosure and the political consequences that may follow—to Jack Kemp who might have been better able to campaign to communicate the same message.

The distinction between express advocacy and all other issue-focused political speech, constitutionally compelled in order to keep campaign finance regulations from overwhelming public issue discussion in America, has produced twenty years of relentless, disruptive and harassing Federal Election Commission attempts to investigate and prosecute issue and legislative advocacy groups ranging from the National Right to Life Committee[57] to the National Organization for Women.[58]

2451 (1997) (96-1590).

[55] *Buckley*, 424 U.S. at 29.

[56] *Id.* at 24-29.

[57] *See* Clifton v. Federal Election Comm'n, 114 F.3d 1309 (1st Cir. 1997).

[58] *See* Federal Election Comm'n v. National Org. for Women, 713 F. Supp. 428 (D.D.C. 1989).

The disparity between hard money and soft money means that wealthy party contributors, able to make only limited candidate-focused contributions, can give unlimited amounts to the party of their choice for party-building activities, voter registration and get-out-the vote drives.[59] The soft money "scandal" did not emerge full-blown in 1996, though many act as though it did. Elizabeth Drew wrote about it in 1984.[60] It was the direct and expected result of the campaign law's severe controls on contributions to presidential and other federal candidates.

The disparity between powerful media owners and all other political speakers results in a situation where the press can expressly advocate the election or defeat of any candidate it so chooses, day after day, on its editorial pages and can give favorable coverage to any candidate it wants, day after day, on its front pages.[61] But those supporters of the disfavored candidate cannot contribute significant funds to enable that candidate to respond.[62] Additionally, the disparity between corporate media entities and other corporate entities is such that an editorial endorsement of a candidate on page 26 is free speech,[63] but the same words spon-

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[59] *See* 2 U.S.C. § 431(8)(B)(xii) (1997) (excluding from contributions the payment of a political party's costs for voter registration and get-out-the-vote activities that would be conducted on behalf of nominees of such party for President and Vice President).

[60] *See* ELIZABETH DREW, POLITICS AND MONEY (1984). Ray Kroc, the founder of McDonald's was one of the Nixon "fat cats" who gave $250,000 to The Committee to Re-elect the President (CREEP) before the FECA was passed and whose contributions helped prompt the campaign finance controls at issue in *Buckley*. A decade later, his widow, Joan Kroc, gave $1 million—four times her husband's contribution—to the Democratic National Committee and was lavishly praised for her party loyalty. Another cause for the enactment of the FECA was the so-called "selling of ambassadorships" by the Nixon Administration. Under President Clinton, the two most recent ambassadors to France, the late Pamela Harriman, and the Wall Street banker, Felix Rohatyn, were major contributors to the Democratic Party.

Once again, *plus ça change, plus ça la meme chose.*

[61] *See* 2 U.S.C. § 431(9)(B)(viii)(1).

[62] *See id.* § 441a(a)(1)(A).

[63] 2 U.S.C. § 431(9)(B)(i).

sored by a corporate entity in an advertisement on page 25 is a felony.[64]

Likewise, for example, if in the New York mayoral election, Rupert Murdoch essentially turns over his news and editorial pages to the campaign of incumbent Rudy Guiliani, the law protects his right to do so. But if George Soros wants to give challenger Ruth Messinger enough funding to run billboard advertisements to counter the Murdoch-Guiliani message, the law treats this effort as an illegal and prohibited campaign contribution. Where is the level playing field in that? Why can Rupert Murdoch "drown out" Ruth Messinger, but George Soros is not permitted to help her out. Freedom of the press, as A.J. Liebling once observed, may belong to those who own one, but our campaign finance laws, however, should not be predicated on such distinctions. People should be free to support the candidate of their choice, whether they write an editorial or a check.[65]

How much longer will our First Amendment system of freedom of expression continue to make these content-based, speaker-based distinctions where the core of the First Amendment is concerned? *Buckley* went a long and necessary way toward protecting a great deal of political communication by invalidating restraints on expenditures. But the Court's upholding of limitations on contributions and the other statutory and constitutional distinctions have produced a crazy-quilt regime. Hard money/soft money, express advocacy/issue advocacy, contributions/expenditures, media speakers/other speakers—these distinctions, although often critical to maximizing protection of political speech, have caused serious problems. What we need instead is a unitary approach, doctrinally and legislatively, that will protect and expand the funding of political speech and activity, not restrict and control it. And, indeed, some are starting to propose the more far-reaching public and private financing of campaigns that may *truly* open the doors of political opportunity.

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[64] 2 U.S.C. § 441b.

[65] *See* Arthur Eisenberg's thought-provoking article, *Buckley, Rupert Murdoch and the Pursuit of Equality in the Conduct of Elections*, (forthcoming N.Y.U. REV. L. & SOC. CHANGE). One might add Arthur Sulzberger or Katherine Graham or Ted Turner, as well.

III. CAMPAIGN FINANCE REFORM: THE FAILED WAY

Such positive policy is not Washington's way. Unfortunately, the major campaign finance reform bill in Washington this season, favored by President Clinton, supported by the media establishment and clamored for by the same people who rallied the last round of great reforms, was about limits, limits and more limits. The proposed reforms were contained in the Bipartisan Campaign Finance Reform Act of 1997, known as the McCain-Feingold bill ("Senate Bill 25").[66] Some limits are imposed directly upon candidates, parties and independent groups.[67] PAC contributions would be outlawed,[68] even though they are both the embodiment of freedom of speech and often facilitate insurgent candidacies from women, minorities, gays and lesbians and other underrepresented constituencies. Soft money would be severely restricted,[69] even though it strengthens political parties, vital to democracy. Independent political groups would be disrupted by burdensome rules seeking to ferret out coordination[70] with candidates, instan-

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[66] Bipartisan Campaign Finance Reform Act of 1997, S. 25, 105th Cong. §§ 101-504 (1997).

[67] *See id.* §§ 101, 105, 211.

[68] *Id.* § 201.

[69] *Id.* § 211 (proposing that a political party "shall not solicit or receive any contributions, donations, or transfers of funds, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements" imposed on contributions to federal candidates. In addition, section 211 proposes that any amount spent by a political party that may affect the outcome of a federal election, including any voter registration or get-out-the-vote activity, any generic campaign activity and any communication that refers to a candidate, shall be made from funds subject to limitations, prohibitions, and reporting requirements).

[70] *Id.* § 405 (stating that a coordinated expenditure would include "a payment made for a communication or anything of value that is for the purpose of influencing an election . . . [and] in coordination with a candidate." The phrase "coordination with a candidate" includes "a payment made by a person in cooperation, consultation, or concert with, at the request or suggestion of, or pursuant to any general or particular understanding with a candidate . . . ." In addition, a coordinated expenditure would include "a payment made by a person for the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign material prepared

taneous disclosure and record-keeping.[71] Issue groups are threatened by grossly expanded definitions of express advocacy.[72] Public subsidies are dangled but with restrictive and coercive conditions upon their availability. A candidate wants free television time? The candidate can just sign up for limits on the overall campaign expenditures and on the use of the candidate's own funds for the campaign.[73] A candidate wants reduced postal rates? The candidate need only agree not to get contributions from supporters in other states,[74] even though they might share a common cause.[75] Additionally, the bill contains a ban on political contributions by persons not eligible to vote, i.e. lawful permanent resident aliens who are not citizens,[76] which is an insult to the First Amendment guarantees of free speech to all within our shores. The bill reduces the recordkeeping threshold for contributions and disbursements from $200 to $50,[77] or for eligible candidates, to as low as $20;[78] this constitutes a gross invasion of political privacy.

All of these new and restrictive rules governing political speech and association would be enforced by giving expanded enforcement powers to the Federal Election Commission. The fact that, in the midst of a campaign the Commission could go to court to enjoin

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by a candidate").

[71] *See id.* § 304.

[72] *See id.* § 406 (Express advocacy is defined by the bill as "a communication that conveys a message that advocates the election or defeat of a clearly identified candidate for Federal office." In addition, express advocacy will include advertising costing more than $10,000 "that refers to a clearly identified candidate, that a reasonable person would understand as advocating the election or defeat of a candidate").

[73] *See id.* § 102.

[74] *See id.* §§ 101, 104. Section 101 provides that in order for an "eligible Senate candidate" to take advantage of the reduced postal rates under §104, at least 60% of the total amount of contributions accepted must be from individuals who are legal residents of the candidate's state.

[75] At this writing, the McCain-Feingold bill has been "trimmed down" to focus on proposed restrictions on issue advocacy and soft money.

[76] *Id.* at § 306.

[77] *Id.* § 304.

[78] *Id.* § 101.

a violation of the Act,[79] poses an ominous and sweeping threat of prior restraint and political censorship.

This bill is fatally and fundamentally flawed when measured against First Amendment values and standards. The provisions of Senate Bill 25 that seek to induce candidates to adhere to spending limits and penalize those who refuse, and severely restrict political action committees and restrain contributions to political parties are not justified by *Buckley* or later cases.[80] The provisions of the bill which assault independent political activity and invade the absolutely protected sphere of issue speech are specifically condemned by *Buckley* and its progeny as all but per se invalid. The entire sweep of the bill, including the greatly expanded enforcement powers given to the Federal Election Commission,[81] is worse than the sum of its parts. In many respects, it seems as objectionable an assault on political freedom as were the provisions of the Federal Election Campaigns Act at issue in *Buckley*.[82]

A. Voluntary Spending Limits

Title I of the bill, providing spending limits and benefits for Senate campaigns,[83] is an attempt to coerce what the law cannot directly command; it is a backdoor effort to impose campaign spending limits—which almost always benefit incumbents—in

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[79] *Id.* § 303.

[80] The Court's most recent pronouncement on the core meaning of *Buckley v. Valeo* came in *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n.*, 116 S. Ct. 2309 (1996). The Court held that a political party's expenditures for radio advertisements that attacked the opposing party's candidate were "independent expenditures" since the advertisements' scripts were developed without consultation with any of the party's three nominees. 116 S. Ct. at 2315-17. Therefore, these expenditures could not be regulated under 2 U.S.C. § 441a(d). In so holding, the Court rejected the government's argument that all party expenditures should be treated as if they had been coordinated as a matter of law. *Id.* at 2318. In addition, the Court also rejected the government's argument that a political party's expenditure is coordinated with a candidate's campaign because the party and the candidate are identical. *Id.* at 2319.

[81] *See* S. 25 § 301-308.

[82] 2 U.S.C. §§ 431-455 (1971).

[83] S. 25 § 101.

violation of essential free speech principles and the doctrine of unconstitutional conditions. The provisions regarding "voluntary" expenditure limits and other campaign funding controls,[84] imposed to induce candidates to accept ceilings and restrictions on political speech and penalize and disadvantage those who will not do so, raise serious First Amendment problems. The receipt of public subsidies or benefits should never be conditioned on surrendering First Amendment rights. Such a situation penalizes the exercise of those rights.[85] Since candidates have an unqualified right to spend as much as they can to get their message to the voters, to spend as much of their own funds as they can and to raise funds from supporters all over the country, they cannot be made to surrender those rights in order to receive public benefits.

In *Buckley* the Court observed that Congress might establish a system where candidates would choose freely and voluntarily between public funding with expenditure limits and private spending without limits, where the non-participating candidate remained free to engage in unlimited private funding and spending.[86] In that setting, the purpose of public financing of Presidential campaigns was not to abridge, restrict or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.[87]

Senate Bill 25 fails this test, for both its overall purpose and effect are to limit speech, not enhance it. The bill imposes substantial penalties on those disfavored, non-complying candidates who will not agree to limit their campaign expenditures, while it confers significant fundraising benefits upon those privileged candidates who adhere to the limits. Privileged candidates receive free broadcast time,[88] as well as sharply reduced broadcast and

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[84] *Id.*

[85] *See, e.g.,* Board of County Comm'rs v. Umbehr, 116 S. Ct. 2342 (1996); Federal Communications Comm'n v. League of Women Voters, 468 U.S. 364 (1984); Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[86] Buckley v. Valeo, 424 U.S. 1, 57 n.65 (1976).

[87] *Id.* at 92-93.

[88] *See* S. 25 § 102.

mailing rates.[89] Disfavored candidates must pay double promotional costs for the same communications.[90]

Most significantly, the bill contains triggers which dramatically raise the spending ceilings and the contribution caps for privileged candidates whenever disfavored candidates threaten to mount a serious, well-funded campaign, or whenever independent groups speak out against a privileged candidate.[91]

In effect, the bill tries to insure that privileged candidates will always be able to counteract the messages of disfavored candidates and their supporters. The law stacks the deck against the candidate who will not agree to limits, usually the challenger trying to defeat an incumbent. In short, this scheme does everything possible to enable the candidate who agrees to spending limits to overwhelm the candidate who does not—that is not a level playing field.

It has been widely argued that *Buckley's* approval of the Presidential funding scheme at issue there forecloses constitutional challenges to the scheme of bills like Senate Bill 25. But that is not the case. There are three reasons why *Buckley* does not control the validity of such provisions.

First, the Court did not address the unconstitutional conditions issue in *Buckley* because the argument was not made. The primary contention was that the Presidential public funding scheme discriminated against those candidates and parties whom it excluded,[92] not that it exacted unconstitutional conditions and limitations from those whom it benefitted, nor that it coerced compliance by penalizing those who declined the offer.[93]

Second, the *Buckley* Court did state that Congress could condition acceptance of public funds on a candidate's agreement to abide by specified spending limits because a candidate may

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[89] *Id.* § 104.

[90] *Id.* § 103(a)(4) (mandating that "the charges for the use of a television broadcasting station . . . shall not exceed 50% of the lowest charge and providing the provision does not apply to noneligible senate candidates").

[91] *Id.* § 101.

[92] *Buckley*, 424 U.S. at 94, n.128.

[93] The unconstitutional conditions argument *was* made, but rejected, in *Republican National Comm. v. Federal Election Comm'n*, 487 F. Supp. 280 (S.D.N.Y.), *aff'd*, 445 U.S. 955 (1980).

voluntarily decide to forego private fundraising and accept public funding.[94] But a candidate or party was free to reject that offer and try to raise and spend more money than the conditional limits would permit, without regard to the actions of opposing candidates or parties. The choice of one candidate did not affect the rights of others. Whether that conditional funding scheme would survive close scrutiny under the Court's unconstitutional conditions doctrine is a substantial question.[95]

Finally, the scheme in Senate Bill 25 is not just a *conditional* funding scheme, requiring candidates to give up rights in order to get benefits and penalizing non-complying candidates by denying them free television prime time,[96] half-priced purchased time and discounted mass mailings rates.[97] Senate Bill 25 is also what has been called a *contingent* benefits scheme whereby the exercise of protected campaign spending rights by a noncomplying candidate *triggers* statutory fundraising benefits to his or her complying opponent.[98] Thus, if any noncomplying Senate candidate exceeds the applicable spending limit by only 5%, the complying candidate's spending limit is raised tenfold by 50%. Likewise, if a noncomplying candidate's expenditures exceed 155% of the limit, the complying candidate's ceiling is again raised tenfold to 200%. In both instances, the contribution limits for the complying candidate, but not the noncomplying one, are doubled from $1,000 to $2,000,[99] making it easier for the complying candidate to raise funds to drown out the noncomplying candidate. Adding insult to injury, noncomplying candidates are subject to more burdensome disclosure requirements to enforce the triggering mechanism that

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[94] *Id.* at 95.

[95] *See* Federal Communications Comm'n v. League of Women Voters, 468 U.S. 364 (1984); Rust v. Sullivan, 500 U.S. 173 (1991).

[96] *See* S. 25 § 102.

[97] *See id.* § 104.

[98] *See* Joseph E. Finley, Comment, *The Pitfalls of Contingent Public Financing in Congressional Campaign Spending Reform*, 44 EMORY L.J. 735, 738-39 (1995) (defining contingent, public campaign financing). *See also* Edward J. Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, 39 CASE W. RES. L. REV. 97, 121-23 (1988) (questioning the validity of conditional limits on public financing or benefits in campaigns).

[99] *See* S. 25 § 101.

raises the spending limits and contribution caps for their complying opponents.[100]

The clear purpose and patent effect of this trigger is to chill and deter, dollar for dollar, any candidate from trying to mount an effective high-spending campaign. Under this contingent limitation scheme, incumbents, who will almost always opt for the public funding, have arranged a way to have their cake and eat it too. That scheme, which coerces candidates to accept the limitations by penalizing them if they do not, is a far cry from anything sustained in *Buckley*.[101]

B. Attacks on PACs

The original McCain-Feingold bill would have totally and entirely banned all political contributions by political action committees,[102] an unprecedented restriction upon the rights of

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[100] *See id.* § 106.

[101] Some lower courts have invalidated such one-sided, lopsided "voluntary" schemes. *See* Shrink Missouri Gov't PAC v. Maupin, 71 F.3d 1422, 1426 (8th Cir. 1995) ("[W]e are hard-pressed to discern how the interests of good government could possibly be served by campaign expenditure laws that necessarily have the effect of limiting the quantity of political speech in which candidates for public office are allowed to engage."), *cert. denied*, Nixon v. Shrink Missouri Gov't PAC, 116 S. Ct. 2579 (1996); Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995).

But other courts have upheld contingent arrangements which allowed favored candidates to be given funding benefits in response to increased funding and spending activities by non-complying candidates or even independent campaign groups. *See, e.g.*, Rosenstiel v. Rodriguez, 101 F.3d 1544 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1820 (1997); Wilkinson v. Jones, 876 F. Supp. 916 (W.D. Ky. 1995).

The most widely known of such schemes is the so-called "Clean Money" law in Maine, which gives direct public funds to participating candidates to counter the messages of non-participating candidates *and* independent groups who *oppose* participating candidates, while allowing independent groups to speak without limit *in favor* of participating candidates. A challenge to the Maine statute was recently dismissed on prematurity grounds, since the full brunt of the new law does not take effect until 2000. Dagget v. Devine, 973 F. Supp. 203 (D. Me. 1997).

[102] S. 25 § 201 (1997).

millions of Americans, most of whom are small donors in the $25 to $100 range, to pool their resources to amplify their voices. Such small-donor PACs, affiliated with groups running the gamut—from the National Abortion Rights Action League and the Human Rights Campaign Fund, on the one hand, to the National Right to Life Committee and the National Rifle Association, on the other—would be denied the right to support the candidates of their choice. This cuts to the heart of the First Amendment's protection of freedom of political speech and association. The bill would give a permanent political monopoly to political parties and political candidates, silencing all groups that want to support or oppose those parties and candidates.

There is not a word in *Buckley*, or any following case, that suggests the Court would uphold a total ban on PAC contributions to federal candidates, stilling all those voices. Nothing in *Buckley* sustains such a radical restraint on the right of freedom of speech and association. *Buckley* upheld a $5,000 limit on political action committee contributions to individual federal candidates,[103] not the total ban, or zero dollar limit, that Senate Bill 25 would impose on all Senate campaigns.

That is why there was a fallback provision that would reduce the PAC contribution ceiling to $1,000 to any candidate, which is also of very doubtful constitutionality.[104] In 1976 dollars, that would be about a $350 ceiling on contributions. It is simply incredible to believe that the *Buckley* Court would have upheld that low a limit on individual or PAC contributions, especially when so many PACS are small donor PACs where the concern with corruption is attenuated. In *Citizens Against Rent Control v. City of Berkeley*,[105] the Court, by a vote of 8 to 1, invalidated a $250 limit on personal contributions to local referendum campaigns. Senate Bill 25's limits would be similarly vulnerable. In any event, this provision is fatally overbroad because it treats all PACs alike, even those made up only of small contributors.

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[103] Buckley v. Valeo, 424 U.S. 1, 35-36 (1976).

[104] *See* Meyer v. Grant, 486 U.S. 414 (1988); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981); Carver v. Nixon, 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 2579 (1996).

[105] 454 U.S. 290 (1981).

Likewise, the ban on "bundling" of individual contributions by organizations would abridge the freedom of association that the Supreme Court has recognized as a basic constitutional freedom.[106] As the Court has pointedly observed, "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process."[107]

Finally, the bill contains an overall cap of 20% on PAC contributions to any candidate.[108] Not only will this simply make it harder for candidates to raise funds, but it also will intrude upon freedom of speech and association and act like yet another backdoor effort to limit overall campaign expenditures—all in violation of *Buckley's* core principles. This cap on the amount of PAC contributions that any candidate could receive operates, effectively, as a zero dollar limit, total ban upon reaching that limit. Once any Senate candidate has received PAC contributions totalling 20% of the applicable spending cap, all other groups are barred from supporting that candidate and effectively silenced.

In *Buckley*, the Court said that, "[g]iven the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy."[109] The Court found that the contribution limits there survived close scrutiny, in large part precisely because the Act, though limiting individual contributions to $1,000, permitted PACs to contribute five times that amount and provided for a proliferation of PACs to fill the fundraising gap.[110] A total or near-total ban on PAC contributions would fail the *Buckley* test.

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[106] Kusper v. Pontikes, 414 U.S. 51, 57 (1973).
[107] *Citizens Against Rent Control*, 454 U.S. at 294.
[108] *See* S. 25 § 101.
[109] Buckley v. Valeo, 424 U.S. 1, 21 (1976).
[110] *Id.* at 23, 29-30.

C. *Issue Speech*

One central and critical distinction has informed the Supreme Court's campaign finance jurisprudence. Contributions and expenditures made by federal candidates, their campaigns or those who expressly advocate their election or defeat, may be subject to regulation. All other political and issue advocacy and discussion, even though it may influence the outcome of an election, may not be subject to government control. This constitutional Continental Divide is compelled by the First Amendment and built upon the concept that only express advocacy of the election or defeat of specific candidates can be subject to regulation.

It is not that there is an inherent distinction between issue speech and electoral advocacy. On the contrary, as the *Buckley* Court recognized:

> For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.[111]

But *Buckley* held that if any mention of a candidate in the context of an issue-based discussion rendered the speaker or the speech subject to campaign finance controls, the consequences for the First Amendment would be intolerable.

Accordingly, while candidate-focused contributions, expenditures and express advocacy may be subject to various restrictions or regulations, the Court clearly held in *Buckley* that all speech which does not in express terms advocate the election or defeat of a clearly identified candidate is totally free of any permissible regulation: "So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, *they are free to spend as much as they want*

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[111] *Id.* at 42.

to promote the candidate and his views."[112] The purpose of this profound distinction is to keep campaign finance regulations from overwhelming all political and public speech.

The effect of this distinction has been manifold. The express advocacy concept defines the notion of soft money—political funding that is used for party-building, get-out-the-vote activities and generic advertising (e.g. Vote Democratic)—all activities which do not expressly advocate the election or defeat of specific federal candidates. Because it is not used for such express advocacy, it can be raised from sources that would be restricted in making contributions or expenditures. It is the express advocacy concept that separates an illegal corporate expenditure advocating the election or defeat of a specific candidate from an allowable issue advertisement discussing public and political questions.[113] It is the express advocacy concept that defines and cabins the concept of independent expenditures and determines the permissibility of coordinated expenditures. It is the express advocacy concept that protects a myriad of non-partisan, issue-oriented groups, such as the ACLU, in their right to comment on and criticize the performance of elected officials without becoming ensnared in the federal campaign finance laws.[114] It is this critical constitutional distinction which Senate Bill 25 seeks to blur beyond recognition.

1. Soft Money

The same principles that protect unrestrained advocacy by issue groups safeguard issue advocacy and activity by political parties. Soft money is funding that does not support express advocacy of the election or defeat of federal candidates, even though it may exert an influence on the outcome of federal elections, in the broadest sense of that term. It sustains primary political activity such as get-out-the-vote drives and issue advertising. Sections 211, 212, 213 and 221 of the McCain-Feingold bill would severely

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[112] *Id.* at 45 (emphasis added).

[113] *Compare* Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), *with* First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

[114] *See Buckley*, 519 F.2d 821, 832 (1975).

restrict the sources and use of soft money by political parties and others organizations. The new sweeping limitations on soft money contributions to, and disbursements by, political parties and other organizations, federal, state or local, would expand the reaches of the FECA into unprecedented new areas, far beyond what any compelling interest would require. The reach of these proposals is breathtaking.

In 1996, the Court cast considerable doubt upon the constitutionality of these various provisions. By a 7 to 2 margin, the Court ruled that even candidate-focused, hard money independent expenditures by political parties on behalf of their candidates were fully protected by First Amendment principles and the *Buckley* precedents. In *Colorado Republican Federal Campaign Committee v. Federal Election Commission,*[115] the Court invalidated the FEC rule that treated all candidate-focused, independent party expenditures as though they were coordinated with the candidate and, therefore, subject to limitations. In language powerfully relevant here, the Court held, "We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties."[116] The case for thorough protection for soft money is even stronger, since it is used by definition for voter registration, get-out-the-vote, generic advertising (e.g. Vote Democratic) and other party-building activities.

Indeed, the unrestricted use of soft money by political parties and non-party organizations like labor unions has been invited by *Buckley*—"[s]o long as persons and groups eschew . . ."[117]—authorized by Congress[118] and enhanced by rulings of the Federal Election Commission. Equally significant, the role of soft money was acknowledged by the Supreme Court in the *Colorado Republican* case.[119] In this case, despite arguments that unrestrained soft money contributions were undermining the Act's

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[115] 116 S. Ct. 2309 (1996).

[116] *Id.* at 2317.

[117] *Buckley*, 424 U.S. at 45.

[118] *See* 2 U.S.C. §§ 431(8)(A)(i), (B)(xii) (1997) (permitting soft money for federal elections, voter registration and get-out-the-vote drives).

[119] 116 S. Ct. at 2309.

limitations on hard money party funding, the Court squarely rejected the sweeping claims that soft money spent by political parties was corrupting the system and had to be stopped. The Court stated:

> We recognize that FECA permits individuals to contribute more money ($20,000) to a party than to a candidate ($1,000) or to other political committees ($5,000). . . . We also recognize that FECA permits unregulated soft money contributions to a party for certain activities, such as electing candidates for state office . . . or for voter registration and get out the vote drives. . . . But the opportunity for corruption posed by these greater opportunities for contributions is, at best, attenuated. Unregulated soft money contributions may not be used to influence a federal campaign, except when used in the limited party-building activities specifically designated by statute.[120]

Accordingly, S.25's sweeping and convoluted limitations on the amounts and sources of soft money contributions to political parties[121] and disclosure of soft money disbursements by other organizations[122] are not justified by precedent.[123] Disclosure, rather than limitation, of large soft money contributions to political parties, but not other organizations, is the more appropriate and less restrictive remedy.

2. *Independent Expenditures*

The McCain-Feingold bill also contains a variety of new restrictions on independent expenditures that improperly intrude upon the core area of electoral speech and impermissibly invade the absolutely protected area of issue advocacy.

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[120] *Id.* at 2316. When the Court suggested that Congress "might decide to change the statute's limitations on contributions to political parties," it was referring to hard money donations, not soft money contributions. *Id.*

[121] *See* S. 25 §§ 211-213.

[122] *See id.* § 221.

[123] *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which upheld a ban on *corporate express* advocacy, does not control the issue of soft money activities by political parties.

Two basic truths have emerged with crystal clarity from twenty years of campaign finance decisions. First, independent expenditures for express electoral advocacy by citizen groups about political candidates lie at the very core of the meaning and purpose of the First Amendment. Thus, groups and individuals, independent of any campaign or candidate, may make unlimited expenditures for express advocacy, subject only to some forms of regulation such as disclosure and, in some cases, limitations on the amount and source of funding. Second, issue advocacy by citizen group lies totally outside the permissible area of any government regulation.[124] The McCain-Feingold bill assaults both principles.

First, Section 405 of the bill vastly expands the concept of coordinated expenditures[125] such that virtually any person or group having had even the most casual interaction with a candidate or a campaign is, therefore, barred from making independent expenditures. These definitions and limitations embody an impermissible kind of "gag order" by association.[126] Thus, these new rules seem sharply inconsistent with the holding of *Colorado Republican* which rejected the validity of a conclusive presumption of impermissible coordination whenever a party made an expenditure favoring its candidates.[127] Yet, Senate Bill 25 replaces the rejected automatic conclusion with an all but conclusive factual presumption of coordination and therefore, limitation.[128]

Second, if significant independent expenditures are made in support of another candidate or against an eligible, privileged candidate, the spending limits of the latter are raised, making it easier to counteract the independent speech.[129]

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[124] *See* Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n, 116 S. Ct. 2309 (1996); Federal Election Comm'n v. Massachusetts Citizens For Life, 479 U.S. 238, 249 (1986); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Buckley v. Valeo, 424 U.S. at 14-15, 78-80 (1976).

[125] *See* S. 25 § 405.

[126] *See, e.g.*, De Jonge v. Oregon, 299 U.S. 353 (1937) (holding that meetings for peaceable political action cannot be proscribed under the First Amendment).

[127] 116 S. Ct. 2309, 2319 (1996).

[128] S. 25 § 405.

[129] *Id.* § 101.

Finally, the bill imposes a number of new, expanded and burdensome disclosure requirements on independent speakers who would make such expenditures.[130] For example, any person or group that spends more than $1,000 to place a small political advertisement in the *New York Times*—and that would be a *very* small advertisement—within three weeks of an election, must file a report with the government within twenty-four hours of when they arrange for the advertisement, before it ever runs.[131] Failure to do so can result in civil monetary penalties or injunctive suits by the Federal Election Commission.[132] The application of these extensive new controls is triggered by any political content the government might deem express advocacy under the grossly expanded and patently unconstitutional definition contained in the bill.[133] The legislative record is replete with evidence that all of these restrictions are designed to chill and deter core electoral advocacy by independent groups.

3. *Issue Advocacy*

The worst legislative assault on settled First Amendment principles is the effort in bills, such as Senate Bill 25, to obscure the bright line test of express advocacy, that has been fashioned over twenty-five years by the courts to protect the broad range of issue discussion in America from campaign finance controls.

The *Buckley* Court could not have been clearer about the need for that bright line, objective test that focuses solely on the speaker's words. That test is an integral part of the First Amendment, no less than the actual malice rule of *New York Times Co. v. Sullivan*,[134] in defamation cases or the incitement test of *Brandenburg v. Ohio*,[135] in subversive advocacy cases.

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[130] *Id.* §§ 106, 241(d).
[131] *Id.* § 241(d)(1)(A).
[132] *Id.* § 303.
[133] *Id.* § 231.
[134] 376 U.S. 254, 285-86 (1964).
[135] 395 U.S. 444, 447-48 (1969).

As noted earlier,[136] the ACLU's initial encounter with campaign finance laws was to defend against the first attempt to use them to muzzle that small handful of dissenters who had published an advertisement in the *New York Times* criticizing the President. The government claimed that the advertisement was for the purpose of influencing the outcome of the 1972 Presidential election. The government was resoundingly rebuffed, and the courts ruled that the campaign finance laws could not be used in such an open-ended fashion to control issue speech.[137] Instead, express advocacy would be the bright dividing line between campaign advocacy and issue speech. The courts fashioned the express advocacy doctrine to safeguard issue advocacy from campaign finance controls, even though such discussion might influence the outcome of an election. The doctrine provides a hard, bright-line, objective test that protects political speech and association by focusing solely on the content of the speaker's words, not the motive in the speaker's mind, the impact of the speaker's opinions, the proximity to an election or the phase of the moon. The doctrine marks the boundary of permissible regulation and frees issue advocacy from any permissible restraint.

Pending legislative proposals assault the understanding of and weaken the protections for issue advocacy by their unconstitutional expansion of the definition of express advocacy. This expansive definition sweeps classic issue speech within the zone of regulation, in violation of the objective and categorical First Amendment concept the Court fashioned. Thus, these bills abandon the bright line test of express advocacy (words which in express terms advocate the election or defeat of a candidate, such as Vote for Smith, Vote Against Jones, Elect, Defeat), a test which the Supreme Court held mandated by the First Amendment. Instead, the bills resurrect concepts and language reminiscent of the "relative to a clearly identified candidate" language struck down by the Court in *Buckley*.

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[136] *See supra* notes 2-13 and accompanying text.

[137] Buckley v. Valeo, 424 U.S. 1, 42-45, 76-80 (1976); United States v. Nat'l Comm. for Impeachment, 469 F.2d 1135, 1139-42 (2d Cir. 1972); Buckley v. Valeo, 519 F.2d 817, 832 (D.D.C. 1975); American Civil Liberties Union v. Jennings, 366 F. Supp. 1041, 1055-57 (D.D.C 1973) (three-judge court).

For example, Section 406 of the McCain-Feingold bill would treat as express advocacy and regulate any communication that "conveys a message that advocates the election or defeat of a clearly identified candidate," or worse, "that a reasonable person would understand as advocating the election or defeat of a candidate."[138] That Section would also treat as express advocacy a communication made, at any time, that meets the reasonable person test and "that is made for the purpose of advocating the election or defeat of the candidate, as shown by 1 or more factors such as a statement or action by the person making the communication, the targeting or placement of the communication, or the use by the person making the communication of polling, demographic, or other similar data relating to the candidate's campaign or election."[139] Publication of "box score" voting records information would be allowed only if the "communication . . . is limited solely to providing information about the voting record of elected officials on legislative matters and that a reasonable person would not understand as advocating the election or defeat of a particular candidate."[140] This circular definition is not a safe harbor for issue advocacy regarding elected officials. That is how incumbents would impede dissemination of information about their voting records and official actions.[141]

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[138] S. 25 § 406(b)(20)(A)(i), (ii), (iii).

[139] S. 25 § 406(b)(20)(A)(iii).

[140] S. 25 § 406(b)(20)(B).

[141] At this writing, a "revised" version of the McCain-Feingold bill was being offered for consideration. The statutory definition of "express advocacy," the term upon which so much of the statutory and constitutional regime depends, has been revised in a number of ways, but the resulting legislative product is no less intrusive and disruptive of the rights of issue organizations.

The revised definition is as follows:

(b) DEFINITION OF EXPRESS ADVOCACY.—Section 301 of the Federal Election Campaign Act of 1971 (2 U.S.C. 431 (as amended by section 212(d)) is amended by adding at the end the following:

"(20) EXPRESS ADVOCACY

(A) IN GENERAL.—The term 'express advocacy' means a communication that advocates the election or defeat of a candidate by—

(i) containing a phrase such as 'vote for,' 're-elect,' 'support,' 'cast your ballot,' '(name of candidate) for Congress,' '(name of candidate)

in 1997,' 'vote against,' 'defeat,' 'reject,' or a campaign slogan or words that in context can have no reasonable meaning other than to advocate the election or defeat of 1 or more clearly identified candidates;

(ii) referring to 1 or more clearly identified candidates in a paid advertisement that is broadcast by a radio broadcast station or a television broadcast station within 60 calendar days preceding the date of an election of the candidate and that appears in the State in which the election is occurring, except that with respect to a candidate for the office of Vice President or President, the time period is within 60 calendar days preceding the date of a general election; or

(iii) expressing unmistakable and unambiguous support for or opposition to 1 or more clearly identified candidates when taken as a whole and with limited reference to external events, such as proximity to an election.

(B) VOTING RECORD AND VOTING GUIDE EXCEPTION.—The term 'express advocacy' does not include a printed communication that—

(i) presents information in an educational manner solely about the voting record or position on a campaign issue of 2 or more candidates;

(ii) that is not made in coordination with a candidate, political party, or agent of the candidate or party; or a candidate's agent or a person who is coordinating with a candidate or a candidate's agent;

(iii) does not contain a phrase such as 'vote for,' 're-elect,' 'support,' 'cast your ballot for,' '(name of candidate) for Congress,' '(name of candidate) in 1997,' 'vote against,' 'defeat,' 'reject,' or a campaign slogan or words that in context can have no reasonable meaning other than to urge the election or defeat of 1 or more clearly identified candidates."

The bill contains other unprecedented provisions which also seek to expand the definition of regulatable political activity beyond where the law has currently allowed. For example, it creates a new concept and regulates a new category of something called "federal election activity." "Federal election activity" is defined as follows:

"(2) FEDERAL ELECTION ACTIVITY.—

(A) IN GENERAL.—The term 'Federal election activity' means—

(i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;

(ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot); and

Such provisions attacking issue advertisements and legislative advocacy, would sweep in the essential issue discussion that *Buckley* and preceding cases[142] have held immune from government regulation and control. It seems aimed exactly against the kind of voting record, box score discussion that emanates from the hundreds of thousands of issue organizations that enrich our public and political lives. In *Buckley*, the Court adopted the bright line test of express advocacy in order to immunize issue advocacy from regulation: So long as persons or groups eschew expenditures that in express terms advocate the election or defeat of a clearly

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(iii) a communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and is made for the purpose of influencing a Federal election (regardless of whether the communication is express advocacy).

(B) EXCLUDED ACTIVITY.—The term 'Federal election activity' does not include an amount expended or disbursed by a State, district, or local committee of a political party for—

(i) campaign activity conducted solely on behalf of a clearly identified candidate for State or local office, provided the campaign activity is not a Federal election activity described in subparagraph (A);

(ii) a contribution to a candidate for State or local office, provided the contribution is not designated or used to pay for a Federal election activity described in subparagraph (A);

(iii) the costs of a State, district, or local political convention;

(iv) the costs of grassroots campaign materials, including buttons, bumper stickers, and yard signs, that name or depict only a candidate for State or local office;

(v) the non-Federal share of a State, district, or local party committee's administrative and overhead expenses (but not including the compensation in any month of an individual who spends more than 20 percent of the individual's time on Federal election activity) as determined by a regulation promulgated by the Commission to determine the non-Federal share of a State, district, or local party committee's administrative and overhead expenses; and

(vi) the cost of constructing or purchasing an office facility or equipment for a State, district or local committee."

This goes beyond the regulatable areas of campaign contributions and expenditures and express advocacy and would intrude legislative regulation into new realms.

[142] *See, e.g.*, Thomas v. Collins, 323 U.S. 516 (1945).

identified candidate, they are free to spend as much as they want to promote the candidate and his views. [143]

It is significant that the Act at issue in *Buckley* contained a similar provision regulating issue-oriented groups because of their box score and issue advocacy activities. That provision was *unanimously* held unconstitutional by the *en banc* Court of Appeals, without any further appeal by the government.[144] Circuit Judges, be they liberal or conservative, were unanimous in their condemnation of that effort to control issue speech.

The expanded definitions of express advocacy in Senate Bill 25 and other bills are similarly flawed. They seek to replace that time-honored concept with the kind of vague and overbroad formulas that *Buckley* and other courts have rejected. The circle has turned full round. *Buckley* said the First Amendment required that the law could only regulate "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."[145] However, the very language and concepts that the *Buckley* Court rejected as permissible definitions for regulatable electoral advocacy have now reappeared in these bills.

First Amendment rights would turn once again on such vague and subjective concepts as whether a communication conveys a message that advocates the election or defeat of a particular candidate or that a reasonable person would understand as advocating the election or defeat of a candidate and that is "made for the purpose of advocating the election or defeat of the candidate as shown by . . . a statement or action by the person making the communication, the targeting or placement of the communication, or the use by the person making the communication of polling, demographic or other similar data relating to the candidate's campaign or election."[146] Indeed, the prospect of subjecting free speech rights to the post facto assessment of a reasonable person test would undo decades of First Amendment jurisprudence

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[143] Buckley v. Valeo, 424 U.S. 1, 45 (1976).

[144] *See* Buckley v. Valeo, 519 F.2d 821, 832 (D.C. Cir 1975).

[145] *Buckley*, 424 U.S. at 44-45, 80.

[146] *See* S. 25 § 406.

designed to protect First Amendment rights against the vagueness and uncertainty of such a standard.

Some have attempted to defend these suspect provisions by distorting the meaning of the independent expenditure concept, as defined by the Court. A communication cannot be defined as an independent expenditure just because it is designed to affect the outcome of a federal election,[147] because the speaker's purpose and effect is to advocate the election or defeat of an identified candidate[148] or because the speaker's predominant intent[149] was to do so. The courts have rejected these subjective tests as treacherously dangerous boundary lines to mark First Amendment rights.[150] Under the First Amendment, an independent expenditure is only one which expressly advocates the election or defeat of a specific candidate.[151] Repeated references to "so-called issue ads" or "phony issue ads" cannot change that fact. Any bill which would undo twenty-five years of bright line protection for issue-oriented speech is fatally flawed.[152]

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[147] *Buckley*, 424 U.S. at 76-80.

[148] *Id.* at 43.

[149] *Id.*; *see* Federal Election Comm'n v. Furgatch, 807 F.2d 857, 863 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987).

[150] Federal Election Comm'n v. Christian Action Network, Inc., 110 F.3d 1049, 1050 (4th Cir. 1997); Clifton v. Federal Election Comm'n, 114 F.3d 1309, 1313 (1st Cir. 1997); Federal Election Comm'n v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 53 (2d Cir. 1980) (per curiam).

[151] Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238, 249 (1986); *Buckley,* 424 U.S. at 80.

[152] The severe First Amendment problems raised by pending legislative proposals are compounded and magnified by the inclusion of new enforcement powers for the Federal Election Commission, which pose unacceptable risks of prior restraint and political censorship.

With the effort to broaden the reach of the Federal Election Campaign Act, giving the Federal Election Commission sweeping new powers to go to court to seek an injunction on the allegation of a "substantial likelihood that a violation . . . is about to occur," section 303 of the Bipartisan Campaign Finance Reform Act of 1997, for example, is fraught with First Amendment peril.

Where sensitivity to the core constitutional protection for issue advocacy is concerned, the Federal Election Commission has, in the words of one Second Circuit judge, "failed abysmally." Federal Election Comm'n v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 55 (2d Cir. 1980)

Bills such as McCain-Feingold, which have garnered so much media support, are precisely the wrong way to seek campaign finance reform. The limits-based approach has been an utter failure. True reform would expand political participation and funding, without limits and conditions; not restrict contributions and expenditures used by groups and individuals to communicate their messages to the voters.

But the major legislative proposals look in the opposite, backward direction. Since twenty-five years of limits have been a failure, how can more limits remedy the situation? While it is problematic enough that many would enact legislation based on the failed strategy of limits, what is even more distressing is the attempt to embed that failed approach into the fabric of the Constitution itself.

IV. CAMPAIGN FINANCE REFORM: THE FATAL WAY

Perhaps most distressing of all is the drumbeat of doomsday rhetoric emanating from press conferences and editorial pages: The political system is corrupt. Democracy is being destroyed. The Republic is at risk. Perhaps most symptomatic of this overheated commentary was the paradoxical comment by House Minority Leader, Richard Gephardt: "What we have is two important values in direct conflict: freedom of speech and our desire for healthy campaigns in a healthy democracy. You can't have both."[153] Civics and Constitutional Law courses have long taught, however, that you cannot have one without the other, if not that political

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(Kaufman, C.J. concurring). Ever since then, non-partisan, issue-oriented groups have had to defend themselves against charges that their public advocacy rendered them subject to all of the FECA's restrictions, regulations and controls. The kind of "chilling effect" that such enforcement authority generates in the core area of protected speech makes the strongest case against giving the Commission additional powers to tamper with First Amendment rights. *See, e.g.*, Clifton v. Federal Election Comm'n v. Christian Action Network, Inc., 110 F.3d 1049 (4th Cir. 1997); Chamber of Commerce of the United States of America v. Federal Election Comm'n, 69 F.3d 600 (D.C. Cir. 1995); Federal Election Comm'n v. National Org. for Women, 713 F. Supp. 428 (D.D.C. 1989); American Civil Liberties Union v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973).

[153] 143 CONG. REC. S. 2173, 2193 (daily ed. Mar. 12, 1997).

speech was at the core of *both* our electoral processes and the First Amendment freedoms. But, our political leaders tell us we have to choose one or the other, clean elections or free speech. That is dangerous nonsense.

Likewise, we now have petitions circulated by distinguished colleagues to overrule *Buckley* so that its principles will not stand in the way of reform. Since that is presently doubtful, with seven of the Justices supporting the basic *Buckley* framework and unlikely to reverse course,[154] others have urged the more drastic step of a constitutional amendment overruling *Buckley* and allowing plenary federal and state control of campaign funding. Proposed amendments are pending in the Congress and well-known political figures, such as former Senator Bill Bradley, plump for them whenever possible on talk shows and at podiums across the nation.

So it becomes important to stare into that particular abyss. What kind of a constitutional landscape would we have if *Buckley* were dispatched, either by the Court's own hand or by amendment of the Constitution?

Whether by interpretation or amendment, a new rule might read as follows:

> Congress shall have power to set reasonable limits on the amount of contributions that may be accepted by, and the amount of expenditures that may be made by, in support of, or in opposition to, a candidate for nomination for election to, or for election to, Federal office.

The States would be given a comparable power. The above phrasing of the rule is taken from the text of Senate Resolution 2,[155] introduced by Senator Fritz Hollings and co-sponsored by a number of his colleagues.

Buckley recognized that campaign finance restrictions pose severe constitutional concerns because they limit the ability of individuals to advocate candidates and causes in the public forum

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[154] *See* Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 116 S. Ct. 2309 (1996).

[155] S.J. Res. 2, 105th Cong. § 1 (1997). On March 18, 1997, a vote was held over the issue to amend the Constitution in order to "reform" campaign finance. Thirty-eight Senators voted to do so. *See* 143 CONG. REC. § 2394-01 (daily ed. Mar. 18, 1997).

and require government monitoring and control of political speech activities.[156] In making this assessment, *Buckley* relied on core First Amendment principles.

But with *Buckley* overruled—by decision or amendment—and the First Amendment principles it embodied in constitutional limbo, what yardstick would we use to measure campaign finance restrictions? How will we fare on uncharted constitutional seas without the principles relied upon in *Buckley* to guide us?

Our political and constitutional system is predicated on the necessity of free, uninhibited and robust debate of public issues, politics and government. Indeed, speech about government and politics is more than self-expression; it is the essence of self-government.[157] Overturning *Buckley* would cut to the heart of our democratic system by empowering Congress or the States to severely restrict the ability of individuals and groups to communicate their views about candidates or causes if such advocacy were in any way by, in support of, or in opposition to a candidate for federal office. By placing the regulation of political funding almost wholly at the mercy of government, these proposals would turn the free speech legacy of Holmes, Brandeis, Black, Douglas and Brennan on its head.

The new regime would grant to Congress the abilities the Supreme Court held the First Amendment denied: plenary legislative control over the regulation of campaign finances.[158] Since the common purpose of the proposals is to carve out an exception to the First Amendment principles announced by the Court, against what baseline would such legislation limiting contributions and expenditures be measured? Or would Congress and the states have largely unfettered discretion to dictate the nature, scope and enforcement of campaign finance legislation?

Additionally, how would courts measure what were reasonable limits on contributions or expenditures? Would zero be a reasonable figure? Could Congress, thereby, completely outlaw any

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[156] *Buckley*, 424 U.S. at 14-23.

[157] New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (citing Stromberg v. California, 283 U.S. 359, 369 (1931)).

[158] *Buckley*, 424 U.S. 1.

personal campaign expenditures by a candidate and force candidates to rely solely on public funding—at whatever inadequate level a Congress full of incumbents might deem reasonable? Challengers and insurgents might have a different view of what is reasonable; incumbents and major parties write the rules, however. In 1974, Congress said $70,000—less than the value of the frank alone—was a reasonable amount to run a Congressional campaign.[159] Would that limit be acceptable today?

Likewise, Congress thought that $1,000 was a reasonable enough limit on independent citizen political expenditures.[160] Thus, it was made a federal crime for anyone to run a small, one-fourth page advertisement in the *New York Times* criticizing the President of the United States and urging people to vote against him.[161] That unprecedented provision effectively suppressed a primary forum of citizen dissent from government policy. The ability of citizens, individually or in groups, to publicly criticize political candidates, government officials and government policy is one of the mainstays of our democratic system. Under a new constitutional provision, such core political speech could be suppressed by totally prohibiting or severely limiting the expenditures required to enable such criticism. It would have outlawed the anti-Nixon impeachment advertisement that got the ACLU into this whole issue a quarter century ago. *Buckley* condemned such a restriction in unqualified terms as violative of the First Amendment. A decade later the Court reaffirmed that independent political expenditures are at the core of the First Amendment and cannot be restricted.[162] The following decade, in 1996, the Court reaffirmed *Buckley* and adhered to the same approach.[163] But *Buckley* is gone. Would the limit now be reasonable? Under any theory of free speech—individual self-expression, democratic self-government or

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[159] 18 U.S.C. § 608(c)(1)(E) (1970 & Supp. IV 1974) (repealed 1976).

[160] *Id.* § 608(b)(1).

[161] *See id.* § 608(e)(1).

[162] *See* Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480 (1985).

[163] *See* Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 116 S. Ct. 2309 (1996).

the market place of ideas—that is a chilling and unacceptable prospect.

By the same token, Congress could reduce the amount of allowable political contributions from $1,000 to $500, or even $100, as suggested in versions of McCain-Feingold, thus effectively prohibiting all private contributions except for the most modest expression of support by contributors. By what constitutional yardstick could such regulation and reduction of the amounts of campaign funding be measured as "reasonable"?

Just as Congress would be the primary judge of what were reasonable contribution or expenditure limits, so too, would Congress decide what communications were in support of, or in opposition to a federal candidate. Would the anti-Nixon impeachment advertisement now be an expenditure in opposition to President Nixon and in support of George McGovern? Remember, that advertisement had not one word of express advocacy,[164] but this consideration was not of concern to the government. Presumably, it would also no longer matter under the new First Amendment. Would any public communication, criticizing or praising any official or individual who happens to be a candidate for political office, be deemed an expenditure that Congress could limit? With *Buckley* eliminated, what would stand in the way of such an intolerable interpretation?

The reach of the "in support of, or in opposition to" language is of particular concern to all the non-partisan, issue-oriented organizations that regularly comment on public policy or inform their members, or the public, about the voting records of such

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[164] United States v. National Comm. for Impeachment, 469 F.2d 1135, 1139-42 (2d Cir. 1972) (holding that publication of advertisements by a committee seeking impeachment of President Nixon did not, by itself, make the committee a "political entity" where the basic thrust of the advertisement was for the impeachment of the President and not for specific election campaigns or candidates); American Civil Liberties Union v. Jennings, 366 F. Supp. 1041, 1054 (D.D.C. 1973) (three judge court), *vacated as moot*, Staats v. American Civil Liberties Union, 422 U.S. 1030 (1975) (holding that a requirement that the media, before accepting advertisements supporting or derogating candidates, obtain certificates from candidates of no connection, under pain of criminal penalty, was an impermissible prior restraint that unconstitutionally discouraged free and open discussion on matters of public concern).

officials on issues of concern. In the past, the government has repeatedly and unsuccessfully attempted to bring such issue discussion within the reach of campaign finance laws.[165] Indeed, as has been noted, in 1974, as part of the sweeping campaign reforms, Congress included a provision explicitly intended to regulate groups such as Common Cause, the Sierra Club and the ACLU, because these organizations published box scores rating the performance of Members of Congress.[166] In *Buckley*, the lower court unanimously ruled that the First Amendment prohibited such government regulation of non-partisan efforts to influence public opinion.[167] Several other courts have reached similar conclusions.[168] The Supreme Court in *Buckley*, in order to cure the First Amendment vagueness and overbreadth of statutory terms such as for the purpose of influencing any election, fashioned the bright-line distinction between express advocacy, which can be subject to some campaign finance regulations, and issue advocacy, which cannot.[169] Are all of these carefully-crafted distinctions as dormant as the *Buckley* case which fashioned and applied them? Since *Buckley* is to be overturned, could issue speech now be systematically regulated or restricted on the ground that contributions and expenditures for such speech are in support of, or in opposition to mentioned candidates?

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[165] *See* American Civil Liberties Union v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973).

[166] *See* 2 U.S.C. § 437a (requiring such groups to report to the commission if they constitute a political committee). The New York Civil Liberties Union fell under §437a. Buckley v. Valeo, 519 F.2d 821, 868-69 (D.C.C. 1975). However, the Court of Appeals ruled that §437a is unconstitutional because it restricts completely non-partisan public discussion of issues of public importance. *Id.* at 868-78.

[167] *Buckley*, 519 F.2d at 832.

[168] Federal Election Comm'n v. Survival Education Fund, Inc., 65 F.3d 285 (2d Cir. 1995); Faucher v. Federal Election Comm'n, 928 F.2d 468 (1st Cir. 1991), *cert. denied*, Federal Election Comm'n v. Keefer, 502 U.S. 820 (1991); Federal Election Comm'n v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45 (2d Cir. 1980) (holding that reporting provisions of the Federal Election Campaign Act only apply to partisan discussions that expressly advocate a particular election result).

[169] Buckley v. Valeo, 424 U.S. 1, 45 (1976).

Lastly, what about the press? May news coverage or editorial endorsements be considered contributions or expenditures in support of, or in opposition to favored and disfavored candidates? Right now, the FECA specifically exempts from the definition of expenditure "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication unless such facilities are owned or controlled by any political party, political committee, or candidate. . . ."[170] In the past, the government tried to prosecute the press for publishing editorial endorsements that might influence the public on election day.[171] The Supreme Court held that a violation of the First Amendment. How would the matter be decided under a potentially revised First Amendment? Is the press that different from any other speaker? *Buckley* was anchored in numerous free press rulings. With *Buckley* gone, do those rulings survive unscathed? Can the press be confident they do?[172]

All of these concerns about the reach of campaign finance restrictions with *Buckley* eliminated are underscored by the pervasive problem of enforcement. From the 1972 impeachment advertisement case to the present time, giving government the power to regulate expenditures in support of, or in opposition to a federal candidate invites intensive and disruptive official scrutiny of all public speech arguably within that zone. In the 1980's, the Federal Election Commission claimed a whole host of non-partisan organizations had violated federal campaign law restrictions because of their criticism of President Reagan's policies. Although the Commission ultimately dropped these charges, these groups

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[170] 2 U.S.C. § 431(9)(B)(i) (1997). *See* Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 668 (1990) (ruling that the legislature *could* give the media such an exemption from campaign finance controls; but the Court did not rule that the government *had* to do so).

[171] *See* Mills v. Alabama, 384 U.S. 214 (1996).

[172] A recent public opinion poll shows that Americans want to restrict newspapers as much as campaign contributions. And more than 80% of Americans would like to place restrictions on the way that newspapers cover political campaigns. *See* Rasmussen Research, *Poll of the Day: Americans Want to restrict Newspapers as Much as Campaign Contributions*, Oct. 24, 1997 (on file with *Journal of Law and Policy*).

were forced to spend considerable time, effort and resources to defend the right to criticize the President without official examination or sanction. As Justice Marshall once observed, "the value of a Sword of Damocles is that it hangs—not that it drops."[173]

Under the broad in support of, or in opposition to language, it is thus possible that individuals, political candidates, political parties, labor unions, corporations, political action committees, issue organizations, interest groups and even the media could all be subject to restrictive regulation of resources used for public and political advocacy. Ironically, if the ability of these groups and individuals to use resources to discuss public issues and political figures is diminished, the relative power of government to shape and control public opinion will be enhanced. Perhaps this is the objective.

These possibilities are not far-fetched speculations. They are the consequences—intended or unintended—of the efforts to overturn *Buckley*. The *Buckley* decision was not a sport. It was solidly grounded in settled First Amendment principles of freedom of speech, press, association and self-government. These principles included (1) that discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution;[174] (2) that this reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open";[175] and (3) that the First Amendment protects political association as well as political expression.[176] Moreover, in striking down limitations on independent expenditures, the Court primarily relied on two important free press cases.[177]

The *Buckley* ruling and the principles it applied have been reaffirmed by the Supreme Court. In 1986, Justice Brennan confirmed *Buckley's* recognition that "independent expenditures constitute expression 'at the core of our electoral process and of the

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[173] Arnett v. Kennedy, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

[174] *Buckley*, 424 U.S. at 14.

[175] *Id.* (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[176] *Id.* at 14-15.

[177] Mills v. Alabama, 384 U.S. 214 (1996); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

First Amendment freedoms.'"[178] A majority of the Court reached the same conclusion a decade later.[179] Without these principles, and with a new First Amendment, the courts and the country will be set to sea, in uncharted constitutional waters.

Displacing *Buckley* by constitutional amendment would also raise difficult problems of constitutional interpretation, namely how would a new amendment mesh or interlock with the existing constitutional provisions and structure. Would it overrule the specific holding of *Buckley* on candidate, campaign and independent expenditures, but not disturb the underlying First Amendment principles of speech, press and association upon which the ruling was based? Could free press or equal protection guarantees still be used to challenge campaign finance laws, or would the new amendment preempt those protections as well? If shifting partisan majorities in Congress decide that the new amendment permits regulation of election day editorial endorsements by newspapers or election day exit polls by the networks, can the media still argue freedom of the press or does the new amendment control? Will Congress regulate news coverage and reporting? If Congress provides total campaign subsidies for Democrats and Republicans, but provides none for independent or third party candidates, can those excluded from funding claim a denial of equal protection of the laws; or is such a claim preempted? If Congress allows political parties to make independent expenditures, but restricts the right of non-party groups to do so, could this disparity be challenged under equal protection guarantees or the equality component of the First Amendment?

Justice Brandeis' classic exposition of free speech was premised, to a great extent, on principles of individual liberty and self-development.[180] May a candidate or independent speaker

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[178] Federal Election Comm'n v. Massachusetts Citizens For Life, 479 U.S. 238, 251 (1986) (plurality opinion).

[179] Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 116 S. Ct. 2309, 2316 (1996) (stating "the independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees").

[180] Whitney v. California, 254 U.S. 357, 372-80 (1927) (Brandeis, J., concurring).

claim that Congressional restrictions on personal campaign expenditures constitute a deprivation of liberty under the Fifth Amendment, apart from the now-superseded protections of the First Amendment?

Americans are not familiar with the notion of a second First Amendment. There will be great uncertainly about how it meshes with the first one, as well as with other pertinent constitutional provisions.

Given these perils and uncertainties, the prudent course would be to address the problems of campaign finance under the First Amendment—the traditional First Amendment—and to avoid creating exceptions to it. Under that First Amendment, the remedy for bad, excessive, overblown or overly funded speech is "more speech"—publicly and privately funded—not "silence coerced by law."[181]

V. CAMPAIGN FINANCE REFORM: THE FIRST AMENDMENT WAY

It is remarkable that this classic and obvious free speech remedy—more speech—has all but been ignored in the current debate.[182] The most effective way to reduce the disparities which our current campaign finance legal regime has created and to expand political opportunity without limiting political speech, has long been known. It is the unitary approach to campaign finance and the political activity it sustains:

1. No limitations on contributions or expenditures to or by candidates or causes in the public arena.

2. Full disclosure of large contributions as the effective and democratic antidote to improper influence by large contributors over elected officials.

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[181] *Id.* at 357, 375-77.

[182] Some Members of Congress have introduced bills that would embody two of the three "more speech" approaches to campaign finance reform, namely, raising contribution limits and making disclosure more effective. *See, e.g.*, H.R. 965, 105th Cong. (1997). But such proposed legislation lacks the third vital element of a "more speech" strategy: serious public financing of various kinds to facilitate political candidacy and speech.

3. Meaningful private and public subsidies and funding of candidates and campaigns to facilitate political opportunity and participation.

These are all less drastic remedies than government restriction of political funding and monitoring of political speech and association.

These are the pillars of true and real campaign finance reform. They supply floors without ceilings, encourage and support political activity without limitation and expand the reach and range of political discourse without limiting it to the two major parties.

The path out from the morass in which campaign finance laws have placed us was chartered long ago by the Framers of the First Amendment; the First Amendment answer to bad, corrupt or excessive speech is more speech—publicly and privately funded—rather than silence coerced by law. The following recommendations would achieve the goal set forth by the framers:

1. Raise individual and committee contribution limits so that candidates may fund their campaigns with greater ease. The campaign finance landscape could be vastly improved by simply raising the low $1,000 ceiling on federal candidate contributions.

2. Give modest tax credits ranging up to $500 for private political contributions to any party or candidate. Such incentive would be the most straightforward and participatory form of public financing of politics—through private choices, publicly amplified.

3. Provide the public with effective and timely disclosure of large contributions. Additionally, ensure that these disclosures are made before the election and are widely publicized by the media and watchdog groups so the electorate will know, prior to the election, about the fundraising activities of candidates. This proposal is the most appropriate and democratic remedy to deal with the problems of undue access and influence on elected officials. Let the people decide who is too cozy with the fat cats and the "special interests."

4. Provide a variety of public subsidies and resources to facilitate campaign activities and reduce the dependence on large private contributions. This proposal must be accomplished without allowing unconstitutional strings to be attached. The receipt of political subsidies or benefits should never be conditioned on the

surrender of First Amendment rights. The First Amendment must not be negotiable.

5. Make public financing available to all legally-qualified candidates and their causes, not just to Democrats and Republicans.

6. Make public seed money or matching funds available, without discrimination and unconstitutional conditions attached.

7. Provide free mailing privileges to all legally-qualified federal candidates. This provision, alone, would help level the playing field between incumbents and their usually underfunded opponents.

8. Afford candidates free air time, without restrictions or conditions, to get their message across to the voters.

Each of these approaches has the collateral benefit of allowing candidates to spend less time raising money and more time raising issues. Additionally, these strategies have one other thing in common: they expand political opportunity and political speech without limitation. They build floors to support political activity without ceilings that restrict it.

Finally, there is one last factor to be considered: the American people must rely on their good judgement to cut through big spending and big giving in order to decide what candidates and causes deserve their support.

There have always been two basic choices regarding the solution to the problems of campaign finance. First, the "haves" may be limited through restrictions and controls. But, this choice is both unconstitutional and futile. People and organizations with resources will always find ways to bring their resources to bear on politics and to communicate their messages to the voters. Restrict one way and they will find others. As a result, we have a proliferation of PACs, soft money contributions and issue-oriented groups.

Or you can choose to help the "have nots" by providing the whole range of subsidies and benefits that expand political opportunity without restricting free speech.

But in the most important sense, that choice has long ago been made for the American people. To quote a great political figure, Senator Eugene McCarthy, one of the challengers in *Buckley* whom Judge Winter and I had the honor of representing: "The best campaign reform law ever written was the First Amendment." What we should do, then, is not repeal or restrict it, but honor it.