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Taking a step back: an analysis of the unresolved core issue of constitutional validity in the campaign finance reform debate

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Taking a Step Back: An Analysis of the Unresolved Core Issue of Constitutional Validity in the Campaign Finance Reform Debate

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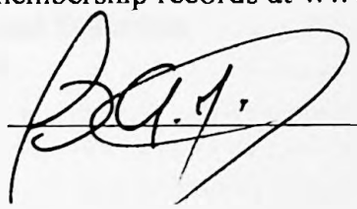
Signature of thesis writer: 

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Chapter 1

INTRODUCTION

"What we have is two important values in direct conflict: freedom of speech and our desire for healthy campaigns in a healthy democracy. You can't have both."
– Congressman Richard Gephardt[1]

Thesis Statement

Congressional attempts to enact reform in the financing of political campaigns may unavoidably violate the First Amendment[2] to the United States Constitution and its guarantees of freedom of speech and association. As a result, the core issue that must be resolved in the campaign finance reform debate is whether campaign finance reform is unavoidably unconstitutional. Both advocates (pro-reformists)[3] and opponents (anti-reformists)[4] of campaign finance reform have been engaging in an extended ad hoc debate over reform measures without adequately confronting the critical core issue that continues to prevent key reform measures from being adopted: does the First Amendment prohibit campaign finance reform?

Statement of the Problem

The process used by the American nation to elect political leaders naturally lends itself to investigation by a political scientist. An investigation may be conducted on many different levels to gather both empirical data and normative insights into the vitality of the American elections process to determine whether it is

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[1] Quoted in Nancy Gibbs, "The Wake-Up Call," *Time*, February 3, 1997: 25.
[2] When referring to the First Amendment, this thesis is concerned solely with the free speech protection contained therein and, as will be discussed, some tangential concerns with the protection of freedom of association that have developed since the time of adoption.
[3] Examples of pro-reformist groups include Twentieth Century Fund, Common Cause, Public Campaign and the Center for Responsive Politics.
[4] Examples of anti-reformist groups include the American Civil Liberties Union and the National Right to Life Committee.

democratic and egalitarian in nature. Traditionally, an enduring tenet of American political ideology has been the concept of an open, free and fair electoral process. This tenet is based upon a notion of equality, and those chosen to exercise political power and formulate public policy are theoretically selected by the citizenry at large in a process embodied by the traditional refrain of "one person, one vote."[5] Perhaps nowhere else in American society is the concept and ideal of equality given as much value as it is in the elections mechanism employed by this country.

Presently, a great deal of debate is occurring in both academic and non-academic circles as to whether the reality of the American electoral process is at odds with its traditional egalitarian ideology. Many scholars, politicians and individual citizens have concluded that the American electoral process is controlled by special interests, and that the wealthy have a pronounced edge when it comes to deciding who is to be elected to hold political office.[6] As a result, reforming the process of campaign financing has become an enduring agenda item for political discussion.[7] The attention of the general public, academics, politicians and all concerned with the

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[5] One Supreme Court decision traced this concept of political equality back to the Declaration of Independence, holding: "The conception of political equality from the Declaration of Independence... can mean only one thing—one person, one vote." Gray v. Sanders, 372 U.S. 368, 381 (1963). *See also* Alexander Heard, *The Costs of Democracy* (Chapel Hill: U of North Carolina P, 1960) 48.

[6] "Most opinion surveys conducted in recent years show that from 70 to 90 percent of the public feel that the system is broken, and significant majorities think that money has too much influence in our political process." *See* Anthony Corrado, *Beyond the Basics: Campaign Finance Reform* (New York: The Century Foundation Press, 2000) 1.

[7] Interestingly, one commentator identifies the first major congressional attempt to restrict campaign financing as the passage of the 1907 Tillman Act (34 STAT. 864) prohibiting corporate and banking contributions to federal candidates. The Tillman Act was upheld in a lower federal court challenge in the case of United States v. United States Brewers Association, 239 F. 163 (W.D.Pa. 1916). The Court holding cited a governmental interest in guarding elections from corruption. *See* Kenneth J. Levit, "Campaign Finance Reform and the Return of Buckley v. Valeo," The Yale Law Journal 103 (1993) : 470, n. 4.

American political elections process has made campaign finance reform an important topic to analyze.

However, the bulk of research and commentary in the campaign finance reform debate leaps past its core issue: whether reform is constitutionally valid. Instead, two distinct areas receive most of the scholarly attention: (1) whether reform is needed, and if so, (2) what reform measures should be adopted. Utilizing the empirical data generated from the analysis of these two areas, reform debaters engage in a dialogue either rejecting or supporting reform in general, and discussing both the feasibility and effectiveness of various reform methods. While this empirical methodology is valuable, it overlooks the one impediment to congressional attempts to enact key reform measures—the United States Supreme Court's interpretation of the First Amendment and its continued adherence to the decision it rendered in the landmark case of *Buckley v. Valeo*[8] ("*Buckley*").

Pro-reformists view the Court's *Buckley* decision as an impenetrable roadblock limiting their ability to create a fair campaign process to select the leaders of the American Nation. They lament the fact that reform legislation has been debated, passed into law and then invalidated by the Court. The Court's adherence to *Buckley* necessitates a continuation of the reform debate and creates an unending cycle of contention pitting the legislative branch of government against the judicial branch. Pro-reformists endlessly criticize the Supreme Court for erecting judicial obstacles that prevent them from remedying what they see as the corrosive influence of special interest and big money in politics. Conversely, anti-reformists see the

[8] 424 U.S. 1 (1976).

Supreme Court as the champion of free speech and the First Amendment and rise to its defense in congressional hearings and public statements.

To break the endless cycle of reform and invalidation it is imperative that the core issue of the reform debate—constitutional validity—be brought to the forefront where it can be adequately examined and analyzed. It is only by *taking a step back* through this kind of examination that the parameters of the reform debate will come into focus, enabling it to go forward on a secure footing and in a cogent manner.

Thesis Approach

As discussed above, this thesis outlines the parameters of the campaign finance reform debate by developing a First Amendment Campaign Finance Reform Methodology that brings into focus the unresolved core issue concerning the constitutional validity of reform measures. One scholar observed two decades ago, when speaking of first amendment theory in a general sense, that "[a]n abundant first amendment literature has failed to dispel the climate of uncertainty and intellectual disorder that permeates [both] the concept and implementation of freedom of speech."[9] Since the time of this scholar's observation, and despite further development of first amendment theory, this uncertainty and disorder continues to exist, and it is perhaps in the area of campaign finance reform that it has become the most apparent.[10] In light of *Buckley*, this thesis posits that the only way an acceptable

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[9] Lillian R. BeVier, "The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle," Stanford Law Review 30 (1978) : 299.

[10] As observed by Harry Jaffe, perhaps unfortunately for the goal of this thesis, "not only are there different laws in different places at the same time, and different laws in the same place at different times, but sometimes even what may be called the same law—e.g., the law of the Constitution of the United States—may be said to differ at different times." Harry V. Jaffa, *Original Intent and the Framers of the Constitution: A Disputed Question* (Washington, D.C.: Regnery Publishing, 1994) 58.

resolution will come about in the arena of campaign finance reform is by bringing some degree of certainty and intellectual order to first amendment issues it raises. To that end, this thesis builds upon a framework that has at its foundation this premise: the primary means of defining and providing meaning to fundamental constitutional provisions is by utilizing a normative approach that draws from political theory, history, law, custom and tradition as its methodological tools.[11]

In the United States, the primary decision maker of constitutional meaning is the United States Supreme Court, and it carved out its preeminence as the final arbiter of constitutional interpretation long ago.[12] The Court and the method by which it makes its decisions is the lens through which this examination views campaign finance reform. This approach has been chosen because the Court will be the ultimate arbiter of reform measures, and acting in this capacity it has not significantly changed its interpretation of the First Amendment as it relates to free speech and campaign finance reform since *Buckley.*

As a result, it is necessary for the participants in the reform debate to clearly articulate their positions both as to the meaning of the First Amendment's free speech protection and as to the premises upon which those positions rest. Only then can the

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[11] This thesis proceeds from a point of view articulated well before the modern day reform debate, but like many viewpoints on constitutional issues, it has continued viability, and is aptly reflected by the following quotation: "...[T]he chief source of our blundering ineptness in dealing with moral and political problems is that we do not know how to think about them except by quantitative methods. . . . In this sense we need to be, not more scientific, but less scientific, not more quantitative but other than quantitative. We must create and use methods of inquiry, methods of belief...[that]...are suitable to the study of men as self-governing persons but not suitable to the study of forces or of machines. In the understanding of a free society, scientific thinking has an essential part to play. But it is a secondary part. We shall not understand the Constitution of the United States if we think of men only as pushed around by forces. We must see them also as governing themselves." Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Westport: Greenwood Press, 1979) 12.

[12] *See* Marbury v. Madison, 5 U.S. 1 Cranch 137 (1803), originally establishing the doctrine that it is the courts, not the Congress, that decides whether a federal statute complies with the Constitution.

debate fully focus on the empirical issues of whether reform is needed and, if so, what that reform might look like. Those who find no constitutional conflict may then genuinely disagree with the Supreme Court's rulings and cogently argue in public appeals that the Court is mistaken.[13] Perhaps these arguments will find favor with current or future members of the Court and eventually lead to a different interpretation of the First Amendment.[14] Conversely, if the participants in the reform debate determine that the First Amendment is a roadblock to reform and the Court is given its traditional and historical deference in constitutional questions, reform advocates may proceed by attempting to amend the Constitution.

The campaign finance reform debate continues because it has not been brought into focus and no clarity as to the meaning of first amendment speech protection in the context of campaign finance reform has been achieved. The difficulty appears to be that pro-reformists see the campaign finance reform debate as a question of *policy* whereas anti-reformists see it in terms of *constitutional validity*. In any event, it is clear that the meaning of the First Amendment's protection of free speech as it applies to campaign finance reform must, of necessity, be determined by either interpretation or amendment.[15] Although the Court's interpretation of the First

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[13] As aptly stated by one scholar in discussing the Supreme Court's role in a first amendment context: "...[T]he Supreme Court, like any other teacher, may be wrong as well as right, may do harm as well as good. . . . From time to time, their judgments are reconsidered and changed...[and although] we must...abide by the rulings of the court it does not follow that we must agree with them." Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Westport: Greenwood Press, 1979) 32-33.

[14] All of the Justices who participated in the *Buckley* decision, with the exception of Chief Justice Rehnquist, are no longer on the Court.

[15] As Meiklejohn stated, "It is not even required that the meaning of the Constitution shall be in the future what it has been in the past. We are free to change that meaning both by interpretation and by explicit amendment." Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Westport: Greenwood Press, 1979) 7.

Amendment has thwarted pro-reformists since *Buckley* and arguably served as the primary defense of anti-reformists,[16] it is only by the means of a full, fair and adequate examination of the First Amendment that all participants in the reform debate will be enabled to press forward without continually being bogged down in the endless cycle of reform and invalidation.

Thesis Plan

The plan of this thesis is as follows. Chapter Two examines some of the basic approaches to constitutional definition, the historical and philosophical underpinnings of the First Amendment, and offers six Models of Speech placed on a Spectrum of Campaign Finance Reform Thought to serve as an analytical framework for examining what speech is protected by the First Amendment. To put the campaign finance reform debate in context, Chapter Three briefly examines The Federal Elections Campaign Act of 1971 (FECA) and *Buckley*. The core of this thesis is contained in Chapter Four within the analysis of reform measures in a first amendment context, which includes discussion of some of the pro-reformist and anti-reformist positions at issue in light of *Buckley*. Finally, Chapter Five summarizes this study and offers some suggestions for future analysis.

My research has revealed that the literature in the first amendment arena is extensive. However, this literature has not been adequately utilized in the majority of the current scholarship on campaign finance reform and the issues created by *Buckley*. Two primary research approaches are normally utilized to determine

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[16] My review of the literature finds only a limited number of scholars citing empirical studies that indicate reform is not needed. *See, e.g.*, Bradley A. Smith, "Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform," The Yale Law Journal 105 (1996) : 1049-1091. It appears the vast majority of empirical analysis supports a need for reform.

constitutional meaning. The first approach employs an historical survey method that seeks to define first amendment meaning by determining the original intent of the nation's founders. This makes use of a method of analysis that draws from material relating to the politics, history and economics of both the current and founding period of the American nation. It is usually contained within the literature produced by political scientists, historians and economists.

Alternatively, a voluminous body of literature employing a legalistic method has been created to examine the precise legal development of Supreme Court jurisprudence in the area of campaign finance reform. This literature charts the history and distinctions of case law development and statutory enactment and is usually contained in sources emanating from law schools such as law review articles and legal treatises.

This thesis will draw from both of these bodies of scholarly work in an effort to synthesize them to achieve its primary purpose of providing a viable analytical structure which incorporates first amendment theory as a foundation, and which cogently examines both pro-reformist and anti-reformist positions. In essence, this examination is *taking a step back* in the campaign finance reform debate by analyzing the issue of *constitutional validity* at the outset instead of as an afterthought, in an effort to shed light on and help forge ahead from this seemingly insurmountable obstacle to far-ranging campaign finance reform—*Buckley*.

Chapter 2

The Search for a First Amendment Free Speech Methodology

"We believe you have made a tragic mistake in this matter in creating a false 'free speech' issue, when the real issue is ..."

–Erastus Corning II, then Mayor of Albany, New York.[1]

One would likely have great difficulty finding someone to disagree with the premise that the concept of free speech, as embodied in the First Amendment, is one of the most valuable jewels in the crown of American political ideology. For example, while examining first amendment challenges in 1948, Professor Alexander Meiklejohn[2] referred to the First Amendment as "that provision of the Constitution which is rightly regarded as its most vital assertion, its most significant contribution to political wisdom."[3]

However, also set in the crown of American political ideology is a jewel of arguably equivalent value, one that is embodied in the concept of democratic elections. This concept encompasses the idea of equality, fairness and meaningful participation in an elections mechanism in order to determine who shall chart the journey of the ship of state. As observed by Meiklejohn, "...[W]e Americans are politically free only insofar as our voting is free."[4] Long before the current campaign

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[1] Although this quote occurred in the distant past and was made while discussing free speech in a racial discrimination context, it describes with remarkable precision the pro-reformist position and succinctly states the core of pro-reformist objection to the Supreme Court's jurisprudence that has invalidated reform measures on constitutional grounds. Quoted in Nat Hentoff, *Free Speech for Me—But Not for Thee: How the American Left and Right Relentlessly Censor Each Other* (New York: Harper Collins Publishers, 1992) 65.

[2] Twenty years ago, Franklyn S. Haiman referred to Professor Meiklejohn as "[America's] most recognized modern philosopher of the [F]irst [A]mendment." Franklyn S. Haiman, *Speech and Law in a Free Society* (Chicago: The U of Chicago P, 1981) 17.

[3] Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Westport: Greenwood Press, 1979) 3.

[4] Meiklejohn, *Political Freedom* 116.

finance reform debate, Meiklejohn recognized that the American elections process might fall short of fulfilling the ideals commonly thought to be embodied in the concepts of freedom and a fair democratic process, as evidenced by his observation:

> The electoral machinery which, by custom and legislative action, we have imposed upon the Constitution, has been peculiarly unsuccessful in winning our confidence that it is suited to its purpose. The party system, as we use or abuse it, with its conventions and platforms, its campaigning appeals so commonly directed to the self-seeking interests of individuals and groups, does not give the impression that we are a nation of free, self governing minds thinking loyally and objectively about the common good. On the contrary, it makes of us rather that scrambling collection of 'factions' which Jefferson feared and condemned. The term politics which if we are free men, should connote our highest aspirations, our most serious and carefully cultivated thinking, has become a term of reproach and contempt. It speaks of trickery rather than of intelligence.[5]

Although Meiklejohn's observations were made fifty odd years ago, they could easily have been taken from a positional statement by a present day pro-reformist. Perhaps even more incredible is the fact that Meiklejohn's observation recites a vaticination given more than two hundred years ago by one of America's most celebrated founders, Thomas Jefferson. It appears as if the core concerns and issues debated with such vehemence by pro-reformists and anti-reformists in the campaign finance reform debate are really not new at all. As a result, campaign finance reform may very well involve, as one anti-reform scholar describes it, "intractable dilemmas."[6]

Interestingly, and perhaps unfortunately, the seemingly intractable dilemmas of the campaign finance reform debate brought about by the Supreme Court's

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[5] Meiklejohn, *Political Freedom* 160.

[6] Lillian R. BeVier, "Campaign Finance Reform: Specious Arguments, Intractable Dilemmas," Columbia Law Review 94 (1994) : 1258 - 1280.

decision in *Buckley* have thrust the two crown jewels of American political ideology—free speech and democratic elections—into a maelstrom of scholarly and public contention highlighting what appears to be an unavoidable and irreconcilable conflict between the two. Is it possible to have both democratic elections *and* free speech? Are these two concepts, as they exist in relation to the modern day funding of political campaigns, capable of simultaneous existence in American society? If not, the assertion of Congressman Richard Gephardt[7] must be correct—an assertion frequently quoted by anti-reformists because, at first blush, it seems so absurd. The response that naturally springs forth to the American mind is the question: how can America have a healthy democracy and democratic campaigns *without* free speech? However, this absurdity seems to exist because the two jewels of American political ideology have been both accepted and internalized by most American citizens as axioms, and any tension between the two necessarily threatens the very edifice of citizens' core beliefs about the American system of government.[8]

But is this a tension that may be harmonized?[9] Perhaps there is another way to frame the issues in the campaign finance debate that does not pit ideological jewel against ideological jewel in an either/or sense, but instead allows for some type of reconciliation between the two. As recognized by one first amendment scholar:

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[7] "What we have is two important values in direct conflict: freedom of speech and our desire for healthy campaigns in a healthy democracy. You can't have both." Quoted in Nancy Gibbs, "The Wake-Up Call," *Time*, February 3, 1997 : 25.

[8] For example, *see* David Kairys, ed. *Freedom of Speech: The Politics of Law, A Progressive Critique.* (New York: Pantheon Books, 1982) 163, who concludes "an ideology of free speech has become a basic element of [American] national identity."

[9] As one scholar stated, "Democracy, as we know it in America is a condition of tension assumed allowed and even encouraged within constitutional controls, tension is its bloom, its virtue, its vigor and its propriety." Cornelia G. Le Boutillier, *American Democracy and Natural Law* (New York: Columbia UP, 1950) 16.

> ...[T]hough we have a theoretical commitment—stemming from our history, traditions, temperament, and geography—to freedom of expression as a near absolute, reality forces us to recognize many competing rights and interests that tempt us, sometimes with good reason, in the direction of restraints on our systems of interpersonal and public communication.[10]

It is this inherent tension, as it exists in first amendment theory, between *freedom of expression as a near absolute* and a *good reasoned temptation to restrain communication*, that shall serve as the parameters of the constitutional aspect of the campaign finance reform debate examined by this thesis. As discussed, this inherent tension certainly did not originate within the confines of the campaign finance reform debate. However, the unique applicability it has to the topic is eerily prescient, as evidenced by the fact that first amendment theory developed in other contexts has such an exacting and transferable application to the central issues in the campaign finance reform debate—no new theories need to be developed or discovered. The quotations set forth throughout this thesis commenting on first amendment theory in these separate and distinct areas are meant to demonstrate the validity of this assertion. The thing often missing in the campaign finance reform debate is perhaps its most important aspect—the recognition that well-developed and traditional theories of constitutional interpretation, although often unarticulated, are really at the core of the reform debate.

The inherent tension identified above between *freedom of expression as a near absolute* and *a good reasoned temptation to restrain communication*, shall serve as the foundational underpinning of the method employed by this thesis to analyze the

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[10] Haiman 4.

First Amendment and campaign finance reform. Of course, the empirical legitimacy of the first concept of the inherent tension—the existence of an American theoretical commitment to freedom of expression as a near absolute—may be vulnerable to challenge.[11] However, this thesis accepts this concept as an axiom and leaves an exploration of the legitimacy of this belief for a later time. Freedom of expression as a near absolute shall serve as both the guidepost and conceptual basis for the extreme of anti-reformist thought. Similarly, the second concept of this inherent tension in first amendment theory—a good reasoned temptation to restrain communication—shall serve as the extreme of pro-reformist thought.

By utilizing these two concepts as the embodiment of the inherent tension present in the First Amendment and by conceptualizing each as a polar extreme of the other,[12] a Spectrum of Campaign Finance Reform Thought[13] can be visualized. Then, the various positions held by those participating in the campaign finance reform debate may be evaluated in first amendment terms and placed at some point along that spectrum. To aid in this placement, this thesis utilizes a classification mechanism that evaluates particular paradigms for first amendment definition by placing them into Models of Speech. The spectrum of reform thought and the model of speech

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[11] For example, in examining the early American commitment to freedom of speech, Leonard W. Levy points out: "The evidence provides little comfort for the notion that the colonies hospitably received advocates of obnoxious or detestable ideas on matters that counted. Nor is there reason to believe that rambunctious unorthodoxies suffered only from Puritan bigots and tyrannous royal judges. The American people simply did not understand that freedom of thought and expression means equal freedom for the other fellow, especially the one with hated ideas." Leonard W. Levy, *Freedom of Speech and Press in Early American History* (Cambridge: Harvard UP, Belknap Press 1960) 35. This thread of thought has continued viability in modern day American society.

[12] The thesis is built around the premises that the two concepts are at odds, and as ultimates, are contraries.

[13] *See* Appendix A for a graphical representation of the Spectrum of Campaign Finance Reform Thought.

classification mechanism are used as the organizing framework to provide a coherent method of analysis and to function as a useful analytical structure to evaluate the constitutional validity of pro-reformist and anti-reformist positions. If this methodology does nothing else, perhaps at the least, it will enable those involved in the campaign finance reform debate to better focus on their own positions and the positions of others, and to develop a greater understanding of the theoretical underpinnings of pro-reform and anti-reform positions. By developing a mechanism to determine how each viewpoint relates to the actual essence of the campaign finance reform debate, the apparent conflict between the simultaneous existence of democratic elections *and* free speech that *Buckley* brought to the forefront may be, if not resolved, at least better understood.[14]

Approaches to Constitutional Definition

Before identifying the six Models of Speech, it is necessary to examine the various approaches that have been developed to arrive at the *correct* meaning of constitutional provisions. In order to analyze the constitutional legitimacy of campaign finance reform in light of the First Amendment, it must first be decided *how* the meaning of the First Amendment is to be discovered: what process, method or approach should be used to arrive at a definition to ensure we are proceeding to the correct and true meaning of the First Amendment?

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[14] "Wisdom consists more in clarifying the fundamental problems and alternatives than in providing solutions." Harry V. Jaffa, attributing this belief to Leo Strauss, in *Original Intent and the Framers of the Constitution: A Disputed Question* (Washington, D.C.: Regnery Publishing, 1994) 171. Perhaps, at the least, this thesis can assist in the journey toward discovering some sort of "wisdom" in the campaign finance reform debate.

As one constitutional scholar has described, "[t]he *deepest* political differences in American history have always been concerning the *meaning* of the Constitution, whether as originally intended, or as amended" (emphasis added).[15] Campaign finance reform certainly evidences a *deep* political difference in American history through both the importance of its issues to the functioning of the American elections mechanism, and simply by virtue of its longevity in the American political landscape. It has managed to command a conspicuous place in the American political debate for at least three decades.

Unfortunately, agreeing on *a method* for determining constitutional meaning is as intractable a dilemma as determining the efficacy of specific reform measures.[16] It is precisely because of this seemingly insurmountable initial obstacle that the issue of campaign finance reform is still being debated. The United States Congress has spoken by enacting the 1971 Federal Elections Campaign Act (FECA),[17] but the United States Supreme Court has also spoken by way of *Buckley,* and the speech of each branch of government directly clashes with the other. As a result, unless the position of one of these bodies changes, this conflict will continue without resolution.

In analyzing the threshold issue of constitutional meaning, it becomes apparent that there are some rather well-defined intellectual traditions developed as potential methods for determining constitutional meaning. Although the list is not

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[15] Jaffa 15.

[16] This was artfully stated by Professor Laurence H. Tribe in the preface to the second edition of his book on constitutional law, in which he discussed his continuing education on matters constitutional and commented that he was "...gaining in the process a deeper appreciation of the very great difference between *reading* the Constitution we have and *writing* the Constitution some of us might wish to have." Laurence H. Tribe, *American Constitutional Law* (Mineola: The Foundation Press, Inc., 1988) iii.

[17] *See* discussion of FECA in Chapter 3.

finite and the approaches claiming legitimacy continually compete for recognition as being the proper method, the most common approaches include: legal positivism, natural law and utilitarianism.

It is important to note that two possible approaches to constitutional definition that are not included within this list and that are often included in the literature as approaches for constitutional definition are methods making use of original intent and contractarian approaches. As discussed in the introduction to this thesis, original intent seeks to define constitutional meaning by reference to the intention, desires or purposes of the nation's founders. It seeks to apply the provisions of the Constitution as originally intended without change.

In a similar vein, contractarian approaches arrive at constitutional definition by appealing to an historical era. One wellspring of contractarianism is John Locke's *Two Treatises of Government,*[18] published in 1690, in which Locke theorized that government comes about for the purpose of preserving individual private property. In order to effectuate this goal, those that form the government agree to divest themselves of some of their natural liberty. This divestiture is an original compact, or contract, and it is by virtue of this compact that individuals bind themselves to the will of the majority even if that will diverges from their own.

Inherent in both the original intent and contractarian approaches, there exists a belief that the Constitution is frozen as of one place and time and as such, being already completely formed, its definition and meanings are already affixed and certain, and change is not to be found through interpretation but only through

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[18] Locke, John, *Two Treatises of Government*, ed. Peter Laslett (London: Cambridge UP, 1970).

amendment. This thesis does not treat either approach as a true constitutional definitional approach because each is more of a justification mechanism that is employed to demonstrate the validity of a positivist, natural law or utilitarian approach. As a result, only the natural law, positivist and utilitarian approaches have been used as categories in this examination. However, when applicable the influences of original intent and contractariansim will be identified and discussed.

Another sub-issue that arises in the context of determining constitutional meaning has endured from the time of the formation of the American nation. This issue is concerned with whether the Supreme Court is simply another policy maker, like the executive and judicial branches, with its own agenda of interests and preferences that it attempts to effectuate through judicial pronouncements, or whether its style of decision making is separate and distinct from a political model. There are those that argue that jurisprudence follows political ideology or is a byproduct of one's general world view and takes the form that it does not because of its internal coherence or the sophistication of its logical structure, but for fairly conventional political reasons. However, even if one accepts this pessimistic view of judicial behavior, the intellectual traditions that will be discussed below inevitably play some part in the determination of constitutional meaning—either as ad hoc rationalizations of specific decision making or as coherent bodies of belief consistently adhered to but manipulated to support policy choices.

Legal Positivism Tradition

The legal positivism intellectual tradition, also know as legal realism, has sought to provide meaning to constitutional provisions by accepting the decisions of a

nation's highest legislators or courts as to the meaning and application of constitutional provisions.[19] The heirs of Justice Oliver Wendell Holmes and Charles Evans Hughes have been described as adherents of legal positivism. Reflective of this tradition is the following statement, made by Charles Evans Hughes, in a 1907 speech: "We are under a Constitution, but the Constitution is what the judges say it is."[20]

One scholar traces the modern origins of legal positivism to Thomas Hobbes and his 1651 publication of *Leviathan*,[21] and traced the ancient roots of legal positivism to Plato's *Republic*,[22] as evidenced by the argument Thrasymachus advanced: the definition of justice could be found in the "interest of the stronger."[23]

How might a constitutional commentator proceeding from a positivist point of view be recognized? Consider the statement made by one highly regarded scholar in the area of constitutional law in addressing how best to arrive at constitutional meaning: "Ultimately, this treatise is premised on the *axiom* that the Constitution—what it *says*, although *not necessarily* what some of its authors or ratifiers *intended* or *assumed*—is binding law" (emphasis added).[24]

Here, the positivistic approach is readily apparent. It is what the Constitution *says*, not what its writers and ratifiers *intended*, that must be examined to give the Constitution meaning. However, the author also leaves some room to proceed from

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[19] Lewis E. Lehrman, *Foreward. Original Intent and the Framers of the Constitution: A Disputed Question*, by Harry V. Jaffa. (Washington, D.C.: Regnery Publishing, 1994) 3.
[20] Jaffa 159, n. 24, quoting speech of Charles Evans Hughes given at Elmira, New York on May 3, 1907.
[21] Thomas Hobbes, *Leviathan* (New York: Dutton, 1950).
[22] Plato, *Republic*, ed. James Adam (Cambridge: Cambridge UP, 1963).
[23] Jaffa 159, n. 23.
[24] Tribe 10, n. 2.

other approaches when he includes *not necessarily* as a qualifier indicating some willingness to consider an original intent approach in determining meaning. He further hedges when he states:

> ...[T]his treatise...[does not accept]...the perspective of those theorists who deem constitutional text in particular, or language in general, to be so radically indeterminate that any text is capable of meaning virtually anything one wants it to mean.[25]

This quote makes clear that positivists clearly do put some limits on determining meaning by alluding to the fact that the spectrum of positivism encompasses varying degrees of interpretation in determining what meaning to provide to the constitutional language used. But it is the text itself that must be adhered to in defining meaning as opposed to the policy, history or influences present in the era of authorship.

Natural Law Tradition

A second intellectual tradition of constitutional interpretation is the natural law approach. One scholar describes the natural law tradition as "an ancient doctrine positing a natural law," apparently a metaphysical principle that regards "the essential nature of man" as "[a] sufficient source and criterion of human rights and of justice."[26] Another scholar provides the following definition:

> The term natural law is defined as that self-evident law which, being grounded in an abstract-universal "nature" of things, including man and society, remains essentially—that is to say as to its very foundation and justification—independent of convention or tradition; of legislation or legal action; and of historically developed social institutions or ideologies—a law therefore, the very foundation of which is in reason or "nature," and which is valid for all times or all places.[27]

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[25] Tribe 13, n. 9.
[26] Le Boutillier v.
[27] Anton-Hermann Chroust, "The Nature of Natural Law," in *Interpretations of Modern Legal Philosophies*, ed. Paul Sayre (New York: Oxford UP, 1947) 70.

The natural law concept is aptly described as ancient in that it can be traced back for more than twenty centuries.[28] The natural law tradition embraces the belief that there is a fundamental law upon which the American nation was founded, evidenced by founding documents of the American Nation—the Declaration of Independence and the English precursors of that document such as the Magna Charta. Proponents of the natural law tradition in America often point to the language of the Declaration of Independence: "the laws of nature and of nature's God that these truths to be self evident that all men are created equal and they are endowed by their creator with the unalienable rights to life, liberty and the pursuit of happiness." Under this view, it is apparent that nature, or the creator, is the origin and source of all political rights.

Professor Finnis provides a definition of natural law by positing three assertions:

> There are (i) a set of basic practical principles which indicate the basic forms of human flourishing as goods to be pursued and realized, and which are in one way or another used by everyone who considers what to do, however unsound his conclusions; and (ii) a set of basic methodological requirements of practical reasonableness (itself one of the basic forms of human flourishing) which distinguish sound from unsound practical thinking and which, when all brought to bear, provide the criteria for distinguishing between acts that (always or in particular circumstances) are reasonable-all-things-considered (and not merely relative-to-a-particular purpose) and acts that are unreasonable-all-things-considered, i.e. between ways of acting that are morally right or morally wrong—thus enabling one to formulate (iii) a set of general moral standards.[29]

As the above quote demonstrates, the themes of natural law posit an objective truth and a universal rightness that is right and proper in all places and all circumstances.

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[28] Chroust 57.
[29] John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) 23.

The basic practical principles, practical reasonableness and general moral standards form the basis of the Constitution under the natural law approach, and the interpretation of its provisions may only be done in light of the influence they had upon the document's creation. In the view of one scholar, a notable judicial example of a subscriber to the natural law constitutional approach was Chief Justice John Marshall, to whom he attributes a jurisprudence that extends to a *natural constitution* existing behind the written Constitution.[30]

Utilitarian Tradition

The utilitarian tradition may be simply stated as a concern for the greatest good for the greatest number of people in society. It attempts to maximize good in an effort to maximize happiness. Its roots may be traced back to Jeremy Bentham, but its primary importance to approaches to constitutional definition in this examination of the concept of freedom of expression in the First Amendment has its origins in the writings of John Stuart Mill.

One of Mill's major contributions to utilitarianism came in his publication of *On Liberty,*[31] in which he advocated the importance of free and robust public debate to ensure the health of society. Mill argued that three situations are possible: (1) if heretical opinion contains the truth, and if we silence it, we lose the chance of exchanging truth for error; (2) if received and contesting opinions each hold part of the truth, their clash in open discussion provides the best means to discover the truth in each; (3) even if the heretical view is wholly false and the orthodoxy contains the whole truth, the received truth, unless debated and challenged, will be held in the

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[30] Jaffe 159, n. 23.
[31] John Stuart Mill, *On Liberty*, ed. David Spitz (New York: Norton, 1975).

manner of prejudice or dead dogma, its meaning may be forgotten or enfeebled, and it will be inefficacious for good.[32] Mill focused primarily on the importance of having a "free press" as a mechanism to protect against tyrannical or corrupt government.

To shed further light on what is meant by a utilitarian viewpoint to constitutional definition, consider the following statement:

> ...[T]he real meaning of judicial review is to be found in the introduction of mediating principles between the large constitutional or philosophical concepts to which some or all of a community pay tribute and the common problems of reconciliation which beset the modern state.[33]

This statement appears to be, at least in part, utilitarian in that it relies on the process of judicial review to reconcile philosophical concepts and common problems by utilizing mediating principles. Judicial review (or providing constitutional definition) seeks only to achieve the good, not merely to adhere to some philosophical concepts in an absolute sense (such as those inspired by natural law) or to adhere to common problems of reconciliation (such as choosing solely to look at the laws passed by legislature in a positivist approach).

Another explanation of a utilitarian type approach is evidenced by the method of determining constitutional definition advocated by Judge J. Skelly Wright.[34] Judge Wright defended the Warren Court era during which values appeared to take precedence over principles. As one critique of Judge Wright describes: "[Judge Wright argues]...that a Court engaged in choosing fundamental values for society

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[32] C. Edwin Baker, "Scope of the First Amendment Freedom of Speech," UCLA Law Review 25 (1978) : 964-965.
[33] Tribe 14, quoting Freund, "Umpiring the Federal System," 54 Columbia Law Review 561 (1954).
[34] J. Skelly Wright, "Professor Bickel, The Scholarly Tradition, and the Supreme Court," 84 Harvard Law Review 769 (1971).

cannot be expected to produce principled decisions at the same time. Decisions first, principles later.... [It is]...value choice that is the most important function of the Supreme Court."[35] This process of choosing values, or choosing between conflicting values, is utilitarian in nature. It entails defining the Constitution based upon value choices that are beneficial and useful to society. It involves a court in "making rather than implement[ing] value choices."[36] As will be demonstrated in Chapter Four, this approach is problematic because, if as is the case in the American nation, a court is a coequal branch of government with the final say on constitutional interpretation, an irresolvable conflict may arise if that court chooses a different value than that chosen by one or more of its coequal branches.

The First Amendment

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[37]

In a search for the meaning of the First Amendment, it is helpful to briefly examine the political and social history that gave rise to the philosophical assumptions underlying the concept of freedom of expression as it is embodied in the First Amendment. There are many historical threads one might choose to follow to assist in the identification of the meaning of the First Amendment, but the most recognizable roots may be traced to the sixteenth century. It was during this era that

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[35] Robert H. Bork, "Neutral Principles and Some First Amendment Problems," Indiana Law Journal 47 (1971) : 5.
[36] Bork 6.
[37] U.S. Constitution, Amendment I (1791).

medieval theology and its control over human thought, directing it to concerns of after-life issues, were replaced by thoughts of this life.[38] A new focus on the analysis of experience by reason and experimentation developed, a belief in the right to think freely began to emerge, and this gave impetus to the rise of Liberalism.[39] Alongside this new focus was the growth of the middle class that built upon commercial interests and that soon shook the bonds of sixteenth century church and state.[40]

Against this sixteenth century backdrop a new idea was produced by John Milton's publication of the *Areopagitica* that is described by one author as "a majestic argument for intellectual freedom in the libertarian tradition."[41] The *Areopagitica* was Milton's response to an attempt to prosecute him for issuing unlicensed pamphlets of divorce.[42] Milton argued against the practice of censorship and advocated liberty of expression as evidenced by his statement that "when complaints are freely heard, deeply considered, and speedily reformed, then is the utmost bound of civil liberty attained that wise men look for."[43] Of particular interest to the campaign finance reform debate is Milton's criticism of censorship that he believed to be dangerous and arbitrary resulting in limitations on diversity and the discernment of truth. Consider the following quote:

> And though all the wind of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth

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[38] Harold J. Laski, *The Rise of Liberalism* (New York: Harper and Brothers Publishers, 1936) 74 - 75.
[39] Laski 74 - 75.
[40] Laski 98 - 99.
[41] Fredrick Siebert, Theodore Peterson, and Wilbur Schramm, *Four Theories of the Press*, 12th ed. (Urbana: U of Illinois P, 1979) 42.
[42] Fredrick Siebert, *Freedom of the Press in England 1476-1776* (Urbana: The U of Illinois P, 1952) 195.
[43] John Milton, *Areopagitica and Of Education*, ed. George H. Sabine (New York: Appleton-Century-Crofts, 1951) 2.

> put to the worse in a free and open encounter. Her confuting is the best and surest suppressing.[44]

Milton was certain that truth would eventually triumph over falsehood in a free and open encounter and free access to the ideas and thoughts of others would result in the discovery of truth. Milton's sixteenth century ideas were at work in eighteenth century America and greatly influenced the authors of the Constitution and the First Amendment.

Beyond the historical influences of the First Amendment, as discussed above, another focal point of contention about the First Amendment in the campaign finance reform debate centers upon a basic disagreement as to whether the First Amendment is a *positive grant* of power to government permitting it to ensure a well-functioning deliberative process among political equals, or is a *negative restraint* that views government regulation of speech as the "antithesis of freedom."[45] Once again, this disagreement is an omnipresent sub-issue in the campaign finance reform debate that forms an almost insurmountable obstacle on the road to resolution.

Essentially, it is a basic disagreement about the proper interpretation of the First Amendment and the proper role of government in the American political scheme. The issue is: does the First Amendment limit, or does it permit, active governmental participation in creating a particular national environment? Or, to put the issue somewhat differently, is the First Amendment to be properly understood as a positive restraint on governmental action or as an affirmative grant of power to take action?

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[44] Milton 50.
[45] Lillian R. BeVier, "Campaign Finance Reform" 1260.

The position of the *Buckley* majority left no doubt of the United States Supreme Court's view when it stated:

> The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources.'[46]

Agreeing with the United States Supreme Court, one anti-reform scholar writes:

> The First Amendment's negative constraints on government, which embody our traditional conception of 'freedom of speech,' have been instrumental in the achievement of the broadly participatory, relatively open, officially uncensored, political debate in which we take pride. It is a mistake, however, to maintain that because the debate that emerges under the First Amendment is quite robust, the First Amendment is intended to assure the widest possible debate about matters of concern to the community or that its guarantee of autonomy may be sacrificed in order to ensure a well-functioning deliberative process among political equals. Such a conclusion mistakes the effect of the principle for the principle itself.[47]

A comprehensive investigation of the scope of the First Amendment, while it undoubtedly would be helpful, is outside of the scope of this thesis. Instead, this section on the First Amendment is included only to give a flavor of some of the historical influences upon it by briefly identifying some of its historical roots. However, one important aspect of this section for the campaign finance reform debate is the idea introduced immediately above: that of whether to view the First Amendment as a positive grant of power to government or a negative restraint upon it—for as will be discussed below, this seems to be the core of *Buckley*.

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[46] *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964); *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

[47] BeVier, "Campaign Finance Reform" 1258.

Models of Speech

Having given the general theoretical background of the major intellectual traditions of constitutional interpretation and some of the historical underpinnings of the First Amendment, it is now possible to proceed to the central theme of this thesis and identify the classification mechanisms that will be superimposed upon the Spectrum of Campaign Finance Reform Thought identified above. The rubric of this classification mechanism is Models of Speech and it is through these models that the contested reform proposals stricken by *Buckley*, as well as those that survived and those that have yet to be devised, may be cogently analyzed and evaluated. An analysis must go beyond the glittering generalities so often advanced by both pro-reformists and anti-reformists about the propriety of their positions and discern the true theoretical basis for their positions. Only then do pro-reformist and anti-reformist positions become amenable to analysis for consistency and viability in a *constitutional sense*. Although these paradigmatic models are certainly not the only possible method for analyzing first amendment issues in a campaign finance reform context, they are a useful organizational structure for encouraging thoughtful analysis.

Model 1 — The Equalizing Model

The theoretical foundations of the Equalizing Model lie in the "basic tension between a private market economy and a modern democratic polity."[48] The Equalizing Model attempts to create and maintain "a well functioning political

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[48] Jamin Raskin and John Bonifaz, "The Constitutional Imperative and Practical Superiority of Democratically Financed Elections," 94 Columbia Law Review 1160 (1994) : 1161-1162, n. 8.

process among political equals."[49] It views the First Amendment as permitting government to engage in affirmative action to ensure that social and economic inequalities do not translate into political inequalities.[50] This Model proceeds from a theoretical basis that views the First Amendment as a positive grant of power to government, permitting it to take active steps to redistribute political resources in an effort to enhance the political process. Additionally, the Equalizing Model embraces use of the term speech in the First Amendment to extend to a system of expression. This system of expression will be discussed at length in Model 6, the Full Protection Model, and to prevent redundancy it will not be examined here. It is sufficient to note at this point, that the Equalizing Model and the Full Protection Model share the same broad definition of First Amendment speech. However, the Equalizing Model gives government broad, far-ranging powers to actively implement this definition.

Model 2 — The Marketplace of Ideas Model

The Marketplace of Ideas Model incorporates the belief that "truth can be discovered only through robust debate [that] is free from governmental interference."[51] The focus of this Model is on the societal benefits of free speech and it forms a theoretical basis primarily from a utilitarian point of view. This can be seen by comparing its approach to John Stuart Mill's emphasis on the importance of free debate to ensure that the beliefs and opinions held by a society remain viable and not simply "dead dogma...inefficacious for [the public] good."[52]

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[49] Cass R. Sunstein, "Free Speech Now," *The Bill of Rights in the Modern State*, ed. Geoffrey R. Stone, et al. (Chicago: Chicago UP, 1992) 292.
[50] Sunstein, *The Partial Constitution*, (Cambridge: Harvard UP, 1993) 84.
[51] C. Edwin Baker 964.
[52] Baker 965, quoting J. S. Mill, *On Liberty* (1956).

Professor C. Edwin Baker breaks the Marketplace of Ideas Model into two sub-categories and labels these categories as "classical" and "market failure."[53] In the Classical Marketplace of Ideas, a typical Millsian approach is evident as it is only through the competition of ideas that it is possible to discover truth. Baker identifies three crucial assumptions of the Classical Marketplace of Ideas Model. First, drawing from the natural law tradition of constitutional interpretation, the classical variant of the model presupposes the existence of an objective or discoverable truth—there must be a truth to be discovered.

Second, this model requires "people to possess the capacity to perceive truth or reality" and their "social location must not control the manner in which they perceive or understand the world."[54] Socialized perceptions based only upon arbitrary circumstances and power relations among groups would interfere with people's ability to perceive truth, and those perceptions would radically vary depending upon the experiences of the groups to which each individual belongs. Finally, people must be able to sort through the form and frequency of messages to evaluate the core notions contained therein—otherwise only those perspectives that are best packaged, advertised and promoted will gain acceptance.[55]

These three assumptions are easily summarized: the classical variant of the Marketplace of Ideas Model requires the existence of an objective truth that is capable of being perceived by the members of society, and those members must be able to sort through messages to recognize the core notions contained within them.

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[53] Baker 964.
[54] Baker 967.
[55] Baker 967.

The second variant of the Marketplace of Ideas Model which Baker identifies is the Market Failure Model.[56] It is concerned with what it perceives as an "absence of meaningful access opportunities for certain positions and advocates that these views be guaranteed adequate access to the marketplace."[57] Baker recognizes the difficulty with this approach when he writes: "of course, the practical problem with this position as a *constitutional standard* rather than as a legislative policy is the difficulty of determining what amounts to an adequate or meaningful...[access]...opportunity" (emphasis added).[58] The core component of the Market Failure Model is the belief that people do not have equal opportunity to participate in the marketplace of ideas and this failure of opportunities for participation violates the equality standard that is so important to American democracy.

Model 3 — The Literal Model

The most basic model used to define protected First Amendment speech is embodied in the Literal Model. This Model's approach is extremely simplistic and does not attract many scholarly proponents arguing from a *pure* Literal Model theoretical basis. However, the Literal Model is helpful for two reasons: first, it is in fact an approach taken by some commentators, scholars and jurists; and second, but perhaps more important, it provides the basic origins of our modern day disputes about constitutional meaning.

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[56] Baker 981.
[57] Baker 982.
[58] Baker 982.

The Literal Model focuses exclusively on a literal or absolute theoretical underpinning to determine what the First Amendment means by the term "speech."[59] In doing so, it simply legally dismisses specific instances of speech by an appeal to positive law. The heavy influence of a positivistic approach, as defined earlier in this chapter, is readily discernable.

The Literal Model asserts that verbal *speech*, as opposed to non-verbal *conduct*, is the only thing protected by the First Amendment. Speech is defined by determining what range of phenomena is properly encompassed under the First Amendment's concept of free speech. The range of phenomena includes *words* because "[c]learly it has been the predominant assumption of our legal system that, unless there is good cause to treat them otherwise, words are the very thing safeguarded by the First Amendment...." [60] As a result, words rather than conduct are what is protected by the First Amendment. Further, words are protected "whether...spoken, sung, broadcast, or printed on a sign, button, handbill, newspaper, magazine, or even the back of a jacket."[61] Simply put, words are what the First Amendment protects and words are protected speech regardless of how they are conveyed, while conduct is, if speech at all, unprotected speech.

This literal definition of speech is then used to analyze specific circumstances of speech on an ad hoc basis in an effort to determine if they are amenable to governmental regulation or protected by the First Amendment. The Literal Model is largely ignored in modern day Supreme Court Jurisprudence, but it did form the basis

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[59] *See* Thomas Emerson, *Toward a General Theory of the First Amendment* (New York: Random House, 1966) vii.
[60] Haiman 16.
[61] Haiman 16.

of early Supreme Court Jurisprudence when the first parameters of the First Amendment began to be defined in Supreme Court decisions following World War I.[62] However, there have been judges on the Supreme Court that have relied on just this type of literal interpretation in defining the parameters of First Amendment speech.

For example, in the 1971 landmark decision of *Cohen v. California*, [63] Justices Blackmun, Black and Burger wrote a dissenting opinion that argued for upholding the conviction of a defendant who appeared in a county courthouse wearing a jacket emblazoned with a written expletive about America's military draft. The opinion basically argued that the defendant's actions involved mainly conduct and little speech.[64] According to the dissent, the government was regulating conduct as opposed to speech and this regulation did not violate the protections of the First Amendment. However, the majority opinion in *Cohen* did not take a literal stance, and found that the *process of communication* is what the First Amendment protects—not the words themselves.

As a method of defining First Amendment speech that is applicable to specific facts and circumstances, the viability of the Literal Model is questionable. This is because the real challenge in First Amendment cases does not lie in distinguishing between verbal speech and non-verbal conduct. Instead, it is in distinguishing between non-verbal speech and non-verbal conduct, especially if one adopts the view

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[62] *See* Schenck v. United States, 249 U.S. 47 (1919); Abrams v. United States, 250 U.S. 616 (1919); Gitlow v. New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927).

[63] Cohen v. California, 403 U.S. 15 (1971).

[64] Professor Haiman called this dissenting opinion "terse, offbeat and inexplicable" and described the *Cohen* majority opinion as taking "...a more expansive view of the communication process—a view, it is hoped, that will continue to command the support of a majority of the Court . . . ." Haiman 16-17.

that the First Amendment protects words regardless of the mechanism used to convey them.

Model 4 — The Political Speech Model

The Political Speech Model is built upon the premise that what is being protected by the First Amendment's reference to speech is *political speech*. The focus is on the *purpose* of the speech. Only speech classified as political speech receives First Amendment protection. All other speech, while it may receive other constitutional protection, does not have First Amendment constitutional protection. This theory classifies speech as falling into separate and distinct categories—political speech and private speech—with each type receiving protection by virtue of different constitutional provisions resulting in different degrees of protection. This Model is based upon a belief that America's founders were rationalists who sought only to protect serious and decent discourse about public affairs.[65]

The modern origin of this theory can be traced back to Professor Meiklejohn who identified a constitutional distinction between private liberties and public freedoms. Meiklejohn believed that private liberties received protection via the Fifth Amendment and public freedoms, such as free speech, received constitutional protection by virtue of the First Amendment.[66] The origins of public freedoms are in the social compact of society and are based upon the fact that all members of the American nation inherently possess and are legally entitled to an equal status in decision making on matters concerning the common good. Meiklejohn describes the

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[65] Haiman 16-17, discussing the viewpoint of Walter Berns.
[66] Meiklejohn, *Political Freedom* xv.

scope of the First Amendment as extending to the prohibition of "...the mutilation of the thinking process of the community."[67]

Meiklejohn's view is grounded in the "necessities of the process of self-government" and leads to, if accepted, "a sharp circumscription of the arena in which the first amendment protection of free speech operates."[68] The limiting effect of this sharp circumscription not only *reduces* the parameters of the arena in which First Amendment protections operate, but it also simultaneously *increases* the level of protection of the speech falling within that arena by conferring on such speech an almost absolute and unqualified protection. One must use the qualifier *almost* because Meiklejohn does place some limits on the extent of protection afforded political speech under the First Amendment. Meiklejohn states:

> The First Amendment...is not the guardian of unregulated talkativeness. It does not require that, on every occasion, every citizen shall take part in public debate.... What is essential is not that everyone shall speak, but that everything worth saying shall be said.[69]

Political speech receives protection from the First Amendment guarantee that *the freedom of speech* shall not be abridged. Since communication about political matters has relevance to the process of self-government and since citizens in a democracy are the governors,[70] only unrestrained freedom of discussion concerning public affairs will ensure that the wisest political decisions are made.

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[67] Meiklejohn, *Political Freedom* 27; 109.
[68] Haiman 433, n. 6.
[69] Meiklejohn 26.
[70] As reflected in the well known statement of President Abraham Lincoln about American Government, "...government of the people, by the people, and for the people." President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), reprinted in D. Fehrenbacher, ed., *Abraham Lincoln: Speeches and Writings (1859-1865)* (Stanford: Stanford UP, 1989) 536.

Private speech encompasses individual expression unrelated to the political process and as a result it falls outside of the purview of *First Amendment* protection. Instead, the source of protection for private speech is the word *liberty* in the Fifth Amendment.[71] The speech protection of the Fifth Amendment, unlike First Amendment speech protection, is highly amenable to governmental regulation both in nature and scope. The Fifth Amendment protects *liberty* and liberty-derived speech, and unlike First Amendment political speech, the government may circumscribe liberty-derived speech so long as such circumscription takes place according to due process of law. The Fifth Amendment protections of speech stand in stark contrast to the First Amendment language: "Congress shall make no law...abridging the freedom of speech,..." denoting an absolute prohibition of government regulation that impinges on the freedom of speech.

Many objections have been raised to Meiklejohn's public-private speech dichotomy. Professor Chaffee rejected Meiklejohn's *discovery* of a special category of political speech and asserted that you cannot *create* an arbitrary hierarchy of values for various categories or types of speech, but that all expression must look to the First Amendment for whatever protection it may or may not obtain.[72] In a similar vein, Mieklejohn's public-private speech dichotomy and the corresponding reliance on different constitutional provisions to govern the protections to be afforded the different types of speech is labeled by Professor Haiman as "a figment of his

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[71] "No person shall...be deprived of life, liberty, or property, without due process of law." U.S. Constitution, Amendment V (1791).

[72] *See* Zechariah Chafee, Jr., *Free Speech in the United States* (Union: Lawbook Exchange, 2000).

imagination."[73] Perhaps Meiklejohn's response would be that he did not create an arbitrary hierarchy of values—the United States Constitution did.

Model 5 — The Liberty Model

The Liberty Model is based upon the theory of First Amendment meaning advanced by Professor C. Edwin Baker.[74] Baker extends First Amendment free speech protection to an *arena of individual liberty* and speech is protected because of the *value of the speech conduct to the individual.*[75] This protection is justified because the conduct protected "fosters individual self-realization and self-determination" and is enforced as long as the conduct protected does not "improperly interfere with the legitimate claim of others."[76] Baker describes his approach as the "...most coherent theory of the [F]irst [A]mendment" and urges its use because of the "...salutary implications for judicial elaboration of the [F]irst [A]mendment."[77] The Liberty Model protects First Amendment speech from "certain governmental restrictions on non-coercive, nonviolent, substantively valued conduct, including nonverbal conduct."[78]

In the Liberty Model, First Amendment speech is not limited merely to verbal speech or non-verbal speech. Instead, it encompasses an arena of individual liberty that is protected, not because of its value to society, but because of its value to the individual.

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[73] Haiman 433.
[74] *See* C. Edwin Baker, "Scope of the First Amendment Freedom of Speech," UCLA Law Review 25 (1978).
[75] Baker 966.
[76] Baker 966.
[77] Baker 964.
[78] Baker 966.

Model 6 — The Full Protection Model

The Full Protection Model is based upon the ideas of Professor Thomas Emerson.[79] Emerson asserted that a *system* of freedom of expression was central to the function of a democratic society, and in American society that system rests to a major extent with the First Amendment.

Emerson groups the values a society should protect in a system of freedom of expression into four broad categories: (1) as a method of assuring individual self-fulfillment, (2) as a means of attaining truth, (3) as a method of securing participation by the members of the society in social and political, decision-making, and (4) as a means of maintaining the balance between stability and change in the society.[80]

Emerson's system of expression, like the protection afforded to political speech by the Political Speech Model, has an absolute quality. However, the realm of absolute protection is drawn around expression. While the state may prohibit or compel "action," this is to be contrasted with the right of "expression" which occupies "a specially protected position."[81] Emerson identifies thought and communication as the "fountainhead of all expression of the individual personality," and believes that "freedom at the point of this fountainhead is essential to all other freedoms.[82]

Drawing from Emerson's system of expression, the Full Protection Model embraces the idea that law and legal institutions can and should play an affirmative

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[79] *See* Thomas I. Emerson, *Toward A General Theory of the First Amendment* (New York: Random House, 1966).
[80] Emerson 3.
[81] Emerson 6.
[82] Emerson 7.

role in the maintenance of a system that protects freedom of expression. This rejects other viewpoints that see the law and judicial process as only ascribing to legal institutions some lesser role in the protection of individual rights. In essence, Emerson's system draws an absolute protective boundary around behavior, whether verbal or nonverbal, calls that expression behavior, and extends to it First Amendment protection that is absolute in nature.

Chapter Summary

This chapter provides both the substructure and superstructure that enables the core analysis of campaign finance reform to take place in Chapter Four. To complete this daunting task, this chapter has identified some of the difficulties and complexities that are involved in attempting to formulate a First Amendment free speech methodology. This chapter formulates such a methodology by identifying a Spectrum of Campaign Finance Reform Thought and six Models of Speech to be used in evaluating the constitutionality of reform positions and placing those positions upon the spectrum using the classification mechanisms of the models. This methodology is employed in the analysis in Chapter Four of some campaign finance reform positions concerning the proper approach for determining constitutional definition. This methodology is employed in Chapter Four by analyzing some campaign finance reform positions. However, before engaging in the core analysis, Chapter Three examines the two factors that make such an analysis necessary—the Federal Elections Campaign Act and the United States Supreme Court case of *Buckley v. Valeo.*

Chapter 3

The Federal Elections Campaign Act of 1971, *Buckley*, and Beyond

The Federal Elections Campaign Act of 1971

The modern advent of significant campaign finance regulation has its genesis in the Federal Elections Campaign Act (FECA) of 1971[1] and the unprecedented regulation that was undertaken by its enactment.[2] The original enactment of FECA had as its fundamental purpose the containment of ever-increasing federal political campaign costs. However, in the wake of the Watergate crises, Democratic majorities in Congress were able to pass amendments to FECA that effectively created a whole new regulatory structure in 1974.[3] The true parameters of FECA became clear only after the passage of the 1974 amendments that are aptly described as substantial.[4] Further post-*Buckley* modifications to FECA came in 1976 and 1979.[5] One scholar helpfully described the scope of FECA and its subsequent amendments by recognizing that it set up a regime of campaign finance regulation based upon four principles: enforceable disclosure provisions, public financing of presidential races, limits on contributions and limits on spending.[6]

At the controls of the regulatory structure FECA created was an independent administrative agency designated as the Federal Election Commission (FEC). The FEC

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[1] Pub. L. No. 92-225, 86 Stat. 3 (1972).
[2] Bradley A. Smith, *Unfree Speech: The Folly of Campaign Finance Reform* (Princeton: Princeton UP, 2001) 109.
[3] Frank J. Sorauf, "What *Buckley* Wrought," *If Buckley Fell: A First Amendment Blueprint for Regulating Money in Politics*, ed. E. Joshua Rosenkranz (New York: The Century Foundation Press, 1999) 12. *See also* Herbert E. Alexander and Brian A. Haggerty, *The Federal Election Campaign Act: After a Decade of Political Reform* (Washington D.C.: Citizens' Research Foundation, 1981) 11.
[4] Kenneth J. Levit, "Campaign Finance Reform and the Return of Buckley v. Valeo" The Yale Law Journal 103 (1993) : 471.
[5] Anthony Corrado, *Beyond the Basics: Campaign Finance Reform* (New York: The Century Foundation Press, 2000) 9.
[6] Smith 32.

was given the authority to enforce the new variety of enacted FECA regulations. These regulations were extremely broad in scope and were designed to prevent both the corruption and appearance of corruption by large financial contributions to political campaigns and reduce campaign costs in an effort to level the political playing field and encourage competition.[7] These purposes were augmented by the Revenue Act of 1971 and the tax incentives it gave to taxpayers making political contributions, and the enactment of a tax check-off box on individual tax returns to designate tax money to be given to publicly subsidize presidential general election campaigns.[8]

In leveling the playing field to encourage competition, the congressional enactment of FECA and especially the subsequent 1974 amendments

> ...creat[ed] a whole new regulatory structure.... For the first time Congress adopted a commanding plan to restrict all the transactions in a campaign's finance.... Moreover, it established a pioneering program of public funding for all aspects of the presidential campaigns, and it created a regulatory agency to oversee its reforms.[9]

Additionally, the experience with the FECA in the 1976 and 1978 elections and dissatisfaction with the burdens the law placed on political debate and effective political campaigning gave rise to further amendments in 1979.[10] These later amendments reduced the reporting requirements and gave greater leeway to state and local political party committees to participate in presidential election campaigns.[11] They also allowed parties to spend unlimited amounts of money on grassroots activities such as party-

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[7] Corrado 10. *See also* Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n, 116 S. Ct. 2309, 2312 (1996) and Buckley v. Valeo, 424 U.S. 1, 25-27 (1976).

[8] Alexander and Haggerty 11; 21-22. Specifically, the Revenue Act of 1971 provided for a 50% tax credit against federal personal income tax for political contributors or a deduction for the amount of contributions. Both credits and deductions were subject to maximum limitation amounts and the deduction provision was eliminated in 1978. However, the Act also established a tax check-off provision to provide a public subsidy to presidential candidates that is still in effect.

[9] *See* Sorauf, "What *Buckley* Wrought" 12.

[10] Sorauf, "What *Buckley* Wrought" 12.

[11] Sorauf, "What *Buckley* Wrought" 12.

building, buttons, bumper stickers, brochures, posters, local party offices, yard signs, voter registration activities and get-out-the-vote drives. These funds were not considered contributions to federal candidates under FECA's 1979 amendments because they were raised for purposes other than express advocacy and did not urge the election or defeat of a particular candidate for federal office. This grassroots party activity eventually was given the name of *soft money* and the ability to raise this soft money outside the parameters of FECA have become a rallying point for pro-reformist criticisms of the current elections system.[12]

As discussed, the specific goals of the FECA provisions were to regulate various types of donors including individuals, political action committees (PACs), party committees, corporations, national banks and foreign nationals. However, FECA went beyond mere regulation of corporations, national banks and foreign nationals by completely proscribing any contributions by these entities or individuals.

An analysis of *individual donors* under FECA is problematic because an individual may be engaged in various types of contribution activities. For example, a donor may be contributing to a candidate for federal office, contributing to their own campaigns when they are seeking federal office, or making political expenditures that are not directed to any particular candidate.

Currently, FECA limitations on *individual contributions* to candidates for federal office may be generally summarized as follows: $2,000 per election to a candidate for political office ($1,000 maximum in a primary election and $1,000 maximum in a general election), $20,000 per year to a national party committee, $5,000 per year to a PAC and

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[12] Smith 35.

$5,000 per year to a state party committee. The aggregate limitation on individual contributions in any given year may not exceed $25,000.[13]

Candidates themselves are not limited in any way in making *independent expenditures* to their own campaigns for public office using their own personal resources, *unless* they are presidential candidates agreeing to accept public financing in exchange for agreeing to such limitations. If they do choose to accept public funding, they are limited to a $50,000 cap on contributions to their own campaigns from personal resources. Public funding for these presidential candidates comes from a voluntary check-off that is placed on individual income tax returns allowing tax payers to elect to contribute $3.00 of the income taxes paid by them to a public fund for presidential candidates. Those candidates that have elected to accept public funding are then eligible to receive monies from the public campaign fund once they have raised at least $5,000 in contributions of $250 or less in each of twenty states. Candidates then receive a dollar-for-dollar match up to the $250 for each contribution received.[14]

The expenditures made by individuals, groups and political parties, other than those made in coordination with a political candidate, are considered *independent expenditures* and are outside of the reach of FECA limitations. As long as such expenditures do not advocate the election or defeat of any candidate there is no limitation upon the amounts that may be expended—although any amounts collected must not violate FECA contribution limitations. Examples of such expenditures would be general advertisements about a candidate taken out in radio, newspapers or magazines. FECA

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[13] *See* Corrado 12; Smith 33.
[14] *See* Corrado 14; Smith 33.

had originally limited these amounts to $1,000 per person but these limitations were invalidated by *Buckely.*[15]

The current FECA limitations placed upon *PAC contributions* are split into two categories depending on whether the PAC is classified as a multi-candidate PAC. To receive multi-candidate PAC status the committee must be registered with the Federal Elections Commission for a six month period and receive contributions from at least fifty-one donors during that same period. Additionally, multi-candidate PACs must make contributions to at least five federal candidates. Multi-candidate PACs may contribute a per year maximum of $5,000 per election to a candidate, $5,000 to other PACs, $15,000 to national party committees and $5,000 state and local party committees. PACs that do not qualify for multi-candidate status may contribute a per year maximum of $1,000 per election to a candidate, $5,000 per election to other PACs, $20,000 per year to national party committees and $5,000 per year to state and local committees.

Party Committees may contribute $5,000 per year and per election to candidates for the United States Congress, and national party committees and national senatorial campaign committees may give $17,500 per election per year to candidates for the United States Senate. Additionally, a state party committee may donate up to $5,000 to National Senate candidates and $5,000 to PACs.

The scholarly literature examining the development of FECA is abundant. One helpful approach to aid in gaining a general understanding about FECA's development over time was undertaken by Professor Frank J. Sorauf.[16] He traces the time period from

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[15] *See* Buckley 81-82; Corrado 15-19; Smith 34-35.
[16] *See* Sorauf, "What *Buckley* Wrought" 11-62.

FECA's enactment through the modern day by dividing it into "three eras."[17] He terms the first era as the *era of adaptation* and dates this era from 1974 to 1984. Professor Sorauf begins his description of the first two years of this era, 1971 and 1972, as the "era of FECA ...that never happened."[18] As observed by Professor Sorauf, the "imposing regulatory edifice never went into effect" because "great chunks of it fell to the Supreme Court's assault in *Buckley v. Valeo* in 1976."[19] Interestingly, the language employed by Professor Sorauf in his characterization of FECA and the Supreme Court's *Buckley* decision highlights how contentious the issue of campaign finance reform continues to be, as evidenced by his description of FECA as a *commanding plan* establishing a *pioneering program* that fell to an *assault* by the Supreme Court. However, that does not detract from the value of his overall historical analysis of FECA.

After discussing the first two years of FECA, Professor Sorauf identifies the true starting date of the first genuine era of FECA as beginning with the elections of 1976 and continuing through 1984. He describes this period as a time of innovation as participants in the campaign financing process adapted to the provisions of FECA not invalidated by *Buckley*. To support his classification of this period as one of innovation and adaptation, Professor Sorauf refers to the growth of PACs and the various strategies employed by participants in the political process to innovate around and adapt to the FECA limitations.

For example, Professor Sorauf identifies one adaptation mechanism of the first period as the emergence of a shift of PAC strategy from the use of electoral strategies to legislative strategies. Legislative strategies employ the technique of making campaign

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[17] *See* Sorauf, "What *Buckley* Wrought" 11-62.
[18] Sorauf, "What *Buckley* Wrought" 12.
[19] Sorauf, "What *Buckley* Wrought" 12.

contributions to candidates identifying with a PAC's particular ideology or agenda. These contributions are made indiscriminately to both incumbents and challengers. However, this strategy proved to alienate those eventually elected to office when contributions were made to their opponents. In the mid-1980s, an electoral strategy began to be employed by PACs that entailed making contributions targeted to those candidates that were likely to win their bids for political office.[20] This electoral strategy was aimed at increasing the likelihood that the candidates receiving the PAC contributions would in fact become or remain office holders.

Another technique developed during the period of innovation and adaptation was the technique of *bundled contributions*. Bundling involves a tactic by which an interest group solicits contributions and requests that the contribution checks be made payable directly to specific candidates but mailed to the interest group. The interest group then gathers the solicited checks together and delivers them *bundled* to the candidate. By adopting this approach the interest group is able to receive political credit for large and meaningful contributions while the ability of the general public to trace these bundled contributions is minimized.

Also, the advent of coordinated expenditures took place. Both state and national political parties are allowed to make expenditures on behalf of individual candidates to federal office in coordination with the candidate. For example, parties may conduct polls, finance media expenses, and research opposition positions. While the money raised to make these coordinated expenditures must comply with FECA contribution limits, the expenditures are not capped by FECA. Under the original FECA terms

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[20] Sorauf, "What *Buckley* Wrought" 14.

invalidated by *Buckley* these expenditures would have been limited to $10,000 per candidate in a House general election and the greater of $20,000 or two cents times the state's voting-age population in a Senatorial general election.[21]

Professor Sorauf identifies a second era of FECA that he calls *the era of stability* lasting from 1985 through 1990. Sorauf characterizes this five year period as a "less innovative era" that "slipped quietly into place" being marked by "[b]oth stability and pragmatism." In this second era the number of PACs remained relatively constant while incumbents raised money with "vigor...[and]...aggressiveness" and "maintaining the status quo was the order of the day." Sorauf concludes that during this second era no significant changes or innovations occured.[22]

Professor Sorauf simply calls the third era of FECA "the 1990s." Here, an inevitable erosion of stability occurred as the consequence of policy deadlock and legislative gridlock. Incumbents became entrenched resulting in a strong and vocal movement advocating term limits. In 1990, redistricting occurred after the census was taken and a national movement to oust incumbents began to occur. This movement resulted in an erosion of incumbency control and created a new competitiveness for elective office placing FECA, once again, into the spotlight. It is during this third era that Sorauf sees the primary emergence of the two biggest concerns of modern day pro-reformists: soft money (discussed above) and issue advocacy. Sorauf concludes that the emergence of these two vehicles of FECA avoidance produced an invigorated impetus by pro-reformists to call for reform.[23]

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[21] Corrado 14-15; 32-34.
[22] Corrado 15.
[23] Sorauf, "What *Buckley* Wrought" 16-19.

The emergence of issue advocacy is viewed as especially problematic by pro-reformists. The interest groups that were prohibited by FECA contributing to candidates directly devised a process to influence voters and operate free from FECA regulations by engaging in issue advocacy. This issue advocacy approach involved operating large-scale advertising campaigns that attacked the records of the candidates without urging voters to vote *for or against* a specific candidate. This type of advocacy did not fall within the parameters of FECA and was expressly permitted by *Buckley*.

The FECA and the arena of campaign finance in which it operates is extremely complex and multi-faceted, and engaging in the type of summary set out above raises the risk of criticism based upon superficiality. However, to put the purpose of this thesis into context it is necessary to provide at least a broad overview of FECA and this section of Chapter Three has been geared to providing that overview.

Buckley[24]

> "...I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it."
>
> —Learned Hand

The concern of Learned Hand identified above seems to have special relevance to the question of whether the Supreme Court is the proper repository for ensuring the existence of the variant of liberty involved in the reform debate—the simultaneous existence of democratic elections and free speech. As this thesis clearly demonstrates there are contrary positions taken as to whether the American elections mechanism

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[24] The *Buckley* decision was rendered on January 30, 1976, and is as much debated twenty-five years later as it was at the time rendered.

currently ensures the existence of liberty. Shortly after the passage of the 1974 amendments to FECA, a group of plaintiffs who believed liberty was being threatened by FECA challenged the constitutionality of its major provisions as violating the First and Fourth Amendments to the United States Constitution, as well as violating the related provisions of the Internal Revenue Code of 1954 as amended in 1975.[25] The Court issued forth two hundred and ninety-four pages consisting of five separate opinions that basically rewrote the rules governing congressional and presidential campaign fundraising and spending.[26]

The *Buckley* plaintiffs included Republican Senator James Buckley of New York, liberal activist Stewart Mott, Democratic presidential candidate Eugene McCarthy, the 1976 McCarthy Committee for a Constitutional Presidency, the Conservative Party of the State of New York, the Mississippi Republican Party, the Libertarian Party, the New York Civil Liberties Union, the Conservative Victory Fund and Human Events, Inc. and the American Conservative Union.[27] As this list illustrates, these individuals and groups came from a broad spectrum of the American political landscape that often advocate diametrically opposed viewpoints. The *Buckley* plaintiffs were challenging what one court called "...by far the most comprehensive reform legislation passed by Congress concerning the election of the President, Vice-President and members of Congress."[28] The leading defendant in the case was the then Secretary of the Senate, Francis R. Valeo,

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[25] Buckley 90. Specifically, the petitioners contended that certain provisions of Subtitle H of the Internal Revenue Code of 1954, as amended in 1975, were unconstitutional because of discrimination in violation of the Fifth Amendment due process clause. *See* Alexander and Haggerty 21-22.
[26] Levit 472.
[27] Levit 472. *See also Buckley* 7-8.
[28] Buckley 7. United States Supreme Court quoting the District of Columbia Court of Appeals.

and the Clerk of the House, Comptroller General, Attorney General and the Federal Elections Commission were also named as defendants.[29]

Essentially, *Buckley* upheld FECA's limitations on individual, group and political committee *contributions* to candidates, disclosure provisions and public subsidies of presidential campaigns while invalidating *expenditure* limitations placed on candidates and individuals.[30] At the core of *Buckley* is the balance of first amendment rights protecting free speech and associational rights against the power of the legislature to enact laws designed to protect the integrity of the elections system.[31] The choice of the Court to accept the *Buckley* case for judicial review clearly indicates its awareness of both the existence and importance of the unique and inherent tension that exists in America between free speech rights and democratic elections.

At trial, the circuit court adjudicating the *Buckley* case approved virtually all of the challenged FECA provisions by justifying the restrictions as *conduct-related* rather than *speech-related*.[32] The trial court's decision focused primarily on the Literal Model of Speech and approached the issue of constitutional definition by employing an analysis that identified a dichotomy between conduct and speech—contributions and expenditures were simply considered conduct rather than speech. As a result, the far-ranging FECA regulations enacted by Congress were permitted. The trial court viewed FECA limitations as being a simple limitation that imposed restrictions on the transfer and use of *money* and *material resources*. As a result, the restrictions were not viewed as limiting first amendment speech because, if they limited speech at all, the limitations were not

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[29] Alexander and Haggerty 25.
[30] Tribe 1133.
[31] Alexander and Haggerty 25.
[32] Levit 472.

direct speech limitations but only incidental speech restrictions. As might be expected in the hotly contested arena of campaign finance reform, the trial court's analysis employing the simplistic Literal Model to test FECA's constitutional validity gave rise to a challenge by anti-reformists.

When the *Buckley* issues reached the United States Supreme Court, the FECA limitations on individual expenditures and contribution limits were found to impose direct and substantial restraints on first amendment speech. These restraints were found to exist because of the modern day realities of effective campaigning that requires large sums of money to engage in the type of mass media campaigns that are necessary to any successful bid for political office. The *Buckley* court recognized that modern day political speech is fueled by money and any limit on the flow of that money necessarily implicates the First Amendment. As a result, any governmental regulation must be sensitive to the free speech implications that arise from that regulation and the importance of the regulation will be balanced against the constitutional importance of free speech. Further, the Court found that FECA's direct and substantial restraints implicated core first amendment political speech rights and as a result they engaged in the highest and most exacting level of judicial scrutiny to review, assess and balance the competing interests and to determine the constitutional validity of the challenged provisions.

After engaging in a long analysis, the Court concluded that the contribution limits did pass constitutional muster but the expenditure limits, apart from the voluntary limits imposed on those agreeing to accept public subsidies, ran afoul of the First Amendment

guarantees of free speech.[33] In the Court's view the importance of spending and contributing were distinctly different in the arena of campaign finance.[34]

Contribution Limits: The Court held that contribution limits do give rise to First Amendment concerns but the *corruption or the appearance of corruption* of the democratic process invokes a sufficiently important governmental interest to support FECA's contribution limitations, and justifies governmental intrusions into this area of protected first amendment activity.[35] According to the Court, "[t]o the extent that large contributions are given to secure political *quid pro quo's* from...[candidates]...the integrity of our system of representative democracy is undermined."[36] The Court believed that if campaign contributions are sufficiently large enough to lead to *quid pro quo* corruption—the exchange of money for specific action or inaction—then both the integrity of the elections system as well as its appearance of fairness are jeopardized. Applying this concern to the FECA contribution limitations, the Court found the restrictions imposed to be within acceptable constitutional parameters.[37] It based this decision on the belief that since individual contributions only express general support for a candidate the FECA limitations impose only marginal restrictions on the ability of a candidate to campaign, and if a candidate needs more campaign money he or she is free to raise additional funds from more people.[38] The Court found a contribution to be a

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[33] Tribe 1133; Alexander and Haggerty 12; 22; 25. It is important to note that in addition to invalidating FECA expenditure limitations, the Court also held that FECA structured the FEC in an unconstitutional fashion in light of the requirements of the appointments clause of Article II, section 2 of the Constitution, based upon the mechanisms employed in dividing the responsibility for administering campaign finance legislation between the House, Senate and the General Accounting Office.

[34] E. Joshua Rosenkranz, Introduction, *If Buckley Fell: A First Amendment Blueprint for Regulating Money in Politics*, ed. E. Joshua Rosenkranz (New York: The Century Foundation Press, 1999) 2.

[35] Smith 34; Tribe 1137.

[36] Buckley 26-27.

[37] Smith 34.

[38] Buckley 21-22.

mere signal of support having little speech value and what little speech value was implicated did not depend on the size of the contribution. The Court also found that corruption was more likely to occur in the arena of contributing and large contributions could give rise to tacit political debts.[39] Finally, the Court did not feel that FECA contribution limits, in and of themselves, undermined to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates and political parties. [40]

Expenditure Limits: Unlike the contribution limitations identified above, FECA's expenditure limits did not survive *Buckley.* The Court first rejected the corruption prevention rationale as being a permissible governmental purpose to limit expenditures. The Court did not believe that these restrictions were justified to prevent political corruption because individuals are able to monetarily support a candidate without expressly advocating the candidate's election to political office. As a result, the means chosen by FECA would not really address this problem.[41] However, the more important basis for the Court's decision involved its conceptualization of the purposes of the First Amendment in the framework of American Government.

First, the Court rejected the trial court's reliance on the use of a money/speech dichotomy (a Literal Model approach) to resolve the constitutionality issue because the Court did not feel that the expenditure of money spent in a campaign could be separated from its speech component:

> ...[t]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First

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[39] Rosenkranz, Introduction, *If Buckley Fell* 2.
[40] Buckley 20.
[41] Tribe 1141.

> Amendment.... Virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.[42]

Secondly, the B*uckley* Court recognized the importance of ensuring robust public debate in the political campaign process as evidenced by its statement that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."[43] This integral component is manifested by what the Court describes as a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open...."[44] The Court finds expenditure limitations to be a barrier to far-ranging open and robust debate in that providing only the freedom "to engage in unlimited political expression subject...to a ceiling on expenditures" is like "being free to drive an automobile as far and as often as one desires on a single tank of gasoline"[45]—it is only a mirage of freedom. The *Buckley* Court held that spending limits violate the First Amendment by constraining the amount and depth of political information candidates and other political advocates can convey to voters, as spending limits amount to "substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression...."[46] The *Buckley* court held that spending does have an important speech value that is more akin to direct speech because every

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[42] Levit 472, quoting *Buckley* at 16 and 19.
[43] Mutch 14.
[44] New York Times v. Sullivan, 376 U.S. 254, 270 (1964).
[45] Buckley 19, n. 18.
[46] Buckley 58-59.

dollar spent will actually increase the number of issues discussed, the depth of their exploration and the size of the audience reached. Further, corruption was held not likely to occur in the area of expenditures because candidates are unlikely to be corrupted by their own spending or by the spending of others not involved in their campaigns.[47]

However, the Court's finding that no constitutionally sufficient purpose to support the governmental regulation of expenditures existed detracts from the core philosophical argument that *Buckley* really addresses. As one reform scholar writes, *Buckley*

> ...rais[ed,] as a constitutional matter[,] one of the oldest conflicts in Anglo-American political thought, that between liberty and equality: between those who wanted no restrictions on the political use of wealth and those who wanted to retard the tendency of unequally distributed wealth to become the basis for a similarly unequal distribution of political influence. Normally, philosophical disputes such as that between equality and liberty remain well below the surface of public discussion, but in the mid-1970's they defined their terms of congressional and court debate.[48]

Although the *Buckley* Court found that corruption or the appearance of corruption would justify the restriction of some types of campaign activities, it rejected any notion that equalizing political opportunity or influence is a constitutionally permitted goal, as "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[49]

The Court distances itself from any evaluation of equality in the democratic political process by simply focusing on constitutional limitation as opposed to the constitutional equalization of the political elections system. As will be evident in the examination of reform arguments in Chapter Four, this concern about political equality is what really lies

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[47] Rosenkranz, Introduction, *If Buckley Fell* 2.
[48] Robert E. Mutch, *Campaigns, Congress, and Courts* (New York: Praeger, 1988) 53.
[49] Buckley 48.

at the core of the many pro-reformists' belief in the need for campaign finance reform and their objection to the *Buckley* decision.

To bring this brief examination of the *Buckley* decision to a close, it is interesting to note that the Court has adopted Meiklejohn's view of the First Amendment about protecting the free discussion of governmental affairs.[50] However, the Court does not go as far as Meiklejohn's belief that the protection of governmental affairs is the *only* purpose of the First Amendment. The Court is willing to give the First Amendment a broader reading than Meiklejohn, but not as broad as the other two branches of government—at least when it involves placing limitations on campaign expenditures.

Post-*Buckley* Cases: Relevant U.S. Supreme Court Decisions

The campaign finance reform debate has continued after *Buckley*, waxing and waning as new issues arise concerning *Buckley's* application to campaign activity. As a result, a brief examination of some of the major developments is appropriate to place this investigation in a current context.

The first post-*Buckley* examination concerning the constitutionality of campaign contribution limitations came in the 1981 case of *California Medical Association v. Federal Election Commission.*[51] Here, the Supreme Court specifically addressed the constitutionality of FECA limitations on contributions made to political action committees by individuals and groups. An unincorporated association, the California Medical Association, challenged FECA restrictions that prohibited it from making any contributions greater than $5,000 to any multi-candidate political committee. Relying on the reasoning established in *Buckley*, the Court determined that since Congress could

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[50] *See* Mills v. Alabama, 384 U.S. 214, 218 (1966).
[51] California Medical Association v. Federal Elections Comm'n, 453 U.S. 182 (1981).

constitutionally limit *contributions* to campaigns, there was no First Amendment violation in limiting contributions to political action committees by unincorporated associations. As a result, the California Medical Association was not being prohibited from making an *expenditure*. Instead, it was merely being made amenable to regulations concerning the making of a *contribution*. The Court found that FECA limitations, as applied in this case, did not infringe upon first amendment speech protection because they were not regulating constitutionally protected political advocacy, but instead were regulating mere speech by proxy.[52]

Another major post-*Buckley* case involving the constitutionality of reform measures is *Citizens Against Rent Control v. City of Berkeley*,[53] in which the Court invalidated $250 contribution limits imposed on individual contributions to committees that were formed to support or oppose ballot measures. The Court found the limitations to be an unconstitutional interference with both associational rights and free speech rights. The limitations placed on the contributions were found to impair freedom of expression because they had the *effect* of limiting individual expenditures, and were contributions to committees formed to favor or oppose ballot measures—not candidates. As a result, the corruption prevention rationale used to support limitations in *Buckley* has no application because ballot measures are distinguishable from candidates and the prevention of corruption is not a sufficient justification to infringe upon essential First Amendment rights.[54]

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[52] Buckley 196; Tribe 1138.
[53] Citizens Against Rent Control v. City of Berkley, 454 U.S. 290 (1981).
[54] Citizens Against Rent Control 299-300; Tribe 1139-1140.

In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*,[55] the Court took up the issue of whether independent expenditures by incorporated political associations were constitutional. At issue was the constitutionality of a FECA provision that prohibits a corporation from using treasury funds to make independent expenditures. The Court found that the provision was not based upon any compelling justification for infringing protected speech and invalidated it as an unconstitutional provision.

In the 1985 case of *Federal Election Commission v. National Conservative Political Action Committee*,[56] the Court struck down a limitation on expenditures by political action committees. The provision prohibited a political action committee from spending more than $1,000 on behalf of a presidential candidate who had chosen to receive federal campaign financing. Relying on *Buckley*, the Court struck this limitation because it prohibited an expenditure that was made by a PAC acting independently of a candidate.

Most recently, in *Nixon v. Shrink Missouri Government PAC*,[57] the United States Supreme Court was presented with a challenge that asked the Court to review whether the entire FECA structure as modified by *Buckley* should be declared unconstitutional. The Court declined to examine this issue and instead limited its consideration of the case to a consideration of whether the Missouri contribution limits for statewide races had been set too low. This case generated interest because the Missouri limits were capped at higher limits than those allowed for federal races under FECA, and it was believed that the Court, with almost a completely new membership roster than at the time of *Buckley*, might use this case to completely reexamine the constitutionality of reform measures.

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[55] Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986).
[56] Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480 (1985).
[57] Nixon v. Shrink Missouri Government PAC, 119 S. Ct. 901 (1999).

However, the Court merely ruled that the state's interest in setting the contribution limits at the specific levels they chose was not supported by an adequate government interest and the limits were invalidated accordingly.

This short summary of post-*Buckley* cases is by no means comprehensive and was not intended to be so. However, it does give a flavor of some of the steps the Court has taken after the *Buckley* decision, and it is important to note that the Court membership, save Chief Justice Rehnquist, has completely changed since the *Buckley* decision was handed down. As a result, the direction of the Court's next step in the campaign finance reform debate is anything but certain.

Chapter 4
A First Amendment Analysis of Reform Positions

This chapter applies the methodology developed and discussed in Chapter Two to analyze some of the positions and arguments taken by those engaging in the campaign finance reform debate. As discussed in Chapter One, the various positions and arguments in the campaign finance reform debate are frequently advocated by their proponents, and criticized by their detractors, seemingly without any awareness or cognition of their viability in a *constitutional sense*. However, it is this constitutional foundation that necessarily underlies all of the argumentation because the basis of that which is being commented upon—campaign finance reform measures—cannot escape the gravitational pull of the *Buckley* case. The participants in the debate leap forward to grandiose discussions about the effectiveness of reform measures and engage in continuous speculation about the development of new and different reform measures while ***always*** being drawn back into the chaos of the main issue of *constitutionality*. The debaters have simply suffered from the lack of a coherent methodology to guide them. As a result, they frequently lose their way in understanding the full range of positions that form the foundations of the argumentation offered in support of or opposition to reform. It is time to take a step back in the campaign finance reform debate to shed some light on this issue through the methodology developed in this thesis.

For example, consider the approach taken by one pro-reformist scholar, Professor Ronald Dworkin. He was asked to author an essay that considers what regulatory regimes built around expenditure limits would be attractive, effective and constitutional *if one assumed that Buckley had been overturned* and expenditure

limits were not deemed automatically unconstitutional.[1] Here we see the wish of so many pro-reformists—*an overturning of Buckley.* This wish is so strong that the author was asked to write an essay that simply wishes *Buckley* out of the way and leaps to the promised land of reform free of *Buckley's* pull.

However, even in the make-believe world that Dworkin's assignment creates by requesting that he ignore *Buckley* and simply assume it away—*Buckley* reemerges. It is clear that Dworkin understands his assignment but he takes the inevitable step back when he begins his examination by identifying what he terms the "strongest case for *Buckley's* ruling that expenditure limits are unconstitutional."[2] Dworkin constructs this strongest case out of what he terms a faulty assumption concerning the best way to realize and protect democracy. He calls this faulty assumption the *democratic wager*[3] and describes it as proceeding from the viewpoint that the protection of democracy is best obtained by *forbidding* government to limit or control *political speech* in *any way.*

Placing Dworkin's conceptualization of the democratic wager on the campaign finance reform spectrum is easily done. However, it occupies a position far short of the strongest case for the Court to rule that expenditure limits are unconstitutional. The resting place of the democratic wager is not the extreme of anti-reformist thought—freedom of speech as a near absolute. Dworkin's assertion that the "most powerful arguments...[in *Buckley's*]...favor" proceed from the theoretical basis of the democratic wager as the representation of the strongest

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[1] *See* Ronald Dworkin, "Free Speech and the Dimensions of Democracy," ed. E. Joshua Rosenkranz (New York: The Century Foundation Press, 1999) 63-102.
[2] Dworkin 66.
[3] Attributing the naming of this assumption to the Jurist Learned Hand.

argument for invalidating reform measures does not take into account the existence of either the Liberty Model (Model 5) or the Full Protection Model (Model 6). This is not to suggest that Dworkin intentionally offers up a straw man to serve as the strongest anti-reform argument. Instead, the misunderstanding may stem from the lack of a cogent methodology to adequately assess the positions of anti-reformists and the failure to recognize that *more absolute* or greater encompassing anti-reform positions exist. In any event, Dworkin's characterization of the democratic wager places it squarely within the Political Speech Model (Model 4). The reference to the absolute protection of political speech is immediately recognizable as Meiklejohn's conceptualization of the First Amendment that extends absolute constitutional protection to political speech.

Dworkin identifies what he sees as a paradox in the democratic wager and highlights this paradox by asking the following question: "How can it improve democracy to prevent government from restricting political speech when government believes that the restriction will itself improve democracy?"[4] Unfortunately, this paradox immediately takes the path of argument down a means-end approach. The utilitarian roots of the argument are easily recognizable in that it focuses on achieving a societal good— improving democracy. However, the approach leaps past the core issue of *constitutional meaning* to focus on *democratic vitality*. It is clear that to refute *Buckley*, one must resist the temptation to examine what is good for democracy and instead focus on what is allowed or forbidden by the Constitution vis-a-vis the First Amendment. Further, Dworkin's paradox proceeds from an implicit unarticulated assumption that ignores the Supreme Court's role as *part of* the

[4] Dworkin 66.

government. Granted, it is true that Congress and the executive branch have decided that FECA restrictions will improve democracy as amply evidenced by their passage of FECA. However, the Supreme Court is a *part of* government and if it is viewed as being neutral on the issue of what is *good* for government in favor of being primarily concerned with what is *constitutional* under the First Amendment, Dworkin's paradox becomes misplaced in a discussion of *Buckley*. The Court's role as *part of* the government is not primarily to decide what will improve democracy. Instead, it is limited to passing on what is *permitted* by the Constitution, or as one scholar described: "The courts are...specialists in the field of constitutional limitation."[5] Sometimes what is good may also be prohibited. As a result, the only path out of the conundrum is through reforming the Constitution by amendment—not by judicial fiat.

Dworkin also argues that *Buckley* proceeds from a theory of democracy that views the current political arrangement as being designed merely to enforce the will of the majority. In contrast, Dworkin offers an alternative conception of democracy that he describes as both more ambitious and understanding. It conceptualizes democracy as a partnership of collective self-government in which all citizens are given the opportunity to be active and equal partners. This view of Democracy and its ramifications for free speech and campaign finance reform place it in the Equalizing Model (Model 1). Of necessity, it views the First Amendment as a positive grant of power to be employed by government in diffusing power throughout society. Of course, *Buckley* explicitly rejects this viewpoint in its denouncement of

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[5] Thomas Emerson, *Toward A General Theory of the First Amendment: A Unique Examination of the Nature of Freedom of Expression and its Role in a Democratic Society* (New York: Random House, 1966) 31.

the suppression of some speech to enhance the speech of others."[6] This thread of Dworkin's argument places its emphasis on the left side of the campaign finance reform spectrum focusing on the jewel of democratic elections and the good reasoned temptation to restrain communication. Although he professes to see freedom of speech as a fundamental human value that must balanced against the needs of democracy, Dworkin quickly balances away free speech in favor of what he views as the most effective approach for achieving the best democratic process. Dworkin desires to equalize the political power structure to make it egalitarian, but this argument has no relevance to the concerns of *Buckley*. *Buckley* is centered on constitutional validity and not the improvement of democracy or the democratic process—that is the role of Congress.

In contrast, Professor Lillian BeVier has created a large body of anti-reformist scholarly literature and draws directly and approvingly from the theory of the democratic wager and its foundation in Meiklejohn's theory of the First Amendment.[7] BeVier recognizes that initial Supreme Court cases addressing the regulation of speech in America focused primarily on determining what type of testing mechanisms to utilize in analyzing the constitutionality of speech regulation, and to what specific type of factual circumstances these testing mechanisms might apply.[8] The testing mechanisms to which Be Vier refers form the basis of the Literal Model of Speech (Model 3). But like most other reform scholars, BeVier does not attempt to validate a

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[6] Buckley 48-49.

[7] *See* Lillian R. BeVier, "Campaign Finance Reform: Specious Arguments and Intractable Dilemmas," Columbia Law Review 94 (1994) : 1258-1280; Be Vier, "The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle," Stanford Law Review 30 (1977-78) : 299-358; and Be Vier, "Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform," California Law Review 73 (1985) : 1045-1090.

[8] BeVier, "Campaign Finance Reform" 1258-1260.

speech/conduct dichotomy approach as being a proper method of analyzing reform measures. Be Vier realizes that such an approach would be too facile and would be unable to take meaningful and proper account of the full range of issues that must be considered to arrive at a proper method of constitutional definition in the area of campaign finance reform.[9]

In one article, BeVier discusses the post-*Buckley* Supreme Court case of *Austin v. Michigan Chamber of Commerce*,[10] which BeViers describes as revisiting the *Buckley* decision to address the question of whether the First Amendment permits legislatures to regulate campaign spending on the ground that governmental regulation of speech actually promotes the purpose *of a system of free expression*" [emphasis added].[11] BeVier examined, through the lens of *Michigan*, whether the "First Amendment is appropriately conceptualized as a source of power to enact legislation that proponents claim will ensure a well-functioning deliberative process among political equals."[12] As will be discussed, the components of the Equalizing Model (Model 1) and the Liberty Model (Model 5) are intermingled in BeVier's construction of the issue present in *Austin*.

First, BeVier identified one of the most quoted phrases of *Buckley*, a phrase that embodies the core of the constitutional approach used by the Court in *Buckley:*

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[9] However, these approaches do occur. Consider one adherent to the Literal Model of Speech, Judge Skelly Wright. Wright defends judicial deference to reform laws in principle and finds that political expenditures and spending should not be conceptualized as pure speech, but rather as a form of conduct related to speech, and as a result the laws regulating such activities should not be invalidated under the First Amendment. Obviously, Wright's pro-reformist approach has at its core a blanket adoption of the Literal Model of Speech (Model 3) approach. Wright makes a simple distinction between political spending and contributing and pure first amendment speech. In essence, Wright argues that reform legislation deals with conduct—not speech. *See* J. Skelly Wright, "Politics and the Constitution: Is Money Speech?" Yale Law Journal 1001 (1976) : 1005-06.

[10] Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

[11] *See* BeVier, "Campaign Finance Reform" 1258.

[12] BeVier 1258.

"Neither political equality nor enhancement of democratic dialogue is a permissible legislative goal under the First Amendment, at least if the pursuit of either entails 'restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others.'"[13] As is readily apparent, this constitutional approach rejects any conceptualization of the First Amendment as a positive grant of power to government. Additionally, it rejects the use of the Equalizing Model of Speech (Model 1) to support using the First Amendment as a mechanism or a justification for active government involvement, through campaign finance legislation, to create and/or maintain a well-functioning political process among equals. Instead, BeVier argues that *Buckley* correctly conceptualized the First Amendment as a restraint on government that would only allow campaign finance legislation, at least in terms of expenditure limitations, to be permissible in the face of corruption or to address the problem of the appearance of corruption. However, BeVier criticizes the *Austin* decision as a retreat from the *Buckley* holding in that FECA limitations on independent expenditures of corporations were upheld as constitutional limitations. BeVier sees this ruling as enlarging the reach of legislative limitations beyond *Buckley's* original pronouncement to limit the prevention of corruption or the appearance of corruption.[14]

To better flesh out the affirmative grant of power versus negative restraint aspect of constitutional interpretation, it is helpful to look at an advocate of a viewpoint that is contrary to that of BeVier. Professor Cass Sunstein proceeds from the point of view that "campaign finance laws...promote the purpose of the system of

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[13] BeVier 1258, quoting *Buckley* 48-49.
[14] BeVier 1259.

free expression, which is to ensure a well-functioning deliberative process among political equals."[15] Sunstein believes that governmental "[e]fforts to redress economic inequalities, or to ensure that they do not translate into political inequalities, should not be seen as impermissible redistribution.... Instead [they] should be evaluated pragmatically in terms of their consequences for the system of free expression."[16]

The roots of Sunstein's argument are not difficult to find. He adheres fully to the Equalizing Model of Speech (Model 1) and affords to speech very little protection from governmental regulation if that regulation is geared to reduce and eliminate political inequalities. Further, Sunstein fully and enthusiastically embraces conceptualizing the First Amendment as a positive grant of power to government that allows it to take affirmative steps to ensure a well-functioning deliberative process among political equals. Sunstein's approach encompasses the belief that the "key to fulfilling the ultimate purposes of the [F]irst [A]mendment is...to make certain that public debate is sufficiently rich to permit true collective self-determination."[17] Of course, this incorporates some aspects of the Marketplace of Ideas Model and its attempt to enrich public debate, but it goes a step further by allowing this purpose to be fulfilled by extensive and intrusive government regulation.

It is important to note that Sunstein also brings in elements from the Full Protection Model of speech to justify the protection of a *system of expression.* At first blush this seems to cast the Sunstein position in a different light than it really is

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[15] Cass R. Sunstein, *The Partial Constitution* (Cambridge: Harvard UP, 1993) 84.
[16] Cass R. Sunstein, "Free Speech Now," *The Bill of Rights in the Modern State*, ed. Geoffrey R. Stone, et al. (Chicago: U of Chicago P, 1992) 255; 292.
[17] Sunstein, "Free Speech Now" 1258, n. 2, quoting Owen M. Fiss, "Free Speech and Social Structure," Iowa Law Review 71 (1986) : 1405, 1408-11.

because it seems to encompass a far-ranging protection of expression and views the First Amendment as extending this protection to a broad spectrum of speech that includes conduct. However, Sunstein quickly subordinates this protection to the right of government to ensure democratic elections, and for Sunstein those assurances are made real by equalizing participation even if that means placing limitations on expression. In other words, Sunstein gives facile approval of the recognition of a broad system of expression but transports that broad protection to the left of the campaign finance reform spectrum to justify affirmative governmental action to restrain communication and equalize the democratic process through good reasoned restraints on speech.

Another attempt to put a new spin on a long established Model of Speech was undertaken by Professors Frederick Schauer and Richard H. Pildes. Schauer and Pildes formulate an argument that rejects the use of a special classification mechanism to place election related speech into a different First Amendment category than other types of speech.[18] In essence, they reject both Meiklejohn and *Buckley's* adherence to the Political Speech Model (Model 4). However, the term they use to refer to the Political Speech Model is "the rhetoric of exceptionalism." Schauer and Pildes offer the following definition of exceptionalism:

> According to electoral exceptionalism, elections are (relatively) bounded domains of communicative activity. Because of this boundedness...it would be possible to prescribe or apply First Amendment principles to electoral processes that do not necessarily apply throughout the domain of the First Amendment. If electoral exceptionalism prevails, the courts, in evaluating restrictions of the

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[18] *See* Frederick Schauer and Richard H. Pildes, "Electoral Exceptionalism." *If Buckley Fell: A First Amendment Blueprint for Regulating Money in Politics*, ed. E. Joshua Rosenkranz (New York: The Century Foundation Press, 1999) 103-120.

> speech that is part of the process of nominating and electing candidates, would employ a different standard from what we might otherwise characterize as the normal, or baseline, degree of First Amendment Scrutiny.[19]

As clearly evident, there is nothing novel in Schauer and Pilde's conceptualization of elections as *bounded domains* through which the Court might choose to create special rules to evaluate the propriety of governmental regulations in a First Amendment sense. It is simply the Political Speech Model carving out a special arena of speech for protection and placing political speech in this arena. However, Schauer and Pildes reject the electoral exceptionalism approach to First Amendment interpretation and do not afford to political or election speech any absolute quality deserving of specialized constitutional protection. Instead, they conclude that election specific pro-reform measures should not be viewed as being automatically contrary to the First Amendment.

To support this position, Schauer and Pildes point to other governmental regulations of political or electoral speech that has been upheld by the Court such as curtailing political speech occurring on government property, in the broadcast media, in public schools or engaged in by government employees. Schauer and Pildes believe the factor that has traditionally controlled the Court's First Amendment interpretation has, historically speaking, been the institution being regulated and not the fact that political speech was involved.[20] As a result, they reject the idea of an absolute view (like the Political Speech Model and Meiklejohn's view) and describe such a conceptualization as an "off the rack" conception of political speech. In

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[19] Schauer and Pildes 105.
[20] Schauer and Pildes 111.

essence, Schauer and Pildes argue that elections do not in any important way, nor should they, differ from any other areas of first amendment regulation.

Another approach to First Amendement interpretation in the campaign finance reform debate is one taken by Professor Burt Neuborne.[21] Neuborne draws freely from multiple free speech Models by picking and choosing from their principles to support his pro-reform argument. This approach, as so often utilized in reform arguments, makes it somewhat difficult to follow the *constitutional* course of Neuborne's beliefs. However, by utilizing the campaign finance reform spectrum to chart the path of Neuborne's argument, a great degree of clarity may be obtained and the premises underlying his positions become amenable to a fuller understanding.

Neuborne begins his argument by agreeing with what he identifies as the "crucial First Amendment principle on which *Buckely* is said to rest."[22] That principle is "the constitutional right to speak vigorously on political issues."[23] As a result, Neuborne seems to agree with the *Buckley* Court's reliance on the Political Speech Model (Model 4) and its focus on the protection of political speech under the First Amendment. Neuborne approvingly refers to the Court's *Buckley* decision as formulating a free speech principle that has as its heart:

> ...respect for the inherent dignity of an autonomous speaker. Once an individual (even a foolish or hateful individual) makes an autonomous decision to speak, the free speech principle trumps most countervailing regulatory values.[24]

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[21] *See* Burt Neuborne, "Soft Landings," *If Buckley Fell: A First Amendment Blueprint for Regulating Money in Politics*, ed. E. Joshua Rosenkranz (New York: The Century Foundation Press, 1999) 169 – 184.
[22] Neuborne 170.
[23] Neuborne 170.
[24] Neuborne 172.

Here, Neuborne's recognition of the basic components of the Liberty Model of Speech (Model 5) is clearly discernable by his identification of the heart of the free speech principle as *respect for the inherent dignity of an autonomous speaker.* Neuborne extends liberty value to the speaker's autonomous decision to speak and this autonomous decision, in a first amendment sense, takes precedence over countervailing governmental interest in regulation. Neuborne attaches value and first amendment protection to an individual's decision to speak and the speech is clearly of value because of its importance to the speaker. However, after recognizing the broad purpose of the Liberty Model's speech protection, Neuborne immediately tacks hard to portside and refines his argument, eventually reaching the conclusion that overruling *Buckley* and implementing far-ranging reform measures would not be a violation of the liberty protection afforded to individuals under the First Amendment. As a result, Neuborne at once embraces the Liberty Model *in principle* but then immediately seeks to restrict it *in practice*.

To justify this *de facto* restriction, Neuborne formulates two primary premises: first, "uncontrolled, massive political spending stops being pure speech [at some point] and becomes an exercise in power," and second, "many—perhaps most—participants in an uncontrolled campaign spending process are simply not autonomous speakers."[25] In an effort to explain his premises and his sudden shift from the far right of the campaign reform spectrum to the far left, Neuborne pauses briefly in the middle of the spectrum to interpose an argument based upon the Literal Model of Speech (Model 3).

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[25] Neuborne 172.

First, Neuborne relies on the Literal Model's conduct/speech dichotomy to reject any conceptualization of campaign spending as speech: "because the act of spending money ultimately leads to speech does not make it speech."[26] To support this position, Neuborne makes use of an analogy that correlates campaign expenses to the expenses of a newspaper in an effort to demonstrate that government intrusion into other areas of protected first amendment activity is considered constitutional. Specifically, Neuborne poses the following question:

> [I]f I own a newspaper, the wages I pay to my reporters are intended, ultimately, to generate speech. But the act of paying those wages is a form of *conduct* subject to government regulation...even though the wages make possible the publication of my newspaper. From a First Amendment perspective, why should spending money on political campaigns be different from spending money on reporter's wages?[27] (emphasis added.)

Neuborne uses this analogy to make the point that the Court has allowed governmental regulation of other activity that may lead to the exercise of protected first amendment activity, but the thing being regulated is not protected first amendment activity. The analogy is open to criticism on many levels, but one revealing criticism might be to invoke Meiklejohn's viewpoint into the discussion. Mieklejohn might respond to Neuborne that his analogy is inapplicable because it confuses the infringement of a *Fifth* Amendment protection regarding a liberty interest (right to contract) with an infringment of a *First* Amendment protection of liberty interests (freedom of the press). The donation or expenditure of campaign funds equate directly with speech—money *is* speech in the campaigning context. Whereas, the payment of wages to employees who gather together information and

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[26] Neuborne 173
[27] Neuborne 173.

assemble it to be disseminated does not equate to speech—instead it is a mere conduit to speech.

Additionally, Neuborne proceeds to critcize *Buckley* for "collapsing campaign spending and campaign speaking into a single first amendment activity" and believes the Court did so because the FECA limits being challenged were "absurdly" low and amounted to "*de facto*" limits on political speech.[28] Once again, Neuborne employs the Literal Model of Speech to argue that governmental regulation of campaign spending, at some point, is not unconstitutional *speech* infringement but only *constitutional conduct* infringement. Neuborne does not believe that massive spending is geared toward the right to speak but toward the right, through amplification and repetition, to dominate discourse and thereby prohibit other speakers from having their message heard.

Neuborne goes on to reject any conceptualization of candidates and donors as free-standing autonomous individuals making their own decisions about how to advance their political ends. Instead, Neuborne believes that candidates are forced to seek greater and greater contributions because their opponents are doing so. As a result, candidates are forced to appease contributors and potential contributors by making political decisions that thwart their autonomy. On the contribution side, Neuborne sees what he describes as a "subtle undercurrent of bribery and extortion" in the contribution process that defeats any claims of autonomous contributions. Instead, the contributions are better thought of as pay-offs made on a non-altruistic basis and the candidates themselves are not autonomous speakers but fierce competitors for resources in their drives to stay in power. In effect, Neuborne rejects

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[28] Neuborne 173.

any attempt to validate the Liberty Model's protection of speech by again finding that its importance to the individual is simply not present because no true autonomous speech exists due to the perverting nature of fundraising.

It is fitting to close this Chapter by examining the position advocated by one of the newest members of the Supreme Court, Justice Clarence Thomas. His opinion as to constitutional interpretation is certainly important in that he is likely to participate in any re-examination of *Buckley.* In *ColoradoRepublican Federal Campaign Committee v. Federal Election Commission,*[29] the Court considered the issue of whether FECA limitations fixing limits on political party expenditures being spent in coordination with specific candidates violated the free speech protections of the First Amendment. Justice Thomas found that any attempt to make a distinction between contributions and expenditures "lacks constitutional significance."[30] Justice Thomas makes clear that he proceeds from the Political Speech Model (Model 4) and interprets the First Amendment as extending protection to political discussion as evidenced by his adoption of former Chief Justice Warren Burger's language from *Buckley:*

> Contributions and expenditures are two sides of the same First Amendment coin...both involve core First Amendment expression because they further "[d]iscussion of public issues and debate on the qualifications of candidates...[which is]...integral to the operation of the system of government established by our Constitution."[31]

Thomas adopts the Political Speech Model of speech and believes that both contribution and expenditure limits infringe upon political expression and as such violate the Constitution.

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[29] 518 U.S. 604 (1996).
[30] Colorado .
[31] Colorado quoting *Buckley* 14, 241.

This Chapter has examined some reform positions using the campaign finance reform spectrum to guide the analysis. There are many positions to examine and the approach used by each is often unique in some way. However, the campaign finance reform spectrum is usually beneficial to assist in charting the various positions and to function as an aid to understand some of the theoretical underpinnings of each position.

Chapter 5

Conclusion

"...[I]n all your actions, look often upon what you *would* have, as the thing that directs all your thoughts in the way to attain it." (emphasis added.)

—Thomas Hobbes, *Leviathan*

This thesis has examined the constitutional ramifications of campaign finance reform in light of the First Amendment. This is because the First Amendment cannot be ignored—it is *what we have* and the focus of the debate upon *what we would have* blurs the real issue: is campaign finance reform constitutional? The maxim of Thomas Hobbes quoted above appears to have been taken to heart by pro-reformists as their participation in the campaign finance reform debate is geared to a*ttaining* what they believe is needed. Indeed, there is a vast amount of quantitative data and empirical research to support their position on the need for far-ranging campaign finance reform.

However, anti-reformist thought claims to embrace the First Amendment and views it as a proscription of far-ranging campaign finance reform. Assuming that anti-reformist beliefs are spawned by honest and genuinely held opinions about the meaning of the American constitution and not merely motivated by a legal means to get *what they would have*—the absence of reform—then we have a troubled debate that lacks a common language. To again use Professor Tribe's quote set out in Chapter Two, the issue centers around "...gaining...a deeper appreciation of the very great difference between *reading* the Constitution we *have* and *writing* the Constitution some of us might *wish to have*."[1] It is also important to remember that the founding fathers left the well

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[1] Laurence H. Tribe, *American Constitutional Law* (Mineola: The Foundation Press, Inc., 1988) iii.

full and the quill sharp, and the reform wished by some may be obtained by amending the Constitution to achieve those desires instead of reading those desires into it.

This thesis has examined the basic issues at the core of the reform debate and attempted to fully bring those issues into the open for observation. A methodology for examination has been developed to cogently examine the various positions on the constitutionality of campaign finance reform to add a degree of clarity to the muddied waters of the debate. While not every possible argument was examined nor every argument examined in full, an attempt has been made to provide an example of how the campaign finance reform spectrum might be employed to analyze various viewpoints and to compare and contrast them with other viewpoints. The purpose of attaining this clarity is to assist in helping the participants in the debate understand and appreciate the views of others who adhere to competing viewpoints, and to help them direct their debate to properly address the concerns opposing viewpoints raise. Attempting to sort through the vast literature on this subject makes clear the vital need for this work.

Limitations of the Study and Suggestions for Further Research

The major impediment to this study is the vast amount of literature and viewpoints relating to this topic, and the diversity of sources upon which one must draw to create a cogent methodology for accurately examining the issues and corresponding problems involved. To successfully pull together the subjective with the objective, the normative with the empirical, and in the end achieve some semblance of coherency is a daunting challenge. However, in the vast maze of this information the foundations of constitutional theory, and in turn first amendment theory, have existed from the beginning just waiting to be recognized, identified and clarified. This thesis is only able

to provide a general overview of the issues and approach envisioned in order to examine the topic. Each area examined in the previous chapters is amenable to further research and clarification, and the following is suggested:

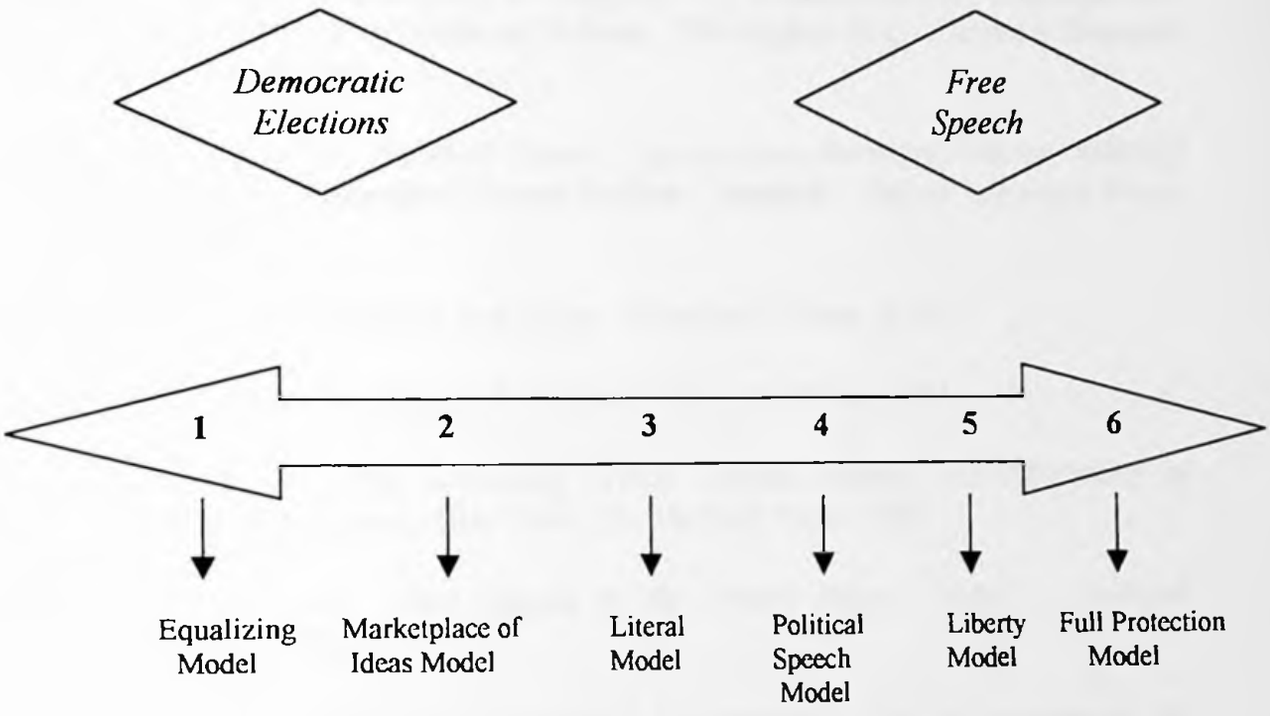
1) Further research into the specific historical and political foundations of approaches to constitutional interpretation such as natural law, positivism, utilitarianism and other approaches;

2) Further research should be undertaken to greater refine the precise definitional elements of the Models of Speech to allow for clearer and more distinct application in comparing and contrasting different approaches to interpretation;

3) Further review of the literature is recommended to identify additional Models of Speech that may be used to further clarify the Spectrum of Campaign Finance Reform Thought.

APPENDIX A

Spectrum of Campaign Finance Reform Thought



Pro-reformists

Anti-reformists

A Good Reasoned Temptation To Restrain Communication

Freedom of Expression as a Near Absolute

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