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Robert F. Bauer

GOING NOWHERE, SLOWLY: THE LONG STRUGGLE OVER CAMPAIGN FINANCE REFORM AND SOME ATTEMPTS AT EXPLANATION AND ALTERNATIVES

Robert F. Bauer[+]

I. INTRODUCTION

The argument over campaign finance reform resembles a battle that ebbs and flows, never shifting decisively in any one direction. Members of one camp seldom appear impressed by the arguments of the other. While the Bipartisan Campaign Reform Act of 2002 is now law, the era of litigation over its provisions has just begun.[1] The outcome of these lawsuits will materially affect the shape of the new law. They will constitute only one phase of the counterattack on reform; another phase will focus on the Federal Election Commission's (FEC) implementing rules; and litigation over the new law is likely to be accompanied by still another wave of litigation over new rules and over enforcement. What will emerge from this fracas is anyone's guess. Experience with the current law suggests that the results will bear little resemblance to current expectations.

What are some of the sources of this unhappy state of affairs? Certainly little comfort can be taken in the political arguments on either side of the reform divide. Those arguments have not improved in clarity or persuasiveness. The arguments are hampered by inconclusive exchanges over the relative importance of free speech, on the one hand, and the urgency of preventing big money corruption, on the other.[2]

[+] Robert F. Bauer is Chair of the Political Law Group in the Washington, D.C. office of Perkins Coie LLP. The author gratefully acknowledges the skillful research and editorial assistance of Donna Lovecchio. Professor Roy Schotland and my colleagues Judy Corley, Marc Elias, Ben Sharp, and Brian Svoboda read drafts and offered helpful comments and raised pointed questions.

1. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 181 (2002); *see also* McConnell v. FEC, No. 02-CV-582 (D.D.C. filed Mar. 27, 2002); NRA v. FEC, No. 02-CV-581 (D.D.C. filed Mar. 27, 2002).

2. For fairly typical arguments on both sides, see the Web sites of the Brennan Center, Brennan Center Documents on the Shays-Meehan/McCain-Feingold Debate, *available at* http://brennancenter.org/programs/prog_mccain_fein0301.html (last visited May 15, 2002) (stating that there are "mountains of evidence that 'large donors call the tune,' and that voters are increasingly unwilling to 'take part in democratic governance.'") and the James Madison Center for Free Speech, available at http://www.jamesmadisoncenter.org (last visited May 15, 2002) ("Though announced with the promise

While media elites promote campaign finance reform, and various charitable foundations fund continued efforts to produce it, the public shows limited interest and rarely "votes" it. [3] From time to time, an "insurgent" candidate, such as John McCain or Ross Perot, may stress campaign finance reform with considerable passion and effectiveness as part of a broad attack on the established political order, but the issue rarely holds its own in any public ranking of its priorities.

The constitutional debate has fared no better, foundering on the longstanding, inconclusive disagreement about the nature of political speech protected by the First Amendment.[4] *Buckley v. Valeo* occupies center stage in this debate, and it has done so for a quarter century. Controversy over whether money is a form of speech proceeds along familiar lines. These arguments have contributed to the development of theoretical First Amendment free speech jurisprudence, but they have had little to say about associative rights or effective political action and therefore have had scant connection to political realities.

There is another source responsible for the lack of progress on this issue. The struggle over campaign finance reform has coincided with a period of pervasive changes in the structure of American political competition. Nonvoting has become chronic, accompanied by a continued decline in party affiliation and loyalty.[5] Interest groups have entered into direct competition with parties, funding their own advertising campaigns and broad-based voter mobilization efforts.[6] New political organizations, such as political action committees (PACs), and "527s",[7] have supplied vehicles for participation outside the traditional channels afforded by affiliation with candidates or parties.[8] Initiatives and referenda have taken hold in some parts of the country as alternatives to elections in which leaders are elected and charged with

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of reducing the corrupting influence of big money, McCain-Feingold 2001 is instead a broad attack on citizen participation in our democratic Republic. This bill shakes a fist at the First Amendment; if passed, it is destined for a court-ordered funeral.").

3. *See, e.g.*, NBC News/Wall Street Journal: The Bush Administration, *available at* http://nationaljournal.com/members/polltrack/2002/todays/010128nbcwsj.htm (last visited Apr. 18, 2002); Harris Political Ratings Poll, *available at* http://nationaljournal.com/members/polltrack/2002/todays/03/0328harris.htm (last visited Apr. 18, 2002).

4. Buckley v. Valeo, 424 U.S. 1, 11 (1976).

5. Richard Morin & Claudia Deane, *As Turnout Falls, Apathy Emerges as Driving Force*, WASH. POST, Nov. 4, 2000, at A1.

6. OUTSIDE MONEY: SOFT MONEY AND ISSUE ADVOCACY IN THE 1998 CONGRESSIONAL ELECTIONS (David Magleby ed., 2000).

7. Francis R. Hill, *Softer Money: Exempt Organizations and Campaign Finance*, 91 TAX NOTES 477 (2001).

8. Morin & Deane, *supra* note 5.

formulating legislation.[9] In this environment, political actors are preoccupied with adaptation and survival. Campaign finance reform introduces a new source of instability and uncertainty by seeking to impose and require political actors to adapt to additional rules of political competition.

Accordingly, proposals for far-reaching reform in a political process undergoing rapid, fundamental change will confront suspicion, confusion, and stubborn disagreement. The stalemate is the product of intellectual and argumentative stalemate, to be sure, but also of the sharply increased uncertainties of electoral politics.

No solution is likely to command broad agreement. It may make sense, however, to seek the broadest possible agreement on goals, by avoiding controversial measures directed at corruption or voter equality and emphasizing measures concerned with promoting voter participation. This approach, which seeks to "level-up" rather than "level-down," does not restrain speech or association, but relies on incentives and the elimination of barriers. It respects rights of political participation and association and recognizes that the vindication of rights is impossible without some commitment of public resources. The approach defends public funding and subsidies to reward and encourage political engagement.

II. POLITICAL STALEMATE: THE PROBLEM OF "CRISIS"

Although the campaign finance debate has undergone many twists and turns, the opposing camps have remained well defined. On one side are those who insist that reform of the political process is urgently needed.[10] Those who support this side of the debate believe that *Buckley v. Valeo* did not allow for remotely adequate government measures to address the crisis of democracy brought on by escalating spending and rising special interest influence.[11] On the other side are critics of an expanded government role in the regulation of political money.[12] Their view is that the crisis posited by the supporters of reform is illusory at best, and at

9. DAVID S. BRODER, DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY (2000).

10. *See* Brennan Center, Brennan Center Documents on the Shays-Meehan/McCain-Feingold Debate, *available at* http://brennancenter.org/programs/prog_mccain_ fein0301.html (last visited May 15, 2002).

11. *See id.*

12. *See, e.g.*, BRADLEY SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM (2001).

worst, simply reflects the desire to favor a particular party or point of view by suppressing competing speech.[13]

This debate has continued for more than a quarter century with little progress. The parties' most extreme views appear irreconcilably opposed. Efforts at striking a balance, as *Buckley* proposed to do, have not yielded satisfactory results. It is less clear *how* the debate has managed to be so unsatisfactory, when many of those engaged in it are men and women of genuine talent and political commitment.

A large problem is the role of the argument about "crisis," about there having occurred some alarming turn for the worse in electoral politics traceable to uncontrolled spending. Reformers insist that there is such a "crisis," and that it justifies measures that otherwise may limit the actions or speech of political participants.[14] Skeptics vigorously deny "crisis," and by and large treat heavy spending for elections as nothing more than the reflection of robust democratic life. [15] Neither side has benefited from the crisis orientation of the argument.

Reform proponents have been led in the wrong direction in their insistence on "crisis" in two ways. First, because they seem to concede that the measures they propose are justified only by extreme circumstances, they make the argument about crisis in extreme terms. Knowledgeable activists declare that "what is going on in Washington these days [is] large contributions buying access and influence in all aspects of legislative decision-making,"[16] and that a failure to enact reform preserves "the corrupt status quo."[17] Claims of these kinds are not typically directed against lobbyists. The eminent political philosopher, Ronald Dworkin has written that political fundraising today is the "curse of American politics," progressing from mere "scandal" to a "disaster."[18] The distinguished political scientist, Frank Sorauf, believes that with the advent of heavy independent spending and issue

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13. *See generally id.*

14. Democracy 21, Noble Thoughts on the FEC and Soft Money Abuses, *available at* http://www.democracy21.org/index.asp?Type=B_PR&SEC={A8B4DE06-6CC2-419D-8A26-B5870F580B57}&DE={A003744B-4C63-4C67-9533-1121EBC959AF} (last visited May 15, 2002).

15. *See, e.g.*, Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049 (1996).

16. Statement of Common Cause President Scott Harshbarger on Role of Soft Money in Politics (Apr. 5, 2000), *available at* http://www.commoncause.org/publications/april00/040500.htm.

17. Democracy 21 Statement on House Passage of Shays-Meehan Bill (Aug. 6, 1998), *available at* http://www.commondreams.org/pressreleases/Aug98/080698g.htm.

18. Ronald Dworkin, "The Curse of American Politics," *The New York Review of Books*, Oct. 17, 1996, at 19.

advertising, the "very stability" of the campaign finance systems has been imperiled.[19] He writes that "[t]here is, in short, a damaging aura of disease and weakness, an increasing expectation of failure, pervading FECA's regulatory regime."[20]

It is striking that the arguments by the critics of *Buckley* are similar in character to the kind advanced in that case as a justification for limitations on speech and association. Only the fact or appearance of corruption would justify limitations; this corruption cited by the *Buckley* Court was drawn from a true crisis, the Watergate scandal resulting in the fall of the Nixon Administration.[21] *Buckley* critics appear to accept the premise that nothing short of "scandal," "disgrace," or "disease" on the scale will support the reversal of *Buckley* and institution of the reforms that they have in mind.[22]

The problem then is that their argument risks standing or falling on the success of the claim about contemporary "crisis." Generally the argument has two parts—that there is a "crisis" in campaign finance, largely associated with the ascendancy and control of special interests, and that it is destroying the confidence of the American people in the representative integrity of their government.[23] Both sides of the argument, however, invite difficult questions; neither is self-evident nor

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19. Frank J. Sorauf, *What* Buckley *Wrought*, *in* IF *BUCKLEY* FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS 49-50 (E. Joshua Rosenkranz ed., 1999).

20. *Id.* at 51.

21. *Buckley*, 424 U.S. at 27, n.28.

22. The crisis posited by the reform debate has included another line of argument about the quality of campaign discourse. Dworkin, *supra* note 18, at 19 (citing the effects of "sound bite" television that results in "negative, witless, and condescending" messages). Professor Dworkin excoriates the role of the press in offering, in the guise of campaign reporting, "entertainment," not information or analysis, and blames news media celebrities earning "huge salaries and lecture fees" and enjoying "public recognition that often dwarfs that of the politicians they supposedly cover." *Id.* In other words, Professor Dworkin is unhappy with the state of electoral politics in America. *See id.* This frustration with the way campaigns are conducted has a wide following. "Negative" campaigns have been the subject of separate academic study. *See, e.g.*, KATHLEEN HALL JAMIESON, DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY (1992). The quality of the press' management of its responsibilities has received attention in numerous books. *See, e.g.*, TIMOTHY CROUSE, THE BOYS ON THE BUS (1973); PAUL TAYLOR, SEE HOW THEY RUN: ELECTING THE PRESIDENT IN AN AGE OF MEDIOCRACY (1990); DR. HUNTER S. THOMPSON, FEAR AND LOATHING: ON THE CAMPAIGN TRAIL '72 (1973). Campaign consultants are also unpopular. *See, e.g.*, JULES WITCOVER, NO WAY TO PICK A PRESIDENT (1999). As discussed below, this disaffection with the electoral process reflects a broader public disengagement from that process and has implications for the direction of any discussion of political reform.

23. This crisis is similar to the corruption threat discussed in *Buckley*, 424 U.S. 1, 45 (1976).

fully consistent with the available evidence. As a result, critics of reform are able, with some ease, to launch a counter-attack on what one has termed "faulty assumptions."[24] The stalemate begins.

Proponents of reform are well within reason, of course to argue that spending is high and increasing, and to express concern that the level of spending and the "arms race" for more money could adversely affect both the quality of campaigns and the integrity of government. An argument grounded in a claim of "crisis" demands more, however. Its vulnerability is that it cannot supply what is missing. This point has been conceded by at least one proponent of reform.[25] Former Harvard University President and Law School Dean, Derek Bok acknowledges, upon review of the evidence, that the link between political money and official action is "only a slight connection at best."[26] He writes, correctly, that "[e]ven those who find that PAC contributions do produce statistically significant changes in voting report that the effects are much more modest than most popular accounts suggest."[27]

Bok also addresses another argument about the existence of corruption — the use of money to buy "access" to decision-makers.[28] Here, too, he counsels that it is a "mistake" to overstate the problem, because "access" should be reflected in voting outcomes, but generally it is not.[29]

Bok's study is notable for its care, candor, and willingness to concede the point about crisis, while at the same time standing his ground in favor of reform.[30] Bok argues for restrictions on party soft money, tighter controls on independent spending, and additional resources for challengers in the form of free mailings and television time.[31] His

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24. Smith, *supra* note 15, at 1057-58. Smith, now a Commissioner of the FEC, cites, then sharply probes, the following assumptions, all of which are component parts of the crisis argument: (1) that too much money is spent on campaigns; (2) that campaigns funded with small contributions are more democratic; (3) that money buys elections; and (4) that money is a corrupting influence on candidates. *Id.* For a critique of Professor Smith's assumptions, see E. Joshua Rosenkranz, *Faulty Assumptions in "Faulty Assumptions": A Response to Professor Smith's Critique of Campaign Finance Reform*, 30 CONN. L. REV. 867 (1998).

25. DEREK BOK, THE TROUBLE WITH GOVERNMENT (2001).

26. *Id.* at 83.

27. *Id.*

28. *Id.* (stating that interest groups contribute money to lawmakers to gain access to them and for the opportunity to present arguments and information on issues important to the interest group).

29. *Id.* at 83-84.

30. *See generally id.*

31. *Id.* at 265-66.

proposal encourages states to experiment with programs for full and partial public financing.[32] He does not, unlike other proponents of reform, rest his case for reform on a claim of crisis that posits the encroaching power and control of special interests over public policy.[33]

The second argument suggests that without limitations, the public will lose confidence in their government. This argument fares no better. Surveys demonstrate an increasing distrust in government institutions, politics, and politicians over the last three decades.[34] A lively debate regarding the source of the distrust has ensued.[35] Campaign finance reform, however, continues to lag far behind other concerns in public opinion surveys.[36] Even if many Americans perceive that special interest groups buy special access and treatment from lawmakers, they seem to care less than they say they do. A recent poll by the Pew Research Center found that campaign finance reform ranked nineteen out of twenty on a scale of national priorities.[37] The authors of the poll conclude that the campaign finance reform "is simply not a cause that

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32. *Id.* at 265.

33. Scholars who are convinced of the salience of the crisis argument recognize, even if indirectly, its limitations. In a recent review of the literature, Professor Richard Briffault acknowledged that studies of the relationship between campaign contributions and legislative behavior "have reached conflicting results concerning the extent to which campaign contributions actually affect legislative votes." Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 579-80 (1999). He suggests that the impact is greatest on votes where other voting cues are lacking — votes on nonpartisan, low-visibility issues. *Id.* at 580. The link he establishes appears far from substantial. But Professor Briffault displays its weakness still more in arguing that the real impact of contributions lies in their subtle impact on access — that they can have an impact on the wording of bills or decisions on scheduling. *Id.* He concedes that "[s]uch influence is likely to be difficult to detect, measure, or police." *Id.* at 581. He also states, however, that:

> [P]olitical scientists who have studied the legislative process believe that it exists. Certainly, it is hard to explain the hundreds of millions of dollars that organized interest groups regularly pour into congressional campaigns unless such politically sophisticated donors have good reason to believe they are getting something for their money.

Id. This argument has moved in this way from a claim that money at least buys access, to the acknowledgement that the effect is hard to detect but can be assumed on the basis of the beliefs of political scientists. Whatever the merits of this position, as a matter of political science belief, it is a weak foundation for limitations on constitutional rights of speech and association.

34. *See, e.g.*, WHY PEOPLE DON'T TRUST GOVERNMENT (Joseph S. Nye, Jr. et al. eds., 1997).

35. *Id.* at 109-79.

36. Pew Research Center for the People & the Press, *Why Americans Aren't Stirred by Campaign Finance Reform*, *at* http://www.people-press.org/aol32701.htm (last visited Dec. 12, 2001).

37. *Id.*

moves most Americans . . . ."[38] It is difficult to make an argument about a crisis of public confidence when Americans are not, in fact, moved by its cause.[39]

Proponents of campaign finance reform, who build the case on "crisis," can expect sustained return fire on "faulty assumptions." As a result, they have dug in hard on their positions, but they have not advanced very far. By the same token, reform opponents show little openness to any concern about the current state of democratic practice in the United States. They may correctly dismiss overstated claims of crisis and corruption, but they do not contend with evidence and associated concerns that politicians and parties are compelled to raise ever increasing sums of money, that many Americans do not vote, and electoral politics, as it is currently practiced, holds out little hope of rekindling their urge to do so. To the contrary, reform opponents appear satisfied to leave politics to the market, allowing the money to flow where it will and accepting a process characterized by low participation and a frenetic concentration on fundraising and spending.

This difference accounts for the stalemate. It would not be a simple matter to bridge the differences between someone passionately concerned about public participation in the political process and another who does not understand why it should matter. Reform opponents take the additional step, just as their adversaries do, of overstating their case, of converting their arguments into a polemic. Reform opponents concede nothing to the cause of reform, but instead choose to treat it as a cynical power play by political opponents, or as the source itself of potential dangers to the political process. Thus a distinguished academic critic of reform implausibly maintains that campaign finance reform does

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38. *Id.*

39. *Id.* Even the number of Americans prepared to enlist in the cause of reform, through personal contributions and volunteer time, seems rather small when considered in light of claims about crisis. *See, e.g.*, ANDREW S. MCFARLAND, COMMON CAUSE: LOBBYING IN THE PUBLIC INTEREST (1984). For example, the membership of Common Cause, a nonprofit, nonpartisan group that seeks to hold the government accountable, has hardly changed. For the past twenty years its membership has remained at the quarter million mark. *Id.* (detailing a history of the mid-eighties of the fluctuations in membership of Common Cause). Other organizations committed to reform, like the Brennan Center of New York University and the Center for Responsive Politics, are funded with grants from large donors and charitable foundations, not from the dues paid by mass memberships. While it is true that the Reform Party, under the leadership of Ross Perot, traveled a certain distance on this argument, its high-water mark, the 1992 Presidential election, occurred at a time when pubic anxiety over the economy was high. The Reform Party's political capital has since been largely spent, and, indeed, the squabbling over its agenda in the 2000 election appears to reflect the relative decline of political reform as a cornerstone of its platform and electoral strategy.

all of the following: entrench the "status quo," promote influence peddling, reduce accountability, and favor select elites, wealthy candidates, and, remarkably, special interests over grassroots activity.[40]

It would be most edifying, of course, to have in hand an answer — some way of looking at the issue, which will largely reconcile the two points of view and point the way to new ground. By its nature, the debate does not make room for this result. Where would a compromise lie?

A compromise could exist, but it would be a political compromise, like McCain-Feingold, that seeks to impose new regulatory restraints while reassuring those concerned with overreach. As one would expect of a political compromise, however, it does not address the larger ideological divide, but seeks instead to make it more palatable for moderates. Because many supporters of this approach are prepared to compromise core constitutional and political positions in the interests of practicality — to produce for political reasons, some law — those observing the process on both sides could come away with the uneasy feeling that something unsavory, not ennobling, had been done. And for those with strong objections to the reform movement, there is additional fear of regulatory "creep" — McCain-Feingold offers less of a compromise and more of an opening that may be exploited in coming years to broaden the government's role in the political process. McCain-Feingold will mark the next phase of the debate, but will not likely be the means by which it is transcended or resolved. The legislation neither establishes a middle ground for debate nor points in the direction where one may be found.

III. CONSTITUTIONAL STALEMATE

The constitutional debate over the current system of campaign finance is also bogged down. The debate is characterized by repetitious arguments over the extent of corruption wrought by special interests, on the one hand, and the clash of proposals for reform with claims about the protections of the First Amendment, on the other. In some sense, the controversy has barely budged from *Buckley*. The muddled ferocity so far afflicting the debate over campaigns has produced, as do all large policy or political conflicts in this country, an appeal to the courts to achieve what Congress so far has not. The courts, and particularly the Supreme Court, have responded with halting attempts to referee the dispute. There is little doubt that its efforts have yielded results for particular cases, but overall, nothing even approaching a coherent

40. Smith, *supra* note 15, at 1051.

jurisprudence likely to endure or command acceptance. In one sense, the Court does not deserve too harsh a rebuke for its shortcomings. It is merely unable to rise in its decisions beyond the confusion and deadlock characteristic of this debate. In another sense, the Court's decisions have made matters worse by exacerbating, instead of redressing, the disorder.

Unfortunately, there is no doctrine that incorporates a defensible view of politics and the role of the courts in refereeing the adoption of rules of political competition. The Court has left the legislatures and litigants with little idea of where constitutionally protected activity ends and permissible government controls begin. The problem begins with the *Buckley* case; it stands tall as a political compromise, but falls dramatically short of a defensible constitutional construct for analyzing the permissibility of government controls. As much as *Buckley* has been pummeled for its shortcomings from all sides, it is worth considering yet again the way in which it has failed the test of time.

When reconsidered, the case may be seen to have missed the mark in its core assumptions about the political process. Its assumptions about the difference between contributions and expenditures forced an inadequate speech analysis to the forefront, failing to place more emphasis on *associative* rights compromised by limits on political money.[41] The problem was compounded by the Court's insistence that government interests could only be vindicated by establishing the fact or appearance of corruption, without a clear statement of what this meant, or how it could be done.

IV. *BUCKLEY* AND THE LOST CHANCE FOR ASSOCIATIVE RIGHTS

The *Buckley* Court deserves some credit for laying bare its theoretical assumptions, which it set out in a section entitled "General Principles." Here the Court argues the constitutional significance of the difference between contributions and expenditures.[42] While the Court acknowledges the controlling concern with protecting both political communication and association, the opinion accepts the view that the right of association in contemporary jurisprudence is significant only "in its instrumental capacity to protect free speech."[43] Thus, *Buckley* concludes that association enhances advocacy, but it is not independently significant. This is a critical choice made by the Court, when, in this landmark case, it could have made another. The result is a distinction

41. *Buckley*, 424 U.S. at 14-23.
42. *Id.*
43. *See id.*

between contributions and expenditures that seriously understates the implications for political association in its own right.

This slighting of associative political rights produces general considerations startlingly devoid of political reality. The Court suggested that contribution limitations impose only a "marginal restriction" on contributors' First Amendment rights, because a contribution constitutes only a "general expression of support of the candidate and his views" without communicating the "underlying basis for the support."[44] The making of a contribution, the Court stated, is only "an undifferentiated, symbolic act," and "[a]t most . . . a very rough index of the intensity of the contributor's support . . . ."[45] The speech right implicated here, the Court finds, is at best speech by proxy, that is, "speech by someone other than the contributor."[46]

This focus on the speech rights of the individual contributor reassures the Court that any First Amendment infringements are tolerably limited, because the contributor may turn to other avenues for more speech.[47] The Court found that making a contribution is an important means of expressing a viewpoint or position, but there are others. The contributor may be a member of a political association, or she may "assist personally" in an effort to elect particular candidates.[48] Hence, the contributor may still participate in the political process, particularly with a view toward supporting candidates, but she cannot spend much money in this effort.

This conclusion appears odd enough in a decision emphasizing the significance of money to effective speech, but by framing the decision in these terms, with little attention to the associative rights of contributors, the Court manages a superficial defense of the contribution/expenditure distinction. If the speech of the contributor is of central importance, the distinction is somewhat plausible. The contributor may find other ways to speak, such as making "independent expenditures" expressly advocating the election or defeat of clearly identified candidates, which an individual may finance without limitation.[49] In addition, it is possible for the contributor to retain her association with a candidate or other political organization within the constraints of contribution limits

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44. *Id.* at 20-21.
45. *Id.*
46. *Id.* at 21.
47. *Id.*
48. *Id.* at 22.
49. *Id.*

inasmuch as she may volunteer services and maintain associative memberships.[50]

Speech, however, is not the paramount concern of many contributors seeking to associate with others in a particular cause. They are seeking to collaborate toward the fulfillment of a plan of political action. Their views propel them on this course, but their efforts will be futile without the active participation of others. Contributors allied with others in this kind of effort are not so much preoccupied with speech, with the expression of their views, as with effective organization. This organization, no less than speech, requires money, and it lies as much, if not more, at the core of political activity.

By ignoring this consideration, the Court can suggest that the limitations it proposes are of minor consequence for those associated with the contributor, as well as for the contributors themselves. The Court claims that contribution limits "merely . . . require candidates and political committees to raise funds from a greater number of persons . . . ."[51] This is not, however, a "merely" proposition, but a monumental one. The contribution limits have required candidates and committees to scour the political landscape for additional contributors and resources, such as much-maligned "soft money." Thus, candidates and other political organizations are forced to spend more time looking for funds.[52]

Moreover, when the search for funds expands, the emphasis shifts from those who are like-minded, who will have given all they can early in the campaign, to those who can be persuaded by other appeals to join a cause to which they otherwise may be indifferent. Appeals to interests, rather than conviction, seed the soil with corruption. These appeals are the sort of bargain Congress found to threaten democratic governance and are inconsistent with the Court's concern with the corruptive effect of contributions.

It is fanciful to say that the limits on the amount of money given directly to a candidate need not be evaluated under a strict scrutiny analysis because the amount a donor provides directly to a candidate is in part symbolic. But, the Court used this reasoning in 1974, only six years after precisely those kinds of large contributions made it possible for the insurgent candidate, Eugene McCarthy, to challenge the incumbent president of his party, Lyndon Johnson. Donors supporting such a

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50. 2 U.S.C. § 431(8)(B)(i) (volunteer exemption); 2 U.S.C. § 441b(b)(4)(D) (membership organizations).

51. *Buckley*, 424 U.S. at 21-22.

52. *See id.* at 26 n.27.

candidate are not engaging in symbolic speech, but instead in very practical political action that is dependent for its effectiveness on the size of the amount donated. Nor, as a practical matter, are there meaningful alternatives. Donors do not wish to make independent expenditures to amplify their unfiltered views; they wish to support the campaign by making resources available to the candidate's campaign (or the candidate's party).[53]

Of course, the problem here is that the First Amendment does not only protect speech, but it also protects political action (association), and the Court has broadly defined the former while narrowly construing the reach of the latter. With this analysis, the Court demonstrated that First Amendment doctrine could supply some notions about individual speech, but that it could not more integrally address and accommodate the requirements of political action and association. The individual speaker has been removed from her proper context, and the entire constitutional analysis is welded to the requirements or limitations of individual speech. The requirements of collective action, the very heart of politics, receive the barest attention. It is curious that the contribution/expenditure dichotomy has been attacked by First Amendment absolutists and reformers alike for either equating cash donations with speech, or for not extending this equation far enough. More striking has been the surreal character of the analysis appears uninformed by any appreciation of the political process, the choices faced by political actors, or the requirement of effective political activity in association with others.

V. TRAPPED IN THE CONTRIBUTION/EXPENDITURE DICHOTOMY: *MASSACHUSETTS CITIZENS FOR LIFE* AND THE *COLORADO REPUBLICAN* CASES

Because the Court overlooked the associative rights at issue in campaign regulation, it could not apply *Buckley* with coherent results to cases where such rights were clearly presented. This was apparent, for example, from the Court's decision in *Massachusetts Citizens for Life, Inc.* (MCFL).[54] There, the Court was concerned with an incorporated association, which was small in scale and modest in funding, that opposed abortion rights.[55] One of its activities, financed by "voluntary donations

53. *See, e.g.*, Eddie Bernice Johnson, *Election Reform Should Come First*, WASH. POST, Dec. 8, 2001, at A23 (stating that "it is important for . . . like-minded citizens to have the opportunity to pool their resources in order to be heard").

54. *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*).

55. *Id.* at 241-42.

from 'members,' and from various fundraising activities," was to produce voter guides.[56] The FEC had concluded that one particular guide, costing just over $9,800, was structured to promote the election of particular candidates and the defeat of others.[57] The Court could not disagree with this assessment, but was also impressed with the raw associational values presented on the facts of the case. To avoid the problem, the Court made two moves, both of which preserved the superficial framework of distinguishing "contributions" from "expenditures," but were motivated in essence by a solicitude for associational rights.

First, the Court declared that the spending in question was independent spending and therefore not constrained under the limitations in *Buckley*.[58] The real problem, however, was not the amount of the spending—barely $10,000 was spent—but the fact that it was made by a corporation that, at the time, was assumed to be barred by the FEC from spending in connection with a federal election. Therefore, in its second move, the Court established a separate constitutional allowance for certain kinds of corporations.[59] The Court held that such corporations could, unlike other organizations, make independent expenditures if the following conditions were met: (1) they were formed for political purposes; (2) they did not offer their members a financial stake in their organization akin to that of shareholders; and (3) they did not accept contributions from corporations or unions.[60]

The Court continued to treat the case as one involving speech: "[t]he [government's] rationale for restricting core political speech in this case is simply the desire for a bright-line rule. This hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom."[61] The government, to be fair, had not simply fashioned a bright-line rule; it had applied a clear statutory prohibition on corporate spending that, since 1907, has never distinguished one corporation from another. Yet, the Court, using a corruption analysis, was indirectly expressing what a clearer focus on association would have more directly captured. The case presented a group of people of modest means joining together to achieve collectively what any one of them could not have done alone. *Buckley*, requiring an expenditure and

56. *Id.* at 242.
57. *Id.* at 244-45.
58. *MCFL*, 479 U.S. at 262-63.
59. *Id.* at 263.
60. *Id.* at 263-64.
61. *Id.* at 263 (emphasis in original).

corruption analysis, made it hard for the Court to state convincingly what was truly at issue.

The Court's doctrinal confusion was still more evident in its resolution of two cases that unambiguously presented the associative value, the *Colorado Republican* cases.[62] In both cases, the Court strained to fit its analysis within the *Buckley* contribution/expenditure dichotomy. In *Colorado Republican I*, the Court held that the government could not place limits on certain radio advertising by the party, because it was conducted independently of their candidates.[63] Neither the parties nor the lower courts had considered this theory because it was assumed—and because FEC rules provided—that parties could not claim independence from their own candidates.[64] The Supreme Court, however, concluded that if individuals, candidates, and ordinary political committees could spend independently, then the same right was fairly claimed by parties.[65] The notion that a party might not *wish* to operate independently from its candidates could not be accommodated by the Court's *Buckley* analysis.

The Court missed this element of the case because its speech analysis operated as blinders. The Court examined whether the independent spending right would encourage contributors to evade contribution limits by funneling the contributions to candidates, through parties.[66] The Court dismissed the concern, insisting that contributors seeking to avoid contribution limits "could spend the same amount of money (or more) themselves more directly by making their own independent expenditures promoting the candidate."[67] Of course, this misses the issue. Under a model emphasizing association rights, the contributor does not wish to make the expenditures directly in the service of her own speech. The contributor's goal is concerted political action, and her goal is satisfied only by contributing to a pool created with others who share that goal.

The Court's opinion in *Colorado Republican II* opened with the same analysis distinguishing contributions from expenditures.[68] The issue was different, presented as the constitutionality of limits placed on

62. Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996) (*Colorado Republican I*); FEC v. Colo. Republican Fed. Campaign Comm., 121 S. Ct. 2351 (2001) (*Colorado Republican II*).

63. *Colorado Republican I*, 518 U.S. at 608.

64. 11 C.F.R. § 110.7(b)(4) (1995).

65. *Colorado Republican I*, 518 U.S. at 618.

66. *Id.* at 616-18.

67. *Id.* at 617.

68. *Colorado Republican II*, 121 S. Ct. at 2358 ("Restraints on expenditures generally curb more expressive and associational activity than limits on contributions do.") (citing Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 386-88 (2000)).

expenditures by parties fully coordinated with their candidates.[69] The statute provided that expenditures coordinated with candidates were contributions.[70] The Court thus embarked on a *Buckley* analysis to determine whether this type of contribution, from party to candidate, occupied some privileged status inconsistent with mandated limits.[71]

The Court's argument in *Colorado Republican II* was different from that in *MCFL*. In *MCFL*, the Court kept its analysis on a technical plane, elaborating the circumstances in which corporations could spend independently.[72] In *Colorado Republican II*, the Court inquired into political realities and how "the power of money actually works in the political structure."[73] By concerning itself with political "realities," the Court expected to show that party contributions to candidates presented the same danger of corruption as any other contribution. Realities, as the Court understood them, led to the conclusion that corruption was a distinct danger—many contributors, like political action committees, used the parties as "conduits" for "contributions meant to place candidates under obligation."[74]

Through this approach, the Court achieved a derogation of association rights. Congress had concluded that parties occupied a special place within the political universe of associations. For example, Congress conferred special expenditure limits on parties.[75] These limits include the right of national, state, and local party committees to transfer monies without limit from one to the other.[76] The Court, held captive by the *Buckley* dichotomy, found that political parties do not merit special constitutional consideration, and that the relationship between the donors and candidates was no different from the ones maintained by all other political committees.[77] The parties had become super-PACs.

VI. ESTABLISHING CORRUPTION

The surreal nature of the Court's approach carries over from the contribution/expenditure distinction to the requirements binding upon legislatures to establish a compelling interest sufficient to override First

69. *Id.* at 2356-57.
70. *See* 2 U.S.C. § 441a(a)(7) (2000).
71. *Colorado Republican II*, 121 S. Ct. at 2358-60.
72. *MCFL*, 479 U.S. 238, 263-64 (1986).
73. *Colorado Republican II*, 121 S. Ct. at 2363.
74. *Id.* at 2364.
75. 2 U.S.C. § 441a(d)(3) (2000).
76. *Id.* § 441a(a)(4).
77. *Colorado Republican II*, 121 S. Ct. at 2366.

Amendment guarantees.[78] In *Buckley*, the Court isolated only one compelling interest—to prevent the appearance or fact of corruption.[79] The Court walked into a trap from which it has yet to emerge. Of all the interests considered—the interest in corruption, the equalization of access to resources, and the need to free candidates from the burdens of fundraising[80]—the corruption rationale was the least susceptible to rigorous and consistent judicial analysis.

Thus the *Buckley* Court could not establish a record of corruption. It cited in a footnote the reports from the Watergate Select Committee and, in doing so, revealed the profound confusion at the heart of the approach.[81] The Watergate Committee did not, in fact, turn up much in the way of evidence of corrupt conduct, such as large private contributions driving officeholders to act on official matters. The committee's devastating findings unearthed political corruption of a wholly different character: a systematic program of abuse of constitutional power by the Executive Branch at war with the president's enemies in the press, the opposition political party, and the media.[82]

Since that time, the Court has been unable to define the nature of the corruption that legislatures may prevent. Its efforts have passed through three distinct phases. First, the Court allowed regulatory measures to enforce the statute, without requiring each regulatory restriction to be justified under the corruption rationale. Under this approach, the regulations were considered useful supplements to the overall statutory scheme.[83] In the second phase, the Court began to require a full-blown analysis of how restrictive measures served the anti-corruption rationale.[84] Over this period, the Court seemed to suggest, and the lower courts seemed to follow, a very limiting test for legislatures to meet.[85]

In its final phase, the Court reversed course and displayed a remarkable and confused flexibility. This phase is most evident in *Nixon*

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78. Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (discussing strict scrutiny analysis for government action that significantly interferes with a fundamental right).

79. Buckley v. Valeo, 424 U.S. 1, 45 (1976).

80. *Id.* at 51 (citing interests).

81. *Id.* at 27 n.28.

82. J. ANTHONY LUKAS, NIGHTMARE: THE UNDERSIDE OF THE NIXON YEARS (1988). Of the six chapters outlining abuses of power, including crimes, committed by members of the President's reelection committee, only one is devoted to political fundraising, and much of it has little direct bearing on the shape of the FECA enacted the year of Mr. Nixon's resignation. *Id.*

83. Cal. Med. Ass'n v. FEC, 453 U.S. 182 (1981).

84. *See, e.g.*, *MCFL*, 479 U.S. 238, 260-63 (1986).

85. *See, e.g.*, FEC v. NCPAC, 470 U.S. 480 (1985).

v. Shrink Missouri Government PAC.[86] The *Nixon* Court affirmed *Buckley* as it applied to sustain legislative contribution limits.[87] The plaintiffs had questioned the basis for the limit set by Missouri, much as one hears the complaint that the $1,000 limit established by federal law, eroded by inflation, provides no constitutionally acceptable room for political giving.[88] The Court, however, found that the legislature should not be second-guessed.[89] It accepted the most casual of materials as ample proof of corruption or its appearance.[90] One piece of evidence was a single affidavit from a state legislator who averred that large contributions posed a serious threat to officeholder integrity.[91] The Court also allowed the record to stand on a series of newspaper articles reporting on scandals involving elected officials, including one limited to the disclosure of allegations.[92] Close observers of the Court, however, could not fail to recall the manner in which the Court had dismissed the proffer of newspaper articles in *FEC v. National Conservative Political Action Comm.*[93]

The government interest, as presented by the Court, could hardly have seemed more trivial. By nature it was supposed to be compelling enough to sufficiently override fundamental speech and associative rights.[94] In practice, as presented by a case like *Nixon*, it barely rose above the level of gossip and newspaper citations.[95] In a country known for its established cynicism toward politics and politicians,[96] the Court had invited, in the place of rigorous showing of government purpose, the submission of standard anti-political pap. Just as the Court had limited its appreciation of the political interests at stake by slighting associative rights, so it failed to achieve a precise delineation of the countervailing

86. 528 U.S. 377 (2000).

87. *Id.* at 395.

88. *Id.* at 383; *see also* Craig Engle, John DiLorenzo, Jr. & Charles Spies, Buckley *Over Time: A New Problem with Old Contribution Limits*, 24 J. LEG. 207, 213-16 (1998).

89. *Nixon*, 528 U.S. at 393-94.

90. *Id.* at 394-95.

91. *Id.* at 393.

92. *Id.*

93. 470 U.S. 480, 499-500 (1985) (holding that newspaper material and public opinion polls insufficient to challenge the independence of groups spending to advocate the election of a president).

94. Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

95. *Nixon*, 528 U.S. at 393.

96. FRANK SORAUF, POLITICAL PARTIES IN THE AMERICAN SYSTEM 147 (1964). Professor Sorauf wrote that "[i]n the most general way one can . . . point to the widespread American suspicion of and distaste for politics and politicians as the basic element of the American political culture." *Id.*

government interest. Neither side of the equation was properly constructed.

VII. THE CONFUSION WROUGHT BY *BUCKLEY*

The Court has seemed generally aware that something is missing in the current state of its jurisprudence. As a result, various justices have proposed doctrinal departures from the *Buckley* framework. Justice Stevens has concluded that money is property, not speech,[97] while Justice Breyer has developed a theory premised on the advisability of deference to the legislature to resolve conflicts between competing constitutional values.[98] Other justices have suggested that it might make sense to dispense with *Buckley* altogether with the intention of allowing the marketplace to rule.[99] While the Court continues to take cases, it is making clear that it cannot offer a coherent, or consistent, rationale for their decision. Arguments within the Court have the same lost, unhappy quality of those taking place outside of it.

The confusion generated by *Buckley* becomes still more apparent when its fruits are laid side-by-side with lines of other First Amendment authority. Of particular interest for this purpose are the Court's decisions, under other constitutional principles, establishing the rights of political parties to control the selection of their nominee and limiting their patronage opportunities. The law in these areas developed over roughly the same period, from the mid-1970s to the 1990s, when FECA and the Court's *Buckley* jurisprudence were evolving.

In protecting parties' rights to select their own candidates, the Court found that party rules determining convention delegate qualification and eligibility criteria superceded conflicting state law.[100] An assertion of state control would "seriously undercut or indeed destroy the effectiveness of the National Party Convention as a concerted enterprise . . . ."[101] The Court upheld this principle again in *Democratic Party of the United States v. Wisconsin* ex rel. *Follette*,[102] by invalidating an attempt by the state to force compliance by party convention delegates with the result of a primary in which all voters, not only declared Democrats, could participate.[103] This line of authority was not focused on protecting

97. *Nixon*, 528 U.S. at 398 (Stevens, J., concurring).
98. *Id.* at 402 (Breyer, J., concurring).
99. *Colorado Republican II*, 121 S. Ct. 2351, 2371-74 (2001) (Thomas, J., dissenting).
100. *See, e.g.*, Cousins v. Wigoda, 419 U.S. 477, 483 (1975).
101. *Id.* at 490.
102. 450 U.S. 107 (1981).
103. *Id.* at 126.

the purity of party activity, but on protecting the purity of the party's own choice. Hence, in *Tashjian v. Republican Party of Connecticut*,[104] the Court found that parties could also choose to open their primary selection process to nonparty members.[105]

What accounted for the broad leeway afforded to parties in this area? In holding that California could not force a blanket primary on parties, which permitted all voters to vote for candidates from all parties, the Court stressed in *California Democratic Party v. Jones*[106] that "a corollary of the right to associate is the right not to associate."[107] The Court also referred to this as the "right to exclude."[108] The Court offered, however, a more affirmative formulation. There was no more important right of parties than its right to select its nominee, who "becomes the party's ambassador to the general electorate in winning it over to the party's views."[109] Indeed, the Court identified a special place in the First Amendment for this activity.[110] In response, to the suggestion that parties could still endorse their own candidates within an all party field, the Court found that an endorsement "is simply no substitute for the party members' ability to choose their own nominee."[111]

The *Jones* case was decided in 2000, four years after *Colorado Republican I* and one year before *Colorado Republican II*. It is not easy to reconcile the differing views reflected in these cases. The *Jones* case provides a special place for parties in their selection of their candidates.[112] Yet, the Court's opinion in *Colorado Republican I* posits that parties may operate independently from their candidates and only allows them to spend liberally on their behalf, if they maintain their independence.[113] The *Colorado Republican II* decision makes the break even sharper.[114] The opinion limits the contributions that parties may make to their candidates, rejecting precisely the view that there is any special relationship between party and candidate, much less an identity of interest.[115] The juxtaposition of *Cousins* and its progeny, with the

104. 479 U.S. 208 (1986).
105. *Id.* at 229.
106. 530 U.S. 567 (2000).
107. *Id.* at 574.
108. *Id.* at 575.
109. *Id.*
110. *Id.*
111. *Id.* at 580.
112. *Id.* at 575.
113. *Colorado Republican I*, 518 U.S. 604, 613-14 (1996).
114. *Colorado Republican II*, 121 S. Ct. 2351, 2371 (2001).
115. *Id.*

Buckley line of cases, shows how the Court is prepared to respect a formal role of parties in naming nominees, while denying these associations the most effective means of supporting them.

The patronage cases also run through the period that FECA and *Buckley* make their appearance, beginning with the 1976 case of *Elrod v. Burns*.[116] In *Elrod*, the Court found that the Constitution did not permit the firing of non-civil service employees based on their party affiliation.[117] The Court cited a concern that employees would be coerced, for fear of job reprisal, to declare views or support candidates inconsistent with their preferences.[118] Beyond the consequences to the individual exercise of speech and association, the Court also identified a danger to the "free functioning of the electoral process."[119] At the heart of the decision was the right to associate: "the First Amendment protects political association as well as political expression."[120] The Court cited in support of that claim was none other than *Buckley v. Valeo*.[121]

The Court progressively expanded the core concern of *Elrod*. In *Rutan v. Republican Party of Illinois*,[122] the Court upheld claims of discrimination based on political affiliation alleged to have affected hiring, promotion, transfer, and recall.[123] The Court found that the parties could build their loyalties less restrictively than through patronage practices that "decidedly impair[] the elective process by discouraging free political expression by public employees."[124] By the time the Court decided *O'Hare Truck Service v. City of Northlake*[125] it had extended these considerations to independent contractors.[126] Justice Scalia, bitterly opposed to this development, declared that in overturning years of patronage practice, the Court had "left the realm of law and entered the domain of political science . . . ."[127]

The question then becomes: what political science? There were different "party" interests at stake—the interest of the winning party in

116. 427 U.S. 347 (1976).
117. *Id.* at 373.
118. *Id.* at 355.
119. *Id.* at 356.
120. *Id.* at 357 (quoting Buckley v. Valeo, 242 U.S. 1, 15 (1976)).
121. *Id.*
122. 497 U.S. 62 (1990).
123. *Id.* at 79.
124. *Id.* at 75.
125. 518 U.S. 712 (1996).
126. *Id.* at 726.
127. *Rutan*, 497 U.S. at 113 (Scalia, J., dissenting).

rewarding friends only with the spoils of victory,[128] and the interest of the losing one to protect against wholesale employment-related discrimination.[129] Yet, the Court, though also using the language of association, seemed more concerned with the individual "free political expression" cited in *Rutan*.[130] There was, to be sure, an associative claim in these cases derived from the party affiliation at the root of the discriminatory treatment. It seemed, however, ancillary in character, much like the limited scope afforded association rights in *Buckley*.[131] Stated another way, the right of association protected by the Court in the patronage cases was more the *individual manifestation* or expression of the associative right. The broader institutional interest of the party, which was actively represented by robust patronage practices failed to carry the day.

By the end of the century, the parties could control the selection of their nominees but were significantly limited in the support they could provide them. The parties were also restricted in applying the public resources they could control through patronage practices. Political parties, as the leading associations in the constellation of organized American politics, fared poorly in the constitutional jurisprudence. Associative rights, a coherent conception of collective action to win elections and hold power, fared poorly as well.

VIII. CAMPAIGN FINANCE AND POLITICAL CHANGE

It is not fair to say that the campaign finance debate has occurred in a political vacuum, without reference to the actual experience of politics. Participants in the debate have taken careful note of the increasing amounts of money involved, as well as the tone and quality of the manner in which campaigns are waged.[132] Those arguing for reform will suggest that Americans, alienated by the role of money in politics, will return to the fold only when it is reduced; while their opponents dispute that the government should limit free speech rights or risk voter fraud through activist measures to encourage voting.

The debate has been overwhelmed to a large extent by political change. One large aspect of that change has been widespread disengagement from the electoral process, reflected in chronic nonvoting.

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128. *Id.* at 66.
129. *Id.* at 79.
130. *Id.* at 75.
131. Buckley v. Valeo, 424 U.S. 1, 16 (1976).
132. IF BUCKLEY FELL (E. Joshua Rosendranz ed., 1999).

Studies conclusively show that nonvoting does not stem from a rejection of, or hypothesized alienation from, the political process, but from a lack of interest in it.[133] While there is considerable disagreement about the extent to which nonvoting Americans have flocked to other forms of political activity in the alternative,[134] few dispute the fact that many choose not to vote.[135] This is a striking irony: in the middle of a strident policy debate about the financing of election campaigns, a limited number of Americans eligible to vote even care about them. It is also clear that there is nothing evanescent about this migration from voting: it has developed over a long period and has become a stable feature of American political life.[136]

Nonvoting is also related to the weakening identification with the political parties.[137] Both of the major parties now command significant allegiance from roughly a third of the electorate, with the remaining third consisting of those swing voters who are "easily attracted to independent

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133. *See* STEVEN J. ROSENSTONE & JOHN MARK HANSEN, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA 212 (1993). The causes of decline "do not include . . . distrust toward government, or generalized alienation from the political system." *Id.*; *see also* Richard Morin & Claudia Deane, *As Turnout Falls, Apathy Emerges as Driving Force*, WASH. POST, Nov. 4, 2000, at A1 ("Most Americans do not reject voting because they are angry," but "because they are bored by politics and indifferent to the political process . . . .").

134. ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000). Putnam argues that all forms of civic association have declined, but other scholars have found otherwise. *Id.* at 48-64; *see also* ROSENSTONE & HANSEN, *supra* note 133, at 1-2 (stating that Americans are "increasingly likely to take part in other kinds of political activities"); SIDNEY VERBA ET AL., VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 510, 530 (1995) (stating that "[i]n short, participation in America is lively and varied," but "from the perspective of the individual voter, going to the polls is the least effective way to take part").

135. In the case of presidential elections, voting participation outside the southern United States has declined by roughly twenty-five percent in the last thirty-six years. *Id.*; *see also* PUTNAM, *supra* note 134, at 32. It dropped thirteen percentage points between 1960 and 1980. ROSENSTONE & HANSEN, *supra* note 133, at 1. In the 2000 presidential election, neither candidate received more than a quarter of the votes of eligible Americans. Press Release, Committee for the Study of the American Electorate, *Mobilization Propels Modest Turnout Increase GOP Outorganizes Democrats Registration Lower, Parties in Trouble Reforms Fail to Boost Turnout* (Aug. 31, 2001). While overall turnout increased in the 2000 election, from forty-nine to 51.2 percent, one million fewer eligible voters cast ballots than in 1992. *Id.* In general, turnout for the 2000 election was the fourth lowest in American history. *Id.*

136. *See* Paul R. Abramson & John H. Aldrich, *The Decline of Electoral Participation in America*, 76 AM. POL. SCI. REV. 502 (1982).

137. *Id.* at 520 (indicating that a decline in party loyalty is one of the factors playing a major role in declining voter turnout); *see also* MARTIN P. WATTENBERG, THE DECLINE OF AMERICAN POLITICAL PARTIES, 1952-1984 (1986).

candidates and third parties."[138] As a result, electoral competition between the parties has become more volatile.[139] Neither party achieves the upper-hand for a sustained period of time and each one spends greater resources to reach fewer voters holding the balance of power.

Parties and candidates must also contend with new sources of competition and different approaches, ranging beyond the electoral process to the winning of political power. Organized interests have experimented with various forms for achieving their political ends. In the early years of the FECA, PACs loomed large.[140] While PACs remain a significant feature of organized activity by interests, more direct intervention, involving unlimited soft money spending on advertising and voter mobilization, have placed interests in direct competition with parties.[141] In the last few years, PACs seem to have been succeeded by so-called "527s" engaged in much the same activity but with fewer (or no) legal restrictions.[142] Interests also organize through aggressive use of initiatives and referenda, seeking to pass "laws without government" because they are a "far more effective way of achieving their ends than the cumbersome process of supporting candidates for public office and then lobbying them to pass or sign the measures they seek."[143]

One scholar has referred to this political order as "the new American political system."[144] This is questionable nomenclature, for it is conceded that this system is characterized by atomized politics, in which "power [is] more widely diffused."[145] This fragmentation and diffuse makes for

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138. JAMES W. CEASER & ANDREW W. BUSCH, THE PERFECT TIE, THE TRUE STORY OF THE 2000 PRESIDENTIAL ELECTION 4 (2001).

139. *Id.*

140. *See* Report of the Twentieth Century Fund Task Force on Political Action Committees, What Price PACs? (1984). In a background paper in that volume, noted political scientist Frank Sorauf wrote that "[t]he role of PACs in campaign finance is now so pervasive, and the attention they receive so extensive, that they have become the centerpiece of a new devil theory of American politics." *Id.* at 3.

141. OUTSIDE MONEY (David B. Magleby ed., 2000). Magleby's important study shows how the interest groups have become steadily more sophisticated in the application of their resources, focusing monies in closely competitive races with ground and mail activities and not only in paid media. *Id.* at 8.

142. *See Recent Legislation: Campaign Finance Reform — Issue Advocacy Organizations — Congress Mandates Contribution and Expenditure Requirements for Section 527 Organizations, An Act of July 1, 2000, Pub. L. No. 106-230, 114 Stat. 477*, 114 HARV. L. REV. 2209 (2001).

143. BRODER, *supra* note 9, at 2, 5.

144. THE NEW AMERICAN POLITICAL SYSTEM (Anthony King ed., 1990).

145. *Id.* at 292, 298.

less of a "system," and more of an environment of continuous change and unpredictability.[146]

It is common to hear acute concern about these changes, including the flight from the electoral process by millions of eligible voters and the heavy fundraising and spending by parties and interests desperately seeking a competitive foothold. Some commentators perceive the emergence of a new political order as having much to offer.[147] Michael Schudson, for example, believes that a good citizen, who may not vote, will monitor government action and intervene as her interests dictate.[148] This citizen's language is that of rights, and she seeks their vindication as much through the courthouse as through the polling place.[149] The "expansion of rights-consciousness," Schudson writes, "has made the polling place less clearly the central act of political participation than it once was."[150] This interest lies in "choice, autonomy, and power," not in submission to the mass rituals of voting.[151] Schudson is not alone in his suggestion that politics has entered into what other commentators have termed a post-electoral order, an order where voting matters less to the competition for political control and may be subordinate to, or may at least share equal billing with, other avenues for achieving political goals.[152]

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146. Sorauf, *supra* note 19, at 25. Professor Sorauf offers an interesting analysis of the sources of political turbulence in the 1990s, resulting in intolerable strains on the existing regulatory regime. *Id.* He cites a host of factors: increased electoral competitiveness, sharp public distrust of politics and politicians, a rise in interest group activity, and a volatile electorate with unstable party loyalties. *Id.*

147. *See, e.g.*, MICHAEL SCHUDSON, THE GOOD CITIZEN: A HISTORY OF AMERICAN CIVIL LIFE (1998).

148. *Id.* at 8.

149. *Id.*

150. *Id.*

151. *Id.* at 304.

152. BENJAMIN GINSBERG & MARTIN SHEFTER, POLITICS BY OTHER MEANS: POLITICIANS, PROSECUTORS, AND THE PRESS FROM WATERGATE TO WHITEWATER (1999). Ginsberg and Shefter view the struggle for political power as shifting away from the mobilization of voters to other means of achieving direct control over governmental institutions. *Id.* at 46. In this view, parties and politicians prefer to "compete for power without engaging in full-scale popular mobilization." *Id.* John Gardner, founder of Common Cause, wrote in his 1972 manifesto, *Common Cause*, that the "ballot isn't enough," because on election day the vote is undone by organized special interest lobbying. JOHN W. GARDNER, COMMON CAUSE 19-20 (1972). Conservative critics of the electoral process have organized their program around term limits, intending to counteract the effects of incumbent strongholds on their offices through manipulation of their many advantages, some of which are even publicly funded. *Id.* A distinguished conservative commentator, George Will, wrote that winning elections requires no more than "a market niche" in which candidates "merchandise themselves with advertising paid for by venture

Whether cited as a post-electoral order or a new American political system, the rapid change in the political process has conditioned the debate over proposals to reform campaign finance. Reform proposals may embody admirable aspirations for the democratic process, but by their nature, they call for changes in the rules of political competition. For example, McCain-Feingold's restrictions on political party "soft money" are certainly founded on public policy considerations,[153] but any limitation on party "soft money" necessarily weakens the relative competitive position of parties faced with interest group "soft money" that funds the same persuasive tools of mail, television, and door-to-door voter contact. Attempts to limit independent interest group "advertising" may cause concerns over the advantages it confers on labor unions whose constitutionally protected communication with their members would remain unrestricted.[154] These are prominent, though not exclusive, examples of the competitive impact of proposed reforms.

For political actors, however, the issue is not primarily whether any particular change favors or disfavors them or their competitors. Of greater concern to them is the introduction of new variables or unknowns into an already unstable and unpredictable environment. Any campaign regulation requires political actors to adapt their programs to new legal requirements. Fortunately, for the competitors, the history of FECA shows significant successful adaptation.[155] Yet, while it is widely assumed that candidates, parties, and PACs will always manage to adapt, it is a mistake to imagine that successful adaptation is a sure thing or free of substantial costs and inefficiency. Participants in the political process seek to plan their programs with some stable assumptions about the ground of competition.[156] In an unstable environment, the task is difficult

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capitalists (contributors) who invest in candidates. The return on this investment is access to decision-makers and influence on legislation and other government actions." GEORGE F. WILL, RESTORATION: CONGRESS, TERM LIMITS AND THE RECOVERY OF DELIBERATIVE DEMOCRACY 92 (1992).

153. ROBERT F. BAUER, SOFT MONEY, HARD LAW 2-3 (2002).

154. 148 Cong. Rec. S2124-25 (daily ed. Mar. 20, 2001) (statement of Sen. McConnell).

155. Sorauf, *supra* note 19, at 12-15.

156. KATHLEEN HALL JAMIESON & PAUL WALDMAN, ELECTING THE PRESIDENT 2000: THE INSIDER'S VIEW 177 (2001). Professor Kathleen Hall Jamieson inquired as to the possible use of soft money to produce a "bio ad" for Democratic nominee Al Gore. *Id.* The dialogue proceeded as follows:

> [BILL] KNAPP: You might be able to [run that kind of ad], but our lawyers weren't comfortable with that.
>
> JAMIESON: But didn't the Dole bio ad run as issue advocacy in '96?
>
> KNAPP: It did. Yes, it did.
>
> JAMIESON: Nobody sent anybody to jail. There's a lot of confusion.

enough. When , in addition, it is proposed that fundamental rules of competition are changed, active resistance can be expected.[157]

With these considerations in mind, the debate over campaign finance may be compared with the public and media reaction to gerrymandering. One might assume that both would provoke active debate and dispute, since both directly shape the grounds of political competition. While campaign finance rules affect the resources available to the political actors, redistricting even more radically determines the fundamental competitiveness of a congressional or state legislative district.[158] With precise map-making technologies, the parties are able to engineer districts with the capacity to enhance dramatically their competitive advantage.[159] This advantage does not vanish with the end of the next election, but is built into the structure of the political districts. Parties and candidates have been able to fund all of these redistricting activities with unlimited soft money provided by the same donors and solicited for regular campaign contributions.[160] Yet redistricting maneuvers, while they generated legal contests, have not given rise to the hue and cry characteristic of the debate over campaign finance reform.

The reasons lie in the relative parity in resources and reasonably secure expectations shared by the combatants in redistricting controversies, and in the role of the courts in quieting the anxieties of

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KNAPP: Well, there isn't just confusion among scholars. There's confusion among consultants.

Id. Later in the discussion, a representative of the Bush campaign stated that the "laws [on issue advertising] don't seem to make much sense," and one of his colleagues complained that "[I]t seems to put lawyers in charge of making political decisions." *Id.* This discussion illustrates that, as some in the reform movement would claim, the law on vital issues like issue advertising might accommodate almost any action, but to the principal actors, its uncertainties are disturbing. There is a difference between attractive loopholes and regulatory chaos: the former offers opportunities, while the latter presents significant risks and can entail substantial costs.

157. This is not to rehash the familiar argument that the history of campaign finance reform is a history of unintended consequences. Reforms have not always followed the course intended by their sponsors. Yet, it is easier to assess and predict the course of such reforms when the political landscape is well mapped. Where the map is being continually revised, the introduction of still more uncertainty through the implementation of reforms substantially adds to the costs of adaptation and its foreseeable success. Of course, the fact that the effects of reforms are largely unknown and widely misjudged, makes matters more difficult for the principal actors.

158. *See generally* Charles Cook, *Politics: Safe Seats Stunning Skills of Lawmakers*, NAT'L J. (Dec. 1, 2001); Mary Clark Jalonick, *Politics & Elections: Incumbent-Friendly Remapping Plan Ready for Texas*, CQ DAILY MONITOR (Nov. 15, 2001), at 14; MARK MANMONIER, BUSHMANDERS AND BUSHWINKLES (2001).

159. *See* MANMONIER, *supra* note 158.

160. FEC Advisory Opinion Nos. 1981-35 and 1082-37.

elites. Participants know that the Constitution compels the redrawing of political boundaries. Each side of the gerrymandering debate has access to the same technology and, because redistricting activities focus only on states with significant population shifts, access to resources is by-and-large equal. Gerrymandering disputes are submitted to the courts under a body of established law. The law may change, as it has in racial gerrymandering,[161] but in each cycle of litigation, the parties argue their positions, before a tribunal of accepted authority, on the basis of the existing law.

The judiciary's role in reapportionment places accepted and authoritative boundaries around redistricting disputes. As a result, while it is understood that parties gerrymander to secure an advantage in electoral competition, the federal courts referee disputes and determine the abuses that require correction.[162] For this reason, the major institutional press, which has been active in the critique of campaign finance practices, follows redistricting controversies but accepts the constitutional framework within which they are resolved. The world of campaign finance, by contrast, is more like the popular image of the Wild West. It is viewed as fundamentally lawless without generally accepted rules or regulations.

IX. DIFFERENT DIRECTIONS FOR THE REFORM DEBATE

Should the reform cause be freed from its traditional mooring, so that it is not hostage to claims and counterclaims about "corruption," it does not follow that it is obsolete. In a period of great change in the political process, characterized by massive defection from the electoral process and changing roles for longstanding political institutions, a refocused reform effort could lay the foundation for renewed voter engagement and political participation. It might do so with two requirements for effective reform that have been omitted from the central reform proposals: (1) an infusion of public resources to promote political engagement; and (2) attention to stabilizing the regulatory environment to allow political actors to plan for the costs and risks of their actions.

X. THE PROBLEM OF RESOURCES

The campaign finance reform debate has sidestepped the role of public resources. The emphasis on corruption in this debate has made this

161. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 644-49 (1993).

162. *See, e.g.*, Veith v. Pennsylvania, No. 1:CV-01-2439, 2002 WL 530870 (M.D. Pa. Apr. 8, 2002).

evasion possible. When politicians are wary about proposing "welfare" or "food stamps" for politicians, it is an understandable temptation to argue that true reform needs to attack corruption and is possible without a penny of public resources. All that is needed, in this scheme, is a prohibition on certain conduct. For example, reformers argue that prohibitions on soft money and various maneuvers that might be attempted to route it into elections are necessary to prevent corruption.[163] The candidates will bear the costs of this approach through the fees paid to lawyers and accountants to comply with the law, while the public, without notice, will fund government enforcement.

The campaign against corruption does not address the requirements for renewed political engagement. It takes the antiquated position that because the most urgent problem facing democracy is corruption, the political needs and aspirations of most citizens will be vindicated by police action directed against special interests.[164] In this way, the anti-corruption campaign avoids confronting the need for public resources to underwrite the costs of more comprehensive reform.

Stephen Holmes and Cass Sunstein have demonstrated that the enforcement of rights is impossible without accounting for, and meeting, their costs.[165] It may be appropriate to limit some kinds of contributions or expenditures, such as those made by corporations and unions, but these measures leave open the question of how legitimate political action should be funded. A telling example from recent history, the dilapidated condition of American voting processes, illustrates how rights are diminished when their true costs are not properly accounted for and allocated. In the wake of the 2000 presidential election deadlock, serious national attention was paid to the inadequate resources made available over the years to election authorities.[166] The National Commission for Federal Election Reform, co-chaired by former Presidents Ford and Carter, found that "[e]lection administrators get so few resources from

163. BAUER, *supra* note 153, at 8-10.

164. Democracy 21, *Noble Thoughts on the FEC and Soft Money Abuses*, *available at* http://www.democracy21.org/index.asp?Type=B_PR&SEC={A8B4DE06-6CC2-419D-8A26-B5870F580B57}&DE={A003744B-4C63-4C67-9533-1121EBC959AF} (last visited May 15, 2002).

165. STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (1999). Indeed, they argue that "[a] legal right exists, in reality, only when and if it has budgetary costs." *Id.* at 19.

166. *See, e.g.*, Help America Vote Act of 2001, H.R. 3295, 107th Cong. (2001).

American governments that we do not even know how much is spent."[167] By the best estimate, it would appear that counties responsible for the basic costs of operating elections receive substantially less for this purpose, by roughly ten-to-one, than they do for other core functions such maintaining parks, recreational programs, or waste disposal programs.[168]

Congress is now correctly addressing different ways to solve this problem, including the consideration of different views of the role properly taken by the federal government. Most proposals accept that any solution will require a greater commitment of public resources.[169] The Senate, for example, passed in April 2002, an election reform bill with a wide-ranging grant program for supporting states in the implementation of voting system standards, the development of computerized statewide voter registration lists, and the improvement of voting systems and technology.[170] These measures recognize, on the basis of bitter experience, that the right to vote does not exist in a vacuum and that its exercise is secured only with a significant commitment of public resources.

XI. THE PROBLEM OF RESOURCES: PUBLICLY FUNDED CAMPAIGNS

The same considerations, favoring more resources for voting rights, holds true for the array of political rights. Yet, beyond the debate over voting processes and systems, there is little active concern for securing or revitalizing the exercise of those other rights. Public financing of political campaigns, for example, has faded from the most prominent reform agenda, giving way to police measures like those in McCain-Feingold. Even at the time of large budget surplus of the late 1990s, it was argued that "[t]he American people hate, detest, and despise the notion that their tax dollars would be used to fund political campaigns," and that public funding programs like the one in place for presidential candidates

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167. THE NATIONAL COMMISSION ON FEDERAL ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 68 (2001). The Commission also stated that "[t]he sums [spent] are literally too trivial to merit national accounting." *Id.*

168. *Id.*

169. HOLMES & SUNSTEIN, *supra* note 165, at 114. As Holmes and Sunstein point out, the cost of holding elections, though it is not highly visible in the public debate, is already substantial. *Id.* In California, a statewide election costs anywhere between $40 and $50 million. *Id.* The production of voter guides alone may require millions of dollars in public funds. *Id.*

170. Equal Protection of Voting Rights Act of 2001, S. 565, 107th Cong. (Mar. 19, 2001). Similar legislation has passed the House. Martin Luther King, Jr. Equal Protection of Voting Rights Act of 2002, H.R. 3295, 107th Cong. (Apr. 11, 2002).

are nothing more than "food stamps for politicians."[171] This was, of course, never the point: the infusion of resources into political campaigns does not primarily serve the interests of politicians, but instead serves the interests of the public by allowing a robust political process liberated, to some extent, from the burdens and preoccupations of private funding. But in the broader political scheme of things, the attack on political "food stamps" has been effective. Allied with the natural inclination of politicians to offer voters more conventional, higher priority benefits from the expenditure of tax dollars, this attack has shaped skepticism about publicly funded campaign alternatives.

The political argument against public funding of campaigns is bolstered by the belief that the presidential public financing scheme has failed.[172] The controversy over soft money, which broke into public view following President Clinton's and Republican nominee Dole's 1996 presidential campaigns, has significantly contributed to the eroding of confidence in the process for campaign funding.[173] The reactions seem somewhat overwrought and are hardly a basis for refusing to consider the alternatives for invigorating political action with public resources. Scholars who carefully review the record, such as Professors Anthony Corrado and Richard Briffault, have produced measured and compelling cases that public funding has accomplished more of its original objectives than its detractors would admit.[174] Professor Corrado points out, for example, that the eighty percent of those who check-off funds for use in the public financing do not otherwise contribute to politics.[175] Hence, he justifiably refers to this system as the "most popular form of participation" in the American political process.[176] He also credits public

171. 147 Cong. Rec. S2630 (daily ed. Mar. 21, 2001) (statement of Sen. McConnell).

172. *See, e.g.*, Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1735-38 (1999). Issacharoff and Karlan argued that the public funding scheme has provided inadequate resources. *Id.* In doing so, the scheme has exacerbated the private fundraising pressures associated with controversies like those following the 1996 presidential election. *Id.* They are also concerned that measures establishing various eligibility requirements have conferred advantages on major political parties. *Id.* For another perspective on the failings of public funding, see Bradley A. Smith, *Some Problems with Taxpayer Funded Political Campaigns*, 148 U. PA. L. REV. 591, 591-92 (1999).

173. *See generally* Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, Final Report of the Comm. on Gov't Affairs, S. Rep. No. 105-167 (1998).

174. *See, e.g.*, CAMPAIGN FINANCE REFORM (Anthony Corrado et al. eds., 2000); Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 583 (1999).

175. Corrado, *supra* note 174.

176. *Id.* at 59.

funding with promoting the involvement of small donors and alleviating, to some degree, the fundraising pressures on candidates.[177] Professor Briffault defends public financing in broad theoretical terms, as "more consistent with our political values" in enhancing competition, equalizing citizen influence over the electoral process, and limiting the special access of large donors to legislative decision-makers.[178]

Soft money may present regulatory challenges to the current public funding rules, particularly those setting expenditure limits for participating candidates, but its steep growth is, at bottom, a symptom of a crisis of resources. It speaks less to the impossibility of designing a successful public financing arrangement for presidential candidates and political parties, and more to the inadequacy of the laws in providing for adequate funding to meet the requirements of effective political action. Because Congress has focused on policing measures, like those in McCain-Feingold, it has committed very little serious attention to the way the current arrangement might be more satisfactorily funded, restructured, or even abolished, so that another, better version could be erected in its place. Any question of extending the program to congressional elections appears to have been put off indefinitely.

The recent Senate consideration of McCain-Feingold did produce an innovative proposal, made by Senator Wellstone and others, to provide for experimentation by the states with various public funding alternatives.[179] This proposal would have accomplished this end by exempting experimentation from the operation of the FECA's preemption provision, authorizing states to develop programs of public funding that would limit contributions, expenditures, and the use by candidates of their personal funds.[180] The debate over this amendment to McCain-Feingold was not edifying, eliciting complaints from opponents about the use of "tax dollars . . . to elect public officials."[181] The proposal was defeated by a vote of sixty-four to thirty-six.[182] This was an instructive moment in the debate over the bill; the Senate turned away a provision intended to simply encourage some degree of creativity among

177. *Id.*

178. Briffault, *supra* note 174, at 565.

179. 147 Cong. Rec. S2619 (daily ed. Mar. 21, 2001) (statement of Senator Wellstone). The notion of turning over the reform efforts to the experimental ingenuities of the states has received some attention in the literature. *See, e.g.* William P. Marshall, *The Last Best Chance of Campaign Finance Reform*, 94 NW. U. L. REV. 335, 384-86 (2000) (explaining how experimentation of campaign finance reform has recurred in several states).

180. 2 U.S.C. § 453 (2000).

181. 147 Cong. Rec. S2624 (daily ed. Mar. 21, 2001) (statement of Sen. McConnell).

182. *Id.* at S2630.

the states in devising programs of public support for the political progress.[183] In this debate, the Senate concentrated on law enforcement instead of the promotion of political engagement in an era of mass political disengagement.[184] The disinclination of the Senate to address this issue most likely flows from the perception that the public will not tolerate "food stamps for politicians." If food stamps of this nature are unpopular in a time of large budget surpluses, they will be still less so when the fiscal ink has changed from black to red.

There is another problem with the attempt to use public financing proposals as a means of shifting the debate away from police actions concerned with corruption, and toward affirmative, publicly funded measures to stimulate political engagement. Public funding proposals are typically allied with the more traditional FECA objectives, such as limiting fundraising and expenditures, because the resources made available through them are intended as a mechanism for securing those objectives.[185] Professor Briffault, for example, offers a brilliant defense of public funding as superior to other reform approaches; but he still structures his defense around its likely success to break the "tie between private wealth and electoral influence" and to limit special access to government for large donors.[186] In other words, money matters, but its significance is largely derivative. The principal interest lies in restricting political activity to guard against its perceived abuses.

As a result, public funding schemes are caught up in the arguments about the legitimacy of these objectives. If public funding proposals rest on a concern with corruption, then their support will be shaky among those skeptical about the existence of the problem. These difficulties also lie in the path of those seeking to make the case on other disputable claims, such as voter equality or the need to promote competition. In each of these cases, good arguments may be made, but they remain the subject of lively disagreement. The chance is slim that they will prevail

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183. *Id.* (including commentary by Senator McConnell that such public funding would mean "squander[ing] tax dollars in such an absurd way").

184. 147 Cong. Rec. S2619 (daily ed. Mar. 21, 2001) (statement of Senator Wellstone). The Wellstone debate was caught up precisely in the kind of fruitless exchange over corruption and special interest money that had plagued the campaign finance debate in previous years. *See id.* The amendment was presented as a way of addressing the "huge imbalance of power where some people . . . have too much wealth access and too many people are left out," where "if you pay, you play." *Id.* The rebuttal generally focused on the horrors of providing "food stamps" for politicians. *See* 147 Cong. Rec. S2630 (daily ed. Mar. 21, 2001) (statement of Sen. McConnell).

185. Buckley v. Valeo, 424 U.S. 1, 85-109 (1976).

186. Briffault, *supra* note 174, at 578.

by overcoming enough doubt about the use of resources for these rather than other public purposes.

XII. THE PROBLEM OF RESOURCES: "VOUCHER" PROPOSALS

In recent years, a somewhat different approach to public resources use has involved vouchers. Significant proposals, which have not received the public attention they deserve, have been made by Professors Bruce Ackerman and Richard L. Hasen.[187] Each of these proposals suggests a level-up approach to reform, described by Hasen as "increasing the ability of those shut out of the political system to participate," rather than the level-down approach of "decreasing the ability of those with disproportionate political capital to exercise greater influence over the political system."[188]

The proposals are similar in redirecting public funds from candidates and political parties to voters, who could direct those funds as their preferences dictated.[189] Voters could make payments with vouchers not only directly to candidates, but also to political parties and other, non-party political committees.[190] Under each proposal, these voucher payments would largely define the universe of permissible election-related spending.[191] Independent expenditures would, for example, be

187. Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, *in* 4 THE AMERICAN PROSPECT 2, 3 (1993); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*," 84 CAL. L. REV. 1, 5 (1996).

188. Hasen, *supra* note 187, at 20; *see also* Joel L. Fleishman & Pope McCorkle, *Level-Up Rather than Level-Down: Toward a New Theory of Campaign Finance Reform*," 1 J. L. & POL. 211 (1984).

189. Hasen, *supra* note 187, at 22, 25 (explaining that voters may donate voucher dollars to individual candidates, interest groups, or political parties, and providing an example of how under the voucher plan, participants can create pamphlets "supporting or opposing a candidate"); *see also* Ackerman, *supra* note 187, at 3-4 (emphasizing that how the campaigns develop will be a "decision in the hands of the citizens of the United States, where it belongs").

190. Hasen, *supra* note 187, at 22 (declaring that the interest groups that the public selects may pursue whichever objectives the public prefers, from ideological to economic); *see also* Ackerman, *supra* note 187, at 3-4 (commenting that those who hold vouchers should "spend where they think it will do the most good" and that they should enjoy a "broad range of choice" among interest groups in which they may invest vouchers).

191. Hasen, *supra* note 187, at 27-28 (noting the egalitarian nature of public funding and how the public's choices in this funding shall reflect the weight of society's interests); *see also* Ackerman, *supra* note 187, at 7 (voicing the public's "brute property intuition" that the public should be able to spend their personal money to fund candidates just as they use their money to buy possessions such as television sets).

permissible, but only with voucher funding.[192] Candidates with personal wealth could not fund their campaigns with private, non-voucher resources.[193] Volunteers could continue to donate time under these proposals, just as media could continue to editorialize for and against particular candidates or parties.[194]

As Professor Ackerman states, voucher use along these lines allows for some escape from "primitive regulatory thinking."[195] He proposes to avoid undue preoccupations, typical of traditional reform proposals, by limiting the use of private monies and supplying public funds, but without the creation of an "imperial bureaucracy."[196] Refreshingly, he acknowledges that spending limits necessarily reduce overall speech-related activities, and also bump up hard against intuitive convictions about the individual's right to spend personal funds as he or she pleases.[197] Professor Ackerman believes that committing public resources and allowing voters to decide how they are used will create a "new occasion for civic responsibility."[198] This approach, and that of other voucher programs such as Professor Hasen's, makes a material break from the main stream thinking about reform over the last twenty-five years.

It is not a complete break, however. Both Professors Ackerman and Hasen justify their proposals, in part, by the likelihood that they will better serve longstanding reform objectives. Although Professor Ackerman designed his program to inject more campaign funding into the next presidential cycle than all presidential candidates spent in total during 1992, he would still limit total spending to the amount of voucher

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192. Hasen, *supra* note 187, at 23 (adding that "with limited exceptions, no private fund may be used"); *see also* Ackerman, *supra* note 187, at 5 (stating that the Patriot proposal "deprives [interest groups] of power based on the wealth of their clients").

193. Hasen, *supra* note 187, at 23 (declaring that many individuals and corporations cannot use private funds to "bankroll their own campaigns"); *see also* Ackerman, *supra* note 187, at 5 (elaborating that the financing of Perot's campaign would be measured in voucher dollars rather than "green" dollars).

194. Hasen, *supra* note 187, at 24-26 (explaining how volunteer services are not included as prohibited expenditures and how media endorsements are similarly excluded); *see also* Ackerman, *supra* note 187, at 5 (declaring that the media would still be free to comment on political matters and that volunteer services "should not be charged against the campaign's budget").

195. Ackerman, *supra* note 187, at 2.

196. *Id.* at 3 (commenting that the Patriot system would provide "a much more egalitarian distribution of financial power").

197. *Id.* at 2 (emphasizing that "money . . . makes effective speech possible," and that certain candidates, such as Ross Perot, can "buy their way to the White House" with their own private funds).

198. *Id.* at 3.

money provided.[199] His program is aimed at reducing the influence of large private wealth and at making it "tough to buy votes."[200] Professor Hasen defends his program by relying on four specific criteria, including a requirement of egalitarianism under which his plan would be expected to "redistribute political capital from small, cohesive groups to other groups in proportion to their level of support in society."[201] Both Ackerman and Hasen (though more the latter than the former) are concerned that their plan not only renew political activity and engagement, but that they do so while satisfying other, collateral requirements.

These requirements are grounded in laudable expectations, such as reducing corrupt conduct or enhancing effective government. They result, all the same, in plans built on premises open to considerable disagreement. Moreover, they provoke, like many reform plans, an uneasiness in some critics about attempting through rules of competition to engineer types of political processes.

The component of "engineering" is evident in the detailed elaboration of Professor Ackerman's program, entitled "Patriot," which he has developed at length with Professor Ian Ayres.[202] Patriot would provide for an allocation of public monies, in amounts of $50 per voter, which voters may use to fund their favored candidates.[203] Second, it would impose a requirement that all private monies must be donated anonymously, so that the candidates cannot identify who supported them and in what amounts.[204] In this way, Patriot would encourage more active involvement by voters,[205] who would have decisions to make about the use of their "Patriot" dollars, while its "secret donations booth," assuring anonymous giving, would avert the dangers of quid pro quo bargains between candidates and interests.[206]

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199. *Id.* at 3.

200. *Id.* at 2.

201. Hasen, *supra* note 187, at 27. Hasen would also evaluate his plan in terms of its impact on governance (judging by its contribution to stability and effective government), its success as a "preference-aggregation mechanism," and its chance of enactment and survival of constitutional scrutiny. *Id.*

202. BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS, A NEW PARADIGM FOR CAMPAIGN FINANCE (2002).

203. *Id.* at 4.

204. *Id.* at 6. As Ackerman and Ayres see it, this approach discards three misguided assumptions of current campaign finance reform: that reform (1) requires limitations on money, (2) demands publicly subsidized campaigns, and (3) must include full disclosure of candidate's sources of financial support. *Id.* at 3-4.

205. *Id.* at 15.

206. *Id.* at 25.

While Patriot is a new paradigm in one sense, it is less so in another, for it is still grounded in a concern with the corruptive effect of political money. Ackerman and Ayres are so committed to this view, that their detailed exposition of Patriot does include an attempt to defend this perspective on the role of money in politics. It is simply taken for granted that "Big money *is* the problem,"[207] that it "scars" contemporary politics by stripping away the "vital insulation" between democratic politics and "economic privilege."[208]

Moreover, while Ackerman and Ayres wish to avoid any "command and control" bureaucratic approach, their own is not without a strong element of government intervention, such as the prohibition on disclosure of the amounts contributed by voter-donors to candidates. The Patriot program is an innovative arrangement, but Ackerman and Ayres correctly concede that "we stand before you as unrepentant social engineers," concerned with structuring the political process to achieve many of the longstanding goals of the reform movement.[209]

Uneasiness with forms of "social engineering" in democratic politics does not require an elaborate justification or defense. In the modern era, campaign finance reform proposals have been remarkably consistent with the partisan objectives, political preferences, and financial circumstances of their sponsors.[210] It is not surprising in light of that history that each proposal, accompanied by explanations of the "values"

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207. *Id.* at 14.

208. *Id.* at 25, 32.

209. Ackerman and Ayres' "social engineering" includes a complex response to the possibility that individuals might show a candidate a cancelled check, purporting to reflect a substantial contribution, when in fact the donor has subsequently revoked the contribution (as the Patriot program would allow them to do). In other words, the donor is faking the donation, while reaping the benefits of claiming credit for it with a candidate in no position to check on the claim. The authors conclude that the "very biggest donors" must "actually enter a physical donation booth if they wish to make a gift of more than $10,000." The donor would not be compelled to make a contribution but if she did, she could only do so within the booth, "within a physical setting that emphasizes the social importance of anonymous giving." *Id.* at 104. This is truly "social engineering," with a metaphysical twist.

210. *See, e.g.*, ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW (1988). Robert Mutch has provided an entertaining account of Democratic support for public financing in 1971 as inspired, at least in part, by the party's unhappy financial condition after the 1968 elections. *Id.* For example, among its debts, the Democratic party owed $1.5 million for phone service and its creditor, AT&T, insisted that it pay an advance for service to be provided at its next national convention in 1972 in Miami, Florida. *Id.* at 121. Even a supporter of public subsidies, like the *New York Times*, could editorially acknowledge that "[o]nly now that the Democrats are out of the White House and into debt does hard necessity concentrate their minds on this problem [of campaign finance reform]." *Id.*

it would promote or inappropriate conduct it would discourage, is met with suspicion. The voucher plans, depending upon how they are designed, will not entirely escape that problem and so they have not altogether led the way out of stalemate.

XIII. THE PROBLEM OF RESOURCES: TRUE LEVEL-UP

If the reform agenda were adjusted to meet other, less controversial, concerns it might arouse less suspicion and make more sustained progress. The contrast between the voting reform and campaign finance reform debates is instructive on this point.[211]

While there are widely different views on how best to achieve voting reform, few disagree that Americans should be afforded an opportunity to vote and that their vote should be counted accurately. Campaign finance reform, however, has run aground on disagreement over fundamental principles. Yet, in a rapidly changing political system characterized by, among other areas of concern, increased nonvoting and political disengagement, the basis for some agreement on fundamental objectives ought to be possible.

These objectives could be described as (1) participation, (2) access to information, and (3) stability in the rules of competition. The first two, participation and access to information, would require some commitment of resources, because it difficult to see how, in their absence, much headway could be made in fulfilling them. However, the resources provided should not be a pretext for imposing spending limits or for introducing or strengthening other restrictions. Instead, the subsidies would be focused on encouraging political participation and association, and they should be judged by their contribution to these goals. Of course, any voucher or subsidy program would include eligibility criteria and safeguards to assure their use for the lawful and intended purposes. These are goals very different from the goals of limiting overall spending, or avoiding the corruptive potential of private money, or reallocating political resources from the wealthier to the less wealthy. The subsidies under discussion here are designed for the purpose of facilitating and promoting political engagement.

The third objective emphasizes clarity in the rules of competition in order to allow political actors to plan their activities with some reasonable certainty and efficiency. Furthermore, such stability

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211. *See, e.g.*, Equal Protection of Voting Rights Act, S. 565, 107th Cong. (2001); Bipartisan Federal Election Reform Act of 2001, S. 953, 107th Cong. (2001); Help America Vote Act of 2001, H.R. 3295, 107th Cong. (2001).

encourages participation by calming fears about liability. These changes do not require major restructuring of the FEC, but rather measures to improve the clarity, rationality, and predictability of its actions.

A. Participation

Measures to promote participation could take a number of forms. Vouchers could play a central role. If used on an experimental basis, these programs could be evaluated. All voting-age Americans could be issued a voucher, modestly valued and usable for contributions to candidates, parties, or other political committees. The vouchers, moreover, could range in total value, with a large sum of money allocated to vouchers issued to registered voters, and still larger sums for vouchers issued to "regular voters," who have voted in both primary and general presidential elections in the last two election cycles. The use of vouchers in this fashion would encourage participation by all eligible Americans, but it would also reward those Americans who had demonstrated a commitment to the voting process. It would also supply the parties with incentives to register voters who could supply, as a result, *both* votes *and* money to the parties that successfully courted them.

Participation could also be encouraged by issuing vouchers to political parties for specific purposes associated with the successful encouragement of citizen engagement. Parties today argue for "soft money" as an essential resource for identifying and turning out voters. It has helped to supply some resources for this activity, but also at some cost and with great inefficiency.[212] A voucher issued for specific voter registration and mobilization would be helpful to parties and would be fully consistent with the goal of encouraging participation; but these vouchers should be made available without onerous conditions. All parties would be eligible to receive the vouchers, but the value of the vouchers could vary according to formulas that take into account the number of voters registered with a party and the number of new voters each party successfully added to its rolls in the last cycle.

Parties should not have exclusive access to public resources. Associations of citizens for political purposes are appropriately

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212. *See* Sorauf, *supra* note 19, at 21-22. Sorauf, though troubled by the explosion in soft money, correctly states that national committees transfer soft money to state parties to "intensify voter registration and get-out-the-vote drives," and to assist state legislative races that help with voter turnout. *Id.* at 22. This funding has played a large part in the resurgence of political parties after a period of decline. *See* James W. Ceaser, *Political Parties—Declining, Stabilizing or Resurging*, *in* THE NEW AMERICAN POLITICAL SYSTEM (Anthony King ed., 1990).

promoted. Nonparty organizations, active in voter registration and mobilization, should be able to qualify for public support, just as organizations may qualify for tax exemption and deductions.[213] Political committees that have become multi-candidate committees under the campaign finance laws might qualify for subsidies for their cost of operation, with the allowable amount depending upon the size of the committee. One of the long-standing inequities in federal law permits corporations and unions to fund these costs from their general treasuries, while other political committees must do so only with hard, limited money or with a mix of hard and soft money determined by complicated formulas.[214]

B. Access to Information

Much has been made of the deteriorated condition of public discourse in the United States. Limited news coverage, sound-bite politics, and negative campaigning are cited as contributors to the vacuous din that some accept as our public dialogue.[215] This is dangerous territory because there is little room for wide agreement on what constitutes beneficial discourse or on the means of bringing it about. A more expansive, varied public dialogue may be taken, however, to have some bearing on the quality and scope of citizen participation and engagement. By offering voters, or citizens who are not yet voters, different chances to hear, in different ways, about politics and public affairs, reforms designed for this purpose may aid the overall effort to engage the citizenry in public life.

Public resources have a useful role to play in this effort. For example, vouchers could be issued to parties for their use in coordinating town hall meetings or arranging debates, featuring their candidates in major races. The government could establish limits on the rates broadcast stations charged for these purposes. Although the broadcast stations would not be required to absorb all the costs, they would be required to discount the applicable charges. Moreover, the parties, and their candidates, would not be required to arrange these debates or meetings. Public resources would be available to them as an incentive to do so. Yet candidates and parties would have to answer for any unwillingness to

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213. 26 U.S.C. § 501(c)(3); I.R.C. § 170.

214. There is little force to the objection that corporations and unions are more restricted in the class of persons they solicit, even if they may more liberally fund their costs of operation. This is a bargain they gladly accept. In any event, it seems unfair, and is a true burden on association, for political committees to pay these increasing costs of staying in business under financial conditions imposed by the federal government.

215. *See, e.g.*, Dworkin *supra* note 18, at 19.

take advantage of those resources and to thereby supply voters with the events they would fund.

C. Stable and Predictable Enforcement

Election laws have not so much collapsed, as they have become steadily more confused and unpredictable. Political actors must still make judgments about compliance. These judgments are costly. The vagaries of enforcement impose direct burdens on political actors; they operate as a restraint on engagement and as a disincentive to participation.

Reform proposals in recent years have not addressed this issue with much energy or imagination. Doubtless Congress will be concerned that any adjustment to the enforcement machinery of the law will come under attack as an attempt by members of Congress, most of whom are candidates, to slip by accountability under the law. This is unfortunate. Uncertain rules of competition, enforced unpredictably, do not implicate principally the liability faced by any particular candidate, much less the well-endowed and experienced class of candidates that include members of Congress. The more serious threat is the one they pose to a stable, predictable environment for conducting political activity, particularly in a rapidly changing political system.

The FEC has done the best it could within the requirements of a statute enacted at a different time and in a different political world. The agency deserves more support from the government in conducting its mission. Regulatory reform, directed toward enhancing the agency's powers and enhancing penalties for violators, should emphasize a more systematic, orderly development of the competition rules.

A possible example of reform would include establishing a standing advisory committee of politicians, political activists, party representatives, and scholars experienced in the campaign finance laws. The committee would review the current body of rules and regulations to determine their relevance and need for modernization, and the committee would make recommendations for improvements. The committee would have a membership selected by the Congress, the President, and the political parties, but the number of congressional members and party members should be limited. Although the committee would only have reporting authority, its mandate could include a salutary emphasis on the effect of agency regulation on citizen participation and association. The committee's recommendations would highlight the current state of the regulatory regime and stimulate some fresh ideas

about the impact of government regulation on the energetic conduct of political activity.

This same advisory committee could also routinely comment on pending advisory opinion requests or proposals for rulemakings. Public comments on pending opinions and rulemakings are currently sparse. Those submitting comments, such as candidates, parties, or reform organizations, do so from very defined perspectives and are motivated by an understandable concern with advancing their interests and policy agendas. The comment process would benefit from the regular participation of thoughtful observers concerned with the quality and effect of regulation on the political process.

An alternative means to achieve regulatory reform would be to relax the barriers to recovery of fees against the government when it is unable to sustain its position in court for actions brought under the FECA. The Equal Access to Justice Act[216] has resulted in the award of fees in some cases,[217] but its requirements are generally difficult to meet. As the law now stands, for example, courts may not find for litigants unless the government has failed to "substantially justif[y]" its position.[218] The government can typically defend on the grounds that the unsuccessfully litigated issue was at least open to question, and that its decision to sue was, in that sense, "substantially justified." This sort of defense has a bad odor about it; for the concern with the use of the government's enforcement powers is greatest when it forces political actors into the courts on "open," "close," or controversial issues. Where political activity and association are at issue, the government should initiate litigation only where the issues are very clear, the constitutional considerations are carefully evaluated, and its chances of success are high. By reforming the Equal Access to Justice Act's standards for political cases, the FEC could be compelled to determine its enforcement priorities with greater sensitivity to political action and association. The point is not to pay the lawyers but to discipline the government; those concerned about the lawyers could be comforted with limitations on fees and other safeguards against abuse.

Courts can also be guided in their contribution to stable FECA interpretation and enforcement. The largest problem is the standard of review. The Supreme Court has concluded that Congress intended for

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216. 28 U.S.C. § 2412(d) (1994).

217. *See, e.g.*, FEC v. Christian Action Network, 894 F. Supp. 946 (W.D. Va. 1995) (giving an example of a group sued for their political activities).

218. 28 U.S.C. § 2412(d)(1)(A) (1994).

the FEC to enjoy broad deference from judicial review.[219] This deference does not apply where the issue under review is constitutional in nature. In practice, however, the courts are uneasy about agency decisions that, while not constitutional in nature, may significantly burden the activities of political actors.[220] As a result, the courts have all too often paid lip service to the agency's authority to construe its own statute, while finding other ways to limit enforcement excess.[221] It would be healthier for FECA enforcement if the standard of review acknowledged the interest of the courts in any government regulation of political activity and openly allowed detailed review without undue deference. This revised standard would also contribute to the goal of greater care by the FEC in the cases it chooses to bring.

XIV. CONCLUSION

There is no reasonable suggestion that in interpretation or practice, these objectives would elude partisan controversies or serious arguments over the means of securing them. The most that can be hoped for is that by attending to these concerns, and not to the traditional complaints about corruption or equality, the controversies may be more contained, the dialogue more productive and the tone more civil. To be sure, the insistence on public subsidies will, all on its own, stir contention, even fury; but those unhappy about this direction in the reform debate will have to explain why it is possible to expend public money on all manners of projects and policies, but not to stimulate and support citizen engagement in the political process. Of course, the use of these resources, focused in this way, may not break the stalemate, but it is a positive step. It at least holds out the possibility of making things better and stands little chance of making them worse.

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219. FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981). This is a case in which the author of this Article represented the losing party. *Id.* at 28. The central issue, involving the right of parties to transfer among one another special coordinated expenditure authority under the FECA, has long passed into distant regulatory history. *See id.* at 28 n.1. More importantly, the Court determined that Congress intended for the courts to give the FEC, an expert agency, substantial deference in its construction of the statute. *Id.* at 37. There is something peculiar, in a democracy, about a government agency, considered an expert in politics, to have the authoritative construction of rules regarding political competition.

220. FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986).

221. *See, e.g.*, FEC v. Harman, 59 F. Supp. 2d 1046, 1056-59 (C.D. Cal. 1999) (concurring in an agency's construction of a statute, but declining to permit the levying of any fines or require refunds).