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# Campaign Finance Reform in Kentucky: The Race for Governor

BY JENNIFER A. MOORE\*

## INTRODUCTION

Prior to 1992, campaign finance reform in Kentucky received minor, if any, attention.<sup>1</sup> The only significant laws regarding campaign finance banned corporate contributions and limited individual contributions to \$4000.<sup>2</sup> This climate changed as a result of two major events: the 1991 governor's race<sup>3</sup> and the BOPTR0T investigation.<sup>4</sup> In

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<sup>1</sup> See Joe Terry, *New Rules Changing Campaigns*, KY. J., Apr./May 1995, at 1.

<sup>2</sup> See KY. REV. STAT. ANN. §§ 121.025 (Michie 1984), 121.150(6) (Michie 1986).

<sup>3</sup> In 1991, Democratic candidates raised between \$2 and \$4 million each. Specifically, each Democratic candidate raised: Scotty Baesler, \$2 million; Dr. Floyd Poore, \$2.6 million; Martha Wilkinson, \$3.6 million; and the eventual winner of the race for governor, Brereton Jones, \$4 million. See Tom Loftus, *Big-Money Politics, With Growing Pressure to Raise Vast Sums, Even Candidates and Contributors Are Calling for Changes*, COURIER-JOURNAL (Louisville, Ky.), Dec. 29, 1991, at A1 [hereinafter Loftus, *Big-Money*].

<sup>4</sup> See Tom Loftus, *BOPTR0T. The Inside Story: 5 Years, 21 Convictions Later, Probe to End*, COURIER-JOURNAL (Louisville, Ky.), July 30, 1995, at A1 [hereinafter Loftus, *The Inside Story*]; Tom Loftus, *Anatomy of a Scandal; BOPTR0T. The Inside Story*, COURIER-JOURNAL (Louisville, Ky.), July 30, 1995, at D1.

BOPTR0T signifies the "biggest, most successful investigation of public wrongdoing in Kentucky." *Id.* The BOPTR0T investigation acquired its name from a "focus on the legislature's Business Organizations and Professions (or BOP) committees and their handling of issues related to harness racing, the trotters." *Id.* For Kentuckians, BOPTR0T illustrated corruption in government and is, therefore, often credited with bringing about campaign finance reform.

1991, the total amount spent by all gubernatorial campaigns reached \$19 million.<sup>5</sup> Not surprisingly, after spending around \$4 million, Brereton Jones emerged as the winner.<sup>6</sup> The race for governor in Kentucky had turned into a campaign of fundraising in which the candidate with the most money wins<sup>7</sup> — a process completely opposite from the one envisioned: “‘Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune.’”<sup>8</sup>

Coinciding with the increased costs of campaigns in Kentucky, the BOPTROT investigation unveiled high levels of corruption in the state and, in 1992, prompted the General Assembly to take action.<sup>9</sup> For the first time, the Kentucky General Assembly passed serious campaign finance reform and became one of the few states in the country to adopt a plan of public financing for its governor’s race.<sup>10</sup> The Public Financing Campaign Act<sup>11</sup> established a matching fund for slates of candidates for governor and lieutenant governor who voluntarily agree to a cap on overall spending.<sup>12</sup> As a result of public funding and voluntary spending limits, the cost of the 1995 governor’s race decreased dramatically from 1991.<sup>13</sup> This, in turn, reduced the effect of big money on the outcome

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*See* Interview with Sheryl Snyder, an attorney at Brown, Todd & Heyburn, in Louisville, Ky. (Nov. 7, 1996).

<sup>5</sup> *See* Loftus, *Big-Money*, *supra* note 3.

<sup>6</sup> *See id.*

<sup>7</sup> *See id.*, *see also* Terry, *supra* note 1.

<sup>8</sup> CENTER FOR RESPONSIVE POLITICS, MONEY IN POLITICS — REFORM: PRINCIPLES, PROBLEMS, AND PROPOSALS 3 (1996) [hereinafter CENTER FOR RESPONSIVE POLITICS] (quoting THE FEDERALIST NO. 57 (James Madison)).

<sup>9</sup> *See* Terry, *supra* note 1.

<sup>10</sup> *See id.*

<sup>11</sup> *See* KY. REV. STAT. ANN. §§ 121A.005-.990 (Michie 1993 & Supp. 1996). For a general description and breakdown of the campaign finance laws of all the states, including Kentucky, see STATE CAPITAL LAW FIRM GROUP, LOBBYING, PACS, AND CAMPAIGN FINANCE: 50 STATE HANDBOOK (Peter C. Christianson et al. eds., 1996) [hereinafter LOBBYING, PACS, AND CAMPAIGN FINANCE].

<sup>12</sup> *See* KY. REV. STAT. ANN. §§ 121A.020(2) (Michie 1993 & Supp. 1996) (“the registry shall distribute transfers for the matching of qualifying contributions to a qualifying slate of candidates”), 121A.030(1) (Michie 1993 & Supp. 1996) (requiring qualifying slates to agree to a maximum spending amount of \$1.8 million).

<sup>13</sup> *See* Terry, *supra* note 1.

of the governor's race and also reduced the quid pro quo effect of such large contributions. In addition, public financing restored the grass-roots level of campaigning by allowing the candidates to focus on the issues rather than raising money. Public financing of the 1995 governor's race benefitted all Kentuckians by removing the "for sale" sign from the office of governor.<sup>14</sup>

In Part I, this Note examines the history of campaign finance reform and, in particular, the development of the law in Kentucky. Part II provides a brief overview of the major provisions of Kentucky's current campaign finance law. As a specific example of the effects and success of Kentucky campaign finance reform, Part III focuses on the public financing of the 1995 governor's race in Kentucky. Part IV examines the constitutional challenges to the Kentucky law and their probability of success based on decisions rendered by the United States Supreme Court, Kentucky courts, and the courts of other states with similar campaign finance laws. This Note concludes with proposals for the Kentucky General Assembly to consider regarding the future direction of campaign finance reform in the state.

## I. HISTORY OF CAMPAIGN FINANCE REFORM

### A. *Early Reforms*

Prior to the age of television and the immediacy of mass communication, campaign finance laws barely existed. The extent of campaign finance laws in the Nineteenth Century consisted of bans on corporate contributions<sup>15</sup> and prohibition of contributions from federal employees.<sup>16</sup> After the turn of the century, the need for government regulation

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<sup>14</sup> See *id.*, see also Sheryl G. Snyder, *Reform Validated by Turnout*, COURIER-JOURNAL (Louisville, Ky.), Nov. 26, 1995, at D3 (analyzing the high voter turnout and the success of public funding in the 1995 governor's race).

<sup>15</sup> See ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW at xvi-xvii (1988) (examining the history of campaign finance reform laws). A few states passed such laws due to the growing influence of business in the political sphere during the industrial revolution. See *id.* at xvii.

<sup>16</sup> See *id.* at xvi. In addition to creating the civil service system, the Civil Service (Pendleton) Act of 1883, 22 Stat. 403 (codified as amended in scattered sections of 18 U.S.C.), prohibited candidates from soliciting campaign contributions from federal employees covered by the law. See MUTCH, *supra* note 15, at xvi.

of campaigns increased as more and more corporations contributed to and influenced campaigns.<sup>17</sup> In 1907, Congress banned nationally-chartered banks and corporations from contributing to federal campaigns.<sup>18</sup> The first federal campaign disclosure law, the Publicity Act,<sup>19</sup> passed Congress in 1910, and the following year Congress amended the Act to set overall expenditure limits of \$5000 for House candidates and \$10,000 for Senate candidates.<sup>20</sup> However, the law proved ineffective when, in 1921, the Court held that Congress did not have the power to regulate primary elections.<sup>21</sup> Congress responded in 1925 by passing the Federal Corrupt Practices Act,<sup>22</sup> which eliminated disclosure requirements for primaries<sup>23</sup> and increased the spending limit to \$25,000 for Senate

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<sup>17</sup> See Michael J. Merrick, Note, *The Saga Continues — Corporate Political Free Speech and the Constitutionality of Campaign Finance Reform: Austin v Michigan Chamber of Commerce*, 24 CREIGHTON L. REV. 195, 207 (1990). See generally *id.* for a history of campaign finance reform.

<sup>18</sup> See The Tillman Act of 1907, ch. 420, 34 Stat. 864-65 (current version at 2 U.S.C. § 441b (1994)).

<sup>19</sup> The Publicity Act of 1910, Pub. L. No. 274, 36 Stat. 822 (requiring post-election disclosure of receipts and expenditures by national party committees and other multistate campaign committees for House of Representative races), *repealed by* Federal Corrupt Practices Act of 1925, ch. 368, § 318, 43 Stat. 1070, 1074.

<sup>20</sup> See Publicity Act Amendments of 1911, Pub. L. No. 32, 37 Stat. 25, 28, *repealed by* Federal Corrupt Practices Act of 1925, ch. 368, § 318, 43 Stat. 1070, 1074. The amendments also extended disclosure requirements to Senate campaigns and pre-election reporting. See *id.* 37 Stat. 25-27

<sup>21</sup> See *Newberry v. United States*, 256 U.S. 232 (1921), *overruled by* *United States v. Classic*, 313 U.S. 299 (1941). The question before the Court in *Newberry* concerned Congress' power to regulate primary elections. The Court held that primaries are not within the reach of Congress because a "primary" does not fit the accepted definition of an election, and thus Congress had no constitutional authority under either Article I, § 4 or the Seventeenth Amendment. See *Newberry*, 256 U.S. at 247. The Court, in *Classic*, included the primary as an integral step in the election of a chosen representative. Contrary to the opinion in *Newberry*, the Court held that primary elections are within the meaning of election as set forth in the Constitution. See *Classic*, 313 U.S. at 314.

<sup>22</sup> Federal Corrupt Practices Act of 1925, ch. 368, 43 Stat. 1070 (codified at 2 U.S.C. §§ 241-256), *repealed by* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, 20 (codified as amended at 2 U.S.C. §§ 431-455 (1994)).

<sup>23</sup> See *id.*

candidates in high-population states.<sup>24</sup> These laws created the illusion of campaign finance reform, but, in reality, they lacked enforcement and effectiveness. For example, zero prosecutions resulted from the Federal Corrupt Practices Act before the Federal Election Campaign Act of 1971 replaced it.<sup>25</sup>

### B. *Federal Election Campaign Act ("FECA")*

After 1925, Congress took very little action on campaign finance reform until 1971, when it passed the Federal Election Campaign Act of 1971 ("FECA").<sup>26</sup> The explanation for congressional inaction may relate to the only slight increase in campaign spending from the 1920s to the 1950s<sup>27</sup> and to the absence of major scandals during this period.<sup>28</sup> The cost of campaigning increased with the influx of televisions into American homes in the 1950s — which led candidates to spend more money in order to purchase television commercials.<sup>29</sup>

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<sup>24</sup> See *id.* at 1073.

<sup>25</sup> See *Campaign Finance Reform: Background*, 6 CQ RESEARCHER 129, 130 (1996).

<sup>26</sup> Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431-455 (1994)); see Merrick, *supra* note 17, at 208.

<sup>27</sup> See ALEXANDER HEARD, THE COSTS OF DEMOCRACY 402-03 (1960). Heard found that the overall cost of national campaigning did not increase between the 1920s and 1950s despite inflation and a larger electorate.

<sup>28</sup> See MUTCH, *supra* note 15, at xviii. After the Teapot Dome Scandal in the 1920s, no major election scandals occurred until Watergate in the early 1970s. See *id.* at 24-26. The Teapot Dome Scandal is the name given to events transpiring in 1921 and 1922. The Secretary of the Interior leased government land to oil developers without taking a bid. However, Harry F. Sinclair, one of the oil developers, gave cash to the Secretary. A Senate investigation revealed that Sinclair gave money to the Republican Party in an "off-elections year." Because the contribution came during a non-election year, it escaped disclosure requirements. The controversy surrounding this affair led Congress to "require political committees to report financial activity for all years." *Id.* at 24; see also HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM I (4th ed. 1992) (stating that election reform was "spurred" by Watergate).

<sup>29</sup> See *Campaign Finance Reform: Background*, *supra* note 25, at 130. In 1952, Dwight D. Eisenhower spent \$6.6 million, which was three times the amount spent by the Republican nominee in 1948. By 1968 campaign costs had increased dramatically with the Republicans spending \$25.4 million and the

In the aftermath of Watergate<sup>30</sup> and the large sums of money spent by President Nixon's re-election campaign in 1972,<sup>31</sup> campaign finance reform emerged as one of the foremost issues in the Ninety-third Congress.<sup>32</sup> For the first time in United States history, Congress passed serious campaign finance reform when, in 1974, it amended FECA.<sup>33</sup> The new law created the Federal Election Commission ("FEC") to administer and enforce the reforms,<sup>34</sup> which included contribution limits of \$1000 from each individual to each candidate for each election<sup>35</sup> and \$5000 from each political action committee ("PAC") to each candidate for each election.<sup>36</sup> The FECA amendments also set the maximum amount an individual or PAC may contribute to a national party committee at \$20,000 and \$15,000, respectively.<sup>37</sup> An individual or a PAC may also contribute up to \$5000 per year to other political committees. However, an individual's aggregate annual total may not exceed \$25,000 in contributions.<sup>38</sup> Other provisions of the 1974 Act limited personal spending by candidates, set caps on overall campaign spending depending on the office sought,<sup>39</sup> and set a \$1000 limit on independent expenditures by individuals to a "clearly identified candidate."<sup>40</sup> In addition to these measures, the 1974 amendments re-enacted

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Democrats \$11.6 million. *See id.*

<sup>30</sup> *See, e.g.,* MUTCH, *supra* note 15, at 47-49. In 1972 five men connected with President Nixon's Committee to Re-Elect the President broke into the Democratic National Committee headquarters in the Watergate Hotel in Washington, D.C. The arrest of these five men led to the uncovering of numerous campaign finance law violations, a secret fund authorized by top presidential aides, and the eventual resignation of President Richard M. Nixon. The culmination of these events along with numerous other violations is commonly referred to as "Watergate." *See id.*

<sup>31</sup> *See* ALEXANDER, *supra* note 28, at 20. In 1972 President Nixon's campaign spent approximately \$61.4 million. The Democratic candidate George McGovern spent around \$30 million. *See id.*

<sup>32</sup> *See id.* at 1-9

<sup>33</sup> *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431-455 (1994)).

<sup>34</sup> *See* 2 U.S.C. §§ 437c-438 (1994).

<sup>35</sup> *See id.* § 441a(a)(1)(A).

<sup>36</sup> *See id.* § 441a(a)(2)(A).

<sup>37</sup> *See id.* § 441a(a)(1)(B) & (2)(B).

<sup>38</sup> *See id.* § 441a(a)(1)-(3).

<sup>39</sup> *See* 18 U.S.C. § 608(a)(1) & (c) (Supp. IV 1974) (repealed 1976).

<sup>40</sup> Federal Election Campaign Act Amendments, 88 Stat. at 1265; 18 U.S.C. § 608(e) (Supp. IV 1974) (repealed 1976).

the Presidential Election Campaign Fund Act of 1966<sup>41</sup> by establishing a tax check-off scheme to finance primary campaigns, party nominating conventions, and general election campaigns.<sup>42</sup>

### C. Buckley v Valeo

Soon after their passage, the FECA amendments met a roadblock when the United States Supreme Court invalidated several provisions of FECA as unconstitutional infringements on freedom of speech rights.<sup>43</sup> The Court upheld the individual and PAC contribution limitations, the reporting and disclosure requirements, and the public financing of presidential campaigns.<sup>44</sup> However, the Court struck down the provisions that limited a candidate's personal spending, overall campaign spending, and independent expenditures.<sup>45</sup> As a result of this landmark decision, federal and state governments have tried to develop campaign finance laws which combat the corrupting influence of money and the increasing costs of campaigns while at the same time protecting an individual's right to free speech.<sup>46</sup>

In *Buckley*, 1976 presidential candidate Senator James Buckley, former Senator Eugene McCarthy, New York Civil Liberties Union executive director Ira Glasser, and others challenged the constitutionality of FECA as an infringement on free speech.<sup>47</sup> The plaintiffs argued that

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<sup>41</sup> Presidential Campaign Fund Act of 1966, Pub. L. No. 89-809, 80 Stat. 1587 (current version at 26 U.S.C. §§ 9001-9013 (1994)) (providing for public subsidies to the national political parties for Presidential elections). *See generally Campaign Finance Reform: Background*, *supra* note 25, at 132. In 1967 Congress suspended the provision and only retained the income tax checkoff. Although Congress re-enacted the plan in 1971, President Nixon insisted that it not take effect until after the 1972 election. *See id.*

<sup>42</sup> *See* 26 U.S.C. § 9006 (1994).

<sup>43</sup> *See Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*).

<sup>44</sup> *See id.* at 143.

<sup>45</sup> *See id.* at 58-59.

<sup>46</sup> *But see* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049 (1996) (challenging the basic assumptions of campaign finance reform and asserting that reforms do not reduce corruption or protect free speech).

<sup>47</sup> *See* MUTCH, *supra* note 15, at 49-50. The plaintiffs in *Buckley* represented a diverse group including conservative organizations such as the American Conservative Union, Human Events, Inc., and the New York Conservative Party as well as liberal individuals, such as Stewart Mott, heir to General Motors. *See*



“limiting the use of money for political purposes constitutes a restriction on communication violative of the First Amendment, since virtually all meaningful political communications in the modern setting involve the expenditure of money”<sup>48</sup> In examining the theory that money equals speech in the political sphere, the Court distinguished between pure speech and “symbolic” speech, and categorized contributions by individuals as a form of “symbolic expression of support.”<sup>49</sup> The Court concluded that a limitation on the amount of money does “not in any way infringe the contributor’s freedom to discuss candidates and issues.”<sup>50</sup> However, the Court recognized the need to protect freedom of speech and determined that the government must present a compelling interest in order to restrict any speech.<sup>51</sup> Based on this reasoning, the Court upheld the provisions limiting individual and PAC contributions to \$1000 and \$5000, respectively.<sup>52</sup> The Court determined that the compelling governmental interest to prevent “corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office”<sup>53</sup> satisfied the test.<sup>54</sup> The defendants also argued for the validity of the Act based on the assumption that Congress should ensure political equality and the integrity of the democratic process.<sup>55</sup> The Court did not focus on these latter two government interests and, instead, upheld certain provisions of the Act based on the corrupting influence of money in the election process.

It is unnecessary to look beyond the Act’s primary purpose — to limit the actuality and appearance of corruption resulting from large

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*id.*

<sup>48</sup> *Buckley*, 424 U.S. at 11.

<sup>49</sup> *Id.* at 21.

<sup>50</sup> *Id.* See generally J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976) (discussing the different viewpoints of money as speech and money as speech-related conduct).

<sup>51</sup> See *Buckley*, 424 U.S. at 24-25.

<sup>52</sup> See *id.* at 23-36.

<sup>53</sup> *Id.* at 25.

<sup>54</sup> See *id.* at 29

<sup>55</sup> See *id.* at 25-26. See generally J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982) (arguing that the decisions in *Buckley* and *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) perpetuate inequality in the name of the First Amendment).

individual financial contributions — in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation. To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.

Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.<sup>56</sup>

The Court justified contribution limits based on the need to combat the *quid pro quo* effect of large contributions. However, the Court determined that the limits on independent expenditures do not serve a compelling government interest and fail the strict scrutiny test under the First Amendment.<sup>57</sup> The defendants argued that limits on expenditures decreased the possibility of circumvention of contribution limits. The Court did not accept this argument, because expenditure limits, unlike contribution limits, constitute a direct limit on speech.<sup>58</sup>

[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 interchange of ideas for the bringing about of political and social changes desired by the people.’”<sup>59</sup>

Following this same logic, the Court struck the provisions limiting expenditures by the candidate and his or her family as well as overall

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<sup>56</sup> *Buckley*, 424 U.S. at 26-27. *But see* Frank J. Sorauf, *Politics, Experience, and the First Amendment: The Case of American Campaign Finance*, 94 COLUM. L. REV. 1348, 1349-50 (1994) (asserting the Court erred in dismissing without discussion the strong government interest in protecting the integrity of the democratic process).

<sup>57</sup> *See Buckley*, 424 U.S. at 45.

<sup>58</sup> *See id.* at 58.

<sup>59</sup> *Id.* at 48-49 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945))).

campaign expenditure limits.<sup>60</sup> The Court held that the limit on a candidate's use of personal funds "imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression."<sup>61</sup> The Court determined that contribution limits and disclosure requirements satisfy the government interest in safeguarding the integrity of the democratic process by preventing corruption and the appearance of corruption. Unlike the contribution limits, the limits on expenditures and overall spending do infringe on the individual's or the candidate's right to engage in political debate.<sup>62</sup>

The plaintiffs also challenged the Presidential Election Campaign Fund Act, which established public financing for primary and general presidential campaigns and party nominating conventions. They based their constitutional claims on the assumption that public financing resulted in the government sponsoring the two major political parties at the expense of minor and new parties and independent candidates.<sup>63</sup> However, the Court decided that Congress' decision to fund presidential candidates at disproportionate rates does not violate the Constitution because "the Constitution does not require Congress to treat all declared candidates the same for public financing purposes."<sup>64</sup> Moreover, the plaintiffs challenged the entire notion of public financing as unconstitutionally infringing on a candidate's right to freedom of speech. Contrary to the plaintiffs' assertion, the reason for public financing of presidential elections is "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."<sup>65</sup> The Court upheld public financing with voluntary expenditure limits as long as the candidates can choose whether to accept public funds.

Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses

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<sup>60</sup> *See id.* at 51-54.

<sup>61</sup> *Id.* at 52. The Court noted that overall expenditure limits would pass constitutional scrutiny if agreed upon voluntarily in connection with acceptance of public financing. *See id.* at 57 n.65.

<sup>62</sup> *See id.* at 58.

<sup>63</sup> *See id.* at 85-108.

<sup>64</sup> *Id.* at 97

<sup>65</sup> *Id.* at 92-93.

to accept, he may decide to forgo private fundraising and accept public funding.<sup>66</sup>

As a result of *Buckley*, contribution limits on individuals and PACs remain valid as do the disclosure and reporting requirements, public financing of presidential campaigns, and the role of the FEC.<sup>67</sup>

#### D. Recent Reforms

During the 1980s, the costs of campaigns<sup>68</sup> and the number of PACs increased dramatically<sup>69</sup> However, Congress failed to combat these spiraling numbers with any major reform.<sup>70</sup> The 1990s have not seen much in the way of reform on the national level. Instead, measures to reform campaign finance laws have turned into partisan debates and, as a result, most efforts have been thwarted by presidential vetoes<sup>71</sup> and threatened filibusters.<sup>72</sup> Although the federal government has failed to

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<sup>66</sup> *Id.* at 57 n.65.

<sup>67</sup> *See id.* at 143.

<sup>68</sup> From 1976 to 1988 "spending by statewide and legislative candidates increased by 450 percent: from \$120 million to \$540 million." CENTER FOR RESPONSIVE POLITICS, 10 MYTHS ABOUT MONEY IN POLITICS 12 (1995); *see also* HERBERT E. ALEXANDER & ANTHONY CORRADO, FINANCING THE 1992 ELECTION 3-7 (1995) (estimating that total campaign spending in the 1992 elections reached \$3.2 billion, almost triple the 1980 cost of \$1.2 billion).

<sup>69</sup> PACs numbered 1949 at the end of 1978 and by the end of the 1980s the number of PACs had increased to 4677 *See* THOMAS GAIS, IMPROPER INFLUENCE: CAMPAIGN FINANCE LAW, POLITICAL INTEREST GROUPS, AND THE PROBLEM OF EQUALITY 49 (1996).

<sup>70</sup> *See generally* Helen Dewar, *Complex Forces Halt Campaign Finance Reform*, WASH. POST, July 8, 1996, at A1 (providing a summary of major proposed legislation which was not introduced or failed to pass Congress).

<sup>71</sup> For example, in 1992, President George Bush vetoed a bill to provide partial public financing for congressional races and set voluntary congressional spending limits. Congress failed to override the veto by the necessary two-thirds vote. *See* SENATE LIBRARY, PRESIDENTIAL VETOES, 1989-1994, S. Pub. 103-13, at 7 (1994).

<sup>72</sup> *See* Helen Dewar, *Senate Kills Campaign Finance Bill*, WASH. POST, June 26, 1996, at A4. The latest reform effort occurred in 1996 when Senators John McCain (R-Ariz.) and Russell Feingold (D-Wis.), in a bipartisan effort, proposed a bill to set voluntary limits on congressional campaign spending, including incentives for compliance, such as free broadcast time and reduced postage rates. The plan also proposed a ban on all contributions from PACs and a prohibition

revise campaign finance law, significant changes have occurred on the state level, including reforms in Kentucky

*E. Kentucky's Campaign Finance History*

At the turn of the century, Kentucky's campaign finance laws did not differ from those of the federal government. In other words, no substantial laws existed.<sup>73</sup> However, the delegates to the 1890 Kentucky Constitutional Convention, concerned about corporate influence, adopted several provisions relating to corporations, including one prohibiting corporations from influencing elections and voters.<sup>74</sup> In 1916, the General Assembly expanded the Constitutional provision by passing the Corrupt Practices Act.<sup>75</sup> In the Act, the legislature expressed its intent:

to promote pure elections, primaries, and conventions, and to prevent corrupt practice in the same; to limit the expenses of candidates; to prescribe the duties of candidates and providing penalties and remedies for violations, and declaring void, under certain conditions, elections in which these provisions or any of them have been violated.<sup>76</sup>

The main provision of the Act banned corporations from directly or indirectly contributing "any money, service or other thing of value towards the nomination or election of any office."<sup>77</sup> This prohibition still exists in Kentucky in virtually the same language as the 1916 Act.<sup>78</sup> The next major change in Kentucky law occurred in 1966 when the

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on most soft money expenditures. After proponents failed to achieve the required number of votes to end the filibuster led primarily by Senator Mitch McConnell (R-Ky.), the bill was tabled and no action was taken. *See id.* For a more in depth analysis of S. 1219, see LARRY CRAIG, S. 1219 — SENATE CAMPAIGN FINANCE BILL (Government Press Release) (Federal Document Clearing House 1996).

<sup>73</sup> Most states did not address campaign finance reform in the Eighteenth and early Nineteenth Centuries. The extent of such laws consisted of bans on contributions from corporations effective in only Nebraska, Missouri, Tennessee, and Florida. *See* MUTCH, *supra* note 15, at xvii.

<sup>74</sup> *See* KY. CONST. § 150.

<sup>75</sup> 1916 Ky. Acts 53.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *See* KY. REV. STAT. ANN. § 121.025 (Michie 1993 & Supp. 1996).

General Assembly established the Kentucky Registry of Election Finance as an independent agency to administer and regulate the campaign finance laws.<sup>79</sup> However, the General Assembly failed to grant the Registry any real power and, as a result, the Registry remained understaffed and underfinanced to the point that no one took the law or the Registry's actions seriously.<sup>80</sup>

Kentucky also responded to the scandals emerging from the Watergate era and amended its campaign finance laws again in 1974.<sup>81</sup> The 1974 Act increased the power of the Registry to oversee all election financing and granted the Registry the power to initiate civil actions to enforce compliance. As a result of the 1974 Act, "[t]he Registry became a 'watchdog' over election financing to insure that Kentucky's elections would not be corrupted."<sup>82</sup> Although amendments in 1980 again increased the power of the Registry,<sup>83</sup> serious reform in Kentucky still did not exist. Aside from the ban on corporate contributions, the only other significant provision in the law imposed a limit of \$3000 on individual contributions which the General Assembly raised to \$4000 in 1986.<sup>84</sup> However, no one adhered to the disclosure and reporting requirements because the penalty for violating the law usually resulted in an insubstantial civil penalty of \$100.<sup>85</sup> Joe Terry, former chair of the Registry, argues that "one hundred dollars is not going to stop anything, the penalties had to be large enough to make someone take a second look before acting."<sup>86</sup> Campaign finance reform in Kentucky underwent little or no change until 1992.

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<sup>79</sup> See 1966 Ky. Acts 903 (codified as amended at KY. REV. STAT. ANN. § 121.110 (Michie 1993 & Supp. 1996)).

<sup>80</sup> See Terry, *supra* note 1.

<sup>81</sup> See The Corrupt Practices Act of 1974, 1974 Ky. Rev. Stat. & R. Serv. 697 (Banks-Baldwin) (codified as amended at KY. REV. STAT. ANN. §§ 121.015-.990 (Michie 1993 & Supp. 1996)).

<sup>82</sup> *Naegele Outdoor Adver. Co. v. Moulton*, 773 F.2d 692, 699 (6th Cir. 1985).

<sup>83</sup> See *id.*

<sup>84</sup> See 1986 Ky. Acts 222 § 4(6) (codified as amended at KY. REV. STAT. ANN. § 121.150(6) (Michie Supp. 1986)). This amount has since been lowered to \$1000. See KY. REV. STAT. ANN. § 121.150(6) (Michie Supp. 1996).

<sup>85</sup> See 1992 Ky. Acts 830 § 30 (codified as amended at KY. REV. STAT. ANN. § 121.990 (Michie 1993 & Supp. 1996)).

<sup>86</sup> Interview with Joe Terry, former chair of the Kentucky Registry of Election Finance, a Lexington attorney, and a board member of the Kentucky Center for Public Issues, in Lexington, Ky. (Nov. 6, 1996).

## II. KENTUCKY CAMPAIGN FINANCE LAW

Spending in the 1991 governor's race<sup>87</sup> coupled with the investigations and convictions resulting from BOPTR0T,<sup>88</sup> led to massive reform measures in the 1992 General Assembly.<sup>89</sup> According to Joe Terry, former chair of the Kentucky Registry of Election Finance, "the reforms in 1992 were brought about by an atmosphere of corruption in government a general feeling that Frankfort was for sale [due to] the crescendo effect of more and more money [being] spent in each gubernatorial race leading up to the [Martha] Wilkinson and [Brereton] Jones race in 1991."<sup>90</sup> BOPTR0T, the investigation conducted by the FBI, led to the convictions of more than a dozen state legislators and lobbyists for receiving illegal contributions and bribes as low as \$400, as well as the conviction of the Speaker of the Kentucky House of Representatives and the governor's director of appointments.<sup>91</sup> During this period, Kentucky witnessed the most costly gubernatorial race in state history. Total expenditures in gubernatorial elections increased almost seven hundred percent from 1975 to 1991.<sup>92</sup> Approaching the 1992 session of the General Assembly, public sentiment could only be characterized as disgust toward the level of corruption in state government and the "for sale" sign on the governor's office. In addition to the climate produced by BOPTR0T and the 1991 governor's race, the media pushed for reform by publishing numerous articles supporting lower contribution limits and public financing in order to combat the quid pro quo effect of contributions from businesses seeking state contracts.<sup>93</sup> In response, State Senator Mike Moloney proposed a long overdue plan which brought Kentucky to the forefront of campaign finance laws. According to Terry, campaign finance reform in Kentucky would not have happened if it had not been for the determination of Moloney.<sup>94</sup>

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<sup>87</sup> See Loftus, *Big-Money*, *supra* note 3.

<sup>88</sup> See generally Loftus, *The Inside Story*, *supra* note 4 (providing a summary of the BOPTR0T investigation).

<sup>89</sup> See *supra* notes 3-4 and accompanying text.

<sup>90</sup> Interview with Joe Terry, *supra* note 86.

<sup>91</sup> See Loftus, *The Inside Story*, *supra* note 4.

<sup>92</sup> See PENNY M. MILLER, KENTUCKY POLITICS AND GOVERNMENT: DO WE STAND UNITED? 219-26 (1994).

<sup>93</sup> See, e.g., Tom Loftus, *Three Part Series; Big Money Politics*, COURIER-JOURNAL (Louisville, Ky.), Dec. 15, 22, & 29, 1991.

<sup>94</sup> See Interview with Joe Terry, *supra* note 86.

Moloney first announced his plan in November 1990.<sup>95</sup> Moloney outlined a scheme for partial public financing for the office of governor and the other state constitutional offices<sup>96</sup> as well as other limitations on campaign spending.<sup>97</sup> At the time Moloney announced his plan, the four major Democratic candidates in the 1991 governor's race had already reported raising \$7.2 million.<sup>98</sup> After the 1991 governor's race, in which total expenditures exceeded \$19 million,<sup>99</sup> Moloney decided to take action. Moloney developed a plan to combat the increasing costs of the governor's race, and in particular to address the problem of "millionaire" candidates who join the race and spend vast amounts of their own money, only to be repaid by contributions once elected.<sup>100</sup> For example, in 1987 Wallace Wilkinson and Brereton Jones loaned their campaigns for governor and lieutenant governor more than \$2.3 million and \$1 million, respectively.<sup>101</sup> In addition to campaign costs, Moloney was concerned with businesses "contributing the maximum amount of money time and time again and bundling vast sums of money, then, in turn, seeing these same individuals receive the no-bid contracts from the administration they contributed to in the campaign or even after the election."<sup>102</sup> The culmination of this practice, along with the enormous amount of spending in the 1991 governor's race, led Moloney to begin discussing his plan with others, including Joe Terry and Ray Wallace from the Registry,<sup>103</sup>

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<sup>95</sup> See Tom Loftus, *Moloney Plan Urges Some Public Funds for State Campaigns*, COURIER-JOURNAL (Louisville, Ky.), Nov. 22, 1990, at B1 [hereinafter Loftus, *Moloney Plan*].

<sup>96</sup> The other state constitutional offices are: treasurer; auditor of public accounts; commissioner of agriculture, labor, and statistics; secretary of state; attorney general; and lieutenant governor. See KY. CONST. § 91. Public financing for the other state constitutional officers never developed, and any future change remains unlikely and potentially unnecessary due to the relatively low amounts of money spent in the campaigns. Interview with former state Senator Michael Moloney, in Lexington, Ky. (Nov 5, 1996).

<sup>97</sup> See Loftus, *Moloney Plan*, *supra* note 95, at B1.

<sup>98</sup> See *id.*

<sup>99</sup> See Loftus, *Big-Money*, *supra* note 3, at A15.

<sup>100</sup> See Interview with former state Senator Michael Moloney, *supra* note 96. Governors John Y. Brown, Jr. (1979-1983), Wallace Wilkinson (1987-1991), and Brereton Jones (1991-1995), all millionaires, loaned their campaigns considerable amounts of money. See Terry, *supra* note 1, at 2.

<sup>101</sup> See Loftus, *Big-Money*, *supra* note 3.

<sup>102</sup> Interview with former state Senator Michael Moloney, *supra* note 96.

<sup>103</sup> Ray Wallace served as the Executive Director of the Registry of Election Finance. See Al Cross, *Jones Returns \$11,500 at the Request of Three Campaign*



and outlining a reform proposal.<sup>104</sup> Moloney urged that something be done in order to restore integrity to the democratic process. Instead of the office of governor going to the highest bidder, all qualified candidates must be given a chance. Moloney found the answer to reducing corruption and leveling the playing field by publicly financing campaigns and lowering the limits on contributions by individuals.<sup>105</sup> The main proposals consisted of lowering the contribution limit; controlling bundling by corporations, labor unions, and other organizations; reforming the distribution of no-bid contracts; and, most importantly and controversially, financing the governor's race in part with public funds.<sup>106</sup>

#### A. *Limits on Contributions by Individuals and PACs*

Limits on contributions by individuals and PACs have long been used as a means to control corruption in government. For years, Kentucky limited contributions to \$3000 and then in 1986 the General Assembly increased the limit to \$4000.<sup>107</sup> These limits placed Kentucky among the least restrictive states that imposed any type of limit.<sup>108</sup> Even at the national level, the government limits contributions by an individual to \$1000 per candidate per election.<sup>109</sup> In 1992, Governor Jones supported

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*Contributors*, COURIER-JOURNAL (Louisville, Ky.), July 3, 1991, at B1.

<sup>104</sup> See Interview with former state Senator Michael Moloney, *supra* note 96.

<sup>105</sup> See Loftus, *Moloney Plan*, *supra* note 95. United States Senator Mitch McConnell, a devoted opponent of campaign finance reform on the national level, publicly opposed Moloney's plan for partial public financing and voluntary spending limits for the governor and lieutenant governor's race. Instead of adopting Moloney's plan, McConnell urged lowering the contribution limits from \$4000 and banning contributions by PACs. See Tom Loftus, *Campaign Spending; McConnell Tells GOP to Oppose Reform Plan*, COURIER-JOURNAL (Louisville, Ky.), Jan. 10, 1992, at B3.

<sup>106</sup> See Interview with former state Senator Michael Moloney, *supra* note 96.

<sup>107</sup> See 1986 Ky Acts. 222 § 4(6) (codified as amended at KY REV STAT. ANN. § 121.150(6) (Michie 1993) (subsequently amended, see KY. REV STAT. ANN. § 121.150(6) (Michie Supp. 1996)). See *supra* note 84 and accompanying text.

<sup>108</sup> See Loftus, *Big-Money*, *supra* note 3. Nineteen states still do not impose any limit on the amount individuals or PACs can contribute to campaigns. Nevada and Wisconsin limit only individual contributions for statewide offices to \$10,000. Two states — South Dakota and Wyoming — limit individual contributions whereas PAC contributions remain unlimited. See CENTER FOR RESPONSIVE POLITICS, *supra* note 8, at 22-24.

<sup>109</sup> See 2 U.S.C. § 441a(a)(1) (1994) ("No person shall make contributions

a \$100 limit on individual contributions which many argued was too low and would require candidates to spend even more time fundraising.<sup>110</sup> In his article, Terry emphasized that one of the goals of the 1992 reforms was “increas[ing] the importance of small, individual contributions.”<sup>111</sup> Grady Stumbo, who ran two unsuccessful races for governor, supported lowering the contribution limit in order “to give power back to the \$25 contributor [and] make it count for something.”<sup>112</sup> Although the General Assembly rejected Jones’ proposal, in 1992, it still drastically lowered the contribution limit from \$4000 to \$500.<sup>113</sup>

In 1996, however, the General Assembly passed House Bill 695 which increased the limit to \$1000<sup>114</sup> — the same as the federal limit. This provision limits to \$1000 per election the amount an individual or PAC can contribute to a candidate, campaign committee, or political issue committee supporting or opposing a question on the ballot.<sup>115</sup> In a recent interview, former state Senator Moloney stated that the increase was a “mistake we didn’t need to do it we proved we could raise the money to run for governor without doing it \$500 is plenty”<sup>116</sup> However, the increase will make it easier for participating slates to reach the \$300,000 threshold at which the slate becomes eligible for public

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— (A) to any candidate and his authorized political committees with respect to any election for Federal Office which, in the aggregate, exceed \$1000 ”).

<sup>110</sup> See Loftus, *Big-Money*, *supra* note 3. Notably, Minnesota’s law which limited contributions to \$100 was held to be “so low as to infringe upon the citizens’ First Amendment right to political association and free political expression.” *Day v. Holahan*, 34 F.3d 1356, 1365 (8th Cir. 1994) (considering constitutional challenges to campaign finance reform in Minnesota), *cert. denied*, 115 S. Ct. 936 (1995).

<sup>111</sup> See Terry, *supra* note 1, at 3.

<sup>112</sup> Tom Loftus, *Campaign Panel Favors Stricter Gift Limits, Public Funding*, *COURIER-JOURNAL* (Louisville, Ky.), Sept. 27, 1990, at B1 [hereinafter Loftus, *Campaign Panel*] (quoting Stumbo, who advocated lowering the maximum contribution limit of \$4000 per election to \$1000).

<sup>113</sup> See 1992 Ky. Acts 824 § 25(6) (current version at KY. REV. STAT. ANN. § 121.150(6) (Michie Supp. 1996)).

<sup>114</sup> See KY. REV. STAT. ANN. § 121.150(6) (Michie Supp. 1996). The limit decreases to \$100 per election for contributions to a candidate for school board. *See id.*

<sup>115</sup> *See id.* For a brief overview of Kentucky’s public financing law, see W. Terry McBrayer & Margaret M. Young, *Kentucky*, in *LOBBYING, PACS, AND CAMPAIGN FINANCE*, *supra* note 11, at 427.

<sup>116</sup> Interview with former state Senator Michael Moloney, *supra* note 96.

matching funds.<sup>117</sup> This will enable slates to divert attention from fundraising.<sup>118</sup> While opponents argue that the increase will result in a return to the quid pro quo effect of large contributions,<sup>119</sup> this should not be the case considering that \$1000 is not a significant amount of money compared to the entire amount raised in a campaign.

In order to prevent the appearance of corruption in campaigns, the law prohibits any type of cash contribution to slates of candidates for governor and lieutenant governor and limits cash contributions to \$50 per election to other candidates, PACs, political issues committees, or party executive committees.<sup>120</sup> The law also restricts candidates, PACs, issues committees, or executive committees from receiving anonymous contributions in excess of \$1000 in the aggregate per election.<sup>121</sup> An individual may make an anonymous contribution up to \$50 per election.<sup>122</sup> The law also limits the total amount an individual can contribute to PACs at \$1500 a year<sup>123</sup> and limits the amount an individual can contribute to party executive committees at \$2500 a year.<sup>124</sup> These limits help increase the importance of small, individual contributions by reducing the disparities among large donors, small donors, and non-donors.<sup>125</sup> Although the state's primary interest in limiting individual and PAC contributions is to prevent corruption and the appearance of corruption, the state interest in providing a level playing field and restoring integrity to the electoral process is also served by preventing one individual from contributing large sums of money into one campaign.<sup>126</sup> In effect, the elimination of large contributions destroys the

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<sup>117</sup> See *infra* Part III (notes 161-99 and accompanying text) for a full description of the public financing system.

<sup>118</sup> See Interview with Sheryl Snyder, *supra* note 4.

<sup>119</sup> See *supra* notes 101-06 and accompanying text.

<sup>120</sup> See KY REV STAT. ANN. § 121.150(4) (Michie Supp. 1996).

<sup>121</sup> See *id.* § 121.150(3).

<sup>122</sup> See *id.*

<sup>123</sup> See *id.* § 121.150(10). Prior to 1993 the limit was \$4000 per year. See 1993 Ky. Acts 37

<sup>124</sup> See KY. REV STAT. ANN. § 121.150(11) (Michie 1993 & Supp. 1996). Prior to the 1992 amendment the limit was \$6000 per year. See 1992 Ky Acts 824.

<sup>125</sup> See CENTER FOR RESPONSIVE POLITICS, *supra* note 8, at 13 (arguing that PAC and individual contributions must be limited in order to affect the disparity of political influence, otherwise candidates will "depend even more on large individual contributors," *id.* at 4).

<sup>126</sup> For a discussion of the Supreme Court's reasoning in *Buckley v. Valeo*,

concern over a quid pro quo effect, especially in the situation of a gubernatorial candidate who will later, if elected, decide upon the recipients of no-bid contracts and state appointments.<sup>127</sup>

### B. *Bundling and No-Bid Contracts*

While contribution limits do reduce the disparity between large and small donors, three major loopholes in the law allow many to circumvent the limits: bundling, soft money, and independent expenditures. Bundling is the “practice of pooling individual contributions from employees of the same corporation, people in the same profession or trade group, or persons who share the same concern or ideology”<sup>128</sup> Bans on bundling are not very common. Currently, only three states (Oregon, Missouri, and Washington) have passed such laws — all by ballot initiative.<sup>129</sup> Instead of directly banning bundling, Kentucky attempts to combat the problem of bundling in other ways. For years, Kentucky has banned contributions from corporations in order to reduce their political influence.<sup>130</sup> Although unincorporated entities, such as labor unions, are allowed to contribute to campaigns, like individuals, they are subject to limitations.<sup>131</sup>

In 1992, the General Assembly set out to control bundling efforts. For too long, corporations in Kentucky had used bundling as a means to circumvent the ban on corporate contributions by bundling contributions from employees, their spouses, and others.<sup>132</sup> In 1991, the Campaign

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424 U.S. 1 (1976), that the government’s interest in preventing corruption meets constitutional muster, see *supra* notes 51-62 and accompanying text.

<sup>127</sup> See *supra* note 102 and accompanying text.

<sup>128</sup> CENTER FOR RESPONSIVE POLITICS, *supra* note 8, at 14.

<sup>129</sup> See *id.*

<sup>130</sup> See KY. REV. STAT. ANN. § 121.025 (Michie 1993 & Supp. 1996) (prohibiting direct and many indirect forms of contributions from corporations). A total of 21 states prohibit corporate contributions and 19 others limit contributions from corporations in some way. Only 10 states allow unlimited contributions from corporations. See CENTER FOR RESPONSIVE POLITICS, *supra* note 8, at 22-24.

<sup>131</sup> See CENTER FOR RESPONSIVE POLITICS, *supra* note 8, at 23.

<sup>132</sup> See Tom Loftus, 1992 *Legislature: Campaign Spending; Report Says the Public Wants “Bundling” to End*, COURIER-JOURNAL (Louisville, Ky ), Jan. 9, 1992, at B5. In 1991, the Kentucky Center for Public Issues joined with the 1990 class of Leadership Kentucky to form a council on Campaign Finance and Electoral Reform which held town forums across the state. See *id.*

Finance and Electoral Reform Policy Council published a report stating that “[s]uch bundling of contributions was perceived to be a pervasive problem and at the heart of the belief that state government in Kentucky is for sale.”<sup>133</sup> The reform package accomplished this in three major ways: strengthening the reporting requirements, limiting aggregate contributions to certain entities, and restricting the awards of state no-bid contracts and state appointments.

First, slates of candidates for governor and lieutenant governor are required to file monthly reports of all contributions and expenditures until the fifty-six days preceding the primary and general election, when slates must report every fourteen days. A final report is required thirty days after the election and every thirty days thereafter until all financial obligations are fulfilled.<sup>134</sup> PACs and state and county executive committees must also list in the report contributors’ names, addresses, employers, and spouses’ employers for all contributions in excess of \$100.<sup>135</sup> This provision provides a check against bundling to see how many employees, or spouses of employees, of a particular corporation contribute. For example, Merit Financial Corporation contributed about \$47,000 to Wilkinson in 1987 and, although the Cincinnati securities firm did not conduct much business in Kentucky prior to that time, it soon became the largest co-manager of state bond issues in Wilkinson’s first two years as governor.<sup>136</sup> The new reporting requirements will allow the Registry to monitor the actual source of contributions and to determine whether or not corporations are the true contributors. However, reporting and disclosure requirements only provide minimum restraints on such bundling efforts.

Second, the 1992 reforms decreased the aggregate amount that a person<sup>137</sup> can contribute to all PACs to \$1500 a year and to a state political party to \$2500 a year.<sup>138</sup> Third, and most effectively, the General Assembly restricted the awards of no-bid contracts and state

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<sup>133</sup> *Id.*

<sup>134</sup> See KY REV STAT. ANN. § 121A.020(5) (Michie 1993 & Supp. 1994). This subsection places the same requirements on states rejecting expenditure limitations and fundraisers for slated candidates registered pursuant to KY. REV STAT. ANN. § 121.170(2).

<sup>135</sup> See *id.* § 121.180(2), (5) & (6)(a). For a complete listing of the reporting requirements, see *id.* § 121.180.

<sup>136</sup> See Loftus, *Big-Money*, *supra* note 3.

<sup>137</sup> Under KY. REV STAT. ANN. § 121.150(11), a PAC is considered to be a “person.” Advisory Opinion 93-001.

<sup>138</sup> See *supra* notes 123-24 and accompanying text.

appointments. Businesses competing for no-bid contracts in Kentucky greatly influence the race for governor.<sup>139</sup> Although corporate contributions have been illegal in Kentucky since early this century,<sup>140</sup> corporations and other businesses circumvent the ban by bundling individual contributions and donating to a campaign.<sup>141</sup> This results in a quid pro quo effect in which the candidate who wins the election decides who will receive no-bid contracts<sup>142</sup> and these contracts often are awarded to businesses who contributed to the campaign.<sup>143</sup> The enormous political influence businesses had over the office of governor led to significant reforms regarding reporting of contributions and expenditures and the awarding of contracts.

The law imposes a prohibition on the awarding of no-bid contracts by elected officials to:

any entity whose officers or employees, or the spouses of officers or employees, knowingly contributed in excess of five thousand dollars (\$5,000) in the aggregate in any one (1) election to the election campaign of the elected official during the term of office following the election campaign in which the contributions were made.<sup>144</sup>

If this law had been in effect during Governor Brereton Jones' administration, about one hundred of Jones' top donors would have been forbidden from receiving either no-bid contracts or appointments.<sup>145</sup> Furthermore, the law prohibits any fundraiser from receiving a no-bid

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<sup>139</sup> See *supra* notes 96-106 and accompanying text; *infra* notes 142-48 and accompanying text.

<sup>140</sup> See *supra* notes 130-31 and accompanying text.

<sup>141</sup> See Interview with former state Senator Michael Moloney, *supra* note 96.

<sup>142</sup> See *id.*

<sup>143</sup> For example, in 1988, Governor Wilkinson cancelled a contract with one architectural firm worth about \$2.65 million and instead the administration awarded the contract to a firm that contributed about \$51,000 to Wilkinson. As a result, the original firm filed suit and the state settled for \$95,000. For a short summary of this and other contributions by special interests and the awards of no-bid contracts, see Loftus, *Big-Money*, *supra* note 3.

<sup>144</sup> KY. REV. STAT. ANN. §121.330(1) (Michie 1993).

<sup>145</sup> See Robert T. Garrett, *Campaign-Finance Compromise Weighed; Plan Meant to Make Partial Public Funding More Alluring*, COURIER-JOURNAL (Louisville, Ky.), Feb. 11, 1992, at A1. One should note that the 100 donor statistic was based on the threshold amount of \$4000 and not the current \$5000 amount. See *id.*

contract, lease, or appointment to any office or board. "Fundraiser means an individual who directly solicits and secures contributions on behalf of a candidate or slate of candidates for a statewide-elected state office

<sup>146</sup> These measures specifically address the concern that the governor's office is "for sale" by reducing the number of no-bid contracts awarded and appointments granted based on the influence exerted over elected officials through campaign contributions. In theory, the quid pro quo effect of special interest contributions and the awarding of no-bid contracts should diminish since special interests may not be repaid in the form of state no-bid contracts and appointments. The strict sanctions which accompany these provisions reinforce the seriousness the General Assembly attaches to these matters. If an elected official knowingly awards a no-bid contract in violation of the law, the penalty provisions specify a felony conviction, which may also result in expulsion from office.<sup>147</sup> The recipient of such no-bid contract also faces a felony conviction and will be ineligible to receive no-bid contracts for five years.<sup>148</sup>

### C. *Soft Money and Independent Expenditures*

In addition to bundling, the General Assembly also attempted to address the soft money loophole.<sup>149</sup> In theory, soft money is for "non-candidate-specific 'party building' activities such as getting out the vote."<sup>150</sup> In reality, parties use soft money as a way to support specific candidates without complying with campaign regulations or limitations.<sup>151</sup> In Kentucky, political parties, corporations, individuals, and other organizations can spend unlimited amounts on "soft-money" issues.

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<sup>146</sup> KY REV STAT. ANN. § 121.015(11) (Michie 1993 & Supp. 1996).

<sup>147</sup> See *id.* § 121.990(14) (providing for a Class D felony conviction). The statute provides that "upon a final judicial determination of guilt, [an elected official will] have his office declared vacant and shall forfeit all benefits which he would have been entitled to receive had he continued to serve." *Id.*

<sup>148</sup> See *id.* § 121.990(15) (providing for a Class D felony conviction).

<sup>149</sup> See *infra* notes 153-60 and accompanying text. On the national level, the major political parties spent \$87.3 million in soft money in 1994. See CENTER FOR RESPONSIVE POLITICS, *supra* note 8, at 15. Soft money reached \$207,002,834 by October 1996 for the election period. See COMMON CAUSE, DEMOCRATIC & REPUBLICAN PARTY COMMITTEES RAISE RECORD \$207 MILLION IN SOFT MONEY THROUGH OCTOBER 16, at 1 (Press Release) (Oct. 30, 1996).

<sup>150</sup> See CENTER FOR RESPONSIVE POLITICS, *supra* note 8, at 15.

<sup>151</sup> See *id.*

In particular, Kentucky permits unlimited spending for issue advocacy by political parties.<sup>152</sup> In order to prevent the circumvention of contribution limits and the voluntary spending limits for public financing of the governor's race, the General Assembly decided to treat inherently coordinated expenditures by a party to elect its nominee or defeat the nominee's opponent the same as contributions.<sup>153</sup> Therefore, a political party could contribute only \$500 in 1995 to a slate of candidates for governor and lieutenant governor.<sup>154</sup>

Currently, the only method to regulate soft money in Kentucky is a \$2500 per year limit on an individual's contributions to the state party executive committee.<sup>155</sup> Other measures to combat soft money probably will not emerge in light of the recent United States Supreme Court decision in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*.<sup>156</sup> In *Colorado*, the Court held that the First Amendment gives party committees a right to spend unlimited amounts of money, as long as the expenditures are not coordinated with a particular candidate. In other words, the expenditure must be made "independently, without coordination with any candidate."<sup>157</sup> The Court based its decision on evidence that money the Colorado Republican Party spent on advertising was independent and without any understanding or coordination with a particular candidate. "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."<sup>158</sup> This holding poses a tremendous problem for Kentucky and other states with public financing.<sup>159</sup> In other words, if Kentucky's

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<sup>152</sup> See *id.* at 23.

<sup>153</sup> See KY. REV. STAT. ANN. § 121A.050(3) (Michie Supp. 1996).

<sup>154</sup> In 1996 this amount was increased to \$1000. See *supra* note 113 and accompanying text.

<sup>155</sup> See *supra* note 124 and accompanying text.

<sup>156</sup> *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 116 S. Ct. 2309 (1996).

<sup>157</sup> *Id.* at 2310.

<sup>158</sup> *Id.* at 2316.

<sup>159</sup> Ten states provide for some form of public financing: Florida, Hawaii, Kentucky, Maine, Michigan, Minnesota, Nebraska, New Jersey, Rhode Island, and Wisconsin. See LOBBYING, PACS, AND CAMPAIGN FINANCE, *supra* note 11, at 251-52, 286, 427, 471, 540, 559, 638, 692, 854, 1073. Most recently in the 1996 election, voters in Maine passed an initiative that created a system of public financing. See An Act to Reform Campaign Finance, Initiated Bill (Me. 1996) (enacted by voter initiative).



soft money limits are struck down, a political party could spend unlimited amounts of money advocating the election of its slate or the defeat of the opposing slate as long as the expenditures were not "coordinated" with the particular candidate or slate. This would result in the state political parties circumventing the contribution limits imposed on individuals and PACs by spending unlimited amounts of money on generic advertising supporting the party's message and slate of candidates. In essence, the efforts to decrease the costs of the governor's race by providing for public funding could become meaningless.<sup>160</sup>

### III. GOVERNOR'S RACE IN KENTUCKY· PUBLIC FINANCING

Prior to 1992, the race for governor in Kentucky depended primarily on who had the most money to spend. This resulted in the era of the "millionaire" candidate.<sup>161</sup> In the 1979, 1987, and 1991 governor's races, millionaires won the office of governor in part by using their own funds. The winner of the 1987 race, Wallace Wilkinson, spent over \$7 million, greatly surpassing his opponents.<sup>162</sup> Moreover, Governors John Y. Brown, Jr. and Wallace Wilkinson loaned their campaigns a total of \$3.55 million from their own pockets, only to be repaid after the election by contributors seeking no-bid contracts.<sup>163</sup> Issues of importance to the public and discussions of the candidate's qualifications were forced into the background as fundraising occupied the bulk of a candidate's and campaign's time and energy. Experience in the public sector did not seem to matter any more considering that prior to being elected governor, Brown and Wilkinson never held public office. The era of the "million-

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<sup>160</sup> Although public financing may suffer as a result of the decision reached in *Colorado*, unlimited spending arguably strengthens a political party's influence and loyalty, which benefits the overall democratic process. Weak political parties result in a few powerful individuals controlling elections whereas a stronger party provides an outlet for large numbers of individuals to participate. See Interview with Carolyn Bratt, Professor of Law, University of Kentucky College of Law, in Lexington, Ky. (Nov. 1, 1996).

<sup>161</sup> See *supra* notes 94-101 and accompanying text.

<sup>162</sup> See Andrew Wolfson, *Wilkinson Challenges Finance Law*, CURIER-JOURNAL (Louisville, Ky.), Nov. 18, 1994, at A1, see also Robert T. Garrett, *Jones, Patton Closer to Getting Debts Repaid*, CURIER-JOURNAL (Louisville, Ky.), Nov. 22, 1991, at B1 (discussing Jones' and Patton's loans).

<sup>163</sup> See MILLER, *supra* note 92, at 219. Brown loaned his campaign \$1.25 million in 1979. In 1987, Wilkinson surpassed this amount by loaning his campaign \$2.3 million. See *id.* See *supra* notes 100-02 and accompanying text.

aire” candidate persisted, culminating in the 1991 race when Brereton Jones emerged as the winner and largest fundraiser, having spent \$4 million.<sup>164</sup>

The enormous amount of spending deterred many qualified candidates who did not have access to large sums of money.<sup>165</sup> Former gubernatorial candidate Grady Stumbo argued that the substantial amount of money one must raise to run for governor posed a disadvantage to the average candidate who cannot compete.<sup>166</sup> Popular support did not matter if a candidate could raise large sums of money. The race for governor transformed into one driven by money. The whole idea of buying the office of governor came to the forefront, however, because of BOPROT.<sup>167</sup> According to Joe Terry, “BOPROT was the event which broke the straw in Kentucky leading to major support for campaign finance reform.”<sup>168</sup>

In 1990, the Kentucky Center for Public Issues and Leadership Kentucky held town forums throughout the state to discuss campaign finance reform.<sup>169</sup> The overwhelming response showed the public’s dissatisfaction with the huge role money played in Kentucky governor’s races, especially contributions from special interests.<sup>170</sup> Reform of the governor’s race became inevitable when the General Assembly met in 1992. The most controversial and significant part of the 1992 reform bill concerned the partial public financing of the governor’s race in Kentucky. The General Assembly adopted a plan modeled after public financing of presidential elections upheld by the United States Supreme Court in *Buckley*.<sup>171</sup> Kentucky is now one of a limited number of states which

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<sup>164</sup> See Al Cross & Tom Loftus, *House Approves Historic Campaign-Reform Bill*, COURIER-JOURNAL (Louisville, Ky.), Mar. 27, 1992, at A1.

<sup>165</sup> See Terry, *supra* note 1, at 2.

<sup>166</sup> See Loftus, *Campaign Panel*, *supra* note 112.

<sup>167</sup> For further explanation, see *supra* note 91 and accompanying text.

<sup>168</sup> Interview with Joe Terry, *supra* note 86.

<sup>169</sup> See Terry, *supra* note 1, at 2.

<sup>170</sup> See *id.*

<sup>171</sup> See *Buckley*, 424 U.S. at 97. See *supra* notes 43-67 and accompanying text. The *Buckley* Court rejected the argument that public campaign financing would effectively discriminate against new or minor party candidates. This argument is based on the idea that established parties would receive sums larger than those received by new or minor parties. The court reasoned that “the Constitution does not require Congress to treat all declared candidates the same for public financing purposes.” *Buckley*, 424 U.S. at 97. If Congress did treat all parties identically, it “would not only make it easy to raid the United States

publicly finance their gubernatorial campaigns.<sup>172</sup> These public financing systems allow the candidates to voluntarily accept or reject the public funds and accompanying spending limits.

The General Assembly passed the bill with the intent to decrease the spiraling costs of campaigns in Kentucky and reduce the influence of special interests that contribute large amounts in return for no-bid contracts.<sup>173</sup> One of the most noticeable changes in the election process, however, requires the governor and lieutenant governor to run as a slate instead of as separate candidates.<sup>174</sup> When asked about this change, Lieutenant Governor Stephen L. Henry replied, "the taxpayer benefits from the fact that the candidates are required to run as a slate since less money is being spent and more time is devoted to campaigning on the issues rather than fundraising."<sup>175</sup> Lieutenant Governor Henry also pointed out that as a result of gubernatorial candidates being allowed to pick their running mates, the office of the lieutenant governor is given a

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Treasury, it would also artificially foster the proliferation of splinter parties.'" *Id.* at 98 (quoting *Buckley v. Valeo*, 519 F.2d 821, 881 (D.C. Cir. 1975)).

<sup>172</sup> See *supra* note 159.

<sup>173</sup> See *supra* Part II (notes 87-160 and accompanying text).

<sup>174</sup> See KY REV STAT. ANN. § 118.127 (Michie 1993 & Supp. 1996) ("A slate of candidates for Governor and Lieutenant Governor shall list on the notification and declaration the names of the candidates who shall jointly appear on the ballot." *Id.* The statute further states that "[n]o candidate for Governor or Lieutenant Governor shall appear individually on the ballot for the nomination he is seeking." *Id.*). In the 1995 general election, the Democratic candidates for governor and lieutenant governor were Paul Patton and Steve Henry and the Republican candidates were Larry Forgy and Tom Handy. See Al Cross, *The Race for Governor; Patton Hits the Campaign Trail with Henry as Slatemate*, COURIER-JOURNAL (Louisville, Ky.), Nov. 11, 1994, at A1.

In *Gable v. Jones*, No. 95-12 (E.D. Ky. Mar. 29, 1996) (unpublished opinion) (on file with the United States District Court, Eastern District of Kentucky in Frankfort, Ky.), the court granted defendant's motion for judgment as a matter of law regarding Bob Gable's challenge to the requirement of a slate as an infringement upon his "First Amendment right to free political association." *Id.* at 2. The court held that the state has a compelling interest to prevent factionalism in state government and to stabilize the government. Therefore, the court determined that the requirement that candidates for governor and lieutenant governor run as a slate is a "reasonable, nondiscriminatory, and virtually unobtrusive restriction[ ] on Gable's right to access the gubernatorial ballot." *Id.* at 3.

<sup>175</sup> Interview with Lieutenant Governor Stephen L. Henry, in Frankfort, Ky. (Nov. 12, 1996).

more functional and productive role in the administration, which benefits all Kentuckians.<sup>176</sup>

Once a candidate for governor chooses a running mate, the slate must file a joint notification and declaration with the Secretary of State.<sup>177</sup> Then, the slate must register with the Registry and file a statement of intent to either accept or reject public financing.<sup>178</sup> In order to be eligible for matching funds, a slate must raise at least \$300,000.<sup>179</sup> The law also requires a slate seeking public financing to have opposition, and at least one opposing slate must raise the threshold amount. Once the slate raises the threshold amount, it may accept matching funds from the state at a rate of \$2 of public funds for each \$1 raised by the slate.<sup>180</sup> Under this system a slate may raise no more than \$600,000.<sup>181</sup> In other words, a slate may receive a total of \$1.2 million from the Election Campaign Fund for a total of \$1.8 million in each election. The law set the spending limit at \$1.8 million, far below the \$4 million expended by Brereton Jones, the winner of the 1991 race. Lieutenant Governor Henry believes the \$1.8 million was sufficient to run an effective, issue-oriented campaign in 1995. However, he does believe that the numbers should be adjusted before the next race to reflect inflation.<sup>182</sup>

The contribution limits apply to slates as well. Each individual and PAC may give up to \$1000 to a slate per election.<sup>183</sup> However, of the total amount a slate may spend, only twenty-five percent or \$150,000 may come from PACs<sup>184</sup> and no more than fifty percent may come from contributors in a single congressional district.<sup>185</sup> Following the ruling in *Buckley*,<sup>186</sup> members of a slate may contribute unlimited amounts to their campaigns, but only \$500 will qualify as eligible for

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<sup>176</sup> See *id.*

<sup>177</sup> See KY. REV. STAT. ANN. § 118.165 (Michie 1993 & Supp. 1996).

<sup>178</sup> See *id.* § 121A.040. See generally McBrayer & Young, *supra* note 115, at 422-27 (providing a brief overview of Kentucky campaign finance).

<sup>179</sup> See KY. REV. STAT. ANN. § 121A.060(1) (Michie 1993 & Supp. 1996). The maximum threshold is \$600,000. See *id.*

<sup>180</sup> See *id.* § 121A.060(3)(c).

<sup>181</sup> See *id.* § 121A.060(1).

<sup>182</sup> See Interview with Lieutenant Governor Stephen L. Henry, *supra* note 175.

<sup>183</sup> See KY. REV. STAT. ANN. §§ 121.150(6), 121A.050(1) (Michie Supp. 1996).

<sup>184</sup> See *id.* § 121A.050(4).

<sup>185</sup> See *id.* § 121A.060(1).

<sup>186</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

matching funds.<sup>187</sup> The \$1.8 million cap, however, includes all contributions and expenditures, regardless of the source of the funds.<sup>188</sup> The law also imposes a limit of \$50,000 on the amount a candidate may loan to his or her campaign. Any amount over \$50,000 will be deemed a contribution and, thus, a candidate cannot be repaid once elected.<sup>189</sup> For example, if a candidate contributes \$75,000 to his or her campaign, only \$500 will qualify for matching funds from the state and \$50,000 will qualify as a loan; however, the entire \$75,000 will count toward the maximum limit of \$1.8 million.

In order to monitor the process and ensure that slates do not exceed the maximum expenditure limits, the General Assembly increased the reporting requirements. Slates must provide monthly reports to the Registry and report every fourteen days during the fifty-six days preceding an election.<sup>190</sup> The reforms also strengthened the penalties in order to make the law more effective and to increase the seriousness attached to the law. The new penalties consist of not only civil penalties,<sup>191</sup> but also criminal sanctions for knowing violations of the law.<sup>192</sup> Also, elected officials are subject to forfeiture of office and all benefits for such violations.<sup>193</sup>

The law also considers situations in which slates choose not to participate in the public financing program. The most controversial provision<sup>194</sup> is commonly referred to as the "trigger provision."<sup>195</sup>

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<sup>187</sup> See *supra* notes 60-62 and accompanying text.

<sup>188</sup> See Terry, *supra* note 1, at 3.

<sup>189</sup> See *Wilkinson v. Jones*, 876 F. Supp. 916, 930 (W.D. Ky. 1995) (discussing KY. REV. STAT. ANN. § 121.150(13) & (20) (Michie 1993 & Supp. 1996)).

<sup>190</sup> See *supra* notes 134-35 and accompanying text.

<sup>191</sup> See KY. REV. STAT. ANN. § 121.140 (Michie 1993 & Supp. 1996) (providing for the Registry to assess penalties against violators of campaign finance law if the Registry concludes that there is probable cause to believe that the law has been violated). The penalties cannot exceed \$100 a day to a maximum fine of \$5000. See *id.* Injunctive relief may also be sought. See *id.*, see also *id.* § 121.990(5).

<sup>192</sup> See *id.* at § 121.990 (providing for Class D felony convictions if there is a knowing violation of the campaign finance laws).

<sup>193</sup> See *id.* Various violations of the campaign finance laws result in the officer having his office declared vacant and a forfeiture of any benefits he would have received in office. Forfeiture occurs when there is a final judicial determination of guilt. See *id.*, see also Terry, *supra* note 1, at 3.

<sup>194</sup> See KY. REV. STAT. ANN. § 121A.030(5)(a) (Michie Supp. 1996).

<sup>195</sup> See *Wilkinson v. Jones*, 876 F. Supp. 916, 926 (W.D. Ky. 1995).

Once a nonparticipating slate exceeds the \$1.8 million cap, the law releases a participating slate from the spending limit and allows it to spend more than \$1.8 million and still receive state matching funds.<sup>196</sup> In effect, the provision provides an incentive for all candidates to agree to the voluntary spending limit of \$1.8 million in order to receive state funds. Due to the fact that both major candidates in the 1995 governor's race accepted public funding the trigger provision has never taken effect in Kentucky. Another provision,<sup>197</sup> later held to be of dubious validity,<sup>198</sup> limited contributions to \$500 to participating slates whereas nonparticipating slates could only accept contributions of \$100 or less from individuals and PACs. The General Assembly intended the "trigger provision" and the difference in contribution limits to encourage all candidates to participate in the public funding in order to "combat corrupt influences and promote 'uninhibited, robust, and wide-open' debate on public issues."<sup>199</sup> As expected, these provisions along with the entire concept of public financing prompted several constitutional challenges to the law

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<sup>196</sup> See *id.* (discussing KY. REV. STAT. ANN. §§ 121A.080(4), (5) & 121A.060(2)(c) (Michie 1993) (subsequently amended, see KY. REV. STAT. ANN. §§ 121A.080(4), (5) and 121A.060(2)); see also Terry, *supra* note 1, at 3.

<sup>197</sup> See KY. REV. STAT. ANN. § 121A.050(2) (Michie 1993). Section 121A.050 was amended in 1996. See 1996 Ky. Acts 307. The 1996 version significantly differs from the 1992 version. The amended version no longer contains the "cap gap" provision which limited contributions to \$100 for nonparticipating slates but allowed a maximum of \$500 for contributions to participating slates. The amended version now limits contributions to any slate of candidates, participating or not, to \$1000. See KY. REV. STAT. ANN. § 121A.050(1)-(2) (Michie Supp. 1996).

<sup>198</sup> See *Wilkinson*, 876 F. Supp. at 929. Potential gubernatorial candidate Wallace Wilkinson brought a federal constitutional challenge to enjoin certain provisions of Kentucky's election finance laws, including the "cap gap" provision. The court found the disparity in permissible contributions between privately-financed and publicly-financed candidates unconstitutional. Privately-financed candidates could only receive \$100 per person whereas publicly-financed candidates could receive \$500 per person. The court determined that the "cap gap," *id.* at 927, is not narrowly tailored to meet the compelling government interest of "thwarting *quid pro quo* corruption." *Id.* at 929. The court reasoned that the five to one disparity is "palpably penal" because a privately-financed candidate would have to reach so many more supporters. See *id.*

<sup>199</sup> *Id.* at 926 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

#### IV CONSTITUTIONAL CHALLENGES TO KENTUCKY CAMPAIGN FINANCE LAW

Since the General Assembly passed the campaign finance reform package in 1992 and the amendments in 1994, four major suits were filed to challenge particular provisions of the laws. This Part examines each of these cases and the probability that the challenged provisions will be upheld based on federal case law and case law from Kentucky and other jurisdictions. The analysis is restricted to the claims concerning the public financing of the governor's race. Each of the following cases involves a challenge to restrictions on content-based speech imposed by the campaign finance laws. In order to meet strict scrutiny for First Amendment claims, the provision which restricts content-based speech must be narrowly tailored to serve a compelling state interest.<sup>200</sup> The United States Supreme Court and Kentucky courts have ruled that the government interest in preventing corruption and the appearance of corruption is compelling;<sup>201</sup> therefore, the only remaining question is whether each challenged provision is narrowly tailored to meet the compelling governmental interest.

##### A. *Wilkinson v Jones*

In 1994, former governor and potential 1995 gubernatorial candidate Wallace Wilkinson filed suit to enjoin enforcement of several provisions of the Public Financing Campaign Act as unconstitutional violations of freedom of speech.<sup>202</sup> Wilkinson is a leading opponent of the plan and

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<sup>200</sup> See *infra* Part IV.A.-D (notes 202-67 and accompanying text).

<sup>201</sup> See *supra* note 56 and accompanying text.

<sup>202</sup> See *Wilkinson v Jones*, 876 F Supp. 916 (W.D. Ky. 1995). Besides the provisions discussed in this Note, Wilkinson challenged the disclaimer provision, see KY. REV STAT. ANN. § 121.190(1) (Michie 1993) (subsequently amended, see KY. REV STAT. ANN. § 121.190(1) (Michie Supp. 1996)), and the prohibition on exploratory polling, see *id.* § 121.150(1) (Michie 1993) (subsequently amended, see KY. REV STAT. ANN. § 121.150(1) (Michie Supp. 1996)), and § 121.175(1) (Michie Supp. 1996). See *Wilkinson*, 876 F Supp. at 921. The court upheld the disclaimer provision. See *id.* at 932. However, the court relied on the decision reached in *Bunning v. Kentucky*, 42 F.3d 1008 (6th Cir. 1994), when it accepted the stipulation that the plaintiffs would likely succeed on the merits regarding the exploratory polling prohibition. See *Wilkinson*, 876 F Supp. at 922; see also *Bunning*, 42 F.3d at 1008. *Bunning* arose out of the Registry's attempt to investigate a poll conducted by Congress-

one of the most successful fundraisers in gubernatorial campaigns. Wilkinson objects to the entire notion of public financing and argues that the plan limits freedom of speech rights and penalizes nonparticipating slates.<sup>203</sup> In 1987, Wilkinson spent over \$4 million in his campaign to win the governor's office; \$3.2 million of that amount was Wilkinson's own money he loaned to the campaign.<sup>204</sup> After the election, Wilkinson spent a great deal of time raising money to reimburse himself for the loans he made to the campaign. When the General Assembly passed the 1992 reform package, Wilkinson's fundraising tactics and loan repayments provided much of the incentive for the passage of several provisions.<sup>205</sup> Wilkinson's suit stemmed from his belief that public funding conditional upon the acceptance of expenditure limits violates the U.S. Constitution. This is simply not the case.

Wilkinson's challenge parallels an unsuccessful attack on public financing of presidential elections. Relying on the Supreme Court's decision in *Buckley*,<sup>206</sup> the court in *Republican National Committee v. Federal Election Commission*<sup>207</sup> upheld the constitutionality of the Presidential Election Campaign Fund Act.<sup>208</sup> The court determined that Congress has the power under the General Welfare Clause to set

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man Jim Bunning's re-election committee testing the effectiveness of his 1992 campaign advertising. The Registry claimed that Bunning may have used the poll to assess his potential as a future gubernatorial candidate, and Kentucky law prohibits such exploratory activity. Bunning claimed that federal law pre-empts state law and, therefore, the Registry was precluded from investigating. The court concluded that the Federal Election Campaign Act pre-empted Kentucky law on the facts of this case, and enjoined the Registry from taking further action with respect to the poll. *See id.* at 1012. In 1996, the General Assembly passed House Bill 135 which added a new section to chapter 121A of Kentucky Revised Statutes allowing slates to have exploratory committees. *See* 1996 Ky. Acts 482.

<sup>203</sup> *See* Mark R. Chellgren, *Wilkinson Says He Won't Run Again If New Campaign Law Isn't Nullified*, HERALD-LEADER (Lexington, Ky.), Nov. 18, 1994, at A1.

<sup>204</sup> *See* Loftus, *Big-Money*, *supra* note 3.

<sup>205</sup> *See id.*; *see also* Terry, *supra* note 1, at 2 ("[w]ith public opinion galvanized by the press coupled with the anti-Wilkinson sentiment, the 1992 General Assembly enacted sweeping reforms"). Terry points out that Wilkinson's fundraising techniques were no worse than those of his predecessors. *See id.*

<sup>206</sup> *See supra* note 64 and accompanying text.

<sup>207</sup> *Republican Nat'l Comm. v. Federal Election Comm'n*, 487 F Supp. 280, 284 (S.D.N.Y.), *aff'd*, 445 U.S. 955 (1980).

<sup>208</sup> Presidential Campaign Fund Act of 1966, Pub. L. No. 89-109, 80 Stat. 1587 (current version at 26 U.S.C. §§ 9001-9013 (1994)).



voluntary expenditure limits as a condition for the acceptance of public funding by a presidential candidate. The court also pointed out that the law is not an unconstitutional violation of the First Amendment as long as candidates remain free to choose whether to accept public funding, and if they reject, their ability to raise unlimited amounts of money is unfettered. "Nothing prevents candidates from seeking private, instead of public, funding. The First Amendment is not implicated where candidates remain free to choose between funding alternatives."<sup>209</sup> The Kentucky law meets this standard by allowing a slate of candidates to file a statement of acceptance or rejection with the Registry.<sup>210</sup> If a slate rejects public financing, the slate may raise as much money as possible subject to the limitations imposed on individual and PAC contributions.<sup>211</sup>

Wilkinson took the argument one step farther and asserted that, even if public financing with voluntary expenditure limits is constitutional, the Kentucky law serves to penalize nonparticipating slates in two major ways: the trigger provision<sup>212</sup> and the disparity between contribution limits for participating and nonparticipating slates.<sup>213</sup> Judge Charles Simpson for the Western District of Kentucky refused to enjoin the "trigger provision," which operates to release publicly-funded candidates from the voluntary spending limit if a privately-funded candidate exceeds the \$1.8 million amount.<sup>214</sup> Wilkinson had asserted that the trigger

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<sup>209</sup> *Weber v Heaney*, 793 F Supp. 1438, 1457 (D. Minn. 1992) (upholding the Minnesota Congressional Campaign Reform Act conditioning public funding upon candidates' voluntary agreement to abide by expenditure limitations did not violate First Amendment), *aff'd*, 995 F.2d 872 (8th Cir. 1993).

<sup>210</sup> *See supra* note 178 and accompanying text.

<sup>211</sup> *See supra* notes 177-87 and accompanying text. For a general summary, see *Wilkinson*, 876 F Supp. at 920-21.

<sup>212</sup> *See Wilkinson*, 876 F Supp. at 926 (discussing KY. REV STAT. ANN. § 121A.030(5) (Michie 1993) (subsequently amended, *see* KY REV STAT. ANN. § 121A.030(5) (Michie Supp. 1996)).

<sup>213</sup> *See id.* at 928 (discussing KY. REV STAT. ANN. § 121A.050(1)-(2) (Michie 1993) (subsequently amended)). *See supra* note 197 (describing amendment).

<sup>214</sup> *See Wilkinson*, 876 F Supp. at 926. *See generally* Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV 1126, 1150-51 (1994) (supporting "trigger provisions" as a necessary component to ensure that public funding remains a "viable option"). *But see* Joseph E. Finley, Comment, *The Pitfalls of Contingent Public Financing in Congressional Campaign Spending Reform*, 44

provision places a burden on nonparticipating slates because it "chills" their speech as they approach the \$1.8 million cap for fear that additional fundraising on their part will allow the participating slates to receive state funds above the limit.<sup>215</sup> However, the trigger provision allows participating slates to raise additional funds only if they choose to do so. Without the trigger provision, participating slates run the risk of being outspent by candidates financed entirely by private funds. In order to satisfy the state's interest in preventing corruption of the governor's office in Kentucky and in preventing the quid pro quo effect of large contributions, the trigger provision must remain intact so as to provide an incentive to candidates to accept public funding.<sup>216</sup> At the same time, the law must grant the freedom to those who reject public funding to raise as much money as they wish. Judge Simpson reasoned that the General Assembly narrowly tailored the provision to meet the compelling state interest to "combat corruption and the appearance of corruption in the Kentucky electoral process."<sup>217</sup>

However, the court was more sympathetic to the arguments challenging the different contribution limits for participating and nonparticipating candidates. As an additional incentive to accept public funding, the General Assembly had limited contributions to \$100 or less for nonparticipating slates whereas participating slates could accept contributions up to \$500.<sup>218</sup> Although courts have upheld such "cap gaps" as constitutional,<sup>219</sup> Judge Simpson explained that the \$100 limit is so low so as to burden a nonparticipating candidate.<sup>220</sup> The Registry later conceded

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EMORY L.J. 735 (1995) (providing a detailed analysis of the penalizing effects of "trigger provisions" on nonparticipating candidates).

<sup>215</sup> See *Wilkinson*, 876 F Supp. at 927

<sup>216</sup> See *id.* at 928.

<sup>217</sup> *Id.* at 926 (interest as it is defined by the government). For other states with "trigger provisions," see FLA. STAT. ANN. § 106.355 (West 1992) and R.I. GEN. LAWS § 17-25-24 (1996).

<sup>218</sup> See KY. REV STAT. ANN. § 121A.050(2) (Michie 1993). This provision has since been amended. See *supra* note 147

<sup>219</sup> See *Wilkinson*, 876 F Supp. at 928-29 ("As a general proposition then, a 'cap gap' is permissible in theory as a weapon against *quid pro quo* corruption. A cap gap is permissible in practice only if it is narrowly tailored to meet that compelling state interest.").

<sup>220</sup> The court, in *Wilkinson*, indicated at the outset of its discussion of this disparity that "here is a substantial likelihood that the plaintiffs will succeed on the merits of their claims challenging the constitutionality of the \$100 contribution cap imposed upon privately-financed candidates." *Id.* at 928. The court thus

that this provision constituted a penalty and therefore, the provision will not be enforced.<sup>221</sup>

Wilkinson also challenged the limit of \$50,000 that a candidate could loan his campaign.<sup>222</sup> Once a candidate gives his campaign more than \$50,000, it is deemed to be a contribution and the candidate may not seek reimbursement after the election.<sup>223</sup> Had this provision been in effect during the 1987 election, Wilkinson would have been financially injured because, after the election, he recouped a major part of the money he loaned his campaign.<sup>224</sup> Judge Simpson found that the limit was narrowly tailored to meet the compelling state interest of decreasing the appearance of corruption and preventing the quid pro quo of campaign loan paybacks. Judge Simpson reasoned that a candidate not heavily indebted to the campaign avoids the appearance of being "personally financially vulnerable"<sup>225</sup> and therefore avoids the appearance of

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agreed that "the \$100 limit is so low as to constitute a penalty for rejecting public financing." *Id.* However, the court also considered a somewhat separate issue: the disparity between the contributions privately-funded candidates can accept and the contributions publicly-funded candidates can accept. *See id.*, *see also* Day v Holahan, 34 F.3d 1356, 1365 (8th Cir. 1994) (holding that \$100 contribution limit was simply too low and could severely restrict political expression by making it difficult for candidates to raise the necessary funds), *cert. denied*, 115 S. Ct. 936 (1995). *But see* Vote Choice, Inc. v DiStefano, 4 F.3d 26, 38-39 (1st Cir. 1993) (upholding Rhode Island's campaign finance law containing a cap gap whereby participating candidates may receive contributions up to \$2000 and nonparticipating candidates are limited to \$1000 because the cap gap is not burdensome or coercive since the candidate is given a choice whether to accept public funds).

<sup>221</sup> In *Galbraith v. Gorman*, Gatewood Galbraith, a 1995 Democratic primary gubernatorial candidate, challenged three provisions of the campaign finance law, including the contribution limitation of \$100 on nonparticipating slates. The court enjoined enforcement of the \$100 limit and upheld the provisions regarding limits on cash and anonymous contributions. *See Galbraith v. Gorman*, No. 94-CI-1731 (Franklin Cir. Ct., Feb. 6, 1995) (unpublished opinion), *cited in* Appellee's Brief at 2, *Kentucky Right to Life, Inc. v Terry*, No. 95-6581, 1997 WL 96900 (6th Cir. Mar. 7, 1997).

<sup>222</sup> *See* KY REV STAT. ANN. § 121.150(13), (20) (Michie 1993 & Supp. 1996).

<sup>223</sup> *See id.*

<sup>224</sup> *See* Richard Whitt, *Session Made Mark with Election Reform*, COURIER-JOURNAL (Louisville, Ky.), Apr. 10, 1988, at A1.

<sup>225</sup> *Wilkinson*, 876 F Supp. at 930.

corruption.<sup>226</sup> The court also found that \$50,000 was not too low as to “chill a candidate’s early and loud speech.”<sup>227</sup> Furthermore, a candidate’s freedom to spend unlimited amounts is not hindered by the \$50,000 loan limit. The limit only restricts the repayment of money to a candidate, not the contribution of money by a candidate. On the whole, the outcome of Wilkinson’s suit reinforced the strength of the Public Financing Campaign Act because the court found that the most crucial provisions of the Act met constitutional standards.

### B. Gable v Jones

Another strong opponent of public financing for the governor’s race in Kentucky is Bob Gable, former chair of the Republican Party of Kentucky and gubernatorial candidate in the 1995 Republican primary election.<sup>228</sup> In 1995, Gable challenged the constitutionality of several provisions of Kentucky’s campaign finance reform law.<sup>229</sup> Gable’s major challenges concerned the public financing of the gubernatorial race, and in particular, the prohibition against receiving contributions thirty days before either the primary or general election and fourteen days before a runoff election, the “trigger provision,” and the limit of \$50,000 a candidate may loan a campaign.<sup>230</sup> Gable asserted that these provisions impose unconstitutional burdens because they

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<sup>226</sup> See *id.*

<sup>227</sup> *Id.* at 931.

<sup>228</sup> See David Royse, *Alexander Is Top Fund-Raiser in State*, COURIER-JOURNAL (Louisville, Ky.), Mar. 11, 1996, at B4.

<sup>229</sup> See *Gable v. Jones*, No. 95-12 (E.D. Ky. Mar. 29, 1996) (unpublished opinion) (on file with the United States District Court, Eastern District of Kentucky in Frankfort, Ky.). In his original complaint Gable listed 22 claims. The 11 claims alleged by the other plaintiff, Darryl Sebastian, were dismissed. Only three claims apply to the analysis at hand. The other claims concern the constitutionality of requiring candidates for governor and lieutenant governor to run as a slate, see KY. REV. STAT. ANN. §§ 118.125, .127 (1993 & Supp. 1996); the definition of independent expenditure, see *id.* § 121.150(1); the prohibition of charitable contributions by PACs, see *id.* § 121.150(2); the disclaimer provision, see *id.* § 121.190(1); the prohibition of vote buying, see *id.* §§ 121.045, .055; and the penalties, see *id.* § 121.990.

<sup>230</sup> See *Gable*, No. 95-12, at 4-5, 12-13. In 1996, the General Assembly amended section 121A.030(5) from thirty days to twenty-eight days preceding a primary or general election. See 1996 Ky. Acts 468. For purposes of analysis in *Gable*, the thirty day restriction will be used.

(1) prohibit him from contributing to his own, or any campaign, in the thirty days prior to a primary or general election; (2) use his spending as a "trigger" for lifting the spending cap on participating slates; and (3) use his spending as a trigger for making additional public funds available for the participating slates.<sup>231</sup>

First, the court granted Gable's motion for summary judgment regarding the claim that the thirty day time restriction was an unconstitutional burden on Gable.<sup>232</sup> The court reached this decision by relying on and distinguishing *Buckley v. Valeo*.<sup>233</sup> In *Buckley*, the Court held that the government may not restrict personal expenditures by candidates on their own behalf. "[I]t is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day."<sup>234</sup> In order to comply with *Buckley*, Kentucky's laws do not restrict the amount a candidate can spend in his or her campaign. Instead, the laws "prohibit candidates from contributing to their own campaigns during the reporting period."<sup>235</sup> The reporting period is thirty days before a primary or general election and fourteen days before a run-off election. The Court in *Buckley* did not determine whether a timing restriction violates a candidate's constitutional rights.<sup>236</sup> In *Gable*, the court relied on Supreme Court decisions which allow the government to regulate the time, place, and manner of speech activities if such regulations are reasonable, nondiscriminatory, and serve "an important governmental interest unrelated to the restriction of communication."<sup>237</sup> The state argued that the time period restriction was not an undue burden considering the government's interest in preventing corruption and the appearance of corruption. Furthermore, the General Assembly intended to prevent candidates from pouring large sums of money into the campaign at the last minute. According to the state, the reporting period ensured the enforceability of the entire campaign financing system by

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<sup>231</sup> *Gable*, No. 95-12, at 5.

<sup>232</sup> *See id.* at 8.

<sup>233</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976). *See supra* notes 43-67

<sup>234</sup> *Buckley*, 424 U.S. at 52-53.

<sup>235</sup> *Gable*, No. 95-12, at 5.

<sup>236</sup> *See id.*

<sup>237</sup> *Id.* at 6; *see* *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Adderley v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

granting the Registry time to determine whether a slate has exceeded the \$1.8 million cap. The court held that the government interest was not compelling as applied to a candidate's own expenditures and, therefore, the provision limiting candidate contributions during the final days of a campaign unconstitutionally restricted a candidate's right to free political expression.<sup>238</sup> Thus, the prohibition against receiving contributions in the last thirty days prior to the election does not apply to funds contributed by the candidate, but only to contributions from other sources.<sup>239</sup>

Second, Gable challenged the constitutionality of the trigger provision.<sup>240</sup> The trigger provision means that once a nonparticipating slate exceeds the \$1.8 million expenditure cap imposed on participating slates, the state releases the participating slate from the cap. The court held that this provision does not burden Gable's right to political speech. By choosing not to participate in the public financing plan, a candidate can still raise unlimited amounts of funds for his/her campaign. Furthermore, the court ruled that Gable's argument that the provision is unconstitutionally coercive of nonparticipating slates was without merit. Granted, the court explained, the provision would "chill" speech to some extent because once a nonparticipating slate exceeds the \$1.8 million cap, any spending over that amount would allow a participating slate to raise additional funds and be eligible for matching funds from the state. However, the court pointed out that the statute does not force a candidate to accept public funding.<sup>241</sup> The court concluded that Kentucky's plan met the guidelines set forth in *Buckley* by allowing slates to choose whether to accept public financing.<sup>242</sup> According to the court, the trigger provision provided an incentive for candidates to accept public financing and thereby agree to an overall limit on expenditures,<sup>243</sup> and the public financing law served a compelling government interest in preventing corruption and the appearance of corruption by controlling the spiraling costs of the governor's race in Kentucky. Moreover, the benefit-equals-burden argument failed for the simple reason that a benefit to a

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<sup>238</sup> See *Gable*, No. 95-12, at 8. In *Buckley*, the Court determined that the government interest in preventing corruption and the appearance of corruption does not support the limitation on a candidate's expenditures of his own personal funds. See *Buckley*, 424 U.S. at 53.

<sup>239</sup> See *Gable*, No. 95-12, at 8.

<sup>240</sup> See *id.* at 4. For a discussion of KY. REV. STAT. ANN. 121A.030(5)(a), the "trigger provisions," see *supra* notes 196-98 and accompanying text.

<sup>241</sup> See *Gable*, No. 95-12, at 10-12.

<sup>242</sup> See *id.* at 9-12.

<sup>243</sup> See *id.* at 11.

participating slate does not ipso facto constitute a burden on another candidate's rights.<sup>244</sup> The court held that Gable did not articulate a reason why the trigger provision itself imposed a coercive burden on a nonparticipating slate and therefore, the court granted judgment as a matter of law for the state.<sup>245</sup>

Gable also challenged the provisions that prohibit a slate of candidates from loaning the campaign in excess of \$50,000 per election.<sup>246</sup> Any amount over \$50,000 is deemed to be a contribution to the campaign and is not recoverable. The purpose of this provision was to prevent the quid pro quo effect which occurred when candidates loaned millions to their campaign only to be repaid after election, usually by businesses seeking no-bid contracts in the state.<sup>247</sup> Gable challenged the constitutionality of this provision as a content based restriction on his right to free political speech. Relying on Kentucky's history of governors receiving contributions after election to repay their debts in exchange for "favors,"<sup>248</sup> the court determined that the statutes were narrowly tailored to meet the government interest of preventing corruption and restoring integrity to the democratic process.<sup>249</sup>

### C. Kentucky Right to Life, Inc. v Terry

In *Kentucky Right to Life, Inc. v. Terry*,<sup>250</sup> Kentucky Right to Life, in its capacity as a PAC ("KRLPAC"), brought suit challenging several provisions of Kentucky's campaign finance law,<sup>251</sup> including the

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<sup>244</sup> See *id.* at 9; see also *Buckley*, 424 U.S. at 95; *Vote Choice, Inc. v DiStefano*, 4 F.3d 26, 38 (1st Cir. 1993); *Weber v. Heaney*, 793 F Supp. 1438, 1457 (D. Minn. 1992); *Republican Nat'l Comm. v. Federal Election Comm'n*, 487 F Supp. 280, 285 (S.D.N.Y. 1980).

<sup>245</sup> See *Gable*, No. 95-12, at 12.

<sup>246</sup> See KY REV STAT. ANN. § 121.150(13), (20) (Michie 1993 & Supp. 1996).

<sup>247</sup> See *supra* note 163 and accompanying text.

<sup>248</sup> *Gable*, No. 95-12, at 13; see also *Wilkinson v Jones*, 876 F Supp. 916 (W.D. Ky. 1995).

<sup>249</sup> See *Gable*, No. 95-12, at 13.

<sup>250</sup> *Kentucky Right to Life, Inc. v Terry*, No. 95-6581, 1997 WL 96900 (6th Cir. Mar. 7, 1997).

<sup>251</sup> See *id.* at \*1. In addition to the claim challenging public financing, the plaintiffs challenged provisions including the definitions of "contribution" and "permanent committee," see KY. REV STAT. ANN. § 121.015(3)(c) & (6)(e) and § 121A.010(9)(c) & (11); the disclaimer requirement, see *id.* § 121.190(1); the

provision preventing slates of candidates for governor and lieutenant governor from receiving PAC contributions in excess of \$150,000 for nonparticipating slates or twenty-five percent of total contributions for participating slates. KRLPAC argued that this infringed on its freedom of speech rights by prohibiting it from contributing to a candidate who had already received the maximum PAC contribution. The court did not accept KRLPAC's argument that the provision imposed an unconstitutional burden. Instead, the court reasoned that since participating slates may accept a maximum of \$600,000 in contributions, only one hundred fifty PACs may contribute the maximum \$1000. Assuming that all one hundred fifty PACs contributed the maximum, the provision would apply to the one hundred fifty-first PAC that sought to contribute. Thus, the court held that the provision imposes a "minimal speech restriction upon" PACs and was narrowly tailored to meet the compelling government interest of "combatting perceived corruption."<sup>252</sup> This decision illustrates the seriousness with which the courts view reforming campaigns in Kentucky and the extent to which the law in Kentucky remains viable.

#### D. Democratic Party of Kentucky v Kentucky Registry of Election Finance

In August 1996, the Democratic Party of Kentucky, Robert A. Babbage, and Terry McBrayer<sup>253</sup> filed suit against the Registry challenging the provision governing independent and coordinated expenditures<sup>254</sup> under the First and Fourteenth Amendments of the United

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limit on PAC contributions, *see id.* §§ 121.150(6), 121A.050(1); the aggregate amount an individual may contribute to a PAC, *see id.* § 121.150(10); and the administrative fee imposed on PACs, *see id.* § 121.180(6)(b). *See Kentucky Right to Life*, 1997 WL 96900, at \*2-3.

The trial court had ruled in favor of the plaintiffs regarding KY REV STAT. ANN. § 121.180(6), which requires all PACs to pay an administrative fee to the Registry equal to 5% of all contributions. *See Gable*, No. 95-12, at 13. The trial court held that the fee was a tax and constituted a restriction on political speech failing to meet strict constitutional scrutiny. *See id.* at 13-15.

<sup>252</sup> *Kentucky Right to Life*, 1997 WL 96900, at \*11.

<sup>253</sup> Bob Babbage is the current chair of the Kentucky Democratic Party and Terry McBrayer served as party chair during the 1995 elections. *See House Candidate Charged in Theft Should Withdraw His Party Chairman Says*, COURIER-JOURNAL (Louisville, Ky.), Oct. 26, 1996, at B2.

<sup>254</sup> *See* KY. REV. STAT. ANN. § 121.150(1).



States Constitution.<sup>255</sup> The suit arose from accusations by the Republican Party of Kentucky that the Democrats exceeded the \$1.8 million cap by knowingly accepting contributions and classifying them as independent rather than coordinated expenses for the governor's race in violation of provision.<sup>256</sup>

Although the General Assembly amended the definition of independent expenditures in March 1996,<sup>257</sup> the plaintiffs alleged that the definition in effect during the 1995 elections was so broad and vague as to deprive any person of notice of what constituted an independent expenditure, therefore violating the Due Process and Equal Protection Clauses of the Constitution. The statute in question provides:

No contribution of money or other thing of value, nor obligation therefor, shall be made or received, and no expenditure of money or other thing of value shall be made or incurred, directly or indirectly, other than an "independent expenditure," to support or defeat a candidate, slate of candidates "Independent expenditure" means one made for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates and which is not made with any direct or indirect cooperation, consent, request, suggestion, or consultation involving a candidate, slate of candidates<sup>258</sup>

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<sup>255</sup> See *Democratic Party of Ky. v. Kentucky Registry of Election Fin.*, No. 96-80 (E.D. Ky. Nov. 6, 1996) (defendant's motion to hold action in abeyance) (on file with the United States District Court, Eastern District of Kentucky in Frankfort, Ky.).

<sup>256</sup> See KY. REV. STAT. ANN. § 121.150(1) (Michie 1993) (subsequently amended, see KY. REV. STAT. ANN. § 121.150(1) (Michie Supp. 1996)).

<sup>257</sup> See *infra* note 258.

<sup>258</sup> KY. REV. STAT. ANN. § 121.150(1) (Michie 1993). The General Assembly amended this statute in 1996. See 1996 Ky. Acts 468. The 1996 version no longer contains the definition of "independent expenditure." It states that no contribution, other than an independent expenditure, shall be made or received to support or defeat a candidate or slate of candidates except through the duly appointed campaign manager or campaign treasurer. See KY. REV. STAT. ANN. § 121.150(1) (Michie Supp. 1996). The definition of "independent expenditure" is now found in KY. REV. STAT. ANN. § 121.015(12) (Michie Supp. 1996) which states that independent expenditure "means the expenditure of money or other things of value for a communication which expressly advocates the election or defeat of a clearly identified candidate and which is made without any coordination, consultation, or cooperation with any candidate "

*Id.*

In explaining the logic behind the suit, McBrayer stated, "the entire time during the election one is worried about whether an expenditure by someone in Bowling Green may be later defined as a coordinated expenditure rather than independent and then it will count against the \$1.8 million [cap]."<sup>259</sup> The plaintiffs claimed that the law does not draw a line between what could be classified as an independent expenditure as opposed to a coordinated expenditure. In the 1995 gubernatorial race, both parties faced major dilemmas in classifying the expenditures in order to make sure the slates did not exceed the \$1.8 million cap.

The likelihood of success in this challenge does not look promising given that the *Gable* court held that the definition of independent expenditure was "not so vague as to restrict free political speech."<sup>260</sup> On the other hand, the United States Supreme Court ruled in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*<sup>261</sup> that a political party can make independent expenditures<sup>262</sup> and a state may not restrict a political party's independent expenditures.<sup>263</sup> If the *Colorado* holding causes Kentucky's independent and coordinated expenditure provision to fail, it could destroy public financing by allowing political parties to spend unlimited amounts regardless of the spending cap.

The Democratic Party suit also challenged the definition of "knowingly" which includes conduct or circumstances a "person is aware of or should have been aware exists."<sup>264</sup> McBrayer argued that a candidate can not control what an independent group or individual does for the campaign and therefore, a candidate should not be held in violation for acts he or she "should have been aware" existed. Considering the strict

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<sup>259</sup> Interview with Terry McBrayer, former chair of the Kentucky Democratic Party and an attorney in Lexington, Ky., in Lexington, Ky. (Nov 5, 1996).

<sup>260</sup> *Gable v Jones*, No. 95-12, at 15 (E.D. Ky. Mar. 29, 1996).

<sup>261</sup> *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 116 S. Ct. 2309 (1996).

<sup>262</sup> *See id.* at 2318.

<sup>263</sup> *See id.* at 2317 During his re-election campaign a Democratic congressman was the subject of Colorado Republican Party radio advertisement attacks. The FEC alleged that the advertising expenditures violated the coordinated expenditure limit. The Court concluded that no presumption exists that political party expenditures are coordinated with a candidate's campaign. *See id.* at 2318. Therefore, since there was no factual proof that the Colorado Party's expenditures were coordinated, the FEC could not constitutionally regulate independent expenditures. *See id.* at 2315.

<sup>264</sup> KY. REV. STAT. ANN. § 121.015(10) (Michie 1993 & Supp. 1996).

penalties,<sup>265</sup> McBrayer argued the definition violates the Due Process Clause.<sup>266</sup>

As of March 1996, both parties had agreed to suspend all proceedings in the action until further motion by either party. Although the courts will not have an opportunity any time soon to rule upon these issues, the problem of independent expenditures is one that faces every campaign in the country. In *Colorado*, the Court held that a true independent expenditure may not be limited by the government for any reason.<sup>267</sup> Independent expenditures reach into the depths of the First Amendment. However, something must be done to control the unlimited spending by political parties or else the purpose of public financing will be destroyed.

### CONCLUSION

The 1995 Kentucky governor's race partially funded by public money differed tremendously from the previous races in which "millionaire" candidates dominated. By focusing on the issues and participating in numerous debates and joint appearances, the candidates proved that the race for governor may be won without the outrageous fundraising tactics witnessed in the past. Public financing opens the door for qualified candidates to participate in the electoral process without worrying about raising several million dollars. Furthermore, public financing allows the candidates to spend more time on grass-roots campaigning rather than fundraising. Discussions of the issues and a race consisting of two viable candidates on equal financial footing resulted in a record voter turnout.<sup>268</sup> Furthermore, due to the decrease in contribution limits and the aggregate amount a candidate may receive from PACs, there is no suspicion that Governor Patton and Lieutenant Governor Henry are in debt to special interests. Finally, Kentuckians may rest assured that the "for sale" sign has been removed from the office of the governor.

Overall, public financing proved a success; however, the General Assembly needs to assess a few problems. First, there exists a serious threat to the voluntary expenditure limits. By allowing political parties to spend unlimited amounts of money for issue advocacy, the purpose of

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<sup>265</sup> See *supra* notes 191-93.

<sup>266</sup> See *Democratic Party of Ky. v. Kentucky Registry of Election Fin.*, No. 96-80 (E.D. Ky. Nov. 6, 1996).

<sup>267</sup> *Colorado*, 116 S. Ct. at 2309.

<sup>268</sup> See Snyder, *supra* note 14 (discussing the fact that the 1995 governor's race was the third largest voter turnout in Kentucky history).

public financing will be thwarted. The Supreme Court's decision in *Colorado* forces the General Assembly to address party spending in order to secure the effectiveness of public funding. One way to do so would be to decrease the amount one can contribute to a party from \$1500 to possibly \$1000 or \$500. This would curtail the overall amount a party could spend. Second, in order to nurture a two-party system in the state, the provision requiring a candidate to have an opponent in the primary must be invalidated. In 1995, Larry Forgy, the Republican candidate for governor, was ineligible for public funds in the primary because he did not have a viable opponent. Even though Forgy was allowed to raise over the \$600,000 maximum amount for participating candidates, then-candidates Governor Patton and Lieutenant Governor Henry were eligible for public funds since they did have opponents in the Democratic primary. The law should be changed so as to allow a candidate in the primary who raises the threshold amount to receive state funds regardless if he or she has a viable party opponent. Finally, the distinction between independent expenditures and coordinated expenditures needs to be clarified in order to prevent candidates from exceeding the overall expenditure limit unknowingly. Each of these proposals present important solutions and must be examined; however, it is important to note that Kentucky has come a long way since the days of BOPTROT and excessive spending in gubernatorial races. Kentucky's campaign finance reform laws, and especially the public financing of the governor's race, should serve as a model to other states with increasing campaign costs.

