

THE FIRST AMENDMENT AND CAMPAIGN FINANCE REFORM: A TIMELY RECONCILIATION

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Although we celebrated the First Amendment's 200th anniversary in December 1991, only the last two decades of its history have borne witness to significant congressional efforts to harmonize its mandate with the strong public interest in remediating abuses in the financing of federal election campaigns.

The issue is of fundamental importance, calling into question the constitutionality of legislation intended to enhance public confidence in the electoral process. Weighty principles are arrayed on each side of the fulcrum. On the one hand, there is wide acceptance of the principle that the most fundamental First Amendment protection is accorded to "political speech," speech focusing on public issues and governmental affairs.¹ "[T]here is practically universal agreement that a major purpose of th[e] Amendment was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates"²

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1. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 19-28 (1960); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 29 (1971); William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 11-12 (1965); Daniel D. Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 6-9; Paul B. Stephan, III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 207-09 (1982); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 638-39 (1982).

2. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

The governmental interests supporting campaign-finance regulation are compelling, focusing as they do on the very integrity of the electoral process. Those interests include the prevention of corruption fostered by leverage over elected officials and acquired through large financial contributions during election campaigns. Other interests identified in the last decade or so include the need to restore competitiveness to congressional elections; incumbents enjoying an inordinately high rate of success because of fund-raising advantages; the high cost of media exposure; the growing influence of Political Action Committee ("PAC") contributions; the desirability of public financing and expenditure limits in congressional elections; the divisive and misleading effects of "negative" advertising; the impact of unlimited independent expenditures; and the widespread use of unregulated contributions to national party committees, so-called "soft" money.

Two hundred years of governance in a climate of robust and unlimited public debate have not resolved the tension between the First Amendment's mandate and the public interest in maintaining the fairness and integrity of elections for public office.³ Remarkably, the constitutional issue was not contested vigorously until the early 1970's. Until then, relevant legislation affecting federal election campaigns, including a prohibition of corporate contributions, was codified in the Federal Corrupt Practices Act of 1925,⁴ which required disclosure of receipts and expenditures by congressional candidates and by certain political committees. The Federal Election Campaign Act of 1971,⁵ Title VIII of the Revenue Act of 1971,⁶ and the Federal Election Campaign Act Amendments

3. See ALBERT J. ROSENTHAL, CITIZENS' RESEARCH FOUNDATION, *FEDERAL REGULATION OF CAMPAIGN FINANCE: SOME CONSTITUTIONAL QUESTIONS* 7-9 (1971); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 13-27, at 1132-36 (2d ed. 1988); Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1046-49 (1985); Jeffrey M. Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. REV. 1273, 1379-82 (1983); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 64-65 (1975); Polsby, *supra* note 1, at 5-9.

4. Ch. 368, tit. III, 43 Stat. 1070 (1925) (repealed 1948, 1972).

5. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 2 U.S.C., 18 U.S.C. and 47 U.S.C.).

6. Pub. L. No. 92-178, 85 Stat. 562 (1971) (codified as amended at 26 U.S.C.

of 1974⁷ constituted "by far the most comprehensive, reform legislation [ever] passed by Congress concerning the election of the President, Vice President and members of Congress."⁸ In its landmark 1976 decision in *Buckley v. Valeo*,⁹ the Supreme Court summarized the operative provisions of the statutes at issue:

(a) individual political contributions are limited to \$1,000 to any single candidate per election, with an overall annual limitation of \$25,000 by any contributor; independent expenditures by individuals and groups "relative to a clearly identified candidate" are limited to \$1,000 a year; campaign spending by candidates for various federal offices and spending for national conventions by political parties are subject to prescribed limits; (b) contributions and expenditures above certain threshold levels must be reported and publicly disclosed; (c) a system for public funding of Presidential campaign activities is established by Subtitle H of the Internal Revenue Code; and (d) a Federal Election Commission is established to administer and enforce the Act.¹⁰

In *Buckley*, the Court for the first time passed on the validity of comprehensive campaign-finance legislation in the context of First Amendment guarantees, overturning several of the provisions that had been upheld by the United States Court of Appeals for the District of Columbia Circuit. Although the Supreme Court upheld expenditure limits imposed as a condition of a presidential candidate's acceptance of public funding,¹¹ the Court invalidated expenditure limits on federal candidates who did not accept or were ineligible for public funding.¹² The Court also invalidated limits on campaign spending by candidates in their own behalf¹³ and limits on

§§ 9001-9013 (1988)).

7. Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified in scattered sections of 2 U.S.C., 5 U.S.C., 18 U.S.C., 26 U.S.C. and 47 U.S.C.).

8. *Buckley v. Valeo*, 519 F.2d 821, 831 (D.C. Cir. 1975), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976).

9. 424 U.S. 1 (1976).

10. *Id.* at 7 (citations omitted).

11. *Id.* at 57 n.65.

12. *Id.* at 54-59.

13. *Id.* at 51-54.

independent expenditures by individuals or groups in behalf of or in opposition to an identified candidate.¹⁴

Predictably, the *Buckley* decision provoked sharp debate among First Amendment scholars over whether the Court appropriately had balanced the public interest in campaign-finance regulation against the free speech values protected by the First Amendment. Critics maintain that the collective public interest in fair election campaigns, secured from the distorting effects of disproportionate resources on either side, constituted a sufficient public interest to offset the infringement on individual speech.¹⁵ Proponents argue that notwithstanding the strong governmental interest in election campaigns that enjoy public confidence, the individual right of expression is of such fundamental constitutional value as to preclude any governmental encroachment.¹⁶

The intervening years since *Buckley* have produced far-reaching changes in the federal campaign-finance arena, particularly with respect to congressional elections. Because the Court in *Buckley* sustained public financing of presidential elections, contributors have diverted campaign funds from presidential to congressional elections.¹⁷ *Buckley* also upheld the validity of ceilings on individual contributions to federal campaigns,¹⁸ causing the influence of the large individual contributor to diminish.¹⁹ The resulting funding gap has been

14. *Id.* at 39-51.

15. See ELIZABETH DREW, POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION 147-50 (1983); TRIBE, *supra* note 3, § 13-27, at 1132-36; Blum, *supra* note 3, at 1379-82; Archibald Cox, *The Supreme Court 1979 Term—Forward: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 55-64 (1980); Harold Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 356-75 (1977); Wright, *supra* note 1, at 631-45; J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1012-21 (1976).

16. BeVier, *supra* note 3, at 1068-90; Polsby, *supra* note 1, at 41-43; L. A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243, 250-54, 279-84.

17. INSTITUTE OF POL., JOHN F. KENNEDY SCH. OF GOV'T, HARVARD U., AN ANALYSIS OF THE IMPACT OF THE FEDERAL ELECTION CAMPAIGN ACT, 1972-78, 96th Cong., 1st Sess., at 41-42 (1979) [hereinafter HARVARD CAMPAIGN FINANCE STUDY]; Fred Wertheimer, *The PAC Phenomenon in American Politics*, 22 ARIZ. L. REV. 603, 604-06 (1980).

18. *Buckley*, 424 U.S. at 35.

19. HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM 67 (2d ed. 1980); HARVARD CAMPAIGN FINANCE STUDY, *supra*

more than made up for by the proliferation of PACs,²⁰ which are subject to less stringent contribution ceilings than are individuals.²¹ Moreover, there is abundant evidence that PAC contributors significantly favor incumbents over challengers, thereby enhancing the traditional advantages of incumbency to the extent that observers question whether recent congressional elections can be considered truly competitive.²² In 1990, of the 406 incumbent members of the House of Representatives who sought reelection, 391 were successful — a reelection rate of 96%,²³ thirty-one of thirty-two incumbent senators also won reelection.²⁴

There is an accelerating public consensus that congressional campaign-finance practices pose a threat to the integrity of Congress itself, a consensus fueled by acknowledgments from numerous legislators that the need to raise campaign funds adversely affects the ability of Congress to function effectively. As Senator David Boren (D-Okla.) recently observed, "If we are going to have true campaign reform, the heart and soul of that reform is to stop the money chase, to stop the runaway spending, to stop this upward spiral almost like an arms race of who can raise more and more and more money."²⁵ Both the Senate²⁶ and the House of Representatives²⁷ passed complementary reform legislation during the first session of the 102nd Congress, reflecting the sentiments expressed by one Congressman that "[t]here is no more important issue

note 17, at 42; Edwin M. Epstein, *The PAC Phenomenon: An Overview*, 22 ARIZ. L. REV. 355, 359-60 (1980).

20. See Herbert E. Alexander, *The Future of Election Reform*, 10 HASTINGS CONST. L.Q. 721, 737-38 (1983); Wertheimer, *supra* note 17, at 605-07.

21. Buckley, 424 U.S. at 23-24.

22. Wertheimer, *supra* note 17, at 607-11.

23. *Campaign Finance Reform: Hearings Held Before the Task Force on Campaign Finance Reform of the Comm. on House Administration, House of Representatives*, 102d Cong., 1st Sess. 109 (1991) (statement of Fred Wertheimer, President, Common Cause) [hereinafter *Task Force Testimony*].

24. *Campaign Advertising: Hearing Before the Subcomm. on Telecommunications and Finance of the Comm. on Energy and Commerce, House of Representatives*, 102d Cong., 1st Sess. 50, 58 (1991) (statement of Fred Wertheimer, President, Common Cause) [hereinafter *House Testimony*].

25. 137 CONG. REC. S 5877 (daily ed. May 15, 1991) (statement of Sen. Boren).

26. S. 3, 102d Cong., 1st Sess. (1991) [hereinafter S. 3].

27. H.R. 3750, 102d Cong., 1st Sess. (1991) [hereinafter H.R. 3750].

before us."²⁸ The bills are expected to be considered by a House-Senate conference committee in 1992.²⁹

Clouding the efforts to achieve congressional campaign-finance reform is the specter of *Buckley* and uncertainty over the extent to which the Supreme Court will tolerate campaign-finance regulation that impinges on First Amendment freedoms. The tension between these competing interests is heightened because each interest reflects concerns of fundamental significance to our democratic processes. The thesis of this Article is that the theoretical conflicts are largely reconcilable; that coexistence between the First Amendment and effective campaign-finance reform is constitutionally permissible.

I. PRIOR TREATMENT OF CAMPAIGN-FINANCE REGULATION

Prior to *Buckley v. Valeo*,³⁰ the federal judiciary was rarely confronted with litigation that implicated the potential conflict between the First Amendment and congressional authority to regulate federal election campaigns. In its earliest efforts at campaign-finance legislation, Congress painted with a broad brush, focusing its regulatory efforts on political contributions by banks and corporations.³¹

Concern over the corruptive influence of large corporate contributions during the 1904 presidential election resulted in the Tillman Act,³² enacted in 1907, which for the first time

28. Next, *Close the Political Sewer*, N.Y. TIMES, Nov. 27, 1991, at A20 (editorial) (quoting Rep. Gephardt).

29. *Id.*

30. 424 U.S. 1 (1976).

31. The history is summarized by Justice Frankfurter, writing for the Court in *United States v. UAW-CIO*, 352 U.S. 567 (1957). There the Court reinstated an indictment charging a labor union with violation of a provision of the Taft-Hartley Act, 18 U.S.C. § 610 (repealed 1976) (the Act prohibited unions from expending funds in connection with elections for federal office), but declined to determine whether the statute was sustainable under the First Amendment. *UAW-CIO*, 352 U.S. at 589-93. For additional discussion of early congressional efforts at campaign finance regulation, see *United States v. CIO*, 335 U.S. 106, 113-20 (1947); ALEXANDER, *supra* note 19, at 26-28; ROSENTHAL, *supra* note 3, at 7-32; John R. Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 ARIZ. L. REV. 373, 375-402 (1980).

32. Pub. L. No. 59-36, 34 Stat. 864 (1907) (current version at 2 U.S.C. § 441b (1988)).

prohibited banks and corporations from making campaign contributions. In 1910 Congress enacted the first financial-disclosure law, requiring political committees operating in more than one state to report contributions and disbursements.³³ The following year, the law was extended to require Senate and House candidates to file campaign-finance reports and to limit the amount of expenditures in primary and general elections for Congress.³⁴

The Supreme Court's decision in *Newberry v. United States*,³⁵ which invalidated federal regulation of Senate primary elections,³⁶ prompted the passage of the Federal Corrupt Practices Act of 1925.³⁷ That statute, the relevant provisions of which continued in force until 1972 when the Federal Election Campaign Act became effective, continued the prohibition against political contributions by banks and corporations, strengthening the bar by more broadly defining "contribution."³⁸ The 1925 Act also required disclosure of contributions and expenditures by candidates for the House and Senate³⁹ and by political committees operating in two or more states.⁴⁰ In *Burroughs v. United States*,⁴¹ the Supreme Court upheld the constitutionality of a provision of the 1925 Act requiring political committees that attempted to influence presidential or vice-presidential elections in two or more states to file financial reports. The Court expressed a broad view of congressional power over campaign-finance regulation:

To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper

33. Act of June 25, 1910, 36 Stat. 822 (current version at 2 U.S.C. §§ 431-455 (1988)).

34. Act of August 19, 1911, 37 Stat. 25 (repealed by Pub. L. No. 94-283, 90 Stat. 496 (1976)).

35. 256 U.S. 232 (1921).

36. *Id.* at 257-58. The Supreme Court, in *United States v. Classic*, 313 U.S. 299 (1941), impliedly overruled *Newberry* by holding that a Congressional primary election was part of the constitutionally-authorized election process, and thus upholding a conviction for ballot fraud.

37. Ch. 368, tit. III, 43 Stat. 1070 (1925) (repealed 1948, 1972).

38. *United States v. UAW-CIO*, 352 U.S. 567, 577 (1957).

39. 2 U.S.C. § 246 (repealed 1972).

40. *Id.* § 242 (repealed 1972).

41. 290 U.S. 534 (1934).

use of money to influence the result is to deny to the nation in a vital particular the power of self protection.⁴²

Perhaps the first congressional campaign regulation to encounter a First Amendment challenge involved a provision of the Hatch Political Activity Act prohibiting certain federal employees from taking "any active part in political management or in political campaigns."⁴³ In *CIO v. Mitchell*,⁴⁴ the Court dealt summarily with the First Amendment issue, observing that the statute "leaves untouched full participation by employees in political decisions at the ballot box and forbids only the partisan activity of federal personnel deemed offensive to efficiency."⁴⁵ The 1940 amendments to the Hatch Act also imposed a \$5,000 limit on contributions to federal candidates or committees,⁴⁶ but one commentator notes that the limitation was ineffective because contributions to multiple committees supporting one candidate were not barred.⁴⁷

In 1943, the Smith-Connolly Act temporarily extended to labor unions the Corrupt Practice Act's prohibition on political contributions,⁴⁸ a prohibition that was reimposed by the Taft-Hartley Act of 1947.⁴⁹ On two occasions the Supreme Court was presented with First Amendment challenges to the Taft-Hartley Act ban on labor union political contributions, but the Court each time declined to resolve the issue.⁵⁰

Viewed from this historical perspective, *Buckley v. Valeo* presented the Supreme Court with what was virtually a constitutional issue of first impression, the validity under the

42. *Id.* at 545.

43. 53 Stat. 1147, 1148 (1939), 54 Stat. 767 (1940) (currently codified at 5 U.S.C. § 7324 (1988)).

44. 330 U.S. 75 (1947).

45. *Id.* at 99.

46. 54 Stat. 767, 770 (1940) (current version at 2 U.S.C. § 441a (1988)); *United States v. UAW-CIO*, 352 U.S. 567, 577 (1957) (discussing the merit of an indictment against a labor organization for using union dues to sponsor political television broadcasts).

47. ALEXANDER, *supra* note 19, at 26-27.

48. Pub. L. No. 78-89, 57 Stat. 163, 167 (1943).

49. 61 Stat. 136, 159 (1947) (currently codified at 2 U.S.C. § 441b (1988)).

50. *United States v. UAW-CIO*, 352 U.S. 567 (1957); *United States v. CIO*, 335 U.S. 106 (1947).

First Amendment of a comprehensive effort to regulate federal campaign financing. Moreover, the legislation under review included an extreme and unprecedented limitation — described as “drastic” by the Court⁵¹ — that restricted independent expenditures by individuals and groups “relative to a clearly identified candidate” to \$1,000 during a calendar year. That expenditure limitation was so severe as to prompt the Court to observe that it “would make it a federal criminal offense for a person or association to place a single one-quarter page advertisement ‘relative to a clearly identified candidate’ in a major metropolitan newspaper.”⁵² From the standpoint of those advocating the principle that realistic campaign regulation was permissible under the First Amendment, the issue could not have been posed less advantageously.

The *Buckley* decision has been subjected to exhaustive and perceptive scholarly commentary,⁵³ and no purpose would be served by an extensive discussion of its analytical roots. A short summary of the relevant issues and holdings will suffice.

The majority opinion in *Buckley* is divided into four distinct parts. Section II of the opinion upholds the constitutionality of the reporting and disclosure provisions of the Federal Election Campaign Act of 1971 (the “Act”);⁵⁴ section III upholds the constitutionality of the statutory provisions authorizing public financing of presidential elections;⁵⁵ and section IV deals with the validity of the provisions providing for appointment of members of the Federal Election Commission.⁵⁶ Of greatest relevance to this discussion is section I of the opinion, dealing with the constitutionality of limitations on contributions and expenditures.⁵⁷ Three distinct categories of contribution limitations were at issue, as well as three specific types of expenditure limitations.

The principle contribution regulation was the \$1,000 limit on contributions by any “person”⁵⁸—broadly defined to include

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

52. *Id.* at 40.

53. See *supra* notes 1, 3, 15-16.

54. *Buckley*, 424 U.S. at 60-84.

55. *Id.* at 85-109.

56. *Id.* at 109-43.

57. *Id.* at 12-59.

58. Pub. L. No. 94-283, 90 Stat. 475, 487 (1976) (current version at 2 U.S.C. §

individuals, partnerships, corporations, committees, or groups of persons⁵⁹ — to any candidate with respect to any election for federal office. The second limitation prohibited so-called "political committees" — defined to include groups registered for at least six months with the Federal Election Commission that have received contributions from more than fifty persons and have contributed to five or more candidates for federal office⁶⁰ — from contributing more than \$5,000 to any candidate with respect to any election for federal office.⁶¹ Third, the Act imposed a \$25,000 overall limit on the total contributions by an individual to all federal candidates during any calendar year.⁶²

The Court sustained all of the contribution limitations. Although acknowledging that a limitation on the size of contributions marginally restricts a contributor's ability to communicate, the Court observed that "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution,"⁶³ and noted that "the transformation of contributions into political debate involves speech by someone other than the contributor."⁶⁴ The Court pointed out that during the 1974 congressional elections only 5.1% of the money raised by all candidates came from contributions in excess of \$1,000,⁶⁵ concluding that the \$1,000 limit would not have a significantly adverse effect on campaign funding.⁶⁶

The Court viewed the primary First Amendment problem raised by the contribution limitations to be the restriction on the basic constitutional freedom of political association, citing *Kusper v. Pontikes*⁶⁷ and *NAACP v. Alabama*,⁶⁸ but noted

441a(1)(A) (1988)).

59. Pub. L. No. 92-225, 86 Stat. 3, 9 (1972) (formerly 18 U.S.C. § 591(g); repealed 1980).

60. Pub. L. No. 92-225, 86 Stat. 3 (1972) (formerly 2 U.S.C. § 433; current version at 2 U.S.C. § 431(4) (1988)).

61. Pub. L. No. 92-225, 86 Stat. 3 (1972) (formerly 2 U.S.C. 608(b)(3); repealed 1976; current version at 2 U.S.C. § 441a (1988)).

62. *Id.*

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

64. *Id.*

65. *Id.* at 21 n.23

66. *Id.* at 21.

67. 414 U.S. 51, 57 (1973).

that even significant interference with that right can be sustained if the governmental interest is sufficient and the regulatory means narrowly crafted.⁶⁹ The Court concluded that prevention of both the actuality and appearance of corruption was a constitutionally sufficient justification to sustain the \$1,000 contribution limitation.⁷⁰ The Court also upheld the \$5,000 restriction on contributions by political committees, finding the challenge based on associational freedoms to be without merit,⁷¹ and sanctioned the \$25,000 aggregate limitation as a moderate restraint on political activity necessary to prevent evasion of the \$1,000 limit on contributions to candidates.⁷²

Of the expenditure limitations considered by the Court, the only one not invalidated was the limit on expenditures by presidential candidates imposed as a condition of acceptance of public funding. The Court observed that Congress could authorize public funding of election campaigns and condition acceptance of public funding on a candidate's agreement to abide by spending limitations.⁷³ The Court held the remaining expenditure limitations — a limitation of \$1,000 in any calendar year on expenditures relative to a clearly-identified candidate by any individual or group,⁷⁴ a limitation on expenditures by candidates from personal or family resources,⁷⁵ and a limitation on expenditures by any candidate for federal office⁷⁶ — invalid under the First Amendment.

Although *Buckley* held any limitation on independent expenditures to be constitutionally impermissible, the Court

68. 357 U.S. 449, 460-61 (1958).

69. *Buckley*, 424 U.S. at 25.

70. *Id.* at 26.

71. *Id.* at 35.

72. *Id.* at 38.

73. *Id.* at 57 n.65.

74. Pub. L. No. 92-225, 86 Stat. 9 (1972) (formerly 18 U.S.C. § 608(e)(1); repealed 1976; current version at 2 U.S.C. § 441a (1988)).

75. Pub. L. No. 225, 86 Stat. 9 (1972) (formerly 18 U.S.C. § 608(a)(1); repealed 1976; current version at 2 U.S.C. § 441a (1988)).

76. Pub. L. No. 92-225, 86 Stat. 9 (1972) (formerly 18 U.S.C. § 608(c)(1)(A), (B), (C), (D), and (E); repealed 1976; current version at 2 U.S.C. § 441a (1988)).

questioned the reasonableness of the \$1,000 spending limit imposed by Congress on individuals or groups:

The plain effect of § 608(e)(1) is to prohibit all individuals, who are neither candidates nor owners of institutional press facilities, and all groups, except political parties and campaign organizations, from voicing their views "relative to a clearly identified candidate" through means that entail aggregate expenditures of more than \$1,000 during a calendar year. The provision, for example, would make it a federal criminal offense for a person or association to place a single one-quarter page advertisement "relative to a clearly identified candidate" in a major metropolitan newspaper.⁷⁷

Addressing the scope of the prohibition, the Court construed the phrase "relative to a clearly identified candidate" to limit the effect of § 608(e)(1) to communications that *explicitly* advocate the election or defeat of a candidate.⁷⁸ Nevertheless, the Court observed that resourceful persons or groups could devise expenditures that avoided the restriction on express advocacy while benefiting a candidate indirectly by promoting his or her public positions.⁷⁹ Beyond noting the apparent ease with which the limitation could be avoided, the Court expressed doubt that independent expenditures posed a threat of corruption comparable to that presented by large campaign contributions, observing that any purportedly independent expenditures that were controlled by or coordinated with a candidate were required to be treated as contributions rather than expenditures under the Act.⁸⁰ Because § 608(e)(1) applied only to expenditures made totally independently of a candidate's campaign, the Court determined that the value to the candidate of such expenditures was diminished, as was the likelihood that they would generate improper commitments from the candidate to the person or group making the expenditure.⁸¹

The Court also rejected any governmental interest in equalizing the resources expended in behalf of candidates as

77. *Buckley*, 424 U.S. at 39-40.

78. *Id.* at 43-44.

79. *Id.* at 45.

80. *Id.* at 46-47.

81. *Id.* at 47.

insufficient to justify § 608(e)(1)'s burden on core First Amendment expression, observing 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"⁸² Hence, the Court invalidated the expenditure limitation of § 608(e)(1), citing the general principle that legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment.⁸³ Although the Court spoke in categorical terms, it is fairly apparent that the limits of the Court's holding were not tested by the \$1,000 limitation imposed by the Act.

The Court also invalidated the provision of the Act limiting expenditures during any calendar year by a candidate "from his personal funds, or the personal funds of his immediate family"⁸⁴ in support of his or her candidacy.⁸⁵ The statutory limits were \$50,000 for presidential and vice-presidential candidates, \$35,000 for senatorial candidates, and \$25,000 for most candidates for the House of Representatives.⁸⁶ Observing that candidates, no less than other citizens, possess an unfettered First Amendment right to advocate their own election, the Court noted that a candidate's expenditure of personal funds reduces reliance on outside contributions and thereby diminishes the corruptive influences with which the Act's contribution limits were concerned.⁸⁷ The Court also rejected as insufficient to sustain the limitation any ancillary governmental interest in equalizing the resources of competing candidates, observing that a candidate who spends less in personal funds than his or her opponent may nevertheless raise and spend more in the aggregate because of a more successful fund-raising effort.⁸⁸ Without addressing whether the limitations on candidate spending could be sustained as a

82. *Id.* at 48-49 (citations omitted).

83. *Id.* at 48-51.

84. Pub. L. No. 92-225, 86 Stat. 9 (1972) (formerly 18 U.S.C. § 608(a)(1); repealed 1976; current version at 2 U.S.C. § 441a (1988)).

85. *Buckley*, 424 U.S. at 54.

86. Pub. L. No. 92-225, 86 Stat. 9 (1972) (formerly 18 U.S.C. § 608(a)(1); repealed 1976; current version at 2 U.S.C. § 441a (1988)).

87. *Buckley*, 424 U.S. at 53.

88. *Id.* at 54.

condition of accepting public financing, the Court held that the limitations presented an intolerable conflict with First Amendment guarantees.⁸⁹

The Court also invalidated the Act's overall spending limitations on candidates seeking nomination or election to federal office, except for limitations imposed as a condition of accepting public funding.⁹⁰ The limits on presidential candidates were \$10,000,000 for the primary election and \$20,000,000 for the general election;⁹¹ the limits for senatorial campaigns were based on a multiple of the voting-age population, but the minimum ceilings in states with smaller populations were set at \$100,000 for primary elections and \$150,000 for general elections;⁹² for House of Representative elections the limit in most states was \$70,000 each for the primary and general elections.⁹³ The limits were to be adjusted upward based on increases in the consumer price index.⁹⁴ Responding to the contention that the limitations were necessary to limit the accelerating growth of campaign spending, which reflected a correlative increase in dependence on large contributions, the Court observed that those concerns were better addressed by the Act's contribution limitations and disclosure requirements.⁹⁵ The Court also rejected the argument that spending limitations had the constructive effect of equalizing resources among competing candidates, suggesting that it was appropriate for candidates with broader public support to be allowed to accumulate greater financial resources for campaign use.⁹⁶ The Court was also unpersuaded by the asserted governmental interest in reducing the skyrocketing costs of political campaigns, observing

89. *Id.*

90. *Id.* at 57 n.65, 58.

91. Pub. L. No. 92-225, 86 Stat. 9 (1972) (formerly 18 U.S.C. § 608(c)(1)(A), (B); repealed 1976; current version at 2 U.S.C. § 441a (1988)).

92. Pub. L. No. 92-225, 86 Stat. 9 (1972) (formerly 18 U.S.C. § 608(c)(1)(C), (D); repealed 1976; current version at 2 U.S.C. § 441a (1988)).

93. Pub. L. No. 92-225, 86 Stat. 9 (1972) (formerly 18 U.S.C. § 608(c)(1)(C) to (E); repealed 1976; current version at 2 U.S.C. § 441a (1988)).

94. Pub. L. No. 92-225, 86 Stat. 9 (1972) (formerly 18 U.S.C. § 608(d); repealed 1976; current version at 2 U.S.C. § 441a (1988)).

95. *Buckley*, 424 U.S. at 55-56.

96. *Id.* at 57.

categorically that the "First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise."⁹⁷

Viewing *Buckley's* critical holdings from the advantageous perspective of hindsight, it is arguable that the restrictions the Court held unconstitutional scarcely scratched the surface of the First Amendment's capacity to tolerate reasonable and necessary restrictions on campaign finance. The evidence accumulated to support Congress's decision to impose aggregate limits on campaign spending and on the use of candidates' personal funds was less than compelling. Moreover, the limit on independent expenditures was unreasonably low, affording the Court little choice but to conclude that the \$1,000 annual limit was unconstitutional. The question unanswered by *Buckley* concerns the extent to which the nation's intervening experience with campaign-financing abuses provides a foundation for campaign-finance regulation that may be compatible with First Amendment principles.

II. IMPACT OF EXISTING REGULATIONS ON CAMPAIGN-FINANCING

Commentators familiar with federal campaign-finance regulation agree substantially on the *effects* of the reform legislation passed in the early 1970s and qualified by the Supreme Court's decision in *Buckley*. Disagreement persists about how best to solve the problems emanating from the Federal Election Campaign Act and its 1974 amendments. Perhaps the most significant effects of the Act have been to limit the influence of individual campaign contributions, increase substantially the contributions and influence of PACs, divert campaign funds from the publicly-financed presidential elections to the privately financed congressional elections, significantly increase the funding advantages of incumbents over challengers and thereby limit the competitiveness of congressional elections, and reduce voter participation in congressional elections. In addition, the increased effectiveness of television advertising as the dominant election campaign medium has fueled the acceleration of campaign expenditures

97. *Id.* at 57.

as well as the almost perpetual pursuit of campaign contributions by incumbents and challengers. Negative television advertising has increasingly become the campaign weapon of choice, with the 1988 Presidential campaign often cited as a testimonial to its effectiveness.⁹⁸ A relatively recent phenomenon is the increased use of so-called "soft" or "sewer"⁹⁹ money—large, unregulated contributions given of record to political party committees but in reality distributed to provide direct support for field operations in behalf of presidential and congressional candidates.¹⁰⁰ Another perplexing problem confronting drafters of campaign finance reform legislation is the potentially distorting effect of large independent expenditures, held by the *Buckley* Court to enjoy broad, if not unlimited, First Amendment protection.¹⁰¹

Perhaps the most visible and best documented after-effect of reform legislation of the 1970s has been the extraordinary proliferation of PACs. The number of PACs registered with the Federal Election Commission increased from 608 in 1974¹⁰² to 4,677 in 1991.¹⁰³ Funds contributed to PACs increased from \$54.4 million in 1976¹⁰⁴ to \$159.1 million in 1991.¹⁰⁵ Factors leading to the meteoric growth in PACs include the \$1,000 limitation on individual contributions contained in the Federal Election Campaign Act, which restricted a traditionally large source of federal campaign funding.¹⁰⁶ In

98. VICTOR KAMBER, TRIVIAL PURSUIT, NEGATIVE ADVERTISING AND THE DECAY OF POLITICAL DISCOURSE, 1-2 (1990) (by the Kamber Group, Washington, D.C.).

99. *Next, Close the Political Sewer*, *supra* note 28, at A20.

100. *Task Force Testimony*, *supra* note 23, at 115-16; JOSHUA GOLDSTEIN, THE \$43 MILLION LOOPHOLE: SOFT MONEY IN THE 1990 CONGRESSIONAL ELECTIONS 5 (Center for Responsive Politics 1991).

101. *Clean Campaign Act of 1985: Hearings Before the Comm. on Commerce, Science and Transportation, United States Senate*, 99th Cong., 1st Sess. 46-47 (1985) (statement of Fred Wertheimer, President, Common Cause on S. 1310) [hereinafter *Clean Campaign Act Testimony*].

102. David Adamany, *Political Finance and the American Political Parties*, 10 HASTINGS CONST. L.Q. 497, 544 (1983).

103. FED. ELECTION COMM'N, 1990 PAC Contributions Down Compared to Past Election Cycles, *Final FEC Report Finds 2* (Press Release Dec. 10, 1991) [hereinafter *FEC Press Release*].

104. Adamany, *supra* note 102, at 544.

105. *FEC Press Release*, *supra* note 103, at 1.

106. *See supra* note 20 and accompanying text.

addition, the public funding of presidential-election campaigns upheld by the Court in *Buckley* substantially reduced the need for business- and labor-affiliated contributions to presidential candidates, thereby encouraging those interest groups to divert their fund-raising efforts to congressional campaigns.¹⁰⁷ Moreover, a provision of the 1974 Federal Election Campaign Act Amendments authorized government contractors to establish PACs,¹⁰⁸ a change in the law supported by labor and business groups seeking to enhance the role of PACs.¹⁰⁹

The available evidence strongly indicates that incumbent senators and representatives have benefited far more than challengers from the growth in PACs and their increased focus on congressional elections. For example, the aggregate amount of campaign funds raised by challengers in the 1980 congressional elections was approximately \$36.5 million; in 1990, challengers raised only \$37.5 million, a one-million-dollar increase in ten years. The comparable figures for incumbents are \$72 million raised in 1980 and \$181 million in 1990, an increase of approximately \$109 million.¹¹⁰ PAC contributions to challengers in House of Representative elections declined from \$7.3 million in 1980 to \$7 million in 1990; during the same period, PAC contributions to incumbents seeking re-election to the House of Representatives increased by 350%, from \$25 million to \$87 million.¹¹¹ That disparity in PAC contributions obviously contributes to the significant funding advantage of incumbents over challengers. In the 1990 elections, House incumbents had aggregate available funds totaling approximately \$239 million, whereas their major-party challengers raised only \$37.5 million.¹¹² The funding advantage obviously affects election results. In 1988, 98.5% of House incumbents who sought re-election were returned to office; the success rate of House incumbents in

107. See *supra* note 17 and accompanying text.

108. Pub. L. No. 93-443, 88 Stat. 1263 (1974) (current version at 2 U.S.C. § 441c(b) (1988)).

109. Wertheimer, *supra* note 17, at 605.

110. *Task Force Testimony*, *supra* note 23, at 110, 113.

111. *Id.* at 110, 113.

112. *Id.* at 112.

1990 was 96%.¹¹³ The 1990 election was the first in which a majority of candidates elected to the House of Representatives received more than one-half of their total contributions from PACs.¹¹⁴

Similarly, during the six-year Senate election cycle ending in 1990, incumbents raised approximately \$145 million,¹¹⁵ of which approximately \$32.8 million was contributed by PACs.¹¹⁶ During the same period Senate challengers raised approximately \$49.2 million, including \$8.3 million from PACs. Thirty-one of thirty-two incumbent Senators won re-election in 1990. In the twenty-eight election races in which challengers ran against incumbent Senators, the average amount raised by the incumbents was \$4.9 million, compared to an average of \$1.7 million raised by challengers.¹¹⁷ Overall, spending in Senate elections has escalated from an aggregate of \$38.1 million in the 1976 elections to a total of \$172.5 million in 1990.¹¹⁸

The dramatic increase in the aggregate amount of PAC contributions, combined with the perceived influence such contributions reflect, has prompted a growing demand for increased regulation of PAC contributions in the form of reduced limits on PAC contributions to candidates and reductions in the aggregate amount of PAC contributions any candidate can receive. A corollary reform effort to reduce the influence of PACs has focused on some form of partial public funding for congressional elections, accompanied by aggregate spending limits imposed on those candidates who accept public funding. Those reform proposals have generated heated debate. Some observers caution that limits on PAC contributions will not reduce PAC influence in the campaign process but will inevitably cause well-organized and well-funded PACs to divert their resources from direct contributions to independent

113. *Id.* at 111.

114. *House Testimony*, *supra* note 24, at 58.

115. *Id.* at 57.

116. *Nearly Half of Senate Incumbents Seeking Election in 1990 Were Unopposed or Financially Unopposed*, COMMON CAUSE NEWS (Common Cause, Wash. D.C.), Feb. 28, 1991, at 4.

117. *Id.* at 4-5.

118. *House Testimony*, *supra* note 24, at 58.

expenditures.¹¹⁹ Although the partial use of public funding for congressional elections has attracted widespread support, some commentators believe that spending limits imposed as a condition of public funding would be counterproductive. The primary arguments against spending limits are that they favor incumbents and also that the aggregate amount of funds expended on election campaigns is too low, reflecting the viewpoint that the public's ability to evaluate candidates is enhanced when campaign spending is unrestricted.¹²⁰

The significant increase in both the cost and use of television has also affected the level of spending in congressional elections.¹²¹ Although the Federal Election Commission does not require candidates to itemize media expenditures, anecdotal evidence indicates that in Senate races at least 50% of expenditures is typically used for television and radio, and in competitive House races 25% to 60% of campaign funds is spent on broadcast media, depending on the size and other characteristics of the district.¹²² In presidential elections media expenditures consume 50% or more of the campaign

119. HARVARD CAMPAIGN FINANCE STUDY, *supra* note 17, at 11; LARRY J. SABATO, PAYING FOR ELECTIONS: THE CAMPAIGN FINANCE THICKET 19-22 (1989); Michael J. Malbin, *Looking Back at the Future of Campaign Finance Reform: Interest Groups and American Elections*, in MONEY AND POLITICS IN THE UNITED STATES: FINANCING ELECTIONS IN THE 1980'S, at 238 (Michael J. Malbin ed., 1984).

120. See *Campaign Finance Reform: Hearings Held Before the Task Force on Campaign Finance Reform of the Comm. on House Administration, House of Representatives*, 102d Cong., 1st Sess. 66, 69, 77-78 (1991) (statement of Curtis B. Gans, Vice-President and Director, Committee for the Study of the American Electorate) [hereinafter *Gans Testimony* 1991]; SABATO, *supra* note 119, at 59-61; David Adamany, PAC's and the Democratic Financing of Politics, 22 ARIZ. L. REV. 569, 578-79 (1980); Herbert E. Alexander, *Making Sense About Dollars in the 1980 Presidential Campaigns* in MONEY AND POLITICS IN THE UNITED STATES: FINANCING ELECTIONS IN THE 1980'S 32-35 (Michael J. Malbin ed., 1984); Lee Ann Elliott, *Political Action Committees — Precincts of the 80's*, 22 ARIZ. L. REV. 539, 549 (1980) (noting that American consumers spent more on garden hoses, nail polish, powdered lemonade, and lipstick than all candidates for federal office spent during the 1977-1978 election cycle); Malbin, *supra* note 119, at 240, 269-70.

121. See *House Testimony*, *supra* note 24, at 54-56; CENTER FOR RESPONSIVE POLITICS, BEYOND THE THIRTY SECOND SPOT: ENHANCING THE MEDIA'S ROLE IN CONGRESSIONAL CAMPAIGNS 10-14 (Center for Responsive Politics, Wash., D.C. 1988); SABATO, *supra* note 119, at 26-27; Chuck Alston, *Forcing Down Cost of TV Ads Appeals to Both Parties*, CONG. Q., Mar. 16, 1991, at 647.

122. CENTER FOR RESPONSIVE POLITICS, *supra* note 121, at 13.

budget.¹²³ In supporting reform legislation to reduce the cost of broadcast time for candidates, Missouri's Senator John Danforth dramatically described the impact of media costs in congressional campaigns:

Air time is the crucial element in a competitive race between candidates. And the cost of air time has skyrocketed. TV advertising costs have more than tripled in the last 8 years. Television ads are now the single largest expense in most congressional campaigns. In today's Senate races, 40 to 60 percent of a campaign's funds go to television alone.

....
The cost of air time is so high it distorts the campaign process. It limits the candidate's speech. It makes it much tougher for a candidate to challenge an incumbent. And it has other, more insidious effects. It forces candidates to spend far too little of their time and energy on the issues, and far too much on raising money from groups whose membership and appeal are narrow.... The need for constant fundraising raises the specter of undue influence by well-financed special interest groups, and lessens the public's confidence in its government.¹²⁴

Concern over the rapidly escalating costs of political advertising on television provoked a 1990 Federal Communications Commission audit of political programming¹²⁵ which was intended to assess the industry's compliance with its statutory obligation to charge candidates the lowest unit rate.¹²⁶ The audit determined that at most television stations surveyed, political candidates paid higher rates than commercial advertisers, primarily because the candidates purchased time at non-preemptible "fixed" rates whereas commercial advertisers bought television time at lower "preemptible" rates. The audit noted that the stations' sales practices "frustrate the intent of Congress" by encouraging candidates to purchase higher-priced non-

123. SABATO, *supra* note 119, at 26-27.

124. 135 CONG. REC. S 5506 (daily ed. May 17, 1989).

125. FED COMMUNICATIONS COMM'N, *Public Notice: Political Programming Audit* 1 (Sept. 7, 1990) [hereinafter *FCC Public Notice*].

126. 47 U.S.C. § 315 (1988).

preemptible time, effectively segregating candidates from commercial advertisers.¹²⁷

Accompanying the increased use of and expenditures for political advertising on television is an increased reliance by candidates on negative advertising, which in recent years has become a dominant form of campaign communication.¹²⁸ Commentators uniformly criticize widespread reliance on negative media advertising, noting particularly its tendency to alienate voters and its focus on short, derogatory messages intended to portray an opponent unfavorably without engaging in substantive discussion of campaign issues. Some commentators contend that negative advertising, together with the overwhelming advantages of incumbency, are largely responsible for the sharp decline in voter turnout during the past two decades.¹²⁹ The combined effects of increased campaign expenditures for television and enhanced use of negative advertising have provoked reform efforts focusing on free or discounted television access for candidates,¹³⁰ enhanced broadcast media coverage of substantive discussions by candidates,¹³¹ and the imposition of candidate-attribution requirements intended to discourage candidates who seek to avoid identification with their own campaign's negative

127. Alston, *supra* note 121, at 650; FCC *Public Notice*, *supra* note 125, at 5.

128. Kamber, *supra* note 98, at 7.

129. *Clean Campaign Act of 1989: Hearing Before the Subcomm. on Communications of the Comm. on Commerce, Science, and Transportation, United States Senate*, 101st Cong., 1st Sess. 42-44 (1989) (statement of Curtis B. Gans, Vice-President and Director, Committee for the Study of the American Electorate on S. 999) [hereinafter *Gans Testimony* 1989]. See generally, RUIZ A. TEIZEIRA, *WHY AMERICANS DON'T VOTE* 109 (1987) (noting that turnout for presidential elections decreased from 65.4% in 1960 to 55.1% in 1980).

130. *House Testimony*, *supra* note 24, at 62-63; *Gans Testimony* 1991, *supra* note 120, at 78-79; PAUL TAYLOR, *SEE HOW THEY RUN* 215-19 (1990); Kamber, *supra* note 98, at 45.

131. *House Testimony*, *supra* note 24, at 18-19. See also CENTER FOR RESPONSIVE POLITICS, *supra* note 121, at 18-20 (noting that the goal of political broadcasting laws should be to increase a candidate's advertising time to provide for greater discussion of issues); JOHN ELLIS, *NINE SUNDAYS: A PROPOSAL FOR BETTER PRESIDENTIAL CAMPAIGN COVERAGE* 6 (Joan Shorenstein Barone Center on the Press, Politics and Public Policy, John F. Kennedy School of Government, Harvard University 1991) (calling for "substantive discussion of . . . major problems," as well as "a serious textured tone to overall news coverage of a presidential campaign"); TAYLOR, *supra* note 130, at 267-83.

advertisements.¹³² Conceding the political effectiveness of negative advertising as well as the First Amendment limitations on regulatory requirements that are content-based, the reform proposals seek to dilute the impact of negative advertising by expanding significantly candidates' access to broadcast media and media coverage of substantive campaign debate.

Reform proposals intended to offset the impact of independent expenditures, which under *Buckley* are afforded broad First Amendment protection, implicate difficult regulatory and constitutional concerns. The concern is that unlimited and unregulated independent expenditures can undermine otherwise fair and competitive elections. Even presidential elections in which both candidates accept public financing can be affected significantly by independent expenditures. For example, in the 1980 general-election campaign, candidates Reagan and Carter each received approximately \$29 million in public funding, but an additional \$10.6 million was spent in behalf of candidate Reagan by independent committees; independent expenditures in behalf of President Carter were nominal.¹³³ Commentators and witnesses testifying about the impact of independent expenditures observe that voters are often uncertain about the source or sponsorship of independently-financed campaign advertisements, and acknowledge that unanticipated independent expenditures can exert a distorting effect on an otherwise competitive campaign.¹³⁴ Reform proposals include tighter restrictions to assure that individuals and groups making independent expenditures are sufficiently independent of the candidates' campaign committees, identification

132. *House Testimony*, *supra* note 24, at 67-69; *Gans Testimony* 1991, *supra* note 120, at 78-79 (detailing the effects of negative advertising and calling for regulation of such advertising); CENTER FOR RESPONSIVE POLITICS, *supra* note 121, at 85 (stating that many members of Congress approve of the use of content restriction regulations to reduce negative advertising).

133. Alexander, *supra* note 120, at 19-25.

134. *House Testimony*, *supra* note 24, at 63-64. See also *Clean Campaign Act of 1989: Hearing Before the Subcomm. on Communications of the Comm. on Commerce, Science and Transportation, United States Senate, 101st Cong., 1st Sess. 8 (1989)* (statement of former Sen. Bryan on S. 999); *Clean Campaign Act Testimony*, *supra* note 101, at 49.

requirements to assist the public in determining the identity of the source of independent expenditures, and enhanced reporting requirements to assure that the Federal Election Commission receives prompt notification of independent expenditures.¹³⁵ In addition, both Senate Bill 3 and House Bill 3750¹³⁶ provide that candidates accepting public funds and against whom independent expenditures over prescribed limits are made would receive additional funds to finance a response to those expenditures.

A recently developed campaign-finance phenomenon is the widespread use of "soft" money by both major political parties, referring in the broadest sense to "any political contributions not subject to the limitations and restrictions of federal campaign law[s]."¹³⁷ Soft money typically is contributed to national, state, and local party organizations, frequently by corporations, labor unions, and individuals in amounts exceeding the authorized limits on individual contributions to candidates.¹³⁸

Amounts of "soft" money affecting federal elections appear to be increasing dramatically. Commentators estimate that \$15 million to \$20 million in soft money was raised in the aggregate by both parties in the 1984 presidential elections.¹³⁹ The size of the contributions is illustrated by the observation that the soft-money fund-raising effort supporting President Bush's 1988 campaign, called Team 100, disclosed 249 contributions of at least \$100,000 each.¹⁴⁰ In addition, recent studies suggest that soft money is also infiltrating congressional campaigns. During 1989 and 1990 an aggregate of \$43.5 million in soft-money contributions has been identified, of which \$25.2 million was collected by the Republican and Democratic National Committees and the balance by state committees.¹⁴¹ The Republican party

135. *House Testimony*, *supra* note 24, at 67.

136. S. 3, *supra* note 26, § 101(a); H.R. 3750, *supra* note 27, § 504(b).

137. GOLDSTEIN, *supra* note 100, at 5.

138. JOSHUA GOLDSTEIN, *THE FAT CATS LAUNDROMAT—SOFT MONEY AND THE NATIONAL PARTIES 1989-1990*, at 2 (Center for Responsive Politics 1991).

139. SABATO, *supra* note 119, at 65.

140. *Task Force Testimony*, *supra* note 23, at 117.

141. GOLDSTEIN, *supra* note 100, at 5. Goldstein notes that the actual amount of soft-money contributions is likely to be substantially larger than that reported,

committees, national and state, collected \$28.2 million and the Democratic committees raised \$15.3 million.¹⁴² Although Federal Election Commission regulations restrict the use of "soft" money to activities that do not affect federal elections, there has been an increasing use of such funds for voter registration and other campaign efforts that materially assist candidates for federal office.¹⁴³ Not unexpectedly, current campaign-finance reform efforts include "soft" money as a primary target for increased federal regulation.¹⁴⁴

The combined effects of PAC money, "soft" money, incumbency fund-raising advantages, negative advertising, and the widespread perception that special interest groups have increased their influence over the elective process have impelled both houses of Congress to pass reform bills intended to overhaul campaign financing practices. The Report from the Committee on House Administration accompanying the House of Representatives Campaign Spending Limit and Election Reform Act of 1991 (House Bill 3750) capsulized the concerns that inspired both the House and Senate bills:

If there is one overriding goal of this legislation, it is to restrain the power of money as a force in our electoral process and as a determinant of its outcomes. From listening to the voices of frustration and alienation among our constituents, from reading the national trends in public opinion polls, as well as from our own experience as candidates and elected officials, it has become abundantly clear that the large sums of money spent in congressional elections have created an appearance of corruption damaging to public confidence in the electoral process. And, let there be no mistaking what the public perception is. That sentiment was well expressed in a recent report on a focus group study, "Citizens and Politics: A View from Main Street," prepared for the Kettering Foundation by the Harwood Group (June 1991):

People believe two forces have corrupted democracy. The first is that lobbyists have replaced representatives

because state records are imprecise. *Id.*

142. *Id.* at 6.

143. *Id.* at 11.

144. See *Tusk Force Testimony*, *supra* note 23, at 117.

as the primary political actors. The other force, seen as more pernicious, is that campaign contributions seem to determine political outcomes more than voting. No accusation cuts deeper because when money and privilege replace votes, the social contract underlying the political system is abrogated. Influenced by this widespread perception, people decide that voting doesn't really count anymore—so why bother?¹⁴⁵

III. PROPOSED LEGISLATION: S. 3 AND H.R. 3750

Both the Senate and House passed campaign-finance reform bills in the First Session of the 102nd Congress. Senate Bill 3 ("S. 3") passed on May 23, 1991, and House Bill 3750 ("H.R. 3750") passed on November 25, 1991.¹⁴⁶ A conference committee is to be appointed during the Second Session.

Although there are significant differences in the two bills, they are quite compatible philosophically. Both bills offer significant public-funding and other benefits to participating candidates who voluntarily agree to comply with campaign-spending limits set at generally realistic levels and indexed for inflation. The benefits provided by the Senate bill include reduced postal rates, media-rate discounts, and publicly-funded broadcast vouchers equal to 20% of the spending limits.¹⁴⁷ In addition, candidates whose non-participating opponents raise or expend funds in excess of the voluntary spending limits receive substantial additional public funding, as do candidates targeted by independent expenditures.¹⁴⁸ The House bill also provides lower postal rates and public funds of up to one-third of the \$600,000 spending limit, as well as additional funding to candidates whose non-participating opponents raise more than \$250,000 and to candidates targeted by independent expenditures.¹⁴⁹ Both bills impose restrictions on political action committees and "soft" money.¹⁵⁰ Neither bill, however, specifies the source of funds to provide the authorized benefits.

145. H.R. REP. NO. 340, 102d Cong., 1st Sess., at 8 (1991).

146. *See supra* notes 26-27.

147. S. 3, *supra* note 26, §§ 101(a), 103(a), 104(a).

148. *Id.* §§ 101(a), 104(a).

149. H.R. 3750, *supra* note 27, §§ 101, 103.

150. *Id.* §§ 201, 205, 502-505; S. 3, *supra* note 26, §§ 102, 215-218.

A. *Spending Limits*

House Bill 3750 imposes a \$600,000 spending limit for House elections, of which no more than \$500,000 can be spent on the general election. In addition, candidates who win closely contested primary elections (10% margin or less) may receive a \$150,000 spending increase.¹⁵¹ Senate Bill 3 imposes a minimum spending limit of \$950,000 and an absolute limit of \$5.5 million, with the actual limit calculated on the basis of each state's voting-age population. The formula is \$400,000, plus thirty cents multiplied by the voting-age population up to four million, plus twenty-five cents multiplied by the voting-age population over four million. In states with one commercial VHF television station the limit is slightly higher.¹⁵² Eligible candidates can exceed the general-election spending limit by no more than 25% by raising in-state contributions in amounts under \$100.¹⁵³ Participating Senate candidates must limit primary election spending to the lesser of \$2,750,000 or 67% of the state's general-election spending limit.¹⁵⁴ Both bills impose general limits on spending from candidates' personal or family funds, \$25,000 in S. 3 and \$60,000 in H.R. 3750.¹⁵⁵

Under S. 3, if a candidate's non-participating opponent spends in excess of 133-1/3% of the spending limit, the candidate is entitled to receive public funds equal to 100% of the spending limit and the spending limit is waived for the participating candidate; if the opponent's expenditures exceed the general election limit but are less than 133-1/3% of the limit, the participating candidate shall receive public funds equal to two-thirds of the spending limit and the limit is waived to that extent.¹⁵⁶ House Bill 3750 removes spending limits for a participating candidate if that candidate's non-participating opponent raises in excess of \$250,000, and the

151. H.R. 3750, *supra* note 27, § 101.

152. S. 3, *supra* note 26, § 101(a).

153. *Id.*

154. *Id.*

155. *Id.*; H.R. 3750, *supra* note 27, § 101.

156. S. 3, *supra* note 26, § 101(a).

\$200,000 limit on matching funds payable to the participating candidate is also waived.¹⁵⁷

B. *Benefits*

Both bills impose eligibility requirements for benefits, in addition to voluntary compliance with spending limits. House Bill 3750 requires a participating candidate to raise \$60,000 from individual contributions without including for purposes of attaining that threshold the amounts of such contributions that exceed \$200.¹⁵⁸ Senate Bill 3 requires a participating candidate to raise the lesser of \$250,000 or 10% of the general election spending limit from individual contributions of \$250 or less, 50% of which must come from in-state donors.¹⁵⁹

Under the House bill, participating candidates are permitted to send a number of pieces of mail equal to three times the district's voting-age population at the same rates charged to national party committees.¹⁶⁰ In addition, candidates will receive public matching funds equal to the first \$200 of contributions from individuals up to a maximum of \$200,000. As noted, the \$200,000 cap does not apply if the candidate's non-participating opponent raises more than \$250,000, and the cap may also be exceeded to offset independent expenditures in excess of \$10,000 used against the candidate or in behalf of his or her opponent.¹⁶¹

Similarly, S. 3 affords participating candidates lower postal rates for first and third-class mail provided the candidate's cost does not exceed 5% of the general-election spending limit.¹⁶² In addition, major-party candidates are to receive publicly-funded broadcast vouchers equal to 20% of the general-election spending limit for the purchase of television advertising, but eligible commercials must run for at least sixty seconds, presumably to enhance their substantive content.¹⁶³ Candidates are also entitled to broadcast advertising rates

157. H.R. 3750, *supra* note 27, § 101.

158. *Id.*

159. S. 3, *supra* note 26, § 101(a).

160. H.R. 3750, *supra* note 27, § 103.

161. *Id.* § 101.

162. S. 3, *supra* note 26, § 104(a).

163. *Id.* § 101(a).

equal to 50% of the lowest unit rates during the forty-five days before the general election.¹⁶⁴ As noted, candidates whose non-participating opponents exceed the spending limit would receive a subsidy equal to two-thirds of the limit and an additional subsidy of one-third of the limit if the opponent's spending exceeds 133-1/3% of the spending limit.¹⁶⁵ As does the House bill, S. 3 also provides a participating candidate with public funds to offset independent expenditures in excess of \$10,000 against the candidate or supportive of his or her opponent.¹⁶⁶

C. Political Action Committees

Both bills seek to restrict the influence of PACs in the campaign-finance process. House Bill 3750 imposes an aggregate limit of \$200,000 on PAC contributions to any candidate, with an additional \$50,000 in PAC contributions permitted to a candidate whose primary-election margin was 10% or less.¹⁶⁷ Senate Bill 3 tenders a far more severe approach, prohibiting PACs from making any contributions or expenditures to influence a federal election.¹⁶⁸ Senate Bill 3 contains a fall-back provision, however, to take effect if the prohibition on PAC funding is held unconstitutional. In that event, S. 3 reduces the maximum permitted PAC contribution from \$5,000 to \$1,000 and imposes an aggregate limit on PAC contributions to any candidate of 20% of the aggregate spending limit for the general and primary elections, the limit to be no less than \$375,000 and the aggregate of PAC contributions accepted by a candidate not to exceed \$825,000.¹⁶⁹ House Bill 3750 also imposes an aggregate limit of \$200,000 on individual contributions to a candidate to the extent that such contributions exceed \$200.¹⁷⁰

164. *Id.* § 103(a).

165. *Id.* § 104(a); *see supra* note 157 and accompanying text.

166. *Id.* § 101(a); *compare* H.R. 3750, *supra* note 27, § 101.

167. H.R. 3750, *supra* note 27, § 201.

168. S. 3, *supra* note 26, § 102(a).

169. *Id.* § 102(d).

170. H.R. 3750, *supra* note 27, § 201.

D. *Independent Expenditures*

As noted above, both the Senate and House bills provide public funds to participating candidates to the extent that independent expenditures against such candidates or favoring their opponents exceed \$10,000.¹⁷¹ In addition, the House bill removes spending limits on participating candidates if independent expenditures adversarial to the candidate exceed \$60,000.¹⁷² Both bills attempt to define independent expenditures more precisely, and S. 3 excludes from the category of independent expenditures so-called "cooperative expenditures," defined as any expenditures made in concert or in coordination with the candidate or the candidate's representative.¹⁷³ Any such expenditure is treated as an expenditure by the candidate for whose benefit it was made.¹⁷⁴ Senate Bill 3 also requires adequate identification of the source of independent expenditures, mandating that during their entire length independently-funded television messages must include a clearly readable statement occupying at least 25% of the viewing area which identifies the funding source and states that the communication is not authorized by any candidate.¹⁷⁵

E. *Disclaimers*

In an effort to assure that candidates assume responsibility for any authorized campaign messages, both the Senate and House bills require that candidates clearly acknowledge that they have authorized and approved campaign messages. In the case of televised communications, H.R. 3750 requires the candidate's image to appear for at least four seconds;¹⁷⁶ S. 3 requires a full-screen personal appearance by the candidate in

171. *Id.* § 101; S. 3, *supra* note 26, § 101(a); *see also supra* note 167 and accompanying text.

172. H.R. 3750, *supra* note 27, § 101.

173. S. 3, *supra* note 26, § 201(b).

174. *Id.* § 201(a)(2).

175. *Id.* §§ 203, 308.

176. H.R. 3750, *supra* note 27, § 801.

which the candidate is identified and expressly states that he or she has approved the foregoing campaign message.¹⁷⁷

F. *Soft Money*

Both S. 3 and H.R. 3750 address the abusive use of "soft money" in federal elections, but the Senate bill's soft-money limitations are the more restrictive. Senate Bill 3 prohibits national party committees and federal candidates and officeholders from soliciting or accepting soft money.¹⁷⁸ In addition, the Senate bill limits national, state, and party committee spending on federal elections, and prohibits any use of soft money in connection with any federal election during the period beginning sixty days prior to the primary election and continuing until the general election.¹⁷⁹

IV. S. 3 AND H.R. 3750: SOME FIRST AMENDMENT IMPLICATIONS

The fitful history of campaign-finance reform efforts over the last decade affords no assurance that the pending bills, after review and reconciliation by a joint conference committee, will coalesce into campaign-reform legislation that is enacted into law. Proponents of reform, however, are optimistic that Congress will pass a campaign-finance bill in 1992 and that its provisions will reflect the essential elements of S. 3 and H.R. 3750. Therefore, contemporary analysis of First Amendment campaign reform issues should necessarily focus on the principal provisions of S. 3 and H.R. 3750.

That focus does not suggest that the debate over the most effective campaign-finance reform strategies has been resolved. That debate, beyond the scope of this Article, has generated and will continue to generate heated controversy. Although most commentators favor the availability of at least partial public funding for congressional elections,¹⁸⁰ critics contend

177. S. 3, *supra* note 26, § 308.

178. *Id.* § 217(a).

179. *Id.* § 216(c).

180. See Adamany, *supra* note 120, at 600-02; Alexander, *supra* note 120, at 32-35; Malbin, *supra* note 119, at 269-70 (arguing that serious consideration should be given to "public financing unencumbered either by spending limits or limits on

that the publicly-funded presidential-election system is a failure because the steadily increasing infusion of "soft" money into presidential campaigns distorts the intended purpose of public financing.¹⁸¹ Although S. 3 and H.R. 3750 reflect a strong congressional consensus in favor of spending limits, many thoughtful commentators contend that a publicly-funded campaign-finance system without spending limits (or at the least with generous spending limits) is better designed to permit candidates to communicate adequately with the electorate.¹⁸² Some experts argue that PAC contribution limits are undesirable, and that increases in individual contribution limits would dilute reliance on PACs.¹⁸³ Several commentators recommend an enhancement in the role of political parties, arguing that augmenting the parties' role in campaign fund-raising would offset reliance on PAC money and diminish the significance of polarizing campaign issues and tactics because of the historic consensus-building role of the national political parties.¹⁸⁴ Whatever may be the fate of S. 3 and H.R. 3750, the debate has far from ended.

The heightened significance of the pending action on the House and Senate bills, however, stems from the accumulated evidence over the last two decades that money and media can dominate, if not distort, the elective process to the extent that public confidence in the process can be severely eroded. That experience provides the context for assessing the governmental interest in campaign-finance reform that is indispensable to First Amendment analysis — a context that was neither as apparent nor as compelling when the Court decided *Buckley*.

The historical studies of the First Amendment's adoption reveal no clear sense of the framers' purpose either in respect of the elective process or, more generally, in respect of the speech that Congress was prohibited from abridging. Professor

candidate's PAC receipts"); SABATO, *supra* note 119, at 59-61.

181. 137 CONG. REC. S 5894-95 (daily ed. May 15, 1991) (statement of Sen. McConnell).

182. Alexander, *supra* note 120, at 32-35; Malbin, *supra* note 119, at 240, 269-70; SABATO, *supra* note 119, at 59-61.

183. Alexander, *supra* note 20, at 740; HARVARD CAMPAIGN FINANCE STUDY, *supra* note 17, at 5, 11.

184. Alexander, *supra* note 20, at 734-37; Malbin, *supra* note 119, at 269; SABATO, *supra* note 119, at 43-57.

Leonard Levy's authoritative works, *Legacy of Suppression*,¹⁸⁵ and *Emergence of a Free Press*,¹⁸⁶ demonstrate that "the men who adopted the first amendment did not display a strong libertarian stance with respect to speech . . . [and] displayed a determination to punish speech thought dangerous to government."¹⁸⁷ Nevertheless, Professor Levy acknowledges that press criticism of government policies and politicians was widespread in the decade prior to the First Amendment, and that "popular government and political parties depended upon the existence of a free press."¹⁸⁸ Neither the experience of the framers, however, nor the events of the intervening years prior to *Buckley* presented an adequate framework against which to test the First Amendment freedom to conduct political campaigns against the governmental interest in preserving the integrity of the electoral process. That framework may now exist, affording a realistic perspective from which to evaluate Congress's latest attempts at campaign-finance reform.

A. *Spending Limits as a Condition of Public Financing*

Both Senate Bill 3 and House Bill 3750 take advantage of the concession in *Buckley* that although any campaign-spending limits on federal candidates violate the First Amendment,¹⁸⁹ such limits are permissible if imposed as a condition on the availability of public financing.¹⁹⁰ Thus, both bills condition the availability of public financing on candidates' compliance with spending limits.¹⁹¹

In *Buckley*, minor-party candidates had challenged the constitutionality of the public-funding provisions for presidential candidates, but not the related spending limits.¹⁹² The Court's conclusory dicta that spending limits

185. LEONARD W. LEVY, *LEGACY OF SUPPRESSION—FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960).

186. LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* (1985).

187. Bork, *supra* note 1, at 22.

188. LEVY, *supra* note 186, at xii.

189. *Buckley v. Valeo*, 424 U.S. 1, 55-57 (1976).

190. *Id.* at 57 n.65.

191. See *supra* note 147-57 and accompanying text.

192. *Buckley*, 424 U.S. at 85-104.

are permissible as a condition of public financing did not attempt to explain the apparent inconsistency between that view and the Court's unequivocal assertion that candidate-spending limits violate the First Amendment right of candidates to communicate with the electorate.¹⁹³

Any doubt about the constitutionality of spending limits imposed as a condition of public financing, however, was put to rest in *Republican National Committee v. Federal Election Commission*,¹⁹⁴ in which the Supreme Court summarily affirmed a decision of a three-judge district court upholding the constitutionality of the provision of the presidential public-financing law that conditions public financing on candidates' compliance with spending limits.¹⁹⁵ In sustaining the statute, the district court rejected the contention that the spending limits unconstitutionally restricted a candidate's First Amendment right to spend unlimited funds during election campaigns.¹⁹⁶ The district court acknowledged the doctrine of unconstitutional conditions,¹⁹⁷ citing *Perry v. Sindermann*,¹⁹⁸ *Shapiro v. Thompson*,¹⁹⁹ and *Frost & Frost Trucking Co. v. California Railroad Commission*,²⁰⁰ but concluded that any burden on the candidates' constitutional rights was justified by compelling state interests.²⁰¹ The interests identified by the district court were the elimination of corruption by obviating reliance on private contributions, and the lessening of the drain on candidates' time by eliminating the effort otherwise devoted to fund-raising, thereby enhancing

193. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1437 n.88 (1989). For a critique of the Court's conclusion that spending limits may be imposed as a condition of public financing, see Polsby, *supra* note 1, at 26-31.

194. 445 U.S. 955 (1980).

195. 26 U.S.C. § 9003(b)(1) (1988).

196. *Republican Nat'l Comm. v. F.E.C.*, 487 F. Supp. 280, 285 (S.D.N.Y.), *aff'd*, 445 U.S. 955 (1980).

197. The doctrine 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." Sullivan, *supra* note 193, at 1415.

198. 408 U.S. 593 (1972).

199. 394 U.S. 618 (1969).

200. 271 U.S. 583 (1926).

201. *Republican Nat'l Comm.*, 487 F. Supp. at 284-86.

the opportunity for competitive debate.²⁰² Ironically, the *Buckley* Court had rejected the argument that spending limits imposed without regard to public financing reduced the danger of corruption, concluding that the recently-enacted contribution limits and disclosure requirements constituted a sufficient protection against the corruptive effects of unlimited private contributions.²⁰³

Based on its adamant view in *Buckley* that spending limits are unconstitutional, the Court's 1980 summary affirmance in *Republican National Committee*²⁰⁴ may have signaled a reluctance to explicate its holding, or even a reassessment of its earlier position. A possible rationalization for the Court's *Republican National Committee* holding is that public funding combined with spending limits reduces reliance on private contributions to a greater extent than spending limits alone; alternatively, the Court may have viewed the burden on expression as indirect rather than direct because the candidate can reject both public funding and spending limits, thereby justifying an assessment that is less than the strict scrutiny otherwise applicable to restrictions on political speech.²⁰⁵ The Court invoked a similar rationale in *Maher v. Roe*,²⁰⁶ upholding a state welfare regulation that denied Medicaid funding for abortions not necessary to the mother's physical and psychological well-being. Finally, the Court may be having second thoughts about its viewpoint in *Buckley* that disclosure and contribution limits are sufficient to offset the corruptive influence of privately-funded federal campaigns without spending limits. Their cumulative experience since 1976 appears to have convinced a majority of the members of Congress that election campaigns without spending limits are dominated by private fund-raising to an extent that demeans both the candidates and the elective process.

There appears to be little doubt that the campaign-spending limits proposed in S. 3 and H.R. 3750, as a condition of public

202. *Id.* at 284.

203. *Buckley v. Valeo*, 424 U.S. 1, 55-56 (1976).

204. 445 U.S. 955 (1980).

205. Marlene A. Nicholson, *Political Campaign Expenditure Limitations and the Unconstitutional Condition Doctrine*, 10 HASTINGS CONST. L.Q. 601, 626-30 (1983).

206. 432 U.S. 464 (1977).

financing, should be sustainable under the First Amendment. Although the public-funding levels proposed are significantly lower than the 100% funding afforded to presidential candidates, they appear to be adequate to justify the condition that participating candidates comply with spending limits. Obviously, the greater the percentage of public funding, the more compelling is the argument that spending limits can justifiably be imposed as a condition of entitlement.

B. Increased Public Financing for Participating Candidates as a Response to Non-Participating Candidates who Exceed Spending Limits

Perhaps the most problematic provisions of S. 3 and H.R. 3750 are those that provide substantial additional public funding to participating candidates if, as in S. 3, their non-participating opponents exceed spending limits, or if, as in H.R. 3750, the non-participating opponent raises or spends more than 50% of the general-election spending limit. The additional public funding afforded to participating candidates is substantial. Senate Bill 3 provides that a participating Senate candidate whose opponent raises or spends an amount that exceeds the spending limit by less than one-third would receive, in addition to the broadcast vouchers valued at 20% of the general-election spending limit, a payment equal to two-thirds of the spending limit, and that payment can be expended by the candidate notwithstanding the general-election spending limit. If the opponent raises or spends an amount that equals or exceeds 133-1/3% of the spending limit, the participating candidate would receive an additional payment equal to one-third of the spending limit and would be permitted to spend funds without regard to any spending limit.²⁰⁷ In simple terms, a participating candidate in a Senate election with a \$5 million dollar general-election spending limit, whose opponent raised or spent more than \$6,667,000, would receive \$1 million in broadcast vouchers, \$5 million in public funds, and would be subject to no spending limit. During the S. 3 debate, those provisions were sharply attacked by Senator McConnell (R. Ky.): "Candidates who dc

207. See S. 3, *supra* note 26, § 101(a).

not comply with spending limits in S. 3 would be bludgeoned with a sledgehammer paid for by the U.S. taxpayers."²⁰⁸ The Senate Committee on Rules and Administration strongly defended the need for substantial supplemental public funding:

Although this amount of assistance may appear coercive, it is in fact designed to deal with the realities of an election finance system where tremendous sums may be spent in the concluding days before an election Because campaign funds can be spent quite rapidly, the Committee believes that substantial resources should be quickly made available to an eligible candidate. Otherwise, prudent candidates would be reluctant to voluntarily enter into a spending limit system.²⁰⁹

House Bill 3750 affords a participating candidate additional public funding and elimination of the \$600,000 spending limit whenever a non-participating opponent raises or spends more than \$250,000. That threshold was selected "because it appears to signal an ability to exceed the spending limit, but sends this signal well before the situation has occurred."²¹⁰ The participating candidate thereby becomes entitled to additional and unlimited public funding in excess of the \$200,000 provided to all participating candidates, in the form of matching funds in respect of individual contributions up to the first \$200 of each such contribution.

The constitutionality of these enhanced public funding provisions of S. 3 and H.R. 3750 is doubtful. The analysis is best undertaken in the context of the so-called "unconstitutional condition" cases, which ordinarily involve a governmental benefit extended in return for the beneficiary's surrender of a constitutional right. The right under pressure by S. 3 and H.R. 3750 is the First Amendment freedom of a candidate, first identified in *Buckley*, to spend unlimited funds in aid of his or her candidacy. The unusual benefit offered by both the Senate and House bills is that the substantial additional grants of public funds to participating candidates

208. 137 CONG. REC. S5895 (daily ed. May 15, 1991) (statement of Sen. McConnell).

209. S. REP. NO. 37, 102d Cong., 1st Sess. 19 (1991).

210. H.R. REP. NO. 340, 102d Cong., 1st Sess. 30 (1991).

authorized by the bills would *not* be made available if the non-participating candidate were to forgo the right to exceed spending limits. Putting aside the question whether the Court currently would adhere to *Buckley's* rigid position on the unconstitutionality of spending limits in the context of spending and fund-raising experience over the past two decades,²¹¹ the crux of the constitutional issue is whether the governmental interest is sufficient to overcome the strict scrutiny standard of review ordinarily applied to laws that restrict political speech.²¹²

Earlier "unconstitutional condition" cases turned on whether the condition was perceived to be coercive. In *Frost & Frost Trucking Co. v. California Railroad Commission*,²¹³ the Court struck down a state's attempt to condition the privilege of using its highways on a private carrier's submission to common-carrier liability, in violation of the carrier's then-prevailing substantive due process rights. The Court viewed the condition as overly coercive: "In reality, the carrier is given no choice, except a choice between the rock and the whirlpool, — an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden."²¹⁴ More recent cases have focused on whether the condition was "germane" to the state's interest. In *Nollan v. California Coastal Commission*,²¹⁵ the Court invalidated California's imposition of a condition on a building permit to owners of a beach-front house requiring that they convey an easement through their backyard allowing the public to pass from one nearby public beach to another. Justice Scalia, writing for the Court, observed that the State constitutionally could have conditioned the permit on the grant of a "viewing-spot" easement from which passersby could see the ocean otherwise obstructed by the proposed new construction, thereby promoting the state's interest in preserving visual access to the beach. The Court concluded, however, that the access easement was not germane to the

211. See *supra* text accompanying notes 180-190.

212. See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786-87 (1978).

213. 271 U.S. 583 (1926).

214. *Id.* at 593.

215. 483 U.S. 825 (1987).

public interest that would have permitted the state to withhold the permit, and therefore was not a valid regulation of land use but "an out-and-out plan of extortion."²¹⁶

In her discussion of "Unconstitutional Conditions," Professor Sullivan rejects both coercion and germaneness as appropriate standards for testing governmentally-imposed conditions on constitutional rights, arguing instead for a strict scrutiny approach to such conditions, weighing the burden of the restriction against the governmental justification for qualifying a benefit by limiting a constitutional right.²¹⁷ Applying that analysis, which is essentially consistent with the conventional standard for testing other restrictions on political speech, the enhanced public-funding provisions of S. 3 and H.R. 3750 appear to be vulnerable.

The critical inquiry is whether the non-participating candidates' spending in excess of the prescribed limit for complying candidates can justify the substantial increase in public funding contingently available to participating candidates. Undoubtedly, elimination of the spending limits for participating candidates would be a germane and non-coercive response to the opponent's refusal to abide by spending limits. It would also further the governmental interest in encouraging compliance by candidates without exposing them to the risk that their spending limit would be frozen. The governmental interest could also be furthered by a larger initial grant of public funding than S. 3 and H.R. 3750 now allow, making participation even more attractive to candidates seeking to avoid extensive fund-raising. However, when the opponent's fund-raising and spending trigger substantial additional infusions of public funds, not limited by the opponent's excess spending, the implication is that the additional funding is offered not as a direct or germane response to the excess spending but rather as a deterrent. The generous additional benefit to the participating candidate appears to be intended to cause an opponent to think twice about pursuing the constitutionally-available option of non-participation.

216. *Id.* at 837 (quoting *J.E.D. Assocs. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)).

217. Sullivan, *supra* note 193, at 1489-1506.

Both bills could undoubtedly be revised to reduce the risk of unconstitutionality while addressing the "early warning" concerns raised by the Senate and House reports. On the one hand, somewhat higher base public funding would encourage candidates' participation and compliance with spending limits. In addition, a requirement that a non-complying candidate announce at an early stage in a campaign his or her intention to exceed spending limits, thereby triggering elimination of contribution and spending limits for the participating candidate, would alleviate some of the concerns about the participating candidate's ability to raise additional funds, a contingency that participating candidates should anticipate. The ideal formula may be elusive, but whether congressional proponents of campaign-finance reform should assume the constitutional risks inherent in the contingent incentives proposed to be offered to participating candidates whose opponents exceed spending limits is highly questionable.

C. Providing Participating Candidates with Matching Funds to Offset Independent Expenditures

Acceding to the holding in *Buckley* that independent expenditures in support of, or in opposition to, a candidate cannot constitutionally be subjected to limits,²¹⁸ both S. 3 and H.R. 3750 address the impact of independent expenditures on participating candidates by providing matching funds in the event independent expenditures in opposition to, or on behalf of an opponent of, the participating candidate exceed \$10,000.²¹⁹ The matching-funds provisions limit neither the amount nor the content of independent expenditures. Nevertheless, such provisions may be viewed as inhibiting or discouraging independent expenditures because the targeted candidate will receive matching public funds. The individual or committee proposing the independent expenditures consequently will be required to assess more carefully the advantage to the targeted candidate's opponent anticipated to accrue from the expenditure, weighing that advantage against the benefit that would accrue to the targeted candidate by

218. See *supra* note 77-81 and accompanying text.

219. See *supra* text accompanying note 166.

receiving the matching funds. The Committee reports accompanying S. 3 and H.R. 3750 disclaim any intention to limit independent expenditures. The Senate Committee Report observes, however, that to ignore the impact of independent expenditures "would severely undermine the incentives [offered by the legislation] by placing a candidate who accepts [spending] limits at risk of having to divert some of the limited funds to respond to an independently financed attack."²²⁰ The House Committee Report also offers strong justification for the matching funds provision:

We must especially take care in assuring that no candidate who participates in the voluntary system and thus agrees to limits on his or her ability to raise and spend money is not ambushed by an outside group, free to spend all it wishes, with the candidate being unduly restrained to respond effectively.²²¹

Simply stated, the justification advanced for the matching-funds provision is that the proposed system of partial public financing and spending limits could not succeed without it, because candidates would not participate unless they are assured of protection from independent expenditures that occur so late in the campaign as to preclude the candidate from raising private funds with which to respond. Acknowledging that the matching-funds provisions may tend to inhibit or at least diminish the perceived advantages of independent expenditures, the validity of those provisions under prevailing First Amendment principles depends on whether the governmental interests served by the inhibition are sufficiently compelling to justify the resulting burden on political speech.²²²

The cumulative congressional experience with the impact of independent expenditures on congressional elections affords strong support for upholding the constitutionality of the matching-funds provisions. As noted, the Court has already considered and upheld the constitutionality of the provision of the presidential public-financing law that conditions public

220. S. REP. NO. 37, *supra* note 209, at 18.

221. H.R. REP. NO. 340, *supra* note 210, at 41.

222. See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978).

financing on candidates' compliance with spending limits,²²³ the provision on which S. 3 and H.R. 3750 are modeled. The congressional judgment underlying the matching-funds provisions is that in the context of congressional elections, with much lower spending limits than in the presidential elections, candidates could not reasonably accept the public-financing benefits and related spending limits without matching funds to protect against last minute independent expenditures. In essence, the congressional judgment is that the proposed statutory scheme combining public funding with spending limits is unworkable without matching funds for participating candidates to respond to independent expenditures. In view of the Court's approval of the concept that public funding can be conditioned on compliance with spending limits, it is unlikely that the Court would reject Congress's judgment that the matching funds provisions are indispensable to the statutory scheme. The post-*Buckley* experience concerning the potential and actual impact of independent expenditures should afford the Court an adequate basis on which to sustain the matching funds provisions.

On the assumption that the matching funds provisions will be upheld, consideration of whether Congress could also impose *reasonable* limits on the independent expenditures that must be matched with public funds may be pertinent. As noted, the \$1,000 limitation on independent expenditures invalidated in *Buckley* was so unrealistically low that it did not test the limits of the First Amendment principles applied by the Court.²²⁴ Observing that the \$1,000 limitation "heavily burdens core First Amendment expression,"²²⁵ the *Buckley* Court rejected as inadequate or inappropriate the governmental interests advanced to justify that burden. The interests proffered were the prevention of corruption, rejected on the basis that independent expenditures were by definition

223. *Republican Nat'l Comm. v. Federal Election Comm'n*, 445 U.S. 955 (1980); see *supra* notes 195-202 and accompanying text.

224. See *supra* text accompanying notes 51-52.

225. *Buckley v. Valeo*, 424 U.S. 1, 48 (1976). In *Federal Election Comm'n v. National Conservative Pol. Action Comm.*, 470 U.S. 480 (1985), the Court, consistent with its holding in *Buckley*, invalidated the provision of the Presidential Election Campaign Fund Act limiting to \$1,000 expenditures by independent political committees in support of a presidential candidate.

not coordinated with the candidate's campaign committee, and the ancillary interest in equalizing the ability of groups to influence the outcome of elections, an interest the Court described as "wholly foreign to the First Amendment."²²⁶ In the context of a campaign-finance bill providing public funding, spending limits, and matching funds to offset independent expenditures, the governmental interest would be significantly stronger. Realistic spending limits — for example, 10% of the general election spending limit — imposed on independent expenditures affecting a campaign in which both candidates are participating in public funding would limit the expense to the government in fulfilling its obligation to provide matching funds. Such limits would also restrain the extent to which independent expenditures could otherwise subvert the purpose of the general election spending limits, the assumption being that matching funds to offset independent expenditures can be spent without regard to spending limits. At the same time, *reasonable* independent spending limits could afford ample opportunity for independent individuals or committees to participate vigorously in congressional-election campaigns without allowing their expenditures to distort a carefully crafted statutory scheme that includes spending limits and matching funds. Such spending limits would draw support from Professor Meiklejohn's well-known analogy to the town meeting: "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said."²²⁷ Other commentators have also expressed general support for the view that adequate limits on independent expenditures are not necessarily incompatible with First Amendment guarantees.²²⁸

The regulatory scheme embodied in S. 3 and H.R. 3750, providing for public funding, spending limits, and matching funds to offset independent expenditures, arguably could be combined with reasonable limits on independent expenditures

226. *Buckley*, 424 U.S. at 49.

227. MEIKLEJOHN, *supra* note 1, at 26.

228. Blum, *supra* note 3, at 1359-61; Wright, *supra* note 1, at 638-44; *see also* DREW, *supra* note 15, at 146-56 (suggesting that limits on independent expenditures could be sustainable in the context of election campaigns supported by public funding).

and could be sustainable against a First Amendment challenge.

D. Validity of S. 3's Ban on Political Contributions and Expenditures by Political Action Committees

Senate Bill 3 includes a sweeping prohibition on all contributions and expenditures to influence federal elections by anyone other than individuals or political committees, but defines political committees to include only the candidate's campaign committee, and the national, state, district, or local committee of a political party.²²⁹ In addition, S. 3 prohibits corporations, labor unions, membership organizations, cooperatives, and non-profit corporations from establishing segregated funds to be used for political purposes.²³⁰ Those provisions would prohibit PACs from participating in federal elections. In recognition of the substantial constitutional issue posed by the PAC prohibition, the bill contains a fallback provision in the event the ban on PACs is invalidated.²³¹ The Senate Committee Report accompanying S. 3 contains an opinion from the Congressional Research Service indicating that the prohibition on PAC political activity is unconstitutional.²³² The fallback provision would reduce the permissible PAC contribution limit from \$5,000 to \$1,000 and would limit the aggregate amount of contributions that any candidate could accept from all PACs to 20% of the sum of the general- and primary-election spending limits, such limit not to exceed \$825,000 nor be less than \$375,000.²³³ House Bill 3750 does not contain a comparable provision banning political activity by PACs nor a reduction in the limit on PAC contributions, but does impose a limit of \$200,000 on the aggregate amount of PAC contributions a candidate can accept.²³⁴

229. S. 3, *supra* note 26, § 102(b) (amending 2 U.S.C. § 431(4) (1988)).

230. *Id.* amending 2 U.S.C. § 441(b)(2)(C) (1988)).

231. S. REP. NO. 37, *supra* note 209, at 23.

232. *Id.* at 25-28.

233. S. 3, *supra* note 26, § 102(d).

234. H.R. 3750, *supra* note 27, § 201.

Despite the widespread criticism of the growing and pervasive influence of PACs on federal elections, even the most severe critics of PACs have recommended restrictions on PAC contributions rather than an outright prohibition of PAC political activity.²³⁵ Senate Bill 3's ban on PAC participation in federal elections can be understood only to reflect the judgment that PACs are so well organized and funded that limiting the amounts they can contribute would be ineffective. The obvious concerns are that PACs would change their focus from direct contributions to independent expenditures, and also that the number of PACs would increase to offset a reduced limit on the amount of PAC contributions.

Senate Bill 3's prohibition on PAC participation in federal elections would in all likelihood be invalidated. Although there has been a statutory prohibition against direct participation in federal elections by corporations since 1907,²³⁶ and by labor unions since 1943,²³⁷ the constitutionality of those prohibitions has never been tested. However, in several cases decided after *Buckley*, the Supreme Court has demonstrated a reluctance to exclude corporate political activity from the cloak of First Amendment protection. In *First National Bank v. Bellotti*,²³⁸ the Court invalidated a Massachusetts statute forbidding expenditures by banks and corporations to influence the vote on referendum proposals not materially affecting their businesses. The Court concluded that the speech restricted by the statute is "at the heart of the First Amendment's protection,"²³⁹ and held that the state interests advanced were insufficient to survive the strict scrutiny mandated by the state's abridgement of protected speech.²⁴⁰ The Court nevertheless acknowledged that a corporation's expenditures to publicize its views on matters of public interest are of a different constitutional stature from corporate contributions to political campaigns.²⁴¹

235. See *Task Force Testimony*, *supra* note 23, at 118-19.

236. See note 32 and accompanying text.

237. See notes 48-49 and accompanying text.

238. 435 U.S. 765 (1978).

239. *Id.* at 776.

240. *Id.* at 786-92.

241. *Id.* at 789-90.

In *Federal Election Commission v. National Conservative Political Action Committee*,²⁴² the Court struck down the \$1,000 limit on independent PAC expenditures in federal elections, expressly acknowledging that the non-profit corporate PACs whose expenditures were at issue enjoyed First Amendment protection, notwithstanding their ability to accumulate substantial contributions and disseminate their message through sophisticated media advertisements.²⁴³ In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*,²⁴⁴ the Court held unconstitutional the application of a provision of the Federal Election Campaign Act that would have required appellee, a non-profit corporation organized to foster respect for human life and to oppose abortion, to make expenditures in support of or opposition to the election of certain candidates out of a segregated fund rather than from its corporate treasury. A sharply divided Court held that the concern underlying the regulation of corporate political activity — that organizations that amass great economic wealth not gain unfair advantage in the political marketplace — did not apply to appellee, and that the detailed record-keeping and disclosure requirements imposed by the Federal Election Campaign Act on segregated funds established by corporations burdened appellee's First Amendment rights.²⁴⁵

Finally, in *Austin v. Michigan Chamber of Commerce*,²⁴⁶ the Court, again sharply divided, sustained a Michigan statute that required corporations to make independent expenditures for political purposes solely from segregated funds and prohibited the use of corporate treasury funds for such purposes. Concurring, Justice Brennan observed that the requirement that independent corporate political expenditures "be financed through a segregated fund or political action committee expressly established to engage in campaign spending" is designed to assure that the PAC's resources, as distinguished from corporate assets, are a reflection of the

242. 470 U.S. 480 (1985).

243. *Id.* at 493-96.

244. 479 U.S. 238 (1986).

245. *Id.* at 263-65.

246. 494 U.S. 652 (1990).

contributor's support for the PAC's political advocacy.²⁴⁷ Referring to the Court's opinion in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*,²⁴⁸ Justice Brennan observed that the Court had adopted the

"underlying theory" of the [Federal Election Campaign Act] "that substantial general purpose treasuries should not be diverted to political purposes" and that requiring funding by voluntary contributions guarantees that "the money collected is that intended by those who contribute to be used for political purposes and not money diverted from another source."²⁴⁹

In a strongly-worded dissent, Justice Scalia supported the right of the Michigan Chamber of Commerce to engage directly in independent political activity:

It is important to the message that it represents the views of Michigan's leading corporations *as corporations*, occupying the "lofty platform" that they do within the economic life of the State — not just the views of some *other* voluntary associations to which some of the corporations' shareholders belong.

[I]t is entirely obvious that the object of the law we have approved today is not to prevent wrongdoing but to prevent speech. Since those private associations known as corporations have so much money, they will speak so much more, and their views will be given inordinate prominence in election campaigns. This is not an argument that our democratic traditions allow The premise of our system is that there is no such thing as too much speech — that the people are not foolish but intelligent, and will separate the wheat from the chaff.²⁵⁰

Although those decisions reflect division on the Court over the precise issues presented, some members appear to support the view that even direct political expenditures by corporations and unions cannot constitutionally be prohibited, with even

247. *Id.* at 670 (Brennan, J., concurring).

248. 479 U.S. 238 (1986).

249. *Austin*, 494 U.S. at 670-71 (Brennan, J., concurring) (citing *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986) (quoting 117 CONG. REC. 43,381 (1971) (statement of Rep. Hansen))).

250. 494 U.S. at 694-95 (Scalia, J., dissenting) (emphasis in original).

stronger support for the view that under First Amendment guarantees corporate and union participation in political campaigns through segregated funds or PACs could not be prohibited.

Senate Bill 3's fallback provision limiting the amounts of PAC contributions and the aggregate amount of PAC contributions a candidate can accept appears to present no significant constitutional question, that issue having been considered and resolved in *Buckley*.

E. Constitutionality of Provisions Requiring Attribution of Political Advertisements

Both S. 3 and H.R. 3750 impose requirements that media and print advertisements by candidates and independent committees include express acknowledgments concerning who paid for and authorized the advertisement. Pursuant to S. 3, a television, radio, or cable communication authorized by the candidate or the candidate's committee must include a full-screen personal appearance by the candidate, or in the case of radio an audio statement by the candidate, in which the candidate identifies himself or herself, the office sought, states that he or she approves the message, and also identifies clearly who paid for and authorized the message.²⁵¹ In the case of independent expenditures, the advertisement must clearly identify who paid for the message and also state that the message is not authorized by any candidate or any candidate's committee.²⁵² House Bill 3750 imposes similar requirements, including a mandate that the statement of attribution and the candidate's image, in the case of television or cable communications, appear on screen for at least four seconds.²⁵³ The Committee Report accompanying S. 3 explains that those provisions in the Senate and House bills were motivated by concerns about the deleterious effects of negative advertising, and reflect the view that a requirement that candidates acknowledge responsibility for an advertisement's content would tend to discourage the use of

251. S. 3, *supra* note 26, § 308(a).

252. *Id.*

253. H.R. 3750, *supra* note 27, § 801(d)(1).

advertisements that could demean or discredit the sponsoring candidate.²⁵⁴ The Committee Report also reflects concern about the constitutionality of more restrictive methods for dealing with negative advertising:

A number of measures referred to the Committee attempted to curb the recent trend toward "negative" media campaigning, by making the candidates more accountable in the minds of the voters for the level and quality of campaign debate. The Committee heard testimony relating the "negative" nature of campaign advertisements to the present high level of voter apathy in recent elections. While the Committee is concerned with this situation, it is also mindful of the constitutional limitations on imposing restrictions in this area. It has attempted to balance these concerns by requiring that candidates personally appear (or, in the case of radio make an audio statement) and state that he or she approved and authorized the advertisement. In the case of an independently sponsored advertisement, the person or organization sponsoring the advertisement must be identified and a statement must be included to the effect that the advertisement is not authorized by the candidate. These provisions do not seek, thereby, to regulate the content of political advertisements. Rather, these provisions do require that candidates and others making political advertisements be accountable for their content and message. The Committee believes that if the identity of the candidate is more clearly established in the mind of the viewer, the campaign will take greater care that the tone of the message be one that does not demean the level of political debate, and, in turn, cause potential discredit to that candidate.²⁵⁵

Without question the provisions in S. 3 and H.R. 3750 mandating acknowledgment by a candidate that he or she approved or authorized an advertisement, combined with a requirement that the candidate's image appear simultaneously with the acknowledgment in television advertisements, constitute a content-based regulation of speech. As the Supreme Court observed in *Riley v. National Federation of the*

254. S. REP. NO. 37, *supra* note 209, at 33-34.

255. *Id.*

Blind,²⁵⁶ in invalidating a state statute requiring that professional fund-raisers disclose in advance to potential donors the percentage of contributions collected by the fundraiser during the past year that were actually received by charities: "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech."²⁵⁷ To the same effect is *Miami Herald Publishing Co. v. Tornillo*,²⁵⁸ in which the Court held unconstitutional, as content regulation of the press, a Florida statute requiring newspapers to give equal reply space to those whom they editorially criticize.²⁵⁹ Similarly, in *Wooley v. Maynard*,²⁶⁰ the Court invalidated a state statute requiring display of the slogan "Live Free or Die" on automobile license plates, concluding that "[t]he right to speak and the right to refrain from speaking" are components of the guarantees protected by the First Amendment.²⁶¹

The validity of the candidate approval-acknowledgment provisions of S. 3 and H.R. 3750, when those provisions are viewed as content-based restrictions of political speech, will turn on whether the governmental interests are so compelling and the statutory requirements so narrowly drawn that the restraint on candidates' speech is constitutionally tolerable.²⁶²

Although the authorization-acknowledgment provisions may have been motivated by a congressional intent to limit negative or irresponsible political advertising, the provisions apply to *all* campaign advertisements. In *United States v. O'Brien*,²⁶³ the Court upheld defendant's conviction for burning his draft card, asserting that the constitutionality of the underlying statute did not depend on the motive that led Congress to enact the

256. 487 U.S. 781 (1988).

257. *Id.* at 795.

258. 418 U.S. 241 (1974).

259. *Id.* at 256-58.

260. 430 U.S. 705 (1977).

261. *Id.* at 714.

262. See, e.g., *Carey v. Brown*, 447 U.S. 455, 465 (1980); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

263. 391 U.S. 367 (1968).

law.²⁶⁴ The principle that motive is irrelevant to a statute's constitutionality may sweep too broadly,²⁶⁵ but the basic underlying congressional purpose — to require candidates to assume express responsibility for advertisements so that the public will better understand that advertisements paid for by a campaign committee necessarily reflect the candidate's direct or indirect approval — applies with equal force to all political advertising, negative or positive. Putting aside the possible deterrent to negative advertisements, the critical question becomes whether the public interest broadly served by the disclosure requirement is sufficient to sustain it.

That portion of the *Buckley* opinion upholding the reporting and disclosure provision of the Federal Election Campaign Act may be the most analogous precedent. Applying strict scrutiny to the Act's comprehensive disclosure and reporting requirements, which included registration and reporting requirements for all political committees and identification of anyone contributing in excess of \$10,²⁶⁶ the Court sustained the requirements and rejected the contention that the significant encroachments on First Amendment rights were unjustified.²⁶⁷ Among the governmental interests relied on by the *Buckley* Court was that the disclosure requirements "aid the voters in evaluating those who seek federal office."²⁶⁸ The Court rejected the analogy to *Talley v. California*,²⁶⁹ in which the Court invalidated an ordinance prohibiting all distribution of handbills that did not contain the names of the author and distributor, observing that the disclosure requirements at issue in *Buckley* were narrowly tailored to advance substantial governmental interests.²⁷⁰

The congressional judgment underlying the approval-acknowledgment provisions of S. 3 and H.R. 3750 is that the voters may not sufficiently link candidates with their campaign committees' advertisements unless the candidates clearly, and

264. *Id.* at 383-86.

265. See *TRIBE*, *supra* note 3, § 12-6, at 821-25.

266. *Buckley v. Valeo*, 424 U.S. 1, 63-64 (1976).

267. *Id.* at 83-84.

268. *Id.* at 66-67.

269. 362 U.S. 60 (1960).

270. *Buckley*, 424 U.S. at 81.

visually in the case of television advertisements, acknowledge approval of the message. The voters' inability to identify candidates with their paid advertisements subverts the political process because it permits candidates to avoid attribution for paid messages that voters might regard as irresponsible. The governmental interest is clear and compelling, and the means advanced by S. 3 and H.R. 3750 are minimal and unintrusive. Although the approval-acknowledgment requirement may be challenged as unduly burdensome on First Amendment rights, the burden is slight and would appear to be outweighed by compelling governmental interests.²⁷¹

V. CONCLUSION

There are undoubtedly other provisions of S. 3 and H.R. 3750 that raise First Amendment and other significant issues. Those provisions that have specifically been discussed — to the extent that they are retained in campaign-finance legislation, if any, ultimately passed by Congress — appear to implicate the most profound First Amendment questions. Determinations concerning their constitutionality will forecast whether such legislation will achieve the congressional goal of enhancing public confidence in the electoral process.

The constitutionality of any campaign-finance bill to be passed by Congress will be influenced substantially by our national experience with presidential and congressional elections since the *Buckley* decision. That experience suggests a compelling public interest in reforming existing campaign-finance laws in order to diminish the advantages of incumbency, reduce the actual or perceived corruptive influence of special-interest money, and enhance public confidence and public participation in the electoral process.

There is no clear consensus about what kind of legislation would be best designed to restore public confidence in federal elections. Although there is broad agreement among experts

271. For a thoughtful discussion of the issue, see Scott M. Matheson, Jr., *Federal Legislation to Elevate and Enlighten Political Debate: A Letter and Report to the 102d Congress About Constitutional Policy*, 7 J.L. & POL. 73, 119-22 (1990) (the government's interest involves the importance of "providing voters with information that will permit them better to assess campaign advertising.").

about the desirability of public financing, the issue continues to be the subject of heated debate. There is a strong consensus for limiting the influence of PACs, but disagreement about how that goal should be achieved. Spending limits continue to be highly controversial, and independent expenditures continue to pose a legislative and constitutional dilemma. Nevertheless, S. 3 and H.R. 3750 reflect for the most part a thoughtful and considered attempt by both houses of Congress to address the principal flaws in our present system, informed by the First Amendment questions implicated by any attempt to reform campaign-finance laws. Presumably, the legislation that emerges from the joint conference committee will incorporate the best features of both bills.

Inevitably, any campaign-finance reform legislation enacted by Congress will be challenged on constitutional grounds. The resolution of that challenge will necessarily draw on the Court's analysis in *Buckley*, but it will also be informed by the compelling evidence that inadequately regulated campaign-finance practices can subvert the integrity of the political process that is at the heart of our democratic system of government. Television-dominated campaigns, sophisticated political consultants, PACs with abundant resources, and other features of contemporary electioneering bear no relation to the political orientation of those who authored the constitution, and pose a serious and unprecedented threat to the public's confidence in the political process.

Paramount as the constitutionally-protected right of free speech may be, there is a powerful competing public interest in assuring that money cannot buy elections and that the interests that provide money cannot determine who is to hold public office. When the financial advantages of incumbency effectively cause most congressional elections to be non-competitive, it is no wonder that the level of voter participation is on a steady decline. When voter-enacted term limits are seen as a more realistic limitation on incumbency than the elective process, there is understandable cause for concern both by Congress and the public.

The constitutional significance of the individual's interest in unlimited political speech cannot be diminished. However, as the Court observed in a different context, "[W]hile the Constitution protects against invasions of individual rights, it

is not a suicide pact."²⁷² Of what enduring constitutional value is unlimited political speech if its practical effect in contemporary society is to corrupt the elective process it was intended to enhance?

The point is simply that the constitutionality of campaign finance regulation cannot be determined by absolutist First Amendment principles. There must be some play in the constitutional joints, enough flexibility to permit an evaluation of campaign-finance reform on the basis of our national experience over the past two decades. In that framework, the traditional individual interest in unrestricted political speech can be weighed against the collective interest in an elective process that deserves and enjoys public confidence. The balance struck should be faithful both to the First Amendment and the citizens it serves.

272. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).