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## REGULATION OF CAMPAIGN FUNDING AND SPENDING FOR FEDERAL OFFICE

*Roscoe L. Barrow\**

The election process is the heart of representative democracy. While major reforms of the process have been achieved through the one man, one vote principle<sup>1</sup> and the abolition of poll tax and property qualifications for voting,<sup>2</sup> our election system remains inadequate. One major inadequacy of the system has arisen from the failure of government to respond satisfactorily to the problems inherent in traditional means of campaign funding.

Heard has correctly stated that the chief requirements for an acceptable means of financing political campaigns are:

- (1) that sufficient money be available to sustain the great debate that is politics, which means to assure the main contestants an opportunity to present themselves and their ideas to the electorate; (2) that the needed sums be obtained in ways that do not inordinately weight the processes of government in favor of special political interests; and (3) that the system command the confidence of the citizenry whose governmental officials are chosen through it.<sup>3</sup>

Today political campaigns are being won or lost on the basis of the size of campaign chests, and most winning candidates are subservient, to varying degrees, to their principal financial supporters. Consequently, much of the electorate is losing confidence in the election process. The health of our self-governing society depends upon reform in the funding of that process.

This article will detail significant data on campaign funding and spending, describe the major laws for regulating campaign funding

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<sup>1</sup> See *Baker v. Carr*, 369 U.S. 186 (1962), and subsequent cases discussed in Commentary: *One Man, One Vote and the Political Convention*, 40 U. CIN. L. REV. 1 (1971).

<sup>2</sup> See U.S. CONST. amend. XXIV; *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (fourteenth amendment equal protection clause bars state from making payment of a state tax a prerequisite to voting); and *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (equal protection clause bars a state from limiting to "property taxpayers" the right to vote in elections called to approve issuance of revenue bonds of a municipal utility).

<sup>3</sup> A. HEARD, *THE COSTS OF DEMOCRACY* 430-31 (1960). This book is the most scholarly and significant study of the effect of campaign spending on the political process.

and spending, analyze the constitutional issues raised by these laws, and propose changes to render the laws safer from attack on grounds of unconstitutionality and more effective in achieving a viable election process.

### I. SIGNIFICANT DATA ON FUNDING OF POLITICAL CAMPAIGNS

In recent years there has been loud complaint about the high cost of political campaigns.<sup>4</sup> Alexander has found that total political costs in the United States rose from \$200 million in 1964 to \$300 million in 1968, an increase of 50 percent in four years.<sup>5</sup> A substantial factor in the rising cost of political campaigns is the increasing use of television for political purposes and the great expense of that medium. Total expenditures for broadcasting in the presidential nomination and general election campaigns in 1968 were \$28.5 million, more than twice as much as was spent on broadcasting in 1964.<sup>6</sup> For primary and general elections at all levels, a total of \$59.9 million was spent for broadcasting in 1968, an increase of 70 percent over that spent in 1964.<sup>7</sup>

Whether the cost of political campaigns should be characterized as "high" or "low" involves a value judgment. In a representative democracy, maintaining the election process must be prominent in our scale of values. For a nation which has an annual gross national product of more than a trillion dollars, \$300 million dollars—the cost of all election campaigns in the peak year of 1968—may not seem a "high" cost. Indeed, the largest corporate advertiser in the United States spent almost as much on advertising in 1968.<sup>8</sup>

The gravamen of the funding of political campaigns is not "high" cost but the disparate availability of campaign funds to parties and candidates. Members of wealthy families have a substantial advantage in politics because they can finance their own campaigns. Two brothers Kennedy served simultaneously as Senators of Massachusetts and New York, and two brothers Rockefeller served simultaneously as Governors of Arkansas and New York. On the other hand, many other aspirants must forego seek-

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<sup>4</sup> This theme runs throughout the hearings on the Federal Election Campaign Act of 1971. See *Hearings on S. 1, S. 382, and S. 956 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess., ser. 92-96 (1971) [hereinafter cited as *Senate Hearings*].

<sup>5</sup> H. ALEXANDER, *FINANCING THE 1968 ELECTION I* (1971). This book is the most incisive analysis of campaign spending in recent elections.

<sup>6</sup> *Id.* at 5.

<sup>7</sup> *Id.* at 93.

<sup>8</sup> *Senate Hearings* 637.

ing political office for lack of financial support. For example, Senator Fred Harris of Oklahoma withdrew from the presidential prenomination campaign in November 1971, the campaign barely having begun, for lack of funds. The unavailability of campaign funds could convert our representative democracy to a plutocracy of the wealthy.<sup>9</sup>

Money does not *always* win elections.<sup>10</sup> In 1964 incumbent President Johnson won reelection notwithstanding that the Republican Party and Senator Goldwater had a financial advantage.<sup>11</sup> However, in the presidential election of 1968, one of the closest popular votes in our history, the Republicans spent twice as much money as the Democrats.<sup>12</sup> Senator Humphrey's serious financial handicap certainly contributed to his defeat by President Nixon. As most campaign managers would say, the *sine qua non* of political success is money.

Another serious concern is the contribution or loan of large sums by a person or special interest. Inevitably, the successful candidate becomes subservient to some degree to the persons or special interests which provided the financial support necessary for election. Campaign contributions may, of course, be motivated by several factors, some of which shore up the political process and others which undermine it. A contributor of a huge sum may desire governmental reform and, not being able to become a candidate himself, feel a responsibility to provide financial support to worthy candidates; or he may make a large contribution in the hope of receiving from the successful candidate a *quid pro quo* in the form of appointive political or diplomatic office or business preferment or other private privilege.<sup>13</sup> Whatever the motive, a gift of the magnitude of almost \$1.5 million, that reported by Mrs. John D. Rockefeller, Jr., as her contribution to the Republican Party in 1968,<sup>14</sup> gives to wealthy persons a power in the election process far beyond that of the average American and contravenes the notion of equality of citizens underlying the one man, one vote principle.

Large contributions by wealthy families and business execu-

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<sup>9</sup> Editorial, *New York Times*, November 12, 1970, at 42, col. 2.

<sup>10</sup> A. HEARD, *supra* note 3, at 16, suggests caution in assuming that a winning candidate having the larger campaign chest won election for that reason. He points out that there are many other factors, such as the substance of the campaign issues and the candidate's popularity. However, during the period in which Heard's data were obtained, the gap between Republican and Democratic campaign expenditures was moderate. *Id.* at 19. In recent years this gap has widened.

<sup>11</sup> H. ALEXANDER, *supra* note 5, at 1.

<sup>12</sup> *Id.*

<sup>13</sup> A. HEARD, *supra* note 3, at 71-72.

<sup>14</sup> H. ALEXANDER, *supra* note 5, at 29.

tives are made principally to the Republican Party. For example, in 1968 of all contributions of \$500 or more, totalling \$17.5 million, Republican committees received 72 percent of the number of contributions and 73 percent of the dollars contributed.<sup>15</sup> On the other hand, labor, through political action committees, largely supports the Democratic Party.<sup>16</sup> Of even greater concern than large contributions are large loans.<sup>17</sup> Inability to repay the loan poses a grave danger of subserviency of the elected official to the lender.

These circumstances may cause a large segment of society to lose confidence in the election process. Even in presidential elections when interest is highest, less than two-thirds of the electorate go to the polls and the percentage of the electorate participating in the election process is declining.<sup>18</sup> There appears to be a movement toward depoliticization and party decomposition<sup>19</sup> with the possibility that nonparticipants may seek solutions to society's problems outside of the election process. Reform of the election process is necessary to maintain and enhance the confidence of the electorate in our political system.

## II. MAJOR LAWS REGULATING CAMPAIGN FINANCING

### A. *Federal Election Campaign Act of 1971*

Over the years a number of laws have been enacted to regulate campaign contributions and expenditures, but most have been ineffective. In January of 1972, Congress passed the Federal Election Campaign Act of 1971, the first major statutory reform in this area of the law in over fifty years. This comprehensive Act will govern the financing of presidential as well as congressional campaigns and regulate the use of the broadcast and other communications media for political purposes.

1. *Limitations upon Contributions and Expenditures by Corporations, Labor Unions and Government Contractors*—In 1907 a predecessor of the Federal Corrupt Practices Act prohibited corporations from making financial contributions in federal elec-

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<sup>15</sup> *Id.* at 162.

<sup>16</sup> *Id.* at 191.

<sup>17</sup> For an analysis of data on political campaign loans, see *id.* at 153-54, 177-79.

<sup>18</sup> A. CAMPBELL, P. CONVERSE, W. MILLER & D. STOKES, *THE AMERICAN VOTER* 49 (abr. 1964).

<sup>19</sup> W. BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* 71-91 (1970).

tions.<sup>20</sup> In 1943 the War Labor Disputes Act temporarily prohibited labor unions from making direct contributions in federal elections,<sup>21</sup> and in 1947 the Taft-Hartley Act permanently prohibited labor unions from making a contribution or expenditure in federal elections and made the limitation on political activity of corporations identical.<sup>22</sup> In general the 1971 Act retains these statutory provisions and strengthens similar provisions applicable to government contractors.<sup>23</sup> The Act does, however, amend the prohibition against political activity by labor organizations and corporations to except any communications by a labor organization to its members and their families and by a corporation to its shareholders and their families, as well as non-partisan registration and voter turnout activities by unions or corporations.<sup>24</sup> This amendment largely codifies judicial decisions interpreting the existing statute.<sup>25</sup>

Examining with particular emphasis the limitations placed upon the campaign financing activities of corporations and labor unions, the purpose of these limitations has clearly been to prevent the officials of these institutions from using funds of corporate shareholders or union members to influence the outcome of elections or to support candidates or parties which some shareholders or union members might not favor.<sup>26</sup> To a significant degree, this legislation has limited the participation of corporations and labor organizations in the election process. Nevertheless, for a variety of reasons, contributions from corporations and labor organizations continue to be a substantial factor in elections.

The management of corporations may still make individual contributions to parties and candidates. A corporation's board of directors can establish executive compensation at a level which takes into account the asserted responsibility of management to participate in the election process and then urge management to assume its responsibility. Moreover, a corporation is not prohibited from urging employees to contribute to the party or candidates

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<sup>20</sup>Ch. 420, 34 Stat. 864 (1907). For a comprehensive description of the federal regulatory statutes, see Lobel, *Federal Control of Campaign Contributions*, 51 MINN. L. REV. 1 (1966).

<sup>21</sup>Ch. 144, 57 Stat. 163 (1943).

<sup>22</sup>Labor Management Relations Act of 1947 § 304, 18 U.S.C. § 610 (1970).

<sup>23</sup>Pub. L. No. 92-225, § 206 (Feb. 7, 1972) [hereinafter cited as Election Act].

<sup>24</sup>Election Act § 205.

<sup>25</sup>Rice, *Unions in the Political Arena: Legislative Attempts to Control Union Participation in Politics*, 23 SW. L.J. 713, 716-21 (1969); Wood, *Corporations and Politics*, 22 BUS. LAWYER 775, 777 (1967).

<sup>26</sup>United States v. CIO, 335 U.S. 106, 115 (1948).

of their choice, and many corporations do this.<sup>27</sup> By restricting this solicitation to the management level, the corporation can assure that the contributions will be made largely to a party or candidates preferred by the corporation. Furthermore, many business and professional political action committees contribute overwhelmingly to the Republican Party and Republican candidates.<sup>28</sup> Similarly, labor organizations indirectly engage in political activity through political action committees which usually expend voluntary employee contributions in support of the Democratic Party and Democratic candidates.<sup>29</sup> Corporations and labor organizations may also engage directly in activities which affect the outcome of elections, such as taking a position on a controversial issue which aids the party or candidate which shares the corporation's or labor organization's view, and using funds to enable voters to register.

2. *Limitations on Expenditures by or in behalf of Candidates*—The Act limits the amount that a candidate or others acting in his behalf may spend for the use of all communications media to ten cents per resident of voting age in the applicable geographical area or \$50,000, whichever is greater.<sup>30</sup> Not more than 60 percent of this amount may be spent on broadcasting.<sup>31</sup> In the case of presidential election campaigns, this percentage limitation is applied on a state by state basis, rather than nationally, so that a disproportionate sum may not be spent in key states.<sup>32</sup>

Prior to passage of the Act, federal law limited to \$5,000 the amount which any person could contribute during any calendar year or in any campaign to or on behalf of any candidate for political office, or to or on behalf of any political action committee supporting a candidate for any office.<sup>33</sup> Unfortunately, this provision permitted a person to contribute the \$5,000 maximum to every political action committee even though several committees supported the same candidate.<sup>34</sup> Also, while no political action committee was permitted to receive or expend more than \$3 million in any calendar year,<sup>35</sup> the purpose of the legislation was circumvented by establishing as many political action committees as there were multiples of \$3 million available. Finally, state, local

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<sup>27</sup> Wood, *supra* note 25, at 780.

<sup>28</sup> H. ALEXANDER, *supra* note 5, at 200-08.

<sup>29</sup> *Id.* at 194-200; Rice, *supra* note 25, at 714.

<sup>30</sup> Election Act § 104(a)(1)(A).

<sup>31</sup> *Id.* § 104(A)(1)(B).

<sup>32</sup> *Id.* § 104(a)(3)(A).

<sup>33</sup> Act of July 19, 1940, ch. 640, § 4, 54 Stat. 767.

<sup>34</sup> Lobel, *supra* note 20, at 22-23.

<sup>35</sup> Act of July 19, 1940, ch. 640, § 6, 54 Stat. 772.

and territorial committees were expressly excepted from the law.<sup>36</sup>

The Act repeals these contribution and committee expenditure limitations.<sup>37</sup> This raises the question whether placing the maximum limitation only on expenditures for use of media in political campaigns is sufficient to prevent undue influence on elections by expenditure of large sums of money in other ways.

With regard to the amount which a candidate may spend from his personal funds or funds of his immediate family, the Act limits the sum to \$50,000 in the case of President or Vice-President, \$35,000 in the case of Senator, and \$25,000 in the case of Representative or other federal office.<sup>38</sup> This should somewhat reduce the advantage of wealthy candidates. Under previous law the limitations did not apply to candidates for executive office,<sup>39</sup> and many types of expenditures were excepted from the limitation.<sup>40</sup> Nevertheless, the possibility remains that a candidate will circumvent the limitation by making gifts to trusted friends or political action committees in anticipation of a future campaign, with such persons and committees later making the contributions and expenditures in the wealthy candidate's behalf.

The Act strengthens prohibitions against offering employment, subcontracts, or other benefits available under a federal program in exchange for political support.<sup>41</sup> Moreover, the Act does not affect present laws which prohibit candidates for federal political office from soliciting or receiving contributions from federal employees for political purposes<sup>42</sup> and prohibit federal employees from running for partisan office or participating in the campaign of another partisan candidate, except in specified communities where federal employees constitute the largest group of citizens.<sup>43</sup> However, political action committees are not prohibited from soliciting contributions from federal employees. A rumor that the "boss" expects employees to do their duty to the party may cause ambitious government employees, particularly those who are members of the party in power, to contribute.<sup>44</sup>

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<sup>36</sup> Federal Corrupt Practices Act of 1925, ch. 368, § 302(c), 43 Stat. 1070.

<sup>37</sup> Election Act § 204.

<sup>38</sup> *Id.* § 203.

<sup>39</sup> The relevant provisions of the Federal Corrupt Practices Act of 1925, ch. 368, § 309, 43 Stat. 1073, placed limitations only on the expenditures of Senate and House candidates.

<sup>40</sup> *Id.*

<sup>41</sup> Election Act § 202.

<sup>42</sup> 18 U.S.C. § 602 (1970); 5 U.S.C. §§ 7321-7325 (1970).

<sup>43</sup> 5 U.S.C. §§ 7323-7327 (1970); 5 C.F.R. §§ 733, 122-124 (1971).

<sup>44</sup> Lobel recognizes the complaints that have been made against the absolute prohibition of political contributions to specified federal officials by federal employees, 18 U.S.C.



3. *Limitations on the Communications Media*—The Act provides that broadcasters may not charge political candidates more than the lowest unit cost for the same advertising time charged to commercial advertisers and that non-broadcast media may not charge political candidates more than the comparable amounts charged to commercial advertisers for the same class and amount of advertising space. This requirement applies only during a forty-five day period preceding primary elections and a sixty day period preceding general elections.<sup>45</sup>

The most significant law dealing with equality of opportunity for candidates to present themselves and their ideas to the electorate is section 315 of the Communications Act of 1934,<sup>46</sup> which provides that if a broadcaster grants the use of broadcasting facilities to a candidate for political purposes, equal opportunities, including equal time, must be granted to all candidates for the same office.<sup>47</sup> An important supplement to the equal opportunities doctrine is the fairness doctrine, which requires that if a broadcaster presents one side of a controversial issue of public importance, he must grant reasonable time to an appropriate spokesman to present the other point of view.<sup>48</sup> Ironically, the Senate version of the Federal Election Campaign Act of 1971 excepted federal elective offices from the equal opportunities doctrine;<sup>49</sup> however, the bill as finally enacted does not modify the doctrine.

4. *Reporting Requirements; Administration*—The Act requires that candidates, individuals and political action committees keep financial records and report each contribution, loan or expenditure in excess of \$100, as well as total receipts, loans and expenditures.<sup>50</sup>

Although the Senate bill proposed that the Act be administered by a six-member Federal Elections Commission,<sup>51</sup> the final enactment provides for the division of administrative responsibilities. The Secretary of the Senate will serve as the supervisory officer for Senatorial campaigns, the Clerk of the House will serve as the administrator for campaigns for the House of Representatives,

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§ 607 (1970), and suggests that a \$100 contribution to local and state campaigns be allowed. Lobel, *supra* note 20, at 27-28.

<sup>45</sup> Election Act § 103.

<sup>46</sup> 47 U.S.C. § 315 (1970).

<sup>47</sup> A comprehensive analysis of the equal opportunities doctrine is contained in Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Form of Democracy*, 37 U. CIN. L. REV. 447 (1968).

<sup>48</sup> *Id.*

<sup>49</sup> S. 382, 92d Cong., 1st Sess. § 101(a) (1971).

<sup>50</sup> Election Act §§ 304-305.

<sup>51</sup> S. 382, 92d Cong., 1st Sess. § 310 (1971).

and the Comptroller-General will serve as the administrator for other federal elective offices.<sup>52</sup>

### *B. Revenue Act of 1971*

The Presidential Election Campaign Fund Act of 1966 provided that individuals making a federal income tax return could designate that \$1 of the tax should be paid to the Presidential Election Campaign Fund.<sup>53</sup> The statute provided a formula of support which was the same for the two major parties but substantially larger than the support available to third parties.<sup>54</sup> The statute was not to become effective until guidelines were adopted governing the distribution of the funds.<sup>55</sup> These guidelines were never enacted, the Presidential Election Campaign Fund Act of 1966 was never activated, and the Act was repealed by the Revenue Act of 1971.<sup>56</sup> Had the statute been put into effect for the 1972 presidential campaign, the Democrats and Republicans would have been eligible to receive \$29 million each, and the American Independent Party would have been eligible for approximately \$5 million.<sup>57</sup> Since the statute required a popular vote of at least five million in the preceding presidential election in order to be eligible to receive a subsidy from the fund,<sup>58</sup> no other party would have qualified.

Sections 801 and 802 of the Revenue Act of 1971, the Presidential Election Campaign Fund Act,<sup>59</sup> contain provisions for support of presidential campaigns similar to the repealed Presidential Election Campaign Fund Act of 1966. Section 802 provides that taxpayers may designate that \$1 of their taxes be paid to the Presidential Election Campaign Fund for allocation to the party of the taxpayer's choice or to a non-partisan account. However, if the taxpayer does not make any designation; partisan or non-partisan, no part of the taxpayer's payment will be placed in the fund. If the total amount designated for a specific party is insufficient to pay the sum for which the party qualifies, an

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<sup>52</sup> Election Act § 301(g).

<sup>53</sup> Act of Nov. 13, 1966, Pub. L. No. 89-806, § 302(a), 80 Stat. 1587.

<sup>54</sup> *Id.* § 303, 80 Stat. 1588.

<sup>55</sup> Act of June 13, 1967, Pub. L. No. 90-26, § 5, 81 Stat. 58.

<sup>56</sup> 11 U.S. CODE CONG. & AD. NEWS 1, 100 (1971).

<sup>57</sup> These data are obtained by applying the statutory formula set forth in Pub. L. No. 89-809, § 303, 80 Stat. 1588, to the popular vote in the presidential election of 1968, in which the Republicans received 31,785,480, the Democrats 31,275,473 and the American Independents 9,906,473 votes. All other parties received a total popular vote of only 244,444 votes. NEW YORK TIMES ENCYCLOPEDIA ALMANAC 148 (1971).

<sup>58</sup> Act of Nov. 13, 1966, Pub. L. No. 89-809, § 303(c), 80 Stat. 1588.

<sup>59</sup> 11 U.S. CODE CONG. & AD. NEWS 87-100 (1971).

amount will be allocated from the non-partisan account to make up the deficiency. If the non-partisan account lacks sufficient funds to make up the deficiency, the party is permitted to accept sufficient contributions from other sources to make up the deficiency, but no more. A party may elect not to accept the support provided by the statute, in which event the party is not limited to the maximum expenditure limitation of this statute. However, if a party elects to accept the support, it must limit its expenditures to the sum for which it is eligible under the statute.

The sum allocable under the statute is computed as follows. Major parties, those which received 25 percent or more of the popular vote in the preceding presidential election, are entitled to a sum equal to fifteen cents multiplied by the number of residents in the United States who were eighteen years of age or older on June 1 of the year preceding the year in which the presidential election is held. Minor parties, those which received more than 5 percent but less than 25 percent of the popular vote in the preceding presidential election, are eligible to receive an amount determined by the percentage of the average major party's vote represented by the vote for the minor party in the same preceding election. Thus, major and minor parties receive an allotment *prior* to each election based on their performance in the election four years earlier. On the other hand, a new party is given an allotment *after* each election in which it receives a certain statutory minimum vote. If a new party obtains more than 5 percent of the popular vote in a current presidential election, it will be reimbursed in an amount equal to the allotment of a major party, multiplied by the ratio of the number of popular votes received by the new party's candidate to the average of the number of votes received by major party candidates.

As drafted, the statute contemplated that the funds to support presidential campaigns would be allocated in the election of 1972. However, President Nixon stated categorically that the Revenue Act of 1971 would be vetoed if the support were applied to the presidential election of 1972, when presumably President Nixon will be the Republican candidate for President. Accordingly, the conferees of the Senate and House agreed to postpone application of the support provisions until the presidential election of 1976.<sup>60</sup>

A further reservation raises a question as to whether enactment of the new Presidential Election Campaign Fund Act has any practical significance. As originally drawn, amounts checked off

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<sup>60</sup> *Id.* at 99.

by taxpayers were to be appropriated automatically to the Presidential Election Campaign Fund. However, the conferees of the Senate and House agreed that the payments into the fund would be made only by appropriation acts.<sup>61</sup> A similar reservation in the Presidential Election Campaign Fund Act of 1966 resulted in that statute never being put into effect. It would not be surprising if the Presidential Election Campaign Fund Act of 1971 meets the same fate.

The Revenue Act of 1971 also provides a tax incentive for contributions to candidates for public office. Section 701 of the Act gives taxpayers the alternative of a tax credit of \$12.50 (\$25 for married persons filing jointly), or a deduction from gross income of \$50 (\$100 for married persons filing jointly) for political contributions in a federal, state, local, primary, general or special election.<sup>62</sup> The credit or deduction applies only to political contributions made in 1972 and subsequent years.<sup>63</sup>

### C. Postscript

While the enforcement of laws regulating campaign financing is difficult, actions have been brought against corporations and labor organizations for violation of prior laws prohibiting them from making contributions or expenditures for political purposes.<sup>64</sup> Nevertheless, loopholes in pre-1971 statutes and the failure of Congress to invoke the Presidential Campaign Fund Act of 1966 rendered ineffective the attempts to control unfair practices. By enacting the Federal Election Campaign Act of 1971 and the provisions of the Revenue Act of 1971, Congress has made a renewed commitment to electoral reform.

Complementing the federal legislation are several state statutes regulating expenditures in political campaigns for state and local offices. For example, a majority of states have enacted corrupt practices statutes which prohibit corporations from making contributions or expenditures for political purposes in state and local elections.<sup>65</sup> While an analysis of state laws is beyond the scope of this article, state legislation provides a helpful background for programming a system of federal regulation of campaign spending.<sup>66</sup>

<sup>61</sup> *Id.* at 92.

<sup>62</sup> *Id.* at 84-86.

<sup>63</sup> *Id.* at 86.

<sup>64</sup> H. ALEXANDER, *supra* note 5, at 199-200, 208.

<sup>65</sup> *See, e.g.*, N.Y. PENAL LAW § 671 (McKinney 1967); Rice, *supra* note 25, at 721-23.

<sup>66</sup> For an analysis of the state approaches, *see* H. ALEXANDER, REGULATION OF POLITICAL FINANCE (1966).

### III. CONSTITUTIONAL ISSUES RAISED BY REGULATION OF CAMPAIGN FUNDING AND SPENDING

Regulation of campaign funding and spending involves a balancing of society's interest in a workable and fair election process with the individual citizen's freedom of speech and assembly in the important area of political expression.<sup>67</sup> The conflict of these interests, which are at the peak of our scale of societal values, raises serious constitutional issues. Reasonable regulation of campaign funding and spending, to enable candidates to present themselves and their ideas to the people, to prevent excessive influence on the election by the wealthy or other special interests, and to instill confidence of the electorate in our election process,<sup>68</sup> should withstand attack by those who charge that such regulation is unconstitutional. However, it is important that such regulations not unduly restrict any citizen's opportunity to participate in the election process.

#### *A. Congressional Power to Regulate Federal Election Campaigns*

The constitutional basis for congressional regulation of campaign funding and spending in federal elections is clearer in the case of congressional elections than of presidential elections. Article I, section 4 expressly authorizes Congress to make law, or alter state law, governing the "Times, Places and Manner" of holding elections for Senators and Representatives. In *Smiley v. Holm*,<sup>69</sup> the Supreme Court, in dictum now unquestioned, stated that this authorization includes the "authority to provide a complete code for congressional elections" including "corrupt practices."<sup>70</sup> As to presidential elections, Article II, section 1 leaves the manner of appointment of electors to the states and empowers Congress to determine "the Time of chusing the Electors and the Day on which they shall give their Votes."

There are several other probable sources of constitutional power to regulate presidential and congressional elections: the necessary and proper clause, the commerce clause, and the power of Congress to make laws implementing section 1 of the fourteenth

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<sup>67</sup> For an analysis of the constitutional issues, see A. ROSENTHAL, THE GREENING OF AMERICAN ELECTIONS: SOME CONSTITUTIONAL QUESTIONS INVOLVED IN THE REGULATION OF CAMPAIGN FINANCE. An amplification of this mimeographed 88 page paper will be published early in 1972 by Citizens' Research Foundation, Princeton, New Jersey. Citations in this article are to the mimeographed paper.

<sup>68</sup> See note 3 *supra* and accompanying text.

<sup>69</sup> 285 U.S. 355 (1932).

<sup>70</sup> *Id.* at 366.

amendment which prohibits the states from abridging privileges of citizens and denying due process and equal protection.<sup>71</sup> Since election to federal office has become a business with contributions, goods and services in the campaign flowing across state lines, the flexible commerce clause might well be stretched to cover business related to elections. The power conferred by the Constitution on the states to make laws governing the election of Presidential Electors and Congressmen provides a basis for invocation of the fourteenth amendment to review state action.<sup>72</sup>

Notwithstanding the foregoing authority, the Supreme Court appears to have based its decisions sustaining the regulation of presidential elections on inherent power of sovereignty. In *Ex Parte Yarbrough*,<sup>73</sup> involving intimidation of Negro voters in an election for Congress, the Supreme Court, in upholding a statute applying to both presidential and congressional elections, stated:

That a government whose essential character is republican, whose executive head and legislative body are both elective . . . has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention. . . . It is essential to the successful workings of this government that the great organisms of its executive and legislative branches should be the free choice of the people. . . .<sup>74</sup>

Again, in *Burroughs v. United States*,<sup>75</sup> where the requirement in the old Federal Corrupt Practices Act that political action committees report contributions and expenditures in presidential campaigns was held constitutional, the Supreme Court stated:

To say that Congress is without power to pass appropriate legislation to safeguard [a presidential] election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection. Congress, undoubtedly possesses that power. . . .<sup>76</sup>

This inherent power of sovereignty would seem to provide ample basis for reasonable regulation of federal elections.

In *Burroughs*, the Supreme Court further indicated that Congress would not be held to a stricter test of reasonableness in choosing the means of regulating federal elections than is applied

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<sup>71</sup> A. ROSENTHAL, *supra* note 67, at 11-12.

<sup>72</sup> *Williams v. Rhodes*, 393 U.S. 23 (1968); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *cf. Oregon v. Mitchell*, 400 U.S. 112 (1970); A. ROSENTHAL, *supra* note 67, at 18-20.

<sup>73</sup> 110 U.S. 65 (1884).

<sup>74</sup> *Id.* at 657, 666.

<sup>75</sup> 290 U.S. 534 (1934).

<sup>76</sup> *Id.* at 545.

in reviewing the work of the Congress in other areas. The Court stated:

The power of Congress to protect the election of President and Vice-President being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship of the means adopted and the end to be attained, are matters for congressional determination alone.<sup>77</sup>

Yet, it would not be surprising to find the Supreme Court, in the context of an unduly severe limitation upon contributions or expenditures, repeating a statement it made in a case not involving regulation of corrupt political practices, *Shelton v. Tucker*:<sup>78</sup>

In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can more narrowly be achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.<sup>79</sup>

The power to regulate primary elections should be identical with the power to regulate general elections. In *Newberry v. United States*,<sup>80</sup> the Supreme Court held that primaries are not elections but merely a method of agreeing on candidates. This is an unsound result; if primaries cannot be regulated to prevent corruption, in the general election the electorate may be limited to a Hobson's choice between two candidates corruptly chosen. The Supreme Court, in the later case of *United States v. Classic*,<sup>81</sup> upheld a conviction for falsely reporting the count of ballots in a primary. At the same time, the Court held that a primary was a part of the election process contemplated by the Constitution. *Classic* implicitly overrules *Newberry*, and Congress today probably would be held to have the power to enact corrupt practices legislation applicable to primaries.

### *B. Limitations upon Contribution and Expenditures*

Heard has described the evolution of American political cam-

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<sup>77</sup> *Id.* at 547-48.

<sup>78</sup> 364 U.S. 479 (1960).

<sup>79</sup> *Id.* at 488.

<sup>80</sup> 256 U.S. 232 (1921).

<sup>81</sup> 313 U.S. 299 (1941).

campaign methods through five stages: the initial period of limited public campaigning, the torchlight era commencing with Jackson, large scale use of campaign literature beginning in 1880, radio campaigning from 1928, and dominance of television campaigning from 1952 to date.<sup>82</sup> In assessing the legality of regulating campaign funding and spending, it is important to take into account the *current* methods of campaign spending and the financial requirement of an effective campaign.

As shown in part II of this article, the major types of regulation of campaign funding and spending include limitations upon the political expenditures of corporations and labor unions. There is a dearth of Supreme Court decisions on the constitutionality of legislation of this nature. Probably this is because loopholes in the statutes alleviated the incentive to test the legislation's validity. Yet, the long history of acceptance of the regulatory statutes tends to support their constitutionality.

*1. Limitations on Expenditures by a Candidate from His Own Resources*—If the limitation on the amount which a candidate may expend from his own resources were set so low that he could not present himself and his ideas to the electorate, this might well constitute an unreasonable restraint on freedom of speech. On the other hand, the purpose of limiting the size of expenditures is to prevent the wealthy candidate from having an undue advantage in elections.

A distinction could be made between expenditures of one's own money and expenditures of money donated by others. Certainly a candidate should be protected by the first amendment in spending his own money to make as many speeches as *he* can make. But if a candidate is using the money of others to fund his speeches, or if he is using either his own money or money contributed by others to induce others to make speeches in his behalf, his first amendment interest is not as strong. Nevertheless, legislation regulating campaign expenditure from a candidate's own resources should not set limits so low that the statute increases the natural advantage of incumbents.<sup>83</sup>

To the extent that the wealthy candidate is allowed an undue advantage, money is a pollutant in the election and the practice is corrupt. If the limitation does not prevent the availability of

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<sup>82</sup> A. HEARD, *supra* note 3, at 400-28.

<sup>83</sup> The unprecedented amount of time that President Nixon requested and received to report to the people on controversial issues such as the Vietnam War, economic controls, and the like has prompted many requests, based on the fairness doctrine, by spokesmen for the Democratic Party for reasonable time to present the opposing viewpoint. Most of these requests have been denied. *See* Democratic Nat'l Comm. v. FCC, 40 U.S.L.W. 2488 (D.C. Cir. Feb. 2, 1972).



adequate funds to support fair and honest elections, limitations on size of expenditures by candidates to prevent disparate influence on the election would be constitutional. This is consistent with the one man, one vote principle in reapportionment cases and other Supreme Court decisions holding that financial or property qualifications for voting deny equal protection of the law.<sup>84</sup>

2. *Limitations on Corporations, Labor Unions, and Federal Employees*—There is limited authority by the Supreme Court on the constitutionality of legislation limiting campaign contributions and expenditures by *source*. All corporations are prohibited from contributing or spending money in federal elections.<sup>85</sup> In fact, corporations were the first entities to be excluded from the election process. Since the exclusion is total, it is surprising that there is no Supreme Court case on the constitutionality of the legislation. Apparently some corporate managers accepted the concept that corporate funds should not be used to support parties or candidates opposed by some members of a pluralistic group of shareholders, while other corporations used the available loopholes.<sup>86</sup>

The prohibition against labor organizations making contributions or expenditures in federal political campaigns<sup>87</sup> was first tested in *United States v. CIO*.<sup>88</sup> The union supported a candidate for Congress in a union newspaper which was published with union funds and distributed solely to union members. To avoid the first amendment issue, the Supreme Court held that the word "expenditure," as used in the statute, was not intended by Congress to apply to a union newspaper distributed solely to union members and not to the general public.<sup>89</sup> Later, in *United States v. Auto Workers Union*,<sup>90</sup> the Supreme Court upheld an in-

<sup>84</sup> Notes 1 and 2 *supra*.

<sup>85</sup> Notes 20 and 22 *supra* and accompanying text.

<sup>86</sup> Notes 27 and 28 *supra* and accompanying text. In *United States v. Lewis Food Co.*, 366 F.2d 710 (9th Cir., 1966), the corporation published in 35 newspapers the voting record of all California legislators on "constitutional principles." The court of appeals reversed the district court's dismissal of the indictment and held that whether the advertisement was designed to influence the public at large to vote for particular candidates was a jury question.

<sup>87</sup> Notes 21 and 22 *supra* and accompanying text.

<sup>88</sup> 335 U.S. 106 (1948). The author of this article was one of the Government's counsel in this litigation.

<sup>89</sup> The legislative history is contrary to the Supreme Court's position. During the debates, Senator Taft, who sponsored the Taft-Hartley Act in the Senate, was asked on several occasions whether favoring a political candidate in a union newspaper came within the ban of the statute and he always answered affirmatively and clearly. 93 CONG. REC. 6436-40, 6447 (1947). Also, in his veto message, President Truman gave as a reason for vetoing the statute that it would "prevent the ordinary union newspaper from commenting favorably or unfavorably upon candidates. . . ." 93 CONG. REC. 7488 (1947).

<sup>90</sup> 352 U.S. 567 (1957).

dictment for using union funds to pay for a television broadcast supporting certain candidates for federal office; however the constitutional issue was held not ripe for adjudication.<sup>91</sup> In the opinion, the Court explained that the "evil at which Congress has struck . . . is the use of corporate or union funds to influence the public at large to vote for a particular candidate or a particular party."<sup>92</sup> The dissent would have held, without remand, that the union's expression of political views was protected by the first amendment.<sup>93</sup> That the Supreme Court did not take advantage of the opportunities in the above cases to decide the constitutional issue, thereby leaving the statute operative, suggests that the constitutionality of the statute in an appropriate case would be sustained.

The Supreme Court has spoken clearly on the constitutionality of legislation restraining the political activities of federal civil service employees.<sup>94</sup> The Hatch Act<sup>95</sup> prohibits federal civil service employees from speaking or writing in support of a political candidate. In *United Public Workers of America v. Mitchell*,<sup>96</sup> this restraint was held constitutional:

The essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery. . . . Again this Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of the government. . . . The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. . . . When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional.<sup>97</sup>

In earlier cases, the Supreme Court had sustained statutes which prohibited any federal employee from giving to or receiving from

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<sup>91</sup> *Id.* at 589-92.

<sup>92</sup> *Id.* at 589.

<sup>93</sup> *Id.* at 593.

<sup>94</sup> For a description of this legislation, see text accompanying note 43 *supra*.

<sup>95</sup> 5 U.S.C. §§ 7324-7327 (1970); 5 C.F.R. §§ 733, 122-124 (1971).

<sup>96</sup> 330 U.S. 75 (1947). A companion case in which the political activity was presiding over a fund raising dinner is *Oklahoma v. Civil Service Commission*, 330 U.S. 127 (1947).

<sup>97</sup> *Id.* at 95-96, 102.

any other federal employee a contribution for political purposes and barred Congressmen from receiving political contributions from federal employees.<sup>98</sup> The opinions in these cases emphasize that the efficiency and integrity of the federal civil service would be jeopardized if federal employees could be pressed into political service or rewarded on the basis of such service. These considerations underlie the establishment of the merit system of appointing federal employees. Nevertheless, although held constitutional in *Mitchell*, prohibiting *all* participation in a political campaign raises a much stronger first amendment issue than merely prohibiting contributions for political purposes.<sup>99</sup>

3. *Reporting Requirements* — In general, the 1971 Act requires that candidates and those acting in their behalf report total receipts, loans and expenditures as well as each contribution, loan and expenditure in excess of \$100.<sup>100</sup> In *Burroughs v. United States*,<sup>101</sup> the Supreme Court held that Congress had the power to legislate in the area of disclosure of political contributions, although first amendment issues were not raised. It is certainly true, however, that requiring the reporting of the source of small contributions and thereby disclosing one's political affiliation or support of a particular candidate or issue might lead in some circumstances to reprisal by an employer or an impairment of the relationship with one's associates. Also, there is less reason to require reporting of small contributions that do not give the donor significant influence over the elected official. So in some contexts involving sensitive areas of privacy and personal relationships, reporting of only the *aggregate* of small contributions, without the individual sources, may fulfill the purposes of a corrupt practice statute without causing constitutional problems.<sup>102</sup>

Since the new legislation excepts from the reporting requirements those contributions under \$100, the basis for constitutional challenge is weaker than under prior law.<sup>103</sup> Nevertheless, a \$100

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<sup>98</sup> *Ex parte Curtis*, 106 U.S. 371 (1882); *United States v. Wurzbach*, 280 U.S. 396 (1930). In these cases the only issue considered by the Supreme Court was the power of Congress to legislate in the area. The first amendment issue was not raised.

<sup>99</sup> A. ROSENTHAL, *supra* note 67, at 40 n. 60.

<sup>100</sup> Election Act §§ 302-305.

<sup>101</sup> 290 U.S. 534 (1934).

<sup>102</sup> A. ROSENTHAL, *supra* note 67, at 62-68; see *Talley v. California*, 362 U.S. 60 (1960), invalidating an ordinance prohibiting the distribution of handbills not carrying the name and address of the sponsor because it was reasonable to suppose that there would be reprisal against the sponsor. However, handbills have traditionally received strong first amendment protection, and it is possible that *Talley* will be limited to the handbill context.

<sup>103</sup> Federal Corrupt Practices Act of 1925, ch. 368, §§ 302-308, 43 Stat. 1070.

Under prior law, candidates, political action committees, and other individuals participating in federal election campaigns had to maintain records of receipts and expenditures and file reports with the Senate or House. However, candidates for President and

contribution is unlikely to give the donor significant influence over the elected officials; indeed, the minimum contribution which must be reported could arguably be substantially higher without jeopardizing the purposes of the disclosure requirement.

### *C. Limitations upon Use of the Communications Media*

The Federal Election Campaign Act of 1971 places a limitation on the amount which a candidate may spend on broadcasting for political purposes. The Act imposes a maximum limitation upon the amount which a candidate may spend for use of the communications media and then provides that no more than 60 percent of that amount may be spent in the broadcast media.<sup>104</sup> A similar provision was contained in a bill passed by Congress in 1970 and vetoed by President Nixon.<sup>105</sup> In light of the cases upholding regulation of campaign expenditures,<sup>106</sup> the extensive regulation of broadcasting which already exists, and the unique impact of broadcasting on political campaigns, there is little doubt that the limitation on the amount which can be spent on broadcasting for political purposes would, if challenged, be held constitutional.

The broadcasting industry has taken the position that any limitation on the amount which may be spent on use of media for political purposes should apply to all media, rather than solely to broadcasting, and that the candidate should be free to choose the manner in which the permitted sum is to be allocated among the media.<sup>107</sup> Regulation of the sum which a candidate may spend on broadcasting without extending the limitation to newspapers, magazines and other media may conceivably raise an issue under the fifth amendment of unequal protection of the laws.<sup>108</sup> However, the Supreme Court has long recognized that the Congress can strike first at the greatest evil without treating simultaneously all degrees of harmful action.<sup>109</sup> In political campaigning, this is the age of television and the impact on the electorate of personal appearance on television and the dramatic advertisements devised

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Vice-President, intrastate committees, and individuals making only intrastate expenditures were excepted from the reporting requirements. Also, the reporting requirements did not apply to primaries.

<sup>104</sup> Election Act § 104(a)(1)(B).

<sup>105</sup> The veto message is reported in 116 CONG. REC. S. 18724 (1970).

<sup>106</sup> See text accompanying notes 85-99 *supra*.

<sup>107</sup> *Senate Hearings* 381 (statement of Dr. Frank Stanton, President of CBS), at 410 (statement of Julian Goodman, President of NBC), and at 420 (statement of Leonard H. Goldenson, President of ABC). The three network presidents took the same position.

<sup>108</sup> See text accompanying notes 130-134 *infra*.

<sup>109</sup> *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

by professionals give television a unique position. Hence, separately classifying the broadcast media and limiting the sum which may be spent for political broadcasts is reasonable. Radio has much less impact than television. However, lumping radio with television and making the limitation applicable to broadcasting generally does not appear to raise any substantial issue of unreasonableness of classification.

However, when Congress accepted the broadcasters' viewpoint by establishing a limitation on the sum which candidates and those acting in their behalf may spend on *non*-broadcast media for political purposes and requiring a candidate to certify in writing to a newspaper or magazine that applicable spending limitations are not being violated,<sup>110</sup> it raised still another constitutional question: does freedom of the press protect the print media from statutory limitations on the use of the media for political purposes? Broadcasting is a unique medium of communication. Access to broadcasting is limited by nature. Broadcasters operate their stations as licensees serving the public interest, and television is unique both in its impact on the electorate and in the cost of political campaigns. These characteristics of the broadcast media obviously do not lend support to the constitutionality of limitations on non-broadcast media. This is demonstrated by the Supreme Court's opinion in *Red Lion Broadcasting Co. v. FCC*,<sup>111</sup> where the Court relied heavily upon the natural limitations of the broadcast media—limitations admittedly not present in the print media—to support the constitutionality of the fairness doctrine in broadcasting.<sup>112</sup> If this distinction is significant in determining the constitutionality of the fairness doctrine which *promotes* use of the media for political purposes, it would appear to be even more significant in determining the constitutionality of a provision in the 1971 Act which *limits* use of the media for political purposes.<sup>113</sup>

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<sup>110</sup> Election Act § 104(b).

<sup>111</sup> 395 U.S. 367 (1969).

<sup>112</sup> *Id.* at 386-90.

<sup>113</sup> On the other hand, it has been noted that, while in a theoretical sense the print media resource is unlimited, practically, however, the print media *are* limited. Monopoly in the print media has been developing rapidly in recent years. In part, this is a product of the competition between the broadcast media and the print media. In 1967, in the entire United States, there were only sixty-four cities which had competing daily newspaper ownerships; in seventeen states there were no competing daily newspapers in any city; in only twenty-six states was there more than one city in which daily newspaper ownerships competed; and in only three cities in the United States did more than two daily newspaper ownerships compete. See B. RUCKER, *THE FIRST FREEDOM* (1968); reviewed by Barrow, 15 N.Y.L.F. 999 (1969).

In these circumstances, a reasonable case might be made for limiting the amount of money which a candidate may spend on political advertising in newspapers, for making

In considering the constitutionality of the limitation upon expenditures for use of the broadcast media, it is essential to note that the election process *can* be unduly influenced by unlimited political advertisement in the print media, and to limit the use of broadcasting alone would simply serve to divert funds to the print media.

Even if the limitation of expenditures for political advertising in the print media should be held unconstitutional, it should not affect the validity of the limitation on use of broadcasting for political purposes. Broadcasting holds a unique place and is distinguishable.

It has been suggested that "spot" political broadcasts, which are too brief to present a political issue and are often used to draw an image of the candidate which may be the opposite of his true political character, should be prohibited.<sup>114</sup> Although there have been attempts in recent elections to use such spot political announcements to influence voting on emotional rather than reasonable bases, some candidates may be able to reach the electorate only through spot broadcasts, and a candidate should be free to choose that format which best suits his political style. Government regulation, such as the equal opportunities and fairness doctrines in broadcasting, that increases the opportunity to speak in the exercise of self-government, implements the first amendment.<sup>115</sup> However, regulation which prohibits a form of speech, such as a spot political broadcast, raises a serious constitutional question.<sup>116</sup>

#### *D. Disparate Treatment of Major, Minor and New Parties*

In a political campaign, a broadcaster who grants the use of a station to a candidate for political purposes must grant equal opportunity to opposing candidates. Outside the campaign con-

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such limitation enforceable by requiring the newspaper to obtain the consent of the candidate prior to carrying the political advertisement, and even for requiring that newspapers give equal opportunity to opposing political candidates to place political advertisements in the newspaper.

<sup>114</sup> *Senate Hearings* 588-92.

<sup>115</sup> Barrow, *supra* note 47, at 508-09. Compare *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding the constitutionality of the fairness doctrine in broadcasting), with *Weaver v. Jordan*, 64 Cal. 2d 235, 411 P.2d 289, 49 Cal. Rptr. 537, *cert. denied*, 385 U.S. 844 (1966) (California's statute prohibiting pay television invalidated as an abridgment of free speech).

<sup>116</sup> See *Mills v. Alabama*, 384 U.S. 214 (1966) (statute that prohibited newspapers from carrying in the election day issue editorials on issues being voted upon held unconstitutional); Federal Communications Commission Memorandum of the General Counsel on the Legality of Establishing Minimum Time Durations for Political Broadcasts, in *Senate Hearings* 588-91.

text, if an elected official or prospective candidate is granted time on a station to discuss a controversial issue of public importance, reasonable time must be granted to an appropriate spokesman for the opposing point of view.<sup>117</sup> The constitutionality of such regulation of broadcasting is well established.<sup>118</sup> Since licensees are granted free use of the publicly-regulated broadcast channels for profit, it is clear that Congress could require broadcasting stations to grant free time to political candidates as a condition to awarding the use of the public channel.<sup>119</sup> Indeed, Congress could establish "open mike" broadcasting, allocate particular channels exclusively for political purposes, or license channels for partial use by the broadcaster—the remainder of the time being reserved for political purposes.<sup>120</sup> The United States licenses the airwaves for use by broadcasters who are under a duty to serve the public interest.

Television is the paramount medium for conducting political campaigns today, and it has a unique impact on the electorate. The licensing and regulation of broadcasting gives government a strong hand in the functions of broadcasters, and it may well be that government cannot permit broadcasters to discriminate in granting access to broadcasting for political purposes.<sup>121</sup> The Senate version of the Federal Election Campaign Act of 1971 would have repealed the equal time requirement of section 315 of the Communications Act insofar as it applies to federal elective office.<sup>122</sup> The Act as finally passed does not repeal the requirement. Although the Senate bill would have discouraged favoritism by broadcasters in granting access to the station for political purposes by making willful or repeated refusal of reasonable access a ground for denial of a license to broadcast,<sup>123</sup> repeal of the

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<sup>117</sup> See text accompanying notes 46–49 *supra*.

<sup>118</sup> Barrow, *supra* note 47, at 505–32; and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

<sup>119</sup> Section 315 of the Communications Act requires that broadcasters which grant the use of the station to a political candidate for political purposes must grant equal time to opposing candidates. 47 U.S.C. § 315 (1970). Similarly, the FCC's rules applying the fairness doctrine to political editorials and personal attacks require the broadcaster to grant free time to reply. These requirements were held constitutional in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

<sup>120</sup> Barrow, *supra* note 47, at 512–13.

<sup>121</sup> Petition of Edmund G. Brown, Jr. to the Federal Communications Commission Regarding Issuance of a Rule Requiring Television Licensees to Afford Reasonable Opportunity to Legally Qualified Candidates for Statewide Public Office to Present their Views on Issues of Public Importance, published in *Hearings on H.R. 8627–28 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess., ser. 92–18, at 119–36; A. ROSENTHAL, *supra* note 67, at 55–57; Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1672–73 (1967); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–86 (1963).

<sup>122</sup> S. 382, 92d Cong., 1st Sess. § 101(a) (1971).

<sup>123</sup> *Id.* § 101(c).

equal time requirement would have raised a substantial constitutional issue. For years, there has been a strong campaign by networks and broadcasters to repeal section 315. The reason given is that networks and stations cannot sell time or grant free time if the number of candidates for an office is large and all are entitled to equal time.<sup>124</sup> This suggests that if section 315 is ever repealed, it is unlikely that broadcasters can be counted upon to provide a practical opportunity for new parties to emerge and minor parties to challenge the major parties in elections. If such a practical opportunity is not provided, issues of denial of freedom of speech and assembly for political purposes and denial of equal protection of the laws would arise.

In 1968, the author of this article proposed a differential equality of access approach to regulation of the use of broadcasting for political purposes.<sup>125</sup> Candidates were classified major, minor or evolving, depending upon support by the electorate as evidenced by the vote for their party in the preceding campaign or by petitions: a major party was one that received three percent of the popular vote; a minor party was one that received one percent of the popular vote or obtained signatures of one-half percent of persons of voting age, and an evolving party was any other party or candidate. The proposal called for the grant of free prime time for campaign purposes during the eight weeks preceding the election. Both as to free time and purchased time, the differential was as follows. Major candidates were accorded equal time as between members of the class, half time being granted to minor candidates but no time required to be given to evolving candidates. If a broadcaster gave a minor candidate time, other minor candidates were accorded equal time, half time being granted to major candidates, but no time being required to be given to evolving candidates. The broadcaster could grant time to an evolving candidate without being required to grant any time to major or minor candidates. For example the broadcaster could use the panel format for evolving candidates, which makes the accommodation of substantial numbers of candidates practical. In 1969, the Twentieth Century Fund Commission on Campaign Costs in the Electronic Era adopted a similar proposal.<sup>126</sup>

It is essential in a representative democracy that all serious

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<sup>124</sup> Barrow, *supra* note 47, at 480-84.

<sup>125</sup> *Id.* at 533-42. For a favorable analysis of the proposal, see Alexander, *Communications and Politics: the Media and the Message*, 34 *LAW & CONTEMP. PROB.* 255, 274-75 (1969).

<sup>126</sup> *THE TWENTIETH CENTURY FUND, VOTERS' TIME, REPORT OF THE TWENTIETH CENTURY FUND COMMISSION ON CAMPAIGN COSTS IN THE ELECTRONIC ERA*, at 20-27 (1971). The Commission was chaired by Newton N. Minow, former chairman of the FCC.



candidates have an opportunity to present themselves and their ideas and that the electorate have an opportunity to see and to hear the candidates. Whether governmental assistance be in the form of a grant of campaign funds or grant of free time on broadcasting stations or both, the problem of giving the electorate an opportunity to evaluate the serious candidates will be aggravated by a great increase in the number of nominal candidates. It is not practical to treat every nominal candidate equally; to attempt this would simply deny the electorate an opportunity to reach a sound judgment on the serious candidates. It is necessary to balance the electorate's interest in a viable election process against the right of individual candidates and their supporters, however small, to engage in the election process. If government regulates access to television for political purposes or campaign funding in a manner which assists, rather than restrains, new parties and evolving candidates, while providing such greater assistance to established parties as may be necessary to give the electorate a reasonable opportunity to evaluate the candidates and platforms, the disparity should withstand constitutional attack. However, if government so favors the major parties that minor parties have no reasonable opportunity to grow and to compete, and the new parties have no opportunity to evolve, then such control would be unconstitutional. The analytic approaches to this constitutional problem, based upon the first amendment and equal protection, will now be considered.

At first blush, it may seem that so long as government grants *some* assistance to a minor or new party, there are no issues of freedom of speech or assembly even though major parties are granted greater assistance. However, by regulating access to the broadcast media, by requiring that candidates be given free television time and grants of campaign funds, or by collecting and allocating taxes designated by the taxpayer for support of the election process, government can affect substantially the opportunity of candidates to communicate with the electorate. To the extent that government favors some candidates and parties over others, government limits the opportunity of the less favored to compete for the eye and ear of the electorate.

The *Red Lion* case, which upheld the fairness doctrine in broadcasting against attack on first amendment grounds, emphasized that

[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of

ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by Government itself or a private licensee. . . . "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." . . . That right may not be constitutionally abridged either by Congress or by the FCC.<sup>127</sup>

In testing the constitutionality of governmental support of the election process, the Supreme Court will likely take this first amendment approach. Indeed, in later cases involving the regulation of the election process, the Supreme Court has focused upon the balancing of the power of Congress to protect the integrity of the election process and the impingement of regulation on first amendment rights.<sup>128</sup>

In the case of state statutes which favor some political parties over others, the Supreme Court has followed an equal protection approach in testing constitutionality. In *Williams v. Rhodes*,<sup>129</sup> the Supreme Court held that state legislation which gives the two major parties an advantage over minor parties in getting candidates on the ballot violates equal protection of the laws guaranteed by the fourteenth amendment. However, the Court observed that the infringement also violated the first amendment right of association which is protected by the fourteenth amendment from encroachment by the states.<sup>130</sup> Through reverse incorporation of the fourteenth amendment into the fifth amendment, other applications of the equal protection clause could be applied to disparate treatment by the Congress of political parties and candidates in federal elections. Reverse incorporation was practiced in *Bolling v. Sharpe*,<sup>131</sup> a companion case to *Brown v. Board of Education*.<sup>132</sup> In *Brown*, the Supreme Court held racial segregation in state public education an unconstitutional denial of equal protection of the laws under the fourteenth amendment. In *Bolling*, the Supreme Court held that racial segregation in the public schools of the District of Columbia denied Blacks due process guaranteed by the fifth amendment. The Court explained:

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<sup>127</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

<sup>128</sup> See *United States v. CIO*, 335 U.S. 106 (1948), discussed in text accompanying notes 88 and 89 *supra* (first amendment issue carefully avoided); *United States v. Auto Workers Union*, 352 U.S. 567 (1957), discussed in text accompanying notes 90-93 *supra* (majority avoided the first amendment issue but the dissent would have met it); and *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947), discussed in text accompanying notes 94-99 *supra* (first amendment issue was a major one).

<sup>129</sup> 393 U.S. 23 (1968).

<sup>130</sup> *Id.* at 30-31.

<sup>131</sup> 347 U.S. 497 (1954).

<sup>132</sup> 347 U.S. 483 (1954).

In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.<sup>133</sup>

Whether state legislation denies equal protection has usually been tested by the standard that the classification must be "rationally based and free from invidious discrimination."<sup>134</sup> However, the Supreme Court has indicated that in some areas, such as political activity, a narrower test would be used:

It is true that this Court has established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. But we have also held many times that "invidious" distinctions cannot be enacted without a violation of the Equal Protection Clause. In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification. In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms.<sup>135</sup>

Whether the first amendment or equal protection of the laws analysis is used, certain conclusions can be drawn. If government through subsidy, tax incentive, or regulation of access to broadcasting for political purposes, favors major parties over minor and new parties, such governmental action may be unconstitutional unless the disparity achieves a reasonable balance between the

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<sup>133</sup> 347 U.S. 497, 500 (1954). Compare *Hurd v. Hodge*, 334 U.S. 24, 35–36 (1948) (courts of the District of Columbia not permitted to enforce racial covenants restricting the conveyance of real estate to Blacks), with *Shelley v. Kraemer*, 334 U.S. 1 (1948) (state courts not permitted to enforce racial covenants because of the equal protection clause). See also *Richardson v. Belcher*, 401 U.S. 935 (1971), in which a federal statute reducing the social security benefits by the amount of workmen's compensation provided by state law was upheld, the Supreme Court observing that a classification which meets the equal protection of the laws standard of the fourteenth amendment "is perforce consistent with the due process requirement of the Fifth Amendment." *Id.* at 257.

<sup>134</sup> *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

<sup>135</sup> *Id.*

need of the electorate to have access to serious candidates and the need for new parties to emerge and minor parties to have an opportunity to compete with major parties. If the amount of assistance granted minor and new parties is so small in comparison with that granted to major parties that the minor and new parties cannot grow and compete, freedom of speech and assembly for political purposes is inhibited. Finally, if the floor for qualifying for governmental assistance is set so high that minor and new parties are effectively excluded from the assistance granted to major parties, the restraint on participation in representative democracy may run afoul of the Constitution.

### *E. Governmental Subsidies and Tax Incentives*

Governmental subsidy of elections and other incentives have been proposed for many years.<sup>136</sup> The proposals have taken the form of direct government subsidy, free use of the mails and broadcast media, and tax incentives. The simplest way to assure sufficient funds to sustain a meaningful political dialogue and avoid undue influence by the wealthy or other special interests would be for government to provide the necessary funds and to prohibit private contributions. This was proposed by President Theodore Roosevelt, and other high officials have repeated the suggestion.<sup>137</sup> Puerto Rico subsidizes elections, but the legality of the program has not been tested.<sup>138</sup> A direct subsidy of elections in Colorado was held unconstitutional, although the Colorado Supreme Court did not write an opinion.<sup>139</sup> Also, a direct subsidy in Massachusetts was invalidated on the unsound ground that expenditure of state funds by political parties or candidates is not a public purpose.<sup>140</sup> The amount of the subsidy in the Massachusetts case was based upon the vote received by each party in the preceding election. Since the Democratic Party had received 80 percent of the vote, one party would have received 80 percent of the subsidy. Such disparate governmental treatment would tend to establish one dominant political party, and would clearly violate the equal protection clause in light of the later Supreme Court decision in *Williams v. Rhodes*.<sup>141</sup> On the other hand, a govern-

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<sup>136</sup> For a history of the effort to secure subsidization of the election process in the United States, see A. HEARD, *supra* note 3, at 431-54; Lobel, *supra* note 20, at 57-60.

<sup>137</sup> A. HEARD, *supra* note 3, at 431.

<sup>138</sup> H. WELLS, *GOVERNMENT FINANCING OF POLITICAL PARTIES IN PUERTO RICO* (1961).

<sup>139</sup> *People v. Galligan*, No. 7323, Colorado Supreme Court, October 10, 1910.

<sup>140</sup> *Opinion of the Justices*, 337 Mass. 800, 197 N.E.2d 691 (1964).

<sup>141</sup> 393 U.S. 23 (1968), discussed in text accompanying notes 128-134 *supra*.

mental subsidy of political elections based upon the voter support of the party or candidate and reasonably graduated so as to assure opportunity for new parties to emerge, minor parties to compete, and major parties to present their platforms and candidates to the electorate should be constitutional.<sup>142</sup>

It is important to note that the tax credit and deduction provisions contained in the 1971 Revenue Act are not direct subsidies, but tax incentives to encourage contributions to the election process.<sup>143</sup> The taxpayer is permitted to take a tax credit or a deduction from taxable income in a limited amount for political contributions. The practice of permitting tax credits and deductions from taxable income for public interest reasons is well established. Well-known examples are contributions to charitable and religious organizations, state and local taxes, and petroleum and natural mineral deposits depletion. Minnesota and California have enacted similar statutes permitting deduction of political contributions from taxable income for state income tax purposes.<sup>144</sup>

A closer question arises with regard to sections 801 and 802 of the Revenue Act of 1971, the new Presidential Election Campaign Fund Act. This statute provides that the taxpayer may designate that one of his tax dollars shall be paid into the fund for distribution to the party of his choice.<sup>145</sup> If the taxpayer designates the party, the transaction may be equated with a tax credit. However, if the designation is to the nonpartisan account and the administrator of the fund allocates the contribution to the party which has a deficiency in the amount for which it qualifies, the transaction approximates a direct subsidy by government. Nevertheless, designation of the nonpartisan account should pass the test of constitutionality. The purpose of the legislation is to encourage citizens of relatively small means to support representative democracy. The interest of the citizen in his government and its integrity is likely to grow when he contributes to the election process. Moreover, encouraging many small contributions reduces the need for large ones and thus ameliorates the influence of large contributions on the political process.

One of the most difficult constitutional issues raised by the new tax incentive and allocation provisions is the favorable treatment of the two major parties vis-a-vis a third party and the relatively

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<sup>142</sup> Lobel, *supra* note 20, at 57-61, concludes that a governmental subsidy may be the only effective way to render political parties a representative instrument of democracy.

<sup>143</sup> For a discussion of these provisions, see text accompanying notes 62 and 63 *supra*.

<sup>144</sup> MINN. STAT. ANN. § 290.21 (Supp. 1971); CAL. REV. & TAX. CODE § 17234 (West 1970); A. HEARD, *supra* note 3, at 445.

<sup>145</sup> For a discussion of the Presidential Election Campaign Fund Act, see text accompanying notes 59-61 *supra*.

high popular vote which a new party must attract in order to qualify for a subsidy.<sup>146</sup> The allocation formula is drawn in such a way that it is highly unlikely that more than two parties will qualify as major, that is, receive 25 percent or more of the popular vote, and that more than one party will qualify as minor, that is, receive more than 5 percent of the vote. If the standard were lowered to 3 percent of the popular vote to qualify as a major party and 1 percent to qualify as a minor party, the results from 1944 through 1968 would have been as follows. There would have been two major parties in all presidential elections, except in 1968, when the American Independent Party received approximately 12 percent of the popular vote; and only three minor parties, the American Labor Party in 1944 and the States Rights Democratic Party and the Progressive Party in 1948. However, under the standard used in the new statute, during the presidential election years from 1944 through 1968, there would have been only two major parties, the Democratic and Republican, and only one minor party, the American Independent Party. It may well be that the new statute so favors the two major parties and discourages the entry of new parties that it offends the Constitution. On the other hand, it is not feasible to treat established parties and all new parties equally, for such a policy would generate a plethora of splinter parties. However, a less rigorous test for major, minor and new parties would have helped the legislation pass the constitutional test.

#### IV. SUGGESTED CHANGES IN THE EXISTING AND PROPOSED LAWS

The new Presidential Election Campaign Fund Act and the Federal Election Campaign Act of 1971 raise substantial constitutional issues. This section suggests a few practical changes in the legislation not only to insure their constitutionality, but also to increase their effectiveness.

The Presidential Election Campaign Fund Act heavily favors major parties—the Democratic and Republican Parties—over minor and new parties having relatively small voter support.<sup>147</sup> The practical effect of the Act is to assure that the Democratic and Republican Parties have funds to conduct an adequate presidential election campaign, to limit the opportunity of minor parties to compete with major parties, and to hinder the entry of new par-

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<sup>146</sup> *Id.*

<sup>147</sup> The statute is described in the text accompanying notes 59–61 *supra*.

ties. New parties, recognizing the impracticality of mustering 5 percent of the popular vote, may not be inclined to run candidates against candidates of major parties supported by large campaign chests allocated by government from tax funds. On the basis of presidential election history, a minor party which qualifies for governmental support will attract little more than 5 percent of the total popular vote and, thus, will qualify for only a small fraction of the support granted to the two major parties.

The vulnerability of the statute to constitutional attack<sup>148</sup> could be ameliorated by lowering the percentage of votes required for new parties to receive assistance and increasing the amount granted to minor parties. Major party should be defined as a party which attracted 5 percent or more of the popular vote in the preceding presidential election, and minor party defined as one which received at least 1 percent of the popular vote or, in the case of new parties, obtained a comparable number of signatures by persons of voting age.<sup>149</sup> A new party should be able to qualify for assistance if it obtains signatures of persons of voting age on petitions in a number which assures that the tax dollars earmarked by that number of voters justify the cost of the identification and accounting involved in administering the tax incentive program. A new party which qualifies under this de minimis administrative cost rule should receive all tax dollars designated for allocation to the new party regardless of the number of votes which it ultimate-

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<sup>148</sup> The constitutional issue is discussed in the text accompanying note 145 *supra*. The constitutional vulnerability of a statute, such as the Presidential Election Campaign Fund Act, which favors the Democratic and Republican Parties over others has been emphasized by the Supreme Court in *Williams v. Rhodes*. The Court stated:

There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as have the old parties in the past.

393 U.S. 23, 32 (1968). The relevance of this statement to a scheme of financial support of elections which favors the Democratic and Republican Parties over other parties is obvious.

<sup>149</sup> Under the suggested definitions of major parties and minor parties, it is unlikely that a large number of splinter parties would emerge. During the seven presidential elections from 1944 through 1968, except for the Democratic and Republican Parties, there was only one party in one election, the American Independent Party in 1968, which received more than 5 percent of the popular vote. The tax incentive is some inducement to growth of a third major party. However, that is unlikely if the Democratic and Republican Parties offer meaningful alternatives to the electorate. A substantial third party emerges only in periods when the two party system tends to become a Tweedledum-Tweedledee system. But when this happens, it is important that a third party have the opportunity to compete. If new parties not qualifying in the election as minor parties receive, as suggested above, only those sums designated by taxpayers for the account of the new parties, no great number of new parties will emerge because of the high cost of a nationwide political campaign.

ly musters in the presidential election. Also, if the new party receives at least 1 percent of the popular vote in the election, it should receive such additional sum as would equal the support which it would have received if it had qualified as a minor party prior to the election. Likewise, the amount of financial support to minor parties should be greater than that provided in the statute. The territorial dimensions of a presidential campaign require a substantial campaign chest if the contest is to be more than a campaign in name only. Accordingly, a minor party should receive no less than one-third of the sum granted to each major party. Major parties, as the statute now provides, should receive equal grants.

Neither the Presidential Election Campaign Fund Act nor the Federal Election Campaign Act of 1971 provides for the grant of free broadcast time for political purposes. The tax incentive provided in the Revenue Act of 1971 would be more effective if it were supplemented with a statutory requirement that broadcasters provide a reasonable amount of free time during the eight weeks preceding the presidential election. Such free time could be allocated among candidates of major, minor and new parties in much the way that the fund designated by taxpayers for political campaigns is allocated.<sup>150</sup> In a free television time statute, differential access standards would encourage new parties and give minor parties an opportunity to compete with major parties.

The Federal Election Campaign Act of 1971 leaves intact the equal time requirement of section 315 of the Communications Act of 1934. This requirement, with appropriate modification, is essential to our political process. Television is the medium having greatest impact on the election process, and broadcasters should not be able to grant broadcast time to favored candidates and deny time to their opponents. It is not sufficient, as the Senate version of the Act would have provided, to consider in renewal proceedings the willful and repeated denial of broadcast time to a political candidate.<sup>151</sup> The FCC rarely denies a license for renewal and, even if it did, this would not right the wrong to the defeated candidate who was denied access to broadcasting. Moreover, the equal time requirement, as presently applied, is inadequate in requiring that every nominal candidate, regardless of voter support, be granted equal time. An amendment of section 315 providing differential equality of access to broadcasting, on the basis of whether the candidate is major, minor or evolving,

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<sup>150</sup> See text accompanying notes 125 and 126 *supra* for one proposed plan.

<sup>151</sup> The Senate bill and other aspects of the equal time requirement are discussed in the text accompanying notes 120-123 *supra*.



would be more practical. Until this is done, the effort of the television networks to repeal the equal time requirement will continue.

The Federal Election Campaign Act raises a substantial constitutional issue in that it limits the amount that can be spent for political advertising in the print media and prohibits the print media from printing a political advertisement without obtaining the candidate's certification that payment will not violate any spending limit.<sup>152</sup> The overall limitation upon expenditures for use of the communications media would have been strengthened by an exemption for small individual expenditures for advertisements in newspapers. An individual expenditure of less than \$100 by a voter to express his view in a newspaper advertisement is unlikely to result in the buying of elections. Also, if no more than a dozen persons form an ad hoc committee, pool their contributions of not more than \$50 each, and purchase a political advertisement in a newspaper, it is unlikely that the laudable purposes of the Federal Election Campaign Act would be significantly undermined. Such a modification in the statute would go far in solving the constitutional problem by reserving a reasonable area for political expression through the individual's choice of a newspaper advertisement. Adoption of the suggested modifications would not require any change in the reporting requirements. Small sums expended under the suggested modifications would be in addition to the maximum expenditure for political use of media now specified in the statute.

The Federal Election Campaign Act of 1971 removes the ceiling on the amount which an individual or a political committee could contribute to or spend in behalf of a candidate. A realistic ceiling should have been retained. Merely limiting the amount which the candidate can spend on use of communications media is no substitute for a ceiling on individual or committee donations to insure that federal elective officials do not fall under the domination of those persons or committees which provide most of the financial support to the successful candidate.

The new legislation would have been more effective if a ceiling on *total* campaign expenditures by all candidates for federal office had been included. The Federal Election Campaign Act of 1971 only limits the amount which can be spent for use of the communications media and the amount which a candidate or his family

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<sup>152</sup> Election Act §§ 104(a) and 104(b). For a discussion of the constitutional issues involved in placing limitations upon the print media, see text accompanying notes 110-113 *supra*.

can contribute to his own campaign. There can be unlimited expenditures by individuals and committees in conducting meetings, getting out the vote, opening neighborhood campaign offices, and other campaign activities. The value of a person's individual activity in behalf of a candidate and the activity of small groups should be excepted from any ceiling. But sums in excess of \$100, which must be reported under the new statute, should be included in an over-all ceiling on campaign expenditures by candidates.

Although sections 801 and 802 of the Revenue Act of 1971, the Presidential Election Campaign Fund Act, limit the *total* expenditures in a *presidential* candidate's campaign to the amount allocable to him from the fund created through the federal tax system, the candidate may reject the allocation and thereby avoid the statutory limitation. For example, a presidential candidate whose party has many wealthy members may choose to reject any allocation from the government campaign fund and proceed to raise a campaign fund from private sources which is two or three times the sum for which even the candidate of a major party can qualify under the statute.

The statute leaves for future administrative action the important problem of regulating loans for political purposes.<sup>153</sup> The danger of subverting indebted elected officials and parties can be avoided only by declaring by statute that loans for political purposes are not legally collectible. They should be "gentlemen's agreements." Meanwhile, the regulations to be promulgated by the Civil Aeronautics Board, Federal Communications Commission, and Interstate Commerce Commission, governing extension of credit to political candidates, should be scrutinized closely.<sup>154</sup>

The disclosure provisions of the Federal Election Campaign Act of 1971 appear entirely adequate and, in view of *Burroughs*<sup>155</sup> clearly constitutional. The Congress exercised wise judgment in excepting the reporting of contributions under \$100.

Although not included in the final version of the Act, the provision of the State bill for a Federal Elections Commission to supervise the campaign funding and spending laws would have

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<sup>153</sup> A substantial loan which the successful candidate is unable to pay poses a danger of subservience of the elected official to the lender. In a political campaign, like a horse race, there is only one winner. Unlike a business there is no certain income or property which can serve as security. The losing party, like the Democratic Party at the present time, finds the debt an inhibition to an active new campaign.

<sup>154</sup> Election Act § 401 gives to these federal agencies the power to promulgate regulations with respect to the extension of credit without security, to any candidate or one acting in his behalf by any persons regulated by these agencies.

<sup>155</sup> *Burroughs v. United States*, 290 U.S. 534 (1934), discussed in text accompanying notes 75-77 *supra*.

improved greatly the enforcement of these laws. The House of Representatives has been reluctant to act against members who allegedly violated the previous reporting laws, and it was anticipated that the House would insist on maintaining control over enforcement. Perhaps after experience with the new statute the Senate proposal may be adopted.

The Federal Election Campaign Act of 1971 and the Presidential Election Campaign Fund Act provide constructive regulation of campaign funding and spending. However, some of the provisions needlessly raise substantial constitutional issues, and omission of other simple provisions renders the statutes less effective than they could be. The modifications suggested above would render the statutes safer from constitutional attack and more effective in promoting a viable election process.