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# *Buckley Over Time:* A New Problem with Old Contribution Limits

*Craig M. Engle*  
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Nothing in American history—not the left’s recent campus “speech codes,” not the right’s depredations during 1950s McCarthyism or the 1920s “red scare,” not the Alien and Sedition Acts of the 1790s—matches the menace to the First Amendment posed by campaign “reforms” advancing under the protective coloration of political hygiene . . . . What today’s campaign reformers desire is a steadily thickening clot of laws and on enforcing bureaucracy to control both the quantity and the content of all discourse pertinent to politics.<sup>1</sup>

## I. INTRODUCTION

The practice of funding public election campaigns with private contributions and expenditures is older than our nation itself. George Washington, during his campaign for the Virginia House of Burgesses, is said to have distributed more than a quart and a half of rum, wine, beer and hard cider per person in his district.<sup>2</sup> In 1828, a candidate for governor of Kentucky was soliciting campaign contributions of \$5000 and \$10,000.<sup>3</sup> In the 1896 presidential race, William McKinley raised and spent between \$6 and \$7 million.<sup>4</sup> The Kennedys spent at least \$2 million (nearly \$11 million in today’s dollars), and possibly twice that amount, just in the 1960 West Virginia Presidential primary.<sup>5</sup> In 1996, labor unions contributed over \$40 million directly to candidates and political parties.<sup>6</sup> Simply put, money has always been a part of the American political process.

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1. George F. Will, *Here Come the Speech Police*, WASH. POST, Sept. 28, 1997, at C7.

2. CENTER FOR RESPONSIVE POLITICS, *A BRIEF HISTORY OF MONEY IN POLITICS 3* (1995) (citing CONGRESSIONAL QUARTERLY, INC., *DOLLAR POLITICS* (3d ed. 1982)).

3. CENTER FOR RESPONSIVE POLITICS, *supra* note 2, at 3 (citing GEORGE THAYER, *WHO SHAKES THE MONEY TREE? AMERICAN CAMPAIGN PRACTICES FROM 1789 TO THE PRESENT* (1974)).

4. CENTER FOR RESPONSIVE POLITICS, *supra* note 2, at 5.

5. SEYMOUR M. HERSH, *THE DARK SIDE OF CAMELOT 90* (1997).

6. *Top Contributors in the 1995-96 Election Cycle*, WASH. POST, Dec. 2, 1997, at A25 (citing Center for Responsive Politics). Seven of the top ten direct contributors to candidates and parties were labor unions. The \$40 million given directly to candidates and parties is exclusive of the estimated over \$100 million that labor unions spent on independent expenditures, issue advertisements and grassroots electioneering in the 1996 election cycle. *Id.*

There is also a long history of American legal precedent protecting this practice. At the birth of modern First Amendment jurisprudence in 1931,<sup>7</sup> the Supreme Court observed that maintaining "free political discussion to the end that government may be responsive to the will of the people" was "a fundamental principle of our constitutional system."<sup>8</sup> First Amendment<sup>9</sup> doctrine has "primarily sought to protect from government regulation an independent realm of speech within which public opinion is understood to be forged."<sup>10</sup> Further, the Supreme Court has consistently ruled that political speech enjoys the highest protection under the First Amendment.<sup>11</sup>

Yet in the name of "campaign finance reform," there is now a growing assault on our established First Amendment right to political speech.<sup>12</sup> This article will not attempt to critique the array of current campaign finance reform proposals.<sup>13</sup> Instead, we will focus on a new constitutional problem that inflation and the increasing cost of campaigns have created for just one of the existing post-Watergate campaign laws: the individual contribution limit to Federal candidates established in 1974.<sup>14</sup>

Section 315 of the Federal Election Campaign Act of 1971 (FECA),<sup>15</sup> codified at 2 U.S.C. § 441a, limits contributions from persons to any federal candidate to \$1000 with respect to any election for federal office.<sup>16</sup> This section of the Act, originally enacted in 1974, has never been indexed for inflation. Congress, of course, has the power to increase this individual contribution limit, just as it has indexed other areas of

7. See Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996).

8. *Stromberg v. California*, 283 U.S. 359, 369 (1931).

9. The First Amendment states: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." U.S. CONST., amend. I.

10. Post, *supra* note 7, at 151.

11. The Buckley Court wrote, "Discussion of public issues and debates on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). As Chief Judge Emeritus of the United States District Court of the Eastern District of California, Lawrence Karlton more recently observed, "From the uncompromising terms of the [First] Amendment it would seem that devising any test upholding limits on political speech or association would be a difficult task indeed, requiring, if permitted at all, the most delicate of judgments, predicated on the most persuasive evidence of the need to serve not only legitimate but urgent governmental interests." *California Prolife Council Political Action Comm. v. Scully*, No. Civ. S-96-1965, slip op. at 3-4 n.6 (E.D. Cal. Jan. 6, 1998).

12. Lawmakers, behind the cover of "campaign finance reform," are attempting to establish sweeping federal controls over political communication. See Douglas Johnson & Mike Beard, "Campaign Reform": Let's Not Give Politicians the Power to Decide What We Can Say About Them (Cato Institute Briefing Paper No. 31, July 4, 1997) (on file with author).

13. See Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258 (1994); Johnson & Beard, *supra* note 12; Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45 (1997); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049 (1996).

14. While this article focuses on federal individual contribution limits, many of the same arguments apply to low contribution limits on the state level. Some states, such as Montana and Missouri, have adopted through ballot initiatives contribution limits as low as \$100 for state legislature seats. A BRIEF HISTORY OF MONEY IN POLITICS, CENTER FOR RESPONSIVE POLITICS 5 (1995).

15. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, tit. I, sec. 112(2), § 320, 90 Stat. 475, 486 *renumbered* by Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, tit. I, § 105(5), 93 Stat. 1339, 1354 (codified at 2 U.S.C. § 441a (1994)). The original version of the \$1000 contribution limit was enacted in the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, tit. I, § 101(a), 88 Stat. 1263, 1263, *repealed* by Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, tit. II, § 201(a), 90 Stat. 475, 496.

16. 2 U.S.C. § 441a(a)(1)(A) (1994).

campaign spending such as the Presidential Election Campaign Fund "check-off" and the coordinated spending limits for political parties.<sup>17</sup> We believe an increase in the individual contribution limit, along with continued indexing for inflation, should be a part of any campaign finance reform. Senator Mitch McConnell (R-Ky), the most vocal opponent in the Senate of McCain-Feingold-type campaign finance reforms, is a strong advocate of increasing the out-dated limits on individual hard money contributions.<sup>18</sup> Norman Ornstein, a senior fellow at the American Enterprise Institute, has recommended a substantial increase in the individual contribution limits from the present \$1000 to \$25,000, with annual adjustments for inflation,<sup>19</sup> and the American Bar Association (ABA) Standing Committee on Election Law has recommended that the current contribution limits be significantly raised, or at a minimum indexed for inflation.<sup>20</sup> Even President Clinton has conceded that "hard money contribution limits ought to be realistic in light of today's cost."<sup>21</sup>

But apart from these policy approaches, it is important to understand the new constitutional problems with the current \$1000 limit, which has now been in place for over twenty years. Because of inflation, the \$1000 individual contribution limit upheld in 1976 in *Buckley v. Valeo*<sup>22</sup> is worth only one-third of its original value. This means FECA no longer precludes just large contributions. Instead, the law now permits only contributions of a negligible value in terms of 1976 dollars, and no longer allows contributors to provide substantial financial assistance to candidates, who in turn are not able to amass sufficient resources to mount effective campaigns.

Accordingly, the distinction in degree between the value of \$1000 in 1976 and today has become a legal difference "in kind," making the current \$1000 individual contribution limit no longer narrowly tailored to the government's interest and therefore constitutionally impermissible.

## II. BUCKLEY CREATES THE FRAMEWORK FOR ANALYSIS OF CONTRIBUTION LIMITS

In the landmark case of *Buckley v. Valeo* the Supreme Court held that political contributions (the act of giving money to a candidate) and expenditures (candidates spending the money raised) were both forms of protected speech.<sup>23</sup> Contributions, however, were afforded less protection than campaign expenditures.<sup>24</sup> While the Court

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17. Revenue Reconciliation Act of 1993, Pub. L. No. 103-66, tit. XIII, ch. 1, § 13441, 107 Stat. 416, 567-68 (codified at 26 U.S.C. § 6096(a) (1994)) (increasing the individual contribution designation to the Presidential Election Campaign Fund from one dollar to three dollars); 2 U.S.C. § 441a(c), 26 U.S.C. §§ 9008(b)(5), 9035(a) (1994) (indexing for inflation the Presidential Election Campaign Fund, convention financing and the coordinated spending limits for political parties).

18. Senator Mitch McConnell, *The Money Gag*, NAT'L REV., June 30, 1997, at 36.

19. William Raspberry, *When Pigs Can Fly*, WASH. POST, Oct. 3, 1997, at A19.

20. Memorandum from Pauline Schneider, Chair of ABA Standing Committee on Election Law to Chairs and Liasons of ABA Sections, Divisions and Forums, Chair of the Task Force on Lawyers' Political Contributions, Presidents and Executive Directors of State Bar Associations (Dec. 12, 1997) (on file with author).

21. *Transcript of Clinton Remarks at DNC Dinner Jan. 8*, U.S. NEWSWIRE, Jan. 9, 1998, available in 1998 WL 5662097.

22. *Buckley v. Valeo*, 424 U.S. 1 (1976).

23. *Id.* at 14-23.

24. Justice Thomas, in his forceful concurring and dissenting opinion in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 116 S. Ct. 2309 (1996), argues that he "would reject the framework established by *Buckley v. Valeo* for analyzing the constitutionality of campaign finance laws [between contributions and expenditures] . . . . In my view, the distinction lacks

extended complete protection to campaign expenditures by striking down the FECA expenditure limits,<sup>25</sup> the Justices, in an oft-quoted paragraph, stated:

By contrast with a limitation upon *expenditures* for political expression, a limitation upon the amount that any one person or group can *contribute* to a candidate or [PAC] entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. *A limitation on the amount of money a person may give . . . thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.*<sup>26</sup>

The Court then noted that contribution limits are a "significant interference with protected rights of political association,"<sup>27</sup> and framed the applicable test as whether the federal government "demonstrates a *sufficiently important interest* and employs means *closely drawn to avoid unnecessary abridgment* of associational freedoms."<sup>28</sup> Thus, the test involves two determinations: (1) is the governmental interest sufficiently important, and if so, (2) is the restriction narrowly tailored to address the compelling interest without unnecessarily abridging freedoms of expression and association.<sup>29</sup> The restriction must be narrowly tailored in its effect on both the contributor's speech and the candidate's right to communicate his or her campaign message.

The *Buckley* Court then found the government's interest of avoiding corruption or the appearance of corruption to be the only lawful basis that could justify any limitation on campaign contributions.<sup>30</sup> The Court found this interest was sufficient to justify the limited effects upon First Amendment freedoms that a \$1000 contribution limit would have on individuals in 1976.<sup>31</sup>

constitutional significance, and I would not adhere to it . . . As Justice Burger put it: "[C]ontributions and expenditures are two sides of the same First Amendment coin." *Id.* at 2323, 2325. Justice Thomas continues, "[A] contribution is simply an indirect expenditure; though contributions and expenditures may thus differ in form, they do not differ in substance." *Id.* at 2327. The Citizen Legislative and Political Freedom Act, H.R. 965, 105th Cong. (1997), introduced by Congressman John Doolittle (R-Cal.) along with sixty-six cosponsors, provides a legislative response to Justice Thomas' concerns by repealing limits on both individual and political action committee contributions to candidates or parties, and by repealing limits on how much parties can contribute to candidates. In stark contrast, others, such as Judge Skelly Wright, argue that money is not speech, and therefore even political expenditures can be regulated without violating the speech rights of the person making the expenditures. J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

25. *Buckley*, 424 U.S. at 18-21.

26. *Id.* at 20-21 (emphasis added).

27. *Id.* at 25.

28. *Id.* (emphasis added).

29. For a statute to be closely drawn the means chosen must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989); see also *California Pro-life Council Political Action Comm. v. Scully*, No. Civ. S-96-1965, slip op. at 26-27 (E.D. Cal. Jan. 6, 1998) (citing *Ward* and *Service Employees Int'l Union v. Federal Political Practices Comm'n*, 955 F.2d 1312, 1322 (9th Cir. 1992)).

30. *Buckley*, 424 U.S. at 25-29.

31. *Id.* at 29.

Today, however, the value of a \$1000 contribution is just \$320 in terms of 1976 dollars.<sup>32</sup> As a result of inflation, the \$1000 FECA contribution limits are no longer constitutionally permissible under the *Buckley* framework stated above. In particular, the present nonindexed limits are no longer narrowly tailored because: (1) they reach smaller contributions that do not corrupt or give the appearance of corruption, (2) they do not allow the contributor to engage in meaningful expression and association through substantial contributions and (3) they do not allow many candidates to amass sufficient resources to effectively communicate a campaign message.<sup>33</sup> Although there is considerable overlap among these three points, each provides an independent and sufficient justification why the current individual contribution limits have changed "in kind" and are unconstitutional.

### III. THE "DIFFERENCE IN KIND" STANDARD FOR EVALUATING NONINDEXED CONTRIBUTION LIMITS

We begin from the baseline assumption that a \$1000 individual contribution limit was constitutionally permissible in 1976. While the *Buckley* Court refused to address the specific dollar amount of FECA's contribution limits, the Court did caution that if contribution limits are "too low," the limits could be unconstitutional.<sup>34</sup> This "too low" standard is of limited utility because it begs the question of when a limit actually becomes too low. We must look elsewhere in *Buckley* and more recent jurisprudence to determine when a contribution limit legally becomes too low. Although the Court in *Buckley* conceded that "a court has no scalpel to probe"<sup>35</sup> whether a different contribution limit would have served as well as the \$1000 ceiling, the Court continued that these, "distinctions in degree become significant only when they can be said to amount to differences in kind."<sup>36</sup>

For example, the *Buckley* Court employed its different holdings in *Kusper v. Pontikes*<sup>37</sup> and *Rosario v. Rockefeller*<sup>38</sup> to illuminate when a distinction in degree becomes a difference in kind.<sup>39</sup> The *Buckley* Court observed (and the Eight Circuit recently emphasized in *Carver v. Nixon*<sup>40</sup>) that the distinction between an eight month and a twenty-four month delay in the ability to vote was so large that it had a different

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32. As of January 1998, the \$1000 limit has a value of approximately \$320 in terms of 1976 dollars. Inflation is calculated using Consumer Price Index (CPI) data provided by the Bureau of Labor Statistics. Because December 1997 data was not available at the time of this article's publication, data for 1997 is an average of the monthly CPI from January to November 1997, and at 310.1% inflation from 1976 to 1997, \$1000 is now worth \$322.48. Assuming current inflationary trends (and for convenience), we rounded \$322.48 down to \$320.00. For an analysis of the impact of inflation on the value of contributions, see *Day v. Holahan*, 34 F.3d 1356, 1366 (8th Cir. 1994), in which the court stated that "a \$100 contribution in 1976 would have a value of \$40.60 in 1994 dollars, or approximately four percent of the \$1,000 limit approved in *Buckley*." Viewing the decreased value of an individual contribution from the time frame of the legislation, rather than *Buckley*, the value of \$1000 today was only \$300 when the limit was enacted in 1974. See *supra* note 15.

33. The current devalued limits also increase the need for candidates to spend time fundraising and increase reliance on political action committees, soft money and independent expenditures.

34. *Buckley*, 424 U.S. at 21.

35. *Id.* at 30 (citing *Buckley v. Valeo*, 519 F.2d 821, 842 (D.C. Cir. 1975)).

36. *Buckley*, 424 U.S. at 30; *California ProLife Council Political Action Comm. v. Scully*, No. Civ. S-96-1965, slip op. at 20 (E.D. Cal. Jan. 6, 1998).

37. *Kusper v. Pontikes*, 414 U.S. 51 (1973).

38. *Rosario v. Rockefeller*, 410 U.S. 752 (1973).

39. *Buckley*, 424 U.S. at 30.

40. *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995).

effect and became a difference in kind. *Rosario's* shorter delay was constitutionally allowable while *Kusper's* longer delay was not:<sup>41</sup> "Although the Court allowed an eight-month delay in *Rosario*, the almost two-year delay in *Kusper*, nearly three times the delay approved in *Rosario*, crossed the Constitutional line,"<sup>42</sup> amounting to a difference in kind.

As stated in *Buckley*, this "difference in kind" analysis is the framework for evaluating when a permissible contribution limit becomes impermissibly low. On its face, the ratio of the difference between what was ruled permissible in *Rosario* and impermissible in *Kusper* is similar to the ratio of the value of the individual contribution limit approved by the Court in 1976 and the value of a contribution under that limit today. Just as there was a three-to-one ratio between the permissible eight month delay and the impermissible twenty-four month delay, there is also an approximately three-to-one ratio between the value of a \$1000 contribution in 1976, and the value of \$1000 today, which is just \$320 in 1976 dollars. This comparable ratio of difference provides at least mechanical evidence of the changed nature of the \$1000 limit. More important, however, is the legal effect of the decreasing value of a \$1000 contribution. In the next section, we will examine this effect: first, on the government's interest in eliminating an appearance of corruption stemming from large contributions, second, on a contributor's associational and speech rights and third, on the candidate's right to communicate a campaign message. Together, these factors substantiate the argument that the diminishing value of a \$1000 contribution, after over two decades, has become a difference in kind rather than merely a distinction in degree.

#### IV. APPLYING THE "DIFFERENCE IN KIND" STANDARD TO THE CURRENT EFFECTS OF THE \$1000 CONTRIBUTION LIMIT

##### A. Significance of the Government's Interest in Avoiding the Appearance of Corruption

We believe the passage of time, and the decreased value of the \$1000 allowable contribution limit, have not diminished the government's interest in regulating campaign finance. Just as in 1976, the government's stated desire to prevent corruption and its appearance by limiting large campaign contributions remains today.<sup>43</sup> But the key

41. *Buckley*, 424 U.S. at 30. The Court in *Rosario* approved a party enrollment provision requiring a voter to enroll in the next party primary even though the cutoff date for enrollment could occur up to eight months before a presidential primary and up to eleven months before a nonpresidential primary. *Rosario*, 410 U.S. at 760. The Court held that the requirement was not arbitrary and unconnected to the important state goal of inhibiting party raiding. *Id.* In contrast, the same Court just a few months after the *Rosario* decision, ruled impermissible in *Kusper* a party enrollment requirement that prohibited a voter from voting in the primary election of a political party if he or she voted in the primary of another party in the preceding twenty-three months. *Kusper*, 414 U.S. at 61. The Court in *Kusper* reaffirmed its previous decision in *Rosario*, but held that the enrollment requirement at issue could potentially cause a two year delay for certain voters. The risk of a two year delay was enough to violate the voter's right to free political association. *Id.* at 51.

42. *Carver*, 72 F.3d at 641.

43. "[P]reventing corruption or the appearance of corruption are [sic] the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985); see also *Buckley*, 424 U.S. at 26-27. While it is possible that some courts would also regard eliminating "the corrosive and distorting effects" of money in the context of uncontrolled corporate spending, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), that rationale is not applicable to the present discussion of individual contributions.

inquiry is—at what point today is a contribution large enough to create an appearance of corruption,<sup>44</sup> and therefore trigger the state interest? In *Citizens Against Rent Control v. City of Berkeley*,<sup>45</sup> the Supreme Court emphasized that “Buckley identified a *single narrow exception* to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of *large contributions* to a candidate.”<sup>46</sup> In fact, the Eighth Circuit overruled the district court decision in *Carver* largely because the lower court did not understand that the state interest arises only with *large contributions*.

The district court held that “[u]nder *Buckley*, [the state] clearly has a compelling state interest in limiting campaign contributions.” This does not square with the interest of limiting “large campaign contributions” as defined in *Buckley*. The district court’s decision substantially broadens the compelling interest identified in *Buckley*. The district court erred as a matter of law in extending *Buckley* to the infinitely broader interest of limiting all, not just large, campaign contributions.<sup>47</sup>

*1. A \$1000 Contribution Today Does Not Have an Appearance of Corruption Because of Inflation and the Increased Cost of Running a Campaign since 1976.*

Inflation has devalued the allowable contribution limits to the point that the limits now prohibit contributions that are not “large” and do not present the commensurate opportunities for corruption, or even the appearance of corruption. If in 1976, a contribution limit of \$320 would not have been “focused precisely on the problem of large campaign contributions,” then Congress would not have been constitutionally justified in their infringement upon free speech in the name of avoiding corruption or its appearance. Campaign contribution limits are subject to the “closest scrutiny”<sup>48</sup> and therefore the state must not only demonstrate a “sufficiently important interest,” but must also employ means closely drawn to avoid the unnecessary abridgment of associational freedoms.<sup>49</sup> While some Justices have suggested in dicta that contribution limits are subject to some level of scrutiny lower than strict scrutiny,<sup>50</sup> other Justices have strongly disagreed.<sup>51</sup> The Eighth<sup>52</sup> and Ninth Circuits<sup>53</sup> have recognized

44. *National Conservative Political Action Comm.*, 470 U.S. at 499 (“[A] tendency to demonstrate distrust . . . is not sufficient.”); *California Prolife Council Political Action Comm. v. Scully*, No. Civ. S-96-1965, slip op. at 22 (E.D. Cal. Jan. 6, 1998) (“[T]he appearance of corruption must be more than illusory or conjectural.”).

45. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

46. *Id.* at 296-97 (citing *Buckley*, 424 U.S. at 28) (emphasis added).

47. *Carver*, 72 F.3d at 639 (citation omitted).

48. *Id.* at 636 (citing *Buckley*, 424 U.S. at 25 (quoting *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958))).

49. *Carver*, 72 F.3d at 636 (citing *Buckley*, 424 U.S. at 25; *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

50. See *Federal Election Comm’n v. Massachusetts Citizens for Life*, 479 U.S. 238, 259-60 (1986); *Citizens Against Rent Control*, 454 U.S. at 301 (Marshall, J., concurring in judgment); *California Medical Ass’n v. Federal Election Comm’n*, 453 U.S. 182, 196 (1981) (Marshall, J., plurality).

51. See *Colorado Republican Fed. Campaign Comm. v. Federal Election Commission*, 116 S. Ct. 2309, 2319 (1996) (Thomas, J., concurring); *Citizens Against Rent Control*, 454 U.S. at 302 (Blackmun and O’Connor, JJ., concurring in judgment) (“[O]rdinance cannot survive constitutional challenge unless it withstands ‘exact[ing] scrutiny.’”); *California Medical Ass’n*, 453 U.S. at 201-02 (Blackmun, J., concurring in part and in judgment).

52. *Carver*, 72 F.3d at 637.

53. *Harwin v. Goleta Water Dist.*, 953 F.2d 488, 491 n.6 (9th Cir. 1991) (requiring the govern-



that because the Court in *Buckley* articulated a strict scrutiny standard, and has not ruled differently since then, the rigorous standard of review applied in *Buckley* must continue to be employed. If there is not an appearance of impropriety inherent in a contribution as small as \$320 in 1976, then the current limit is not narrowly tailored, and therefore is impermissible.

Further, the increased overall cost of campaigns makes a \$1000 contribution much less significant than it was twenty years ago. In 1976 approximately \$540 million was spent on all United States elections, and by 1996 that figure jumped to over \$4 billion.<sup>54</sup> The amount spent on Senate and House campaigns dramatically increased from approximately \$195 million in the 1977-78 cycle to over \$765 million in the 1995-96 cycle,<sup>55</sup> or 387%. Simply put, a single \$1000 contribution certainly has less corrupting appearance in today's atmosphere of campaign spending than it did when examined by the Court in 1976.

## 2. *The Devalued Contribution Limit Has Led to Both the Appearance of Corruption and More Actual Corruption*

We also believe that the current artificially low contribution limit is actually counterproductive to the government's interest of preventing corruption. The nonindexed limit has led to evasion by both contributors and candidate committees as well as to the appearance of corruption, because money is now channeled away from disclosed hard money to other forms of candidate support which are illegal or not as fully regulated or disclosed.

The current ceiling on contributions has become so low in value that some contributors who want their voices heard are evading the law by contributing in other peoples names, such as through their children or employees. For example, the number of contributions of more than \$1000 from persons listed as students in Federal Election Commission (FEC) records has more than quadrupled since 1980.<sup>56</sup> This often occurs when the parents in a family give the maximum contribution to a candidate and then contribute more in their children's names. At least twenty-five, and perhaps fifty of the top 400 political donors in 1996 were joined by one or more of their children or grandchildren in giving to their favorite candidates.<sup>57</sup> In 1996 Bill Clinton received at least \$200,000 in "kid aid,"<sup>58</sup> and Senator Edward Kennedy raised \$65,000.<sup>59</sup> Many of these kiddie-cash donations come from sophisticated donors<sup>60</sup> who know the contri-

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ment to show "a sufficiently important interest and employ means closely drawn to avoid unnecessary abridgment of associational freedoms") (quoting *Buckley*, 424 U.S. at 25).

54. *Campaign Reform Dead? Not According to Public*, USA TODAY, Oct. 22, 1997, at 14A. These figures include the amount spent on all United States elections, including local, state and national offices, political parties, political action committees and ballot issues. See also *infra* Part IV(C) for a discussion of the increased cost of campaigns.

55. Federal Election Comm'n, Press Release (Apr. 14, 1997); see also HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM, 78-81 (1992).

56. Michelle Malkin, *Kiddie-Cash Collections Open Fund-Raising Loophole*, SEATTLE TIMES, May 27, 1997, at B4.

57. *Id.*

58. *Carl Kids*, DET. NEWS, Oct. 12, 1997, at B6. Bob Dole similarly raised \$35,000 from children donors. *Id.*

59. *Id.*

60. "Many of the young donors' parents are longtime political activists who know the rules. . . . David Grossman, the son of Steven Grossman (the DNC's new head) contributed \$25,000. When Hugh Westbrook headed the Democratic Senatorial Campaign Committee in 1993-94, it raised about 50 grand

bution limits but are determined to contribute enough to have their voice heard. While it is illegal to donate money in another person's name<sup>61</sup> the chance of enforcement is minimal.<sup>62</sup> As a result, this practice—which is illegal and appears corrupt—is becoming more widespread. This creates exactly the opposite result intended by the contribution limits: more, not less corruption.

A similar scheme for contributors to evade the contribution limits is for employers who wish to give over \$1000 to a candidate to have their employees contribute, and then reimburse them. In 1996 Boston industrialist Simon Firestone plead guilty to federal charges of making \$120,000 worth of reimbursements to individuals who contributed to Bob Dole's Presidential campaign. Firestone agreed to pay what was at that time a record fine of \$6 million.<sup>63</sup> While the Firestone violation certainly involved a larger sum of money than may be involved in most employee reimbursement schemes, it is representative of the often illegal lengths that contributors sometimes go to under the current limits to have their voices heard. Raising the contribution limit to a reasonable level (at least commensurate with what was approved by the Supreme Court in 1976) would allow the vast majority of contributors to have their voices heard in a direct, legal and fully and accurately disclosed manner.<sup>64</sup> While the evasion of laws by contributors must not be condoned, the perverse cause of this evasion and its appearance of corruption should also not be ignored.

Just as contributors have devised schemes to contribute more money, candidates and campaign committees have also become inventive with schemes to raise enough money to get their message out. A prime example is the Democratic Senatorial Campaign Committee's (DSCC) "Tally" program for contributors that have already reached their federal limit by contributing \$2000 to the primary and general election campaigns of their favorite Democratic senator. Under the Democrat's Tally program, a contributor can write a special \$20,000 check to the DSCC and make clear which senator they want the money to be spent on. The DSCC then tallies how much money was donated

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in kiddie cash. . . . Westbrook also had some familial help: His son, now college-age, has given more than \$25,000 over the years." David Mastio, *The Kiddie-Cash Caper: Gifts from Minors Are the Next Big Campaign Loophole* (last modified May 21, 1997) <<http://www.slate.com/Features/kiddiecash/kiddiecash.asp>>.

61. 2 U.S.C. § 441f (1994) ("No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.").

62. David Mastio explains that the FEC has never shown much interest in pursuing these violations and often accepts fantastic excuses. One father informed the FEC that his daughter earned the money for her \$1000 contribution from raising vegetables such as cucumbers and onions. Mastio, *supra* note 60.

63. *Promises, Promises in Washington*, BOSTON GLOBE, Jan. 26, 1997, at E6. Similarly, USA Waste Services Inc., owners of Empire Sanitary Landfill in Pennsylvania, agreed in October 1997 to pay an \$8 million fine for using corporate funds to reimburse employees for \$129,000 in campaign contributions to federal candidates. *Justice Hauls Biggest Fine Ever in Election Law Case: \$8 Million*, POL. FIN. & LOBBY REP., Oct. 22, 1997, at 1.

64. At the *Journal of Legislation's* Symposium on Campaign Finance Reform held on November 14, 1997, Common Cause's Donald Simon responded that this argument was like arguing that because people rob banks the laws against bank robbery should be eliminated. Videotape: Campaign Finance Reform (*Journal of Legislation* 1997) (on file with author). The difference, however, is that bank robbery is *malum in se*, while contributing \$3000 rather than \$1000 to a campaign is *malum prohibitum*. Although Common Cause may believe that campaign contributions are inherently evil, for those who believe that a campaign contribution is important First Amendment expression there is nothing that makes a \$3000 contribution morally different from a \$1000 contribution except that the larger contribution is statutorily prohibited.

to support that senator and earmarks that money to be spent on his or her race.<sup>65</sup> This tally both avoids the direct contribution limits and leads to an increased appearance of corruption because the prophylactic effect of disclosure is removed.<sup>66</sup>

One of the purposes of FECA was to provide strict disclosure requirements for contributions so that citizens, watchdog groups, a candidate's opponent and the media could monitor who contributed to which candidates and assure that there was no quid pro quo from the candidate in return. Low limits on individual and PAC contributions,<sup>67</sup> however, have pushed contributions out of the fully disclosed (and therefore easily monitored) realm of hard money into complex schemes like the DSCC tally program or into soft money and/or independent expenditures. Again, while illegal schemes cannot be condoned, raising the individual contribution limits would allow more contributions to be given and reported as hard money.<sup>68</sup> Our system actually prefers hard money because there are fewer restrictions on how it can be spent than soft money and the state interest of avoiding corruption or its appearance through the prophylactic effect of full disclosure.

#### **B. Contribution Restrictions Are No Longer Narrowly Tailored to Avoid Unnecessary Abridgment of Contributors' Political Speech**

Although the *Buckley* Court allowed contribution limits of \$1000, we suggest that they would not have permitted contribution limits of \$320 in 1976. The difference between the value of \$1000 and \$320 is so great that the lower limit is no longer narrowly tailored to the government's interest. The First Amendment will not allow limits that prohibit contributions of \$320 in terms of 1976 dollars because the limit is no longer narrowly tailored to address the identified evil without unnecessarily abridging First Amendment freedoms.

Chief Judge Emeritus Karlton of the Eastern District of California recently ruled that the contribution limits included in California's Proposition 208<sup>69</sup> were not constitutionally permissible because they were set at such a low level that they precluded the opportunity to conduct a meaningful debate.<sup>70</sup> Judge Karlton explained that "the adoption of the variable limits [of Proposition 208] reflects a conclusion on the part of

65. National political parties are allowed to make coordinated expenditures "in connection with the general election campaign of candidates for Federal office." 2 U.S.C. § 441a(d)(1) (1994). Specific figures for individual states are calculated pursuant to 2 U.S.C. § 441a(d)(3) (1994).

66. The DSCC was forced to pay a \$75,000 civil penalty in 1995 to the Federal Election Commission under the Conciliation Agreement for Matter Previously Under Review (MUR) 3620 (dealing with complaints filed by the John Seymour U.S. Senate Committee and the National Republican Senatorial Committee regarding the DSCC's "Tally" program). The DSCC, however, continued with its Tally program through the 1996 election cycle. See Federal Election Comm'n, Press Release: FEC Releases 10 Compliance Cases (Oct. 6, 1995), available in LEXIS, Campaign Library, Federal Campaign Finance File.

67. 2 U.S.C. § 441a(2) (1994) ("No multi candidate political committee shall make contributions-(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed \$5,000 . . .").

68. "Raising contribution limits would force money that is being contributed outside of the federal system, namely 'soft money,' back into the system. Funds within the federal system are subject to disclosure and thus accountable to the FECA and the public at large." Memorandum from Pauline A. Schneider, *supra* note 20, at 4.

69. California Political Reform Act of 1996, Proposition 208, Cal. Legis. Serv. A-6 (West) (codified at various sections of CAL. GOV'T CODE).

70. California Prolife Council Political Action Comm. v. Scully, No. Civ. S-96-1965, slip op. at 36 (E.D. Cal. Jan. 6, 1998).

the voters that the \$200 limit suffices to address the issue of corruption even if it is not the lowest amount which would do so.<sup>71</sup> Therefore, the lower California \$100 limit for some candidates is not closely drawn (and consequently impermissible) since it restricts associational rights to a degree unnecessary to achieve the governmental purpose.<sup>72</sup> Similarly, the *Buckley* Court's approval of the \$1000 contribution limit reflects a conclusion on the part of the Court that the \$1000 limit suffices to address the issue of corruption, even if it is not the lowest amount which would do so. Hence, today's limit worth \$320 is not narrowly drawn because it restricts associational rights to a degree unnecessary to achieve the governmental purpose.

The *Buckley* Court found that the FECA contribution limits were acceptable because "[t]he Act's \$1000 contribution limitation focuses *precisely on the problem of large campaign contributions*—the narrow aspect of political association where the actuality and potential for corruption have been identified."<sup>73</sup> Even assuming that most large contributors do not seek improper influence over a candidate's position or an officeholder's action, the *Buckley* Court held that the \$1000 limits are not overbroad because "[n]ot only is it difficult to isolate suspect contributions, but, more importantly, Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated."<sup>74</sup>

The FECA individual contribution limits, after twenty years of inflation, are no longer narrowly drawn to avoid unnecessary abridgment of contributors' First Amendment rights. *Buckley* stated that a \$1000 limit in 1976 did not unnecessarily restrict the contributor's rights because the Act.

leave[s] persons free to engage in independent political expression, to associate actively through volunteering their services, and to *assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources*. Significantly, the Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates and political parties.<sup>75</sup>

We believe many of today's contributors' rights are unnecessarily abridged. Although contributors are free to engage in independent expenditures and to volunteer services, the contribution limits no longer allow them to assist candidates with financial resources to a substantial extent. Providing \$1000 in 1998 money is no longer tantamount to substantial assistance to a candidate. Additionally, at some point in the future, the value of \$1000 will be almost negligible (say the equivalent of \$1 in 1976 money). At that point, a court would surely recognize the limits do not allow the contributor to assist to a substantial extent. The value of \$1000 in 1998 is sliding quickly and surely down the slope towards a negligible value, and is closer to being the equivalent of a "negligible \$1" in 1976 money than the \$1000 substantial contribution recognized by the Court in *Buckley*.

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71. *California Prolife Council Political Action Committee*, slip op. at 27.

72. *Id.* at 28.

73. *Buckley v. Valeo*, 424 U.S. 1, 28 (1976) (emphasis added).

74. *Id.* at 30.

75. *Id.* at 28-29 (emphasis added).

There are many ways for a supporter of a candidate to express views to a candidate and/or render assistance to the campaign. Methods for showing support range from the most basic (but ultimately important) act of voting, to writing a letter to express a viewpoint, to volunteering time or expertise, to contributing money. Contributions of money have a uniquely expressive value which can be separated, for example, from a vote, because contributions allow contributors to specify not only which candidates they agree with<sup>76</sup> but also the intensity of their support.<sup>77</sup> Additionally, the delivery of support by means of contributions, rather than only at the ballot box, has the advantage of funding the democratic process.<sup>78</sup> The participatory value of contributions, however, is undermined when the contribution limit is set too low. If, for example, affording opportunities for expression of the intensity of constituents' viewpoints are an important part of the democratic process, then severely limiting the way that intensity can be reflected is antidemocratic. In 1976, because so few people contributed over \$1000<sup>79</sup> this restriction was minimal. Now, however, because \$1000 is no longer perceived as a large contribution, the opportunity to register intensity of support is restricted.

### C. Contribution Limits No Longer Allow Candidates to Amass the Funds Necessary to Communicate a Campaign Message

The Court in *Buckley* recognized that, "Given the important role of contributions in financing political campaigns, *contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy.*"<sup>80</sup> Contribution limits are now having this feared impact on political expenditures. The \$1000 contribution limit, after twenty years of inflation, does not allow candidates to amass the sufficient campaign funds necessary to effectively communicate their campaign message. Candidates are well aware of the increased cost of campaigning, but are hampered by the outdated contribution limits of the 1970s. The harmful effects of the contribution limits on the candidate's ability to communicate are further exacerbated by two concurrent forces. From one direction is the decreased value of a \$1000 contribution and from the other is the increased cost (outpacing inflation) of running an effective modern campaign.

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76. David Strauss describes this as "the problem of bundling," and explains that "a system of delivering contributions might better reflect popular sentiment than a system of delivering votes." because "a voter is likely to approve of some positions a candidate takes and disapprove of others, but she can only vote in favor of or against the candidate's entire package . . . . A contributor can make a legislator's reward depend precisely on the degree to which the legislator has taken positions of which the contributor approves . . . ." David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1374 (1994); see also JAMES D. GWARTNEY & RICHARD E. WAGNER, *Public Choice and the Conduct of Representative Government*, in PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 10 (James D. Gwartney & Richard E. Wagner eds., 1988).

77. A voter cannot express degrees of enthusiasm for a candidate or views at the ballot box because of the limited options of voting for, voting against, or abstaining. A contributor, however, can give contributions in direct proportion to the intensity of his or her views. Strauss, *supra* note 76, at 1374.

78. *Id.* Campaign contributions devoted to conveying information and arguments from candidates to citizens is an essential function of a representative government. *Id.* at 1375.

79. See discussion *infra* Part IV(C).

80. *Buckley*, 424 U.S. at 21 (emphasis added).

Although many contributors would prefer to donate higher dollar amounts to insure their chosen candidate communicates effectively with the electorate, they are restricted by antiquated limits. In discussing the effect of the \$1000 limits, the *Buckley* Court stated,

There is no indication, however, that the contribution limitations imposed by the Act would have any *dramatic adverse effect on the funding of campaigns and political associations*. The overall effect of the [limits] is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.<sup>81</sup>

The *Buckley* Court found it particularly significant (noting twice) that 94.9% of funds raised by candidates for Congress in 1974 came from contributions of \$1000 or less.<sup>82</sup> The Court also stated that the contribution limits would not “undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by . . . candidates.”<sup>83</sup> This lack of concern by the Court about the effect in 1976 of the new contribution limits on the candidate’s ability to communicate was understandable at that time, because the limit was set high enough that it would only effect the 5.1% of contributors who gave contributions of over \$1000.

It is, of course, impossible to predict with certainty what percent of individual contributors would be responsible for contributions in excess of \$1000 if the contribution limit were raised or eliminated. Within the current constraints, however, there has been a clear trend towards larger individual contributions. In the 1996 election cycle not only were more funds raised from individual contributions over \$500 than under \$500,<sup>84</sup> but also, for the first time, more funds were raised from contributions of amounts between \$750 and \$1000 than from contributions of amounts less than \$200.<sup>85</sup> It has been estimated that a successful Republican presidential candidate in 2000 will have to find 18,000-19,000 contributors willing to donate \$1000 in order to raise the necessary \$32.1 million for the primary campaign.<sup>86</sup> Because the Republican universe of \$1000 donors appears to be around 50,000 nationwide,<sup>87</sup> it will be difficult for one candidate to convince over one-third of those possible donors to contribute \$1000. If the Court in 1976 had observed a situation (like the current one) where a

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81. *Id.* at 21-22 (emphasis added).

82. *See id.* at 21 n.23, 26 n.27.

83. *Id.* at 29.

84. *See* Federal Election Comm’n, Press Release 16 (Apr. 14, 1997) (on file with author).

85. *Id.* at 2. Individual contributions to both Senate and House campaigns in 1995-96 were as follows: contribution amounts less than \$200 totaled \$158,502,771, contribution amounts between \$200 and \$499 totaled \$55,460,410, contribution amounts between \$500 and \$749 totaled \$71,491,158 and contribution amounts more than \$749 totaled \$158,566,605. *Id.* at 16.

86. STAN HUCKABY, ANALYSIS OF THE FINANCIAL REQUIREMENTS FOR THE 2000 PRESIDENTIAL PRIMARY PROCESS 2 (1997). Similarly, the successful Democratic candidates in the 2000 presidential primary will need to find 16,000 contributors willing to donate \$1000. *Id.*

87. “The Republican universe of \$1,000 donors appears to be between 45,000 and 50,000 contributors. This number allows for contributors who gave to more than one 1996 primary candidate and those who decided they could not support any of the 1996 Republican candidates. . . . The Democrats’ universe of \$1,000 donors appears to be undefined as yet based on the large increase from 1992 to 1996 of \$1,000 donors.” *Id.* at 5.

substantial percentage of contributors were contributing over \$750 to campaigns, then it is likely it would not have approved a contribution limit set at \$1000 because the limit would "have a dramatic adverse effect on the funding of campaigns and political associations."<sup>88</sup> The adverse effect of the limit also raises representational concerns because those declining to run or retiring from the United States Senate now generally note as a reason the difficulty and time consuming nature of fundraising.<sup>89</sup>

A major force from the other direction is the increased cost since 1976 of running a modern campaign.<sup>90</sup> An example the *Buckley* Court used as demonstrative of the cost of campaigning was the cost of a newspaper advertisement.<sup>91</sup> The record shows that as of January 1, 1975, one full-page advertisement in a daily edition of a certain metropolitan newspaper (*The Washington Post*) cost \$6,971.04.<sup>92</sup> One full-page advertisement in a February 1998 daily edition of *The Washington Post* costs \$22,347.60.<sup>93</sup> Similarly, in 1974 a \$1000 contribution bought 10,000 first-class postage stamps. But today, a \$1000 contribution will buy only 3125 first-class stamps. That means a candidate needs to raise close to four times as much money to purchase a newspaper advertisement today, or raise three \$1000 contributions to mail the same number of campaign flyers as \$1000 reached in 1974.

Aside from the increased cost of traditional campaign methods such as newspaper advertisements and mailings, new technology and sophisticated campaign techniques have also increased the costs of an effective campaign beyond the increases attributed merely to inflation. While a congressional candidate in the 1970s might have been successful utilizing a volunteer campaign manager and treasurer, today an effective campaign has a professional (meaning paid) campaign manager and fundraising staff, and must budget for legal and accounting expenses (to fill out FEC forms and ensure compliance with the current amalgamation of laws) along with polling and campaign consultants to produce and place advertisements. Voters expect a credible candidate to have professional appearing and sounding commercials, which are expensive to produce. Once the commercials are produced, the proliferation of cable and satellite television stations means that viewers are no longer easily reachable through

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88. *Buckley*, 424 U.S. at 21.

89. Separate from the state interest of eliminating corruption or the appearance of it, scholars have argued that decreasing the amount of time candidates spend fundraising should be a goal of campaign finance reform. See Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994); BROOKS JACKSON, *HONEST GRAFT: BIG MONEY AND THE AMERICAN POLITICAL PROCESS* 91-92 (rev. ed. 1990); ELIZABETH DREW, *POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION* 96 (1983). Columbia Law Professor Vincent Blasi has taken the "need to protect candidates' time" argument a step further and suggested that candidate time protection is a permissible state interest under *Buckley*. Blasi, *supra*. While Blasi's premise that candidates spend too much time fundraising is certainly debatable, if he is correct then increasing the individual contribution limit addresses protection of candidates' time more effectively (in terms of First Amendment protection, and in practical application) than Blasi's preferred remedy of expenditure limits. As one Senator explained, "The 'money chase' is rhetoric, not reality. But if there is any truth to it at all, it is because of the added difficulty imposed by the 1974 contribution limits." Senator Mitch McConnell, *Campaign Finance "Reform": A View from Capitol Hill*, FREE SPEECH AND ELECTION LAW NEWS, Fall 1996, at 2.

90. The *Buckley* Court recognized, "The electorate's increasing dependence on television, radio and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." *Buckley*, 424 U.S. at 19.

91. *Id.* at 20.

92. *Id.*

93. Telephone Inquiry to the Advertising Department of *The Washington Post* (Feb. 5, 1998).

the placement of television commercials on the local broadcast network affiliates. Instead, the diffusion of viewers away from networks and towards other media sources has driven up the cost of purchasing a Gross Ratings Point.<sup>94</sup> Together, these factors require a campaign to raise vastly more money to have the same communicative impact. The present limit significantly impairs a candidate's ability to meet that challenge.

## V. CONCLUSION

In a democratic system of government where individual liberty interests are cherished, the right of citizens to participate in politics is not only desirable, but imperative. While there are many ways individuals can participate in elections, it is important that the competing ideas of the political marketplace (and not government regulation) determine who is and is not ultimately successful. *Buckley* and its progeny have repeated this commitment by reinforcing that the government may not interfere with the flow of political speech, absent a compelling governmental interest. While the interest of preventing corruption allows contribution limits to be imposed in our political marketplace, these limits may only remain if they are narrowly tailored and actually serve that interest.

Inflation in the 1970s gave rise to the term "bracket creep," when high inflation, coupled with nonindexed tax brackets, created new incentives for tax evasion and meant working families paid higher taxes but had less spending power. Congress finally remedied that situation in the early 1980s by passing legislation to index the tax brackets. But the same inflation which led to bracket creep has, over time, devalued the giving and spending power of the \$1000 federal individual contribution limits and created the force for its circumvention. The difference is that over twenty years later, and with individual contributions now worth less than one-third of their value when passed, Congress has still not raised or indexed the contribution limits. Because Congress has failed to act, FECA's antiquated contribution limits have created an unworkable, unsatisfying and, most importantly, unconstitutional condition in the one area of law that can least tolerate it. Absent immediate legislation which correctly remedies the situation,<sup>95</sup> the burden will once again fall on the judiciary to remedy unconstitutional impulses or effects of Congress' mismanagement of our First Amendment.

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94. Dave Mason of the Heritage Foundation has suggested that the cost of purchasing Gross Ratings Points may have doubled (or more) from just 1986 to 1996. Telephone interview with Dave Mason, Senior Fellow, Heritage Foundation (Oct. 1997).

95. Senator Mitch McConnell has introduced a bill which raises the individual contribution limit to presidential candidates to \$10,000 per election (\$20,000 per cycle). S. 1416, 105th Cong. (1997). Additionally, Senator McConnell advocates raising the individual contribution limits for Congressional races to \$3000 and indexing the limits for future elections.



