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Cover Page Footnote

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CAMPAIGN FINANCE REFORM: LIMITS ON OUT-OF-STATE CONTRIBUTIONS AND THE QUESTION OF UNCONSTITUTIONAL CONDITIONS

David J. Schwartz[*]

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I. INTRODUCTION

In the 1995-96 election and campaign cycle, congressional candidates spent a total of $765.3 million attempting to win their respective races.[1] In Massachusetts alone, one Senate race cost over eighteen million dollars.[2] With the cost of campaigns skyrocketing to such high amounts, many in Congress feel that this is the optimum time to pass "tough" campaign finance reform legislation. Public support for such reform seems to be increasing, especially in light of questionable fundraising activities engaged in by the President, some members of the House and Senate, and the major political parties.[3] Reform advocates suggest that change is needed because of the public's perception that expensive campaigns are in some way corrupt, namely, that money buys favor and influence.[4] Reformers also suggest that expensive campaigns force elected officials to spend substantial amounts of time fundraising rather than doing "the people's work."[5] In the 105th Congress, two similar bills, S. 25[6] and H.R. 493,[7] currently have the most support.[8] One aspect of S. 25, the Senate proposal,[9] is to provide congressional candidates with thirty minutes of free broadcast time,[10] reduced broadcast rates,[11] and reduced postal rates,[12] all on

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[1] Federal Election Commission, *Congressional Fundraising and Spending up Again in 1996* (last modified Apr. 14, 1997) <http://www.fec.gov/press/canye96.htm>.

[2] Federal Election Commission, *Financial Activity of Senate Campaigns through December 31, 1996* (last modified Apr. 7, 1997) <http://www.fec.gov/1996/states/ma_02.htm>. Senator John Kerry (D) raised $10,342,115 and Senator William Weld raised $8,074,417.

[3] *See* Warren P. Stobel, *President Concedes "Mistakes" in Fundraising; But He Says Donors Got Only His Ear*, WASH. TIMES, Jan. 29, 1997, at A1.

[4] It is unclear how reformers are gauging public opinion. Public opinion polls are very inconsistent. For instance, in one poll, campaign finance reform was not even mentioned amongst the top sixteen issues for the Government to address. *Powell 49%, Gore 35%; Gore Beats Other GOPers*, REUTERS/ZOGBY POLL, Feb. 3, 1997, *available in* LEXIS, News Library, Hotline file. Another poll indicated that one percent of respondents thought the President should focus on campaign finance reform first. *65% Say State of Union Is 'Ceremony for Insiders,'* FOX POLL, Feb. 4, 1997, *available in* LEXIS, News Library, Hotline file. Yet another poll found that campaign finance reform should be third on the President and Congress' list of priorities. CNN/USA TODAY/GALLUP POLL, Feb. 4, 1997, *available in* LEXIS, News Library, Hotline file.

[5] Senator Dodd estimates that a Senator needs to raise an average of $16,000 to $20,000 per week for a period of six years in order to be competitive in a bid for reelection. FDCH Congressional Hearing Summaries, Webwire-Campaign Finance Reform, April 17, 1996.

[6] S. 25, 105th Cong., 1st Sess. (1997).

[7] H.R. 493, 105th Cong., 1st Sess. (1997).

[8] Both of these bills were drafted in the 104th Congress and have been reintroduced in slightly modified form. *See* S. 1219, 104th Cong., 2d Sess. (1996); H.R. 2566, 104th Cong., 1st Sess. (1995).

[9] This Comment refers exclusively to the Senate version as of May 1997. The House version is similar in concept and design but is drafted to specifically govern House candidates.

[10] S. 25 § 102 (amending § 315 of the Communications Act of 1934 (47 U.S.C. § 315)).

the condition that the candidate agree to certain expenditure and contribution restrictions.[13]

There is, however, considerable room for debate as to whether the proposed solutions run afoul of fundamental First Amendment protections. Serious constitutional concerns arise when the federal government seeks to restrict or burden political speech or otherwise discourage those seeking elected office from engaging in a full and open debate of the issues. As Justice Brennan noted in *New York Times v. Sullivan*,[14] the First Amendment represents "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[15] Free speech functions as the best guarantee of an informed body politic, and is essential to electing those best qualified to represent the People's concerns.[16]

In 1976, the Supreme Court, in *Buckley v. Valeo*,[17] extensively evaluated the First Amendment implications of the then recently amended Federal Election Campaign Act ("FECA").[18] In its decision, the Court distinguished between campaign finance laws that impose expenditure limitations and those that limit contributions. Campaign finance laws that impose expenditure limits were deemed to substantially restrain political speech and were therefore subjected to the most rigid judicial scrutiny.[19] Contribution limits also implicated fundamental First Amendment rights, but they were seen as only marginally restricting the contributor's ability to engage in free expression. As such, most of the expenditure limitations were struck down and all of the contribution limits upheld.[20] As a result, the conclusions reached in *Buckley* present serious hurdles for reformers who wish to keep campaign spending down. In fact, some reformers

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11 S. 25 § 103 (amending § 315(b) of the Communications Act of 1934 (47 U.S.C. § 315)).

12 S. 25 § 104 (amending 39 U.S.C. § 3626(e)).

13 *See infra* notes 68-71 and accompanying text.

14 376 U.S. 254 (1964).

15 *Id.* at 270.

16 *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (stating that "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth").

17 424 U.S. 1 (1976).

18 2 U.S.C. §§ 431-42 (1997) (originally enacted as Act of Feb. 7, 1972, ch. 14, 86 Stat. 3, *amended by* 88 Stat. 1263 (Oct. 15, 1974), *amended by* 90 Stat. 475 (May 11, 1976), *amended by* 93 Stat. 1339 (Jan. 8, 1980)). The 1974 amended version was quite extensive and was passed largely in response to the spending scandals surrounding Watergate. *See* discussion *infra* notes 37-46 and accompanying text.

19 *Buckley*, 424 U.S. at 25, 44.

20 *Id.* at 58-59.

believe that the Supreme Court would have to reverse the *Buckley* decision in order to have "meaningful" reform.[21]

In S. 25, Congress has attempted to work around the *Buckley* limitations by making the contribution and expenditure limits voluntary and by providing benefits to candidates whom agree to abide by those limits.[22] Congress' attempt to offer benefits only to those candidates who are willing to give up their protected political speech rights provokes a discussion of whether Congress may do indirectly that which it is prohibited from doing directly. Part II of this Comment discusses Congress' previous attempts to reform the campaign finance system and then summarizes court rulings concerning these efforts.[23] Part II further lays out the provisions of the 105th Congress' efforts of using benefits to encourage candidates to "voluntarily" place limits on contributions and expenditures.[24] Part III first considers the constitutionality of restrictions on out-of-state contributions under the *Buckley* framework.[25] After concluding that restrictions on out-of-state contributions would be unconstitutional, Part III then considers whether Congress' attempt to encourage candidates to accept contribution and expenditure limitations in exchange for certain benefits is constitutional under the doctrine of unconstitutional conditions.[26] It concludes that even though the contribution and expenditure limitations purport to be "voluntary," the effect would be to impermissibly coerce candidates to relinquish their Free Speech rights.[27] Part IV concludes that the contribution and expenditure limitations are more coercive than voluntary and therefore would likely be declared unconstitutional. As such, these provisions should be removed from S. 25 because passing such legislation allows Congress to mislead the public by telling us they have passed reform, when in actuality they have passed a bill that will never have effect.

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[21] *See* David L. Boren, *A Recipe for the Reform of Congress*, 21 OKLA. CITY U. L. REV. 1, 10-11 (1996). Mr. Boren served as a United States Senator for Oklahoma from 1979 to 1994.

[22] *See infra* notes 71-72 and accompanying text.

[23] *See infra* notes 28-61 and accompanying text.

[24] *See infra* notes 62-72 and accompanying text.

[25] *See infra* notes 79-113 and accompanying text.

[26] *See infra* notes 114-83 and accompanying text.

[27] *See infra* notes 150-83 and accompanying text.

II. BACKGROUND

A. Campaign Finance Reform and the Courts

1. History of Congressional Attempts to Reform Campaign Finance Laws

As America emerged from the Civil War, so too did the influence of corporations on campaigns.[28] The growth of corporate influence led to a demand for change, which resulted in the passage of the Tillman Act of 1907,[29] prohibiting all federally chartered corporations and national banks from making monetary contributions to campaigns.[30] In 1910, Congress amended the Act to require political organizations to disclose all transactions involving more than $100.[31] Shortly thereafter, Congress further amended the statute to place expenditure limitations on campaigns for the House ($5,000) and Senate ($12,000).[32] Further efforts to reform campaign financing led to the enactment of the Federal Corrupt Practices Act of 1925,[33] the Hatch Political Activities Act,[34] and the Taft-Hartley Act[35] as further controls on federal campaigns. In 1971, the Federal Election Campaign Act ("FECA") was passed, replacing the Federal Corrupt Practices Act as the governing body of federal law regulating campaigns.[36]

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[28] Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1053 (1996).

[29] Tillman Act of 1907, ch. 420, 34 Stat. 864 (1907). Congress' primary source of authority for regulating federal elections is Article I, section 4 of the Constitution, which states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of chusing Senators." U.S. CONST. art. I, § 4.

[30] Tillman Act of 1907, ch. 420, 34 Stat. at 864.

[31] Act of June 25, 1910, ch. 392, §§ 5-6, 36 Stat. 822, 823 (1910).

[32] Act of Aug. 19, 1911, ch. 33, sec. 2, § 8, 37 Stat. 25, 28 (1911). The Supreme Court later declared the expenditure limitations unconstitutional because Congress lacked the constitutional authority to regulate the internal affairs of political parties. *See* Newberry v. United States, 256 U.S. 232, 258 (1921).

[33] Federal Corrupt Practices Act of 1925, ch. 368, § 301, 43 Stat. 1070, 1070-74 (1925) (codified at 18 U.S.C. §§ 610-17, repealed 1971) (broadening disclosure requirements and further restricting corporate contributions).

[34] Act of Aug. 2, 1939, ch. 410, 53 Stat. 1147 (1939) (codified at 5 U.S.C. §§ 1501-08 (1974)) (banning overt political activities by all federal employees other than presidential appointees).

[35] Labor Management Relations Act, ch. 120, sec. 304, § 313, 61 Stat. 136, 159 (1947) (banning labor union contributions to campaigns and prohibiting corporations and unions from making campaign expenditures on behalf of candidates).

[36] Federal Election Campaign Act, Pub. L. No. 92-225, 86 Stat. 3 (1971) (codified at 2 U.S.C. §§ 431-56.

Several years later, the Watergate scandal served as the catalyst for Congress to amend and drastically overhaul FECA. The 1974 amendments imposed a variety of fundraising limitations.[37] The amendments limited political contributions to federal candidates by an individual or group to $1,000[38] and by a political committee to $5,000,[39] with a total annual contribution limit of $25,000 by an individual contributor.[40] The amendments also limited overall campaign expenditures,[41] independent expenditures on behalf of a candidate,[42] and a candidate's use of personal and family resources in his or her own campaign.[43] Other provisions of FECA dealt with disclosure requirements,[44] creation of the Federal Election Commission,[45] and public financing of presidential elections.[46] It was the contribution and expenditure limitations, however, that would provide the Supreme Court with the opportunity to articulate the limits of campaign finance reform.

2. The Supreme Court and Campaign Finance Regulation—*Buckley v. Valeo*[47]

A year-and-a-half after the FECA amendments were signed into law, the Supreme Court had reviewed all of its major provisions.[48] While most of the provisions passed constitutional muster, the Court struck down the contribution and expenditure limitations.[49] Before addressing the

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[37] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-433, 88 Stat. 1263 (1974) (codified as amended in scattered sections of 2 U.S.C., 18 U.S.C. & 26 U.S.C.).

[38] 2 U.S.C. § 441a(a)(1)(A) (1994).

[39] *Id.* § 441a(a)(1)(C).

[40] *Id.* § 441a(a)(3).

[41] Pub. L. No. 93-443, 88 Stat. at 1264-65 (codified at 18 U.S.C. § 608(c) (Supp. 1974), repealed 1976).

[42] Pub. L. No. 93-443, 88 Stat. at 1265 (codified at 18 U.S.C. § 608(e)(1)-(2) (Supp. 1974), repealed 1976).

[43] Pub. L. No. 93-443, 88 Stat. 1266 (codified at 18 U.S.C. § 608(a) (Supp. 1974), repealed 1976).

[44] 2 U.S.C. § 432(b)(2)(A) & (B) (1994).

[45] *Id.* § 437c(a), (b).

[46] 26 U.S.C. §§ 9001-13, 9031-42 (1994).

[47] 424 U.S. 1 (1976).

[48] *Id.* In fact, this total review of FECA produced arguably the longest Supreme Court opinion in history, taking up 294 pages of the United States Reports. *See id.* at 1-294.

[49] *Id.* Because the Court's analysis of the contribution and expenditure limitations is most relevant to the discussion of the 105th Congress' attempt to limit out-of-state contributions and overall expenditures by voluntary compliance, this Comment will outline the Court's analysis of this issue only. It is not the purpose of this Comment to debate the wisdom of the Court's conclusions or rationale in *Buckley*.

constitutionality of the limitations, the Court articulated a series of principles that would guide its decision. First, the Court recognized that political expression involves the most fundamental of First Amendment activities, and that these activities are afforded the broadest First Amendment protection.[50] Second, the Court recognized that the First Amendment protects political speech and association equally.[51] Third, the Court rejected the contention that contributions and expenditures should be viewed as conduct rather than speech.[52] By rejecting the idea that contributions and expenditures are conduct, the Court concluded that political contributions and expenditures are to be treated as protected speech.[53] Finally, the Court recognized that contribution limitations also impinge protected associational freedoms.[54]

In analyzing FECA's contribution limitations, the Court saw the primary problem as being its restriction on a contributor's freedom of political association.[55] The Court noted, however, that "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication."[56] Since FECA limited but did not ban contributions, the limitations were upheld as being sufficiently narrowly tailored to the government's interest of preventing corruption or the appearance of corruption.[57]

In contrast, FECA's ceiling on expenditures imposed "direct and substantial restraints on the quantity of political speech."[58] The expenditures at issue were independent expenditures on behalf of

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[50] 424 U.S. at 14. "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates." *Id.* (quoting Mills v. Ala., 384 U.S. 214, 218 (1966)).

[51] 424 U.S. at 15 (citing NAACP v. Ala., 357 U.S. 449, 460 (1958) and Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973)).

[52] 424 U.S. at 15-16. In rejecting this argument, the Court was also rejecting the court of appeals' holding and reliance on United States v. O'Brien, 391 U.S. 367 (1968). 424 U.S. at 16; *see* Buckley v. Valeo, 519 F.2d 821, 840 (D.C. Cir. 1975).

[53] 424 U.S. at 16-23. The Court justified this by explaining that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19.

[54] *Id.* at 22. "Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals." *Id.*

[55] *Id.* at 24-25.

[56] *Id.* at 20-21.

[57] *Id.* at 25. The Court further noted that a person was left "free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." *Id.* at 28.

[58] *Id.* at 39.

candidates, expenditures by candidates from personal resources, and the overall spending limitation. Since these limitations would effectively cut off a candidate's speech, the Court held that the limitations were not narrowly tailored to meet the government's interest in preventing corruption.[59] In reaching this conclusion, the Court flatly rejected the existence of an interest in equalizing the relative ability of individuals to influence the outcome of elections.[60] In addition, the Court rejected the argument that the sky-rocketing cost of elections justified such limitations, declaring that "[t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise."[61]

B. Congressional Response to Buckley

In spite of the Court's clear pronouncement that mandatory expenditure ceilings are unconstitutional, reformers continue to trudge down this path.[62] The primary catalyst for this effort is the continued spiraling costs of financing a campaign, which has risen more than 300% since 1980.[63] In the 1996 election cycle the average winning Senate candidate spent $3.6 million and the average winning House candidate spent $660,000.[64]

In an attempt to bring down the cost of campaigns, Congress is targeting a new perceived evil, out-of-state contributions. A restriction on out-of-state contributions is seen as necessary to "make elected officials more accountable to the people . . . who live" in the candidate's state or district.[65] Thus, S. 25 requires that "Eligible Senate Candidates"[66] raise at

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[59] *Id.* at 37-57.

[60] *Id.* at 48-51. "[T]he 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." *Id.* at 48-49.

[61] *Id.* at 57.

[62] *Buckley* is seen as such an obstacle to reform that, in the 103d Congress, Senator Ernest F. Hollings (D-S.C.) introduced a joint resolution calling for a constitutional amendment to allow Congress and state legislators to set spending limits. S.J. Res. 10, 103d Cong., 1st Sess. (1993).

[63] It should also be noted that the *Buckley* Court acknowledged in its opinion that campaign costs had increased 300% between 1952 and 1972. *Buckley*, 424 U.S. at 57. This had no impact on the Court's final decision. *Id.*

[64] Public Citizen, *1996 Campaign Finance Facts and Figures* (visited April 17, 1997) <http://www.citizen.org/congress/reform/cfr/public_speaking/facts.html> (compiled from Federal Election Commission Reports).

[65] Center For Responsive Politics, *Part V: Proposals for Reforming Campaign Finance* (visited Jan. 18, 1997) <http://www.crp.org/reform/finance2.html>.

least sixty percent of their campaign funds from within their state.[67] In order to reduce the presumed fundraising advantage of the wealthy, the Bill also requires that personal funds be treated as contributions from outside the state.[68] In addition, S. 25 limits expenditure of personal funds to the lesser of ten percent of the general election expenditure limit, or $250,000.[69] The Bill also imposes an overall expenditure limit.[70] Because most of these proposals, with the exception of the out-of-state contribution restriction, have already been declared unconstitutional in *Buckley*, S. 25's drafters seek to avoid Supreme Court nullification by making the limitations "voluntary."[71] To encourage candidates to "voluntarily" accept the limitations, certain benefits are provided, namely reduced postage rates, reduced broadcast rates, and free broadcast time.[72]

III. ANALYSIS

Providing benefits in exchange for a candidate's decision to accept certain limits that would otherwise be unconstitutional is an issue that has never been addressed by the Supreme Court.[73] The doctrine of unconstitutional conditions is properly invoked where the government attempts to give benefits in exchange for the relinquishment of constitutional rights.[74] The doctrine, simply stated, "holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."[75] In other words, the government may not do indirectly that which it is prohibited from doing directly.[76] Virtually all of the expenditure

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[66] An "Eligible Senate Candidate" is defined as one who certifies that he or she will abide by the limitations after meeting certain minimum standards. S. 25, 105th Cong., 1st Sess. § 101 (1997) (amending § 502(a) of the Federal Election Campaign Act of 1971).

[67] S. 25 § 101 (amending § 502(e)(1)(A) of the Federal Election Campaign Act of 1971).

[68] S. 25 § 101 (amending §§ 502(e)(1), (2) of the Federal Election Campaign Act of 1971). This includes funds from the candidate's family. S. 25 § 101 (amending § 503(a)(2)(A) of the Federal Election Campaign Act of 1971). As of now, candidates have an unlimited right to use their own money in financing their campaign. *See Buckley*, 424 U.S. at 50-59 (holding unconstitutional a limitation on the amount of personal funds used to finance one's own campaign).

[69] S. 25 § 101 (amending § 503(a)(2)(A), (B) of the Federal Election Campaign Act of 1971).

[70] S. 25 § 101 (amending § 503(d) of the Federal Election Campaign Act of 1971).

[71] *See, e.g., Hearings on Campaign Finance Reform Before the Senate Committee on Rules*, 104th Cong., 2d Sess. 121 (1996).

[72] *See* sources cited *supra* notes 10-12.

[73] *See infra* notes 154-62 and accompanying text (discussing Republican Nat'l Comm. v. FEC, 487 F. Supp. 280 (S.D.N.Y. 1980), which did address the issue).

[74] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989).

[75] *Id.* at 1415.

[76] *See* Branti v. Finkel, 445 U.S. 507, 513-20 (1980); Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593 (1926); *see also infra* notes 121-23 and accompanying text.

limitations comparable to those in the Senate's current proposal have been declared unconstitutional by the *Buckley* Court. However, the provision that restricts out-of-state contributions raises an issue that has not yet been addressed by the courts. As such, it is appropriate to evaluate the constitutionality of this provision before engaging in a discussion of whether this system of benefits violates the doctrine of unconstitutional conditions.[77]

A. Is the Restriction on Out-of-State Contributions Constitutional?

In determining whether S. 25's forty percent limitation on out-of-state campaign contributions violates the free speech rights of the contributor, *Buckley* provides excellent guidance. The first question to ask, guided by the *Buckley* Court's general principles of political speech,[78] is whether the partial ban on out-of-state contributions burdens free speech. If it does burden free speech, then to avoid the constitutional ax, such a ban must be narrowly tailored to meet a compelling governmental interest.

1. Does a Restriction on Out-of-State Contributions Impinge Free Speech Rights?

In upholding the contribution limitations of FECA as constitutional, the Supreme Court found that limiting the size of contributions only marginally restricts free speech.[79] The ability to contribute, the Court reasoned, "serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."[80] Since FECA only imposed a limit on the amount of money a contributor could give, a reduction in the permissible amount of contribution involves "little direct restraint" on the contributors' political expression.[81] Since the contribution is still given, the symbolic communication—the expression of support for the candidates' views and positions—is still made.

Implicit in this reasoning is that the contributor is still allowed to make the contribution. Limiting the amount of out-of-state contributions,

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[77] This is so because if a restriction on out-of-state contributions is constitutionally permissible, the issue of unconstitutional conditions is moot as to this provision.

[78] *See supra* notes 50-54 and accompanying text.

[79] Buckley v. Valeo, 424 U.S. 1, 20-21 (1976).

[80] *Id.* at 21.

[81] *Id.*

however, would have a much more severe impact, namely prohibiting many individuals from contributing at all. For instance, in the 1996 New Hampshire Senate race the Democratic challenger for the seat, Dick Swett, received ninety-five percent of his campaign contributions from out-of-state.[82] To convert his ninety-five percent out-of-state amount into the permissible forty percent amount, Mr. Swett would have had to refuse $590,000 worth of contributions.[83] If we assume that everyone from outside the state gave the maximum allowable contribution of $1000, which is highly unlikely, then at least 590 individuals would have been denied the opportunity to voice their support for Mr. Swett.

The *Buckley* Court would have undoubtedly found this ban on some individual's contributions to be more than a marginal restriction on free expression. The Court noted the important role contributions play in campaigns and concluded that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy."[84] In fact, the principal reason for striking down the expenditure limitations was because it would have the effect of totally cutting off speech. Similarly, totally cutting off the speech of contributors should be equally unacceptable.

In addition to restricting free expression, the contribution limitations also impinge upon protected associational freedoms. The *Buckley* Court noted that "making a contribution . . . serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals."[85] The Court further explained that FECA's contribution ceiling limited one means of association with a candidate, but left the contributor free to assist personally in the association's efforts.[86] This restriction, not even an outright ban, led the Court to conclude that the contribution limitations "implicate fundamental First Amendment interests," and that the

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[82] This figure is provided by the Center for Responsive Politics and is based on Federal Election Commission data. Center for Responsive Politics, *nhsen.htm* (visited Feb. 20, 1997) <http://www.crp.org/1996elect/nhsen.html>.

[83] Mr. Swett's out-of-state contributions totaled $611,505 and in-state contributions totaled $32,010. *Id.* (These figures only represent contributions of greater than $200.) To calculate the permissible out-of-state amount, the formula would be: Total Contributions × 60% = Contributions required from inside the state. Thus, for Mr. Swett, divide $32,010 by (60%), which equals $53,350. This amount represents the total contributions allowable. Now subtract $32,010 from this number. This equals $21,340. This is the allowable amount from out-of-state (or 40% of total contributions). If you do not follow this math, imagine trying to administer this rule in an active campaign where such calculations would have to be done every day to ensure that the candidate has not violated his or her agreement.

[84] 424 U.S. at 21.

[85] *Id.* at 22.

[86] *Id.*

expenditure limitations were more severe because they had the effect of cutting off speech.[87]

Applying the principles articulated in *Buckley*, the court in *Vannatta v. Keisling*,[88] addressed the constitutionality of an amendment to the Oregon Constitution, which required candidates to raise at least ninety percent of their funds from within their district. The plaintiffs in the case were prevented from contributing to a particular candidate who lived in another district. The court noted that such a ban on contributions would serve to prevent them from associating with out-of-district candidates.[89] Such a ban on association and expression "directly burden[s] First Amendment rights," the court concluded, requiring the amendment to be subjected to strict scrutiny.[90] The court ultimately held the amendment to be unconstitutional.[91]

Similarly, to the extent that S. 25 bans individual contributions, it also prevents certain individuals from associating with a candidate. This effective ban on association, coupled with the prevention of free expression of support for a candidate, requires that strict scrutiny be satisfied. Thus, the government must demonstrate that such a provision is narrowly tailored to serve a compelling state interest.

2. Is There a Compelling Governmental Interest?

In *Buckley*, the Court addressed three suggested governmental interests: the prevention of corruption and the appearance of corruption; the equalization of the relative ability of individuals and groups to influence the outcomes of elections; and slowing the skyrocketing cost of political campaigns.[92] Of these three, only prevention of corruption or the appearance of corruption was recognized as a compelling governmental interest.[93]

Though the Supreme Court has rejected equalization of individuals in campaigns and keeping down the cost of running for election as valid interests for limiting speech, reformers continue to use such arguments as justification for reform. One figure reformers often cite is that campaign

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87 *Id.* at 23.

88 899 F. Supp. 488 (D. Or. 1995).

89 *Id.* at 494.

90 *Id.* at 496.

91 *Id.* at 497.

92 424 U.S. at 25-26.

93 424 U.S. at 26.

costs have risen over 300% since 1980.[94] This increase, however, would hardly be enough to convince the Supreme Court to reconsider its decision and recognize cost containment of elections as a compelling interest. The Court noted a similar increase in costs between 1952 and 1972.[95] In fact, to put current campaign costs into perspective, recent commentators have compared annual campaign expenditures to the cost of regular consumer items. For example, Americans spend more than twice as much money each year on yogurt[96] and almost three times as much on potato chips, as they spend on political campaigns.[97] Thus, although reformers continue to use cost containment as a reason for reform,[98] the Supreme Court should continue to disregard such reasoning as a basis for limiting political speech. "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise."[99]

Similarly, reformers continue to justify the restriction on out-of-state contributions as a means for equalizing the position of challengers, incumbents, and independently wealthy candidates.[100] Limiting out-of-state contributions is supposed to level the playing field between incumbents and challengers since more incumbents raise more of their funds from outside their state than do challengers.[101] Furthermore, to limit

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[94] *See, e.g., Hearings on Campaign Finance Reform Before the Senate Committee on Rules and Administration,* 104th Cong., 2d Sess. 91-100 (1996) (statement of Joan Claybrook, President of Public Citizen) (noting that the average winning candidate spent $1.2 million in 1980 and $4.6 million in 1994—a 383% increase).

[95] Buckley v. Valeo, 424 U.S. 1, 57 (1976) (noting a 300% increase in costs between 1952 and 1972).

[96] *See* George F. Will, *So We Talk Too Much*, NEWSWEEK, June 28, 1993, at 68 (comparing total costs of congressional races in 1992 to amount spent on yogurt that year).

[97] *See* Clare Ansberry, *The Best Beef Jerky Has Characteristics Few Can Appreciate*, WALL ST. J., Apr. 4, 1995, at A1, A12 (noting that annual American potato chip consumption was in excess of $4.5 billion).

[98] *See, e.g., Hearings on Campaign Finance Reform Before the Senate Committee on Rules and Administration,* 104th Cong., 2d Sess. 91-100 (1996) (statement of Joan Claybrook, President of Public Citizen); *id.* at 14-17 (statement of Senator Russell D. Feingold). Senator Feingold is a co-author of S. 25.

[99] 424 U.S. at 57.

[100] *See, e.g.*, 141 CONG. REC. S257, S259 (1995). Senator Feingold, co-sponsor of S. 25, stated that:

> [The] central problems that need to be addressed [are] the obscene amount of money being spent on political campaigns and the fact that so much of the money being raised to run these expensive campaigns comes not from the people who will be represented by the winner of the contest, but from wealthy individuals and special interests outside the State where the election is being conducted.

Id.

[101] *See* Sandy Hume and Sarah Pekkanen, *Campaign Finance Reform Resurfaces, but Outlook for Passage Is Still Bleak*, THE HILL, November 13, 1996, at 5. They estimate that in 1996, "Senate

a wealthy candidate's advantage, S. 25 requires that personal funds be treated as funds received from outside the state.[102] Unfortunately for reformers, the *Buckley* Court rejected equalization of candidates as a justification for reform, declaring that "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."[103]

The only justification recognized by the *Buckley* Court was that a limitation on the amount of contributions serves a compelling interest in preventing corruption or the appearance of corruption.[104] The Court was primarily concerned with the possibility that large contributions could be given to secure a political quid pro quo from the office holder.[105] Furthermore, the public's awareness that wealthy individuals had the opportunity to gain some sort of legislative favor from such political quid pro quo was further justification for a restriction on the amount of the contribution.[106] In acknowledging these justifications for government regulation of contributions, the Court expressed a concern for "the integrity of our system of representative democracy."[107]

It is difficult to see, however, how a restriction on out-of-state contributions serves to prevent corruption or otherwise preserves the integrity of our system of representative democracy. Reformers might argue that it is somehow corrupt for candidates to solicit and receive support from those who are not or would not be the candidate's constituents.[108] Such an argument, however, is based upon the incorrect assumption that elected officials only represent their constituents.[109] For

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incumbents collected only 34 percent of their money from inside their state, [while] challengers pulled in a hefty 71.8 percent from local residents." *Id.*

[102] *See supra* note 68 and accompanying text.

[103] Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).

[104] *Id.* at 26-29.

[105] *Id.* at 26.

[106] *Id.* at 27.

[107] *Id.* at 26-27.

[108] *See, e.g.*, Center for Responsive Politics, *Proposals for Reforming Campaign Finance* (visited Jan. 18, 1997) <http://www.crp.org/reform/finance2.html> (suggesting that a ban on out-of-state contributions would make elected officials more accountable to the voters in their own state). *But see* Hooker v. Sasser, 893 F. Supp. 764 (M.D. Tenn. 1995). In *Hooker*, the plaintiff, a Tennessee resident, sued the defendant, the U.S. Senator from Tennessee, for accepting donations from out-of-state because such donations dilute the weight of Tennessee citizens' votes for United States Senator and denies them the undivided loyalty of such Senator, and furthermore denied them the right to have their Senator elected exclusively by Tennessee citizens. The court dismissed the action, finding no evidence of injury. *Id.* at 767-68.

[109] *See* Vannatta v. Keisling, 899 F. Supp. 488, 497 (D. Or. 1995). The court rejected the State's argument that there was a compelling interest in banning out-of-district contributions, reasoning that "[e]lected officials in state offices impact all state residents, not just the candidate's constituents within his election district." *Id.*

instance, I might want to contribute some money to Sen. Richard Shelby of Alabama, who is also Chairman of the Senate Intelligence Committee, because I approve of the way he is conducting business in his committee. As chairmen of committees, senators are not just representing those from within their state, but rather people from across the United States who have an interest in the goings on of that committee.[110]

Another example illustrates the point. Suppose an individual lives in Ohio but works across the street at a local business that also happens to be across the state line in Indiana. A person living so close to one state would undoubtedly be interested in the political views of the representative from Indiana. For instance, the candidate's willingness or ability to get funding for roads or small business loans, as well as his position on labor issues and income taxes would all be of great import. Such a person should be able to contribute to the candidate of his or her choice irrespective of which side of the street (or state line) he or she lives.

Apart from these three proffered justifications, reformers offer no other argument for restricting out-of-state contributions. Thus, since there is no compelling governmental interest in suppressing the political expression and association of contributors who live outside of a particular state, any attempt to ban out-of-state contributions would likely fail to meet constitutional muster.

3. Even if a Compelling Interest Is Identified, a 40% Limit on Out-of-State Contributions Is Not Narrowly Tailored to Meet This Interest

Even if the Court were to identify out-of-state contributions as being potentially corrupt or perceived as corrupt, a 40% limitation on such contributions is not sufficiently tailored to meet this interest. For instance, S. 25 does not in any way attempt to distinguish corrupt out-of-state contributions from legitimate contributions (not that this would be possible).[111] As such, my neighbor, who might have evil intentions in contributing to a candidate, could make a contribution, while another without such intentions would be barred from making a contribution simply because the candidate had already hit the 40% limit. Furthermore,

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[110] Few would argue that all Americans do not have an interest in the Nation's security. This argument is not just limited to chairmen. In reality, all Senators or Representatives represent the interests of all Americans in the decisions they make. Even the Senator who is trying to procure "pork" for his state affects residents from other states, because government spending and taxing is not apportioned per state.

[111] In *Vannatta*, the court rejected the state's argument that a limitation on out-of-district contributions prevents corruption. 899 F. Supp. at 497. The court noted first that such a ban prevents non-corrupt contributors from associating with a candidate. *Id.* Second, a ban on out-of-district contributions in no way prevents in-district corruption. *Id.*

the 40% limit itself seems to be a totally arbitrary limit. Reformers do not offer a reason why a 40% limit on out-of-state contributions would be better or worse at preventing corruption than a 41%, 30% or 70% limit. It would seem that if out-of-state contributions are somehow corrupt, then a more appropriate measure would be to ban them all.[112]

The primary reason the *Buckley* Court found the contribution limitations sufficiently narrowly tailored was because it left "persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources."[113] Few, if any, of these options would be available to some individuals living outside the state. The result in *Buckley* still allowed all citizens the opportunity to contribute some money, though the amount was limited. S. 25 would undoubtedly deprive some citizens of that option altogether. For out-of-state supporters, other means of contribution are not a realistic option. For example, suppose an individual in Maine supported the views taken by the Socialist Party. In Maine, however, no one is running as a Socialist for the Senate seat. Suppose also that a Socialist was running for Senate in Nebraska. If that candidate had already received the maximum allowable out-of-state contributions, then that individual would not be able to volunteer for most of the things volunteers do, such as going door-to-door and attending rallies, unless they have a large travel expense account. Thus, this restriction on contributions would eliminate nearly all avenues for expressing support for the candidate.

Consequently, a restriction on out-of-state contributions would not be sufficiently narrowly tailored to meet a compelling governmental interest. Not only would such a scheme result in arbitrary line drawing between those who could support a candidate and those who could not, the 40% demarcation is itself arbitrary. Furthermore, this plan might eliminate all expression of support some individuals would be able to give a candidate. Thus, this proposal fails to meet the requirements of strict scrutiny and should be declared unconstitutional.

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[112] An alternative approach, not yet found in proposed legislation, might be to limit the amount of contribution an out-of-state supporter could make. For example, allowing in-state contributors to give $1000 and out-of-state supporters to contribute $600. While such an approach would certainly implicate the First Amendment, the Court might be willing to find a compelling interest in limiting the amount of influence persons from one state have on another state's politics.

[113] Buckley v. Valeo, 424 U.S. 1, 28 (1976).

B. Unconstitutional Restrictions on Speech Do Not Become Constitutional When the Government Offers Benefits in Exchange for a Candidate Choosing the Limitations

The drafters of S. 25 realize that many, if not all, of the contribution and expenditure limitations are unconstitutional and have, thus, made such limitations "voluntary."[114] Simply using the label "voluntary," however, does not ensure constitutional legitimacy. When the government offers benefits to citizens on the condition that they relinquish protected free speech rights, the doctrine of unconstitutional conditions could be invoked to prevent implementation of such legislation. Providing benefits to only those candidates who are willing to give up their constitutional rights, as declared in *Buckley,* suggests that the government is coercing candidates into giving up their and their contributors' constitutionally protected speech and association rights.[115] Furthermore, the hefty penalties assessed to the candidate who decides to exercise his constitutionally protected rights by spending more than allowed strikes another heavy blow to the free exchange of political views.[116]

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[114] *See* 142 CONG. REC. S6683-90 (reporting Senators Feingold and McCain debating with opponents of S. 1219, the 104th Congress' version of S. 25); *see also Hearings on Campaign Finance Reform Before the Senate Committee on Rules*, 104th Cong., 2d Sess. 98 (1996) (statement of Joan Claybrook, President of Public Citizen).

> S. 1219 [the 104th Congress' version of S. 25] . . . has been carefully drafted to protect the rights of free speech and political association as defined by the Court. The voluntary spending limits . . . truly [are] voluntary. . . . And a potential . . . challenge to a limit on out of state contributions is avoided by making that limit a condition of receiving the media benefits.

Id.

[115] The contributor's rights would be deprived because of S. 25's out-of-state contribution restriction. An interesting issue is whether candidates should be able to give up their speech rights at all, since doing so would infringe on the rights of listeners. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 395-97 (1985).

[116] *See* S. 25 § 101 (amending § 506(b) of the Federal Election Campaign Act of 1971). Section 506(b) assesses civil penalties depending on the amount spent in excess of the limit. The fine for expenditures that exceed the limit by 2.5% or less is equal to the amount in excess of the limit. *Id.* at § 506(a)(1). The fine for expenditures of more than 2.5% of the limit and less than 5% of the limit is equal to three times the amount spent in excess of the limit. *Id.* at § 506(b)(2). The fine for expenditures that exceed the limit by more than 5% is equal to three times the amount spent in excess of the limit plus a civil penalty imposed by the FEC. *Id.* at § 506(b)(3).

1. Origins of the Doctrine of Unconstitutional Conditions

The doctrine of unconstitutional conditions is a doctrine that appears seldom but arises in a variety of contexts.[117] It has been developed to ensure that the government does not use its power of the purse to elicit questionable waivers of constitutional rights.[118] Its origins can be traced to the *Lochner*-era's concern with economic rights and states' attempts to condition corporate activity within their borders upon such concessions as an agreement by a corporation not to invoke federal diversity jurisdiction.[119] The Supreme Court invalidated such measures because they placed improper pressure on fundamental rights.[120] From this era came perhaps the most articulate explanation for its rationale:

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. . . . [I]t is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.[121]

Beginning with the Warren era, the doctrine became increasingly invoked as a restraint on governmental attempts to broker away constitutional protections. In *Branti v. Finkel*,[122] the Supreme Court refused to allow the government to dismiss an employee because of his political affiliation, reasoning that doing so would impose an "unconstitutional condition on the receipt of a public benefit and therefore came within the rule of cases like *Perry v. Sindermann*."[123] In *Perry*, the Court held:

> [The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in

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[117] For a thorough discussion of the doctrine, see Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1989); Sullivan, *supra* note 74; Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990).

[118] *See* Edward J. Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, 39 CASE W. RES. L. REV. 97, 97-107 (1998-89).

[119] *See* Terral v. Burke Constr. Co., 257 U.S. 529, 531 (1922).

[120] *Id.* at 532.

[121] Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926) (Sutherland, J.).

[122] 445 U.S. 507 (1980).

[123] *Id.* at 514.

> freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or association, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly."[124]

The doctrine, so stated, seems simple enough. Constitutional waters, however, are seldom so clear. The difficulty arises in determining when the government is "indirectly" burdening speech. Resolution of this issue usually hinges on whether the state action in question coerces individuals, either by enticing them to accept a benefit in exchange for a restriction on free speech rights or by penalizing those who refuse to relinquish their rights by denying them benefits to which they would otherwise be entitled.[125] If the statute is coercive, it is deemed to burden the exercise of such speech and therefore must satisfy strict scrutiny.[126] Otherwise, there is no constitutional barrier to implementation of the statute.

2. Coercion and Case Law

The issue of coercion arises in several contexts, but most often in First Amendment cases dealing with religious liberty,[127] tax exemptions,[128] and public employment.[129] The scarceness of the doctrine's occurrence and the wide variety of situations to which it has been applied make a succinct model for application difficult to discern. Thus, a few examples of where the doctrine has arisen are instructive. For instance, in *Sherbert v. Verner,*[130] the Court invalidated, under the Free Exercise Clause, a denial of state unemployment benefits to a woman who would not work on Saturday because it was her Sabbath and who was, therefore, unemployed. The Court found the condition to be coercive because of the "unmistakable"

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[124] 408 U.S. 593, 597 (1972) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

[125] *See* Sullivan, *supra* note 74, at 1419-20.

[126] *See* Elrod v. Burns, 427 U.S. 347 (1976). "It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny . . . . This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct." *Id.* at 362 (quoting Buckley v. Valeo, 424 U.S. 1, 64-65 (1976)).

[127] *See, e.g.,* Lee v. Weisman, 505 U.S. 577, 580 (1992); Sherbert v. Verner, 374 U.S. 398, 404 (1963).

[128] *See, e.g.,* Regan v. Taxation with Representation of Wash., 461 U.S. 540, 551 (1983); *Speiser*, 357 U.S. at 532.

[129] *See, e.g.,* Rankin v. McPherson, 483 U.S. 378, 384 (1987); Perry v. Sinderman, 408 U.S. 593, 602 (1972); Keyishian v. Board of Regents, 385 U.S. 589, 609 (1967).

[130] 374 U.S 398 (1963).

pressure placed upon Mrs. Sherbert to forego the practice of her religion.[131] The Court reasoned that the imposition of such pressure "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[132]

Where tax exemptions and other government benefits are involved, the Supreme Court has attempted to distinguish between denial of benefits which amount to penalizing constitutional rights (coercive) from denials which amount to a mere refusal to subsidize certain activities (not coercive). For instance, in *Rust v. Sullivan,*[133] the Court refused to apply the doctrine in upholding regulations issued by the Department of Health and Human Services prohibiting Title X funding for abortion counseling and activities advocating abortion as a method of family planning.[134] The Court reasoned that "the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized."[135] Similarly, in *Regan v. Taxation with Representation of Washington,*[136] the Court declined to apply the doctrine, holding that the First Amendment is not violated by denying tax exemptions to certain nonprofit organizations that lobby.[137] The Court explained that Congress had not denied the plaintiff the right to receive deductible contributions to support its non-lobbying activity, but had merely refused to pay for the lobbying with public funds.[138]

Alternatively, in *Speiser v. Randall,*[139] the Court held that tax exemptions to veterans could not be conditioned upon the taking of a loyalty oath, because such a condition would have the effect of penalizing them for engaging is certain forms of speech.[140] The Court went on to note that "the denial of tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech."[141]

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131 *Id.* at 404.

132 *Id.*; *see also* Hobie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (invalidating the denial of unemployment benefits to a Seventh-Day Adventist who declined to work on Saturday because it was her Sabbath).

133 500 U.S. 173 (1991).

134 *Id.* at 196.

135 *Id.*

136 461 U.S. 540 (1983).

137 *Id.* at 546.

138 *Id.* (analogizing to Cammarano v. United States, 358 U.S. 498 (1959), where the Court allowed a denial of business expense deductions for lobbying activities).

139 357 U.S. 513 (1958).

140 *Id.* at 529.

141 *Id.* at 519.

In the public employment context, the issue most often arises when a state employee has been fired because of something they said or because of an employee's refusal to provide political support, financially or otherwise, to their boss.[142] In these cases, it is continued employment that is the government benefit. In the landmark case of *Perry v. Sindermann*,[143] the Court addressed the issue of whether an employee with no contractual right to retain his job could be denied renewal of a one-year teaching contract for engaging in constitutionally protected speech.[144] In holding that non-renewal could not be predicated on the teacher's exercise of free speech rights, the Court declared: "[T]his Court has made clear that even though a person has no 'right' to a valuable governmental benefit . . . [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interests in freedom of speech."[145]

In another far reaching opinion, the Court in *Elrod v. Burns*[146] confronted the issue of whether public employees could be dismissed for failure to express their political allegiance to the party in control of the office.[147] In holding such a practice to violate the First Amendment, the Court wrote: "The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly."[148] The Court clearly recognized the coercive nature of the practice and that the practice not only inhibits protected expression but in fact "penalizes" its exercise.[149] The unconstitutional condition cases yield the conclusion that where the government conditions receipt of a benefit on the surrender of a constitutional right, the government action is susceptible to a constitutional challenge.

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[142] *See, e.g.*, O'Hare Truck Serv., Inc. v. City of Northlake, 116 S. Ct. 2353 (1996) (holding that the First Amendment is violated when the government retaliates against a contractor for the exercise of rights of political association or expression of political allegiance). The Court found that such retaliation was similar to the coercion exercised in other unconstitutional condition cases. *Id.* at 2355 (citing Perry v. Sindermann, 408 U.S. 593 (1972)).

[143] 408 U.S. 593 (1972).

[144] *Id.* at 598.

[145] *Id.* at 597.

[146] 427 U.S. 347 (1976).

[147] In *Elrod*, a Democrat replaced a Republican sheriff. *Id.* at 351. In accordance with longstanding tradition, the new sheriff replaced non-civil-service employees of the sheriff's office with members of his own party when the existing employees refused to affiliate with that party. *Id.*

[148] *Id.* at 361.

[149] *See id.* at 355-59; *see also* Rutan v. Republican Party, 497 U.S. 62 (1990) (extending *Elrod* to the promotion, transfer, recall, and hiring decisions based on party affiliation and support).

3. S. 25 Imposes an Unconstitutional Condition

a. S. 25's Statutory Scheme Is Coercive

The issue of unconstitutional conditions in the context of campaign finance regulation has not been addressed by the Supreme Court. Reformers will undoubtedly point to the current system of presidential financing as evidence of S. 25's constitutionality. Under the presidential system, candidates have the choice of receiving public financing in exchange for limiting expenditures or foregoing public financing in exchange for unlimited private fundraising.[150] In *Buckley*, the Court was not asked to address the constitutionality of the limit on presidential candidates who accept public financing, but rather was asked to assess the constitutionality of public financing in general.[151] Unfortunately, the doctrine was neither mentioned by the Court nor argued by the parties. Another source of hope for reformers is a footnote in *Buckley* indicating that conditioning public financing upon a candidate's agreement to limit expenditures would be permissible.[152] Relying on one footnote in a 144-page majority opinion would be risky, however, especially since the Court was without the benefit of brief or argument on the matter. Furthermore, a system of public financing differs from S. 25 in that under S. 25, congressional candidates must still spend large amounts of time fundraising. The purpose of publicly financing presidential elections was to free candidates from the rigors of fundraising and "to facilitate and enlarge public discussion and participation in the electoral process."[153] Since S. 25 does not provide public financing, it would therefore not alleviate the need for candidates to spend expansive amounts of time soliciting funds.

In *Republican National Committee v. FEC*,[154] a district court was faced with the unconstitutional conditions argument and concluded that the

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[150] 2 U.S.C. § 441a(b)(1) (1994). The subsidy is $20 million in 1974 dollars adjusted each election cycle for inflation.

[151] Buckley v. Valeo, 424 U.S. 1, 90-91 (1976).

[152] *Id.* at 57 n.65.

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.

Id.

[153] *Id.* at 92-93.

[154] 487 F.Supp. 280 (S.D.N.Y. 1980).

presidential financing statute did not unconstitutionally burden free speech.[155] Devoting little space to the issue, the court simply noted that a candidate is not forced to accept the public funds and that Congress is allowed to condition benefits.[156] The court's lack of thoroughness leaves much to be debated.[157] For instance, the court never mentioned the words coerce or penalize, and never attempted to distinguish cases such as *Perry v. Sindermann*[158] or *Elrod v. Burns*.[159] *Sindermann* and *Elrod* both stand for the proposition that government employment cannot be conditioned on the employee's willingness to restrict his or her speech, absent a compelling state interest.[160] The district court did not attempt to answer the question of why mere candidates for a public job should be afforded any less protection against government imposed conditions. The decision was appealed to the Supreme Court and affirmed, unfortunately, without comment.[161] Thus, the precedential value of the decision is questionable.[162]

Recent Supreme Court decisions, however, seem to hold the door open to the possibility that the doctrine of unconstitutional conditions could be used to invalidate legislation such as S. 25. Even in *Rust v. Sullivan*,[163] where the Court refused to apply the doctrine, the Court was careful to distinguish *Rust* from other cases which hold that the government may not deny a benefit on a basis that infringes speech.[164] The Court noted that it "has recognized that the existence of a Government 'subsidy,' in the form of Government-owned property, does not justify the restriction of speech in areas that have 'been traditionally open to the public for expressive activity.'"[165] Yet Congress is now trying to use a "subsidy" to extract a restriction on such traditional public speech.

In fact, political speech is the quintessential form of speech traditionally left open to the public. The Supreme Court has long

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[155] *Id.*

[156] *Id.* at 284.

[157] *See* Fuhr, *supra* note 118, at 131-36 (challenging the validity of many of the court's assumptions and conclusions).

[158] 408 U.S. 593 (1972), discussed *supra* note 122 and accompanying text.

[159] 427 U.S. 347 (1976), discussed *supra* notes 124, 144-47 and accompanying text.

[160] *See supra* notes 122-24 and accompanying text.

[161] Republican Nat'l Comm. v. F.E.C., 487 F.Supp. 280, 284 (S.D.N.Y.), *aff'd*, 445 U.S. 955 (1980).

[162] Edelman v. Jordan, 415 U.S. 651, 671 (1974) (explaining that "[although] summary affirmances obviously are of precedential value . . . they are not of the same precedential value as would be an opinion of this Court treating the question on the merits").

[163] 500 U.S. 173 (1991).

[164] *Id.* at 199; *see also* Pacific Gas & Elec. v. Public Util. Comm'n, 475 U.S. 1 (1985). The Court stressed that contribution limits could be regulated more closely because of their close relationship to corruption, but regulation of expenditures is less warranted because of their higher speech value. *Id.*

[165] *Rust*, 500 U.S. at 199-200 (quoting United States v. Kokinda, 497 U.S. 720, 726 (1990)).

recognized that one of the major purposes of the First Amendment is to protect political discourse, including the speech of candidates.[166] Such protection of political speech is essential to bringing about desired social change and achieving the worthwhile goal of ensuring that the public can make informed choices amongst various candidates who will lead the country down its path of change.[167] Conditioning the benefits found in S. 25 upon an agreement to limit speech is tantamount to penalizing candidates who seek to engage in unlimited speech, as is the case where the government tries to allow tax exemptions on the conditions that veterans take loyalty oaths.[168]

The existence of a subsidy in S. 25, in the form of free television time and reduced postage and television rates, does not justify the restriction on political speech the bill seeks to extract. If all Congress was required to do was provide benefits to get around constitutional barriers, Congress would utilize this scheme more often. For instance, if S. 25 were deemed constitutional, it is conceivable that Congress would offer more benefits to candidates in exchange for an even greater extraction of speech rights. There is also the possibility that Congress could use this newly found method for skirting constitutional barriers in other arenas. For example, Congress could offer subsidies to newspapers that are in danger of going out of business on the condition that the newspaper agree to print or not print articles relating to certain topics. While this may seem unlikely, it is not far removed from what Congress is trying to accomplish with S. 25.

Rather than attempt to maximize political speech while minimizing the opportunity for political corruption, Congress seems determined to limit the amount of dialogue achieved in campaigns. Senator Feingold, one of the Bill's authors, has even stated that "[o]ur goal [is] to reduce the flow of money in the electoral process."[169] Translated, the goal of S. 25 is to limit campaign spending. Since the Court in *Buckley* trumped Congress' attempt to do this directly, Congress is now trying to entice candidates to limit the amount of campaign spending and the number of out-of-state supporters who can contribute to their campaigns. While the degree of coercion may be debatable, its existence in S. 25 is undeniable. In its

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[166] *See* Mills v. Ala., 384 U.S. 214, 218 (1966) (noting that "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates"); *see also* Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) (stating that "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office").

[167] *See* Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (recognizing that "the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation").

[168] *See* Speiser v. Randall, 357 U.S. 513 (1958); *see supra* note 126 and accompanying text.

[169] 142 CONG. REC. S6684 (daily ed. June 24, 1996).

starkest sense, S. 25 forces a candidate to choose between retaining constitutionally guaranteed speech rights, or surrendering those rights in exchange for benefits to which he or she would not otherwise be entitled. A law seeking to elicit a purely voluntary choice would not require the introduction of such positive externalities. Thus, it would seem that S. 25 is not providing a system of truly voluntary campaign spending limits.

In addition to denying benefits to candidates retaining their speech rights, S. 25 contains a number of provisions which place increased pressure on candidates to accept the limitations. First, apart from the restrictions on candidates, S. 25 bans Political Action Committees ("PAC's") entirely.[170] Such a ban will make it much more difficult for candidates to raise and spend money, which in turn will make them more susceptible to accepting the limitations. Second, S. 25 allows "Eligible Senate Candidates" to increase their overall expenditure limits in response to certain levels of spending by non-complying Senate candidates.[171] If the eligible candidate's expenditure limit is raised, that candidate is then permitted to accept contributions of $2000, while the non-complying candidate is still burdened by the $1000 limit.[172]

As such, candidates who wish to retain unlimited speech rights would have to work harder to raise funds. Allowing this increase creates a powerful incentive to accept the limitation if one's opponent does, since not accepting the limits would allow the opponent to have the television and postal benefits, an increased expenditure limit, and higher contribution limits. Thus, the complying candidate is put in a better position than the candidate retaining their speech rights. Such a scheme can only discourage candidates from retaining their constitutionally protected rights.[173] Finally, the very existence of such a statute places increased pressure on candidates to accept the limits, because they would be susceptible to inaccurate arguments that he or she refuses "to play by the rules of the game and insists on ignoring the spending limits that the Congress has determined are adequate and fair."[174] Such statements misconstrue a candidate's desire to

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[170] *See* S. 25 § 201 (amending §§ 301-02, 315-16, 324 of the Federal Election Campaign Act of 1971 (codified at 2 U.S.C. §§ 431-32, 441a, 441b)). PAC's are currently allowed to contribute a maximum of $5,000 per candidate. 2 U.S.C. § 441a(a)(1)(C) (1994). The constitutionality of such a ban is highly questionable. *See* Shrink Mo. Gov't PAC v. Maupin, 71 F.3d 1422 (8th Cir. 1995) (holding that a state ban on PAC contributions is unconstitutional).

[171] S. 25 § 101 (amending § 503(e) of the Federal Election Campaign Act of 1971).

[172] *Id.* at § 105.

[173] In *Shrink Missouri Government v. Maupin*, the Eighth Circuit addressed the constitutionality of a state statute that prohibited candidates who would not agree to spending limits from accepting contributions from anyone other than an individual (e.g., PAC's, labor unions, and political parties). 71 F.3d at 1424-25. No such restrictions were placed on complying candidates. *Id.* The court found the statute penalized speech, was coercive, and impermissibly infringed free speech. *Id.* at 1425.

[174] *See* Public Citizen, *Ten Good Reasons to Support Campaign Finance Reform* (visited Feb. 2, 1997) <http://citizen.org/congress/cfr/tenreasons.html>.

simply retain his or her constitutionally guaranteed right to speak freely and without limit, a right that benefits those willing to listen.

It is difficult to see why the speech of public employees, like those protected in *Elrod v. Burns*[175] or *Perry v. Sindermann*,[176] should receive more protection from speech-based denial of benefits than candidates for a public job. The combination of S. 25's provisions, which deny benefits to candidates wishing to retain their speech rights, and the coercive nature of such provisions yields the likely result that S. 25 impermissibly burdens the candidate's speech rights and that of their contributors. As such, the government must provide a compelling governmental interest.

b. S. 25 Does Not Satisfy a Compelling Governmental Interest

Though a condition may adversely affect First Amendment interests, it may still be upheld if there is a compelling governmental interest for burdening the protected speech.[177] Most of the justifications for S. 25's expenditure and contribution limits are the same as those offered for the FECA amendments addressed in *Buckley*. Senator Russell D. Feingold, author of S. 25, has testified at length that passing S. 25 is necessary because campaigns are "too expensive."[178] Reducing the cost of campaigns, however, is an interest that was soundly rejected by the Supreme Court in *Buckley*.[179] Similarly, providing a "level playing field" was just as quickly rejected.[180] In fact, rather than leveling the playing field, a limitation on expenditures would handicap a candidate who lacks sufficient name recognition. Thus, these limitations would only serve to benefit well-known candidates, especially incumbents. Such a situation is hardly a level playing field.

Addressing public financing of presidential campaigns, the court in *Republican National Committee v. FEC* recognized "free[ing] candidates from the rigors of fundraising" as a compelling interest.[181] Such a purpose cannot, however, be attached to S. 25. In fact, candidates who opt for the

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[175] 427 U.S. 347 (1976).

[176] 408 U.S. 593 (1972).

[177] *See Elrod*, 427 U.S. at 360 (1976).

[178] *Hearings on Campaign Finance Reform Before the Senate Committee on Rules,* 104th Cong., 2d Sess. 14 (1996) (statement of Senator Russell D. Feingold).

[179] *See supra* note 59 and accompanying text.

[180] *See supra* note 58 and accompanying text.

[181] 487 F.Supp. 280, 285 (S.D.N.Y. 1980). The court intimated that *Buckley* recognized this as a compelling interest. *Id.* Though this interpretation of *Buckley* is arguable, the *Buckley* Court did recognize this rationale as the purpose for this particular provision. *See* 424 U.S. 1, 91 (1976).

benefits will undoubtedly have to work harder to raise funds, since many sources of money are restricted or eliminated. S. 25 abolishes PAC's, limits out-of-state contributions, and reduces expenditures from personal funds from an unlimited amount to ten percent of the general election expenditure amount.[182] Therefore, since the sources of contributions are greatly reduced, the time a candidate will have to devote to fundraising will greatly increase. Furthermore, one of the primary reasons the *Buckley* Court upheld public funding of presidential campaigns was because its purpose was "not to abridge, restrict or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people."[183] Such is not the case with S. 25, whose obvious purpose and effect is to limit speech, not enlarge it. Given the lack of sufficient justification for the restrictions contained in S. 25, it should be declared unconstitutional.

IV. CONCLUSION

While there may be many reasons to be concerned with the financing of political campaigns, reform efforts must be careful not to impinge upon fundamental free speech rights. Political speech, though often detested, is essential to maintaining an informed body politic and encouraging a robust debate of public issues. Banning out-of-state contributions impermissibly restricts speech and association rights and is based on the faulty premise that representatives primarily represent the interests of their constituents; such a ban should be declared unconstitutional. Furthermore, an effort by Congress to skirt the principles articulated in *Buckley v. Valeo,* by denying benefits to candidates who retain their right to speak, is susceptible to the doctrine of unconstitutional conditions. Labeling S. 25's benefits as "voluntary" is a thinly veiled attempt by Congress to coerce candidates into brokering away their speech rights. Thus, most of the significant provisions of S. 25 should be declared unconstitutional. As such, Congress should abandon these efforts and focus on legislation that would truly reform the campaign finance system and that would not deprive Americans of their right to engage in political speech and association.

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[182] *See supra* notes 170 and accompanying text.

[183] 424 U.S. at 92-93.