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Price Fixing on the Campaign Trail: Free Speech and Equal Protection Conflicts with Spending Limitations Established in the Federal Election Campaign Act Amendments of 1974

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NOTE

PRICE FIXING ON THE CAMPAIGN TRAIL: FREE SPEECH AND EQUAL PROTECTION CONFLICTS WITH SPENDING LIMITATIONS ESTABLISHED IN THE FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974

INTRODUCTION

In the years 1972 to 1974, the political institutions of the United States sustained the greatest scandal in our country's 200 years of existence. Watergate brought out all that is bad in political campaign financing: Individual donors' giving large sums of money to win influence of ambassadorships;[1] a former cabinet member's serving as a bag man, collecting illegal contributions from corporations fearful of retaliation if no donation were given;[2] large, unneeded sums of money's sitting in diverse bank accounts and private safes, eventually used to finance break-ins and hush payments.[3] It was these aspects of political fundraising, as well as others, that led one prominent Illinois fundraiser to the conclusion that "fundraising is a seamy, tawdry business, but it must be done."[4]

As the costs of campaigns continue to rise, the necessity for fundraising becomes more apparent. In 1968, approximately $300 million was spent on all elections held in the United States,[5] while in 1972, the figure rose to $400 million.[6] The 1972 primary and general election candidates for the House and Senate spent $77,255,078 for the period of April 7 through December 31.[7] The

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[1] *See* TIME, April 16, 1973, at 8.

[2] *See Hearings Before the Select Committee on Presidential Campaign Activities of the United States Senate*, 93d Cong., 1st Sess. 5494-521 (1973).

[3] *See* SUBMISSION OF RECORDED PRESIDENTIAL CONVERSATIONS TO THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES BY PRESIDENT RICHARD NIXON 188-207 (1974) (March 31, 1973, meeting between Richard Nixon and John Dean) (transcripts of White House tapes).

[4] Conversation with Angelo G. Geocaris, fundraiser for Illinois Governor Daniel Walker, winter 1973.

[5] H. ALEXANDER, POLITICAL FINANCING 38 (1972).

[6] *Hearings on S. 372 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 219 (1973) (statement by H. E. Alexander) [hereinafter cited as *1973 Hearings*].

[7] Common Cause Press Release, "Total Campaign Finances in the 1972 Congressional Races," Report No. 1, Sept. 13, 1973, on file with the *Denver Law Journal*.

Senate Commerce Committee in 1971 declared that one purpose of campaign reform was to "halt the spiraling cost of campaigning for public office."[8] Campaign spending seemed to be getting out of control.

These figures, however, need to be put in some perspective. The $300 million spent in 1968 represented less than one-tenth of one percent of all money spent by the government, and came to about $1.50 per citizen to elect over 500,000 political officials.[9] Proctor and Gamble in that same year spent $270 million on advertising alone.[10] These figures led Herbert Alexander, Director of the Citizens' Research Foundation and long-time advocate of campaign reform, to conclude that rather than being over priced, politics is underfinanced:

> $400 million is just a fraction of one percent of the amounts spent by governments at all levels, and that is what politics is all about, gaining control of governments to decide policies on, among other things, how tax money will be spent.[11]

While seemingly large amounts of money are spent in political campaigns, one must consider these costs in light of the educational function a campaign serves. The Committee report on the 1974 bill proposing spending ceilings cited a Harvard study suggesting that rather than too much, *not enough* money is being spent to educate the electorate.

> Watergate and related events tend to place the issue in the context of preventing excessive spending and controlling "corruption." The idea is that the less money spent, the less needs to be raised, and thus the purer the process. Completely neglected in this statement of the issue is the need for campaigns to serve the broader public purposes and currently proposed spending limits just would not permit this to be done.[12]

But the American people see otherwise. In a Gallup Poll taken in November 1972, those interviewed expressed an overwhelming desire to place limits on the amount of money in campaign coffers.[13] Two years later, the people had what they wanted.

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[8] S. REP. No. 92-96, 92d Cong., 1st Sess. 20 (1971).

[9] H. ALEXANDER, *supra* note 5, at 38-39.

[10] *Id.* at 39.

[11] *1973 Hearings*, *supra* note 6, at 219.

[12] H.R. REP. No. 93-1239, 93d Cong., 2d Sess. 152 (1974).

[13] Washington Post, Nov. 30, 1972, § A, at 2, col. 4. In response to the question, "Would you favor or oppose a law which would put a limit on the total amount of money which can be spent for or by a candidate in his campaign for public office?", the response

The Congress overwhelmingly passed the Federal Elections Campaign Act Amendments of 1974[14] (the Campaign Act of 1974), and it was signed into law on October 15, 1974. The key effects of this new law are to:

> (1) establish ceilings on the amounts an individual may contribute to any one campaign for federal office;
> (2) establish a $25,000 ceiling on the aggregate amount anyone may contribute to federal campaigns in any one election year;
> (3) establish a ceiling on the amount of personal funds a candidate for federal office may himself contribute to or spend on his own campaign;
> (4) establish limitations on campaign expenditures for congressional and presidential campaigns; and
> (5) provide for voluntary public financing of presidential primary and general elections.[15]

The first four provisions may well conflict with the first amendment guarantees of freedom of speech in that each would, to some degree, restrict the freedom of expression of both the candidates and the electorate. The fourth provision, the establishment of limitations on campaign expenditures, however, seems to be the most constitutionally infirm, both on its face and in its application.

While many in Congress expressed sincere reservations about ceilings on expenditures,[16] few voted against the bill the day it passed. This paradox is the natural consequence of a political process "filled with arbitrary compromises and responsive as in some degree it must be to . . . short run pressures . . . ."[17] One short-run pressure which must have been on the minds of the members of Congress when the final vote was taken was the un-

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was: Favor, 71%; oppose, 18%; no opinion, 11%. *Id.*

[14] The Campaign Act of 1974 passed the Senate by a vote of 60 to 16. 120 CONG. REC. S. 18,455 (daily ed. Oct. 8, 1974). It was passed by the House by a vote of 365 to 24. *Id.* at H.R. 10,344-45 (Oct. 10, 1974).

[15] Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263 (codified in scattered sections of 2, 18, 26 U.S.C.A.).

[16] *See generally* 120 CONG. REC. (daily ed. March 26, 27, 29; April 1-5, 8-11, 1974) (S. 3044 considered and passed by the Senate); *Id.* (Aug. 7, 8, 1974) (H.R. 16,090 considered and passed by the House); *Id.* (Oct. 8, 1974) (Senate considered and passed the Conference Rep.); *Id.* (Oct. 10, 1974) (House considered and passed the Conference Rep.); *1973 Hearings, supra* note 6; *Hearings on H.R. 7612 [and] S. 372 Before the Subcomm. on Elections of the Comm. on House Administration*, 93d Cong., 1st Sess. (Supp. 1973) [hereinafter cited as *Hearings on H.R.* 7612 (Supp.)].

[17] Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CINN. L. REV. 199, 220 (1971).

pleasant and politically unpopular task of having to explain to their constituents a vote against reform legislation in a campaign year dominated by corruption.

In this as in other instances, legislators' votes may result from the pressures of Gallup Polls, constituent demands, and national scandal rather than from consideration of more enduring values, such as constitutional considerations. Senator James Buckley lent support to this belief when he stated on the floor of the Senate that the constitutional aspects of the Campaign Act of 1974 were almost totally ignored by the Congress.[18] One reason the constitutional aspects are not accorded their due respect in the halls of Congress may be the result of "a feeling that because the Supreme Court has the ultimate say on most constitutional issues, other institutions of government, not to mention citizen observers, need not concern themselves with the constitutionality of legislative action."[19]

This note is directed generally at the issues a court of law must consider in passing upon the constitutionality of placing limitations on campaign expenditures, with specific references to the ceilings provided for in the 1974 Act. The discussion is limited to congressional ceilings; consideration of the issues behind ceilings on presidential campaigns is omitted.

I. SPENDING LIMITATIONS AND FREE SPEECH

A. *Speech in a Political Setting*

The Campaign Act of 1974 provides for expenditure ceilings on the amounts of money which may be spent for political campaigning in both Senate and House races.[20] The Act also contains

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[18] 120 CONG. REC. S. 5707 (daily ed. April 10, 1974).

[19] H. PENNIMAN & R. WINTER, CAMPAIGN FINANCES: TWO VIEWS OF THE POLITICAL AND CONSTITUTIONAL IMPLICATIONS 59 (1971).

[20] 18 U.S.C.A. § 608(c)(1)(C)-(E) (Supp. I, 1975).

> (c)(1) No candidate shall make expenditures in excess of—
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> . . . .
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> (C) in the case of any campaign for nomination for election by a candidate for the office of Senator or by a candidate for the office of Representative from a State which is entitled to only one Representative, the greater of—
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> (i) 8 cents multiplied by the voting age population of the State
>
> . . . ;
>
> or
>
> (ii) $100,000;
>
> (D) in the case of any campaign for election by a candidate for the office of Senator or by a candidate for the office of Representative from a

a provision excluding from the ceilings those costs, up to 20 percent of the appropriate spending ceiling, incurred in the course of raising funds.[21] Thus, for example, a candidate for the House from a state having more than one representative, may spend in each election $84,000, *i.e.*, the $70,000 ceiling plus an additional 20 percent, or $14,000, if at least $14,000 of a candidate's expenditures have been incurred in the course of raising funds. There is, in addition, a provision in the law which ties the ceiling level to any rise in the cost of living.[22]

While the ultimate effects of a limitation on campaign expenditures may be the subject of much dispute and diverse opinion, one effect of the new law seems very clear: It results in an infringement of the freedom of speech guaranteed by the first amendment.[23]

State which is entitled to only one Representative, the greater of—

(i) 12 cents multiplied by the voting age population of the State . . . ;

or

(ii) $150,000;

(E) $70,000, in the case of any campaign for nomination for election, or for election, by a candidate for the office of Representative in any other State . . . .

[21] 18 U.S.C.A. § 591(f)(4)(H)(Supp. I, 1975).

(f) "expenditure"— . . . .

(4) does not include—

. . . .

(H) any costs incurred by a candidate in connection with the solicitation of contributions by such candidate, except that this clause shall not apply with respect to costs incurred by a candidate in excess of an amount equal to 20 percent of the expenditure limitation applicable to such candidate under section 608(c) of this title . . . .

Id.

[22] *Id.* § 608(d)(1):

At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the per centum difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period. Each limitation established by subsection (c) and subsection (f) shall be increased by such per centum difference. Each amount so increased shall be the amount in effect for such calendar year.

[23] 120 CONG. REC. S. 5703 (daily ed. April 10, 1974) (remarks by Senator Buckley). *See also* R. WINTER, CAMPAIGN FINANCING AND POLITICAL FREEDOM (1973); Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51 N. CAROLINA L. REV. 387 (1973) [hereinafter cited as Fleishman]; Rosenthal, *Campaign Financing and the Constitution*, 9 HARV. J. LEGIS. 359 (1972).

One reason that free speech is so greatly affected by ceilings on spending can be found in the changing nature of campaigns. A soapbox campaign, as an effective means of communicating with a large percentage of the population, has long since become obsolete. In today's complex society, wide-spread communication of a candidate's views and positions requires substantial expenditures of money for media, literature, mailings, and organization. To the degree that a spending ceiling limits these activities, a candidate's free speech—his right to communicate with the voters—has been abridged. Professor Ralph Winter has advanced the proposition that if free speech does nothing else, it protects "explicit political activity;"[24] he argues that a ceiling on spending is merely an attempt to limit this protected activity.[25]

The Washington State Supreme Court has recently struck down a state statute which established ceilings on campaign expenditures.[26] While relying on the principle of vagueness in reaching its determination of unconstitutionality, the court found a serious first amendment infringement in that a ceiling

> is fatally defective because it can operate to prohibit absolutely plaintiff and others from exercising their constitutionally guaranteed freedom of speech. The defendants argue that the section merely imposes a regulation on the amount of money which can be spent in communicating. However . . . [t]o communicate effectively with the mass of voters, one cannot be limited to verbal communication person-to-person, but must use the media in one form or another.[27]

There is also support for the argument that expenditure ceilings prohibiting one from making an individual contribution may violate one's freedom of association. *See* 120 CONG. REC. S. 18,537 (daily ed. Oct. 8, 1974) (remarks of Senator Buckley). Professor Winter has said:

> Contributions to a candidate permits individuals to pool their resources and voice their message far more effectively than if each spoke singly. This is critically important because it permits citizens to join a potential organization and propagate their views beyond their voting districts.

R. WINTER, *supra* note 23, at 64. While the Constitution makes no mention of freedom of association, it has evolved as an important element of the first amendment. The Supreme Court stated in NAACP v. Alabama, 357 U.S. 449, 460 (1958), that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *See also* Williams v. Rhodes, 393 U.S. 23, 30 (1968).

[24] H. PENNIMAN & R. WINTER, *supra* note 19, at 60.

[25] *Id.*

[26] Bare v. Gorton, 84 Wash. 2d 380, 526 P.2d 379 (1974).

[27] *Id.* at 385, 526 P.2d at 382.

In order to evaluate the degree to which the free exercise of speech is affected, it is necessary to put the infringed right in its proper milieu. This law is not aimed at speech which can be characterized as obscene, loud or raucous, inciteful, or inimical to the concepts of our democratic process. Rather, the type of speech curtailed by campaign spending ceilings forms the very basis of the responsive, democratic form of government which we have enjoyed since the founding of the nation. This speech is "the rock on which our government stands."[28]

The Campaign Act of 1974 is a legislative attempt to establish a limit on the amount of speech which may be undertaken during the course of a campaign for federal office. The words of Justice Black in *Mills v. Alabama*[29] have an unmistakable relevance to this attempt by the Congress to limit campaign debate:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course included the discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.[30]

All hard fought campaigns for the U. S. Congress embrace discussions of candidates, structures and forms of government, and the manner in which government is or should be operated.

It is generally accepted that free speech is not guaranteed to all speaking.[31] However, when one speaks to the issues upon which voters must decide, speech should be afforded its greatest protection, for one of the purposes of the first amendment

> is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal. When a free man is voting, it is not enough that the truth is known by someone else . . . . The voters must have it, all of them. The primary purpose of the First Amendment is, then, that all the citizens shall as far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them.[32]

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[28] A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 91 (1948).
[29] 384 U.S. 214 (1966).
[30] *Id.* at 219.
[31] Schenck v. United States, 249 U.S. 47 (1919).
[32] A. MEIKLEJOHN, *supra* note 28, at 88-89.

The Supreme Court has recognized in numerous landmark cases that the high degree of protection assigned political speech is the necessary consequence of any self-government.[33] This is true not simply for the benefit of those expounding diverse ideas, nor for the benefit of candidates debating the crucial issues of any one campaign. Rather, the freedom of speech in a political setting is afforded the greatest protection for the benefit of those who must decide how to cast their votes each and every time an election is held. The Supreme Court has long recognized the importance of receiving information as the corollary to the first amendment right to freedom of speech, and has made constant references to this right.[34] Throughout the discussion of the constitutionality of spending limitations on campaigns, the right of the people to receive adequate information on which to base their votes must not be forgotten.[35]

In turning to the role of the Court in passing upon the constitutionality of the Campaign Act of 1974, it is well to keep in mind the words of Justice Brennan in *New York Times Co. v. Sullivan*.[36] Like that case, any case in which the Court considers the constitutionality of the spending ceilings will be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open . . . ."[37]

B. *The Court's Approach to Infringements on Speech*

It has been a long-acknowledged principle of law that although the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech,"[38] this is not itself an absolute prohibition against laws which may for various reasons infringe on this freedom.[39] The Court has from time to time estab-

[33] *See* Mills v. Alabama, 384 U.S. 214 (1966); Garrison v. Louisiana, 379 U.S. 64 (1964); Wood v. Georgia, 370 U.S. 375 (1962); Terminiello v. City of Chicago, 337 U.S. 1 (1949).

[34] *See* Bullock v. Carter, 405 U.S. 134 (1972); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Mills v. Alabama, 384 U.S. 214 (1966); Griswold v. Connecticut, 381 U.S. 479 (1965); United States v. CIO, 335 U.S. 106 (1948); Martin v. City of Struthers, 319 U.S. 141 (1943).

[35] *See* Comment, *Free Speech Implications of Campaign Expenditure Ceilings*, 7 HARV. CIV. RIGHTS—CIV. LIB. L. REV., 214, 225-29 (1972).

[36] 376 U.S. 254 (1964).

[37] *Id.* at 270.

[38] U.S. CONST. amend. I.

[39] *See* Adderly v. Florida, 385 U.S. 39 (1966); Feiner v. New York, 340 U.S. 315 (1951);

lished various tests by which it can judge the alleged infringements to determine their constitutionality. Three tests have emerged as a guide for the Court: (1) the local community standards test;[40] (2) the clear and present danger test;[41] and (3) the "balancing test."[42] Each test is more or less designed as a test of a particular type of infringement in a specific context. The local community standard test has been applied to speech attacked as obscene;[43] the clear and present danger test has been used in the "regulation of subversive activity and of the publication of matter thought to obstruct justice;"[44] and the balancing test has been applied "primarily in the case of regulations not intended directly to condemn the content of speech but incidentally limiting its exercise."[45]

It is clear that the establishment of ceilings on expenditures does not fit within the context of the local community standard test. The applicability of the clear and present danger test is inappropriate because excessive spending in campaigns could hardly be considered as subversive activity "believed to endanger the safety of the Nation."[46] This is particularly true in light of the Court's decision in *Brandenburg v. Ohio*,[47] which further limited this test to advocacy "directed to inciting or producing imminent lawless action and [which] is likely to incite or produce such action."[48] The imminency required by *Brandenburg* is absent in the case of excessive campaign expenditures.

It is the balancing test which is most likely to be applied by the Court in reaching a determination of the constitutionality of spending ceilings, for, at least ostensibly, the purpose of Congress in enacting the ceiling was not to limit the content, but to limit the unnecessary and excessive exercise of campaign speech.[49] One

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Kovacs v. Cooper, 336 U.S. 77 (1949); Abrams v. United States, 250 U.S. 616 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).

[40] Miller v. California, 413 U.S. 15 (1973).

[41] Schenck v. United States, 249 U.S. 47 (1919).

[42] Konigsberg v. State Bar, 366 U.S. 36 (1961).

[43] Miller v. California, 413 U.S. 15 (1973).

[44] Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 11 (1965).

[45] *Id.*

[46] *Id.* at 8.

[47] 395 U.S. 444 (1969).

[48] *Id.* at 447.

[49] *But see* text accompanying notes 121-38 *infra*.

must, therefore, scrutinize the balancing test itself, in relation to the ceilings established in the Campaign Act of 1974, to arrive at a conclusion as to the constitutionality of the ceiling.

C. *The Balancing Test*

Very simply stated, the balancing test is a weighing of the interests sacrificed against the value to society of the goals sought to be achieved by a particular act of Congress.[50] In the case of ceilings on campaign spending, the interests sacrificed are first amendment freedoms in a political setting. These must be balanced against the government's interest in the preservation of the purity of the electoral process. In *United States v. O'Brien*,[51] Chief Justice Warren summarized the nature of the requisite governmental interest as well as the degree of balancing necessary for legislative infringements on protected freedoms to survive the scrutiny of the Court:

> To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[52]

Under this test, a legislative infringement on first amendment freedoms is likely to be upheld only if four elements are satisfied: (1) there is constitutional power to legislate; (2) an important or substantial interest is furthered; (3) the interest is unrelated to suppression of speech; and (4) the restriction on first amendment freedoms is incidental and no greater than is essential to promote the interest. Congressional power to regulate campaign spending, the first element of the *O'Brien* test, is clearly granted in article I, section four of the Constitution[53] and is also implied in the

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[50] Rosenthal, *supra* note 23, at 372.

[51] 391 U.S. 367 (1968).

[52] *Id.* at 376-77 (footnotes omitted).

[53] The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. CONST. art. I, § 4(1).

Commerce Clause. Therefore no discussion of this element will be undertaken.[54]

1. Furtherance of a Substantial Interest

The second element of the test enumerated in *O'Brien* is that to justify legislative infringement on speech, an important or substantial interest must be promoted. Prevention of numerous evils has been advanced as the government's interest in campaign reform generally, and in ceilings specifically. The rationale for reform can generally be resolved into three catagories: (1) fear that the high cost of campaigns will lead to a dependence on a small number of large contributors; (2) fear that the inequalities which result from one candidate's having far greater financial resources will lead to a highly unbalanced presentation of candidates' views and qualities before the American electorate, and that competition among candidates will be distorted by inequality of opportunity to communicate with the voters; and (3) fear that spiraling campaign costs will deter many well qualified people from seeking office.[55] While a limitation on expenditures may appear to meet these evils head on and thus accomplish the goals, a closer evaluation reveals that a ceiling may not inhibit them at all.

a. *Candidates' Dependence on Large Contributors*

It has been suggested that a limit on spending can reduce the financial liabilities of candidates who must raise large sums of money to campaign for public office.[56] This line of reasoning is predicated on the belief that the more money a candidate spends, the more likely it is that the candidate will turn to large donors. While certainly true in a good many instances, this is by no means the universal case. The Tenth Congressional District of Illinois was the site of one of the closest as well as the most expensive House race in 1974.[57] Yet the entire amount spent was

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[54] *See* A. ROSENTHAL, FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS 12-15 (1972). *See also*, United States v. CIO, 335 U.S. 106 (1948); United States v. Classic, 313 U.S. 299 (1941); *Ex parte* Yarbrough, 110 U.S. 651 (1884); *Ex parte* Siebold, 100 U.S. 371 (1879).

[55] *See* Rosenthal, *supra* note 23, at 360.

[56] Note, *Campaign Spending Regulation: Failure of the First Step*, 8 HARV. J. LEGIS. 640, 646 (1971).

[57] Both candidates, according to reports filed with the Clerk of the House of Representatives, spent a combined total of $537,474. Common Cause Press Release, April 11, 1975, on file with the *Denver Law Journal*. The winner received 51.3 percent of the vote.

financed by contributions limited to $3,000 per contributor.[58] Abner Mikva, the Democrat and ultimate victor, received close to half of his funds in contributions of under $100.[59]

While one need not always resort to large donors as one's spending increases, the influence of large donors would not necessarily be removed by the establishment of an expenditure ceiling. Were there no attempt to limit the size of contributions,[60] one could still receive the entire ceiling amount from large donors. Thus it is a reduction in the level of individual contributions, not the establishment of ceilings on expenditures, that will serve to eliminate the potentially corruptive effects of large donations.

Additionally, in establishing a maximum ceiling of $168,000 in a race for the House,[61] it is possible, even with a provision limiting individual contributions to $1,000 or less, that some individuals wishing to donate to the candidate of their choice may be barred by a prior attainment of the ceiling limit by the candidate. This potential turning away of donors is exactly the opposite of what is desired. According to Representative James Cleveland, "Often the act of contributing is the most direct opportunity open to the individual, beyond the act of voting, to express his will. We should preserve this, expand it, and give even greater leverage to the small individual contributor."[62] Studies show us that only 14 percent of the voters have even been asked to contribute, and only 9 percent have ever done so.[63] If the ranks of contributors are to

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[58] Both Mikva and Young adhered to a self-imposed limit of $3,000 per contributor. The Campaign Act of 1974 effectively limits the individual to a contribution total of $2,000—$1,000 in the primary, and $1,000 in the general election. *See* note 60 *infra*.

[59] Interview with Jack Marco, former campaign manager for Representative Abner Mikva, in Skokie, Ill., March 24, 1975.

[60] The Campaign Act of 1974 does provide for a ceiling on contributions:

> (b)(1) Except as otherwise provided by paragraphs (2) and (3), no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1,000.
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> . . . .
>
> (5) The limitations imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

18 U.S.C.A. § 608(b)(1) & (5) (Supp. I, 1975).

[61] The candidate is allowed $84,000 for the primary and $84,000 for the general election. *See* notes 20 & 21 *supra*.

[62] *Hearings on H.R.* 7612 (Supp.), at 3.

[63] *Id.* at 9 (statement by Representative H. Johnson). *See generally 1973 Hearings*,

expand in number, the law must provide greater incentives for small individual contributions, not prohibitions against them.

The central point is this: Very few people could suggest that a candidate had developed financial liabilities no matter how much he spends, providing that the money came from the right places and in small enough amounts.[64] A ceiling will neither ensure that the source is beyond reproach, nor that the amounts given are small.

b. *Inequality of Financial Resources and Unbalanced Presentation*

A second interest of reform legislation is the elimination of inequalities of opportunity to communicate with the voters in order to assure a balanced presentation of all sides of every issue, and to prevent a candidate with greater resources from drowning out the voice of his opponent with massive media, mailings, or organization.

It becomes apparent that ceilings on expenditures fail to achieve the desired result. Those who have the greatest difficulty in projecting their views and qualifications before the voters, and who are supposedly the ones who would benefit the most from a limitation on spending, are third party candidates and those with meager financial resources, poor name recognition, or poor issue identification. Professor Martin Redish discusses the plight of the resourceless candidates who cannot afford to put their views across to the electorate:

> [S]pending limitations . . . fail to aid poorer third parties or financially lacking candidates in a manner which advances the fundamental goals of the first amendment. For such limitations in no way help these individuals familiarize the public with their names and policies. At most, all the spending ceilings can hope to do is to keep the voters as unfamiliar with the candidates who have access to large financial support as they are with the less wealthy. In the words of one commentator, "the most important effect of money in a political campaign is not that the candidate with the most money will win, but that the candidate with the lesser amount of money will not be able to present his case to undecided voters."[65]

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supra note 6, at 109-26 (testimony of Senator G. McGovern).

[64] *1973 Hearings*, *supra* note 6, at 61.

[65] Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U.L. REV. 900, 919 (1971) (footnotes omitted).

It is immediately obvious that a ceiling will not provide the poorer candidate with postage for district-wide mailings or cheaper rates for television spots. Instead, the only effect will be to curtail the amount of information voters will be able to receive from the more wealthy candidates. From this perspective, a ceiling acts more as a penalty on wealth than as an aid to those most in need; money is effectively taken from the purse of the rich, but is not in any way distributed to the poor. The uninformed become less informed.

To meet the goal of an educated electorate one needs to develop the concept of a floor, not a ceiling.[66] Reform legislation should provide a certain minimum resource level for bonafide candidates so as to guarantee that even the less wealthy or less well known candidates can achieve a minimum of name recognition and publicity. Such a proposal will be examined below.[67]

The use of a ceiling as a device to prevent one candidate from drowning out his opponent has found adherents in the halls of Congress, where incumbents have expressed alarm at the possibility that a wealthy candidate may enter a race, pour thousands of dollars into a media campaign, and thereby effectively neutralize the advantage of name recognition which an incumbent enjoys.[68] An argument can be made that extravagant media campaigns can drown out opponents. It may also be contended that such campaigns cheapen the electoral selection process by promoting images and impressions rather than issues and programs, thereby lessening the educational role of a campaign. There are grave questions, however, as to a ceiling on expenditures as a means to rectify these evils.

In drafting the first amendment, our Founding Fathers must have placed a great deal of faith in the people to sift through all the campaign rhetoric that might pass their way. The dreaded effects of a media campaign on a voter should be considered in light of a basic faith in the American electorate.

> This concern over information which "insults" the voter or "overwhelms" him represents a basic lack of faith in the ability of the individual to sort out the logical from the illogical, the important

[66] On the subject of floors, *see* Fleishman at 479; *1973 Hearings*, *supra* note 6, at 224.

[67] *See* notes 116-20 *infra*, and accompanying text.

[68] *See generally 1973 Hearings*, *supra* note 6, at 95-98 (testimony of Representative Murphy).

> from the frivolous. Whether such a lack of faith is justified is open to question. But the fact remains that the first amendment, and indeed the whole concept of self-government, are premised on the concept that the individual does have this ability (whether he chooses to use it or not), and until that concept is rejected, any governmental efforts to protect the public from confusing or irrational information in the political sphere must be considered inconsistent with the policy of the first amendment. The theory of the "marketplace of ideas" is that irrational information will merely spotlight by contrast the rational or correct course.[69]

If a media campaign is to be rejected, it should be rejected by the people who are subjected to it, not by a legislative act which infringes on first amendment rights. Evidence does support the theory that voters will reject a campaign which they consider to contain excessive media.

A 1974 post-election survey in the Tenth Congressional District of Illinois revealed one voter who did indeed "reject" what she thought to be excessive advertising.[70] The Mikva campaign, as its only attempt at broadcast media advertising during the 1974 elections, developed a radio spot in which the interest group ratings of the two candidates were compared. The same advertisement was run several times a day for several weeks. In the post-election survey, the respondent, a Democrat, gave this as her reason for voting as she did:

> Well, I think Mikva (the Democrat) is the most qualified. I have always liked him and voted for him in 1972. But it's funny, I got so sick of hearing that damn commercial about the ratings that I voted for Young. You probably think that's stupid, don't you?[71]

While it is apparent that this woman rejected what she considered to be excessive advertising, consideration should also be given to the voter who seldom listened to the two stations on which the advertisement was broadcast, and heard it for the first time only days before the election. It is true that if someone hears a commerical 30 times and receives the entire message the first 3 times they hear it, the last 27 times may be wasted.[72] This is not true, however, for those individuals who hear it for the first time

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[69] Redish, *supra* note 65, at 911 (footnotes omitted).

[70] This survey, in which the author took part, was designed to give the Mikva campaign some indication of the effectiveness of various campaign activities.

[71] Telephone interview in Evanston, Ill., Nov. 12, 1974. The respondents were asked to name two or three reasons why they voted as they did.

[72] Redish, *supra* note 65, at 913.

on the 16th, 25th, or 30th time it is broadcast. There were surely a good many individuals in the Tenth District who never once heard that "damn commercial about the ratings," as well as many who heard it once or twice, but not enough to recall the content. A spending ceiling may prevent more individuals from hearing such campaign advertisements. Therefore, not merely the right of a candidate to broadcast his views, but also the first amendment right of the voters to hear these broadcasts is at stake.

Finally, an attempt to equalize opportunity to be heard in the campaign forum falsely assumes "that someone—presumably Congress—knows how much information is the right amount . . . ."[73] There is, however, inherent in any attempt by the Congress to establish a ceiling the following "Catch-22."

There are two competing factors which must be taken into account in setting the ceiling, and in the final analysis, they are mutually exclusive. First, unless the ceiling is set fairly high, few challengers will be able to mount a successful campaign against an incumbent. The advantages of incumbency, in terms of name recognition, constituent service, and the advantages that inhere in most all elective offices, are formidable obstacles to overcome.[74] Second, to be balanced against this need for a high ceiling is the need for a ceiling low enough to ensure that a candidate of limited means will not be outspent by too great a margin. If the ceiling adopted by Congress in the Campaign Act of 1974 is supposed to meet this goal, it has missed its mark, for the ceiling established is far too high to aid most of the resourceless candidates. The average amounts raised by incumbents and challengers in House contests in 1972 were $58,359 and $31,355 respectively.[75] The average raised by incumbents actually falls short by $25,641 of what candidates may now spend in the primary alone. An additional $84,000 may then be spent in the general election. To the average challenger who was able to scrape up only $31,355 in 1972, it will be small comfort to realize that the incumbent is limited to a mere $168,000 in his combined 1976 primary and general election campaign.

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[73] Fleishman at 455.

[74] *See* text accompanying notes 160-75, *infra*.

[75] Rohde, *Public Financing of Federal Election Campaigns*, 6 COLUM. HUMAN RIGHTS L. REV. 43 (1974).

The ceiling that has been set for the House races—$84,000 each for the primary and the general campaigns—is clearly too high to aid a candidate with limited resources. This ceiling may also be too low to enable an effective challenge against an incumbent.[76] This leads to the conclusion that:

> [I]f one really believes the people are so easily fooled and so in need of protection, there is no end to the campaign tactics eligible for regulation and no end to the need to increase the power of those *not* fooling the public. Indeed, the most disquieting aspect of the drive to regulate campaign money is that so many of its adherents view themselves as possessing a monopoly of political truth.[77]

c. *Deterrence of Potential Candidates*

Finally, there is the question of deterrence: Will able candidates be deterred from running for office by large campaign costs? The most important aspect in an analysis of this question relates to the availability of funds, and to the factors which determine to whom campaign donations go. The traditional argument is that money flows to incumbents,[78] not to challengers. If this is in fact true, then challengers may well be deterred from entering a race. In the 1972 House races, incumbents were able to outraise their challengers by a margin of almost two to one.[79] On the Senate side the inequality was even greater, incumbents raising $525,809 and challengers only $243,070.[80] Common Cause has gone so far as to declare that we have a party of neither Democrats nor Republicans, but "an Incumbency party which operates a monopoly."[81]

There is, however, an alternative theory to suggest to whom money flows and why. Professor Fleishman suggests that the amount of money raised is an indication of a candidate's support, rather than the means of his obtaining support.[82] The hypothesis is that the more likely to win a candidate appears, the more support he will have and the more money he will attract, whether an incumbent or a challenger. The reverse would also be true: The

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[76] *See* text accompanying notes 147-50, 157-59, *infra*.

[77] R. WINTER, *supra* note 23, at 12.

[78] This is the conclusion reached by Common Cause after an extensive analysis of 1972 campaign spending. 31 CONG. Q. WEEKLY REP. 3130 (1973).

[79] Rohde, *supra* note 75.

[80] *Id.* at 44.

[81] Common Cause, *supra* note 7, "Common Cause Releases Study of 1972 Congressional Campaign Finances."

[82] Fleishman at 459.

less likely to win one appears the less support he will receive. Senator Baker addressed himself to the relationship between raising money and getting votes:

> It seems to me that during this hearing, we need to keep clearly in mind the fact that in the American elective process, the campaign, the effort to have a broad base of voter support is only narrowly more intensive than the campaign to have a broad base of financial support which I think subsequently negates the idea that the public should be or is cynical about the large sums of money that are spent.[83]

There is some statistical support for the hypothesis that the likelihood of winning attracts money. Thirteen of the 40 challengers for House seats who were successful in 1974 also ran in 1972. The average amount spent by those 13 candidates in their first bid for election was $59,218, while the expenditures by the same challengers averaged $112,483 in 1974.[84] This dramatic 90 percent increase could be the result of the increased perception on the part of the voters supporting the challengers (or opposing their opponents) that the possibility of a victory was better in 1974 than in 1972. The candidate, once perceived as a likely winner, would attract greater resources and thus be able to spend more money. Statistics on the 1972 House races released by Common Cause are also consistent with the theory that it is the "winnability factor"[85] which determines the flow of money. These statistics show that the closer the race, the higher and more equal are the expenditures.[86]

Winning percentage (Range)	Number of Candidates	Winner's expenditures (Average)	Loser's expenditures (Average)
70% to 90%	97	$ 38,729	$ 7,479 [19.3%]
65% to 70%	66	42,212	16,060 [38%]
60% to 65%	91	55,065	30,483 [55.3%]
55% to 60%	60	73,616	54,600 [74.2%]
up to 55%	66	107,378	101,166 [94.2%]

As the bracketed numbers clearly indicate, as the victory margin

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[83] *1973 Hearings*, *supra* note 6, at 58.

[84] All 1974 figures are computed on the basis of figures found in Common Cause Press Release, April 11, 1975, on file with the *Denver Law Journal*. The 1972 figures are computed from statistics provided by Common Cause. 31 CONG. Q. WEEKLY REP. 3131-37 (1973).

[85] *See* H. ALEXANDER, *supra* note 5, at 3.

[86] Common Cause, *supra* note 7, House Appendix A.

narrows, the ratio of the loser's expenditures to the winner's rises remarkably.

There is, however, one other important statistic to which Common Cause did not address itself. In the 66 races in which the winner received less than 55 percent of the vote, 40 involved incumbents. In those 40 races, challengers actually outraised incumbents $106,865 to $95,849.[87] This refutes the idea that money flows to incumbents only. It may suggest that in a closely contested race, one which will be decided by less than 10 percent of the vote, incumbents may have little or no advantage in raising funds. The chance of winning in these contests is equally split; both candidates are seen as possible winners.

Although there is currently a lack of research on the effects of money in political campaigns[88] and definite conclusions are impossible to draw, there certainly is some basis for the hypothesis that winnability determines the flow of money. Average incumbents outraise their challengers by a margin of two to one. In closely contested races the ratio approaches one to one until in the very closest races, challengers outraise their incumbent opponents. The conclusion may be drawn that it is the winnability factor which most likely enhances the ability to raise funds and thereby dictates an inequality of opportunity to communicate a candidate's views. A candidate's resources may be insufficient because people generally prefer to contribute to those who will win, and "there is nothing either illegal or improper in the simple fact that they prefer to support likely winners rather than losers."[89]

To achieve the goal of equalizing opportunities to communicate by equalizing availability of funds, a ceiling must be such as will increase a candidate's winnability factor, for unless one's chances of winning appear good a candidate will be unable to raise sufficient funds. But, again, the "Catch-22" applies. A ceiling which is set low, while possibly equalizing expenditure levels by limiting the amount an incumbent may spend, would not permit challengers to spend sufficient amounts to overcome the

[87] This is computed on the basis of figures provided by Common Cause. *See* note 84 *supra*. In 1974 there were 81 races in which the winner recieved less than 55 percent of the vote. The incumbents in these 81 races outraised their challengers by an average of $90,113 to $79,243, yet 37 of the 81 incumbents were outspent. *Id.*

[88] *See 1973 Hearings*, *supra* note 6, at 220 (statement by H.E. Alexander).

[89] Fleishman at 462.

advantages of incumbency. A ceiling that is set high, while allowing challengers to spend enough money, would do nothing to increase a challenger's winnability factor, that is to convince the voters that the chances of a challenger's victory are good. A ceiling established at some level in between may effectively remove the advantages of a low and a high ceiling, leaving only the disadvantages of both.

While the necessity of fund raising certainly serves as a deterrent to some prospective candidates, this deterrence may produce some beneficial results. The oft-quoted log-cabin dream in our country—that anyone can grow up to be President—may be true, but it does not mean that everyone deserves to be President, a Representative, or a Senator or that the road to public office is an easy one. A campaign must necessarily serve as a screening process,[90] a proving ground where those with insufficient qualifications, or perhaps without sufficient roots in the community or respect from their peers, will be weeded out.

In summary, a ceiling on expenditures will do nothing to ensure that a candidate of limited wealth or resources can achieve even minimum recognition or exposure. Rather, a ceiling serves only to curtail the outflow to the voters of information about the candidate who has money or the support to raise it. Additionally, the deterrent effect of current campaign spending levels may not be as great a factor as a first glance suggests. If it is winnability that determines where money goes, a candidate for the House or Senate, if of high caliber and possessing a good base of community support, should then be a financially attractive candidate to those sharing his political philosophy. On the other hand, if one is up against a candidate with high name recognition or popular appeal, or against one entrenched in office, then it is a low winnability factor, not the cost of campaigning, which would deter one from running. Under such circumstances, spending ceilings are not likely to motivate anyone to run who is not already so inclined. It would be difficult if not impossible to defeat such an incumbent with equal spending limits. Finally, it is very difficult to develop a spending ceiling that will be low enough to ensure one with little financial support a minimum of recognition and at the same time high enough to enable challengers to mount an effective campaign against incumbents.

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[90] *See* R. WINTER, *supra* note 23, at 5.

2. Governmental Interest Unrelated to Suppression of Speech

The third element of the Court's test as set forth by Warren in *O'Brien* is that the governmental interest promoted by legislation must be unrelated to the suppression of free speech. Deliberations on the Campaign Act of 1974[91] reveal a legitimate concern on the part of Senators and Representatives that the spiraling costs of political campaigns may endanger the purity of the electoral process. On the other hand, there is also evident a strong awareness of the possibility that spending limits will serve to protect the interests of incumbents in power.[92] The incredible lack of concern for the rights of free speech among a body of lawmakers, many of whom are lawyers, leads one to suspect that the effect of reducing speech may have been more than an incidental by-product of a desire to preserve the purity of the electoral process. Senator Buckley, referring to the actions of his colleagues, pointed out that:

> The fear of overly persuasive campaigns, particularly when expressed by incumbent members of Congress, strikes dangerously close to prohibited suppression of speech because of its content. It must certainly give the Supreme Court pause when they see officeholders with vested interests in remaining officeholders passing legislation that restricts the ability of potential opponents and average citizens alike to alter the political makeup of the Congress.[93]

In light of the above, the motive of Congress in passing this legislation deserves particular attention.

The Court has taken the approach that it will seldom view its judicial function as appropriate to an investigation of what was on the minds of lawmakers while framing legislation.[94] In deferring to the judgment of Congress, the Court has emphasized that where Congress brings a "specially informed legislative competence" to its decisionmaking, then it is "Congress' prerogative to weigh these competing considerations."[95] Legislative competence should be well developed in the field of campaigns. The

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[91] *See generally* note 16 *supra*.

[92] *See* text accompanying notes 102 and 105, *infra*. *See also* Part II *infra*.

[93] 120 CONG. REC. S. 18,537 (daily ed. Oct. 8, 1974) (remarks of Senator Buckley).

[94] *See* Barenblatt v. United States, 360 U.S. 109 (1959); Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949); Burroughs v. United States, 290 U.S. 534 (1934).

[95] Katzenbach v. Morgan, 384 U.S. 641, 655-56 (1966) (relating to literacy requirements for voting) (footnote omitted).

Court's view is that the people's recourse to bad law and the products of ill-conceived motive lies with the ballot box, not with judicial determinations: "The forum for correction of ill-considered legislation is a responsive legislature."[96]

However, while stating that inquiries into congressional motives and purposes are hazardous,[97] the Court does on occasion entertain an evaluation of congressional purpose behind legislation.[98] One instance in which a legislative purpose and motive may receive at least a modicum of scrutiny is suggested by *Kramer v. Union Free School District No. 15*.[99] There the Court said:

> The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are so structured as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.[100]

This analysis suggests that the basis of the Court's lack of inquiry into congressional motive is the assumption that the voters will serve to check the actions of a responsive legislature should bad laws be passed or congressional motives be suspect. If a spending ceiling will reduce the responsiveness of the legislature, the rationale for not scrutinizing congressional motive—the responsiveness of the legislature—is no longer applicable. The crucial question is whether spending ceilings do affect the responsiveness of the Congress. Ceilings may well serve to perpetuate incumbents in office by not allowing challengers to spend sufficient funds to attain a possible victory.[101] If this were in fact the result of ceilings, then the responsiveness of the Congress would be greatly impaired and therefore congressional motive should be considered by the Court.

Congress was well aware of the potential effects spending ceilings would have on future campaigns. Representative Armstrong put it very clearly before the House:

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[96] Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 224 (1949).

[97] United States v. O'Brien, 391 U.S. 367, 383 (1968).

[98] *Id.* at 385-86.

[99] 395 U.S. 621 (1969).

[100] *Id.* at 628.

[101] *See* text accompanying notes 147-50, 157-59 *infra*.

> Finally, we all know—and I think most of us know in our hearts—this is a sweetheart incumbent bill. This is a bill which is going to make it harder than ever to defeat an incumbent of either party. It sets the kind of limits that makes it almost impossible for an unknown to become known, and thereby heightens existing advantages which incumbents enjoy.
>
> In view of the overall poor record of the Congress of the United States, it seems to me the last thing we need to do is to give further advantages to the incumbent Members of Congress. Let us defeat this bill and get on to some true reform which is so badly needed.[102]

Representative Armstrong's comments were followed by those of Representative Treen, who again asked whether challengers, under the limits set by the bill, could effectively challenge incumbents.[103] These legitimate constitutional questions raised in the bill were then summarily dismissed by Representative Wayne Hayes, who characterized the preceding speech as "90 percent baloney."[104]

Senator Buckley vigorously opposed the spending limits as set, denouncing them as being highly protective of incumbents:

> It is my firm belief that a certain amount of money must be spent by a challenger just to offset the incumbent's advantage . . . .
>
> If this assumption is correct, the uniform spending limits . . . can only aid incumbents because they make it impossible for a challenger to spend the money necessary to overcome the incumbent's advantage. It is this feature . . . that makes it both fair and accurate to characterize the bill as the Incumbent Protection Act of 1974.[105]

Considering these statements and Congress' relative lack of concern regarding the constitutional questions inherent in any spending ceiling, the Court, fearing that the responsiveness of the Congress may in some degree be reduced, should take a close look at congressional motive to see whether, as Senator Buckley phrased it, the Congress has come "dangerously close to prohibited suppression of speech because of its content."[106]

3. Restrictions on Speech Merely Incidental and Necessary to Promote the Governmental Interest

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[102] 120 CONG. REC. H.R. 7900 (daily ed. Aug. 8, 1974).

[103] *Id.*

[104] *Id.* at H.R. 7901. One cannot tell to whom Representative Hayes was referring (Armstrong or Treen or both), or which part of the speech was the 10 percent not constituting "baloney."

[105] *Id.* at S. 4938 (daily ed. April 1, 1974).

[106] *Supra* note 93.

The final element of Chief Justice Warren's test in *O'Brien* is that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest" to be protected.[107]

While it has been suggested throughout this note that there are open to Congress more effective alternatives to accomplish the goals sought to be achieved by spending ceilings, there is no actual requirement by the Court that less drastic alternatives to achieve certain goals be available before an unconstitutional infringement on free speech will be struck down.[108] However, if there are less drastic means of achieving these goals, then it is less likely that these ceilings will be allowed to stand. The Court has said:

> 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 be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[109]

There are less drastic means to achieve political equality on the campaign trail. To combat the ability of the large donors to gain influence with federal officials there are several approaches available. First, there is the alternative of a ceiling on the amounts an individual may contribute to any one campaign. This is the approach taken by Congress in the Campaign Act of 1974. The amount which an individual may contribute to any one federal candidate is now limited to $1,000 per election[110] and "[n]o individual shall make contributions aggregating more than $25,000 in any calendar year."[111] Although beyond the scope of this note, there are many of the same constitutional problems

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[107] 391 U.S. at 377.

[108] United States v. Robel, 389 U.S. 258, 267 (1967):
> It is not our function to examine the validity of that congressional judgment. Neither is it our function to determine whether [a particular program] exhausts the possible alternatives to the statute under review. We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake. The task of writing legislation which will stay within those bounds has been committed to Congress.

[109] Shelton v. Tucker, 364 U.S. 479, 488 (1960).

[110] *See* note 60 *supra*.

[111] 18 U.S.C.A. § 608(b)(3).

inherent in limitations on contributions as there are in expenditure ceilings. The effects, though, are surely not as great.[112]

Another less drastic means to achieve this goal would be to impose a heavy tax on any contributions over a certain limit. The revenues could be placed in the Presidential Election Campaign Fund[113] or earmarked to defray the costs of the Federal Election Commission, established to administer the Campaign Act of 1974.[114] In addition, the size of the present tax credit/deduction could be increased so as to encourage a greater number of small donors.[115]

To help ensure at least a modicum of equality in campaign opportunities, the concept of a floor rather than a ceiling should be carefully investigated:

> To counteract the advantages of incumbency or of wealth, we need not enact questionable ceilings, but rather look toward establishing floors. By floors are meant minimal levels of access to the electorate for all legally qualified candidates.[116]

The most attractive feature of floors is that they entail no restrictions on first amendment rights.[117]

To promote the concept of a floor at least one campaign reformer has advocated free mailing privileges or public subsidies to ensure minimal exposure to challengers.[118] The bill, which was passed by the Senate and sent into conference, did in fact contain a public financing provision for House and Senate races, as well as for presidential contests.[119] The use of the frank (free mailing privileges) by candidates is hardly a novel concept, yet the reluctance of incumbents to share their free mailing privileges with

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[112] For a general discussion of the constitutional issues involved in limitations on contributions, see A. ROSENTHAL, *supra* note 54, at 12-29.

[113] *See* INT. REV. CODE OF 1954, § 9006(a). This fund is to be used to finance presidential campaigns, starting with the 1976 elections. *Id.* §§ 9001-06.

[114] 2 U.S.C.A. § 437c (Supp. I, 1975).

[115] One may currently elect either a tax deduction or a tax credit. A tax deduction of $50, or $100 for those filing a joint return, is allowed. INT. REV. CODE OF 1954, § 218. Or one may take a tax credit of one-half of all political contributions, with a maximum credit of $12.50, or $25.00 for those filing a joint return. *Id.* § 41.

[116] *1973 Hearings*, *supra* note 6, at 224 (statement by H. E. Alexander).

[117] Fleishman at 479.

[118] *1973 Hearings*, *supra* note 6, at 224 (statement by H. E. Alexander).

[119] *See* S. 3044, 93d Cong., 2d Sess. § 502(c)(1)(A) & (B)(1974). These public financing provisions for House and Senate campaigns were removed from the Senate bill in Conference Committee.

challengers, plus the high cost of such a proposal[120] appear to have blocked any attempt to get this idea through Congress.

Although requiring a far greater financial commitment by the federal government, these alternatives would accomplish the same goals as those sought to be achieved by expenditure ceilings. They would result in less, if any, infringement on first amendment rights. It would appear that because there are alternatives available to Congress, a ceiling on expenditures would not meet the fourth criterion of the Court's test in *O'Brien*.

This evaluation of the component elements of the Court's test of the constitutionality of restrictions on free speech, as applied to the spending ceilings on political campaigns, leaves grave questions as to whether a limitation on expenditures will pass the test of constitutionality when brought before a court of law. Limitations appear not only to fall far short of achieving the goals they were designed to promote, but also to infringe protected freedoms far more heavily than would alternatives available to the Congress.

D. *Prior Restraint*

In none of the many cases sustaining the right of Congress to regulate federal elections has a congressional attempt to limit the amount or content of political speech been sustained.[121] It is hard to see why the Court would start a new precedent in a case involving the constitutionality of the Campaign Act of 1974. It has been suggested that spending ceilings would infringe primarily the amount rather than the content of speech and that the balancing test would be appropriate to weigh the constitutionality of the law.[122] In *Konigsberg v. State Bar*[123] Justice Harlan discussed governmental attempts to limit the unfettered exercise as opposed to the content of speech:

> [G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequis-

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[120] *See* 120 CONG. REC. S. 5080 (daily ed. April 2, 1974).

[121] Fleishman at 449-50 and cases cited therein.

[122] Comment, *Free Speech Implications of Campaign Expenditure Ceilings*, 7 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 214, 224 (1972).

[123] 366 U.S. 36 (1961).

> ite to constitutionality which has necessarily involved a weighing of the governmental interest involved.[124]

It is possible that a spending ceiling on campaign expenditures has the effect of limiting the content, not just the exercise, of speech. If this is true, then the balancing test may not be the appropriate test of constitutionality. Limiting the content of speech may constitute a prior restraint on freedom of expression.

Arguably, a candidate who is prohibited in advance by a ceiling on expenditures from spending more than a specified amount of money is a victim of prior restraints on his freedom of expression. This is particularly true in that certain types of campaign activities, such as the distribution of literature, are recognized by the Court as vital elements of the right to free speech.[125] It may be true that a ceiling on spending would *primarily* limit the amount as opposed to the content of speech. However, the small percentage of the time that a ceiling would limit the content of speech raises the most serious constitutional questions and poses a grave threat to our electoral process.

An election is by definition limited in time—it ends on election day. No speech, charge, countercharge, or response can have any effect on a voter once the "X" is made or the lever pulled. Anything worth saying by a candidate must be expressed prior to the time the people vote. A spending ceiling could substantially alter the nature of this process of campaign interaction. A candidate who had spent his limit could not turn to television or radio to answer a last minute charge by his opponent, nor could he buy time to air his response to, or opinion of, an event of major significance occurring just prior to election day. The speech that would be barred is no ordinary speech, "For speech concerning public affairs is more than self-expression; it is the essence of self-government."[126]

In *Mills v. Alabama*[127] the Supreme Court invalidated a state statute the effect of which was similar to that which may result from a ceiling on expenditures. Alabama had passed a law which barred electioneering on election day. One of the daily newspapers ran an endorsement of a candidate in its election day issue

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[124] *Id.* at 50-51.

[125] Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

[126] Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

[127] 384 U.S. 214 (1966).

and was prosecuted for violation of the statute. The Court, after discussing the importance of free speech in the political arena, went on to say:

> The state statute leaves people free to hurl their campaign charges up to the last minute of the day before election. The law . . . then goes on to make it a crime to answer those "last-minute" charges on election day, the only time they can be effectively answered.[128]

It seems unlikely the Court would strike the Alabama statute, yet let a spending ceiling stand when the very same evil condemned in *Mills* may be generated by limitations on expenditures.

To punish a candidate for poor budgeting by cutting off his means to communicate with the voters is a severe penalty. Such a penalty punishes not only the candidate but, more importantly, the public at large. Under the first amendment, the voters have a very precious and essential right to hear a candidate's response to a charge, or his reaction to an event.[129] This right is not based on whether the candidate has spent his limit. The Court has stated that:

> [T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . . Without those peripheral rights the specific rights would be less secure.[130]

One cannot, under the burden of a ceiling, punish the overspender without punishing the public also.

The effect of a ceiling may also be to induce a candidate to develop a strategy whereby he attempts to deplete the resources of his opposition in order to push him toward the limit. It is far more difficult to undo damage of a timely, unfounded charge than to make the charge in the first place. A candidate's inability to meet a charge from his opponent is hardly desirable.

In two recent cases courts have been unwilling to uphold a prior restraint on speech. In its decision involving a suit by the government to enjoin publication of the "Pentagon Papers,"[131] the Supreme Court faced the issue of prior restraint. The justification

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[128] *Id.* at 220.

[129] *See generally* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[130] Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965).

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

for the desired restraint on publication was the national security of the country, which the government feared would be compromised if the "papers" were published.[132] In ruling against the United States, the Court held that the government had not met the requisite burden of justification for the restraint.[133] The rule had been stated in an earlier case that, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[134]

A recent California case[135] involved an injunction against further publication by a candidate for public office of allegedly libelous newspaper excerpts, or of any versions of the excerpts, about his opponent. Recognizing that prior restraints are only permissible under extraordinary circumstances, such as to prevent disclosure of military secrets in time of war or "to prevent the utterance of words that may have the effect of force,"[136] the California Supreme Court ruled that the prior restraint imposed on the plaintiff candidate could not be upheld, even though the issue involved a restraint of libelous material.[137]

Once a prior restraint is established, the party defending the restraint has the burden of overcoming the "heavy presumption against its constitutional validity."[138] The fact that a ceiling on expenditures may act as a prior restraint on speech is one of the most forceful arguments against the constitutionality of ceilings as a method of campaign reform. There is little to suggest that a ceiling on campaign expenditures, which can act as a prior restraint, can withstand the heavy presumption against its validity.

II. Spending Limits and Equal Protection

A. *The Advantages of Incumbency*

One effect of spending limitations is that challengers may no longer be able to spend more money in a congressional race than their incumbent opponents. It is the contention of this note that

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[132] *Id.* at 718 (Black, J., concurring).

[133] *Id.* at 714.

[134] Bantam Books, Inc. v. Sullivan, 37 U.S. 58, 70 (1963). *See also* Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). One advocating prior restraints "carries a heavy burden of showing justification for the imposition of such a restraint." *Id.* at 419.

[135] Wilson v. Los Angeles County Superior Court, 43 U.S.L.W. 2379 (Cal. March 4, 1975).

[136] *Id.*

[137] *Id.*

[138] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

equal spending limitations for incumbents and challengers may in effect deny the latter the equal protection of the laws inherent in the due process clause of the fifth amendment.[139] This aspect of the new law presents another serious danger to our political system. Unfortunately, because full disclosure of campaign contributions did not go into effect until April of 1972,[140] no comprehensive conclusions can be drawn in regard to the amount of spending necessary to defeat incumbents. However, preliminary conclusions, based on the 1972 and 1974 congressional races, reveal some ominous statistics for challengers hoping to unseat current officeholders and lend support to the argument that a spending ceiling may have grossly unequal effects on incumbents and challengers.

During the last half century, incumbent Senators and Representatives have been successful in more than 80 and 90 percent of their campaigns respectively.[141] Between 1956 and 1972, House incumbents won 3,350 of 3,551 races, for a winning percentage of 94.34. Senate incumbents fared slightly worse, winning 222 of 261 or 84.67 percent.[142] The 1972 House elections marked the third straight election in which over 95 percent of incumbents were victorious,[143] while in the 1972 Senate races only 6 incumbents met defeat. The primary and general elections of 1974, a "disaster year" for incumbents, saw over 87 percent of House incumbents re-elected, while 85 percent of the incumbent Senators were successful.[144] Figures such as these led one commentator to write, "There is a tendency to believe that, aside from isolated instances where an over-riding issue is present, there is little excuse for defeat."[145]

Based on the impressive percentage of incumbents' victories,

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[139] *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[140] Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 406, 86 Stat. 20. This Act became effective 60 days after its passage on February 7, 1972.

[141] 120 CONG. REC. S. 4938 (daily ed. April 1, 1974) (remarks of Senator Buckley).

[142] *Hearings on H.R. 7612* at 2 (Supp.) (statement by Representative Cleveland).

[143] 31 CONG. Q. WEEKLY REP. 3130 (1973).

[144] For the 1974 congressional election results see 32 CONG. Q. WEEKLY REP. (Nov. 9, 1974). In 1974, 48 incumbents were defeated in races for the House; 8 in the primaries, 40 in the general election. Forty-four incumbents elected not to run. On the Senate side, four incumbents were defeated, two in the primaries and two in the general election. Seven incumbents chose not to run for re-election. *Id.*

[145] 120 CONG. REC. S. 4938 (daily ed. April 1, 1974) (quote by Charles Clapp in remarks of Senator Buckley).

one would suspect that the American people view the current legislature and its performance with high regard. But Senator Buckley points out that the reverse is true:

> Recent poll figures force one to the conclusion that the Congress is not exactly held in the highest esteem by the American people. In fact, as most of us are aware a number of pundits have observed that we are presently less popular even than the President [Nixon] with a collective approval rating of but 21 percent.[146]

According to Common Cause, great sums of money are required to defeat such disapproved legislators.[147] In the November 1972 races for the House, only 10 incumbents were defeated, and 8 of the 10 were outspent by their challengers.[148] It took an average of $125,521[149] to defeat these incumbents. On the Senate side, only six incumbents were defeated, and four of the six were outspent.[150]

The 1974 House elections proved to be an anomaly in the recent trend. Although over 95 percent of all incumbent Representatives to run for re-election were successful in each of the three preceeding elections,[151] the percentage dropped below 90 percent in 1974.[152] The number of incumbents losing their seats in 1974 nearly quadrupled in respect to the number who lost in each of the three preceeding elections. This startling increase in the number of unsuccessful incumbents is in large part a result of the Watergate scandal and the effect the revelations of political corruption had on the minds of the voters.[153]

As a result of Watergate, 1974 was a relatively easy year for challengers, particularly Democratic ones. This being the case, one can hypothesize that although challengers have to spend large amounts of money and in many cases outspend their oppo-

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[146] *Id.* (remarks of Senator Buckley).

[147] Common Cause, *supra* note 7, "Common Cause Releases Study of 1972 Congressional Campaign Finances."

[148] *See* 31 CONG. Q. WEEKLY REP. 3130-37 (1973).

[149] Common Cause, *supra* note 7, House Appendix B. It is not possible, on the basis of the 1972 or 1974 spending figures, to apportion a certain percentage of total expenditures by a candidate to the general election and a certain percentage to the primary. Reporting was not required for each election separately.

[150] 31 CONG. Q. WEEKLY REP., *supra* note 148.

[151] *See* note 143 *supra*.

[152] *See* note 144 *supra* and accompanying text.

[153] To attribute this "high" turnover to the state of the economy ignores the fact that of the 40 incumbents to lose, 36 were Republicans and only 4 were Democrats. 32 CONG. Q. WEEKLY REP. 3066 (1974).

nents to be successful, the spending in 1974 need not have been as high as in 1972 because incumbency in certain districts in 1974 was more a disadvantage than an advantage.[154] It would also follow that knowing the disadvantage they faced, incumbents would be less likely to allow themselves to be outspent. This apparently was the case.[155] Spending figures for the 1974 campaigns support the above hypothesis, that given the over-riding issue of Watergate, challengers needed less money to be successful. Based on an evaluation of the 1974 spending reports filed by the candidates and committees, an average of $100,468 was spent by the challengers who were successful in the 1974 general election, as compared to $125,521 in 1972.[156] Additionally, of the 40 incumbents defeated in the November 1974 elections, 22, or 55 percent, were outspent as compared to 80 percent in 1972.[157]

While neither the average amount spent by successful challengers, nor the percentage of challengers outspending their opponents, was as high in 1974 as in 1972, even considering the impact of the Watergate affair the 1974 figures are consistent with the theory that the average challenger must be prepared to spend a large amount of money, as well as to outspend his opponent, if the chances of victory are to be good. When only 12 to 13 percent of the incumbents to run for re-election are defeated[158] and over one-half of that 12 percent are outspent,[159] the ability to outspend must be regarded as an important factor.

On the basis of the successful record established by incumbents over the last half century, and of the expenditure statistics for congressional races in the 1972 and 1974 elections, a strong argument can be advanced that equal expenditure limitations are inherently unequal in their impact on incumbents and challengers.

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[154] Four of the 36 Republicans who lost were members of the House Judiciary Committee and had consistently supported the President during the television impeachment hearings. They were: David Dennis, Joseph Maraziti, Wiley Mayne, and Charles Sandman. *Id.* *But see id.* at 3066, stating that three, Dennis, Mayne, and Sandman, faced problems before the impeachment inquiry began.

[155] In 1972 the 40 incumbents who lost in 1974 spent on the average $69,199. Faced with serious opposition in 1974, their average expenditures rose to $101,173. *See* note 84 *supra*.

[156] *Id.*

[157] *Id.*

[158] *See* note 144 *supra* and accompanying text.

[159] *See* text accompanying note 157 *supra*.

If it is not, as polls suggest, a high regard by the American people that returns large percentages of incumbents to Washington each election, there must be other factors. Most of these can be found in the nature of elective offices. Senators and Representatives are elected to serve their constituencies and the American people. To fulfill this role, they must have at their disposal resources such as staff allowances, office expenses, access to media, and the frank. Staff allowances of $204,000 are allowed to congressional officeholders.[160] An incumbent thus has at his disposal expert advice and a continuous source of research into matters of public concern. The challenger must often start from scratch in research on issues and development of alternative policies, and this may require the hiring of staff assistants at his own expense. In addition, incumbents are entitled to have several district offices from which to provide constituent services. By far the majority of work conducted in a district office involves case work,[161] solving problems for constituents. Casework involves people, and people mean votes. Even a courteous reply to a letter written to a congressman can so impress the constituent that it ensures the incumbent a vote.[162]

Access to the media is also an important advantage inherent in incumbency.[163] While incumbents do not have the networks at their control, a well-seasoned politician can certainly manipulate press coverage by introduction or sponsorship of key legislation, delivery of major policy addresses or statements on critical events, or the announcement of a press conference. While the challenger may attempt all the above except the introduction and sponsorship of legislation, his words are not *official* words, and are not apt to be accorded the same weight given those of an incumbent.

Perhaps the greatest advantage enjoyed by incumbents is the

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[160] Interview with Genie Ermoyan, Administrative Assistant to Representative Abner Mikva, in Washington, D.C., Mar. 18, 1975.

[161] Estimates indicate that from 60 to 75 percent of the work in a district office involves casework. Telephone interviews with Jack Marco and Pearl Alperstein, District Managers for Representatives Abner Mikva and Tim Wirth, respectively, April 12, 1975.

[162] While canvassing a neighborhood in October 1974, the author talked to an elderly lady who had been so impressed by the official reply she had received from her congressman that she had framed it. Her vote had been sewn up by this letter.

[163] *See* 120 CONG. REC. H.R. 10,337 (daily ed. Oct. 10, 1974) (remarks of Representative Treen).

frank—the ability to send official mail postage free.[164] Free mailing is vital to the functioning of a congressional office, and if used with an eye toward re-election can be used to gather a very broad base of support by convincing voters that their representative is working hard and is doing as much for them as possible. The frank is used in essentially two ways: First, in the normal day to day correspondence of an office; and second, to send district-wide newsletters or questionnaires to the residents of a district. Members of the House enjoy one further advantage in their district-wide mailings—each letter need not be individually addressed, but may be sent under the label "Postal Patron, 'X' Congressional District."[165] The advantage this affords a mass mailer may only be properly appreciated by recognizing the many hours spent hand addressing or typing and sticking on labels. The cost savings of the "Postal Patron" privilege can be enormous.[166] In addition, if a candidate exceeds his allowance for printing costs in mailing franked mail, he may claim as a tax deduction the excess expenditure.[167] To duplicate the output of franked mail by an incumbent could cost a challenger over $200,000.[168]

Nothing that has been said regarding the postal advantages or office and staff expenses is in any way intended to suggest these perquisites of elective office are excessive or unnecessary. Rather, the availability and wide use of these privileges are essential to the proper functioning of an office. What needs to be recognized, however, particularly by those who establish the ceilings on campaign expenditures, is that these advantages do exist and that they must be taken into account when imposing restrictions on expenditures. This must be recognized for one important reason: In practice, there is a very thin line between what can be considered official business and that which borders on electioneering. Liberal use of the above privileges may increase substantially the inherent inequalities which exist between incumbents and challengers.

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[164] *See* 39 U.S.C. § 3210 (1970).

[165] 39 U.S.C.A. § 3210(d)(1)(A) (Supp. 1975).

[166] A cost of $29 per 1,000 letters was quoted by American Products, a Chicago firm, for the addressing and processing required for mass mailings. Thus, if a congressional district has 168,000 households, as in the Tenth District of Illinois, the cost would be $4,872 just for the addressing and processing. Citizens Committee for Abner J. Mikva Press Release, July 18, 1974, on file with the *Denver Law Journal*.

[167] Fleishman at 469.

[168] *See* note 166 *supra*.

The use of the frank is for all practical purposes limited only by the conscience and ethical standards of those in office,[169] a fact which may appear frightening in light of the events of recent years. It has been suggested that an excessive use of the frank will be singled out by the voters, and therefore one must not abuse the privilege for fear of retaliation at the polls.[170] Experience dictates that this is not always the case, perhaps because it can be very hard for a voter to perceive the widespread effects a monthly newsletter can have. In Colorado's Second Congressional District, Democratic challenger Tim Wirth tried to make an issue of his opponent's use of the frank, but without success.[171] In the Tenth Congressional District in Illinois, district-wide mailings were being sent out at a rate of almost one a month by the incumbent Representative, with three arriving at every home in the district within a 4-week period in the summer months preceding the election of 1974. Yet in a survey taken in that district, one of the most affluent and well educated in the country,[172] the people expressed almost no concern with this recurring use of the frank,[173] so the challenger dropped the issue. This indicates that if the frank is effectively used, it is almost without practical limitation.

Representative Bill Frenzel introduced into the *Congressional Record* some illuminating statistics regarding the frank.[174] According to these statistics, the timing of franked mail, as indicated by activity in the congressional folding room, is significant. The work piles up every September and October of even numbered years—the congressional election years. In September and October of 1968, 1970, and 1972, there was twice as much work in the folding room as in those same months in the years of 1967, 1969, and 1971. Further, in October of 1968, 1970, and 1972, the folding room averaged about 85 percent more work than it did in the average month of those years.[175] One reason for this increase is clear: As the congressional session comes to an end, the mem-

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[169] H. PENNIMAN & R. WINTER, *supra* note 19, at 17.

[170] *Id.*

[171] Interview with Representative Tim Wirth in Denver, Feb. 13, 1975.

[172] N.Y. Times, Nov. 3, 1974, § 6 (magazine), at 75.

[173] Respondents were asked to characterize as "fair" or "unfair" the following statement: "Sam Young has spent a lot of taxpayers' money sending out a newsletter each month." The result was: Fair, 20%; Unfair, 67%; and Not Sure, 13% (Poll conducted by Peter Hart Research Associates, for Abner J. Mikva, Aug. and Sept., 1974).

[174] 120 CONG. REC. H.R. 8424 (daily ed. Jan. 14, 1974).

[175] *Id.*

bers of Congress send their final reports back to their constituencies,[176] complete with pictures of themselves and expressions of appreciations for being allowed to serve them during the preceeding two years. This is not necessarily improper, but, again, it is something that should be taken into account in establishing the level of ceilings. It obviously was not in the 1974 Act.

It is not sufficient to discount these advantages of incumbency by saying, as one congressman has said, that, "People do not vote for incumbents unless they are doing a decent job."[177] It may be because many incumbents do only a "decent job" that the Congress receives such low ratings in the polls. Representative Treen has said:

> [I]f one is going to defeat an incumbent, he has got to expose the incumbent's record.
>
> That means that we have got to go to massive newspaper, radio and television coverage to talk about the record. He cannot do that on the spending limits we have in this bill.[178]

As indicated by a majority of the races where incumbents were defeated in 1972 and 1974, "exposing the record" usually requires outspending the officeholder.[179]

In an effort to neutralize the tremendous advantages of incumbency, Senator Buckley introduced during the debate on the proposed ceilings an amendment to provide a challenger with a spending ceiling of 130 percent of the amount which could be spent by the incumbents.[180] His amendment, tabled in April of 1974 when first introduced, was later reintroduced and defeated by a vote of 17 to 61 just prior to the passage of the bill by the Senate.[181]

Statistics show that a large percentage of incumbents who lose are outspent, an event which, as a result of the ceilings established in the Campaign Act of 1974, may never happen again; an

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[176] *Id.*

[177] *Id.* at H. 7848 (Aug. 7, 1974) (remarks of Representative Pike).

[178] *Id.* at H. 7900-01 (Aug. 8, 1974).

[179] *See* text accompanying notes 148, 150, & 157 *supra*.

[180] 120 CONG. REC. S. 4937 (daily ed. April 1, 1974).

> (c) No candidate who is not an incumbent may make expenditures in connection with his campaign for nomination for election, or for election, to any Federal office in excess of 130 percent of the amount of expenditures which an incumbent candidate may make . . . .

Id.

[181] *Id.* at S. 18,537 (Oct. 8, 1974).

incumbent willing and able to spend his limit cannot be outspent by a challenger seeking to overcome the advantages which inhere to incumbents. An officeholder in this situation has a large edge in his race for re-election. And contrary to the renowned hare, he is unlikely to take a nap off to the side of the trail.

B. *Equal Protection of the Laws and the Application of Spending Ceilings*

The U.S. Constitution provides that no state may "deny to any person within its jurisdiction the equal protection of the laws."[182] Although this prohibition applies only to the states, it is well settled that the equal protection clause is applicable to the federal government through the due process clause of the fifth amendment, when "discrimination may be so unjustifiable as to be violative of due process."[183]

A maximum ceiling of $84,000 on the expenditures of each candidate for each election creates on its face no "suspect categories" or "invidious discrimination." No one candidate is put into a classification different than another, and each is allowed equal spending. This is not, however, enough to satisfy the requirements of due process. The Supreme Court, in its decision in *Yick Wo v. Hopkins*[184] looked beyond the mere "on its face" test of the fourteenth amendment and went into the effects of the law as it was applied. It is now settled that although no classifications exist on the face of a statute, unjustifiable discrimination resulting from the application of a law may be "as invidious a discrimination as if [the statute] had selected a particular race or nationality for oppressive treatment."[185] The heavy burden which equal spending ceilings impose on the campaign effort of almost any challenger could constitute such discrimination.

The discrimination promoted by spending ceilings would be even greater in the case of third-party candidates.[186] Generally a third party has no grass roots organization as do the Republicans or Democrats, organizations whose expenditures for general activ-

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[182] U.S. CONST. amend. XIV, § 1.

[183] Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[184] 118 U.S. 356 (1886).

[185] Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942). *See also* McLaughlin v. Florida, 379 U.S. 184, 194 (1964); Lassiter v. Northhampton County Bd. of Elections, 360 U.S. 45, 50 (1959).

[186] *See* Redish, *supra* note 65, at 919.

ities, though clearly inhering to the benefit of a candidate of its own party, may not come within the purview of the ceiling.[187] The classic example of the advantages of party organization is the case of a Democratic candidate running for election in the City of Chicago. While such a candidate has the benefit of one of the most unbeatable precinct organizations in the country, he would have to report, for all the benefit he received from the grass roots Democratic organization, not a penny of expenditure. To suggest that equal limitations do not discriminate in such a situation is pure folly. And while the argument can be made that a ceiling does not prevent a third party from establishing an organization, this is often impractical in that an organization is more likely to form around a winner, rather than to develop to form a winner. The potential effect of inhibiting the growth of third parties has been condemned by the Court in *Williams v. Rhodes*.[188]

Another discriminatory effect of spending ceilings exists where an incumbent is challenged in the primary, particularly in one-party districts, where the primary is in effect the election. The number of such districts is not insignificant. In the 1974 general elections, 46 races—over 10 percent of all races for the House—were unopposed.[189] Unlike a challenger to an incumbent of the opposing party in a two-party district, a challenger in a one-party district does not have a primary and an additional primary allotment of $84,000 with which to build his name recognition, present his programs, and develop the grass roots organi-

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[187] This "loophole" exists because activities such as a voter registration drive, a canvass to determine party preference, and an election day "get out the vote" campaign (which is based on the results of the canvass—one only brings to the polls those who are sure to vote "properly") if conducted by a party organization inhere to the benefit of every candidate of the party conducting the activities, from federal candidates down to the local dog catcher. These activities may not, in fact, be authorized by a particular candidate, even though he would receive the benefits of them. If, on the other hand, any one or all of the above activities are carried out *on behalf of* a federal candidate, then those expenditures would go toward a candidate's ceiling.

> (B) an expenditure is made on behalf of a candidate . . . if it is made by—
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> (i) an authorized committee or any other agent of the candidate for the purposes of making any expenditure; or
>
> (ii) any person authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure.

18 U.S.C.A. § 608(c)(2)(B) (Supp. I, 1975).

[188] 393 U.S. 23, 31 (1968). *See also* Redish, *supra* note 65, at 919.

[189] *See* 32 CONG. Q. WEEKLY REP. 3084-91 (1974).

zation necessary for the election day contest with the incumbent. Rather, these challengers have a maximum of only $84,000 at their disposal with which to overcome the advantages of incumbency and to carry out their campaign activities. The ceilings imposed in the Campaign Act of 1974 hardly reflect the difficulty of such a challenge.

A final form of possible discrimination resulting from spending ceilings is that inherent in setting universal limits throughout the entire country, without taking into account local variances in cost of such vital campaign expenses as radio and television time.[190] A 30-second prime time television spot can vary from $200 in Phoenix to $4,600 in New York City.[191] By enacting the same ceilings for New York as for Phoenix, the people in the City of New York will be given far less opportunity to see and know their candidates than will the voters in Phoenix.[192] While this discriminatory aspect is most exemplified by media costs, the same is no doubt true, though to a lesser extent, of printing costs, newspaper advertising, and salaries. The difficulty of arriving at a fair ceiling for each region of the country presents another difficulty in enacting spending ceilings.

The discriminatory effects of spending ceilings on campaigns thus fall into three categories: (1) A challenger may not be able to overcome the natural advantage of incumbency should an incumbent decide to spend the limit; (2) third-party candidates are discriminated against in that they generally lack the organizations available to major party candidates; and (3) challengers to incumbents in primaries face the disadvantage of having to defeat an incumbent with only $84,000 of expenditures.

Equal ceilings for challengers and incumbents will, in many cases, make it very difficult for a less well known challenger to present himself and his platform effectively before the electorate. If the Court should find that the limitations on free speech which result from ceilings on campaign expenditures fall hardest in their application upon the challenger, then this discriminatory effect can only be justified by some "compelling state interest" sought to be achieved by the legislation.[193] Although the purity of

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[190] *See* Fleishman at 467. *See generally Hearings on H.R. 7612* at 4 (Supp.).

[191] H. PENNIMAN & R. WINTER, *supra* note 19, at 14.

[192] *See* Note, *supra* note 56, at 661.

[193] The "compelling state interest" standard is applied where a fundamental interest is involved. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

the electoral process is an important concern, it cannot be said that this interest will necessarily be enhanced by ceilings placed on spending. The previous evaluation of the governmental interest promoted by these ceilings[194] should leave doubts in many minds as to whether *any* interest—other than that of incumbents—is really promoted by limits on campaign spending.

CONCLUSION

Reform of campaign funding is long overdue. Money has been and will continue to be the root of corruption and impropriety among elected officials. Until steps are taken which will assure the American public that political contributions are not given in order to extract political favors or gain political clout, the aura of suspicion which surrounds campaign contributions will continue to hang precariously over the American political process. Unfortunately, a problem which is so easily identified is not so readily cured.

The governmental interest in re-establishing some purity in our electoral process is as powerful an interest as can be conceived in our democratic society. If the method by which our leaders are chosen is tainted with potential or actual abuse, then the decisions these officials render must be suspect. Yet no matter how great the evil created and no matter how powerful the interest to be served, the solution relied upon must be consistent with the principles established in the Constitution. Absent constitutional problems, relatively simple answers might suffice. In the case of campaign reform, however, the first amendment requires a complex solution. A spending ceiling is an example of a simple answer, one which ignores the first and fifth amendments as well as political reality.

Suit has already been filed challenging the Campaign Act of 1974,[195] and one of the numerous causes of action is aimed at the ceiling on expenditures as a violation of the right to free speech and due process.[196] The purity of the electoral process is thus in the hands of the judiciary. In the long run, this purity might be better served by the elimination of a spending ceiling as a means to achieve it.

Robert W. Drake

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[194] *See* text accompanying notes 55-90 *supra*.

[195] 121 CONG. REC. S. 2014-20 (daily ed. Feb. 18, 1975). The suit has been filed in the United States Circuit Court of Appeals for the District of Columbia by Senator James Buckley and former Senator Eugene McCarthy.

[196] *Id.* at 2018.